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Mr. Blanchard's letter on the subject of costs, which will be found in another place, invites discussion. Even in conservative England attention has been directed to this subject and suggestions in the line indicated in our correspondent's letter have been made by able writers. At least it may safely be said that the preparation of bills of costs is only a little less repulsive than the reception of them. We shall be glad to hear from those who may have thought over the subject and would be willing to formulate their ideas for the general benefit.

The publication of Mr. E. F. B. Johnston's article on Negligence and the Jury, in a recent number (ante vol. 32, p. 735), has created much interest amongst lawyers throughout the Dominion. A western barrister having fully digested it, submits the following question, which was tried before the County Judge of Huron. We refer this conundrum to some industrious student for an answer. Facts: A., a weak minded young man, is known to be so to B. By way of a lark B. loads a gun with a heavy charge of powder and gives it to A., requesting him to fire at some hens in the yard. A. being readily persuaded, takes the gun, fires as directed, and the recoil breaks his collar bone. Is B. liable in an action of negligence? State grounds for answer.

The holding of Divisional Courts weekly in Ontario has not been an unqualified success. It has undoubtedly facilitated the dispatch of business in some cases, but in others delays have arisen owing to the absence of counsel on circuit, and no advantage has been gained. Enough experience has been probably obtained to warrant the opinion that a weekly sitting of the Divisional Court is not really required. In

many weeks during the past year there was either no work at all for the Divisional Court, or but two or three days' work at the utmost, and consequently the Court either did not sit at all, or else adjourned after sitting but one or two days. But though the Courts did not sit on the off days thus occasioned, it must be remembered that in planning out the distribution of business for the year, arrangements had to be made for the possible contingency of each of the three Judges composing the Divisional Courts sitting throughout the week, and consequently a good deal of waste of judicial time has taken place, to say nothing of the inconvenience and difficulty of providing for so much work on paper with only ten Judges to perform it. We are not, therefore, surprised to learn that the Judges have decided to reduce the number of Divisional Court Sittings, and, instead of [illegible]ng them weekly as during the past year, to make them hereafter monthly. The probable effect of this will be that a longer list will accumulate than heretofore, and that the Divisional Courts will be able to sit continuously for at least a fortnight at a time. On another page will be found the Rules effecting this change. All things in the realm of practice in Ontario seem, at present, to be in a constant state of flux, and it is to be hoped that on the completion of the revision of the Rules now in progress, it may be found that the work has been so well done as to need no further tinkering for some time to come. For some time past practitioners have no sooner mastered one change of practice than another has followed on its heels, and in such a manner that it has become almost a hopeless task to know, or bear in mind, what the changes are, or even where they can be found.

DISMISSAL OF CIVIL SERVANTS.

There is a question of law, not unmixed with politics, which at the present day must be of interest to the general public, and to the legal fraternity in particular. I refer to the question of the dismissal of civil servants, and of course deal with it only from the purely legal aspect.

So far as my knowledge goes, no action has yet been brought by any civil servant dismissed by the present Government for damages for wrongful dismissal—no redress has been sought by the dismissed in the Courts. The matter, therefore, is in this country res integra, a consideration which tends to make it the more attractive for the student and the more profitable for discussion. A brief outline of the subject from the point of view of the student of law is what I propose to put before the readers of the JOURNAL in this paper.

To begin with the Common Law aspect of the question. The English authorities must of course be our guide, both as being suitable to our condition, and as alone affording instruction upon the question apart from statute. The American authorities are not numerous, as it is too well recognized in the neighboring Republic that the right to dismiss is absolute and without limit, the pleasure of the President being supreme.

It is the Law in England that the Crown may dismiss its servants at pleasure; and recent reports contain several cases dealing with the question.

In *Dunn* v. *The Queen*, (1896) 1 Q.B. 116 (see ante vol. 32, p. 188) the question came up squarely for decision. The suppliant had been engaged in the service of the Crown for three years certain by the Commissioner for the Niger Protectorate, who himself (presumably by the terms of his appointment) held office only during the pleasure of the Crown. He claimed damages for being dismissed before the expiration of the period of his engagement. In argument a distinction was made between civil and military services. Lord Esher, M.R., held, in the most general and emphatic way,

that any service for the Crown, civil or military, might be terminated at pleasure.

Lord Herschell speaks of exceptional cases "where it has been deemed to be more for the public good that some restriction should be imposed on the powers of the Crown to dismiss its servants," and of exceptional cases "where there is some statutory provision for a higher tenure of office." It is not clear whether Lord Herschell intends to make a distinction between cases of officials excepted by statute and cases of officials excepted by the nature of their office apart from statute. Kay, L.J., concurred, and the petition was refused. The judgments proceeded upon the general ground that it would be against public policy and detrimental to the public interest to restrict the power of the Crown to dismiss its servants. It may be noted that their Lordships made particular reference to an unreported decision of the House of Lords, in *De Hohse* v. *Reg.* which appears to have been an emphatic endorsement of the doctrine that the Crown may dismiss at pleasure.

Shenton v. *Smith*, (1895) A.C. 229, was a case of military service and may be passed over.

The latest case bearing on the subject is *Gould* v. *Stuart*, (1896) A.C. 575. (See post p. 68.) Though the decision turns upon the construction of the New South Wales Civil Service Act, the principle is again affirmed, and held to apply to New South Wales, that in a contract for service under the Crown, civil as well as military, there is imported into the contract a condition that the Crown has the power to dismiss at its pleasure, but it is important to notice that Sir Richard Couch, who delivered the opinion of the Court, seemingly to bring himself in accord with Lord Herschell's utterances in *Dunn* v. *The Queen*, qualifies the rule by the words "except in cases where it is otherwise provided by law." Like his monitor, he leaves us in doubt as to his meaning, whether he means by "law" statute law or common law.

To recapitulate. From an examination of the English authorities it is clear that, as a general rule, the Crown may dismiss its servants at pleasure, and there seems to be nothing

to govern or limit the exercise of this discretion. If, however, the power to dismiss is based upon considerations of public policy, and is intended to be a protection to the public interest, does it not follow that it must be exercised so as not to contravene public policy or conflict with the public interest. In reason the answer would be "yes"; and any one would say that a servant of the Crown who had faithfully performed the work and duties of his office should not in the public interest be dismissed. Whatever the right answer may be, the question does not seem to have been considered in the cases cited, and we may conclude that, if an answer had been given under the existing state of the law, it would have been in the negative so far as the strict legal right is concerned.

But what of the exceptions which prove the rule? Can they only be created by statute, or do they arise from the nature of the office held by the servant? And what nature of office is taken out of the rule? It must always be remembered that the Crown, i.e., the public interest, has alone any rights in the matter. The public servant is in himself entitled to no consideration; he is under an obligation, but has no rights. That is the principle underlying the engagement of a civil servant, as established by the authorities. Therefore it would be no reason for withholding the power to dismiss, that the servant, either from the nature of this employment or the circumstances of his condition, would suffer great and exceptional hardship from his dismissal.

But it may be inferred from the reasons of the decisions, if not from the decisions themselves, that if it is peculiarly in the interests of the public that the services of certain officials should be retained, such officials should not be dismissed by the Crown. That is equivalent to saying that the pleasure of the Crown is the same thing as the convenience of the public. How to define the exception and carry it into practice is the difficulty.

It is evident that an old and well tried and valuable servant would not be dismissed by his master without cause; if the master still had employment for such a servant, it would

not be wise or convenient to dismiss him, altogether aside from the rights of the servant. Suppose there was in the service of the Crown in England such a servant, say an ambassador who had peculiar influence at the Court to which he was accredited, and who could be of special service to his country in that position, and the Government of the day, say from personal or party motives, contrary to the public interests and the welfare of the country, undertook to dismiss such an official, what redress would there be? The complaint could not come from the servant dismissed. The only remedy there would appear to be would be an appeal to the representatives of the people in the House of Commons. The Crown could not sue itself. The act of the ministers is the Act of the Crown. The question becomes one of policy, and must be determined in the popular assembly or at the polls. The Courts do not say that every dismissal of a public servant must be proper because there is the power to dismiss at pleasure, but the result of the Crown having that power vested in them is that they become responsible only to the public for the proper exercise of it. What is a proper exercise of the power depends on the circumstances of the case; it would be foreign to the purpose of this paper to attempt to deal with that aspect of the question.

From the case of *Gould* v. *Stuart* we deduce the principle that the Common Law right of the Crown to dismiss its servants at pleasure may be qualified by statute, a principle which does not require the sanction of judicial authority. Does our statute book engraft any qualification on the Common Law doctrine?

The Civil Service Act, R.S.C. c. 17, is the charter of our public service. The following are the material provisions of that Act:

3. "The Civil Service, for the purposes of this Act, includes and consists of all classes of employees, elsewhere than in the North-West Territories, in or under the several departments of the executive Government of Canada and in the office of the Auditor-General, included in the schedules A and B to this Act, appointed by the Governor-in-Council or

other competent authority, before the first day of July, one thousand eight hundred and eighty-two, or thereafter appointed in the manner provided by the Civil Service Act for the time being in force, and such officers and employees in the North-West Territories holding positions, which, if held in other parts of Canada, would bring them under the provisions of this Act, as the Governor-in-Council brings under the provisions hereof."

10. (*a*) "All appointments to the Civil Service shall be during pleasure, and no person shall be appointed or promoted to any place below that of a deputy head unless he has passed the requisite examination and served the probationary term hereinafter mentioned."

11. "The Deputy heads of departments shall be appointed by the Governor-in-Council, and shall hold office during pleasure; but whenever such pleasure is exercised in the direction of removing a deputy head from his office, a statement of the reasons for so doing shall be laid on the table of both Houses of Parliament within the first fifteen days of the next following session."

50. "The head of a department, and in his absence the deputy head of such department, may

(*a*) "Suspend from the performance of his duty or from the receipt of his salary any officer or employee guilty of misconduct or negligence in the performance of his duties.

(*b*) "Remove such suspension; but no person shall receive any salary or pay for the time during which he was under suspension."

2. "All cases of suspension by the deputy head of the department shall be reported by him to the head of the department."

55. "No provision herein contained shall impair the power of the Governor-in-Council to remove or dismiss any deputy head, officer, clerk, or employee, but no such deputy head, officer, clerk or employee, whose appointment is of a permanent nature, shall be removed from office except by authority of the Governor-in-Council."

The Civil Service Superannuation Act, R.S.C. c. 18, contains the following provision:

8. "Retirement shall be compulsory on every person to whom the superannuation allowance hereinbefore mentioned is offered, and such offer shall not be considered as implying any censure upon the person to whom it is made; nor shall any person be considered as having an absolute right to such allowance, but it shall be granted only in consideration of good and faithful service during the time upon which it is calculated.

2. "Nothing herein contained shall be understood as impairing or affecting the right of the Governor-in-Council to dismiss or remove any person from the Civil Service."

These show that the Common Law principle is not affected by statutory enactment in this country. We have nothing to correspond to the provisions of the New South Wales Civil Service Act, which in *Gould* v. *Stuart* were held to vary the general principle and create an exception to the rule, or rather we have provisions which expressly declare the Common law principle to be in force and to govern.

We may therefore take it that if the question should come before our Courts the principle that the Crown may dismiss its servants at pleasure would be affirmed. This view is confirmed by sections 10 (*a*) and 55 of the Civil Service Act, which are general and sweeping enough to cover every case. There is some inconsistency in granting power to deputy heads of departments to suspend unsatisfactory officials with this general power of dismissal vested in the Crown. The power to suspend is a necessary incident to the power to dismiss, and it would go without saying that if the Crown could dismiss at pleasure it could suspend at pleasure.

The whole subject, it is submitted, is clearly defined and the law well settled, save for the matter of the exceptions mentioned in Lord Herschell's judgment in *Dunn* v. *The Queen*, about which there may be some room for judicial interpretation.

In conclusion, I would summarize the law in this country as follows: The Crown may dismiss its civil servants at pleasure

without cause. Should the power be exercised in a manner contrary to the public welfare, the complaint must come from the people through its representatives. As an illustration, suppose the case of a valued and faithful employee of a corporation whose contract of employment provides that he may be dismissed at pleasure, and who is afterwards dismissed by the corporation's manager without cause: the objection would come from the corporation, i.e., the directors, and not from the servant; the manager would have to answer to them for his action. So it would be with a Government which dismissed a useful civil servant. Legally their action would be justifiable; the test of its real correctness and propriety rests in the popular opinion.

REX.

Halifax, N.S.

NEGLIGENCE, AND WHEN IT IS A QUESTION FOR THE JURY.

In the very careful and able resume of the authorities on the functions of judge and jury in negligence actions, appearing at page 735 of the last volume of the LAW JOURNAL, by Mr. E. F. B. Johnston, Q.C,, he has, with regard to the submission by the judge to the jury of the question of what is negligence, expressed views which, however apparently reasonable, are not, as it seems to me, either supported by the authorities, or such as could be applied in the trial of actions. He says at p. 743, "The judge has power to non-suit on the ground that there is no evidence of negligence to go to the jury. To decide this he must necessarily be the judge of what is negligence before he can give an opinion that none exists, and yet the ordinary question submitted to the jury is 'was the defendant guilty of negligence causing the plaintiff's injury?'—the judge on a non-suit says, 'there is no evidence of negligence.'" The learned contributor then asks the question, "Is not this after all essentially the question for a jury?"

The answer is unquestionably, no. For why should a different rule prevail in actions for negligence than in other

forms of action of tort? Surely the onus is on the plaintiff to give evidence of the wrong he complains of, before he can be allowed to go to the jury. He must prove his cause of action before he can be allowed to go to the jury. Take for instance an action for trepass; what is or what is not trespass is a question of law for the judge to decide before submitting the case to the jury. If there is no evidence of a legal trespass the plaintiff must fail in his action and be non-suited.

There is a prevalent error abroad among professional men as to what in law constitutes negligence, and in the multitude of decisions, which are very contradictory, many have become hopelessly mixed. It is therefore necessary to get back to first principles. Negligence may be said to be the doing of an act which a reasonable, careful man should see would cause injury to another, or the omitting to do some act by which another is injured.

The law imposes upon every man a duty towards his fellow man of so conducting himself, and so ordering his property or business, that no injury shall be done to his fellow man—and the action of negligence is for breach of that duty. The onus then is on the person complaining, to show, first, a legal duty to do, or the omitting to do, some legal duty by the defendant; second, that the plaintiff has been thereby injured. If he fails in this he fails in his action.

It has been held in *Blyth* v. *The Birmingham Waterworks Co.*, 11 Exch. 781, that the law considers injurious acts to be in general "culpable," which are such as a reasonably careful man would foresee might be productive of injury, and which he would abstain from doing. And in *Heaven* v. *Pender*, 11 Q.B.D., 503, decided in the Court of Appeal in England, the principle enunciated by Brett, Master of the Rolls, seems to be that if a reasonable man must see that if he did not use care in the circumstances he might cause injury to the person or property of another, a duty arises to use such care. The question in each case must therefore be, Is there a legal duty, and has there been a breach of such duty on the part of the defendant or his servants in not using such care, and has injury been done to the plaintiff?

In Beven on Negligence, at page 92, the author says a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would be thought at the time of the negligent act reasonably possible to follow, if they had been suggested to his mind. Wills, J., in *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679, at p. 688, defines negligence as "the absence of care, according to the circumstances."

The trial judge is always justified in asking counsel at the close of the plaintiff's case what legal duty was there on the defendant to do or not to do the acts complained of, and what evidence do you adduce to establish a breach of that duty? and surely if he fails to show this to the satisfaction of the judge, the action must fail.

It is true many judges have erred in non-suiting in actions for negligence. One of the most notable cases is that of *Sangster* v. *Eaton*, 25 O.R. 78, in which one of our most astute and clear-headed judges fell into an error in non-suiting the plaintiff. The facts of that case are as follows: A mother and infant child, for the purpose of purchasing goods, went into a large departmental store, where a portable mirror was leaning against the wall unfastened. The mother, while engaged in making some purchases, allowed the child to walk about. The mirror fell upon the child and caused an injury, for which damages were sought to be recovered in the action. The learned trial judge, Mr. Justice Street, non-suited, holding that there was no breach of duty to the plaintiff on the part of the defendant company. The Queen's Bench Divisional Court, however, consisting of Armour, C.J., and Falconbridge, J., reversed the trial judge, and directed a new trial. Armour, C.J., in his judgment, which is a masterly exposition of the law, says; "This case ought not to have been withdrawn from the jury, for there were questions arising upon the evidence which must have been submitted to them." After showing the duty upon the defendants to use reasonable care in the premises, the learned Chief Justice goes on to

say: "If it (the mirror) fell without any active interference on the child's part, that would afford evidence to go to the jury, of negligence on the part of the defendants in having it so placed that it would fall, for its falling is more consistent with there being negligence than not, and being entirely under the control of the defendants and their servants, if it was negligence it was their negligence." This judgment was afterwards affirmed by the unanimous judgment of the Court of Appeal (21 A.R. 624), and the Supreme Court of Canada (24 S.C.R. 708).

Of course while the law casts upon the plaintiff the onus of thus proving his case, yet in many cases he is helped out by the doctrine of res ipsa loquitur, and it is sufficient for the plaintiff to prove circumstances from which he can show a duty with no default on his part and the happening of the event, if it is an unusual occurrence. This makes a prima facie case. The onus is then shifted, and the defendant must clear himself by evidence that he has not been guilty of negligence, but that the unusual occurrence was through no fault of his own or his servants, or was the result of inevitable accident.

C. J. Hagarty in his very able judgment in the Court of Appeal in the *Sangster case*, points this out, 21 A.R. at p. 626: "My impression is that such a case should not be dismissed merely because some positive evidence is not given as to the cause of falling. The plaintiff does not know the cause, but merely proves the falling to his injury, and that no fault or act of his own contributed to the fall."

This statement of the law is fully sustained by a long list of authorities. In *Czech* v. *General Steam Navigation Co.*, L.R. 3 C.P., where a cargo of sugar was destroyed by oil (page 18), Bovil, C.J., says: "If the goods are damaged and no reasonable explanation of the damage can be given except the negligence of the defendants, a jury are justified in finding that such negligence is proved." *Simson* v. *London General Omnibus Co.*, L.R. 8 C.P., p. 393, Bovil, C.J., says: "In the present case a horse drawing an omnibus belonging to the defendants, without any assignable cause kicks out and strikes and injures the female plaintiff who was riding on the

vehicle, it seems to me that that alone presents a case that calls for some explanation on the part of the proprietors. It is said that it is the nature of horses to kick, but I think it ought not to be the nature of a horse drawing a public vehicle to kick. The mere fact of his having kicked out was, I should say, prima facie evidence for the jury."

In *Skinner* v. *L. B. & S. C. Railway Co.*, 5 Exch. at p. 789, Pollock, C.B.: "Surely the fact of a collision between two trains belonging to the same company is prima facie evidence of negligence on their part."

Alderson, B. "It is not necessary for the plaintiff to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality it is for the defendants to show it." Denman, C.J., to the same effect in *Carpie* v. *London and Brighton Railway Company*, 5 Q.B. at 751. In *G.W.R. of Canada* v. *Fawcet*, 1 Moore P.C.N.S., at p. 116, Lord Chelmsford, in delivering the judgment of the Privy Council, after referring to the two last mentioned cases, goes on to say: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to prima facie evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it."

See also *Kearney* v. *London B. & S. C. Railway Co.*, L.R. 5 Q.B. 411, in Exch. Ch. L.R. 6 Q.B. 759; *Briggs* v. *Oliver*, 4 H. & C. 403; *Scott* v. *London & St. K. Docks Co.*, 3 H. & C. 596.

The case of *Davey* v. *London & South Western R. W. Co.*, 12 Q.B.D. 70, cited by Mr. Johnston, cannot be said to be law in the face of *Patterson* v. *Wallace*, 1 McQueen H.L. Cas. 748, where it was held by the House of Lords in a case where there was no controversy about the facts but only a question whether certain facts proved established negligence on the one side or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held to be a mere question for a jury—so Bagallay, L.J., who dissented in the Davey case, would appear to be right and the other judges wrong.

It is submitted, therefore, that the question of what is evidence of negligence must ever be a question for the judge, and could never be properly submitted to a jury. If there is any evidence of negligence or conflicting evidence of facts showing legal negligence, or if the doctrine of res ipsa loquitur applies, or if there is evidence of contributory negligence by the plaintiff and evidence of negligence on the part of the defendant, then the case must go to the jury under instructions from the judge, otherwise not.

JOHN MACGREGOR.

Through the courtesy of the editor of the LAW JOURNAL, I have read the foregoing article before publication. It adds an interesting chapter to the discussion of a subject which forms the basis of a large percentage of actions now tried at Nisi Prius. I desire to state only this in reply:

The question of negligence or no negligence is a question of fact. There is no criterion, no exact test by which the facts can be squared. One judge says a certain state of facts shows no evidence of negligence; another holds that it does. I do not quite understand what the writer means by "what in law constitutes legal negligence." The matter is surely one of pure fact.

Some of the American authorities discuss such a thing as "legal negligence." There is a fiction of law in England and Canada to the same effect defining negligence in law, but the issue of negligence as tried out in every-day practice rests purely in the realm of fact. There may be, as in the *Saugster, Case*, certain presumptions raised by the act itself. Given a state of facts such as the bare circumstance of the falling of the mirror, and there arises a presumption that there may have been negligence on the part of the defendant. That is a fact, and the jury may give effect to it or may not. The difficulty I suggested is, that the facts themselves constitute negligence or they do not, and it is almost, and to my mind quite, impossible to separate the question of evidence or no evidence from the jury question, negligence or no negligence.

I admit, as I practically suggested in my article, that technically, my conclusion might not be in accord with the authorities, but I thought—and having carefully read the article of the learned writer—I still think the practical solution is to leave all these cases to the jury.

The evidence adduced on behalf of the plaintiff, if not evidence of negligence, is not admissible at all, as it is entirely irrelevant and ought to be excluded. But if admitted, then presumably it is relevant, and if so, the jury is the tribunal to decide, first, as to its sufficiency, and secondly, as to its effect.

E. F. B. JOHNSTON.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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PRACTICE—NON-PAYMENT OF COSTS—SEQUESTRATION BY WAY OF EXECUTION FOR COSTS—DISCRETION—ORD. xliii. R. 7 (ONT [illegible]LE 881).

In *Hulbert* v. *Catchart*, (1896) A.C. 470, the defendant was a married woman who seems to have figured in several recent decisions. Two orders had been made against the defendant for the payment of costs, and the plaintiffs, in order to enforce payment thereof, applied in Chambers and obtained leave to issue a sequestration on an affidavit alleging that the defendant was in receipt of a yearly income of £3,500 from property real and personal. The order had been made against the defendant's separate estate not subject to any restraint against anticipation. On appeal to the Court of Appeal this order had been set aside, but the House of Lords has restored the order holding that the granting of the order was under the English Rule, Ord. xliii., r. 7, discretionary, and that the judge who granted it having exercised his discretion, it ought not to be interfered with by an Appellate Court, unless it should be shown that there had been an improper exercise

of discretion, or some miscarriage of justice. And it was also held by their Lordships not to be necessary on such an application to point out the specific property which is to be made available under the writ. Under Ont. Rule 881, the writ is issuable on præcipe where a party is in custody for contempt, but in other cases it is still necessary that an order should be obtained therefor.

LANDLORD AND TENANT—COVENANT TO REPAIR AND KEEP IN REPAIR IN SUB-LEASE—MEASURE OF DAMAGES.

Conquest v. *Ebbetts*, (1896) A.C. 490, is the case which was known in the High Court as *Ebbetts* v. *Conquest*, (1895) 2 Ch. 377, noted ante, vol. 31, p. 512. The case, it may be remembered, turns on the question of what is the proper measure of damages in an action by a sub-lessor against his sub lessee for breach of a covenant to repair. The sub-lessor was under covenant with his lessor to repair and the sub-lease was for the full period of the original lease, less ten days. The defendants claimed that the proper measure of damages was the amount by which the plaintiff's reversion was depreciated by reason of the breach of the defendant's covenant, and that it was not proper in estimating the damages the defendant was liable to pay, to take into account the plaintiff's liability under his covenant to his lessor. The judgment of the House of Lords (Lords Herschell, Macnaghten and Morris) was delivered by Lord Herschell, and affirmed the judgment of the Court of Appeal. Their lordships admit that it is not an invariable rule that the covenant necessary to put the premises in repair, is the measure of damages in such cases, when the action is brought during the currency of the lease, and declare that in all such cases all the circumstances of the case must be taken into consideration, and the damages assessed at such a sum as reasonably represents the damage which the covenantee has sustained. Even admitting that the test was in this case the amount by which the plaintiff's reversion had been depreciated, their lordships thought the damages had been properly assessed, and that the Court could not go into a speculation as to whether the

property at the end of the term would be better without the buildings. The referree who had assessed the damages had taken into account the plaintiff's liability under his own covenant to the original lessor, as a ground for awarding in this case the amount it would take to put the premises in repair, less a rebate for the unexpired portion of the defendant's term.

BILL OF EXCHANGE—FRAUDULENT ALTERATION—ACCEPTING BILL IN SHAPE WHICH FACILITATES ITS ALTERATION—NEGLIGENCE—ESTOPPEL—BILLS OF EXCHANGE ACT 1882, (45 & 46 VICT., c. 61, s. 64)—(53 VICT., c. 33, s.63 (D.).)

Scholfield v. *Londesborough*, (1896) A.C. 514, has at last reached its conclusion, and the House of Lords has affirmed the decisions of the Courts below, (1894) 2 Q.B. 660, and (1895) 1 Q.B. 536 (noted ante, vol. 30, p. 681, and vol. 31, p. 262). The facts were simple: A bill of exchange for £500 was presented to the defendant for acceptance, having on it stamps sufficient for £4,000, and there were also blank spaces in it which admitted of its being altered. The defendant bona fide accepted the bill, and it was subsequently fraudulently raised to £3,500—and got into the hands of the plaintiff a bona fide holder for value. The question was whether the defendant was liable for the amount of the bill as altered, and all the judges before whom the action has come, except Lopes, L.J., have decided that he was not. In arriving at this conclusion the House of Lords (Lords Halsbury, L.C., Watson, Macnaghten, Morris, Shand and Davey) take occasion to disapprove of the doctrine which owes its origin to *Young* v. *Grote*, 4 Bing. 253, to the effect that an instrument which has been fraudulently altered, may become valid in its altered state as against a party to it, merely by reason of his want of care, or his negligence, having indirectly facilitated the fraud. Their lordships do not expressly dissent from *Young* v. *Grote*, which was a case between banker and customer, in which the former claimed the right to debit the customer with the amount of a cheque which the latter had left with his wife, signed in blank, with authority for her to fill it up, and which, after it had been filled up for £50 by the wife,

was subsequently fraudulently raised to £350, by a third person into whose hands it came,—the fraud having been facilitated by the negligent leaving a blank space in the cheque. Still their lordships were generally agreed that that decision could only be supported on the ground that a customer owes a duty to his banker so to fill up his cheques as not to facilitate any subsequent fraudulent alteration being made therein, and that when he violates that duty, the banker may require him to reimburse any sums which he (the banker) has been misled into paying, through the fault of his customer: but they held that at all events that doctrine had no application as between the acceptor of a bill of exchange in which the amount is not left blank—after it is accepted, and any subsequent holder: and that an acceptor owes no duty to any subsequent holder of the bill, such as a customer owes to his banker. From this it would appear that no amount of negligence on the part of an acceptor of a bill of exchange for a stated amount, can involve him in any liability for any subsequent alteration of the bill. This at first sight seems hard on holders for value without notice, but the difficulty in establishing that an alteration has been made after acceptance will always, in the ordinary course of affairs, be a sufficient inducement to acceptors not to facilitate such alterations by any negligence on their part.

CUSTOMS DUTY—IMPORTED STEEL RAILS—STATUTE, CONSTRUCTION OF—50 & 51 VICT., C. 36 (D.) S. 1, ITEM 88; S. 2 ITEM, 174.

Toronto Railway Co. v. *The Queen*, (1896) A.C. 551, was an appeal from the Supreme Court of Canada on the question whether certain steel rails imported by the Toronto Railway Co. for the construction of their street railway, were liable to the duty imposed by the Dominion Act, 50 & 51 Vict., c. 39, s. 1, item 88, on "iron or steel railway bars for railways and tramways." The Railway Company contended that the rails in question were exempt from duty under s. 2, item 173, which exempts "steel rails weighing not less than twenty-five pounds per lineal yard for use in railway tracks." Having regard to the curious wording of these two items, it is not

surprising that there has been a considerable variety of judicial opinion as to their proper construction, and the manner in which they may be harmonized. We think on the whole the Privy Council (Lords Hobhouse, Macnaghten and Davey, and Sir R. Couch) very satisfactorily solves the question by declaring that according to the true meaning of the Act the only distinction between taxed and free steel rails for railways is that of weight, and that it is quite immaterial for what particular purpose they are intended to be used. In the present case the rails imported by the railway being above the specified weight, were held to be exempt from duty, and their appeal was allowed.

GRANT OF LAND—RESERVATION OF RIGHT TO MAKE WATER COURSE—CONSTRUCTION—RIGHT TO DIVERT STREAMS.

In *Remfry* v. *Surveyor-General of Natal*, (1896) A.C. 558, an appeal was brought from the decision of the Supreme Court of Natal. The question at issue was the proper construction of a Government grant of land, which reserved to the Crown the right to make water courses over the land thereby granted, for the public benefit. The Crown, in the exercise of this right, had constructed an artificial water course on the grantee's (Remfry's) land, and had diverted into it the waters of a natural stream, which flowed on his land; Remfry had obstructed the flow of water from this stream into the artificial water course, and an injunction had been granted at the instance of the Crown to restrain him from so doing, and it was from this judgment he appealed. Their lordships of the Privy Council (Lords Watson and Davey, and Sir R. Couch) were of opinion that the Crown had acted within its rights, and that the injunction had been properly granted, and therefore dismissed the appeal.

CROWN GRANT—CONSTRUCTION—PREROGATIVE RIGHT OF CROWN—PRECIOUS METALS—GOLD AND SILVER—MINES AND MINERALS—EJUSDEM GENERIS.

Esquimalt Ry. Co. v. *Bainbridge*, (1896) A.C. 561, although an appeal from British Columbia, determines a point of general interest. By the British Columbia Act, 47 Vict., c. 14, and the Dominion Act, 47 Vict., c. 6, an arrangement was

concluded between that province and the Dominion, whereby the latter was to construct a railway through that province, and the province agreed to grant to the Dominion a belt of land forty miles in width. Pursuant to the Provincial Act, the lands were accordingly granted by the province to the Dominion, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein or thereunder." The Dominion in like manner granted the lands to the Esquimalt Ry. Co. Afterwards the province granted to Bainbridge a mining license upon some of the land so granted, and having been ejected by the railway, he brought this action to determine his rights. The Privy Council (Lords Watson, Hobhouse, Davey and Sir R. Couch) agreed with the provincial court that the words of the grant from the province to the Dominion were insufficient to divest the prerogative right of the Crown to the precious metals on the lands thereby granted, and that right therefore remained vested in the province, notwithstanding the grant to the Dominion, and Bainbridge's title to the mines was therefore valid. Referring to the general words of the grant, Lord Watson, who delivered the judgment, says: "According to the usual rule observed in the construction of the concluding and general items of a detailed enumeration, they may be held to signify alia similia with the minerals or substances previously ennumerated, and it appears to their lordships to be sufficient for the decision of the present case that they may be aptly limited to minerals or substances which are incidents of the land, and pass with the freehold."

CIVIL SERVANTS OF THE CROWN—CROWN, POWER OF, TO DISMISS SERVANTS AT PLEASURE—LEGISLATIVE RESTRICTION ON RIGHT OF CROWN TO DISMISS SERVANTS AT PLEASURE.

Gould v. *Stuart*, (1896) A.C. 575, was an action brought by the plaintiff against the Government of New South Wales, claiming £1,500 damages for having been wrongfully dismissed from the civil service of that colony. The plaintiff succeeded in the Colonial Courts, upon a demurrer to his statement of claim, and the government brought the present

appeal which was argued in the absence of the respondent. Notwithstanding his non-appearance, the Privy Council (Lords Watson, Hobhouse and Sir R. Couch) decided the appeal in his favor. The appellant relied on the cases of *Shenton* v. *Smith*, (1895) A.C. 229, (noted ante vol. 31, p. 441), and *Dunn* v. *The Queen*, (1896) 2 Q.B. 116, (noted ante vol. 32, p. 188), but their Lordships held that the present case was distinguishable from those cases, owing to the fact that the Colonial Legislature had passed a Civil Service Act, which, inter alia, provided for the establishment of a superannuation fund to be formed by deductions from the salaries of officers, and for the superannuation of officers; and regulated the mode in which they might be suspended, or dismissed from office. The provisions of this Act were considered to be inconsistent with importing into the contract of service of persons coming within its provisions, the term that the Crown may put an end to the contract at its pleasure.

CORRESPONDENCE.

LAW COSTS.

To the Editor of the Canada Law Journal.

In comparing the country dockets of to-day with those of thirty years ago, the marked decrease in the number of causes now for trial as against those of long ago, is apt to suggest serious reflections.

Many explanations are urged: present poverty; fewer disputes, and even more wisdom. May it not be the "glorious uncertainty" of the law that is mainly responsible? Under our old practice, a gambler in justice, on applying to his attorney for law, could be told, after considering his story and making due allowance for the ability of the opposing witnesses, that he had perhaps an even chance, or, more encouragingly, the best two out of three chances of winning; and, further, that the costs to judgment would be, say $60 on each

side, with a little margin for witness fees. An appeal would mean $70 more. Here all hazard was eliminated, except the main chance of how judge or jury would view the matter. This being so, the anxious litigant knew beforehand just how much he had to put up, and, with fair knowledge of the risk, he ran it.

But now the scene is changed. Plaintiff or defendant may essentially win his case, and even get costs; but failing on some one issue, the costs of that issue go against him and practically deprive him of costs. Or else, by some application for further particulars, plea struck out, or other single combat in Chambers, costs accrue which perhaps balance or even surpass those of the general action in Court.

Here to the litigant another element which he cannot attempt to weigh has been introduced. The contest that he thought would be decided by the merit of his cause is now dependent on the skill of his lawyer. True, to a certain extent that was the case heretofore; but now it is more a battle of "costs" than then. It is suggested, humbly, that our present Judicature Act is very injurious to the health and vitality of the golden goose.

In some States of the Union they have done away altogether with solicitors' costs as between opposing litigants. Each party pays his own lawyer as agreed upon, or by a fixed schedule of fees between solicitor and client; the one who is defeated, besides losing the subject matter in contention, pays in addition to his own costs, merely the fees of witnesses and officers of the Court.

It is stated by able lawyers where this practice is in vogue, and with whom the writer has discussed the question, that a great deal more law business is done under this method than was or would be under the usual, that is, our procedure. It is stated that prudent men of business, who would not litigate under our procedure, as it contains too many uncertainties and chances of a big bill of costs being piled up over a comparatively trifling matter, now, in these States, more frequently resort to the Courts to decide matters at variance.

And this is reasonable. Here in Canada, clients continually tell us "if they knew just what it would cost," they would ask the assistance of the courts, but as it is, law is too dangerous.

Many a farmer would willingly pay his lawyer sixty dollars to get some worrying question of a line fence between him and his neighbor settled. But even a lawyer would doubt the wisdom of a farmer in risking his farm to settle one of its boundaries. Again, a great many merchants have numbers of accounts against debtors who either will not or at present can not pay. With clerks constantly changing, with wilful lapses of memory on the part of defendant, with a possibility of the debtor eventually being worthless, and with here and there a lawyer willing to defend the debtor on the chances of a possible bill of costs resulting from some fluke, creditors often refuse to take their cases into Court for the simple reason that it does not pay.

The matter is open to debate, and a mere statement of the proposition will at once suggest a multitude of arguments. It is alleged that a change in our practice as to costs, such that each party, in any event, pays his own costs, would result in increased law business, better feeling between litigants, and more real and actual justice. If this is so, and it may be, it should benefit not only the lawyers, but also the clients, and would give our Courts a position as ideal arbitrators to which the people might resort with as small risk of aggravated loss as in its nature human justice will allow.

H. PERCY BLANCHARD.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

ROSE, J.] [Nov. 13, 1896.

JOHNSON *v.* DOMINION EXPRESS CO.

Common carriers—Express company—Profession of carrying—Discrimination in customers—Charges.

An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, provided they are reasonable, and an action to compel it to carry goods tendered was dismissed with costs.

D'Alton McCarthy, Q.C., and *Leighton McCarthy*, for the plaintiffs.

C. Robinson, Q.C., *S. H. Blake*, Q.C., and *Angus McMurchy*, for the defendants.

STREET, J.] [Nov. 13, 1896.

BARBER *v.* TORONTO R. W. CO.

Jury notice—Motion to strike out—Non-repair of highway—Law Courts Act. 1896, s. 5.

In an action against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city, owing to the heaping up of snow upon the side of the roadway, the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel.

Held, that the action must be treated as one for non-repair of a street within the meaning of s. 5 of the Law Courts Act, 1896; and a jury notice was therefore irregular and should be struck out.

It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the motion.

Raney, for the plaintiffs.

J. Bicknell, for the defendant company.

W. C. Chisholm, for the defendant corporation.

STREET, J.] [Dec. 14, 1896.

RENNIE *v.* BLOCK.

Costs—Taxation—Chambers motion—Copies of deposition.

In taxing the costs of a motion in Chambers, no allowance can be made for copies of depositions taken for use upon the motion.

O'Donohoe, Q.C., for the plaintiff.

D. T. Symons, for the Quebec Bank, garnishees.

MEREDITH, C.J.] [Dec. 15, 1896.

KATRINE LUMBER CO. *v.* LIVERPOOL AND LONDON AND GLOBE INS. CO

Particulars—Pleading—Fire Insurance—Proofs of loss—False and fraudulent statements.

The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants, was that the plaintiffs' claim was vitiated by the 15th statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss: (1) that the fire originated at a specified tim. from the embers of a previous fire upon the same premises; (2) that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs; (3) that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true.

Upon an application for particulars :—

Held, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged that the fires were caused by his procurement, means, or contrivance.

2. That as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely.

3. Nor should further particulars be required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent. The statement that the fire was caused by his wilful act was sufficient.

4. That as to the alleged falsity and fraud of the declaration as to the extent of the loss, it was sufficient for the defendants to say that the plaintiffs had overstated by a specified sum the loss on the whole of the articles insured, without saying by how much the plaintiffs had overstated the loss on each of the classes of articles.

R. McKay, for the plaintiffs.

W. M. Douglas, for the defendants.

ROSE, J.] [Dec. 19, 1896.

HESSELBACHER *v.* BALLANTYNE.

Sale of goods—Executory contract—Possession—Non-payment of price—Loss of goods—Liability.

Where goods, the subject of an executory contract of sale, have passed into the possession of the vendee, without payment therefor being made, and have while in such possession been lost or destroyed, through no fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the the terms of the contract, passed to the vendee, and notwithstanding that no negligence on his part is shown.

Rodd, for the plaintiff.

W. H. Hearst and *J. McKay*, for the defendant.

OSLER, J.A.] [Jan. 4.

JOHNSTON *v.* TOWN OF PETROLIA.

Appeal—Court of Appeal—Cross-appeal—Notice—Rule 825—Time—Signing of judgment—Rule 804—Extension of time.

In an action brought against three defendants for damages for pollution of a stream, judgment was given at the trial for the plaintiff argainst one defendant, and the action was dismissed against the other two.

Held, that upon the appeal of the first defendant to the Court of Appeal, the plaintiff, the respondent, could not maintain a cross-appeal against the other defendants by way of notice under Rule 825, but must proceed by way of an independent appeal.

Freed v. *Orr*, 6 A.R. 690, not followed.

Re Cavenders' Trusts, 16 Ch. D. 270, followed.

Under Rule 804, the time for service of notice of appeal runs from the day on which the judgment appealed against is actually signed or entered, and not from the day upon which it is pronounced.

Time for giving notice of appeal extended where the party proposing to appeal had from the first shown his intention to appeal, but had been under a misapprehension as to the practice, and no session of the Court had been lost.

W. R. Riddell, for the plaintiff.

D. McCarthy, Q.C., for the defendants, Fairbanks, Rogers & Co.

W. Cassels, Q.C., for the defendants, the Imperial Oil Co.

MEREDITH, C.J.,
ROSE and MACMAHON, JJ. } [Jan. 12.

RUSSELL *v.* FRENCH.

Mechanics' Lien Act, 1896, ss. 10, 13—Drawback.

The owner of a property entered into an agreement with a contractor under which the latter agreed to execute the masonry and brick work of three houses to be built thereon for the sum of $2,358. The contractor entered upon the work in pursuance of the contract. When he had done work to the value of $1,593, as certified to by the architect, and had been paid $1,275 on his certificates, he was dismissed from the job in pursuance of one of the conditions of the contract. The owners then entered into a new contract with a third person to complete the work at a cost of $933. The plaintiff supplied brick to the first contractor, and there remained due to the plaintiff, when the work was abandoned, the sum of $373. The plaintiff claimed a lien to the extent of 20 per cent. of the value of the work done at the time of the abandonment. The defendants, the owners, sought to deduct from this 20 per cent. drawback the additional amount which it required to complete the work over and above the first contract price.

Held, 1. that under s. 10 of the Act of 1896, the 20 per cent. therein directed to be retained by the owner is a fund set apart for the lien-holders upon which a lien attaches, notwithstanding that such percentage may never become payable to the contractor, and the plaintiff was allowed the whole

amount he claimed, viz., 20 per cent. of the value of the work done at the time of abandonment or dismissal.

2. The cases of *Goddard* v. *Coulson*, *Re Cornish* and *Re Sears & Wood* are no longer applicable owing to the change made in the language of the section.

3. That s. 13 of the Act, which seems to have been passed specially for the protection of wage earners, was held not to limit the right of the material man in this respect.

Denton, for the plaintiff.

Snow, for the defendants.

ASSESSMENT CASE.

In the Matter of the Assessment of the Toronto Railway Company.

Assessment—Rails, poles and wires of street railway.

Held, (per McGibbon, Co. J., and Dartnell, J.J.—McDougall, Co. J., dissenting) that the rails, poles and wires of a street railway company, operated on the trolley system and located on a public highway, are not liab'‸ to assessment.

[Toronto, Nov. 28, 1896.

The Court of Revision for the City of Toronto having confirmed an assessment of $537,137 for the rails, poles and wires of the Company on the streets of the city, the company appealed from the decision to a Board of Judges of the counties of York, Ontario and Peel, constituted under the provisions of the Assessment Act.

Osler, Q.C., and *Laidlaw*, Q.C., for the Company.

1. All legal distinctions between rails and personal property must yield to the definitions of real and personal property given by the Assessment Act, on the ground that the Assessment Act classifies all property liable to assessment under two separate divisions, namely, (1) real property, which includes buildings erected on or fixed to land, and machinery fixed to buildings, so as to form in law part of the realty; and (2) personal property, which includes goods, chattels etc., and all other property, except land and real estate.

2. The rails, poles and wires are not real estate under the definition for assessment purposes, because they are not buildings erected on or fixed to land, and are not machinery fixed to a building, so as to form in law part of the realty.

3. The rails, poles and wires are either personal property under the legal definition, or come within that part of the definition of personal property, "all other property except land and real estate," and are therefore exempt from assessment under s. [illegible] of the Act.

4. The whole scope and spirit of the system of law of assessment and collection of taxes shows the duty of assessors and of collectors, and gives power to sell land for arrears of taxes, but a tax deed of land for arrears of taxes would not pass title to a purchaser of 80 miles of rails, poles and wires through the streets of the city, because they are not so fixed to any buildings as to form in law part of the realty under the definition of real estate.

5. The rails, poles and wires were also exempt under sub-sec. 7 of s. 7, because they were on the public highway, and the fee was in the Crown, and not the subject of taxation.

6. The decision of the Court of Appeal in the case of *The Toronto Railway Company* v. *Fleming*, 37 U.C.R. 116, was the unanimous decision of the Court on the liability for the assessment of the superstructure of a street railway, and it ought to be followed in this appeal, because there has been no change either by new legislation or by the consolidation of the assessment law which qualifies this decision in any way.

7. The agreement between the city and the company was entered into in the belief that the law in the above case was a binding decision on both parties.

8. The superstructure of the railway was also exempt under s. 29 of the Assessment Act and the cases decided under that section: *Central Vermont Ry. Co.* v. *St. Johns*, 14 S.C.R. 288.

Fullerton, Q.C., and *Caswell*, for the city.

1 The original enactment of s. 7 of the Assessment Act was in the words: "All land and personal property in this province shall be liable to taxation, subject," etc., but the section was afterwards changed, and is now consolidated in the words: "All property in this province shall be liable to taxation." The law in the *Fleming case* was therefore qualified if not overruled, by the change made by the legislature, and by the later decision of the Court of Appeal in the *Consumers' Gas Company* v. *Toronto*, 32 C.L.J. 516, 23 A.R. 551.

2 The rails, poles and wires were all inseparable parts of the system of motive power of the street railway, and attached to and operated in conjunction with lands of the company assessed, and that they came within the definition of real estate under the Assessment Act.

3 Under the agreement between the city and the company, right was given to the company to lay down the rails and erect the overhead system of motive power as therein provided, but the exemption of highways would not extend to the exemption of the rails, poles and wires, because they were all parts of an indivisible ownership of the real estate of the company.

4 The exemption of the superstructure of a railway under s. 29, and the cases decided under that section did not extend to a street railway.

5 That the decision of the Court of Appeal in the *Consumers' Gas Company's case* being the latest case, and not in any principle distinguishable from this case, ought to be followed.

6 That the railway company was also assessable under sub-sec. 2 of s. 7, as property occupied by the railway within the meaning of that subsection.

7 A municipality cannot by agreement exempt the property of a street railway from taxation, and such exemption was never contemplated or agreed to between the parties.

The Board of Judges reserved their decision until the 28th day of November, 1896, and the decisive extracts from the judgments are now given.

McGibbon, Co. J.—The question submitted for our consideration is, Are these rails, poles and wires rateable property within the meaning of the Consolidated Assessment Act of 1892?

The classes of property mentioned in the Act liable to assessment are: First, land, real property and real estate; and second, personal property and personal estate. After careful consideration I have come to the conclusion that the expressions land, real property and real estate are synonymous terms, and that the only classes of property liable to assessment are lands and personal property, and the personal property of a railway company is exempt under s. 34, sub-sec. 2, of the Assessment Act.

The only remaining question to be considered is, "Are these rails, poles and wires, land, real property and real estate, and liable to assessment as buildings erected upon or affixed to the buildings on the land assessed, or machinery affixed?"

It cannot be contended that either the rails, poles or wires are real estate, but only become so when they become affixed to the land and form a part thereof, and would be saleable under a tax deed for arrears of taxes.

In my opinion the rails, poles and wires are not buildings erected upon or affixed to the land of the company, or machinery or other things affixed to any building erected on the said land, under sub-sec. 9, s. 2, of said Act. The rails are laid on and fastened to the superstructure which is attached to the road or street, and are in no way attached to the land, real property or real estate of the company, so likewise are the poles and wires. If the rails, poles and wires are attached to any land they are attached to the roadway or street, and form part of the same, and therefore exempt under s. 7, sub-sec. 6, of the Consolidated Assessment Act.

It is contended by the respondents that the appellants are occupants of the street, and their property therefore liable to taxation. I do not think the appellants have such an occupancy independently from the respondents, as to say that the respondents have parted with their official occupancy and given it to the appellants, and that the appellants are liable to be taxed for the said streets under the sub-sec. 2 of s. 7 of the Assessment Act.

The respondents do not part with the occupancy of the streets, but retain possession of the same, merely granting to the appellants certain rights and privileges, and the appellants cannot be considered the occupants under sub-sec. 2 of s. 7, and liable to assessment. The streets remain the property of the Crown under the jurisdiction of the municipality, and they are exempt from taxation, as also are the rails, poles and wires of the appellants, when affixed to the said streets.

I do not think the decision in the English rating cases are applicable to the present case. The difference in principle is shown in the judgment of Burton and Patterson, JJ.A., in the case of the *Toronto Street Railway Company* v. *Fleming*, 37 U.C.R. 116.

I do not consider the assessment law has been materially changed since the decision in the *Fleming case* so as to affect this case. The sections are now, with the exception of a few trifling verbal changes, the same as they were when the *Fleming case* was decided.

I cannot distinguish this case from the *Fleming case*, in which it was held that the railway company was not assessable for those portions of the streets occupied by them for the purpose of their railway, as being land within the meaning of the Assessment Act of 1869.

This case is distinguished from the *Consumers Gas Co.* v. *Toronto*, 26 O.R. 722; 23 A.R. 551, in that the pipes and mains of the Gas Company were laid in the city streets and attached to the plant and buildings of the company, whereas in the case under consideration the rails, poles and wires are in no way connected with the power house, plant or buildings of the appellants company.

I hold this case to be covered by the decision in the *Flaming case* and would therefore allow the appeal with costs.

I am well satisfied to arrive at this conclusion because the city and the company entered into their agreement 55 Vict., c. 99, on the faith of the law settled by the Court of Error and Appeal in the *Fleming case*, and it would be, in my opinion, inequitable for the city, by an assessment of the railway in the streets of the city to increase the liability of the railway company under the agreement.

DARTNELL, J.J.—The city, apparently acting on the assumption or belief that the case in the Court of Appeal of the *Consumers' Gas Co.* v. *Toronto*, 23 A.R. 531, had practically modified, distinguished, or overruled the case of *Fleming* v. *Toronto Street Railway*, 35 U.C.R. 264; 37 U.C.R. 116, conceived that the latter case was no longer binding upon them, and undertook for the first time to impose a rate upon the property of the company now the subject of appeal.

Since the case of *Fleming* v. *Toronto Street Railway* has been decided, the verbiage of the Assessment Act has been altered, and, in that respect, the authority of that case as applied to the question before us is somewhat weakened. But for this I should be inclined to hold that we were concluded by that case, and should without question allow the company's appeal.

I am clearly of opinion that the relationship between the city and the company is not that of landlord and tenant. It is rather that of licenser and licensee. In fact the agreement between the parties, ratified by legislation, explicitly treats and styles them as "vendors" and "purchasers." No weight whatever can be given to this argument. Neither do I think that this railway can be treated as a railway company in the sense that the C.P.R. or the G.T.R., or any railway incorporated under Dominion or provincial authority, can be classed as such, and entitled to exemption from taxation in respect of their rails as part of their superstructure.

The English authorities cited by my brother McDougall, in his judgment, which I have been allowed to see, however instructive, are not, as I think, altogether binding upon us, inasmuch as the method of rating in England, for the purposes of taxation, is essentially different from our own. There the question before the courts is, "Is this a bona fide occupancy?" And the occupant is rated. In Ontario the "property" is rated and is primarily liable. The question of ownership is entirely subsidiary.

I agree with my brother McDougall that the poles and wires of the com-

pany are governed by the ratio decidendi in the gas companies' cases as being the vehicle by which the generating power is conveyed from the power house. I think that they are so intimately connected with the source of motor power as to become as much realty as say a shaft driven by a central machine, or a cable laid along or under the public streets. I think the rails, if utilized for conveying the current to the motors, or after the expenditure of its force on the motors, returning it to the power house, in other words, completing the circuit, would be assessable; but, if such circuit could be completed without the aid of the rails, that then the rails would not be assessable, because they would form part of the highway constructed and used for the purpose of more effectually and rapidly furnishing the paramount object highways are established and maintained for, namely, rapid, convenient and efficient transit and traffic.

The judgment of the Court of Appeal in the *Gas Case*, in which the gas mains and pipes were held assessable, proceeds largely upon the assumption that these mains and pipes are as Mr. Justice Rose expresses it (23 A.R. at page 556), "liable to taxation as part of the property of the company, increasing the value of the building and plant." It could not well be held otherwise, for the special case submitted to the Court expressly states that these mains and pipes were "attached to buildings and plant of the company." Unless the use of these rails of this company for the purpose of transmitting the motor power can be said to attach them to the plant and buildings of the company—to my mind they are entirely detached, and are personal property and non-assessable. It is not essential that the company should use this current in this particular way as a motive power. They could use it in another way by erecting a return wire, discarding the current by means of the rails, or they could establish storage batteries or motors driven by compressed air, or by other means which the advance of science is so constantly suggesting.

With great diffidence I venture to record my opinion that the judgment of the Court of Revision should be reversed, with appropriate costs to be paid out of the fund paid into the City Treasurer to cover the costs of appeal.

McDOUGALL, Co.J.—The first question I propose to consider is as to whether street railways come within the purview of s. 29 of the Assessment Act; because if they do so the superstructure is not assessable, under several decisions in our own courts: *G. W. R. Co.* v. *Rouse*, 15 U.C.R. 168; *London* v. *G. W. R.*, 17 U.C.R. 262; approved in *Central Vermont Ry.* v. *St. Johns*, 14 S.C. 288. It is well to note that in the case of the *Toronto Street Ry. Co.* v. *Fleming*, 35 U.C.R. 264, and on appeal, 37 U.C.R. 116, no question was discussed as to the right of the plaintiffs to escape taxation on the ground that the superstructure of their road was exempt. Richards C.J., and Wilson, J., placed the liability on the company because they occupied with their tracks the soil of the highway, and that that occupation and user, though not exclusive, was an interest in lands. The thing (track) they had affixed to the land became land, and like gas mains laid beneath the surface, was liable to taxation.

Now when we trace up the history of s. 30 of the Assessment Act of 1892, we find a section substantially the same, introduced for the first time by 16 Vict., c. 182, s. 21 (1851-3), requiring railway companies to transmit to the

clerk of the municipality the statement therein provided. This section is preserved with very slight verbal alterations in all the subsequent Assessment Acts down to 1892. It could not be said that this section was intended to include street railways at the time of its introduction, for none, so far as I know, were in existence, at least in Canada. They are a more modern creation. The railway companies intended to be covered by s. 29 of the Assessment Act, are in my opinion only those companies which are subject to the provisions of the Ontario and Dominion Railway Acts. The other companies are known as street railways, and were always incorporated by special Acts of Parliament. They may since 1883 be formed under the provisions of the Street Railway Act, R.S.O. 171. It is quite true that the expression "railway track" is in some sense a generic term, but, as I have said before, an examination into the origin of s. 29 in my opinion clearly shows that it was never intended to apply to or to include a street railway. The fact that this contention, though raised in the reasons against appeal, is not mentioned in the judgments in appeal in the *Toronto Street Railway* v. *Fleming*—the only case where the taxable status of a street railway company has been inquired into prior to the present Appeal—in some degree strengthens the opinion expressed. If I am right in this conclusion, then such decisions as *G. W. R. Co.* v. *Rouse*, do not apply to street railways.

The next important matter to be considered is the effect of the decision in the Court of Appeal of the *Toronto Street Railway Co.* v. *Fleming*, 37 U.C.R. 116. A judgment in that case was pronounced in 1875 upon the clauses of the Assessment Act as they stood at that date. 32 Vict., c. 36, s. 3 O., reads, "The terms land, real property and real estate respectively include all buildings or other things erected upon or affixed to the land, and all machinery or other things so affixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to Her Majesty."

Sec. 4. "The terms personal estate and personal property include all goods, chattels, shares in incorporated companies, interest on mortgages, dividends from bank stock, money, notes, accounts and debts at their actual value, income, and all other property except land, real estate and real property as above defined, and except property herein expressly exempted."

Sec. 5. "The term property includes both real and personal property as above defined."

Sec. 9. "All land and personal property in the Province of Ontario shall be liable to taxation, subject to the following exemptions, that is to say," etc.

Now in the Act of 1892, the s. 5 of the Act of 1869 is transposed, and becomes sub-sec. 8 of s. 2, with a slight change of wording. It now reads s. 2, sub-sec. 8: "Property shall include both real and personal property as hereinafter defined." Sub-sec. 9 takes the place of s. 3, and reads: "Land, real property and real estate shall include," etc.—following the exact words of the old section, with the addition of the words "and land covered by water." Sub-sec. 10 takes the place of s. 4, with some additions and modifications of no importance to this appeal. S. 9 of the Act of 1869 has an important

change made in it, and becomes s. 7 in the Act of 1892, and reads now as follows: "All property in this province shall be liable to taxation subject to the following exemptions, that is to say," etc.

The first point to be noticed is the passage in the judgment of Patterson, J.A., in *Toronto Street Railway* v. *Fleming*, at page 127. He says: "If there was a general law that all property should be assessable for municipal purposes, I should have no hesitation in deciding that this was assessable property. The question, however, is: Is it assessable as land?" Mr. Patterson then proceeds to argue that, as in the exemption clauses, sub-sec. 6 exempts every public road and way, or public square, and as it is sought to assess the company in respect of the portions of the streets used for the purposes of the railway, and it is only land that can be assessed, they are not liable because all the land in the public roads is exempt. Upon reference back to the case stated in *Toronto Street Railway* v. *Fleming*, reported in 35 U.C. 264, it will be seen what was the subject of controversy there, and the assessment or alleged claim for taxable liability which was under consideration, in order to contrast it with the subject-matter of this appeal. Paragraph 2 of the stated case shows this clearly, and reads as follows: "The assessment for the said taxes in regard to which the said distress was made by the defendant, was made by the city of Toronto in respect of the portions of Queen St., Yonge St. and King St., used by plaintiffs for the purposes of their said railway, under the provisions of the Act, statutes and by-laws hereinafter referred to."

The present appeal is against the assessment of the company under the head of lands, buildings and improvements; and in the column headed "Value of Buildings and Improvements," the disputed assessment appears as follows:

"$4,000, buildings and improvements.

$537,137, rails, wires and poles used by the company in connection with the said lands, for the purpose of operating its railway in and upon the lands of the company or the streets of the city."

What this appears to mean, I take it, is: rails, wires and poles used by the company, placed upon the lands of the company or on the streets of the city, which said rails, wires and poles so placed as aforesaid are used by the company in operating their railway.

Now it has been recently held by the Court of Appeal in the *Consumers' Gas Co.* v. *Toronto*, 32 C.L.J. 516; 23 A.R. 551, that the gas mains laid in the public streets beneath the surface are assessable, notwithstanding the existence of sub-sec. 6 of the exemptions sections. The Chancellor, in his judgment, in the same case (26 O.R., p. 729), says: "To telegraph companies the same rules apply where the wires are carried above or underneath the soil of the highway."

In *Electric Telegraph Co.* v. *Overseers of Salford*, 11 Exch. 181, the Court gave effect to the legal definition of land as including not only the face of the earth, but everything on it or over it; and that definition is not ruled by our Assessment Act, which says "land" shall include such and such meanings—not that all others legally possessed by the word shall be excluded.

In *Pimlico Tramway Co.* v. *Greenwich*, L.R. 9 Q.B. 9, the company was held to be rateable as occupants of the highway by reason of the track being

laid thereon, because it was held that although they had not the exclusive use of the surface of the track, that being in the exclusive occupation of any portion of the soil, as they were in laying their tracks in the same, they were liable. Lord Blackburn, at p. 14, says: "There is considerable resemblance between the iron tram rail or artificial tramway here and the pipe which is laid down, though there is this difference, undoubtedly, that the pipe (I do not know that it would be necessary if it should be so) is generally buried in the soil some way below the actual pavement or macadamized road which forms the thing actually supporting the carriages passing along; but I do not think that makes any difference." Lush, J., said: "I am of the same opinion. The Act of Parliament enables the proprietors of a tramway to appropriate for their own purposes a given portion of the public road for the purpose of laying down the tram rails which are requisite for the conveyance of their carriages along the line of road. The tram rails occupy a portion of the soil. They are exclusively used by the tramway company for the purposes of the tramway, and that, I think, makes them occupiers of that portion of the soil. I do not think they are the less occupiers because the public as well have the right of way over the surface of their iron road; and the road, as a tram road, is in their exclusive use, and used for their exclusive benefit." Quinn, J., said he was unable to distinguish the case from the cases which had been decided on the occupation of land by water companies and gas companies. At p. 16 he says: "It appears to be that no difference can be pointed out between this tramway and those gas and water mains, except that the gas and water mains are deeper in the soil than this iron tramway." Again he says: "I am unable to distinguish the iron tramway from the gas and water pipe. Both physically occupy the soil. One is somewhat deeper than the other, the tram rail having the upper surface level with the road, but they both occupy the soil of the road physically and in exactly the same manner. I do not see either in s. 57 or s. 62 any provision which in any way interferes with that principle. They only preserve the right of the public to go over the surface as before, but in no way is it stated that these tramways so made, and the baulks of timber upon which they are laid, were part of the road in the sense of being the property of the public authorities. They remained the private property of the tramway company, and they by means of the iron tram rails and the baulks of timber are occupying the soil of the road in the same manner exactly as the gas pipes and water pipes; and the latter being rateable, I think the former are also rateable."

I have quoted at some length from this instructive judgment because I think its language is singularly apposite to the questions in issue in this appeal. The position of the tracks, ties, etc., of the railway company, buried in the soil, I cannot differentiate from the position of gas mains buried under the soil. The street railway has exclusive use of their rails and of the soil occupied by their rails and ties for the purposes of their business. It is true that the public can drive over and along these track . By their agreement with the city they are compelled to have them flush with the pavement, to enable vehicles to do so; and they are consequently let into the soil, except the mere surface of the rail. If gas mains are assessable I am firmly of opinion

that these rails and ties are, with so much of the soil as is used therewith, realty of the company, and in this respect assessable. As to this underground soil surrounding and between their ties and rails, they are owners and occupiers within the meaning of the assessment law of Ontario. This conclusion is supported by the last cited English case of *Pimlico* v. *Greenwich*, and by the *Consumers' Gas Co.* v. *Toronto*, 26 O.R. 722, and by the judgment of the Court of Appeal in the same case. Whatever doubt may have been felt as to the meaning of the word "land" as used in s. 9 in the Assessment Act of 1869, is now, to my mind, dispelled by the change to the word "property" in s. 7 of the Assessment Act of 1892.

As to the rights of the public they are subordinate to the rights of the company, who have the right of way in preference to the public, and the public must give way to them and to their cars, and they have in that way a prior and exclusive right to the possession and use of their track and rails: *Heliwell Union* v. *Helkyn Drainage Co.*, A.C. 1895, 117. In this case *Pimlico* v. *Greenwich*, is approved.

The wires and poles in use by the Toronto Street Railway Co., to my mind, are also undoubtedly assessable on the principle defined by the case of the *Consumers' Gas Co.* v. *Toronto*, as being in precisely the same position as gas mains, save that they are in the air over the highway instead of being buried in the soil. The posts carrying them are planted in the soil, and the wires, posts and cross-wires form one general fixture connected with and forming an unbroken connection with the power house of the company. Through them the electric current is carried along the whole system of the street railway to move their cars. Like the gas mains, they thus, united with the machinery in the power house, form one fixture with it, and it is one indivisible plant. They have the exclusive use of these poles and wires, beyond all doubt, and the public—whatever their rights may be on the surface of the street—have no joint or even subordinate rights in those poles or wires overhead. I refer to *Lancashire Telephone Co.* v. *Manchester*, 13 Q.B.D. 700, and 14 Q.B.D. 267, in appeal; *The Electric Telegraph Co.* v. *Salford*, 11 Exch. 181; and *Consumers' Gas Co.* v. *Toronto*, ante.

Mr. Osler urged that as the title of the highways upon which these rails are laid was vested in the Crown or in the municipality under ss. 525 and 527 of the Municipal Act, no portion of the soil is, therefore, taxable, lands so vested being exempt. Sub-sec. 1 of s. 7 of the Assessment Act reads: "All property vested in or held by Her Majesty, etc., is exempt;" but sub-sec. 2 of the same section declares that: "When any property mentioned in the preceding clause is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable." Similarly, municipal property by sub-sec. 7 is declared to be exempt, whether occupied for municipal purposes or unoccupied, "but not when occupied by any person as tenant or lessee, or otherwise than as a servant or officer of the corporation for the purposes thereof." The land is liable to be assessed, and the occupant made liable for the taxes. I think in view of these provisions, and of the conditions of purchase by the Toronto Railway Company, they cannot be deemed to be tenants of the city, but are

owners of the tracks and plant, and are occupants of the streets, whether said streets are vested in the Crown or in the municipality; and as such occupants they are liable to taxation, though the land so occupied itself is not liable for the payment of said taxes. The fact that under sub-sec. 2 of s. 7, exemption clause, a special liability is created against an occupant of Crown or municipal lands to pay taxes in respect of such lands and of such occupation, develops a taxable responsibility almost identical with that existing in England, and hence decisions in the English courts upon this point are germane and cogent in determining questions arising in reference to this class of ratepayers. I have already pointed out that so far as my own opinion is concerned, I am unable to distinguish any difference in liability between the owners of street car tracks buried in the soil twelve or eighteen inches and the owners of gas mains buried four or five feet beneath the surface of the same street. The Court of Appeal for this province, by its latest decision upon the same sections of the Assessment Act, as now amended, has held that gas mains are assessable. In the present case I think I am justified in following the principle of the latest decision upon these troublesome sections of the Assessment Act.

Province of Nova Scotia.

SUPREME COURT.

Full Bench.] [Dec. 19, 1896.

THE QUEEN *v.* BURKE.

Municipal election—Presiding officer—Appointment and resignation of candidate—Mandamus to compel warden and clerk to swear in will not lie where office has been filled, even though prior notice of application has been given —Councillor de facto should be served—Failure to do so held complete answer—Crown Rule 55.

H. having been appointed to act as returning officer at the election of a municipal councillor for one of the districts of the municipality of Cape Breton, handed a formal written resignation to the clerk of the municipality, whereupon the deputy warden and three councillors, under one of the provisions of the Act, appointed M. to act in his place, and H. delivered to M. the papers in his possession as presiding officer, including the nomination papers of both candidates, and a protest signed by one of the candidates, C against the nomination of the other candidate, R., on the ground of disqualification. Subsequently H., treating his course in connection with his resignation as ineffective, obtained his resignation paper from the municipal clerk, took it away, and proceeded to hold a poll. A number of votes having been polled for R. and none for C., H. declared R. elected. M., acting under his appointment by the deputy warden and councillors, held no poll, on the ground that R. was disqualified, and returned C. as duly elected.

When the municipal council met on January 14th, 1896, both R. and C. applied to be sworn in, and, no action having been taken, on the following day R. served the warden and clerk of the municipality with notice of motion for a

mandamus to compel them to swear him in. On the 18th of January C. was sworn in as councillor for the district and continued to act as such. No notice of motion was served upon him until two months after the date at which he was sworn in.

Held, that the principle that mandamus will not lie, where the office sought is full, was not affected by the fact that notice of the application was given prior to the date at which C. was sworn in, the return to the writ having reference to the state of affairs as it exists when the writ is served.

Held, also, that if the warden and clerk had power, before the service upon them of the notice of motion, effectively to swear in C., that power could not be affected by a mere notice of motion, and that, therefore, when C. was sworn in he would become a councillor de facto.

Held, also, under Crown Rule 55, that it was necessary to serve C., as the person principally, if not wholly, interested in opposing the motion, and that the fact that he was not served until two months after the time at which he was sworn in and commenced to act, was a complete answer to the motion. which must, therefore, be refused, even if the warden and clerk had failed to show any reason why mandamus should not be allowed.

R. E. Harris, Q.C., *W. A. Henry* and *D. A. Hearn*, in support of application.

R. L. Borden, Q.C., and *H. McInnes*, contra.

RITCHIE and MEAGHER, JJ., GRAHAM, E.J. Dec. 19, 1896.

ZWIEKER *v.* ERNST.

Wills Act, R.S., 5th series, c. 89—Fee defeated by executory devise—Word "heirs" used in sense of "children" or "issue."

Testator devised a lot of land to his grandson E., who was then away at sea, and in the event of E. not returning home, he devised the lot, together with the remainder of his real estate, to his son J. In the event of J. dying "without leaving any lawful heirs," he directed that the land bequeathed to J. should go to E. P., and in the event of E. P. dying before J., or in the event of his dying without heirs, or before reaching the age of twenty-one years, he directed that the land should go to the plaintiff.

The trial judge found that E. never returned home, that J. died without leaving any children surviving him, and that E. P. died without heirs before J., and before attaining the age of twenty-one years.

Held, that plaintiff was entitled to the land as against defendant, who claimed under a conveyance from the widow of J.

Held, also, that while J. took a fee under the devise to him (by virtue of the Wills Act, R. S., 5th series, c. 89), he took it subject to its being defeated by the executory devise over to plaintiff in the event of J. dying without leaving issue.

Held, also, that the word "heirs" as used by testator in reference to J., was used in the sense of "children" or "issue."

F. B. Wade, Q.C., for plaintiff.

W. B. A. Ritchie, Q.C., and *C. W. Lane*, for defendant.

RITCHIE and MEAGHER, JJ.,
GRAHAM, E.J. } [Dec. 19, 1896.

McKENZIE *v.* McKENZIE.

Action by purchaser of land against third party, the holder of the legal title, to compel conveyance—Defence of fraud as against creditors—Decree made with costs, it appearing that the intention of the conveyance was not fraudulent.

In December, 1875, plaintiff, a carpenter and builder, went into possession of a lot of land under an agreement to purchase from M., and commenced the erection of a dwelling house. Some time after plaintiff applied to the Nova Scotia Building Society for a loan of money in order to pay M., who was pressing for his money, and also for the purpose of paying for material necessary for the completion of the house. At the time plaintiff applied for the loan he made known to the society the fact that there were several judgments recorded against him, and the society, on this ground, declined to make the advance sought. It was thereupon arranged that M. should convey the land to defendant, a nephew of plaintiff, who was in plaintiff's employ and was treated as a member of his family, and that defendant should execute the mortgage and obtain the loan. Upon the completion of the house plaintiff moved into it and occupied it with his family, and subsequently, during his temporary absence from the province, his agent received the rents and applied them towards payment of the mortgage. The business of obtaining the loan and of applying the proceeds was performed by plaintiff openly, and without any attempt at concealment, and his interest in the property was shown to have been known to some, at least, of his creditors.

There being in the opinion of the majority of the Court, no evidence that the conveyance to defendant was procured to be made with any fraudulent or wrongful design or intent, and there being evidence that plaintiff sought to obtain a conveyance of the property while the claims of those of his creditors. who had not already been paid, were capable of being enforced against him,

Held, that plaintiff was entitled to decree with costs for the conveyance of the land from defendant, who, while admitting plaintiff's ownership, sought to retain the property on the ground that the conveyance to him was fraudulent.

GRAHAM, E.J., dissented, considering that the transaction was fraudulent as against creditors, and that the plaintiff, therefore, was not entitled to the assistance of the Court.

R. L. Borden, Q.C., and *A. E. Silver*, for plaintiff.

W. B. Ross, , Q.C., and *A. Whitman*, for defendant.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] [Mich. Term, 1896.

MCFARLANE *v.* FOSTER.

Dominion elections—Preliminary objections—Procedure—Leave to file nunc pro tunc.

This petition was against the return of Hon. Geo. E. Foster, and was filed by the petitioners on the 1st of August last. On Aug. 5th a copy of the pre. liminary objections was filed, and on the same day copies were served on the petitioners and their attorney. On Aug. 11th an additional copy was filed for the petitioners. No proceedings whatever were subsequently taken by either party till Oct. 23rd, when the counsel of petitioners applied to set aside the preliminary objections on the ground that two copies had not been filed on Aug. 5th.

For the respondent it was contended that the statute only required one copy to be filed and the other to be presented, which was done, and that if two copies were necessary it was a mere matter of procedure and could be filed after the expiration of five days mentioned in s. 12 of the Act.

Held, that this was a mere matter of procedure and did not go to the jurisdiction and could be waived or subsequently filed. The application of the petitioners was therefore dismissed and permission given to file if necessary nunc pro tunc.

Pugsley, Q.C., and *J. H. Barry*, for the petitioners.

Currey, Q.C., and *Powell*, Q.C., for the respondent.

Full Bench.] [Dec. 12, 1896.

EX PARTE REID.

Bastardy—Con. stat. N.B., c. 103—Trial.

This was an application for a writ of prohibition to restrain the Judge of the County Court from proceeding with the trial of the applicant on a charge of bastardy. It appeared the child had been born before, but no information had been laid until after, the June term of the County Court. At the October sitting of the County Court the case was entered for trial, when the Court was restrained by an order nisi for prohibition granted by a judge of this Court. The applicant relied upon s. 7, c. 103, Con. Stat of N.B., which enacts, "All informations or charges for bastardy . . . shall be tried at the term of the County Court for the county in which the information is laid next ensuing the delivery of the woman.

The Court divided equally. Rule nisi for prohibition discharged.

A. J. Gregory, for applicant.

W. Vanwart, Q.C., contra.

BARKER, J.
In Equity.
[Dec. 19, 1896.

MOREHOUSE *v.* BAILEY.

Practice—Injunction—Undertaking as to damages—Dismissal of bill.

This was an application by the plaintiff to have his will dismissed. He had obtained an ex parte injunction on giving an undertaking as to damages which was afterwards dissolved. Defendant contended that present application should not be allowed until damages and costs of information were paid.

Bill dismissed.

Wilson, for plaintiff.

Bliss, for defendant.

McLEOD, J.
St. John Circuit.
[Dec. Sitt., 1896.

FERRIS *v.* BUTT.

Breach of promise of marriage—Seduction—Pleading—Evidence.

Action for breach of promise of marriage and seduction. Plea: Never promised.

In cross-examination of the plaintiff, defendant's counsel proposed to ask her if she had not promised to marry a person other than the defendant.

Held, that the question was not admissible under defendant's plea, which only put in issue that the defendant never promised to marry.

Defendant offered to put in evidence attacking plaintiff's character.

Held, that the evidence could only be admitted under special plea for that purpose, which in the absence of evidence to support it, would have aggravated the damages.

A. W. MacRae, for plaintiff.

C. J. Coster, for defendant.

VANWART, J.
In Chambers.
Jan. 7.

SHAW *v.* BURNS.

Initials—Jurisdiction—49 Vict., c. 81 (N.B.)—Perth and Andover Civil Court.

This was an application to review a judgment recovered before the Police Magistrate of the district of Andover and Perth Civil Court, on the grounds (1) That the defendant was sued by initials instead of by his Christian name, and (2) The Police Magistrate had no jurisdiction, as both parties were non-residents of the county.

Held, that the defendant may be sued by any name or names he may have acquired by usage or reputation: *Williams* v. *Bryant*, 5 M. & W. 447; that from the evidence it appeared the defendant in this case had transacted business under the name of P. C. Burns, and was known to several witnesses by such name, which was quite sufficient even if objection had been taken at the trial. The defendant was present at trial and offered no defence.

The plaintiff was a non-resident of the county, and defendant lived in the State of Maine, and it was contended the Court had no jurisdiction unless the

defendant was a resident of the county. In case the plaintiff was a non-resident of the county,

Held, that 49 Vict., c. 81, s. 3 (N.B.) was not open to that construction. The process of the magistrate cannot be served outside the limits of the county. In case the plaintiff is a non-resident, so long as the defendant is served with process within the magistrate's territorial jurisdiction, it matters not where his residence may be. The magistrate acquires jurisdiction.

Judgment of magistrate affirmed with costs to plaintiff.

D. Jordan, Q.C., for plaintiff.

C. E. Duffy, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] [Dec. 23, 1896.

REGINA *v.* DOUGLAS.

Criminal law—Evidence—Deposition of prisoner taken in a former civil proceeding, admissibility of—Identity.

This was a case reserved for the decision of the Full Court on the following questions :—

(1) Whether the depositions of the prisoner taken compulsorily in a civil proceeding before a Court in the province of Quebec were admissible in evidence on the trial of the prisoner in Manitoba on a criminal charge.

(2) Whether the evidence was sufficient to identify the prisoner as being the party whose depositions had been taken.

An official stenographer from the province of Quebec was present at the trial, and gave evidence as to the taking of the depositions of John S. Douglas, and that he believed that the prisoner was the same man, but could not speak positively as to his identity.

Held, (1) That s. 5 of the Canada Evidence Act, 1893, has no application in such a case, and that the depositions in question were admissible in evidence; *Reg.* v. *Coote*, L.R. 4 P.C. 599.

(2) That the judge was warranted in submitting the evidence of identity to the jury, and it was for them to decide whether they were satisfied on that point.

Conviction quashed.

MacLean, for the Crown.

Howell, Q.C., and *Metcalfe*, for the prisoner.

[See *Reg.* v. *Chisholm*, 32 C.L.J. 591, and *The Queen* v. *Erdheim*, Ib. 668.—ED. C.L.J.]

Full Court.] [Dec. 23, 1896.

CROTHERS *v.* MONTEITH.

Liquor License Act, R.S.M. c. 90, s. 35—Cancellation of license—Prohibition—Implied authority.

Judgment of Bain, J., noted ante vol. 32, p. 681, affirmed with costs.

Wade, for plaintiff.

Maclean, for defendants.

Full Court.] [Dec. 23, 1896.

IN RE MARQUETTE ELECTION.

Election petition—Preliminary objections—Affidavit of petitioner—54, 55 Vict., c. 20, s. 3—Examination of petitioner.

In this case, no preliminary objections having been filed, and the petition being at issue, the petitioner was examined on his statement in the affidavit filed in accordance with the Act 54, 55 Vict., c. 20, s. 3, "that he had good reason to believe, and verily did believe, that the several allegations contained in the said petition are true."

The petitioner's answers upon such examination showed that his information was based on common rumor and newspaper reports, that he could not remember the name of any person who had made a specific charge of any of the corrupt practices alleged in the petition; that although he said he believed the charges to be true, he knew nothing personally of the truthfulness of them, and he admitted that he had no reason to suppose that the respondent had been personally guilty of bribery as charged in the petition.

Held, that the statute required a true affidavit to be filed with the petition, and that the respondent might take the objection if he brought it to the notice of the Court within a reasonable time after he discovered it, notwithstanding the time was passed for filing preliminary objections under section 12 of the "Dominion Controverted Elections' Act," and that the Court had under section 2, ss. (j), the same power at any time to correct an abuse of its process or to punish a fraud attempted to be practised upon it, as it would have in any ordinary cause within its jurisdiction; and that on account of the proved falsity of the affidavit, all proceedings on the petition should be stayed with costs.

Per TAYLOR, C. J.: Even if the examination on the affidavit was ultra vires and unauthorized by the statute, no objection was taken to it at the time, and besides the Court can of its own mere motion, and at any time, direct an inquiry as to any fraud practised upon it, or any improper use of its process and punish the same, if discovered: *Dungey* v. *Angora*, 2 Ves. 304.

Howell, Q.C., for the petitioner.

Tupper, Q.C., and *Phippen*, for respondent.

Full Court.] Dec. 23, 1896.

RE MACDONALD ELECTION.

Election petition—Preliminary objection—Affidavit of petitioner—54, 55 Vict., c. 20, s. 3—Examination of petitioner.

This case was similar to the Marquette election case above noted, but with this difference, that although the examination of the petitioner was

said to be far from satisfactory, yet before making his affidavit there had been read to him affidavits or statements made by a number of persons as to transactions connected with the election, and he also mentioned several instances told him of what, if true, were corrupt practices, giving at the same time the names of his informants.

Held, that although the affidavit might have been made without due consideration, and a judge might not have felt justified in making such an affidavit on such information, yet it could not be said that it was a manifestly false affidavit.

Appeal from decision of Killam, J., noted ante vol. 32, p. 720, dismissed without costs.

Howell, Q.C., for the petitioner.

Tupper, Q.C., and *C. H. Campbell*, Q.C., for respondent.

BAIN, J.] [Dec. 28, 1896.

IN RE ZICKRICK.

Prohibition—Liquor License Act, s. 174—Summons on original information after conviction quashed.

This was a motion for a writ of prohibition to prevent a magistrate from further proceeding on an information laid before him on the first day of June, 1896, for an offence against the Liquor License Act, on the ground that the defendant had been convicted of the offence charged in the information, and that the conviction had been quashed.

It was shown that at the hearing before the magistrates on the 4th of June, on the return of the first summons issued on the information, an attorney appeared for the defendant and pleaded guilty for her, whereupon the magistrates convicted her of the offence charged, and imposed a fine; that the attorney paid a portion of the fine, but that afterwards the defendant succeeded in getting the conviction quashed on the ground that the attorney had acted without her authority or knowledge.

Subsequently another summons was issued on the same information and the present motion was made, counsel for defendant relying upon s. 174 of the Liquor License Act, R.S.M., c. 90, which enacts that all informations or complaints for the prosecution of any offence against any of the provisions of the Act shall be laid or made in writing within thirty days after the commission of the offence.

Held, that there was nothing in this section to prevent the prosecution from proceeding on the original information, which was in time, and there was no reason why the defendant could not meet the charge on its merits as well in November as in June, as any delay in the proceedings had been caused by the defendant herself.

Motion dismissed with costs.

Wade, for the defendant.

MacLean, for the Crown.

NEW RULES.

HIGH COURT OF JUSTICE, ONTARIO.

DIVISIONAL COURTS.

The following rules were made by the Supreme Court of Judicature on the 9th January.

Rule 1429 is hereby repealed and the following substituted therefor :—

"218 (1) Unless otherwise ordered, sittings of the Divisional Courts shall commence on the first Monday in each month, and shall continue for two weeks, unless the business before the Court shall be sooner disposed of, subject to the following exceptions :

"(2) The Divisional Courts will not sit on any day falling in any vacation, nor upon any Saturday or public holiday.

"(3) Where the first Monday in a month shall fall in any vacation the Divisional Court will not commence its sittings until the first Monday after the expiration of such vacation ; and where the first Monday in a month shall be a public holiday the Divisional Court will commence its sittings on the first juridical day thereafter, not being in vacation."

Rule 1484 is hereby repealed, and the following substituted :—

"799 A. (1) Every motion to a Divisional Court against a judgment or for a new trial, or to set aside a verdict, or by way of appeal from a judgment or order of a Judge of the High Court, made at a trial or otherwise in respect of the judgment pronounced at a trial, shall be set down to be heard for, at the latest, the first sittings of a Divisional Court which commence after the expiration of one month from the date of the verdict or the pronouncing of the judgment (if any), unless otherwise ordered.

"(2) Every such motion shall be upon a seven clear days' notice, and the motion shall be set down two clear days before the commencement of the sittings of the Divisional Court for which notice is given, unless otherwise ordered.

"709 B. (1) Every motion to a Divisional Court by way of appeal from any judgment or order made by a Judge of the High Court sitting in Court, otherwise than at a trial, or by way of appeal from any judgment or order made by a judge of the High Court sitting in Chambers, which is appealable to a Divisional Court, shall be set down to be heard for the first sittings of a Divisional Court, for which due notice can be served after the expiration of four days from the pronouncing of the judgment or order complained of, unless otherwise ordered.

"(2) Every such motion shall be upon a two clear days' notice, and the motion shall be set down two clear days before the commencement of the sittings of the Divisional Court for which the notice is given, unless otherwise ordered.

"799 C. Every notice of motion or appeal to a Divisional Court shall set out the grounds of the motion or appeal."