Canada Law Journal.

VOL. XL. NOVEMBER 1, 1904 NO. 21.

We doubt whether Professor James Bryce's proposal to aid the cleansing of the Augean stable of politics in the New World by having every public officer or member of an administration "excluded absolutely and entirely from participation in the ballot" and from the right "to speak or write on any political subject" is at all likely to be adopted by the free communities of America To deny the franchise and the right of free speech on any subject that strikes at the heart of patriotism to cabinet ministers and civil servants, while these "birth-rights of British freemen" are open to the abuse of every small partisan trickster and bar-room loafer is a bit of radical despotism too silly to be debated. Better begin by disfranchising those who could not obtain a certificate of good citizenship from the courts, say we; and rigidly enforce the provisions of the present election law as to those guilty of corrupt practices.

In connection with matters affecting Bench and Bar we have from time to time referred to the system of appointing judges in vogue in the United States apart from the Supreme Court Bench. We have ventured to express a doubt whether our system after all, as carried out in recent years, produces the best result. An article in one of our exchanges in the State of New York shews a very satisfactory condition of things in this regard, and that the Superior Court judges of that State are quite as free from political influence as we can claim for those in this Dominion. The time for boasting of our system as compared with the elective system as worked out in the State of New York seems to be at an end. We commend the last sentence of the article referred to, to the consideration of those who, of whatever political party, have the grave responsibility of making judicial appointment. It would seem rather a shameful thing for us that the electors of a democratic country should show more sense of responsibility in such an important matter than the Ministers of the Crown in a comparatively conservative community.

The article above referred to reads as follows: "The nomination by both the Republican and Democratic conventions in New York State of two judges for the Court of Appeals who have already been in service on that bench, and one of whom is a Republican and the other a Democrat, gives great satisfaction to the majority of good citizens. Some of the Supreme Court judges have received similarly unanimous renominations. It is highly encouraging to those who believe in separating the judiciary as far from partisan influences as possible. It is also a strong proof of the fitness of the voters to be entrusted with the privilege of electing their own judges. Several severe lessons have been taught the politicians by the voters of New York State when political influences have been too prominent in the selection of candidates for the bench. There are, nevertheless, some in both parties in whom the theory that offices are meant for political rewards is so ingrained that they deprecate the action taken by the conventions of the great parties this year, and there were plenty of men in the conventions who were very reluctant to nominate on their ticket a candidate who belonged to the other party. Nevertheless, good sense and political wisdom combined in overruling those ultra-partisans. The history of judicial elections in New York State has now pretty fully demonstrated that the judges of the higher courts, at least, if they have performed satisfactory service, will be re-elected, making practically a life tenure after the first election until they reach the age limit. Furthermore, frequent rebukes of the politicians when they have made a nomination which the voters thought to be only a reward for political services, and not based on any special fitness for the place, have made it clear that the people are fairly well able to protect the bench from being the gift of the political bosses. It would be too much to say that political influences are of no weight in the selection of judges, but it is not too much to say that the voters have compelled them to be kept well within bounds, and that there is an increasing evidence that they will not tolerate the use of the judicial office as a mere gift of spoils."

THE PRIVY COUNCIL AND CANADIAN JUDGES.

If there is one thing more than another that has taught those who dwell in the "British dominions beyond the Seas" respect for the Bench of the mother-land it is the dignified courtesy of its occupants both in demeanor and speech. Rare lapses from the splendid traditions of judicial behavior in England have indeed been known to us—such as, for instance, when Lord Westbury proclaimed his malevolent delight in reversing his great rival and predecessor Campbell's decisions, asserting that all that was required to enable one to do so was the knowledge of a "few elementary rules of law." But such instances of what the French call grossièreté have happily been few, and pale their insignificant fires in the brighter atmosphere of refinement which envelops the history of the judiciary as a whole. Unfortunately, however, in the halls of justice, as well as in other public spheres, the civilization of modern England, cultured as it is, ever and anon discloses some faint "intimations of the savage," which serve to remind us that man's progress toward the ideal of conduct is a slow and arduous one. Eternal vigilance may be said to be the price of good manners as well as of liberty.

The above reflections were engendered by reading the report of the judgment of the Judicial Committee of the Privy Council in *Toronto Railway Co.* v. *City of Toronto*, ante p. 753. This judgment purports to have been written by Lord Justice Davey, and contains the following extraordinary criticism upon one whose reputation as a judge is second to none among the personnel of the Canadian Bench at the present time:—

"Their Lordships are always disposed to treat with great respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own statutes, but they cannot accede to the argument addressed to them, *or adopt the reasoning of Mr. Justice Osler in Kirkpatrick's case without doing violence to the English language, and to elementary principles of English law.*"

We leave it to the dispassionate consideration of our readers to say if the above expressions as italicized by us would redound to

the credit of any judge in speaking of the opinion of another judge, be the latter never so incapable, or his court never so inferior. But to put it mildly, it shocks our sense of right that the subject of these strictures should be such a man as Mr. Justice Osler, whom learning and painstaking research in connection with cases coming before him is only equalled by his courtesy and consideration for others. There are those who might well follow his distinguished example in these respects.

Let us explain that it is not to our purpose to endeavour to impugn the conclusion arrived at by their lordships of the Privy Council in the *Toronto Railway Company's* case. We sufficiently apprehend the futility of enterprises of this sort to withhold our hand from them whether their lordships are right or wrong in their decisions; but we feel it incumbent on us as an organ of the legal profession in this country to denounce and displace the imputation so gratuitously placed upon the capacity of a Canadian judge, as well as the court for which he spoke, in delivering judgment in the *Kirkpatrick* case.

Now what is this matter in which Mr. Justice Osler has "done violence to the English language and the elementary principles of English law"? It is a matter touching the legal interpretation of the word "fixtures." Such being the case, it does not need the skill of a philologist to show that Lord Davey's talk about violence being done to our mother-tongue is baseless to the verge of maliciousness. No one ought to be better aware than Lord Davey himself, an Oxford "double-first" as he is, that the literal meaning of the word "fixture" is not only not its legal meaning, but that the legal meaning is sometimes the very antithesis of its common and literal meaning. When Judge Osler refers to "fixtures" in the *Kirkpatrick* case, he treats it as a term in legal technics—and what is more, Lord Davey knows that he does. How specious, then, to raise any question of etymological exactness!

So much for the "English language" element in Lord Davey's strictures. Now let us see how far Judge Osler has offended "elementary principles of English law." The case in which Osler,

J., acted as the mouth-piece of the Ontario Court of Appeal in deciding that the term "fixtures" would include the cars or rolling stock of an electric street railway, arose upon an interpleader issue between certain execution creditors, who were defendants in the foreclosure case of *Kirkpatrick* v. *Cornwall Electric Street Railway Co.*, and certain trustees and debenture holders, who were plaintiffs in that case (see 2 O.L.R. 113 and 119). On the interpleader issue the chief question was whether the railway company's rolling stock was liable to seizure under execution, or was protected by a mortgage made by the company of its real estate, together with all "buildings, machinery, appliances, works, and fixtures, etc., and also all rolling stock, and all other machinery, appliances, works, and fixtures, etc." to be thereafter used in connection with the railway. For the execution creditors it was contended that the rolling stock was personal property, and did not pass with the railway to the mortgagees under the mortgage. The trial judge, (Armour, C.J.,) decided the interpleader issue in favour of the mortgagees, and the Court of Appeal affirmed this judgment, holding (per Osler, J.,) that the rolling stock of an electric railway constitutes a "part of a great machine confined to a particular locality, for which it is specially constructed and fitted, being operated by means of a continuous current of electricity generated in part of the fixed plant in the power house, and passing through the trolley pole of the car, which is fitted to the overhead wire, through the car to the unbroken line of rails and back to the generator." Hence, "detached from the rails the rolling stock is incapable of use; and upon the principles laid down in *Place* v. *Fagg*, 4 M. & Ry. 277; *Fisher* v. *Dixon*, 12 Cl. & F. 312 and *Mather* v. *Fraser*, 2 K. & J. 536, such rolling stock "is to be regarded in the nature of a fixture, passing with the land over which it runs." Thus we find that instead of dealing with an "elementary" (i.e. primary, simple) principle Mr. Justice Osler is here dealing with one of the most complex and uncertain subjects that confront us in English law. In *Sheen* v. *Rickie*, 5 M. & W. at p. 182, so great a judge as Baron Parke professes his inability to put any nice limitation upon the meaning of the word "fixtures"

in law. He regards it as a "very modern word," with its bearings still in a welter of ambiguities. Again, so far has the word departed from its "elementary" meaning that Brown on Fixtures (4th ed. p. 2) says: "The term 'fixtures' originally connoted in every instance of its use that sort of positive fixation and positive annexation which the etymology of it suggests; and it now connotes in the general instance no such idea at all; but on the contrary the very opposite idea, namely, the right of the tenant to unfix and remove." Another able writer (6 Am. Law Rev. p. 412) has said: "The student who seeks to determine a question relating to 'fixtures' has before him a task by no means easy. He finds at once that the primary definitions are not merely vague but conflicting; and, proceeding further, he meets a variety of ingenious theories and distinctions quite out of harmony with each other, and complex in the extreme: and finally, in his last resort, the reports, he encounters a mass of heterogeneous cases." Setting aside the "wavering definitions," as he styles them, Brown, in the work quoted, would venture "to define the term in the following neutral manner, that is to say, things associated with, and more or less incidental to the occupation of lands and houses or either thereof."

Accepting as authoritative these expositions of the vagueness and ambiguity surrounding the subject of "fixtures", we think that Lord Davey was just as unhappy in his criticism of Judge Osler's knowledge of "the 'elementary' principles of English law" as he has been shown to be in his fleer at the esteemed Canadian judge's acquaintance with the use of his native language. Furthermore, we hazard the opinion that the professional mind will find in Judge Osler's application of the doctrine of "fixtures" in the *Kirkpatrick* case more harmony with the definition stated by Brown, and quoted by us above, than it will in Lord Davey's view that "the cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, *and are not fixed in any sense whatever to anything which is real estate.*" We submit, with deference, that any one acquainted with the system of electric trolley traction as it obtains

in this country, would "do violence to the English language" if he maintained that a trolley car in use was "not fixed in any sense whatever" to the rails and wires and power house; and 'fixed' to an infinitely greater degree than fish in an artificial pond, manure upon land, seaweed cast upon the shore, the key to a lock (which may be carried in one's pocket), and a number of other extraordinary things which the courts of England and America have held to be "fixtures." All cases of this class have been decided not upon the theory of actual fixation or annexation to the land, but upon that of permanent accessory use therewith. In *Fisher* v. *Dixon*, 12 Cl. & F. at p. 330, Lord Cottenham says: "If the corpus of the machinery is to be held to belong to the heir, it is hardly necessary to say that we must hold that all that belongs to that machinery, although more or less capable of being used in a detached state from it, follows the same principle and remains attached to the freehold."

Lord Cottenham's observations are precisely in line with Judge Osler's view, and, as will be seen, *Fisher* v. *Dixon* is relied on by the latter in the *Kirkpatrick* case. It is also to be observed that the *Kirkpatrick* case was decided along the same lines as those upon which the judgment of the Supreme Court of the United States proceeded in *Pennock* v. *Coe*, 23 How. 117, where the mortgagees of a railroad were held entitled to the rolling stock as against execution creditors, the mortgage there in question purporting to convey the road "together with the rolling stock, and all other personal property, etc." So in the case of *Farmer's Loan and Trust Co.* v. *Hendrickson*, 25 Barb. 484, where as between mortgagees and judgment creditors of the mortgagors, all kinds of rolling stock of the railroad company, such as engines, passenger and freight cars, hand-cars, snow-plows, etc., were held to be fixtures. In the course of his very able opinion (adopted by the Court) in the latter case, Strong, J., says: "That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can of course be no doubt. Their wheels are fitted to the rails; they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else. They are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose . . . The railway is constructed expressly for the business to

be done by the cars ; . . . . it is nothing without its locomotive vehicles." Very much the same reasoning led Drummond, J., in the Quebec case of *Grand Trunk Ry. Co.* v. *Eastern Townships Bank*, 10 L.C.J., at p. 15, to hold a locomotive engine an "immovable by destination." See also *Ontario Car Co.* v. *Farwell*, 18 S.C.R. 20.

Now these arguments apply with greater force to electric trolley roads ; for inasmuch as trolley cars are not independent of the tracks and permanent structures of the railroad, in respect to their motive power, like a train of steam-cars, they are obviously more in the nature of "fixtures" in the primary and literal sense.

We think we have laboured the points at variance between Lord Davey and Mr. Justice Osler sufficiently to show that the latter was guilty of doing violence neither to the English language nor to the elementary principles of English law in his judgment in the *Kirkpatrick* case. We think also that upon our review of the law and the facts, it is pretty well established that Lord Davey's objectionable language in the *Toronto Railway Company's* case was simply a bit of petulant hypercriticism. But we do not imagine that it is going to stimulate in any way the aversion to maintaining the system of appeals from this country to the Privy Council, of which we hear something now and again in the press and Parliament. The tone of the Bench and Bar in Canada is above any vindictive or prolonged resentment of a slight such as this. Circumstances may prompt us to forgive it, if we cannot wholly forget it. We recognize Lord Justice Davey as a good and able judge ; but we also recognize that "quandoque bonus dormitat Homerus," and that it is now possible for the lowered standard of judicial behaviour in the Privy Council to suffer in comparison with that of a Canadian Court.

INJURIES OCCASIONED BY OR THROUGH THE ACTS OF THIRD PERSONS.

It seems repugnant to one's notion of abstract justice to find that many injuries to which other people have directly or indirectly contributed by carelessness or greed should come under the classification of injuries incapable of legal redress. This objection has been felt in courts of law, and attempts have been made to enlarge the borders of redressible injuries, but these efforts have been more or less hampered, on the one hand by the difficulty of finding any satisfactory legal principle on which to base relief, and on the other, by a dread of opening the door of justice too widely. One of this class of cases was the well-known case of *Heaven* v. *Pender*, 11 Q.B.D. 503. In that case the plaintiff's master was employed to paint a ship then lying in the defendant's dock, the defendant having contracted with the ship's owner to provide the necessary staging to be strung on the side of the vessel to enable the painting to be done. This staging proved to be insecure, and gave way, whereby the plaintiff was injured. His master, apparently, was not liable, because he was in no way responsible for the efficiency of the staging unless therefore the man who negligently erected the staging was liable—the injured workman was without redress and his misfortune would be damnum absque injuria. He accordingly sued the dock-owner and at the trial judgment was given in favour of the plaintiff, but this was subsequently set aside on appeal by the Divisional Court (Field and Cave, JJ.), 9 Q.B.D. 302. Field, J., said: "In order to support an action, the plaintiff must shew either the existence of a contract between himself and the defendant, or that some relation existed between them which created a duty from the defendant to the plaintiff to use due and reasonable care, and that the defendant was guilty of a breach of that duty," and this was considered generally up to that time to be a correct statement of the law governing the case. Here there was no contract between the plaintiff and defendant, and the Divisional Court held there was no duty owing from the defendant to the plaintiff. The Court of Appeal (Brett, M.R., and Cotton and Bowen, L.JJ.) reversed this decision, and made a distinctly new departure, but they differed in their reasons. Brett, M.R., laid down as the guiding principle that "wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary

sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger;" but to this rule the other members of the Court declined to assent, and they based their decision on the ground that the defendant had, in contemplation of law, invited the plaintiff to use the staging and, therefore, owed a duty to him to see that it was safe. This theory of "an invitation," is, of course, a pure creation of the legal imagination, and seems a less satisfactory ground for the decision than the broader principle proposed by Brett, M.R., and yet it must be confessed that such a principle, if established, would widen the circle of a man's liability for injuries occasioned by his negligence very considerably, if not indefinitely. Not long ago many people in England were suffering from arsenical poisoning, which it was discovered was occasioned by the beer they were drinking. In the manufacture of the beer brewing sugar, in which sulphuric acid is an ingredient, had been used. The makers of this sugar contracted with the firm which supplied the acid that it should be free from arsenic, but they, in breach of their contract, delivered acid containing arsenic with the result that many persons suffered serious injury through their carelessness—according to the chain of liability recognized by the law, the customers could sue the retail dealer: *Wren* v *Holt* (1903) 1 K.B. 610 (ante vol. 39, p. 438), and the retail dealer could sue the brewer; the brewer could sue the vendors of the brewing sugar; and the manufacturer of the brewing sugar could sue the manufacturers of the acid: *Bostock* v. *Nicholson* (1904) 1 K.B. 725 (ante p. 453); but the consumers had apparently no right of action against the makers of the acid who were the real cause of their injury. Abstract justice would seem to require that in such a case the manufacturer of the deleterious article should be liable in damages to all who should suffer injury as the result of his carelessness. The damages of those who ultimately suffer under such circumstances, however, is in the eye of the law "too remote" from the original cause of the injury.

Possibly if it could have been shewn that the manufacturers of the acid knew that it was to be used in making beer they would have been directly liable to the persons injured by drinking the beer.

There is, however, a class of cases in which it has been held that third persons injured by goods purchased by another are

entitled to recover damages from the vendor for injuries caused by such goods. Thus there is the well-known case of the gun bought by a father for the use of his son, which the vendor represented to be sound, and made by a well-known gun maker, but which proved to be unsound, and not made as represented, and which exploded injuring the son, and the son was held entitled to sue the vendor for damages: *Langridge* v. *Levy*, 2 M. & W. 519, affirmed in the Exchequer Chamber 4 M. & W. 337. In giving the judgment of the Court of Exchequer in that case Parke, B., said: "We therefore think that as there is fraud, and damages, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted on, the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequence of his fraud whilst the instrument was in the possession of a person to whom his representation either directly or indirectly communicated, and for whose use he knew it was purchased." That case, therefore, rests on the ground of the fraudulent representation at the time of sale which the defendant knew would be acted on by a person for whose use the gun was bought.

In *George* v. *Skivington*, L.R. 5 Ex. 1, the plaintiff purchased from the defendant a hair wash for the use of his wife, which had been prepared by the defendant. The vendor represented that the article was fit and proper to be used as a hair wash. In consequence of the unskilful making up of the article damage was done thereby to the plaintiff's wife. The husband and wife sued. It was argued that the action was that of the wife only, and that as there was no privity of contract between her and the defendant, he was not liable to her; but the Court of Exchequer (Kelly, C.B. and Pigott and Cleasby, B.B.) held that the defendant had been guilty of negligence in preparing the wash which he knew was to be used by the female plaintiff, and was liable to her in damages.

In *Priest* v. *Last* (1903) 2 K.B. 148 (noted ante vol. 39, p. 615), the plaintiff purchased a hot water bottle which proved defective, and his wife was, in consequence scalded, and the plaintiff sued for

the expense he had been put to in consequence, and was held entitled to recover, but there was privity of contract between the plaintiff and defendant, and the only question was whether there was an implied warranty of fitness; but according to *George* v. *Skivington* the wife herself would also have had a cause of action. The cases of *Heaven* v. *Pender*, *Langridge* v. *Levy* and *George* v. *Skivington* have been relied on as as establishing the principal enunciated by Brett, M.R., but without success, and the Courts have shewn an intention of restricting rather than extending the principle of those cases. Thus in *Caledonia Railway Company* v. *Mulholland* (1898) A.C. 216, the plaintiff's husband was a servant of the Glasgow Railway, and was killed owing to a defective brake on a waggon belonging to the Caledonian Railway, which had been lent by that company to the Glasgow Railway. The plaintiff sued the Caledonian Railway, and *Heaven* v. *Pender* was relied on, but the House of Lords held that the plaintiff was not entitled to succeed because the Caledonian Railway owed her husband no duty: and so far as regards misrepresentation, acted on by third parties they have definitely held that unless such misrepresentation can be shewn to have been made fraudulently and with an evil mind the third party has no right of action: *Peek* v. *Derry*, 14 App. Cas. 337: *Le Liever* v. *Gould* (1893) 1 Q B. 491; *Low* v. *Bouverie* (1891) 3 Ch. 82. The cases on this subject up to the year 1900 have already been very fully discussed in this journal by Mr. Labatt (see vol. 36, p. 178), and it would be useless to reiterate what was there said. The matter is one, however, of perennial interest, and is again brought to our attention by the very recent case of *Earl* v. *Lubbock*, 91 L.T. 73. In that case the defendant was under contract with Beaufoy & Co. to keep in good and substantial repair certain vans. One of the vans was repaired by defendant, but owing to the negligence of one of his workmen, it was not efficiently repaired, and one of the wheels came off and the plaintiff, a servant of Beaufoy & Co., who was driving the van at the time, was injured. If negligence constituted a good ground of action, as was held in *George* v. *Skivington*, supra, then one would think the plaintiff had a good case, but the very point in question had in fact been determined adversely to the paintiff in *Winterbottom* v. *Wright*, 10 M. & W. 109; there the Postmaster-General had made a contract with the defendant to repair certain mail coaches; in making repairs to one of the coaches he was guilty of

negligence, and in consequenee the plaintiff, who was driving the coach, was injured, and the plaintiff was held to have no right of action against the defendant. That case the Divisional Court (Lord Alverstone, C.J., Wills and and Kennedy, JJ.) in *Earl* v. *Lubbock*, considered to be good law, and dismissed the action. At the same time it is deserving of notice that *Winterbottom* v. *Wright*, as Kennedy, J., points out, was decided on a demurrer to a declaration which did not allege that the defendant knew that the plaintiff or other persons of the same class would necessarily or probably drive the van in question. How far the omission of this allegation of fact, influenced the decision, it is difficult to say.

The difficulty in threading one's way through this branch of law is increased by the conflict of judicial opinions, and the impossibility of ascertaining with precision the precise rule which governs any given case; for example, negligence in preparing an article bought, to the knowledge of the vendor, for the use of a third person who is injured thereby, will give the third person a right of action against the vendor though there be no privity of contract between them: *George* v. *Skivington*, supra; and negligence in constructing a staging intended to be used by a third person will give the third person a right of action for injury sustained in consequence of such negligence against the person guilty thereof: *Heaven* v. *Pender*, supra; but negligence in repairing a vehicle intended to be used by third persons will give such third person no right of action for injuries sustained in consequence of such negligence: *Winterbottom* v. *Wright* and *Earl* v. *Lubbock*, supra; and mere negligence (without actual fraud), in making a statement which a third person acts upon will give no right of action to such third person making the statement: *Peek* v. *Derry*, and other cases, supra; *Low* v. *Bouverie* (1891) 3 Ch. 82; *Dominion S. & J. Co.* v. *Kittridge*, 23 Gr. 631; *Moffatt* v. *Bank of U. C.*, 5 Gr. 374; *Cook* v. *R. C. Bk.* 20 Gr. 1. These appear to be self-contradictory propositions and yet all are good law according to the present state of the authorities.

G. S. HOLMESTED.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

SHIP—CHARTER PARTY—DETENTION BY ICE—CESSATION OF HIRE.

In re Traae v. *Lennard* (1904) 2 K.B. 377, brought up the construction of a charter party which provided that there should be a cessation of the hire in case of detention by ice "unless caused by the breakdown of the steamer." In the course of her voyage the ship was stranded and had to be repaired, when she resumed her journey she was unable to reach her port owing to ice. This would have been avoided but for the delay occasioned by the stranding and subsequent repairs. Ridley, J., held that this was a detention "caused by the breakdown of the steamer" and therefore there was no cessation of hire.

WILL—CHANGE OF DOMICIL OF TESTATOR—WILLS ACT, 1861 (24 & 25 VICT. C. 114) S. 3—(2 ED. 7, C. 18, 3, 4 (O.).)

In re Groos (1904) P. 269, a testatrix, a foreigner, residing in Holland in November, 1868, made her will. She subsequently married and came to reside in England, where she acquired an English domicil. According to Dutch law, the marriage did not revoke the will. The question was raised whether the will was revoked by change of domicil, and it was contended that the Wills Act, 1861, s. 3 (2 Edw. 7 c. 18, s. 4, O.) only applied to wills of British subjects. Barnes, J., however, held that the section applied to all wills, but as the will, in accordance with the Dutch law, limited the executorship to one year, the probate was also so limited.

SHIP—BILL OF LADING—NEGLIGENCE OF CARRIER'S SERVANTS—LIMITATION OF LIABILITY OF CARRIER.

The Pearlmoor (1904) P. 286, may here be briefly referred to as affirming the rule laid down in *Price* v. *Union Lighterage Co.* (1904) 1 K.B. 412 (noted ante p. 262), that a shipowner who seeks to exempt himself from liability for the negligence of his servants must do so by express words.

COMPANY — WINDING UP — PRACTICE — LIQUIDATOR TAKING PROCEEDINGS — SECURITY FOR COSTS.

In re Strand Wood Co. (1904) 2 Ch. 1, a liquidator had instituted proceedings against certain officers of a company in liquidation for an alleged misfeasance, and they applied to compel the liquidator to give security for costs on the ground of his poverty; but the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) affirmed the order of the Registrar dismissing the application, holding that the practice did not warrant the granting of the motion.

TENANT FOR LIFE—REMAINDERMAN—CAPITAL—INCOME—WASTING SECURITIES RETAINED—RATE OF INTEREST—INCOME OF INVESTED SURPLUS.

In re Woods, Gabellini v. *Woods* (1904) 2 Ch. 4. certain mining royalties, forming part of a testator's residuary estate, which were subject to a trust for conversion, were retained by the trustees pursuant to a power in that behalf, and it became necessary to determine the rights therein of the tenant for life and remainderman, and Kekewich, J., decided that the value of the royalties must be ascertained and interest at 3 per cent. on such value be paid to the tenant for life, that rate being fixed having regard to the rate of interest at present obtainable in England on securities on which trustees may invest, and that the surplus income derived from the securities should be invested as capital, and the interest on that should also be paid to the tenant for life.

EASEMENT OF NECESSITY - LIGHT — GRANT OF ONE OF TWO ADJOINING TENEMENTS—DEROGATION FROM GRANT—IMPLIED RESERVATION.

In *Ray* v. *Hazeldine* (1904) 2 Ch. 17, Kekewich, J., decided that where the owner of two adjoining houses grants one of them to another person, there is no implied reservation of a right to light for the house retained by the grantor, as it exists at the time of the grant. In the present case the grantee's successor in title erected a wall which blocked a light to a pantry window in the house retained by the grantor, so as to render the pantry useless as a pantry. The right to light to a window, the learned judge holds, cannot be regarded as implied by or reserved as an "easement of necessity," such easements being only such as are absolutely necessary, without which the property retained cannot be used at all.

PRINCIPAL AND SURETY—CO-SURETIES—INSURANCE OF MORTGAGE DEBT—COVENANT TO PAY WITH LIMIT OF LIABILITY—CONTRIBUTION.

In re Denton, License Insurance Corporation v. *Denton* (1904) 2 Ch 178, the decision of Eady, J. (1903) 2 Ch. 670 (noted ante p. 103) has failed to meet with the approval of the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.), that Court being of opinion that upon the true construction of the contract the plaintiffs who had insured the mortgage debt were not co-sureties with Denton, who had also covenanted for its payment in part, but were guarantors to the mortgagees against the default of both the mortgagor and Denton, and as assignees of the mortgage were entitled to recover against Denton on his covenant, and that he was not entitled to deduct from the amount due by him any sum as due by way of contribution by the plaintiffs as co-sureties.

DOMICIL—CHANGE OF DOMICIL—EVIDENCE—ONUS OF PROOF.

Winans v. *Attorney-General* (1904) A.C. 287, was an appeal from the Court of Appeal's decision that the father of the appellant had changed his domicil of origin and had acquired an English domicil, and, in consequence, that a legacy left by his will was liable to legacy duty. It was clear on the evidence that the deceased's domicil of origin was in the United States, and it appeared that, though he had left the States in 1850 and had never returned, but had lived in England, Scotland and Russia, yet he had never entirely given up his intention of returning to the United States, but, on the contrary, shortly before his death, had expressed his intention of so doing, and described himself in his will as a citizen of the United States of America. The House of Lords (Lord Halsbury, K.C., and Lords Macnaghten and Lindley) came to the conclusion on the evidence that the onus was on those who asserted the change of domicil, and that they had not satisfied it. Lord Lindley, however, dissented, and considered that the proper inference to be drawn from the acts of the testator during the last twenty or twenty-five years of his life was that he had abandoned his domicil of origin, and acquired an English domicil.

WATER—RIPARIAN OWNER—RAILWAY COMPANY—ABSTRACTION OF WATER FOR PURPOSES UNCONNECTED WITH RIPARIAN TENEMENT.

McCartney v. *Londonderry & L. S. Ry.* (1904) A.C. 301, was an appeal from the Irish Court of Appeal. The defendant railway

crossed a natural stream, the water from which they proposed to divert by a pipe placed in the stream at the crossing, so as to carry the water along their line to a tank, to be there consumed in working their locomotive engines. The appellant, who had also riparian rights in the same stream, which he utilized for the purpose of his mill lower down, took steps to prevent the plaintiffs from so diverting the water, and the plaintiffs claimed to restrain him from interfering with their use of the pipe. The defendant was unable to shew any material damage sustained by him by reason of the pipe, or that, if worked to its full capacity, it would have injured his mill. The Irish Court of Appeal granted the injunction as prayed, but the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) held that the defendant was acting within his rights and dismissed the action, overruling the case of *Sandwich* v. *Great Northern Ry.* (1878) 10 Ch. D. 707. Their lordships hold that the only use a riparian proprietor is entitled to make of the waters of the stream is for the purpose of his tenement, and that the use which the railway company made of the water in question was not a riparian use at all.

MORTGAGE—CLOG ON EQUITY OF REDEMPTION—OPTION TO MORTGAGEE TO PURCHASE MORTGAGED PROPERTY.

In *Samuel* v. *Jarrah Timber Co.* (1904) A.C. 323, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) have affirmed the decision of the Court of Appeal (1903) 2 Ch. 1 (noted ante vol. 39, p. 618), to the effect that a provision in a mortgage deed giving the mortgagee an option to purchase the mortgaged property is a clog on the equity of redemption, and as such invalid. The Lord Chancellor regrets that such should be the state of the law, as the bargain was fair and each party knew what they were doing.

COMPANY—PROSPECTUS—OMISSION FROM PROSPECTUS OF MATERIAL CONTRACT—FRAUDULENT PROSPECTUS—SHAREHOLDER—DIRECTOR—COMPANIES ACT, 1867 (30 & 31 VICT. C. 131), S. 38—(2 EDW. VII., C. 15, S. 34 (D.)) — DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT., C. 64) S. 3, SUB-S. 1—(R.S.O. C. 216, S. 4.).

Shepheard v. *Broome* (1904) A.C. 342, is the case known as *Broome* v. *Speak* (1903) 1 Ch. 586 (noted ante vol. 39, p. 443). The point in issue was the liability of a defendant, who was a director of a limited company, for damages sustained by the plain-

tiff as shareholder, owing to his having bought shares on the faith of a prospectus which omitted a material contract. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) affirmed the judgment of the Court of Appeal, holding it to be immaterial that the director was advised and bonâ fide believed that the ommission was immaterial, because, notwithstanding that fact, the prospectus must "be deemed to be fraudulent within s. 38 of the Companies Act, 1867," (2. Edw. VII., c. 15, s. 34 (D.)), and that the director was liable both under that Act and the Directors' Liability Act, 1890, (R.S.O. c. 216, s. 4).

COMPANY—FLOATING CHARGE.

Illingsworth v. *Houldsworth* (1904) A.C. 355, is a case known in the court below as *In re Yorkshire Wool Combers' Association* (1903) 2 Ch. 284, which was noted ante vol. 39, p. 704, for the fact that it furnished a judicial definition of what is "a floating charge" on the assets of a company. It is here only necessary to say that that decision has been affirmed by the House of Lords.

INSURANCE—PROPERTY OF ALIEN ENEMY—LOSS BEFORE COMMENCEMENT OF WAR—SEIZURE BY ENEMY'S GOVERNMENT—WARRANTY AGAINST CAPTURE, SEIZURE AND DETENTION.

Robinson Gold Mining Co. v. *Alliance Insurance Co.* (1904) A.C. 359 was in its previous stages (1901) 2 K.B. 919, and (1902) 2 K.B. 4 & 9, (noted ante vol. 38, p. 149, and vol. 39, p. 25). The House of Lords have now affirmed the decision of the Court of Appeal. The facts were briefly as follows:—Gold, the property of the plaintiffs—a company registered under the laws of the late South African Republic—was insured by the defendants against "arrests, restraints, detainments of all kings, princes and people" during transit from the mines of the United Kingdom, but subject to a warranty "free of capture, seizure, and detention whether before or after declaration of war." In contemplation of hostilities, but before the actual declaration of war, the gold was seized by the government of the republic and appropriated to its uses. Their lordships (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) held that this was a "seizure" within the meaning of the warranty, and therefore the insurers were not liable. We may observe, in passing, that the methods of insurers are curious, and while issuing policies appearing to insure against a specified loss a clause of warranty adroitly introduced practi-

cally relieves the insurer from liability for the very loss which the previous part of the policy purports to insure against.

LICENCE TO CUT TIMBER — EFFECT OF LICENCE — TRESPASS ON LICENSEE'S LAND BEFORE LICENCE GRANTED—CON. STAT. NEWFOUNDLAND 2ND SERIES C. 13, S. 51—(R.S.O. C. 32, S. 3 (i.)).

Glenwood Lumber Co. v. *Phillips* (1904) A.C. 405, although an appeal from the Supreme Court of Newfoundland, may be found of use in Ontario. The action was brought by the plaintiff as the holder of a timber lease or licence from the Government of Newfoundland to recover damages for timber cut upon the lands covered by the licence or lease prior to the grant thereof to the plaintiff, but removed therefrom by the defendant subsequently to the grant. The defendant contended that the licence only conferred on the plaintiff a right to cut and carry away timber, but did not give the licensee any right of occupation or interest in the land itself, or in the timber previously cut, and that he had no right to timber cut prior to the grant of his licence. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey and Lindley, and Sir A. Wilson) held that it was immaterial whether the licence were called a lease or licence, that its legal effect was to give the holder an exclusive right of occupation of the land, and under The Newfoundland Act, C.S.N. 3rd Series c. 13, s. 5 (which appears to be in similar terms to R.S.O c. 32, s. 3), the licensee is empowered to sue for trespasses committed on the lands. At the trial the plaintiff recovered the value of the timber taken by defendant, and $400 damages and costs, and the judgment was affirmed by the Supreme Court of Newfoundland. On the appeal the principal point argued was, that the logs having been cut before the date of the plaintiff's title, they did not vest in him and were not the plaintiff's property; but their lordships declined to adopt that view, holding that the plaintiff's licence gave him exclusive possession of the lands and of the logs then lying thereon, and it was an invasion of his rights for the defendants, who were mere wrong-doers, to enter and take the logs away, and the appeal was accordingly dismissed.

PRACTICE—SPECIAL LEAVE TO APPEAL—ABSTRACT POINT OF LAW.

In *The King* v. *Louw* (1904) A.C. 412, the Attorney-General of the Cape of Good Hope applied for leave to appeal in respect of a point of law incidentally discussed in the case. The respon-

dent had been found guilty of an assault. At the time of the assault he was a British subject, but had gone into rebellion and was serving under a commandant of the forces of the Orange Free State. His defence was that he was acting under superior orders. A point of law was reserved at the trial—viz., that the judge had misdirected the jury that the prisoner, being a rebel, such orders constituted no defence at law. The prisoner was convicted, and the Court upheld the conviction; but a majority of the judges expressed the opinion that there had been a misdirection, and the Attorney-General desired to obtain the opinion of the Judicial Committee on that point; but their lordships held that it being in the circumstances a mere abstract question of law it was not the proper subject for an appeal, and they refused the application.

The *Central Law Journal* generally succeeds in having in each issue an excellent collection and review of cases on some subject of general interest. A recent article in that journal deals with the question when and in what cases the owner of animals which are nearly tame may be liable for their mischievous or wrongful acts. It discusses the subjects under the following heads:—General liability; scienter of the owner of animals; who may in legal contemplation be the owner of a vicious animal; defences and contributory negligence; and trespasses of domestic animals. The article concludes with a quotation from one of those breezy utterances peculiar to the Western States in which a learned Judge, doubtless a lover of that animal which more than any other bring grist to the legal mill:—"A man's dog stands by him in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry winds blow, and the snow drives fiercely, if only he can be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of the pauper master as if he were a prince. When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens."

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.] [July 4.

TORONTO GENERAL TRUSTS CORPORATION *v.* ONTARIO RAILWAY CO.

Railways—Bonds—Mortgage—Default in payment—Sale of railway—Validity—46 Vic. c. 24, s. 14, 15, 16 (D).

A railway incorporated by Provincial Legislation, and which is afterwards declared to be a work for "the general advantage of Canada" can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding.

Judgment of BOYD. C., 6 O.L.R., affirmed.

Aylesworth, K.C., and *Walter Barwick*, K.C., for appellants. *C. Robinson*, K.C., and *Riddell*, K.C., for respondents.

Moss, C.J.O.] [July 4.

RE NORTH RENFREW PROVINCIAL ELECTION, WRIGHT *v.* DUNLOP.

Provincial election—Presentation of petition—Subsequent denial by two of the petitioners of the statements contained therein—Absence of corroboration—Denial of parties interested.

Within a few days after the presentation of an election petition, signed in a solicitor's presence, while the affidavits accompanying it sworn to before another solicitor, deposed to the presentation of the petition being in good faith, and with reason to believe the statements contained in it were true in substance and in fact and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to being intoxicated at the time and unable properly to realize what he was doing, while the petition had only been partially read over to him, some of the statements in which he had since found was wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and that without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first named solicitor and a hotel keeper to sign the petition and swear to the affidavits.

Held, that in the absence, not only of any corroboration of the statements made in the subsequent affidavits, but in the face of their denial by

the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent, to set aside the petition.

Judgment of Moss, C.J.O., affirmed.

Hellmuth, K.C., for appellants. *R. A. Grant*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C., Meredith, J., Idington, J.] [June 30.

MARTIN *v.* MARTIN.

Will—Construction—Devise—Life interest—"Premises"—Election.

The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set about in his will, in which were the following provisions:

"To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life. To my son Joseph Martin the south-west half of the north-west half of lot 10 . . . containing 50 acres . . . also the south-west quarter of lot 10 . . . fifty acres . . . subject to the following conditions . . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay, etc. My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain or mortgage . . . before he attains his thirty-fifth birthday." Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority. The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph the widow leased the 100 acres, reserving the dwelling-house and out buildings and four acres for herself.

Held, MEREDITH, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life.

Held, also, upon the evidence, that the widow had not elected to take $200 a year in lieu of "the use of the premises."

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

M. Houston, for plaintiff. *Johnson*, K.C., for defendants.

Boyd, C., Meredith, J., Idington, J.] [June 30.

IN RE RUSSELL.

Surrogate Courts—Jurisdiction—Accounting—Falsifying inventory of assets.

The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details is now vested in the Surrogate Courts of

Ontario. For full enquiry and accounting resort must be had to the administrative powers of the High Court. Review of English authorities.

Where upon an accounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money, not included in the executors' inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed this sum as a gift from the testator in his lifetime,

Held, MEREDITH, J., dissenting, that the judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him.

Order of the Judge of the Surrogate Court of Halton reversed.

H. Guthrie, K.C., for executrix. *J. Bicknell*, K.C., and *J. W. Elliot*, for residuary legatees. *W. A. McLean*, for executor.

Boyd, C., Meredith, J., Anglin, J.] [June 30.

DOYLE *v.* DIAMOND FLINT GLASS CO.

Executors and administrators—Fatal Accidents Act—Status of widow—Grant of administration pendente lite—Workmens Compensation Act—Negligence—Release of cause of action—Rights of mother—Expectation of benefit—Discovery of fresh evidence—Damages—New trial.

An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained, as widow, pendente lite, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial judge found against the plaintiff's status, but the jury found negligence, and assessed the damages at $1,500, apportioning that sum equally between the plaintiff and the mother.

Held, 1. There was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; MEREDITH, J., dissented, being of opinion that there should be a new trial on the whole case.

2. The release given by the plaintiff should not, on the evidence, be held binding on her; ANGLIN, J., hesitating.

3. On the evidence, the mother had no sufficient interest in her son's

life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept $750.

4. There should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to shew that the plaintiff was the true widow.

5. If the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action.

Trice v. *Robinson*, 16 O.R. 433, and *Murphy* v. *Grand Trunk R.W. Co.*, unreported decision of a Divisional Court, May 27, 1889, applied and followed. Judgment of IDINGTON, J., 7 O.L.R. 747, reversed.

Clute, K.C., and *A. R. Clute*, for plaintiff. *Shepley*, K.C., and *R. H. Greer*, for defendants.

Trial—Meredith, J.] [July 9.

CITY OF HAMILTON *v.* HAMILTON STREET R.W. CO.

Street railways—Contract with municipality—Payment of proportion of gross receipts—Intra vires—Meaning of "gross receipts."

Covenant by the defendants to pay to the plaintiffs a certain proportion of defendants' gross receipts was held to be not beyond the powers of the plaintiffs, a city corporation, and defendants, a street railway company.

Upon the proper construction of the covenant the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where these passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding.

McKelcan, K.C., for plaintiffs. *Armour*, K.C., and *Levy*, for defendants.

Anglin, J.] [July, 13.

ATTORNEY-GENERAL FOR ONTARIO *v.* TORONTO JUNCTION RECREATION CLUB.

Company—Cancellation of letters patent—Action by Attorney-General—Order in Council pendente lite—Injunction—Crown—Extra judicial opinion.

An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to shew cause why their charter should not be revoked by order in council.

Held, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R.S.O. 1897, c. 191, s. 99), and merely

a power, not a duty, or whether the prerogative right still subsists, the bringing of an action does not clothe the Court with jurisdiction to restrain the exercise of the power.

The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign.

It is not proper for a judge to express an extra-judicial opinion as to the mode in which the discretion of the Attorney-General should be exercised.

Johnston, K.C., for defendants. *Cartwright*, K.C., and *Dwart*, K.C., for plaintiff.

Magee, J.] IN RE CARRIAGE WORKS, LIMITED. [Sept. 12.

Winding-up—Inability to pay debts as they become due.

This was a petition for the winding-up of the above company, under the Dominion Winding-up Act, R.S.C. c. 129. The petitioner alleged that the company was unable to pay its debts as they became due, within the meaning of s. 5 (a) of the above Act, but gave no evidence of the demand in writing and neglect by the company to pay within 60 days thereafter, as required by s. 6.

Held, that s. 6 specifies the only way of proving a case under clause (a) of s. 5, and petition must be dismissed, unless amended, and additional evidence offered within 14 days.

McInnes, for petitioners. *S. B. Wood*, for company.

Cartwright, M.C.] [Oct. 10.

PERRINS, LIMITED *v.* ALGOMA TUBE WORKS.

Evidence—Discovery—Company—Foreign company — Officer of company.

An order may be made for the examination for discovery of the officer of a foreign corporation, residing in a foreign country, when the foreign corporation has attorned to the jurisdiction of the Courts of this Province.

C. A. Moss, for plaintiffs. *Middleton*, for defendants.

COUNTY COURT, LEEDS AND GRENVILLE.

Reynolds, J.J.] BIGFORD *v.* BAILE. [October 11.

Ditches and Watercourses Act — Engineer's award — Time for making directory.

Held, on appeal from the Award of the Engineer of the Township of the front of Yonge and Escott, made under the Ditches and Watercourses Act, R.S.O. c. 285, that the 30 days prescribed by s. 16 (2) of that Act,

within which the engineer is to make his award, is merely directory and not imperative; and where the engineer attended on May 25 under the Act, but did not make his award till August 1, the award would not be set aside on the ground of being made too late.

M. M. Brown, for appellants. *Deacon*, K.C., for respondent.

Province of Manitoba.

SUPREME COURT.

Full Court.] HUMPHREYS v. CLEAVE. [July 12.

Mechanics' and Wage Earners' Lien Act—Costs of sale and reference to Master—Limitation of 25 per cent., to what costs applicable.

This was an action to realize a lien under R.S.M. 1902, c. 110, by the ordinary procedure of the Court as provided for by s. 27 of the Act. At the trial the plaintiffs had judgment for $322.25, and their costs down to and including the trial were taxed at $190.16 and inserted in the judgment. The defendant was ordered to pay both amounts into Court within one week, and the judgment further provided that in case of default the lands, material, machinery, etc., should be sold with the approbation of a judge of the Court, and that, for the purpose of such sale, it be referred to the Master at Winnipeg, and that all necessary inquiries be made, parties added, accounts taken, costs taxed, and proceedings had by the said Master for the sale of the said property, and that the purchase money should be applied in payment of the plaintiffs' claims as proved, with subsequent interest and subsequent costs to be computed and taxed by the Master. There was no appeal from this judgment. Default having been made by defendant, the lands were sold under the judgment by direction of the Master, and the purchase money paid into Court. The plaintiffs' costs of the proceedings subsequent to the judgment were taxed and allowed at $229.30, inclusive of disbursements, and the total amount of the costs taxed, exclusive of disbursements, was $228.75.

Defendant appealed from the taxation of the subsequent costs on the ground that the latter sum far exceeded the limit of 25 per cent. of the amount of the judgment ($322.25) provided for by s. 37 of the Act.

Held, that the expression in that section, "costs of the action awarded in any action under this Act by the judge or local judge trying the action," refers to the costs up to and including the trial, and means the costs which are allowed by the judge at the hearing and entered in the judgment: *Gearing* v. *Robinson*, 19 P.R. 192; and that the limitation of 25 per cent. does not apply to the subsequent costs of sale and proceedings before the Master, which may be dealt with by the judge as in other cases.

The judgment empowered the Master to tax and add to the plaintiffs' claims the costs of the subsequent proceedings; and, as the defendant did not appeal from the judgment, the Court could not, on this motion, interfere with its provisions. Under its terms, the taxing officer properly allowed the ordinary costs of a sale conducted in the Master's office.

It was further urged by defendant's counsel that s. 39 of the Act applied to this case. That section provides that, where the least expensive course is not taken by the plaintiff, the costs allowed shall not exceed what would have been incurred if the least expensive course had been taken, and the defendant contended that, if the plaintiffs had adopted the alternative mode of proceeding provided for by s. 31, the costs would have been much less.

Held, per RICHARDS, J., that it cannot be assumed that proceedings under s. 31 would have been any less expensive than those that had been taken.

Per PERDUE, J., that the question as to the least expensive course should have been dealt with, if at all, by the judge who tried the action, and the taxing officer had no power, without a special direction in the judgment, to determine which would have been the least expensive course and to limit the plaintiffs' costs accordingly.

Appeal dismissed with costs.

Hoskin, for plaintiffs. *Hudson*, for defendant.

Full Court.] CALLOM v. MCGRATH. [July 12.

Conditional sale—Lien note—Verbal agreement at time of sale to give lien note afterwards—Priority as between chattel mortgage and lien note given subsequent to purchase.

Appeal from a County Court in an action for wrongful conversion of three cows which the plaintiff had sold on credit and delivered on Dec. 10, 1903, to one Coaker under a verbal agreement that Coaker would give plaintiff a lien on the cows by signing a lien note, there being no form of such note available at the time. Plaintiff afterwards procured a blank form of such note and had it filled up and signed by Coaker on Dec. 31. On Jan. 21 following, Coaker gave defendant a chattel mortgage on the cattle to secure a debt of $134, and the chattel mortgage was duly registered. Coaker having made default, the plaintiff tried to get possession of the cattle in March, but was prevented from so doing by defendant who took possession under his chattel mortgage. Plaintiff then brought this action in which he had a verdict.

Held, that under sub-s. (a) of s. 26 of The Sale of Goods Act, R.S.M. 1902, c. 152, the defendant's title to the cattle was better than that of the plaintiff, as defendant had received the chattel mortgage in good faith and without notice of any lien or other right of the plaintiff in respect of the

cattle; and that the case was not within the exception provided for by sub-s. (b) of the same section, because Coaker was not a person who had "bought or agreed to buy the goods under a contract or agreement in writing, signed by him, providing that the property in or title to the goods should not pass to the buyer until payment in full of the price thereof." When Coaker took possession there was only a verbal promise by him that he would sign such a contract or agreement when called upon, but the statute requires that the writing should be signed before or at the time of the delivery of the goods, or so soon thereafter as to form part of one transaction.

Appeal allowed with costs.

T. R. Ferguson, for plaintiff. *Potts*, for defendant.

Full Court.] [July 29.

IN RE ASSESSMENT ACT, 1903, AND NELSON AND FORT SHEPPARD RAILWAY CO.

Assessment Act, 1903—Wild lands—Valuation of—Average value per acre—Assessor acting on instructions from superior officers—Exemption from taxation under—Jurisdiction of Court of Revision to deal with question of exemption.

Appeal by the company from the decision of a Court of Revision and Appeal. In assessing 500,000 acres of wild land, consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from his superior officers and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal evidence was taken and an average value of 45 cents per acre was fixed. An appeal was taken to the Full Court on the grounds that the valuation was too high, and that so far as some of the lands were concerned they were exempt from taxation under the Company's Subsidy Act, and on the argument counsel for the company asked the court to fix the assessable value of the lands at the specific sum of $47,986.23.

Held, per DRAKE, J.: That as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs.

Per IRVING, J.: The evidence did not enable the court to form any opinion as to the value of the land within the meaning of s. 51, and as the assessment was improperly levied at the outset the court should simply declare that there was no proper assessment in respect of which an appeal will lie.

Per DUFF, J., dissenting: 1. The evidence was adequate to enable the court to fix, as against the appellant, the assessable value of the lands.

2. The court has power to deal with the assessment even though it was not made in accordance with the statute.

3. In fixing the value of a tract of wild land a process of averaging is reasonable and a compliance with the statute.

Per DRAKE and IRVING, JJ., DUFF, J., dissenting: That by the operation of s. 3 of the Amending Act, with respect to all the lands granted to the company, the exemption from taxation conferred by s. 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th April, 1893, and that therefore the lands claimed to be exempt were assessable.

Per DUFF, J.: The Court of Revision under the Assessment Act, 1903, had no jurisdiction to decide whether or not the lands in question were exempt from taxation, and consequently the Full Court has no jurisdiction to deal with that question.

MacNeill, K.C., for the company. *John Elliott*, contra.

Richards, J.] MASSEY-HARRIS CO. *v.* MOLLOND. [August 15.

Sheriff—Negligence of bailiff—Liability for loss of stolen money—Satisfaction of judgment when sufficient goods seized—Sale under fi. fa. immediately after seizure.

Application by the executors of the estate of the defendant on notice to the sheriff and the plaintiffs for an order for the entry of satisfaction of the plaintiffs' judgment against the defendant under the following circumstances:—The sheriff having received a fi. fa. goods on the judgment, and also one for another creditor, sent warrants to his bailiff, Adams, to realize thereon. The defendant died, and his executors decided to sell his chattels by auction, and employed Adams, who was an auctioneer, to conduct the sale. Adams advertised the sale as being by order of the executors, to be held on April 5, 1901. On his arrival at the place of sale he seized the goods under the fi. fas. and notified the executors and their solicitor. The sale was then proceeded with, none of the buyers knowing anything about the fi. fas. Some of the chattels were paid for in cash and others by promissory notes made payable to the executors, the money and notes being handed over to Adams at the close of the sale.

The Union Bank of Canada had a mortgage on some of the chattels, and, at the request of the bank's solicitor, Adams agreed to hold the money and notes until the bank should be paid off by the executors out of other funds. Adams afterwards collected the amounts of the notes, and, instead of putting the money into a bank, he kept it along with the other money in an ordinary cash box in his office, from which it was subsequently stolen. After this, the executors paid off the bank's claim, and then paid the sheriff a sum which, with the money stolen from Adams, was sufficient to discharge both executions. Adams paid nothing to the sheriff on the executions, and the sheriff paid nothing to the plaintiffs, and claimed that he was not bound to account to them for anything beyond the sum received directly from the executors.

Held, following *Gregory* v. *Cotterell*, 5 E. & B. 571, and *Smart* v. *Hutton*, 8 A. & E. 563 n., that the sheriff was responsible for the acts of the bailiff and was bound to account for the money received by the latter.

A seizure of sufficient goods by the sheriff is in itself a discharge of the debtor: *Clerk* v. *Withers*, 2 Lord Raymond, 1072; and therefore a seizure of sufficient goods to make part of the debt is a discharge quoad that part. It was the duty of the bailiff to deposit the money in a bank for safe keeping, and it made no difference even if the executors had assented to the retention of the money to secure the claim of the bank.

The loss was the result of gross carelessness on the part of Adams, and that carelessness was, in law, the carelessness of the sheriff himself so far as liability to others was concerned.

Held, that the judgment had been discharged, that the signature of the plaintiffs to the satisfaction price should be dispensed with, and that satisfaction of the judgment should be entered; costs against the plaintiffs and the sheriff.

Robson, for plaintiffs. *Wilson*, for executors.

Province of British Columbia.

SUPREME COURT.

Full Court.] BORLAND *v.* COOTE. [April 18.

Statute of Frauds—Agreement for sale of land—Description of property—Latent ambiguity—Evidence to identify—Specific performance—Appeal—Introducing fresh evidence—Acquittal for perjury alleged to have been committed at civil trial—Proof of not allowed on appeal in civil action.

B., on behalf of D., negotiated with C. for the purchase of C.'s property on the north-west corner of Hastings Street and Westminster Avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price leaving the description blank for C. to fill in, as he did not know the Land Registry description, but adding the description, "north-west corner, etc.," below the space reserved for C.'s signature. B. took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt. Lots 9 and 10, block 10, were on the north-east corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the north-west corner and were owned by C. B. asked to have the agreement or receipt rectified or reformed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed.

Held, that it was the property on the north-west corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement.

For perjury alleged to have been committed at the trial by the defendant he was tried and acquitted before the hearing of the appeal, and, on the appeal, his counsel moved the Full Court be allowed to read the verdict of the jury in the criminal trial. The Court dismissed the motion IRVING, J., dissenting.

Martin, K. C., for appellant. *Davis*, K. C., and *Bowser*, K. C., for respondent.

Court of Criminal Appeal.] [June 21.

REX *v.* WONG ON AND WONG GOW.

Criminal law—Judge's charge to the jury—Murder—Manslaughter Definitions—Failure to instruct jury as to—Failure to object to charge —New trial.

Crown case reserved.

Held: 1. It is the duty of the judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and its cognate offences, if any. Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the judge's charge is immaterial.

2. After the case for the Crown and defence was closed, the Crown called a witness in rebuttal whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses, and which tended to weaken the alibi set up by the accused.

3. To allow the evidence was entirely in the discretion of the judge and there was no legal prejudice to the accused as he was allowed an opportunity to cross-examine and meet the evidence.

Conviction of murder set aside and new trial ordered.

Taylor, K.C., for the prisoners *Belyea*, K.C., for the Crown.

Duff, J.] MUIRHEAD *v.* SPRUCE CREEK MINING CO. [Sept. 20.

County Court—Stay of proceedings under s. 34—Whether applicable to proceedings under mining jurisdiction—Prohibition.

On an application for prohibition.

Held, allowing the application, that s. 34 of the County Court Act, which provides inter alia that if in any action of tort the plaintiff shall claim over $250.00, and the defendant objects to the action being tried in County Court and gives certain security, the proceedings in the County

Court shall be stayed, applies to proceedings in the County Court under the mining jurisdiction of that Court.

Belyea, K.C., for the application. *Kappele*, contra.

Book Reviews.

The Law of Waters and Water Rights, international, national, state, municipal and individual; including irrigation, drainage and municipal water supply. By HENRY PHILIP FARNHAM, M. L. (Yale), Associate Editor of The Lawyers' Reports, Annotated. Vol. 1. Rochester, U. S. The Lawyers' Co-operative Publishing Company, 1904. Canada Law Book Co., Toronto, Canadian Agents.

This book and Mr. Labatt's work on Master and Servant are the most exhaustive, complete and satisfactory law books which have been given to the press for many years past. They are similar in character and each of them tells us all that can be said on the subjects treated.

The work before us takes up the general subject of waters in every one of its numberless ramifactions, giving a complete analysis and exposition of everything with which water has a direct or a remote connection. It is evident that to accomplish this no labour has been spared, and it is claimed that every volume of every series of reports, American, Canadian, and English has been examined page by page. The result is certainly most satisfactory. The book is both analytic and synthetic, so that the practicing lawyer not only has before him the fundamental principles, but the application of these principles to the multitudinous variety of circumstances with which the courts have had to deal in connection with a subject which is as wide as the ocean, and as intricate as the rivers and streams which traverse the continents.

The author deals not only with the subjects which are ordinarily discussed in treatises on waters and water-courses, but takes up a variety of matters not hitherto included in such works, e. g., municipal water supply and sewage, questions between landlord and tenant as to water taxes, drainage water-pipe, etc.; how railroads are affected; questions of eminent domain; the involving and acquiring of water rights and injuries thereto; nuisances; surface waters, etc., etc.

The table of contents alone contains over thirty pages of closely printed matter. The examination of a work such as the one before us and the few others of a like character, fills one with amazement at such a display of dogged industry. We have in fact a complete encyclopaedia of the law, making it a waste of time to look elsewhere for anything that can be said on the subject.