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THE PSYCHOLOGY OF NEGLIGENCE.

Negligence has been characterized as "one of the most difficult, involved and voluminous topics of the law"(*a*).

The English word "negligence" is derived from the Latin substantive "negligentia," which primarily means "want of care" and is the antonym of "diligentia." But while the correspondence between "negligentia" and its English derivative is exact in ordinary use, there is a technical difference between them as respectively employed in the Roman and English systems of law. In the former system "negligentia" only became an actionable or punishable fault (culpa) when it fell within the classification of "great negligence"—"magna negligentia culpa est"(*b*).

In the language of jurisprudence, therefore, "culpa" and "negligence" are to be regarded as terms of equal meaning.

It has been said that no definition of negligence formulated by any one judge or jurist has proved satisfactory to the framer of another definition(*c*); and the reason is not far to seek; for when we begin to define the law we enter the province of philosophy, and since philosophy emerges from the analysis of empirical conceptions, which, as Kant points out(*d*), can only be *explained* and not *defined*, it is not to be expected that in any branch of the philosophy of the law we can start out with the synthetical exactness of mathematical science. But even Kant concedes that propositions or statements, which are properly speaking not definitions but merely approximations thereto, may be used with advantage in philosophy; and, as the subject in hand demands some attempt at a concise statement of the elements of negligence in law, the following is predicated upon the

(*a*) Campbell's "Science of Law," p. 200.

(*b*) Paul., Dig. 50, 16, 226.

(*c*) Shearman & Redfield on Negligence, 5th ed., vol. 1, § 1.

(*d*) Kritik der reinen Vernunft (Method) § 1. In mathematics, Kant says, definition belongs ad esse, in philosophy ad melius esse.

opinions of the judges expressed in the cases collected in the foot note(*d*).

Negligence, as a cause of action for civil damages, consists in a breach of duty to exercise care, whereby injury naturally and proximately results to some one entitled to a fulfillment of the duty.

Before proceeding to examine the legal doctrine of negligence in its psychical bearings it would not be an uninstructive digression to notice for a moment the sociological principle which underlies it as a whole.

That principle has been designated by Herbert Spencer as the principle of "equal freedom"(*e*). Mr. Spencer says: "Every man has freedom to do all that he wills, provided that he infringes not the equal freedom of any other man." If we regard the word "freedom" so used as equivalent to the word "right"(*f*), then Mr. Spencer's formula sufficiently expresses the legal conception of man's duty to man in the social state. Cicero declared that the right of the citizen to immunity from harm at the hands of his fellows lies at the very base of positive law—"Fundamenta justitiæ sunt ut ne cui noceatur, etc.," and in generalizing the domain of Wrongs the Roman jurists regarded every unjust infringement of the rights of others as the result of malice or negligence, the presence of either rendering the conduct complained of culpable, *i.e.*, giving rise to the legal duty of reparation(*g*). Thus throughout the literature of jurisprudence we will find that the principle of altruism—le droit d'autrui—is recognized as the very essence of the conception of responsibility for negligence.

(*d*) Per Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; per Willes, J., in *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679; per Blackburn, J., in *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L., 115; per Byles, J., in *Collis* v. *Selden*, L.R. 3 C.P. 498; per Brett, M.R. in *Heaven* v. *Pender*, L.R. 11 Q.B.D. 503; and in *Lane* v. *Cox*, [1897] 1 Q.B. 415; per Patterson, J., in *Chandler Electric Co.* v. *Fuller*, 21 S.C.R. 337; per Robinson, C.J., in *Dean* v. *McCarthy*, 2 U.C.Q.B. 448; per Young, C.J., in *McDougall* v. *McDonald*, 12 N.S.R. 219; per Mitchell, J., in *Osborne* v. *McMasters*, 40 Minn. 103, S.C. annotated in 12 Am. St. Rep. 698.

(*e*) Social Statics, ed. of 1868, p. 121.

(*f*) "Legal rights are the effects of civilized society. . . Freedom. . . . . is the effect of law." Bouvier's Law Dict. (by Rawle) 1. p. 848.

(*g*) Cf. Salkowski, Rom. Priv. Law, p. 514, and Goudsmit's Pandects, § 76.

So much for the sociological side of the legal doctrine of negligence, a matter not to be lightly passed over by the student of jurisprudence, for, as pointed out by Mr. Clarke (*h*), law is but a branch of the science of sociology.

Turning now to a consideration of the psychical bearings of legal negligence, it must be admitted that there is a regrettable amount of confusion in the books as to whether the element of *intention* on the part of the wrong-doer has aught or nothing to do with the theory of liability. For instance, some writers, such as Mr. Horace Smith(*i*), assert that negligence is an "unintentional breach of duty"; while, on the other hand, we find so distinguished a jurist as Professor Salmond, of the University of Adelaide, affirming that negligence is "a form of mens rea"(*j*). It is submitted that neither of these obviously divergent views can be accepted as correct. Let us test them by reason and authority.

Dealing, in the first place, with the view that negligence is "an *unintentional* breach of duty," it is reasonable to argue that there may be an *intentional* breach of some particular duty to exercise care not only not coupled with an intent to cause injury to the person entitled to the fulfillment of the duty, but, on the contrary, accompanied by a desire that no injury will be sustained by him by reason of the breach. Let us illustrate this. Suppose A., the owner of a factory, fails to erect a guard or fence around a portion of the machinery in his factory which he knows to be dangerous to the persons employed by him. B., an employee, in consequence of such breach of duty by A., sustains bodily injury. Now, although A. was aware of his duty, and *intended to commit a breach of it*, he never intended that B. should be injured thereby, but, on the contrary, hoped that B. would operate the unprotected machinery without accident. Here B. is undoubtedly liable for negligence(*k*), but could it be said that the negligence is founded on an "unintentional breach of duty?" Clearly in such a case the psychical element of intention

(*h*) Science of Law, and Law-Making, p. 4.

(*i*) Smith on Negligence, 2nd ed., p. 1.

(*j*) Jurisprudence, p. 433.

(*k*) *George Matthews Co.* v. *Bouchard*, 28 S.C.R. 580.

does not manifest itself in relation to the result of the breach of duty, but is confined wholly to the breach itself, which may or may not be followed by an injurious result; and it is only the result which makes the conduct of the wrong-doer a subject of juridical enquiry. Furthermore, it is obvious that in such a case the injury arises from carelessness, rather than from an intention to cause harm(*m*). On the other hand, a breach of duty committed with the intent to injure some one thereby, falls outside the sphere of negligence, as will be shewn hereafter.

But, if negligence may not be said to be "an unintentional breach of duty," is it, in the second place, "a form of mens rea?" This enquiry cannot be answered without first reviewing the place and meaning of the phrase *mens rec* in the language of the law.

The phrase in question is but a fragment of the maxim "Actus non facit reum nisi mens sit rea," which may be freely translated so: The act does not constitute a crime unless it is attended with a guilty mind, *i.e., criminal intent.* This maxim has been described as "one of Coke's scraps of Latin"(*n*), but its first appearance in the common law is much older than Coke's time. In the Leges Henrici Primi(*o*) we have it in this form: Reum non facit nisi mens rea, and it undoubtedly filtered its way there through the canonists from its primary source in St. Augustine's "Sermones"(*p*). Dealing with the sin of false swearing, St. Augustine says: "The tongue is not guilty unless it speaks with a guilty mind" (ream linguam non facit nisi mens rea). However, in the Leges Henrici we cannot expect to find a very marked cleavage between the ecclesiastical and civil bearings of the maxim, and therefore we must turn to Coke to discover its place and significance in the common law.

(*m*) Mr. Bigelow (Torts, 2nd ed., p. 13) very properly draws the distinction between intending an act and intending its consequences in this way: "To speak of an 'intended act' is a pleonasm. An 'act' is necessarily intended, though its consequences may or may not be intended." He refers on this point to Ziehen: Philosophical Psychology, 29. (Lond. 1892). On this point see also Markby's Elem. Law, sec. 219.

(*n*) See an able article on "Mens Rea" in 13 Crim. Law Mag., p. 831.

(*o*) 5, s. 28. Thorp's Anc. Law and Institutes of Eng., 1, 511.

(*p*) No. 180, c. 2.

In the third part of Coke's Institutes (a treatise upon the pleas of the Crown) we find the axiom in precisely the same words as we have it to-day. At p. 10, chapter 1, entitled "Of High Treason," there is the following passage commenting upon Sir John Oldcastle's insurrection in the reign of Henry VIII.:—"It was specially found that divers of the King's subjects did minister and yield victuals to Sir John Oldcastle, knight, and others, being in open war against the King, and that they were in company with them in open war; but all this was found to be pro timore mortis, et quod recesserunt, quam cito potuerunt, and it was adjudged to be no treason because it was for fear of death. Et actus non facit reum, nisi mens sit rea."

Again, in chapter 47, entitled "Of Larceny or Theft at Common Law," we read: "First, it must be felonious, id est, cum animo furandi, as hath been said. Actus non facit reum, nisi mens sit rea" (p. 107).

So it is established that the emergence of the maxim from the writings of the ecclesiastics and canonists into the modern jurisprudence of England was through the door of Coke's *Institutes*. Let us trace its development as a principle of the law of crimes.

In Hale's Hist. Plac. Cor. (*q*), published first in the year 1736, the doctrine of criminal intent is thus enunciated: "The consent of the will is that which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so, regularly, where there is no will to commit an offence, there can be no transgression or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences" (*r*).

(*q*) Vol. 1, p. 15.

(*r*) There is an obvious confusion of terms in this passage. The author means by the phrases "consent of the will" and "will to commit" simply "mens rea" or "guilty intent." The distinction between "will" and "intention" as elements of crime is well made in Harris' Criminal Law, 10th ed., p. 10. Sir James Fitzjames Stephen argues the distinction at length in his Hist. Crim. Law, vol. II., chap. 18. The following passage from p. 100 is a succinct statement of his conception of the elements of a voluntary action: "A voluntary action is a motion or group of motions accompanied or preceded by volition and directed towards some object. Every such action comprises the following elements—knowledge, motive, choice, volition, intention; and thoughts, feelings, and motions, adapted to execute the intention. *These elements occur in the order in which I have enumerated them.*" See also Terry's Lead. Princ. Anglo-American Law, § 79, where the confusion of "will" with "intention" in a modern English work is attributed to a German origin.

In 1798, Lord Kenyon(*s*) explicitly adopted the maxim as embodying the criminal law doctrine of complementary "intent" and "act." He says: "It is a principle of natural justice, and of our law, that actus non facit reum nisi mens sit rea. The intent and the act must both concur to constitute the crime." Cockburn, C.J., in 1861, even more emphatically insulated this maxim from the mass of proverbial philosophy, and destined it to the criminal law. He said: "Actus non facit reum nisi mens sit rea is the foundation of all criminal justice"(*t*). Sir James Fitzjames Stephen, recognizing the peculiar part the maxim plays in the criminal law, expounds it as follows: "The truth is that the maxim about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. Thus, in reference to murder, the 'mens rea' is any state of mind which comes within the description of malice aforethought. In reference to theft the 'mens rea' is an intention to deprive the owner of his property permanently, fraudulently, and without claim of right. In reference to forgery the 'mens rea' is anything which can be described as an intent to defraud. *Hence the only means of arriving at a full comprehension of the expression 'mens rea' is by a detailed examination of the definitions of particular crimes.*"

"Actus non facit reum nisi mens sit rea—this maxim of our criminal law." *Broom's Legal Maxims*(*u*).

"The guilty state of mind, the mens rea or criminal intention." *Harris' Criminal Law*(*v*).

"The maxim is exclusively applicable to criminal cases, and does not affect civil cases." *Adams Juridical Glossary*(*w*).

There would seem, then, to be no doubt that the maxim in question has, from the very earliest times down to the present,

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(*s*) *Fowler* v. *Padget*, 7 T.R. at p. 514.

(*t*) *Reg.* v. *Sleep*, 8 Cox C.C. at p. 477.

(*u*) 7th ed (1900), p. 249.

(*v*) 10th ed. (1904), p. 11.

(*w*) 1st ed. (1888), p. 59.

had a special place and meaning in the criminal law; and, that being so, any unnecessary dislodgment of it therefrom for the purpose of making it do duty as a part of the technics of another and distinct branch of legal science is to be deprecated under any circumstances, but where the new setting for the old maxim is incongruous and subversive of its original meaning, such a use, or rather abuse, ought not to be allowed to become general.

It is submitted that the following examination of the psychology of negligence will demonstrate that Professor Salmond's view(*x*) that negligence is "a form of mens rea"(*y*) is not only inaccurate, but misleading—

(1) Because the phrase "mens rea" in legal technics(*z*) has become a synonym for *criminal intent.*

(2) Because even if the term might with propriety be extended to denote the psychical element of "intention" in civil wrongs involving fraud or malice, it is meaningless as applied to negligence.

The first branch of our proposition has, we hope, been adequately established; it remains for us to demonstrate the correctness of the second.

If we survey the province of civil wrongs in English law, as a whole, we find that they resolve themselves into three great classifications:

1st. *Personal wrongs,* marked by a deliberate intention to do harm, such as cases of assault, slander and libel, conspiracy, and malicious prosecution(*a*);

(*x*) Absolute originality in the impugned use of the phrase "mens rea" is not to be charged against Professor Salmond. For instance, more than a dozen years before the appearance of Salmond's "Jurisprudence," Cave, J., in *Chisholm* v. *Doulton* (1889) 22 Q.B.D. at p. 741, said:—"It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes it is malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression "mens rea."

(*y*) It should be stated that Professor Salmond, when he expresses the view above quoted, refers to negligence as the foundation of liability in civil cases.

(*z*) "The law has its technical terms, and hence a dictionary of its own." Bigelow on Torts, 2nd ed., p. 15.

(*a*) Many wrongs of this class are also treated as criminal offences, and, indeed, there is no moral cleavage between this group of torts and crimes involving the same grounds of complaint. The only difference is in procedure. See Pollock on Torts, 7th ed., p. 9; Harris' Criminal Law, 10th ed., p. 2.

2nd. *Wrongs to property, i.e.,* trespasses to lands, goods and proprietary rights;

3rd. *Wrongs arising to the person, or property,* through negligence(*b*).

The theory of responsibility referable to each of these three groups is distinctive. In the first, it proceeds upon the principle that one who intentionally injures another must answer therefor in damages. In other words, the subjective element of intention, a "state of mind" in which the wrong-doer contemplates the probable consequences of his act and desires them to follow upon it, must always accompany the wrongful act in cases falling under the first group. In the second group, the theory of responsibility is highly technical and peculiar. It would seem to proceed wholly upon the principle that a legal right has been invaded, without contemplating the cause or effect of such invasion. It is not necessary in such cases to shew that the defendant was either "sciens" or "volens" in respect of doing the act which constitutes the trespass. As was said by Lord Camden in *Entick* v. *Carrington*(*c*), "by the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damages be nothing." And so with regard to trespass to goods; if the trespass involves a deprivation of possession to such an extent as to be inconsistent with the rights of the owner, the circumstances amount to a conversion. "It is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done, if such conduct can be said to be inconsistent with the title of the true owner, it is a conversion"(*d*).

(*b*) We have made no reference in the text to the doctrine of liability for nuisance, because it has no bearing on the main question under discussion, and we do not wish to unnecessarily add to the difficulties of mastering an abstruse subject. Nuisance is in some respects coincident with trespass, and in others it resembles negligence; but it differs from both in its salient features, and holds a substantive place in the law of torts. See Underhill on Torts, 7th ed., p. 325; Jaggard on Torts, chap. xi., p. 745, et seq.

(*c*) 19 St. Tr. at p. 1066.

(*d*) Per Harrison, C.J., in *Duffil* v. *McFall*, 41 U.C.R. at p. 320.

Turning, finally, to the third group, wrongs arising through negligence, we are confronted with a theory of responsibility which makes a standard of conduct the test of the wrongful character of the act done. That, of course, is entirely an objective basis of liability, the theory finding its raison d' être in the obvious justice of requiring one who has conducted himself carelessly in respect of a duty owed by him to another, to make amends for his carelessness in damages. If there can be said to be any *subjective* side to the legal doctrine of negligence it consists in a purely passive state of mind on the part of the wrong-doer toward the consequences of his carelessness, such a state of mind as negatives the presumption of intention to produce the injury suffered.

Clearly, then, if the authorities support the proposition that the element of intention does not enter into the theory of legal liability for injury arising from negligence, it is both incorrect and misleading to characterize negligence as a "form of mens rea." If mens rea denotes "criminal intent," and negligence is opposed to "intentional injury," surely it is a mere antilogy to make such a characterization.

Let us examine some of the leading authorities for the purpose of testing the soundness of the proposition that we have just stated.

A modern writer has very truly said that "the legal duty to exercise care has its foundation in the requirements of civilized society. . . . The Roman law recognized the duty of a citizen 'alterum non laedere,' and appreciated the significance of the obligation requiring the exercise of care"(*e*). It is undoubtedly true that the common law of torts has been worked out by English judges on lines more or less distinctive, but that the principles of the Roman law have been of incalculable assistance to them cannot be disputed. Particularly is this true of the subject of negligence. In respect of the state of mind of the wrong-doer, the doctrine of culpa in the Roman law is in entire agreement with the doctrine of negligence as it obtains in our law to-day; and we have never seen the Roman doctrine more accurately

(*e*) Jones on Negligence of Municipal Corporations, § 3.

stated than by Ayliffe(*f*), an English writer of the early part of the eighteenth century. These are his words: "The word 'fault,' in Latin called culpa, is a general term; and according to the definition of it, it denotes an offence or injury done unto another by imprudence, which might otherwise be avoided by human care. For a *fault*, says Donatus, has a respect unto him who hurts another not knowingly or willingly. Here we use the word offence or injury by way of a *genus* which comprehends deceit, malice and all other misdemeanours, as well as a fault. For deceit and malice are plainly intended for the injury of another, but a fault is not so designed. And, therefore, we have added the word *imprudence* in this definition to point out and distinguish a fault from deceit, malice, and an evil purpose of mind which accompanies all trespasses and misdemeanours. A fault arises from simplicity, a dulness of mind, and a barrenness of thought which is always attended with imprudence, but deceit, called dolus, has its rise from a malicious purpose of mind, which acts in contempt of all honesty and prudence, with a full intent of doing mischief or an injury." The mental attitude of the wrong-doer in culpa, is thus described by a modern commentator on the Roman law(*g*): "La faute (culpa) considérée au point de vue le l' acte illicite, consiste à commettre celui-ci par suite d'un défaut de soins. Le caractère distinctif de la faute est la négligence; l' auteur de l' acte illicite n'a pas prévu la lésion du droit d' autrui, ou bien s'il la prévu, il ne l'a point voulue; mais il n'a pas apporté à sès actions la somme de soins nécessaire."

That the Roman law basis of liability for negligence was an objective one is apparent from the last quotation and the following: "There was grave fault (culpa lata) where one neglected the measures of precaution that every man habitually takes, under ordinary circumstances, and with due regard to the manners, the usages or the peculiarities of the place where the act is done;" or, "where, being under an obligation to another, a person had not given to the property or the business of that other the same care and attention that he habitually gave to his own. . . . .

(*f*) A new Pandect of the Roman Civil Law, by John Ayliffe, (Lond. 1734), Bk. 2, tit. 23, pp. 108-110.

(*g*) Van Wetter, Cours clémentaire de droit romain, 1, § 88.

The slight fault (culpa levis) consisted in neglecting the care which an attentive and intelligent man of business, under ordinary circumstances, habitually gave to his own affairs. (Diligentia diligentis patrisfamilias)"(*h*).

How close the English law approaches to this doctrine is shewn by the following expressions of judges and text-writers:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, *unintentionally*, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done." Per Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.*(*i*).

"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect, the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." Per Brett, M.R., in *Heaven* v. *Pender*(*j*).

"What a man does through negligence, he does not do from a fraudulent motive. Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design." Per Fry, J., in *Kettlewell* v. *Watson*(*k*).

"Unreasonable conduct is usually called negligence in law, because in a standard man in the party's situation it could not arise from any other state of mind than negligence or intention, which latter the law is reluctant to presume." Professor Terry in "Leading Principles of Anglo-American Law"(*l*). "The state of mind of the doer of an act is often the subject of legal enquiry

(*h*) Goudsmit's Pandects, § 76, pp. 213, 214. On this point see also Gaius III., 213; Savigny, Syst III., p. 388; Heinecc. Elem. Juris. Civ. III., 14. 784; and a learned article by Mr. Schuster on the "Liabilities of Bailees in German Law." 2 Law Quart. Rev. 188.

(*i*) 11 Exch. at p. 784.

(*j*) L.R. 11 Q.B.D. at p. 507.

(*k*) L.R. 21 Ch. D. at p. 706.

(*l*) § 217, p. 200.

with a view to ascertaining whether it exhibits the phenomena of 'intention.' From the nature of the case, a similar enquiry can hardly be undertaken with a view to detecting the psychological phenomena of 'negligence.' Lawyers have, therefore, long been content, in enquiring into the alleged negligence of a given individual, to confine themselves to ascertaining whether or no his acts conform to an external standard of carefulness. Two such standards were employed by the Roman lawyers to measure that 'diligentia' the failure to attain which they called 'culpa.' . . . This abstract, or ideal, objective test" [the care which would be exercised, under the circumstances, by the average good citizen] "is that which is applied in modern codes, and is stated with growing clearness in the decisions of English and American courts." Holland's Elements of Jurisprudence(*m*).

"Negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea, and has nothing to do with a state of mind." Clerk & Lindsell on Torts(*n*).

"The Roman conception of delict agrees very well with the conception that appears really to underlie the English law of tort. Liability for delict, or civil wrong in the strict sense, is the result either of wilful injury to others, or wanton disregard of what is due to them (dolus), or of a failure to observe due care and caution, which has similar though not intended or expected consequences (culpa)." Pollock's Law of Torts (*o*).

"Negligence is the contrary of diligence, and no one describes diligence as a state of mind. The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances." Ibid(*p*).

Many other authorities to the same effect might be quoted, but our purpose has been served by those already collated, and we would not weary our readers. We think it has been fairly

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(*m*) 9th ed. pp. 105, 106.

(*n*) 3rd ed., p. 431.

(*o*) 7th ed., (1904), pp. 17, 18.

(*p*) p. 429.

shewn that the law, in formulating its theory of liability for negligence in civil cases, has not regarded the mental attitude of the wrong-doer, but has contented itself with fixing an external standard of conduct as the criterion of blameworthiness. To attempt to overlay this purely objective theory with subjective refinements is not such an experiment as could be expected to commend itself either to hard-headed practitioners or to the more academic members of the legal profession who are jealous to keep intact such symmetry as the philosophy of the common law has up to the present time been able to achieve.

CHARLES MORSE.

SUGGESTED CHANGES IN THE ELECTION LAW.

Changes in the election law have been discussed in preceding numbers by two writers from different standpoints and with widely different views. The first in the calm and judicial manner appropriate to the conservative province "down by the sea." And the other in the fresh and breezy style that one has learned to expect from the prairie province. Both articles are well worth consideration. We venture to think, however, that the writer of the later one scarcely grasped the true thought of the first in reference to his main suggestion. As we understand his proposal it is that there should be an official whose special duty it would be to enforce the election law; and, in order that such an official should be free from improper interference, suggests that he should not be removable from office except by a two-third vote of the House of Commons. It may be noted that a somewhat similar provision exists in reference to many other appointments, municipal and otherwise throughout Canada. The purpose of such a provision is obvious and does not strike us as being unreasonable. Scarcely, under the circumstances, could he be called an "irresponsible functionary," a "dictator," or a "despot."

The reason for the appointment of such an official as suggested is presumably based largely on the truth of the old saying that "what is everybody's business is nobody's business." As pointed out by Mr. McLeod, the working out of the duties of such an

officer would doubtless be surrounded by many difficulties, but that, of course, applies to many other matters. It is quite true also that one of the great needs of the country is "a quickening of the individual conscience"; but we doubt his statement that the law now in existence is an advance of public opinion, and that the latter must come before a more drastic measure is desirable. The public conscience has been strongly aroused lately by a succession of scandalous election frauds. Judge Wallace's suggestion is quite in the line of the quotation from Bryce, when that writer says: "Although you cannot make men moral by statute you can arm good citizens with weapons which improve their chances in the incessant conflict with the various forms in which political dishonesty appears." May it not also be said that Mr. McLeod's main argument applies with equal force to our Sunday laws, our temperance laws, and kindred statutes which certainly are attempts "to make people moral by Act of Parliament."

We should be glad to hear a discussion in the legislative arena as to the advisability of such an appointment as the one suggested by Judge Wallace. In conclusion we think it may safely be said that the public do not recognize the present law as satisfactory and would be glad of some such amendment as would aid, to a certain extent at least, in bringing proper punishment to those who defraud honest electors of their franchise.

In the proceedings taken at the instance of the Attorney-General for Ontario against the Grand Valley Railway Company for running cars on Sunday, the defence has been raised that the Province has no jurisidiction whatever over criminal law, as well as that the Dominion Parliament cannot delegate any dealing therewith to the Provinces. It is claimed by the Company that the Privy Council sustains them in both contentions. The decision will be of interest in discussing the competent authority for the enforcement of the criminal law.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PROSECUTION—LIMITING TIME FOR INSTITUTING PROCEEDINGS.

Brooks v. *Bagshaw* (1904), 2 K.B. 798, was a prosecution under the sale of Foods and Drugs Act, 1899, in which the question was, whether the proceedings had been instituted within the time prescribed by the Act, viz., within twenty-eight days from the purchase of the alleged adulterated article. It appeared that the information was laid, and a summons taken out within the twenty-eight days, but the summons not having been served, it was allowed to drop, and a new summons was taken out on the same information, but after the time limit had expired. The Divisional Court (Lord Alverstone, C.J., and Kennedy, and Phillimore, JJ.) held that it was sufficient that the information was laid within the prescribed time, but that it was not necessary that the summons should be made returnable or be served within the twenty-eight days, and that it is competent to issue on the same information two or more summonses in succession, until the matter is adjudicated upon on the merits.

JUDGMENT DEBT—CHARGING ORDER—INTEREST OF DEBTOR IN STOCK—1 & 2 VICT. C. 100, S. 14—3 & 4 VICT. C. 82, S. 1—(R.S.O. C. 334, SS. 21, 23.)

In *Bolland* v. *Young* (1904), 2 K.B. 824, the plaintiff having recovered judgment against the defendant sought to obtain a charging order for the amount of the judgment against the defendant's share in an estate in which he was beneficially interested under the will of an American lady, who died in 1903, whereby she appointed two persons resident in England, trustees of all her moneys, bonds, securities and property in England, and directed the executors and trustees to collect and gather in all such residue of the estate in England, and to invest and reinvest it from time to time, and to accumulate the income for six years, and at the end of six years to apply the accumulated income in a certain way, and to divide the capital in three parts, one of which was to be paid to, and become the sole property of, the debtor. The funds subject to the trusts of the will had been invested in Transvaal Government stock which stood in the books of the Bank of England in the name of the trustees of the will.

Phillimore, J., had refused the application of the plaintiff for a charging order against the debtor's beneficial interest in the stock, but the Court of Appeal (Sterling and Mathew, L.JJ.) held that the latter had an interest in the stock which might be charged under the statutes 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1 (R.S.O. c. 334, ss. 21, 23), and accordingly made the order as prayed.

SUBMISSION TO ARBITRATION—STAYING PROCEEDINGS—ARBITRATION ACT (52 & 53 VICT. c. 49), s. 4—(R.S.O. c. 62, s. 6).

In *Hodson* v. *Railway Passengers Assurance Co.* (1904), 2 K.B. 833, an application was made to stay proceedings, on the ground that the matters in question were by statute to be submitted to arbitration. The Railway Passengers Assurance Company's Act of 1864 provided that any question arising on a contract of insurance made by the defendant company should be referred to arbitration, and that if an action were brought it might be stayed; while this Act was in force the contract sued on was made, which contained a condition that any dispute arising thereon should be referred to arbitration. After the making of the contract the Act was repealed by a Consolidating Act which, however, provided that all contracts in force at the date of the repeal were to be valid and effectual as if the Consolidating Act had not been passed. Under these circumstances the Court of Appeal (Collins, M.R., and Stirling, L.J.) held that an order had been properly made by Phillimore, J., staying the actions, as the effect of the saving clause in the Consolidated Act was to leave in force a valid submission to arbitration within the meaning of the Arbitration Act, s. 4 (R.S.O. c. 62, s. 6), and, therefore, under that Act the Court had jurisdiction to stay the action.

SUMMARY JUDGMENT ON SPECIALLY INDORSED WRIT — ORDER XIV.—(ONT. RULE 603)—EXCESSIVE INTEREST.

Wells v. *Allott* (1904), 2 K.B. 842, was an application for a summary judgment under Order XIV. (Ont. Rule 603). The defendant set up that the rate of interest (which was equal to £105 per cent. per annum) was excessive and extortionate, against which he was entitled to relief under the Money Lenders Act 1900 (63 & 64 Vict. c. 51), s. 37. Phillimore, J., had given the plaintiff leave to sign judgment for the amount indorsed on the writ, but the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.J.) set the order aside holding that such a defence ought not to be disposed of on summary application but that the action should go to trial in the ordinary way as to the excess claimed over and above the amount advanced, and simple inter-

est at five per cent., for which latter sum alone the plaintiff was entitled to immediate judgment.

SECURITY FOR COSTS—BOND OF FOREIGN COMPANY AS SECURITY FOR COSTS.

In *Aldrich* v. *British Griffin Co.* (1904), 2 K.B. 850, the Court of Appeal (Lord Halsbury, L.C., and Stirling and Matthew, L.JJ.) held that there is no rule or reason precluding the allowance of the bond of a foreign company carrying on business in England, as a sufficient security for costs.

BILL OF EXCHANGE—CONFLICT OF LAWS—CHEQUE STOLEN ABROAD —FORGED INDORSEMENT—TRANSFER IN FOREIGN COUNTRY—BILLS OF EXCHANGE ACT 1882, 45 & 46 VICT. C. 61, S. 24—(53 VICT. C. 33, SS. 29, 71 D.)

Embericos v. *Anglo-Austrian Bank* (1904), 2 K.B. 870, brings to light a rather curious feature of Austrian law. The plaintiffs were drawees of a cheque drawn abroad and payable in England. They indorsed it to their correspondents in England for collection; but the cheque was stolen in transit, and the indorsement of the name of the plaintiffs' correspondent was forged and the cheque was then presented to and cashed by a Bank in Vienna acting in good faith and without negligence. The Vienna Bank then endorsed the cheque to the defendants in London who got it cashed. The plaintiffs sued the defendants for conversion. At the trial it appeared that by the law of Austria the Vienna Bank acquired a valid title to the cheque notwithstanding the forged indorsement. It was therefore held by Walton, J., that the plaintiff could not succeed because the transfer of the cheque in Vienna was governed by Austrian law (see Imp. Stat. 45 & 46 Vict. c. 61, s. 24 p., and Dom. Bills of Exchange Act: 53 Vict. c. 33, ss. 27, 71) which gave the Vienna Bank a good title which they had transferred to the defendants. This case has been affirmed on appeal.

ADMIRALTY—COLLISION—DAMAGE—TUG AND TOW.

The Harvest Home (1904), P. 409, is an Admiralty case. Two tugs were towing a sailing vessel in charge of a pilot, the pilot's cutter being made fast to the sailing vessel, and owing to the negligence of the tow and her tugs the pilot cutter was sunk by collision with a schooner which was also damaged. The action was brought by the owner of the pilot cutter against the schooner and the tow and her tugs, and the owner of the schooner counterclaimed against the owner of the pilot cutter and the tugs. Jeune, P.P.D., held that the pilot cutter and the

schooner were both entitled to suceed against the owners of the tugs, for though those in charge of the tow were negligent, in not properly directing the tugs, yet an independent duty was cast on the owners of the tugs to exercise reasonable care and skill in keeping clear of the schooner, which on the evidence he found they had not done. He also held that the pilot cutter was not so identified with the tow as to be unable to recover. After the collision one of the tugs towed the schooner to Cardiff and claimed salvage, but the learned President held that though it was the duty of the tug to stand by the disabled schooner, and was debarred by negligence from recovering salvage, yet she was not bound to tow her to the port of destination, but having done so was entitled to payment therefor on ordinary towage terms.

MUNICIPAL BY-LAW — VALIDITY—REASONABLENESS—PROHIBITION OF SALE OF PAPERS ON STREET DEVOTED TO RACING TIPS.

Scott v. *Pilliner* (1904), 2 K.B. 855, was a proceeding to quash a municipal by-law prohibiting the sale on the streets and other public places of newspapers "devoted wholly or mainly to giving information as to the probable result of the races, steeple chases, or other competitions." Phillimore, J., thought the by-law not unreasonable, and therefore valid, but the majority of the Divisional Court (Lord Alverstone, C.J., and Kennedy, J.) held that it was too general in its terms and unreasonable. It may be doubted whether Lord Alverstone's dictum that "such by-laws should not make unlawful things which are otherwise innocent" is not altogether too wide. Judged by such a rule many by-laws would be invalid. It is an innocent thing to walk on the grass bordering a path, but if by so doing you spoil thousands of dollars worth of city property, as is the case in the city of Toronto, surely the city might pass a by-law to prevent it.

ADMIRALTY — MASTER'S DISBURSEMENTS — MASTER'S WAGES — BONUS TO MASTER — COSTS OF DEFENDING ACTION — MARITIME LIEN—MERCHANT SHIPPING ACT 1894—(57-58 VICT. C. 60) SS. 167-742.

The Elmville, No. 2 (1904), P. 422, is another admiralty case in which two points are decided by Jeune, P. P. D. (1) that costs incurred by the master of a vessel in defending an action brought against him on a dishonoured bill of exchange which he had drawn on the owners for the price of coals supplied to the vessel, are not "liabilities properly incurred by him (as master) on account of the ship" within s. 167 of the Merchant's Shipping

Act unless the defence was reasonably necessary in the interests of the ship. And (2) that the term "wages" will include a bonus promised to a master by the owners in addition to his agreed wages, on condition that he remained with the vessel and satisfied the owners that he had done all in his power to promote the interests of the ship.

DESIGN — REGISTRATION — PATENT AND REGISTERED DESIGN FOR SAME INVENTION—INFRINGEMENT.

Werner Motors v. *Gamage* (1904), 2 Ch. 580, was an action to restrain the infringement of a design for frames of motor cycles. On November 8, 1901, the plaintiffs applied for a patent for an improvement in frames for motor cycles and delivered a provisional specification; on No. 18, 1901, the plaintiffs registered the design of a frame for motor cycles; on August 8, 1902, they delivered a complete specification for the patent applied for on Nov 8, 1901, the specification contained a drawing identical with the registered design. The defendant had infringed the registered design, and contended that the effect of the plaintiffs obtaining a patent dated prior to the registration of the design was to annul the registration of the design, because the prior patent precluded registration for want of novelty. Byrne, J., gave judgment for the plaintiffs which was affirmed by the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.), the court being of opinion that in the circumstances of this case the two rights under the registration of the design and the patent could co-exist, because at the time of the application for the patent in Nov., 1901, there had been no publication of the design, the provisional specification being merely a statement in writing without any drawing shewing the shape of the frame as registered.

COMPANY—RECONSTRUCTION—ARTICLES—POWER TO SELL UNDERTAKING FOR SHARES IN ANOTHER COMPANY—SALE FOR PARTLY PAID SHARES—ULTRA VIRES.

Manners v. *St. David's Gold Mines* (1904), 2 Ch. 593, was an action to restrain the defendant company from carrying out a sale of its undertaking on the ground that the sale was not warranted by the articles of Association. The articles authorized a sale of the undertaking for shares of a new company, such shares to be distributed in specie, but so that no sale was to be made which would amount to a reduction of capital without the sanction of the court. The capital of the company having been fully paid, a scheme of reconstruction was adopted whereby the undertaking was to be sold to a new company in consideration (among other things) of partly paid shares in the new company, which

the shareholders were to have the option of taking in exchange for their existing shares. And in the event of the old company going into liquidation within a certain period after the completion of the purchase the liquidator was to fix a time within which the new shares were to be taken up, and any shares not accepted within that time were to be realized and applied in reduction of the liabilities of the new company under the scheme. This arrangement was embodied in an agreement between the two companies. The Court of Appeal (Romer and Cozens-Hardy, L.JJ.) agreed with Joyce, J., that this agreement was unwarranted by the articles of association, and was a device to compel the holders of fully paid shares to contribute further capital, or forfeit their interest in the company, and was therefore ultra vires.

COMPANY—BORROWING POWERS—UNAUTHORIZED APPLICATION OF FUNDS—ULTRA VIRES—NOTICE TO DIRECTORS OF INTENDED MISAPPLICATION OF LOAN.

In re Payne, Young v. *Payne* (1904), 2 Ch. 608. The company in liquidation had borrowed from another company, upon the security of a debenture of the borrowers, a sum of money which it applied for purposes not authorized by its articles of association. It was known to Kolckmann, one of the directors of the lending company, who was also interested in the borrowing company, that the loan was to be used for the purpose to which it was applied, but that fact was not known to any other of the directors of the lending company. The borrowers had a general power to borrow money for the purpose of their business. The lenders claiming to prove as creditors in respect of their debenture, it was objected that they were bound by the knowledge acquired by the director Kolckmann and that the debenture was void; but the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) affirmed the decision of Buckley, J., that the knowledge of Kolckmann was not to be imputed to the lending company as he owed no duty to that Company either to receive or disclose to that company information as to how the loan was to be applied, and that the company was not under any obligation to inquire as to the purpose, or proposed application, of the loan.

GAS COMPANY—LIMITED DIVIDEND AUTHORIZED BY STATUTE—DIVIDEND FREE OF INCOME TAX.

In *Attorney-General* v. *Ashton Gas Co.* (1904), 2 Ch. 621, the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) affirmed the decision of Buckley, J., to the effect that where a Gas Company's Act of incorporation limited the rate of

dividend which it might declare, it was not competent for the company to declare such dividend free of income tax; as that would be declaring a dividend not only for the statutory rate, but for that rate plus the income tax which would be unwarranted, and therefore that the income tax paid by the company should be deducted from the dividend paid to the shareholders.

COMPANY — PROSPECTUS — NON-DISCLOSURE OF CONTRACTS IN — DIRECTORS' LIABILITY—"KNOWINGLY ISSUED"—IGNORANCE—COMPANIES ACT 1897, (30 & 31 VICT. C. 131), S. 38—(2 EDW. VII. C. 15, S. 34(D.)).

Tait v. *MacLeay* (1904), 2 Ch. 631, was an action brought against a director of a company to recover damages for the non-disclosure in a prospectus of the company of certain contracts which by s. 38 of the Companies Act (2 Edw. VII. c. 15, s. 34(D.)), were required to be disclosed. The defendant set up that he had forgotten the contract in question; but it appeared that at the meeting of directors at which the prospectus was approved, the minutes of the various meetings at which the contract was considered were read and confirmed in his presence and he had himself approved the contract; and he had a general knowledge of the existence of contracts which might fall within the section, but made no inquiry into them, but accepted the assurance of the company's solicitor that the prospectus disclosed all the contracts which the section required to be disclosed. Kekewich, J., held under these circumstances he must be taken to have "knowingly issued" the prospectus and was liable for the omission, and the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) agreed with him. See *Hoole* v. *Speak, infra.*

EXECUTOR—DUTY OF EXECUTOR TO GIVE NOTICE OF LEGACY—CONDITIONAL GIFT—EXECUTOR ENTITLED ON BREACH OF CONDITION—ESTOPPEL.

In re Lewis, Lewis v. *Lewis* (1904), 2 Ch. 656, the question is discussed as to how far, if at all, an executor is bound to give notice of a legacy to the legatee. In this case the matter was further complicated by the fact that the legacy in question was given on condition, and the executor himself was beneficially entitled in the event of the legatee failing to perform the condition; and there was the further circumstance that the executor had furnished the legatee with some information about the legacy and had offered to purchase the property bequeathed, but had said nothing about the condition. Pending the negotiations the legatee died, having failed to perform the condition. By the terms of the will in question the testatrix appointed her son Edward her executor and bequeathed a leasehold house to her son

Evan then abroad, but in case he should not return to claim it it was to go to Edward the executor. After the death of the testatrix the executor wrote to his brother Evan "A house has been left to you, according to the will it is to be in my hands until you claim it," and he did not inform him of the gift over, but offered to buy the house. The legatee died without having returned to claim the legacy, and without being aware of the gift over; his representative now claimed the legacy; but Joyce, J., came to the conclusion that the letters were written bonâ fide and without any intention to deceive, and that the executor was entitled under the gift over, and was not estopped from claiming by anything contained in the letters sent to the legatee. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) affirmed his decision, holding that there was no duty resting on the executor to disclose the terms of the legacy, even though he was beneficially entitled under the gift over, and that the executor could not be estopped from setting up the gift over by reason of his omission to mention it in his letter to the legatee.

INFANT—CONTINGENT LEGACY LEFT BY FATHER—MAINTENANCE —SURPLUS INCOME.

In re Bowlby, Bowlby v. *Bowlby* (1904), 2 Ch. 685. In this case a testator had by his will bequeathed to each of his daughters who should obtain 21 a legacy of £50,000, provided that the legacy should not vest absolutely in her, but should be retained by the trustees upon trust to pay the income to her during her life, and after her death in trust for her children and remoter issue. The testator left four daughters, all of whom were infants. On an application made to the court for that purpose, an order had been made for the payment of £1,000 a year for the maintenance of one of the daughters during her minority. She had now come of age and the question presented for determination was, who was entitled to the surplus income which had accrued on her legacy during her minority. Buckley, J., following *In re Scott* (1902), 1 Ch. 918, held that the daughter was entitled to the surplus, but the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.), over-ruling that case, decided that the surplus was to be regarded as an accretion to the capital, and that the daughter was only entitled to the income thereof during her life.

COMPANY — PROSPECTUS — NON-DISCLOSURE OF CONTRACT IN — DIRECTORS' LIABILITY—UNAUTHORIZED ISSUE OF PROSPECTUS —RATIFICATION—"KNOWINGLY ISSUED"—COMPANIES ACT 1867 (30 & 31 VICT. c. 131) s. 38—(2 EDW. VII. c. 15, s. 34, (D.)).

Hoole v. *Speak* (1904), 2 Ch. 732, is another action against the directors of a limited company for knowingly issuing a pros-

pectus which omitted to disclose a material contract, contrary to the provisions of the Companies Act 1867, s. 38 (2 Edw. VII. c. 15, s. 34 (D.)). In this case it appeared that the prospectus in question was "provisionally approved" at a meeting of the directors, but, before it received their final approval, advance copies were issued to the public by one of the promoters who was not a director, without authority from the directors. This prospectus was the one on which the plaintiffs had acted, it was afterwards finally approved at a meeting of the directors. Kekewich, J., however, held that the advanced copy of the prospectus could not be said to have been "knowingly issued" by the defendants, and their subsequent adoption of a prospectus in the same form, could not make them liable for the advanced copy issued without their authority.

COMPANY—WINDING UP—SALE OF ASSETS—DISSOLUTION BEFORE SALE COMPLETED—TRUSTEE ACT 1893 (56 & 57 VICT. C. 53), SS. 25, 35—(R.S.O. C. 336, S. 15).

In re Taylor (1904), 2 Ch. 737, is a case in which a limited company was wound up, and an agreement made for the sale of part of its assets, consisting of a patent of invention, to the applicants, but before the sale was completed by the execution of an assignment of the patent the company was dissolved. The purchasers applied for a vesting order under the Trustee Act 1893, s. 35 (R.S.O. c. 336, s. 15), but Buckley, J., was of opinion that on dissolution of the company the legal interest in the letters patent vested in the Crown, and that in that case, though the Crown did not act as trustee, it could not be said that the trustee "could not be found" within s. 35, but if the legal interest did not vest in the Crown, there was no trustee, and it could not in that case be said that the trustee "could not be found"; and therefore, whichever was the case, he had no jurisdiction to make a vesting order. The learned judge further suggests that the patent merged as soon as the legal interest vested in the Crown, if it did so vest. Neither could a new trustee be appointed because the Crown is not bound by the Trustee Act. While the purchaser was indubitably in a snarl, the learned judge furnished no clue as to how he was to get relief; but by a foot note we learn that the Board of Trade acting on the suggestion of counsel for the Treasury had directed the comptrollers to register the purchaser as proprietor of the letters patent.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] PHELPS *v.* MCLACHLIN. [Jan. 31.

Contract—Sale of goods—Refusal to perform—Specific performance—Damages.

By contract in writing M. agreed to sell to P. cedar poles of specified dimensions, the contract containing the following provisions: "All poles as they are landed at Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining at Arnprior over one month after they are in shipping condition to be paid for on estimate in thirty days therefrom, less 2 per cent. discount. . . . For shipments cash 30 days from dates of invoices less 2 per cent. discount."

Held, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition, but only after 30 days from receipt of the estimate of such poles.

M. refused to deliver logs that had been on the ground one month without previous payment and P. brought an action for specific performance and damages, claiming that he could not be called upon to pay until the poles were inspected and passed by him and also that M. should supply the cars. M. counterclaimed for the price of the poles.

Held, SEDGEWICK and KILLAM, JJ., dissenting, that each party had misconstrued his rights under the contract and no judgment could be rendered for either.

Appeal allowed without costs.

Watson, K.C., and *Slattery*, for appellant. *S. H. Blake*, K.C., and *Henderson*, for respondents.

N.S.] OLIVER *v.* DOMINION IRON & STEEL CO. [Jan. 31.

Negligence—Employers' Liability Act—Defect in ways, works, etc.—Care in moving cars—Contributory negligence.

O., a workman in the employ of defendant company, was directed by a superior to cut sheet iron and use the rails of the company's railway track for the purpose. The superior offered to assist and the two sat on the track facing each other. O. had his back to two cars standing on the track to which, after they

had been working for a time, an engine was attached, which backed the cars towards them and O. not hearing or seeing them in time was run over and had his leg cut off.

Held, 1. O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation and could not recover damages for such injury.

2. The employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so.

3. Per SEDGEWICK, NESBITT and KILLIAM, JJ., that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, etc., of the company within the meaning of s. 3 (*a*) of The Employers' Liability Act.

4. Per GIROUARD and DAVIES, JJ., that if it was such defect was not the cause of the injury to O.

Appeal allowed with costs.

H. A. Lovett, for appellants. *Henry*, for respondent.

N.S.] MOORE *v.* ROPER. [Jan. 31.

Debtor and creditor—Assignment of debt—Sheriff's sale—Equitable assignment—Statute of Limitations—Payment—Ratification.

In Nova Scotia book debts cannot be sold under execution and the act of the judgment debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser.

The purchaser received payment on account of a debt so sold which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations.

Held, that though the creditor might be unable to deny the validity of the payment he could not adopt it so as to obtain a right of action thereon and the payment having been made to a third party who was not his agent did not interrupt the prescription. *Keighley, Maxstead & Co.* v. *Durant* (1901), A.C. 240, followed. Appeal dismissed with costs.

Newcombe, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondent.

N.S.] SIEVERT *v.* BROOKFIELD. [Jan. 31.

Negligence—Trespasser—Licensee—Master and servant.

A trespasser or bare licensee injured through negligence may maintain an action. The workmen of a contractor for tearing down portions of a building in order to make alterations, turned on a water tap in a room where they were working and neglected

to turn it off, whereby goods in the story below were damaged by water.

Held, DAVIES and NESBITT, JJ., dissenting, that the act of the workmen was done in course of their employment; that it was negligent; and that the owner of the goods could recover damages though he was in possession merely as an overholding tenant who had not been ejected. Appeal allowed with costs.

W. B. A. Ritchie, K.C., and *H. A. Lovett,* for appellant. *Mellish,* K.C., and *Silver,* for respondent.

N.S.] IN RE ESTATE OF ALICIA CULLEN. [Jan. 31.

Will—Execution—Evidence—Appeal.

In proceedings for probate of a will the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers and if she wished the two persons present to witness it, and she answered "yes"; each of the witnesses acknowledged his signature to the will, but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed and his decision was affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment appealed from (36 N.S.R. 482) that two courts having pronounced against the validity of the will, such decision would not be reversed by a second Court of Appeal. Appeal dismissed with costs.

Ross, K.C., for appellants. *Newcombe,* K.C., and *Henry* for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Oct. 14, 1904.

IN RE NORTH RENFREW ELECTION.

Contempt of court—Newspaper—Controverted election.

Having regard to the principle that the summary remedy of committal for contempt because of comments on a matter sub judice should be granted only when it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant, the court refused a motion to commit the editor of a newspaper because of comments made in an editorial, pending the trial of an election petition in which

the applicant, the member elect, was respondent, upon his election methods and expenditure, especially as after the argument of the motion the petition and a cross petition—both containing many charges of corrupt practices—had come on for trial and no evidence having been offered on either side had been dismissed, the applicant then resigning the seat.

Hellmuth, K.C., for applicants. *Aylesworth*, K.C., for respondent.

Full Court.] REX *v.* RYAN. [Jan. 23.

Criminal law—Stealing post letter—Decoy letter—Confession.

Suspicion having been aroused as to the honesty of a letter carrier the superintendent of the post office wrote in his office in the post office a letter to a person in the letter carrier's district, enclosed it in a duly addressed envelope, placed in the envelope bank notes of which the numbers had been taken, and put upon the envelope a stamp which was then cancelled by impressing upon it the cancellation stamp of another post office. The letter was then handed by the superintendent of the post office to the superintendent of letter sorters, who gave it to one of the sorters and he placed it in the box in which letters for delivery by the suspected letter carrier were being placed. The letter did not reach the person to whom it was addressed and one of the bank notes was used by the suspected letter carrier and was obtained by a detective and shewn to the post office superintendent. The superintendent then had an interview with the letter carrier and accused him of the theft, telling him that he had the bank note in question in his possession, and the letter carrier acknowledged his guilt;

Held, that the letter in question was a "post letter" within the meaning of the definition thereof contained in the Post Office Act, R.S.C. 1886, c. 35, s. 2, as amended by 1 Edw. VII., c. 19, s. 1 (D.).

Held, also, there having been in fact no indictment or threat, evidence of the confession was admissible, the relationship of the superintendent to the letter carrier not being in itself sufficient to justify the inference of coercion, and the statement as to possession of the bank note, even if treated as a false statement, not making the admission of that evidence improper.

Leave to appeal from the judgment of Falconbridge, C.J. K.B., refusing to state a case, refused.

McBrady, K.C., for the prisoner. *Cartwright*, K.C., for the Crown.

From Boyd, C.] McVITY *v.* TRENOUTH. [Jan. 23.

Limitation of actions—Title by possession—Registry Act—Notice—Mortgage—Avoidance of prior unregistered deed—Relation back to date of deed.

In 1891 the female defendant, being desirous of conveying to the male defendant in contemplation of her then intended marriage with him an interest in certain land owned by her, conveyed the land in fee simple to a conveyancer who then conveyed to her and her intended husband in fee simple as tenants in common. The conveyancer duly registered the conveyance to himself, but fraudulently omitted to register his conveyance to the defendants, who then were and continued to be down to the time of the bringing of the action in actual possession of the land. The conveyancer, after previously mortgaging the land to other persons, mortgaged it in 1895 to the plaintiffs, who registered their mortgage in good faith, the previous mortgage having been paid off. The fraud was not discovered till 1902, and in 1903 the plaintiffs brought this action to enforce their mortgage;

Held, that the avoidance by virtue of the Registry Act of the prior unregistered deed by the conveyancer to the defendants related back to the time of its execution; that from the time of the execution of the deed by the female defendant to the conveyancer the legal title was in him and that the statute then began to run against him; that the mortgage by him in 1895 to the plaintiffs did not give a new starting point to the statute as against the defendants, and therefore that the action was barred. Judgment of Boyd, C., reversed.

Cameron v. *Walker* (1890), 19 O.R. 212, must, in view of the decision to the contrary of the Court of Appeal in *Thornton* v. *France*, [1897] 2 Q.B. 143, be regarded as no longer of authority.

Watson, K.C., and *Ruddy*, for appellants. *H. J. Scott*, K.C., for respondents.

HIGH COURT OF JUSTICE.

W. L. Scott, Local Master.] [Nov. 24, 1904.

OTTAWA STEEL CASTING CO. *v.* DOMINION SUPPLY CO., AND THE CITY OF OTTAWA.

Mechanic's lien — Assignment — Debt "due" — Lien holder — Priority—When lien attaches—Mechanic's Lien Act—(R.S.O. c. 152)—ss. 4, 13—Jud. Act, s. 58 (5).

Where E., sub-contractor, commenced work August 29, 1903, and completed his contract Oct. 11, 1904, and registered his lien Oct. 12, 1904, and on November 14, 1893, the contractor by

whom he was employed assigned $2,558 of the amount due to him from the owners on his contract to D., another sub-contractor, who duly gave notice thereof to the owners; and there was at the time of the assignment $2,558 earned under the contract, which did not become payable until giving of the architect's certificate on Nov. 4, 1904,

Held, 1. Under the Mechanic's Lien Act, s. 14, E.'s lien related back to the commencement of his work, and under s. 13, it was entitled to priority over D.'s assignment for the full amount of the lien, and not merely for that portion thereof actually earned by E. up to the date of assignment.

2. The assignment was valid and bound the debt assigned, though it was not payable at the date of assignment.

3. The debt due and owing is a sufficient consideration for the assignment of a chose in action and the assignment was therefore not revocable or impeachable as being voluntary.

The following cases were cited: *Hall* v. *Prittie*, 17 O.A.R. 306; *Bank B.N.A.* v. *Gibson*, 21 O.R. 613; *Lane* v. *Dungannon A. P. Assn.*, 22 O.R. 264; *Re McRae*, 6 O.L.R. 238; *Graham* v. *Bourque*, 6 O.L.R. 428 and 700; *Mitchell* v. *Goodall*, 5 O.A.R. 164; *Quick* v. *Colchester*, 30 O.R. 645; Encyc. of Law of England, vol. 1, p. 375, *Shirlock* v. *Powell*, 26 A.R. 407; *Re European L. Ass. Co.*, 39 L.J., Chy. 326; *McBean* v. *Kinnear*, 23 O.R. 313.

McDougal, *Henderson*, *Beament*, *McColl*, *Fripp*, and *McVeity* for the various parties interested.

Meredith, C.J., MacMahon, J., Teetzel, J.] [Nov. 25, 1904.

BELL *v.* LOTT.

Trespass—Searching for liquor without warrant in private dwelling house by county constable—Notice of action—Bona fide conduct—Leave and license—Jury.

Defendant, a county constable appointed by a police magistrate, searched the dwelling house for liquor without a warrant and without any special authority. In an action for trespass the trial judge held that the defendant was acting in the discharge of his duty and there being no evidence of malice he was entitled to notice of action and withdrew the case from the jury and directed a non-suit.

On an appeal to a Divisional Court, it was

Held, that the question as to whether the defendant was acting bonâ fide in the discharge of his duty as a constable in searching a private house as being a house of public entertainment for liquor was a question for the jury; and that leave and license,

which was argued on the appeal but not pleaded on the record, should also if pleaded be submitted to the jury and the judgment dismissing the action was set aside and a new trial ordered with liberty to the defendant to amend by adding a plea of leave and license.

Judgment of the County Court of Hastings reversed.

E. Guss Porter, for the appeal. *J. H. Moss*, contra.

Boyd, C.] [Dec. 5, 1904.

NASMITH CO. *v.* ALEXANDER BROWN MILLING CO.

Statute of Frauds—Contract by letter signed by plaintiff—Entry in defendants' book.

The essence of a signature whether made by writing or stamp or print must be to authenticate or identify the contract by the party to be charged.

In action for breach of a contract in the form of a letter from the plaintiff to the defendant to "enter our order for two thousand barrels Prarie Rose flour at $4.10 per barrel xxx cash discount ½ of 1 per cent.—we to have option of another three thousand barrels xx provided option is taken up by . . . Delivery as required" in which it was shewn that an entry was made in the defendants' contract book among other orders "1904. Dec. 30, by 2,000 P. Rose $4.10, cash dis. ½ of 1 per cent." under the head of the plaintiffs' company name and that the fly sheet of this book had the defendants' company name stamped on it.

Held, that, the contract was not proved according to the requirements of the Statute of Frauds.

Shepley, K.C., for plaintiffs. *DuVernet*, and *A. Miller*, for defendants.

Britton, J.] GILBERT *v.* IRELAND. [Dec. 8, 1904.

Action to establish will—Costs.

In an action to establish a will in which the defendants set up an unsuccessful defence of fraud and undue influence.

Held, under the circumstances of the case that all parties should have their costs out of the estate.

Clark, K.C., and *Kerns* for plaintiffs. *Watson*, K.C., and *Kirwan Martin*, for defendants.

Divisional Court.] [Dec. 12, 1904.

HAMMOND *v.* GRAND TRUNK RY. CO.

Master and servant—Negligence of servant—Injury to third person—Scope of employment.

A watchman was employed by the defendants to lower bars or gates across the highway at each side of a crossing on the approach of trains and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train was passing and the gates down the plaintiff—a lad of sixteen—and two other lads climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them which struck the plaintiff in the eye destroying the sight.

Held, that, this act having been done not of mere malice or ill-temper or to punish the plaintiff, but for the purpose of warning him to get off the gate and so of enabling the watchman to perform the duty required of him, the defendants, his employers, were responsible in damages as well as the watchman who was also a defendant. Judgment of ANGLIN, J., affirmed.

Riddell, K.C., for appellants. *Clute,* K.C., and *E. G. Morris,* for respondents.

Trial—Anglin, J.] KENT *v.* MUNROE. [Dec. 12, 1904.

Bank—Winding-up—Promissory note maturing after order—Set-off of deposit to credit of indorser—Note made by municipal officers for municipal purposes—Personal liability—Set-off of deposit to credit of municipality.

The funds of a township corporation were deposited in a chartered bank to the credit of an account kept in the name of "A.M., treasurer of R." The township council purported, by by-law, to authorize the treasurer and reeve to borrow from the bank money to be used for drainage purposes. Accordingly the treasurer made a promissory note, which he signed in his own name, with the words "treasurer of the township of R." after it, in favour of the reeve, and the reeve indorsed it, signing his own name, with the words "reeve of R." after it. This note was discounted by the bank, the proceeds placed to the credit of the account referred to, and paid out for the drainage purposes specified. The bank being in liquidation under the Dominion Winding-up Act, the liquidators sued the reeve and treasurer in their personal capacities upon the note, which matured after the winding-up order.

Held, that the defendants were personally liable upon the note, and were not entitled to set-off, against the plaintiff's claim upon it, the balance in the bank to the credit of the account kept in the name of the treasurer at the date of the winding-up order; but the defendant, the reeve, was entitled to set off the amount standing to the credit of his private account in the bank at the date of the winding-up order, and the defendants were allowed to amend their pleadings so as to claim that set-off.

Vanier v. *Kent*, 11 Que. K.B. 373, not followed.

Leitch, K.C., and *J. A. C. Cameron*, for plaintiffs. *Maclennan*, K.C., and *Cline*, for defendants.

Boyd, C., Meredith, J., Idington, J.] [Dec. 20, 1904.

BURRISS *v.* PERE MARQUETTE R.W. CO.

Railway—Accident—Negligence—Crowded trains—Standing on platform—Contributory negligence.

The plaintiff when travelling by an excursion train belonging to the defendants' system was constrained, by reason of the over-crowding of the cars, to resort to the platform outside one of the cars, and for better protection sat down on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the people standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding was struck by some fixture on the track and he sustained injuries.

Held, that the defendants were liable.

Bartlett, for plaintiff. *Rose*, for defendants.

Falconbridge, C.J.K.B.] [Dec. 23, 1904.

ATTORNEY-GENERAL FOR ONTARIO *v.* LEE.

Revenue—Succession duty—"Aggregate value" of property—Incumbrances.

In estimating the "aggregate value" of the property of a deceased person under the Succession Duty Act, R.S.O., 1897, c. 24, as amended by 62 Vict. (2), c. 9, and 1 Edw. VII. c. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein.

Frank Ford, for plaintiff. *Riddell*, K.C., for defendants.

NOTE.—It must, however, be understood that this decision does not deal in any way with the "dutiable value" of an estate, *i.e.*, the value upon which the duty is payable. The ex-

pression "aggregate value," as used in the Act, is what is considered in ascertaining whether an estate is liable or not in the first instance and at what rate the duty is chargeable.—Ed.

Divisional Court.] [Dec. 27, 1904.

SMITH *v.* NIAGARA AND ST. CATHARINES RY. CO.

Negligence—Railways—Dangerous crossing—Failure to give warning—Contributory negligence.

A siding of the defendants' line of railway which was not used by the defendants more than two or three times a week crossed a narrow arched in lane or alleyway (held on the evidence to be a highway) very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiffs' servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded, nor the bell rung. The plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—

Held, that, assuming but not deciding that the duty to sound the whistle or ring the bell did not apply in case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing a lane, especially in view of the very dangerous nature of the crossing, and that not having done so they were guilty of the negligence and prima facie liable in damages.

Held, also, that under all the circumstances it could not be said that there was not some evidence to support the finding of the judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably and was therefore not guilty of contributory negligence.

Judgment of the County Court of Lincoln, affirmed.

W. H. Blake, K.C., for appellants. *Marquis*, for respondent.

Teetzel, J.] IN RE HARKNESS. [Dec. 29, 1904.

Life insurance—Benefit of wife and children—Declaration by will—Identification of policy—Residuary estate—"Including."

A testator being the holder of a policy of life insurance, payable to "his order or heirs," made his will by which he devised

real estate, and proceeded: "I give the residue of my property, including life insurance, to my wife and to my two youngest children:—

Held, that the will sufficiently identified the policy within the meaning of s. 160 of the Insurance Act, R.S.O. 1897, c. 203, and operated as a valid declaration under the statute in favour of wife and children to the exclusion of creditors.

Re Cheesborough, 30 O.R. 639, applied.

Held, also, that the word "including" in the will did not mean that the life insurance was a part of the residuary estate, but that it was given in addition to the residuary estate.

A. R. Clute, for executor. *Marsh*, K.C., for widow. *Harcourt*, for infants. *A. C. McMaster*, for creditors.

Divisional Court.] VALIQUETTE *v.* FRASER. [Dec. 30, 1904.

Negligence—Building contract—Fall of wall—Architect.

The defendants being desirous of building a mill obtained from the owner of a mill of the desired character in the same vicinity the plans used by him which had been prepared by architects of high standing, and then proceeded to build in general accordance with these plans employing an experienced builder. There was contradictory expert evidence as to the mode of construction and as to the doing of mason work in winter. After the walls and roof had been completed machinery was being brought into the building though large door openings left unclosed for that purpose. The wind during a violent storm, rushing in through the openings forced off the roof and the walls fell, the plaintiff's husband, who was working at the building being killed:—

Held, that leaving the openings was not under the circumstances a negligent act, and that there was no liability in that respect.

Held, also, that there was no liability because of the mode of construction, even if defective, there being no patent defect or anything in the nature of a trap, an owner (in the absence of something of that kind) being entitled, in carrying on building operations, to rely on the plans of qualified architects and the skill of competent builders, and not being bound at his peril to acquire the technical knowledge necessary to enable him to decide as to the plans and the nature of the work. Judgment of TEETZEL, J., affirmed.

Lorn McDougall, for appellant. *Aylesworth*, K.C., for respondents.

Boyd, C., Meredith, J., Magee, J.] [Dec. 30, 1904.

BEEMER *v.* BEEMER.

Malicious prosecution—Proof of favourable termination of prosecution—Informal abandonment—Findings of jury.

This was an action for malicious prosecution upon an information before the Police Magistrate by the defendant charging the plaintiff with setting fire to the house of the defendants's mother. Warrants were issued, the plaintiff was arrested and put under bail to appear on a particular day for preliminary hearing, and eleven witnesses for the prosecution were summoned for the same day. Before that day the prosecutrix obtained information leading her to believe that the plaintiff could not have caused the fire in question. Whether anything, or what, passed between her and the magistrate in consequence was not shewn, but the magistrate gave some instructions to the chief constable, and in the result no witnesses appeared, the proceedings were in some way stopped, and the prosecutrix or her mother paid the fees and nothing more was heard of the case. Three months afterwards this action was commenced.

Held, MEREDITH, J., dissenting, that enough had been shewn to justify the jury and the court in assuming that the prosecution had terminated favourably to the accused before the action was brought.

Holman, K.C., for defendants. *Heyd*, K.C., for plaintiff.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Jan. 4.

NELSON *v.* LENZ.

Division Courts—Attachment of debts—Jurisdiction—Garnishee out of Province—"Carrying on business"—Assignee of fund attached—"Intervener."

A person living in the Uinted States entered into a contract in Ontario for the building of a house upon land owned by his wife. It was shewn also that he acted as his wife's agent in affairs relating to this property and other property in Ontario, all situate within the territory of a certain Division Court, process from which was issued against him as garnishee.

Held, that the evidence did not shew that he was carrying on business in the division within the meaning of s. 190 of the Division Courts Act, R.S.O. 1897, c. 60.

Held, however, STREET, J., dissenting, that, as the garnishee had submitted to the jurisdiction of the Division Court, a person holding an equitable assignment from the primary debtor of a part of the fund sought to be garnished, could not effectively

intervene under section 193 and defeat the garnishing proceedings by shewing that the Court had no jurisdiction over the garnishee.

C. A. Moss, for primary creditors. *W. H. Blake*, K.C., for intervener.

Divisional Court.] [Jan. 28.

SCHWOOB *v.* MICHIGAN CENTRAL RY. CO.

Negligence—Master and servant—Defect in machinery—Conflict of opinion as to type—Defective system of inspection.

In an action brought against a railway company to recover damages because of the death of a fireman who was scalded by steam which escaped in consequence of the giving way of a water pipe in an engine, evidence was given on behalf of the plaintiff that the type of engine in question was of dangerous construction and especially liable to accidents of the kind, but it was shewn on cross-examination of the plaintiff's witnesses that the use of engines of this type was well established and that they had many points in their favour.

Held, that the principle adopted in actions of negligence against professional men should be applied, namely, that negligence cannot be found where the opinion evidence is in conflict and reputable skilled men have approved of the method called in question.

At common law a master is bound to provide proper appliances for the carrying on of his work and to take reasonable care that appliances, which if out of order, will cause danger to his servant are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge either personally or by employing a competent person in his stead and the purpose of sub-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, as modified by s. 6, sub-s. 1, is to take from the master his common law immunity for the neglect of such a person.

Where, therefore, an accident occurred as the result of the giving way of a water pipe in an engine which had not long before been in the defendants' repair shop for the purpose of having the water pipes repaired it was held that the inference might be drawn that there had been negligence on the part of the workman entrusted with the duty of doing the repairs, and either absence of inspection or negligent inspection and that if an inference of either kind were drawn the defendants would be liable.

A non-suit granted by MEREDITH, J., was therefore set aside and a new trial ordered.

Crothers, for plaintiff. *Cattanach*, for defendants.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] BUCHANAN *v.* HARVIE. [June 4, 1904.

Practice—Security for costs—Foreclosure suit.

It is not a ground for refusing an order for security for costs, where plaintiff is resident abroad, that the suit is for foreclosure mortgage.

W. H. Trueman, for plaintiff. *Kaye*, for defendant.

Barker, J.] COOL *v.* COOL. [June 6, 1904.

Will—Construction—Maintenance clause—Lien.

Where testator by his will gave his estate, consisting of farm and dwelling house and personal property, to his son upon condition that he would maintain testator's widow and daughters, except in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance.

Hazen, K.C., for plaintiffs. *Stockton*, K.C., for defendants.

Barker, J.] [June 20, 1904.

CONTINENTAL TRUSTS CO. *v.* MINERAL PRODUCTS CO.

Priorities—Equitable mortgage—Mining licenses—Sheriff's sale—Judgment creditor—Purchaser—Notice.

Where a company made a mortgage of their lands, and of mining rights therein, the title to which at the time was in the Crown, mining licenses subsequently issued to them were held to pass to the mortgagee as against a judgment creditor of the company who with notice of the mortgage purchased the licenses at a sheriff's sale under an execution upon his judgment, and although he had paid to the Government overdue rent on the licenses and obtained an issue of the licenses to himself.

Semble, that this title would have been postponed to that of the mortgagee though he had been a purchaser without notice of the mortgage.

Hazen, K.C., and *Stockton*, K.C., for plaintiffs. *Pugsley*, A.-G., and *Ewing* for defendants.

Barker, J.] [June 6, 1904.

SHAUGHNESSY v. IMPERIAL TRUSTS CO.

Company—Debenture mortgage—Foreclosure—Parties—Costs.

A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustee being made a defendant.

In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name.

Pugsley, A.-G., and *L. P. D. Tilley*, for defendants. *Earle*, K.C., and *F. R. Taylor*, for plaintiff.

Barker, J.] ROBIN & CO. v. THERIAULT. [Sept. 20, 1904.

Crown land—Squatter—Tenant—Purchaser for value—Priorities—Notice.

A squatter upon Crown land, which he had partly cleared and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant. In 1898 a son of the squatter having no knowledge of the mortgage or deed or that his father occupied the land as tenant, obtained a grant of the land from the Crown.

Held, that he should not be declared a trustee of the land for the purchaser from the father.

Earle, K.C., and *Gilbert*, for plaintiffs. *Stockton*, K.C., for defendants.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] JOHN ABELL CO. v. HORNBY. [Jan. 18.

Estoppel by representation—Lien on land—Consideration.

Action to recover balance due for a threshing outfit sold and delivered by the plaintiff company to defendants, Charles Hornby and his wife, Ellen Hornby, under a written agreement signed by defendants which provided that promissory notes were to be given on approved security for the amounts payable at the dates mentioned. When the machinery had been delivered

the defendants' farm the plaintiffs' agent called there to take settlement for it. Defendants then signed the notes asked for and the agent demanded a lien on the farm as security for the notes, and, relying on the representations of both defendants then made, that the wife owned the land, accepted a lien on the land for the amount, signed by Mrs. Hornby in the presence of her husband, and did not insist, as he might have done, that the husband should also sign it. It appeared that the title to the land was then actually in the husband and had remained so ever since. The chief contention at the trial was as to whether the plaintiffs were entitled to a lien on the land for the debt as against the defendant Charles Hornby.

Held. 1. There was ample consideration for the giving of the lien as the plaintiffs might have removed the machinery and refused to go on with the transaction if the lien on the land had been refused.

2. The defendant Charles Hornby was estopped by the representations he had made, and subsequently repeated, from denying that the land in question was his wife's property and from claiming it as his own as against the plaintiffs. *Freeman* v. *Cooke*, 2 Ex. 654, followed.

Judgment, declaring that the lien in question forms a valid charge on the land referred to for the amount of the plaintiffs' claim and costs of suit.

Howell, K.C., and *Mathers*, for plaintiffs. *Aikins*, K.C., and *McLeod*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court. RICHARDS v. WILLIAMS. [Jan. 11

Practice—Judgment obtained by fraud—Fresh action to set aside judgment—Pleading—Fraud—Allegation of.

Appeal from order of DRAKE, J., dismissing plaintiff's action.

Plaintiff sued to set aside a judgment recovered against him and alleged in the statement of claim "the plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action as defendants well knew at the time."

Held, dismissing the appeal—

Per HUNTER, C.J.:—Fraud was not alleged in the statement of claim.

Per MARTIN and MORRISON, JJ.: Fraud was alleged—but

Per MARTIN, J.: There was no positive averment of the recovery of judgment against the defendant, which was essential.

Where a judgment has been obtained by fraud, the court has jurisdiction in a subsequent action brought for that purpose to set it aside.

Decision of DRAKE, J., affirmed, MORRISON, J., dissenting.

W. J. Taylor, K.C., and *Twigg*, for appellant. *Oliver*, for respondent.

Full Court.] [Nov. 22, 1904

SCOTT v. FERNIE LUMBER CO.

Master and servant—Negligence—Inconclusive verdict—Course of trial—Parties bound by—Supreme Court Act, 1904, s. 66—Practice.

In an action for damages for personal injuries sustained by a workman engaged in decking logs caused by the alleged negligence of defendants in supplying a team of horses unfit for the work the jury found that the team was unfit; that the accident was caused by reason of such unfitness and that plaintiff did not have a full knowledge and appreciation of the danger:—

Held, by the Full Court, affirming a judgment in plaintiff's favour, that although the findings read alone did not establish any legal liability on the part of defendants, yet as the issues for the jury were limited to the questions submitted to them and as defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence.

The provisions of the Supreme Court Act, 1904, s. 66, are applicable to an appeal in an action tried and decided before the provisions were enacted.

The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case.

The proviso of said section giving a party the privilege of having his right to have the issues for trial submitted to the jury, enforced by appeal, without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury or where the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass.

Joseph Martin, K.C., for appellants. *W. A. Macdonald*, K.C., for respondent.