Canada Law Journal.

VOL. XXXVIII. JUNE 1, 1902. NO. 11.

We regret to learn that Mr. Justice Ferguson has been incapacitated for work owing to illness, and has applied for six months' leave of absence. On dit that another learned judge, Mr. Justice Robertson, has also applied for leave of absence, it is said, as a preliminary to his retirement from the Bench.

It is interesting to note the establishment of the High Court of Justice for the Transvaal, which it is said will be opened on July 8th. It is to consist of four judges—Sir J. Rose Innes, and Mr Justice Solomon, of Cape Colony; Sir William Smith, lately judge in Natal; and Mr. J. W. Wessels. A single judge court will be established at Johannesburg, with High Court jurisdiction over the Witwatersrand. As to qualifications for admission to the Bar, English and Scottish barristers and advocates of the High Court of the late Republic are entitled to admission; also advocates from any British Colony after passing an examination, which we presume will be in charge of the Law Society, which has also been established. Offices will be organized for registration of deeds and of patents and trade-marks, and other machinery provided for the due administration of justice.

The *South African Law Journal* gives a portrait and sketch of the life of Sir James Rose Innes, K.C., K.C.M.G., who has recently been appointed Chief Justice of the Transvaal Colony. He is by birth and education a South African, born at Grahamstown Jan. 8, 1855. Both his father and grandfather held important public positions in Cape Colony. His career at the bar has been one of continued success, whilst he is also well and favourably known in politics. In 1890 he joined the first Rhodes Ministry as Attorney-General retiring three years later; and whilst occupying that position was instrumental in framing and passing several important public measures. He more recently became Attorney-General in the fourth Sprigg administration, which position he held until his appointment as Chief Justice. In 1901 he was selected as delegate

for Cape Colony to attend a conference in London to consider the question of a final Court of Appeal. Our contemporary says that "His name and fame guarantee that he will worthily and impartially occupy and discharge the functions of the high office to which he has been appointed, with dignity and honour, with credit to himself and great benefit to the country."

The question of the authority of counsel to compromise is discussed at some length by Mr. H. L. Bellot, B.C.L., in the English *Law Times* of 10th May last. We notice that the learned writer makes no reference to *Stokes* v. *Latham*. It will be seen from that article that in England also this particular point of law is in a most unsatisfactory condition. The writer concludes that the recent decision of the Court of Appeal in *Neale* v. *Gordon-Lennox* is correct, but at the same time is liable to be fraught with injustice to suitors, who are put to the necessity of rising in Court and publicly repudiating the action of their counsel if he is acting contrary to their wishes. This, he seems to think, is hard upon suitors of the fair sex who would naturally have considerable diffidence in discharging such a duty. One would think that the difficulty might be overcome in such cases by the judge inquiring of suitors present in Court if they were content with a proposed settlement. This would relieve the suitors from the embarrassment of spontaneously rising to protest. Where suitors do not attend in person, then, in the absence of express knowledge to the other side that their counsel is not following his instructions, they ought to be bound by his action, as being their accredited agent for the purpose; but then comes the difficulty that while other agents are responsible to their principals for damages occasioned by their acting contrary to instructions this particular agent is not liable.

THE BIRTH OF A NEW NATION.

The history of the dealings between civilized races is not a long record of unselfishness; on the contrary altruism in such matters has been more honoured in the breach than in the observance. Indeed, "omnes sibi malle melius esse quam alteri" might be written as an appropriate motto upon the annals of international

relations down to the close of the nineteenth century. It is with the consciousness of this painful fact strong upon us that we extend our warmest congratulations to our American cousins for the very handsome way in which they have carried out their ante-bellum protestations of disinterested friendship for the Cuban people. Very few imagined when the United States decided to intervene in behalf of the insurgents in 1898 that, in the event of American arms triumphing over the Spanish defences, the Cubans would be granted a prompt, free and untrammelled opportunity to prove that they possess the qualities whereof nations are made. Example the world over made for the contrary view. It is, furthermore, to be admitted that in view of the strategic importance of the island in time of war, a very cogent argument might have been made by the Americans for a claim of suzerainty at least ; and so when we find them renouncing even that privilege we feel that they have distinctly raised the level of international ethics.

On the 20th of last month the natal day of the Republic of Cuba was celebrated with all pomp and circumstance at Havana. The transfer of the control of the island from the United States Government to the Cuban Government was effected at high noon when the American flag was lowered by General Wood, assisted by General Gomez, from its position on the official buildings and that of the new republic hoisted in its stead. Thereupon the American warships and transports sailed away from "Cuba Libre."

The constitution of the latest addition to the family of nations is closely modeled upon that of its "guide, philosopher and friend." The President is elected for a term of four years, but may not be elected for more than two successive terms—a wise provision against the possibilities of dictatorship. There are provisions for a Vice-President, a Cabinet, and a Supreme Court of Judicature upon lines similar to those in such matters found in the American constitution. Perhaps it is hardly necessary to add here that while the public law of the country will thus conform to the American system, the supreme court and the inferior tribunals will administer the Spanish Civil law hitherto in force there as the basis of common rights and remedies. The Senate is composed of twenty-four members, four from each of the six provinces, chosen through electors for a term of eight years ; but half of the Senate is to retire every four years. A similar principle is applied to the House of Representatives, whose members are elected for a term of four

years, half of them to be chosen every two years. There are to be semi-annual meetings of Congress, the sessions not to be less than forty days in duration—so there will be ample opportunity for the exercise of native rhetoric, possibly a very useful vent for that perfervid temperament which the young, both of nations and of individuals, are prone to manifest. There is one innovation upon the American plan which may do admirable work in destroying sectionalism in the new republic, namely, there is no restriction in the Constitution as to the local residence of the members of either house of Congress.

We extend the felicitations of the Canadian bar to the Cuban republic, and express the hope that it has taken a useful and permanent place in the history of civilization in the Western Hemisphere.

MISTAKES AND DEFECTS IN WILLS.

Mistakes and defects in wills stand upon a somewhat peculiar footing. A will is a unilateral instrument intended to reflect the will of the testator, and no one else's, save so far as it is identical with that of the testator. A will however is frequently drawn by some other person than the testator, it is perchance entrusted to some other person for safe keeping, and it is consequently exposed to the danger of being improperly drawn, or got at, and tampered with after execution by some interested party, and thus it happens that after a man's death it may be discovered that the document which purports to be his will, may as it then stands for some reason or other not in all respects really be his will. The person who may have drawn it may have erred, or some fraudulent alteration, or interpolation, or obliteration may have been made in the instrument. It is obvious in such a case it would not do to reject the will altogether, for that would be often playing into the hands of those who might have a direct interest in creating the difficulty. How then are the defects on the face of a will to be overcome so that the real will of the testator may be vindicated?

Mistakes in wills are of two classes, viz.: (1) Mistakes which are correctible by the Court of Probate, and (2) mistakes which can only be remedied by a court of construction. Mistakes of the first class are such as are due to some positive fraud, or clerical

error or omission whereby the true intention of the testator has been purposely violated, or by the mistake of some other person has not been carried out.

According to the most recent authorities the power of the Probate Court is limited to striking out from the will any words improperly inserted contrary to the true intention of the testator, but it has no power to supply matters alleged to have been improperly omitted.

Defects corrected by Probate Court.—The Probate Court has struck out from a will propounded for probate a gift of a residue in favour of the writer of the will, the testatrix being almost blind and there being no independent proof of any instruction for such bequest: *Barton* v. *Robins*, 3 Phill. 455 n.; also a bequest in the legatee's own writing, the earlier part of the will being in the testator's own writing, and his capacity being doubtful, and there being no independent evidence of instruction for the legacy in question: *Billinghurst* v. *Vickers*, 1 Phill. 187; *Wood* v. *Wood*, Ib. 357, and see per Lord Cairns, *Fulton* v. *Andrew*, L.R. 7 H.L. at 461; *Baker* v. *Butt*, 2 Moore P.C. 317; *Barry* v. *Butlin*, Ib. 480. Also a bequest introduced after the death of a testator though pursuant to his expressed wish before death: *Nathau* v. *Morse*, 3 Phill. 529; *Rockell* v. *Youde*, Ib. 141. So also a portion of the will obtained by coercion: *Piercy* v. *Westropp*, Milward 495; and a bequest which the legatee by noise and clamour had prevented the testator from altering: *Maguire* v. *Marshall*, Milward 307, and a clause fraudulently introduced has been struck out: *Harrison* v. *Stone*, 2 Hagg. 549. Where the testator himself is responsible for a mistake or omission it would seem it cannot be corrected. Thus where a testator executed a will in which he gave to each of his servants two years' wages, and afterwards desired another person to transcribe it, which he did, the testator himself dictating and transposing some of the legacies, and after this latter paper was executed it was pointed out to the testator that the legacies to the servants had been omitted, and he then said it was of no consequence as they could be inserted in another will which he intended to make, but having died without executing any other will, it was held that the Probate Court could not include the legacies to servants as having been omitted by mistake: *Sandford* v. *Vaughan*, 1 Phill. 128.

In *Harter* v. *Harter*, L.R. 3 P. 11, an attempt was made to get rid of the word "real" whereby a residuary clause was limited to "real estate" instead of the testator's personal estate as was intended, and as was provided in the original instructions, but it was unsuccessful, because it appeared that the draft will had been left with the testator, and, on his suggestion, some alterations made in it, but not in the words of the residuary clause. Sir James Hannen said "I think it is not in the power of the court to supply words accidentally omitted from a will." In his opinion the Wills Act admits of no qualification and every part of a will must under its provisions be duly signed and attested as thereby provided, and he cites with approval Williams' Exors, 6th ed. 345, to the effect that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends. See also *Guardhouse* v. *Blackburn*, 1 P 109.

As a general principle where there is a variation between the draft and the executed will the latter must govern and the court will not decide that it is contrary to the intention of the testator, except on the clearest proof of the real intentions of the deceased and that the mistake or defect has happened either by some fraud practised on him, or by some act of commission contrary to his intention on the part of the person with whom he advised. In some of the older cases the Probate Court seems to have gone much farther than the later cases would warrant. Thus where a will consisting of thirty-three sheets numbered 1 to 19 and 21 to 34 (no. 20 being omitted by mistake) and the sense being imperfect, the court admitted to probate the sheet thus accidentally omitted: *Travers* v. *Miller*, 3 Add. 226; but see *Treloar* v. *Lean*, 14 P.D. 49; *Rees* v. *Rees*, 3 P. 84. So where in a draft will in the testator's own handwriting he had bequeathed £5,000, part of a sum of £60,000, to a nephew Richard Bayldon, but in the will as executed this bequest was omitted and no other disposition made of the £5,000 and the residue of a specified amount was bequeathed as if the bequest had been made, the court granted probate with the legacy in question of £5,000 to Richard Bayldon supplied: *Bayldon* v. *Bayldon*, 3 Add. 232, but this seems opposed to *Nathan* v. *Morse* and *Sandford* v. *Vaughan*, already referred to, and was before the Wills Act and would probably not now be followed. References in testamentary papers by mistake to prior revoked wills have been rejected: *Re Whatman*, 34 L.J.P. 17; *In*

re Anderson, 39 L.J.P. 55 ; but see *In re Stedman*, 6 P.D. 205 ; *Re Reade* (1902) P. 75 ; and a clause inserted per incuriam in a paper executed by the deceased and for which he had not given any instructions and of the existence of which clause he was ignorant was omitted from the probate : *In re Duane*, 2 Sw. & Tr. 590

The late Mr. Justice Butt in recent years in two cases undertook to correct a clerical error which appeared in a will and which was proved to have been made in the engrossment by mistake in copying by not only striking out the erroneous word but, also by substituting the word intended to be used. *In re Bushell* (1890) 13 P.D. 7, he substituted for the word 'British' the word 'Bristol' as the designation of an infirmary intended to be benefited by the will ; and in *Re Huddleston* (1890) 63 L.T. 255, it was proved that when the draft of the will was read over to the testator the word 'including' was altered by his direction to 'excluding,' and it was believed at that time that the alteration so made in the draft was correctly copied in the engrossment, and the latter was duly executed by the testator under that belief. It was found after his death that the word had been altered in a different part of the will through a clerical error. The executors applied to have the word altered by mistake restored as it stood before the alteration, and also to alter the word 'including' to 'excluding' as was intended by the testator. Butt, J., granted the first part of the application but refused the latter.

In the later case of *Re Reade* (1901) P. 190, Jeune, P.P.D., struck out the word 'revenue,' which had been inserted in the will by mistake for the word 'residue,' but he declined to insert the word 'residue,' and held that the cases of *Re Bushell* and *Re Huddleston*, supra, were not to be followed; and that though the court might strike out a word it could not properly substitute any other.

With regard to obliterations, interlineations or other alterations appearing on the face of the will, these, if made after the execution of the will, are void unless affirmed in the margin or otherwise by the signature of the testator and the attestation of witnesses : *Greville* v. *Moore*, 7 P.C. 320, and although in a deed the presumption of law is that obliterations, interlineations or other alterations appearing on it have been made before execution because they could not be made otherwise without fraud, and the law will not presume fraud. Yet in the case of wills the presumption is the other

way, because a will may be altered by a testator after execution without fraud or wrong. Hence in the case of wills, unattested alterations are as a general rule presumed to have been made after execution, and in the absence of positive evidence that such alterations were made before execution, they will (if important) be presumed to have been made afterwards and will be omitted from probate: *In re Adamson*, 3 P. 253; *In re Horsford*, Ib. 211, R.S.O. c. 128, s. 23. Generally speaking when there are alterations in pencil they will be regarded as merely deliberative, and will be rejected: *In re Hall*, 2 P. 256; *In re Adams*, Ib. 367; *In re Wyatt*, 2 Sw. & Tr. 494. But in *Re Tonge*, 66 L.T. 60, a printed revocation clause in a testamentary paper struck out with pencil was omitted from the probate because the testator had enclosed the document in a sealed envelope with instructions that it was to be opened at the same time as his will, so that the court was satisfied that the pencil mark had been made before the execution of the will and therefore gave effect to it, as also *In re Sykes*, 3 P. 26.

In the absence of any evidence that words written over erasures in a will were so written before the execution of the will, or codicil, if any, probate is granted with blanks wherever erasures occur, if the words erased cannot be ascertained: *Doherty* v. *Dwyer*, 25 L.R. Ir. 297. Where the words erased are still discernible they should be included in the probate: *Re James*, 1 Sw. & T. 238; *Jeffrey* v. *Cancer Hospital*, 57 L.T. 600; *In re Greenwood*, (1892) P. 7. Where however the words interlined and unattested were unimportant single words, each of which was required to complete the sentence to which it belonged, and they were apparently written with the same ink and at the same time as the rest of the will the court held that it was not bound to presume they were made after execution and included them in the probate: *In re Cadge*, L.R. 1 P. 543; *In re Hindmarch*, Ib. 307.

As is well known testators sometimes avail themselves of their wills as a vehicle for the abuse or vituperation of other people and efforts have been made to omit from probate abusive expressions contained in wills. Such expressions can hardly be classed under the head of mistakes or defects, nevertheless attempts have been made to exclude them from probate.

In a note to the case of *Re Whartnaby*, 4 N.C. 476, it is said that cases were mentioned in which Sir William Wynne and Sir John Nicholl had allowed offensive passages in a will to be struck

out, but Sir John Nicholl in *Curtis* v. *Curtis*, 3 Add. 33, declared that at least upon motion he had no authority to strike out what a testator had written, and he said that Sir William Wynne had rejected such an application on the part of a nobleman whose wife had made serious reflections upon him in her will. In *Re Honeywood*, L.R. 2 P. 251, an application of that kind also failed.

Mistakes correctible by court of construction.—In addition to the class of mistakes already referred to there is that class which can only be remedied by a court of construction. Mistakes of this kind are chiefly those where property purported to be disposed of, or the person intended to be benefited, is misdescribed in the will, and it then becomes a question for the court of construction to say whether, notwithstanding the misdescription in the will, the property really intended to be disposed of, will pass, or whether the person really intended to be benefited will take.

The general rule is that although a mistake in a deed may be corrected and the deed reformed so as to carry out the true intention of the parties, a mistake in a will cannot be corrected: *Powell* v. *Mouchett*, 6 Madd. 216; 22 R.R. 276. But though the court cannot actually correct a mistake in a will, it may be able sometimes to declare that notwithstanding the mistake it is to be read and construed as if the mistake had not in fact been made. Thus under a devise of "all and every part of my real property, viz., 26 in the 6th concession," lot 22 in the 6th concession was held to pass: *Doe d. Lowry* v. *Grant*, 7 U.C.Q.B. 125; and this case was followed in *Doyle* v. *Nagle*, 24 Ont. App. 162; under a devise of "200 acres of land the west half of lot 14," the west half though it contained only 100 acres was held to pass: *Holtby* v. *Wilkinson*, 28 Gr. 550. So also under a devise of "all my real estate comprised of the north-west quarter of lot number ten in the 6th concession," the north-west quarter of ten in the 5th concession was held to pass: *Wright* v. *Collings*, 16 Ont. 183, and see *McFadyen* v. *McFadyen*, 27 Ont. 598; *Hickey* v. *Hickey*, 20 Ont. 371; the words "all my real estate" being held sufficient to distinguish the case from *Summers* v. *Summers*, 5 Ont. 110, and *Hickey* v. *Stover* 11 Ont. 106; *Re Bain* v. *Leslie*, 25 Ont. 136. In *Young* v. *Purvis*, 11 Ont. 597, under a devise of the residue as follows: "lot 16 concession 7 N.H." it was held the north half of lot 16 in the 7th concession of Morris, passed; but where a testator devised "all that newly built

house being No. Sudely Place . . . with the piece of ground in the rear thereof" there being three other similar devises with the numbers in each case left blank, it was held that because it appeared that the testator had himself intended to select the house for each devisee, and the descriptions in each case were indistinguishable, all of the devises were therefore void for uncertainty; *Asten* v. *Asten* (1894) 3 Ch. 260; 51 L.T. 228.

From these cases it may be gathered that where an intention appears on the face of a will to dispose of all the testator's property, a devise of property which the testator did not own may pass property which the testator did in fact own, and as to which there would otherwise be an intestacy; but where an intention to dispose of all his property is not apparent, then the mere fact that the testator has purported to dispose of property which he did not own, will not be sufficient to enable the court to declare that property will pass which he did own and which by the will is not otherwise disposed of.

Many instances may be found in the books where misdescriptions of legatees have practically been corrected by the court of construction declaring the person really intended by the testator was entitled to the benefit thereof notwithstanding such misdescription, even though the misdescription has been of name, parentage, residence, occupation, and even sex, but those cases are too numerous to be referred to here. It may suffice to refer to one of the most recent, *Re Davis Hannen* v. *Hillyer*, 86 L.T. 292, where a testatrix amongst other charitable bequests for the blind, orphans, deaf and dumb, etc., made a bequest to "the Home for the Homeless, 27 Red Lion Square, London." She declared however that in the event of any question arising as to the designation of any of the charitable institutions, mentioned in the will, or of any doubt as to which one of two or more of such institutions it was intended to benefit the decision should rest absolutely with her executor; and she directed the residue of the estate to be divided rateably amongst "the various charitable institutions which are beneficiaries under this instrument." At the date of the will there was not and never had been any institution known as "the Home for the Homeless" or bearing a similar title. Buckley, J., held that there was sufficient on the face of the will to shew a general charitable intention on the part of the testatrix and that the legacy did not lapse and must be applied cy-près.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

RECEIVER—PUBLIC HOUSE—LICENCE IN JEOPARDY.

In *Charrington* v. *Camp* (1902) 1 Ch. 386, the plaintiffs were lessors of a public house of which the defendant was tenant, under an agreement whereby he bound himself not to do any act whereby the licence might be forfeited or lost, and upon quitting the premises to assign the licence to the plaintiffs, and he was to reside on the premises and keep them open and not to suffer the trading thereat to be suspended, and it was agreed if he committed any act whereby the licence should be jeopardized, the tenancy was to cease, and plaintiffs to be at liberty, without any notice, to re-enter. The defendant had closed the house and gone away. The plaintiffs' action was for possession of the premises, and for the appointment of a receiver of rents and profits thereof, and of the licence belonging thereto. The plaintiffs moved for the appointment of an interim receiver. The defendant contended that the plaintiffs could not succeed, because they had given no notice of forfeiture under the Conveyancing Act, s. 14 (R.S.O. c. 170, s. 13). Joyce, J., refused to determine that point, which he left to be disposed of at the trial, and made the order for a receiver as asked.

WORKMEN'S COMPENSATION ACT—EMPLOYEE OF CONTRACTOR—CONTRACT WITH MINE-OWNER TO OBEY REGULATIONS—MINE-OWNER, LIABILITY OF—EMPLOYERS AND WORKMEN ACT, 1875 (38 & 39 VICT., C. 90), S. 10—(WORKMEN'S COMPENSATION FOR INJURIES ACT (R.S.O. C. 160), SS. 2, 3).

Fitzpatrick v. *Evans* (1902) 1 K.B. 505, was an action by a workman's representatives against the owners of a mine to recover damages under the Employers and Workmen Act 1875, (R.S.O., c. 160). The deceased was employed and paid by a contractor with the mine owners in the work of sinking and walling a shaft in the latter's colliery. The deceased, however, as a condition of being allowed to work in the mine, had been required by the defendants to sign an agreement to observe the regulations laid down for the safety of the mine and for the guidance of the persons employed therein. It was contended that this agreement consti-

tuted the relationship of employer and employed between the defendants and the deceased so as to make the defendant liable under the Act. The jury found as a fact that the deceased was in the employment of the defendants, and judgment was given for the plaintiff at the trial, but it was set aside by the Divisional Court. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) agreed with the Divisional Court on the ground that there was no evidence on which the jury could properly find that the deceased was employed by the defendants; the Court of Appeal being of opinion that the case was covered by *Marrow* v. *Flimby B.M. Coal Co.* (1898), 2 Q.B. 588, (noted ante vol. 35, p. 102).

INSURANCE — ACCIDENT — PRINCIPAL AND AGENT — MISREPRESENTATIONS IN APPLICATION FOR INSURANCE.

Biggar v. *Rock Life Assurance Co.* (1902), 516, was an action on an accident policy. The defendants set up misrepresentations in the application for the policy. The application had been filled up by the defendant's agent, many of the answers filled in by him being false in material respects. The answers were filled in by the agent without the applicant's knowledge, he having signed the application without reading them. The application contained a declaration that the applicant agreed that the statements therein should form the basis of the policy, and the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the application. Wright, J., held that it was the duty of the applicant to read the answers, and that in filling them up the agent must be deemed to have been acting as his agent and not as agent of the defendants, and consequently the plaintiff could not recover. In *Sowden* v. *Standard Fire Ins. Co.*, 5 Ont. App. R. 290, there was an express agreement that if the insurers' agent filled up the application he should be deemed the insured's agent for that purpose, this case however shews that without any such agreement that is the legal result; and see *Knisely* v. *The British America Ass'ce Co.*, 33 Ont. 376.

PRACTICE —ATTACHMENT OF DEBT—ASSIGNMENT—PAYMENT INTO COURT BY GARNISHEE AFTER ASSIGNMENT.

In *Yates* v. *Terry* (1902) 1 K.B. 527, a debt due by the defendant to one Henderson amounting to £50 1s. 6d. was attached to answer a judgment recovered against Henderson of £37 18s. 4d.

A summons to pay over was issued on Feb. 21. On 27th Feb. Henderson assigned to the plaintiff Yates £16 17s. 8d. and on 28th Feb. the plaintiff gave notice of this assignment to the defendant. On 15th March a second garnishee summons was served on the defendant, and thereupon the defendant as garnishee paid into Court £37 18s. 4d, on the first summons and £12 3s. 2d. being the balance of the £50 1s. 6d. which sums were presumably paid out to the respective attaching creditors, the defendant having failed to set up the assignment to the plaintiff which was prior to the second garnishee order. The plaintiff claimed to recover the £12 3s. 2d. under this assignment notwithstanding the payment into Court by the defendant, the County Court Judge who tried the case gave judgment for the plaintiff but the Divisional Court (Lawrance and Kennedy, JJ.,) reversed the judgment holding that the first attachment bound the whole debt, and not merely sufficient of it to satisfy the claim of the attaching creditor (1901) 1 Q.B. 102 (noted ante vol. 37, p. 184). The Court of Appeal (Collins, M.R. and Romer and Mathew, L.JJ.,) have now reversed the Divisional Court, and hold that it was the duty of the garnishee to set up the assignment, and that he omitted to do so at the peril of having to pay the balance a second time.

PROBATE—SOLDIER'S WILL—WILLS ACT (1 VICT., C. 26) S. 11—(R.S.O. C. 128 S. 14).

In *Gattward* v. *Knee* (1902) P. 99, the plaintiff propounded as a soldier's will a letter written by a soldier at the time quartered in India whose battalion, on 7th September, 1899, had been warned for service, and two days later was ordered to mobilize for active service in South Africa, for which place it embarked on 19th September, 1899. The letter in question was undated but was written between September 8th and 19th, and was received in England on 2nd October, 1899. The letter contained inter alia the expression: "If you have a letter to say that I am killed, then the lot is for you, . . . You will receive the lot if I am killed in action, for I shall make out my will in your favour." No other document in the nature of a will was received and the writer died during the siege of Ladysmith. Jeune, P.P.D., held the will to be a soldier's will within the Wills Act (1 Vict., c. 26) s. 11, (R.S.O. c. 128, s. 14), and having been written after the order to mobilize had been given the testator was to be deemed in "actual service" at the time of its being written.

WILL—ABSOLUTE GIFT—SECRET TRUST—CHARITY—TRUST FOR PUBLIC BUT SO THAT THEY SHOULD ACQUIRE NO RIGHTS.

In re Pitt-Rivers, Scott v. *Pitt-Rivers* (1901) 1 Ch. 403, the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.,) have been unable to agree with the decision of Kekewich, J., (1901) 1 Ch. 352 (noted ante vol. 37, p. 300). The question was whether a charitable trust had been created enforceable by the Crown for the benefit of the public, under a will whereby the testator devised to his son absolutely a museum and pleasure ground which he had established and which in his lifetime he maintained for the benefit of the public, the testator also bequeathed an annuity of £300 to the son for the maintenance of the museum and pleasure ground. The Court of Appeal found that it was proved that the testator intended his son to maintain the museum and pleasure grounds and allow the public access thereto as before the testator's death and that the son accepted the gifts with the assurance that he would continue to use the property for the amusement and enjoyment of the public in same way that the testator had done, but that this was insufficient to create a trust enforceable against him, because the testator had expressly declared that the public were to acquire no rights.

LUNACY—FOREIGNER TEMPORARILY WITHIN JURISDICTION—JURISDICTION.

In re Burbidge (1902) 1 Ch. 426, a petition was presented praying an inquiry into the state of mind of an alleged lunatic. The lady in question was the widow of a citizen of the United States of America and was domiciled there. She had come over to England in June 1901, and on the voyage and after her arrival had manifested symptoms of insanity and was placed in an asylum. She had only some trifling chattel property in England, but was owner of real estate in New Jersey. Cozens-Hardy, L.J., had some doubts as to the jurisdiction of the Court in such a case, and referred the matter to the full Court (Williams, Stirling, and Cozens-Hardy, L.JJ.,) who held that there was ample jurisdiction to make the order referring to *In re Sottomaior*, L.R. 9 Ch. 677.

VENDOR AND PURCHASER—ADVERSE TITLE—CONSTRUCTIVE NOTICE—NOTICE OF TRUANCY

In *Hunt* v. *Luck* (1902) 1 Ch. 428, the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.,) have affirmed the

judgment of Farwell, J., (1901) 1 Ch. 45 (noted ante vol. 37, p. 186). The short point was whether notice to a purchaser of the property being in possession of a tenant was constructive notice of the rights of that tenant's lessor. Farwell, J., held that it was not, and the Court of Appeal agreed with him, and held that it is only constructive notice of the tenant's rights, but not notice of his lessor's, so also it is held that knowledge that the rents are paid to an estate agent does not affect a purchaser with notice of the rights of the person for whom they are received, nor put on him any obligation to inquire.

WILL—SPECIAL POWER—COVENANT TO EXERCISE SPECIAL POWER IN A PARTICULAR WAY.

In re Bradshaw, Bradshaw v. *Bradshaw* (1902) 1 Ch. 436, two points were decided by Kekewich, J., first, that where a testator exercises a special power of appointment by his will and it fails to take effect because it transgresses the rule against perpetuity, and by the same will the testator bequeathed property of his own to the person entitled in default of appointment, that in such a case the beneficiary is bound to elect between the property bequeathed and the property he would take by reason of the failure of the appointment. In arriving at this conclusion the learned judge dissents from the dicta of James, V.-C., and Pearson, J., to the effect that the doctrine of election can not be invoked in order to give effect to a distribution made in violation of the rules of law, which with all due deference to the learned judge, seems to be the better opinion. The second point determined is that a covenant by the donee of a special testamentary power to exercise it in a particular way is absolutely void and cannot be enforced against the covenantor or against his estate after his decease.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] DALLAS *v.* TOWN OF ST. LOUIS. [March 3.

Negligence—Personal injuries—Drains and sewers—Liability of municipality—Officers and employees of municipal corporation.

The act incorporating the Town of St. Louis, Quebec, gives power to the Council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendance of an officer appointed by the corporation."

Held, affirming the judgment appealed from, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the Council to make such connections, as he is neither an employee of the corporation or under its control.

Lafleur, K.C., and *Hibbard* for appellant. *Bisaillon*, K.C., and *Mignault*, K.C., for respondents.

Que.] PRICE *v.* TALON. [March 4.

Negligence—Saw mill—Injury to workman—Opening in floor—Fencing—Appeal—Findings at trial—Contributory negligence.

T. was working in a saw mill at a time when the saws were stopped in order to change any saws requiring to be replaced. One only, the butting saw, was left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen sat on this table, and T. going towards the end to find a seat slipped and fell into an opening in the floor where the deal ends were dropped on being cut off. On slipping he threw out his left arm which came against the saw in motion and was cut off. In an action for damages against the mill-owner the trial judge held that the latter was negligent in not protecting the opening and in not stopping the butting saw with the others. On an appeal from the decision of the Court of Review confirming the judgment at the trial,

Held, affirming said judgment, that the want of protection of the opening was negligence for which the owner was responsible.

Held also, STRONG, C.J., hesitante, that if T. was guilty of contributory negligence he was sufficiently punished by a division of the damages at the trial.

Held, per SEDGEWICK, DAVIES and MILLS, JJ., that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others. Appeal dismissed with costs.

Stuart, K.C., and *Bender*, K.C., for appellant. *Belcourt*, K.C., and *Martineau* for respondent.

B.C.] WARMINGTON *v.* PALMER. [March 7.

Negligence—Work in mine—Entering shaft—Code of signals—Disregard of rules—Damages.

A miner was getting into the bucket by which he was to be lowered into the mine when, owing to the chain not being checked, his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine-owners, the jury found that the system of lowering the men was faulty, the man in charge of it negligent, and that the engine and brake by which the bucket was lowered were not firm and proper for the purpose. Printed rules were posted near the mouth of the pit providing, among other things, that signals should be given by any miner wishing to go down the mine or be brought up by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells, and that the injured miner knew of the rules but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for plaintiff;

Held, reversing said judgment (8 B.C.R. 344) and restoring the judgment of the trial judge (7 B.C.R. 414) that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employers and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should, therefore, not have been granted.

Held, further, that, as the negligence causing the accident was not that of the employers themselves, but that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employers' Liability Act, R.S.B.C. 1897, c. 69.

Davis, K.C., and *Macdonald*, K.C., for appellant. *Clute*, K.C., for respondent.

Ont.] TORONTO RAILWAY CO. *v.* BALFOUR. [May 6.

Negligence — Street Railway — Verdict — General or special — Appeal — Matter of procedure.

In an action against The Toronto Railway Co. for damages arising from personal injuries caused by a collision between a street car and a wagon in

which plaintiff was riding, the grounds of negligence alleged against the Co. were: 1. The car was running unlawfully down the eastern track. 2. It was running at too great speed. The judge at the trial charged the jury, in case they found for plaintiff, to state what negligence they pointed to. The jury found the company responsible 1. Because the car was on the wrong track according to the general custom. 2. The motorman and his appliances were on the rear instead of at the front, the car being reversed. A verdict was entered for plaintiff on their findings. Before the Court of Appeal the company claimed that the verdict was special and reasons should not have been given but only facts stated from which the Court could decide. The Court of Appeal sustained the verdict holding that it was general not special. The company appealed to the Supreme Court of Canada.

Held, that the question whether the verdict was general or special was a matter of procedure only in which the Court would not interfere. Appeal dismissed with costs.

Jas. Bicknell, for appellant. *John Macgregor*, for respondent.

Ont.] PROVIDENT SAVINGS LIFE INS. CO. *v.* MOWAT. [May 6.

Life insurance — Terms of contract — Delivery of policy — Payment of premium.

A contract for life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, having ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, neglects to do so, he cannot, after paying the premium be heard to say that it did not contain the terms of the contract agreed upon. Judgment of the Court of Appeal, 27 O.A.R. 675, reversed.

Marsh, K.C., for appellant. *Riddell*, K.C., and *Harding*, for respondent.

Ont.] TOWNSHIP OF GODERICH *v.* HOLMES. [May 6.

Contract—Sale of goods—Delivery—"At" shed—"Into" shed or grounds adjacent.

A tender by H. to supply coal to the Town of Goderich pursuant to advertisement therefor contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto where directed by you," (that is by a committee of the Council.) The tender was accepted and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from the vessel on to the dock, about 80 feet from the shed, and separated from it by a road.

Held, reversing the judgment of the Court of Appeal that the coal was not delivered "at the coal shed" as agreed by the contract signed by the parties which was the binding document.

Held, also, that if the contract was to be decided by the terms of the tender the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto."

Garrow, K.C., for appellant. *Aylesworth*, K.C., for respondent.

Ont.] LANGLEY *v.* VAN ALLEN. [May 6.

Money paid—Voluntary payment—Insolvency of debtor—Action by assignee—Status.

S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim and took from S. notes aggregating in amount $708, all payable in September, which S. agreed in writing to pay at maturity and did pay. In November, 1899, S. assigned for benefit of his creditors when the arrangement between him and V. first became known and the assignee and other creditors brought an action to recover the said sum of $708 from V. as part of the insolvent estate.

Held, affirming the judgment of the Court of Appeal (3 O.L.R. 5) and that at the trial (32 O.R. 216) that S. having paid the notes voluntarily without oppression or coercion could not himself have recovered back the amount and his assignee was in no better position.

Held, per TASCHEREAU, J.—As anything recovered by the assignee would be for the benefit of his co-plaintiffs only who would thus receive what would have been an unjust preference if stipulated for by the agreement for extension, the plaintiffs had no locus standi in curia.

Geo. Kerr, for appellants. *Lynch Staunton*, K.C., for respondents.

Ont.] CANADA R. W. ACCIDENT INS. CO. *v.* MCNEVIN. [May 6.

Appeal—Amount in controversy—Interest before action—Accident insurance—Baggageman on railway—Conditions in policy—Hazardous occupation—Voluntary exposure to unnecessary danger.

A judgment for $1,000 damages with interest from a date before action brought is appealable under 60 & 61 Vict., c. 34, s. 1 (c).

An accident policy issued to M., who was insured as a baggageman on the C.P.Ry., contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed

for such increased hazard." (There was no classification of "exposure" by the company). "This insurance does not cover . . . death resulting from . . . voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakeman whose occupation was classed by the company as more hazardous than that of a baggageman.

Held, affirming the judgment of the Court of Appeal (2 O.L.R. 521) which sustained the verdict for plaintiff at the trial (32 O.R. 284) that as he was only performing an isolated act of coupling cars the insured was not injured in an occupation classed as more hazardous under the first of the above conditions.

Held, also, that as the evidence shewed that insured was in the habit of coupling cars frequently and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger," within the meaning of the second condition.

Nesbitt, K.C., and *Fripp*, for appellant. *Aylesworth*, K.C., and *McGarry*, for respondent.

EXCHEQUER COURT.

FINDLAY *v.* OTTAWA FURNACE AND FOUNDRY CO. [March 4.

Trade Mark and Design Act—R.S.C., c. 63—Industrial design—Court of Exchequer has jurisdiction to grant injunction to restrain infringement of—Expunging design from official register—Imitation—Inspection by judge.

Action for injunction to restrain the defendants from infringing the registered industrial design of the plaintiffs in respect of the "Royal Favorite" cooking stove by applying the said design or a colourable imitation thereof to the manufacture of the stove named by the defendants the "Royal National," or by selling or exposing for sale or use the said "Royal National" stoves, or colourable imitations of the "Royal Favorite" stoves, and to have the Register of industrial designs rectified by expunging therefrom the industrial design of the defendants' "Royal National" stoves.

Hogg, K.C., for plaintiffs. *G. F. Henderson*, for defendants.

BURBIDGE, J.—I do not think anything would be gained by reserving this case. It is largely a question of fact that is to be determined, and the question has been very fully discussed. I have no doubt that I have jurisdiction in the matter, and I think it clear that the plaintiffs have a registered design, in respect of which they are entitled to protection. As to the law bearing on the case, it is, I think, to be found in the cases mentioned during the argument, those referred to *In re Melchers*, 6 Ex. C.R., at p. 101, that is *Harper* v. *Wright*; *Holdsworth* v. *McCrea*; and *The Hecla*

Foundry Coy's. case; and the case of *Oliver* v. *Thornley*, 13 Cutl. P.C. 490, and other cases that have been referred to.

Then as to the question of imitation, it seems to me that the stove the defendants are making, the "Royal National," is, as it is now manufactured, an obvious imitation of the plaintiffs' "Royal Favorite," for which the latter have a registered design. I do not think I am called upon to express any opinion as to whether or not the defendants might make a stove similar in dimensions and shape to the "Royal Favorite" that would not be an imitation of the "Royal Favorite." The only question here is whether the "Royal National" is an imitation or infringement of the plaintiffs' registered design, and I think it is. I confine myself to that issue, and I hold myself free to deal, upon its merits, with any other case that may arise.

Now as to the remedy, I think the plaintiffs are entitled to an injunction against the manufacture and sale of the "Royal National" stove in the form in which it has been manufactured and with the design adopted by the defendants. I do not say that the defendants are not entitled to manufacture a stove to be called the "Royal National," only that they are not to manufacture it in the form and with the design shewn in evidence in this case. I agree with Mr. Henderson that if an injunction should be granted there should also be an order to expunge from the register of industrial designs the defendant's registration of the "Royal National." There will be such an order.

Province of Ontario.

COURT OF APPEAL.

Britton, J.] REX EX REL. TOLMIE *v.* CAMPBELL. [April 14.

Municipal corporations—Election of reeve—Quo warranto—Illegal voting.

At a municipal election for reeve at which upon a large vote the successful candidate obtained a majority of six, it was shewn that a widespread belief prevailed among the electors of the right to vote at each subdivision in which the name of the elector appeared; that four electors had in fact voted twice, and that several others had received ballot papers within a polling booth, after having already voted for reeve.

Held, that the statutory presumption arising under the Municipal Act, R.S.O. 1897, c. 223, s. 162, sub-s. 3, did not apply in proceedings to set aside an election, and that as owing to the destruction by the clerk of the ballot papers pursuant to the provisions of the Act, it was impossible to tell whether more than four voters had voted twice, the election should not

be set aside, the voting twice by four electors not having in the opinion of the Court affected the result.

Held, also, that if as alleged, the respondent had himself voted twice, this was not a cause for setting aside the election; voting twice not being in itself a corrupt practice, and the commission of that offence not being, under the statute, a disqualification for office during the current year.

Held, also, that there being strong reasons to believe that the relator had himself voted more than once, and there being undoubted evidence that he had advised other electors to vote more than once, he could not successfully urge this objection against the validity of the election.

St. Clair Leitch, for relator. *Du Vernet*, for respondent.

Maclennan, J. A.] FRANKEL *v.* GRAND TRUNK R.W. Co. [May 5.

Practice—Appeal—Supreme Court—Claim and counterclaim.

The plaintiff claimed $1,500 damages for delay in delivery of iron. The defendants besides denying the charge of non-delivery in due time, counterclaimed for $1,223 demurrage. At the trial judgment was given for the plaintiff for $1,000 and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiff's counsel stated that the plaintiff's claim on the reference would be less than $1,000 and contended that no appeal lay.

Held, however, that as the plaintiff claimed $1,500 and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of $1,000, so that the appeal lay.

Held, also, that upon the counterclaim the sum of $1,223 was involved and that an appeal lay in respect thereof.

H. E. Rose, for defendants. *James Baird*, for plaintiff.

Full Court.] REX *v.* D'AOUST. [May 8.

Evidence—Accused testifying on his own behalf—Cross-examination as to previous convictions.

An accused person, who, on his trial for an indictable offence, is examined as a witness on his own behalf is, except so far as he may be shielded by some statutory protection, in the same situation as any other witness as regards liability to and extent of cross-examination, and may be cross-examined as to previous convictions.

Cartwright, K.C., for Crown.

From Boyd, C.] [May 8.

MONTREAL AND OTTAWA R.W. CO. *v.* CITY OF OTTAWA.

Railway — Highway crossing — Compensation to municipality — Private ownership of highway—Construction of railway—"At or near" city—Power to take through county—Statutory provisions.

The plaintiffs were authorized by 47 Vict., c. 84 (D.), to lay out, construct, and finish a railway, from a point on the Grand Trunk Railway in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott and Russell, and also to connect their railway with any other railway having a terminus at or near the city of Ottawa.

Held, 1. "At or near the city of Ottawa" should be read as "in or near the city of Ottawa," and the plaintiffs were authorized to carry their line to a point in the city and to connect it with the line of the Canadian Pacific Railway Company in the city.

2. The plaintiffs had power, by implication, to take their line into the county of Carleton.

3. The portion of the Richmond road (or Wellington street) within the limits of the city of Ottawa which the plaintiffs' line crossed, was not the private property of the defendants; and the plaintiffs, having taken the proper proceedings under the Railway Act of Canada and being duly authorized to cross that highway, were not bound to make compensation to the defendants for crossing it.

Judgment of BOYD, C., 2 O.L.R. 336, affirmed.

Aylesworth, K.C., and *McVeity*, for appellants. *Wallace Nesbitt*, K.C., and *Curle*, for respondents.

Full Court.] REX *v.* HANRAHAN. [May 8.

Criminal law—Keeping disorderly or common betting house on race track of incorporated association—Betting at—Conviction—Code ss. 197 & 204.

The defendant was tried before a police magistrate, charged with keeping a disorderly or common betting house, found guilty and convicted. In a case stated by the magistrate after leave granted in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper: that the accused appeared and he found him to be the keeper: that the house was owned by a joint stock company of which the accused was president and was situated on the race track of an incorporated association: that there were about thirty persons betting with the accused and his assistants, some on races then in progress in the State of New York with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association.

Held, that the offence was the keeping of a house for the purposes prescribed by s. 197 of the Code, and that the facts proved brought the accused within its danger and he was rightly convicted.

Held, also, that sub-s. 2 of s. 204 of the Code stands by itself and that the exception contained in it is expressly limited to the first part of that section and it should not be read into s. 197.

Cartwright, K.C., for Crown. *Johnston*, K.C., for accused.

Full Court.] GUNN *v.* HARPER. [May 12.

Judgment—Date of—Amendment—Death of plaintiff between argument and judgment.

The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument. *Turner* v. *London and South-Western R. W. Co.*, L.R. 17 Eq. 561, and *Ecroyd* v. *Coulthard* (1897) 2 Ch. 554, followed.

Delamere, K.C., for defendants.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Street, J.] [May 9.

CANADIAN BANK OF COMMERCE *v.* ROLSTON.

Execution—Fieri facias — Unassigned dower — Equity of redemption—Execution Act, ss. 29, 30, 33.

The defendant's husband died in 1899 intestate, leaving the defendant and two children surviving, and being owner in fee simple of the equity of redemption in a farm subject to a mortgage. Consequently the defendant upon his death had her election not yet exercised between taking her dower in the equity of redemption or taking an undivided one-third of the land absolutely, subject to the mortgage, as tenant in common with her children, the heirs at law.

Held, that in which ever way the defendant elected her interest was not saleable by the sheriff under a writ of fieri facias.

The interest of one of several shares in an equity of redemption cannot be sold under a fi. fa., nor is there any authority under the statutes in a sheriff to sell a widow's dower in an equity of redemption.

A woman having a right to dower which has not been assigned, although she is entitled to redeem a mortgage to which her dower is subject is not possessed of an estate in land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption," within s. 29 of the Execution Act. Her interest does not come within s. 30 of that Act, and therefore is not saleable under it, nor under s. 33.

Held, however, that the execution creditor should have proceeded under Consolidated Rules 1016, 1017 and 1018, and not by action to obtain the aid of the Court in respect to his execution.

H. J. Scott, K.C., for plaintiffs. *Ludwig*, for defendant.

Master in Ordinary.] [April 15.

RE DIAMOND MACHINE AND SCREW CO.

Winding-up order—Arrears of taxes—Right of corporation to sue—Leave to distrain after liquidation.

On December 14, 1901, an order was made for the winding up of the company under the Dominion Winding-up Act. On January 6, 1902, the collector of taxes put in a distress for arrears of taxes, which was afterwards withdrawn as a violation of the provisions of the Winding-up Act. By an arrangement between the solicitors, the warrant was withdrawn on the condition that the position of the corporation was not to be prejudiced Subsequently the assets of the company were sold, and the corporation now make an application, nunc pro tunc, for leave to issue distress.

Held, that as the corporation is restricted from suing for taxes until it is shewn that the amount cannot be recovered in the special manner provided by the Assessment Act, refusing the application would deprive the corporation of their right of action, which is contingent on the failure of their distress, and it would therefore operate as a denial of justice. In view of the agreement above referred to, the proper order would be for the liquidator to pay the amount of taxes due, but not the penalty claimed which is in the nature of damages, nor the bailiff's fees.

Chisholm, for the collector of taxes. *James Bicknell*, for the liquidator

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Falconbridge, C.J.K.B., Street, J.] [April 20.

MONRO *v.* TORONTO RAILWAY CO.

Infant—Lease by—Repudiation of, on attaining full age—Partition—Parties—Exclusion of tenant in common—Mesne profits—Damages.

Plaintiff, while an infant, joined with an adult brother and sister in a lease of a park property, in which all three were tenants in common, for a period of ten years to the defendants, a street railway company, who pulled

down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it and brought crowds of people there. During the term he came of age and at once repudiated the lease, refusing to be bound by it and effected a partition with the other two tenants in common of the land (to which the defendants were not parties). In an action by the plaintiff against the Railway Company only, for possession of his part of the land under the partition: that the partition be declared binding, or for a new partition between him and the Company, for a declaration that the lease was not binding on him, and that he had been excluded from possession and for mesne profits and damages,

Held, 1. The partition made could not be declared binding on the Company who were not parties to it.

2. The brother and sister were not necessary parties to any new partition between the plaintiff and the Company.

3. The Company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and he was entitled to recover mesne profits from the time he became of age, and damages, and a partition was ordered between him and the Company for the residue of the term.

Judgment of MEREDITH, C.J.C.P., reversed.

C. Millar, for appeal. *James Bicknell*, contra.

Divisional Court.] [April 23.

BASTON *v.* TORONTO FRUIT VINEGAR COMPANY.

Contract—Acceptance—Purchase of goods—Acceptance by delivery.

The plaintiff who had had previous dealings with the defendants, wrote to them on May 5th asking them if they were going to buy cucumbers that year, and what they were going to pay for them; adding, please let me know as I want to make a contract with someone for them, as I want to put in quite a few this year." The defendants replied: "We are pleased to learn that you are going to do a lot of growing this year and will be pleased to take all you grow at the same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants who accepted them and paid for them, nothing being said at the time of any contract between the two parties.

Held, that the defendant's letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged.

Carlill v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, distinguished.

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

S. B. Woods, for plaintiff. The defendants were not represented.

Boyd, C., Meredith, C.J.C.P.] [May 15.

REX *v.* ST. PIERRE.

Municipal corporations—By-law—Transient traders—Taking orders for goods—Conviction—Certiorari—Statute taking away right to—Want of jurisdiction.

There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at a hotel and taking orders there for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited.

Notwithstanding the amendment to s. 7, of the Ontario Summary Convictions Act, by s. 14 of 2 Edw. VII. c. 12, taking away the right to certiorari; a conviction made by a magistrate without jurisdiction may be removed by certiorari; and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is ultra vires of the statute which gives the power to pass a by-law, there is such absence of jurisdiction as warrants the issue of a certiorari.

Du Vernet, for defendant. *Aylesworth*, K.C., for prosecutor.

Boyd, C., Meredith, C.J.C.P.] [May 19.

IN RE SNURE AND DAVIS.

Landlord and tenant—Overholding Tenants Act—Summary order for possession—Review by High Court—Evidence—Breach of covenant in lease—Notice specifying—Necessity for.

Under the Overholding Tenants Act, R.S.O. 1897, c. 171, two things must concur to justify the summary interference of the County Court Judge, the tenant must wrongfully refuse to go out of possession, and it must appear to the Judge that the case is clearly one coming under the purview of the Act.

It is only the proceedings and evidence before the Judge, sent up pursuant to the certiorari, at which the High Court may look for the purpose of determining what is to be decided under s. 6 of the Act.

Where there was nothing in the evidence to shew that the tenants had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession.

Per BOYD, C.:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by s. 13 of the Landlord and Tenants Act, R.S.O. 1897, c. 170, which is applicable to summary proceedings under the Overholding Tenants Act.

George Kerr, for tenants. *Thomas Mulvey*, for landlord.

Boyd, C.] [May 19.

IN RE CANADIAN PACIFIC RAILWAY AND CITY OF TORONTO.

Landlord and tenant—Lessee of city—Liability to pay taxes—Usual covenant—Assessment Act, s. 26.

Property of a city municipality, when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (R.S.O. 1897, c. 224, s. 7, sub-s. 7); and such tax is a tenant's tax payable by him and not in any event payable by the landlord as between him and the tenant.

S. 26 of the Assessment Act (R.S.O. 1897, c. 224) as to tenants deducting taxes from their rent has no application to such a case, as it applies only to taxes which can be legally recovered from the owner. The reason of the rule embodied in that section disappears when the property is in the hands of the landlord exempt, and becomes liable to be taxed only when in occupation of a tenant.

Semble, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner" within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee.

Where the municipality had entered into an agreement to grant a lease for a rent specified but no mention had been made of taxes.

Held, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity and exercising its sovereign power to lay taxes upon the property when no longer exempt by reason of its being under lease. Taxes and rent are distinct things and collectable by the corporation in different capacities, and the imposition of the yearly taxes is not a derogation from or inconsistent with the contract.

A covenant by a tenant to pay taxes is a "usual" covenant, and it lay upon the tenant here objecting to give it to shew by competent evidence that it was not so in such a case as that in question here or in this country, which the tenant had failed to do.

Armour, K.C., and *MacMurchy*, for tenant. *Robinson*, K.C., and *Fullerton*, K.C., for city.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] McDONALD *v.* McDONALD. [April 7.

Donatio mortis causa—Cash in bank on deposit receipt—Delivery of receipt and orders—Held good assignment—Transfer of fund held to carry interest—Costs.

M. in his life time deposited with the Union Bank of Halifax the sum of $6,000 on deposit receipt numbered 2793, to be accounted for by said bank to said M. only upon production of the receipt. During his last illness M. signed three orders directing the bank to pay the sum of $2,000 out of said deposit receipt to each of the three individuals named in the orders, and delivered the orders together with the deposit receipt to D. M. to be delivered to the persons named. D. M. delivered one of the orders to the wife of M., for whom it was intended, and retained the others for the other parties named. On appeal from the judgment of the learned trial judge holding that there was not a good donatio mortis causa of the deposit receipt and orders or cheques,

Held, 1. Allowing the appeal with costs and determining the issue the other way, that the evidence shewed an intention on the part of M. to give the donees the fund represented by the deposit receipt, and that the delivery of the orders with the receipt constituted an assignment of the fund.

2. The delivery to D. M. for the benefit of the three parties mentioned was sufficient.

3. The omission on the part of M. to make any provision for distribution of the interest due on the deposit was merely a matter of defective enumeration, and was not to be regarded as indicating an intention on the part of M. not to give the deposit receipt or the sum represented by it.

Russell, K.C., and *Harris*, K.C., in support of appeal. *Borden*, K.C., and *Chisholm*, contra.

Full Court.] REX *v.* BEAGAN. [April 7.

Canada Temperance Act—Conviction—Evidence to support—Restraint upon review on certiorari—Costs.

A conviction for a violation of the Canada Temperance Act was attacked on the ground that there was no evidence to support the conviction.

Held, 1. There having been an adjudication by a tribunal having jurisdiction over the subject matter, and no defect appearing on the face of the proceedings, that the Court would not on certiorari quash such adjudica

tion on the ground that any fact however essential had been erroneously found.

2. The case was all the stronger in favour of supporting the conviction inasmuch as the statute imposed a restraint upon review by certiorari.

3. The order for the certiorari must be discharged with costs including costs incurred on the motion before the Master and upon the certiorari, and also the costs upon the application to the Court, and the papers remitted to the magistrate for such further proceeding as might be necessary or proper in the premises.

The Queen v. *Walsh*, 29 N.S.R. 521; *The Queen* v. *Stevens*, 31 N.S.R. 124; *The Queen* v. *The "Troop" Co.*, 29 S.C.R. 673, followed.

Power, in support of application. *Rogers*, contra.

Full Court.] [April 7.

ATTORNEY-GENERAL EX REL. GUILD *v.* WAVERLEY GOLD MINING CO.

Mines and minerals—Proceedings to forfeit lease—Failure to give notice to lessee—Forfeiture set aside—Address of applicant for lease—Substantial compliance—Laches.

The Nova Scotia Mines and Minerals Act of 1892, c. 1, s. 152, requires "all applicants for leases or licenses under this chapter" to furnish the Commissioner of Mines with their address, which shall be registered, and all summonses, notices, etc., which require to be served under the Act "shall be considered served if sent to such address."

By the terms of the amending Act of 1893, c. 2, s. 10, the Commissioner of Mines is not required to send notices of default of payment to any lessee unless previous to such default such lessee shall have given written notice to the Commissioner of his post office address.

A lease of gold mining areas held by the relator G. was forfeited for alleged non-compliance with the provisions of s. 152 of the Act of 1892. The forfeiture was entirely ex parte, no notice being given to the lessee that rent was overdue or that any proceedings would be taken to forfeit the lease.

The lease in question was granted in 1890, at which time there was no provision in force requiring an applicant for a lease to give his residence or post office address, but the evidence shewed that as a matter of fact the name, address and occupation of G. were indorsed on his application and were registered in a book kept in the office of the Commissioner for some time afterwards. No further address was given.

Held, 1. There having been a substantial, if not a literal compliance with the provisions of the statute on the part of G., the forfeiture of his lease without notice sent to the address given by him was illegal and void and must be set aside.

2. As the Act imposed a forfeiture and affected individual rights it must be given a strict construction, and the words "after the passage of this

Act" could not be read into it so as to require G. to give a second notice, and, in default thereof, to deprive him of the rights given him under his lease.

3. The doctrine of laches as affecting the application to set aside the forfeiture had no application, this not being an action invoking the equitable assistance or interference of the Court, but an official information, on the relation of G., based upon his legal rights, in which he required no equitable assistance.

Borden, K.C., and *F. H. Bell*, for appellant. *W. A. Henry*, for respondent.

Full Court.] ATTORNEY-GENERAL *v.* LOVITT. [April 7.

Succession Duty Act—Acts 1895, c. 8, s. 5—Provincial debentures exempt from taxation held subject to payment of succession duty.

A part of the estate of L., deceased, consisted of debentures of the province of Nova Scotia, issued under the provisions of a statute of the province which exempted them from taxation for provincial, local or municipal purposes.

Held, (per WEATHERBE, J., GRAHAM, E.J., and MEAGHER, J., MCDONALD C.J., and RITCHIE, J., dissenting,) that, notwithstanding the exemption from taxation under the provisions of the Act, the debentures in question must be included in the valuation of the estate for the purpose of determining the amount payable to the Government of the province under the Succession Duty Act. Acts of 1895, c. 8, s. 5.

A. Mackay, for Attorney-General. *W. B. A. Ritchie*, K.C., for executors.

Full Court.] ANDERSON *v.* HICKS. [April 7.

Dominion election—Presiding officer—Refusal to deliver ballot to voter—Liability for—Malice Burden of proof as to—Judicial capacity—Non resident's oath — Not applicable to voter residing in another province.

Plaintiff, who resided at St. John, in the Province of New Brunswick, was a property owner, and entitled to vote at Dalhousie, in the County of Annapolis and Province of Nova Scotia, where his name appeared on the list of voters as a non-resident. Plaintiff presented himself before the Deputy Returning Officer at Dalhousie at the last Dominion election and demanded a ballot paper, but the officer refused to deliver a ballot paper or to permit plaintiff to vote unless plaintiff took the non-residents' oath.

Held, that the oath proposed was not applicable to the case of a property owner residing in another province, and that the officer was wrong in his refusal to permit plaintiff to vote.

Per RITCHIE, J., MCDONALD, C.J., concurring (affirming the judgment of the trial judge),

Held, 1. Plaintiff's right to vote being clear defendant was responsible in damages for his refusal to permit him to do so.

2. Defendant was merely a ministerial officer to carry out the provisions of the Act, and in undertaking to determine plaintiff's right to vote he was not acting in a judicial capacity.

3. Even assuming that defendant was acting in any respect in a judicial capacity, that his action in refusing the ballot paper, not being bona fide, but being wilful and corrupt, the action was maintainable, even on the theory that proof of malice was necessary.

Per WEATHERBE, J., and GRAHAM, E. J.

Held, that defendant was a public officer having a quasi judicial duty to perform, and that he could not be made liable for an error of judgment.

Held, that in order to make defendant liable malice must be shewn; that the burden of shewing malice was on plaintiff, and that the evidence was not sufficient for that purpose.

Wade, K.C., for appellant. *J. J. Ritchie*, K.C., for respondent.

Full Court.] REX *v.* BEAGAN. [April 8.

Canada Temperance Act—Conviction—Power of Court to review—Minute and record of conviction—Costs of distress and conveying to jail—Discretion of magistrate as to.

A conviction for violation of the Canada Temperance Act was attacked on the ground that the record of conviction did not agree with the minute upon which it was based, the record providing for costs and charges of conveying to jail, which was not provided for in the minute; and upon the further ground that the summons, information, minute of conviction and record of conviction were not, nor was either of them in accordance with the forms provided in such cases.

Held, 1. As the magistrate who made the minute also made the conviction, and as the conviction did not impose a penalty greater than that authorized by the statute, and was made for an offence against one of the provisions of the statute, the Court, by the express words of the Act, s. 117, was deprived of power to determine that the conviction was insufficient or invalid whether there was or was not a mistake as to costs, and whether the minute did or did not refer to the costs complained of.

2. Following *The Queen* v. *Vantassel*, 34 N.S.R. 79, that it was not necessary for the magistrate to insert the provision as to costs of distress and conveyance to jail in the minute, it being fixed by the statute.

3. The magistrate had no discretion to adjudicate in regard to it or to deal with it.

4. The provision as to costs being properly set out in the conviction its insertion in the minute was unnecessary and immaterial.

Power, in support of motion. *Rogers*, contra.

Full Court.] [May 6.

THE TOWN OF LIVERPOOL *v.* THE LIVERPOOL, ETC., R'Y. CO., LTD.

Municipal corporation—Control of streets—Railway crossing—Regulation requiring erection of gates—Power to make—By-laws—Towns Incorporation Act—R.S. (1900) c. 71, ss. 263, 264.

By the Act amending the Act of incorporation of the defendant company the company was given the right to lay its tracks across the streets of the plaintiff town provided that before doing so the consent of the town council should first have been obtained. On application by defendant to the town council for permission to cross one of the streets of the town a resolution was passed granting the application, "subject to such regulations as the town council may from time to time make to secure the safety either of persons or property." Subsequently the town council passed a resolution requiring the company to forthwith erect and maintain two gates of the latest approved pattern of railway gates on and across the street on either side of the track. Defendant failed to comply with the resolution so made. In an action by the town:—

Held, 1. The regulation was one that it was within the powers of the town council to make.

2. The town council having a special interest in the subject matter the action could be brought in the name of the town without joining the Attorney-General.

3. The regulation in question, being made by virtue of a power given by a special Act, was not, in the absence of express words to that effect, a by-law of the town, which required the assent of the Governor-in-Council before going into operation.

4. Such assent was required only in connection with the cases specially mentioned in the Act: Towns Incorporation Act, R.S. (1900) c. 71, ss. 263, 264.

RITCHIE, J., dissented.

W. B. A. Ritchie, K.C., for appellant. *W. M. Fulton*, for respondent.

Full Court.] CONRAD *v.* CORKUM. [May 6.
WHIFFORD *v.* CORKUM.

Fraudulent conveyance—Subsequent validation—Priority—Consideration—Future support—Not sufficient.

In 1877 C. made a conveyance by way of mortgage to H. The conveyance was made without consideration and in fraud of creditors, and was voidable as against creditors and subsequent purchasers for valuable consideration. In 1896 H., at the request of C., assigned the mortgage so made to W., who was a creditor of C. and pressing for payment.

Held, that the mortgage, although fraudulently made in the first instance, was validated by the assignment to W. for valuable consideration.

Held, 1. The giving of time by W. to C. in connection with the antecedent indebtedness was sufficient consideration to support the assignment. But nevertheless that the validating of the mortgage would not affect the right to priority of the party claiming under a second mortgage made by C. previously to the assignment to W.

2. Following *McNeil* v. *McPhee*, 31 N.S R. 140, that a deed made by C., the sole consideration for which was the future support of the maker and his wife by the grantee, was not founded upon valid consideration within the Statute of Elizabeth.

McLean, K.C., for (defendants) appellants. *Wade*, K.C., and *Paton*, for (plaintiffs) respondents.

Province of New Brunswick.

SAINT JOHN PROBATE COURT.

Trueman, J.] RE JAMES ROBERTSON. [May 3.

Letters of administration—Quebec will—Notarial form.

Where a will is in natural form and in the custody of a notary in the Province of Quebec, letters of administration with a certified copy of the will annexed will be granted on proof by affidavit of the death and domicile of the testator, of the law of Quebec, and of the original will being executed in accordance therewith, that the original will is in the custody of a notary in that province, and that the executors named in the will are acting thereunder.

W. H Trueman, for the application.

Province of Manitoba.

KING'S BENCH.

Bain, J.] LING *v.* SMITH. [April 23.

Real Property Act—Petition of caveator—Security for costs—Practice—Irregularity—King's Bench Act; Rule 335.

The caveatee, having applied for a certificate of title under "The Real Property Act" for the land in question, upon which the cavetor held a registered mortgage to secure $193 and interest, procured the service upon the caveator of a notice under the Act from the District Registrar

calling upon the cavetor to take proceedings to prove his claim under his mortgage. The caveator then filed his petition under the Act to maintain his mortgage and, being resident out of the jurisdiction, the caveatee took out a præcipe order requiring the caveator to give security for costs.

This was an appeal from an order of the referee refusing to set aside the præcipe order for security. The Real Property Act, s. 31, provides that when land subject to mortgage is brought under the new system, all rights, remedies and matters of contract between the mortgagor and mortgagee in relation to such land shall remain intact as if such land were under the old system; and the cavetor, having filed an affidavit that there was due to him $200 on the mortgage, urged that he was in the position of a defendant brought into Court by the caveatee to litigate his claim, and that in any event the amount due under the mortgage was a sufficient asset within the jurisdiction to answer any claim for costs. The proceedings in the Land Title Office were not before the Court.

Held, dismissing the appeal, that it must be presumed that the District Registrar had good reason for causing the notice to be served, that the caveator was the actor in the proceedings in Court, and that as the caveator claimed there was nothing due on the mortgage, and that the caveator was out of the jurisdiction, the ordinary rule must be applied, and he must give security for costs.

Armstrong v. *Armstrong*, 18 P. R. 55, distinguished on the ground that, in that case, there was no dispute as to the existence of sufficient assets belonging to the plaintiff within the jurisdiction to meet any liability for costs.

Objection was taken to the regularity of the præcipe filed by the caveatee on taking out the order in that, being his first proceeding in the matter, his place of residence and description should have been endorsed on it as required by the practice of the Court.

Held, that the objection was only a technical one and that, as it did not appear that the interests of the caveator had been or would be affected by the irregularity, if it were one, no effect should be given to the objection. Rule 335 of the King's Bench Act.

Affleck, for caveator. *A. C. Ewart*, for caveatee.

Killam, C.J.] KING *v.* YOUNG. [April 25.

Criminal law—Criminal Code, ss. 195, 198—Bawdy house.

This was a motion for a writ of habeas corpus on behalf of the prisoner who was convicted before a police magistrate on the charge of unlawfully keeping a bawdy house. There was evidence that the prisoner was a prostitute and lived in a rented room kept by her for purposes of prostitution, but there was no evidence that any other female occupied or resorted to the premises in question for such purposes.

Held, following *Singleton* v. *Ellison* (1895) 1 Q.B. 607, Wharton's Criminal Law, ss. 1449, and Bouvier's Law Dict. tit. "Bawdy House," that there can be no conviction of a female for keeping a bawdy house unless it is proved that it is occupied or resorted to by more than one female for purposes of prostitution.

Bonnar, for the prisoner. *Campbell*, K.C., for the Police Magistrate. *Patterson*, for the Crown.

Province of British Columbia.

SUPREME COURT.

Full Court.] IN RE FLORIDA MINING COMPANY. [Nov. 7, 1901.

Winding-up—Order for whether final or interlocutory—Appeal—Security —Demand for, after expiration of time for furnishing—Waiver.

Sec. 27 of the British Columbia Companies Winding-up Act, 1898 requires, in an appeal from a winding-up order, the appellant within eight days to make a deposit or give security to prosecute the appeal and pay such damages and costs as may be awarded the respondent. The solicitors for both appellant and respondent were unaware of this provision, and after the expiration of the eight days respondent's solicitors demanded such security for costs as is usually given on an appeal from a final order, appellant's solicitors offered such security as is usually given on an appeal from an interlocutory order whereupon respondent's solicitors, who had discovered the provisions as to security, wrote withdrawing their demand and then took out a summons to dismiss the appeal. Appellants applied to fix amount of security and extend the time for giving it. On the return IRVING, J., dismissed the appeal and dismissed appellant's summons, and appellants appealed from both orders.

Held, 1. A winding-up order is a final order.

2. Respondent had waived his right to take advantage of the security not having been furnished in time.

Taylor, K.C., for appellants. *Davis*, K.C., for respondent.

Hunter, C.J.] WEHRFRITZ *v.* RUSSELL AND SULLIVAN. [April 4.

Arrest—Ca. re.—Form of writ—Summons to set aside—Appearance.

Action for moneys alleged to be due in respect of unpaid cheque and salary. The defendant Sullivan was arrested on a ca. re. the material part of which so far as this report is concerned was as follows:

"We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take E. M. Sullivan if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action at the suit of Benjamin Wehrfritz or until . . . ." On an application to set aside the writ of capias

Held, 1. The writ was bad because it did not state the nature of the cause of action.

2. It is not necessary for a person arrested under a writ of ca. re. to enter an appearance before applying for his discharge.

3. The defendant having asked for costs, the order for his discharge should provide that no action be brought against the plaintiff or the sheriff by reason of the capias or the arrest.

Harold Robertson, for the summons. *Bloomfield*, contra.

Irving, J.] IN RE ASSESSMENT ACT. [May 1.

Assessment—Income of locomotive engineers—Taxation.

Question referred by Order in Council to a judge of the Supreme Court for consideration, the question being "whether the earnings of railway locomotive engineers were income within the meaning of that term as employed in the Assessment Act prior to the amendment of the said Act by the Assessment Act Amendment Act, 1901, and whether such earnings were liable to taxation.

Assessment Act, R.S.B.C. 1897, c. 179, s. 3. provides in effect that with certain exceptions the annual income of every person in the Province in excess of $1,000.00 is liable to taxation, and before 1901, the Act contained no definition of "income." Prior to 1901, the earnings (in excess of $1,000.00) of railway locomotive engineers who received pay according to the number of miles they ran their locomotives were assessed. The contention on their behalf was (1) that earnings not the result of capital, but the result of personal exertions are not "income" and (2) that in order to arrive at amount of income a deduction from gross earnings must be made for reasonable living expenses.

The question was answered in the affirmative.

Wilson, K.C., for engineers. *Maclean*, D.A.G., for Crown.

Book Reviews.

The Criminal Code and the Law of Criminal Evidence in Canada. By W. J. TREMEEAR, of the Toronto Bar. Toronto: The Canada Law Book Company. $10.

This is a very complete and particularly well indexed book on Canadian Criminal Law, annotating the Criminal Code and the Canada Evidence Act as amended to May, 1902. The work embraces 934 pages, in addition to the preliminary tables. One of its prominent features is the methodical classification of the annotations under each section, and the placing in the page headings of the "part" number and title, and the "section" number as well as the book paging.

The author is already well known to the profession as the editor of the Canadian Criminal Cases, a series of reports which is now indispensible in the field of criminal law, and it is needless to say that the heavy task of annotation has been done not only carefully and thoroughly, but with a high degree of erudition.

As the title indicates, special attention has been paid to the subject of evidence. Notes of the latest Canadian and English authorities relative to the evidence applicable to each offence appear under the section of the code which declares the offence. In most of the citations, particularly those of the last fifty years, which predominate throughout the book, the year of the decision is also given. The Canadian cases, both before and after the code, are thoroughly reviewed and classified. Common law crimes are discussed, and the distinctions between them and similar code offences pointed out, but without the unnecessary recital of obsolete cases from the English reports and text books which too often constitute the filling of criminal law books. Procedure upon indictments, speedy trials, summary trials, summary convictions and appeals, as well as the subjects of habeas corpus and certiorari, are thoroughly dealt with, and as a practice book it is the most satisfactory work that has yet been issued on Canadian criminal law. The printing and binding are both of the high order characteristic of this publishing house.

Life Insurance Contracts in Canada by FRANK EGERTON HODGINS, Barrister at law, Toronto; Canada Law Book Company, 1902.

We are here given a treatise on the scope, making, character and effect of the contract for the insurance of life in Canada, with special reference to insurances by which a trust is created.

The author takes the Ontario Act as the framework of his book. The various subjects treated of are divided into appropriate chapters; each commences with a statement of the subject matter to be discussed. This is

followed by a citation of the section of the Act referring thereto; after which the author reviews and explains the state of the law, and refers to the authorities found in the reports of the various provinces of the Dominion and the Supreme Court, and to such of the English and American cases, as throw light on the various enactments. Then we are given the statutes affecting life insurance in the other provinces of the Dominion. Cross references give the reader the sections of the Ontario Act where similar law is discussed. We are thus given in convenient form the law as it stands affecting a subject of great importance to the public and increasing interest to the profession.

The industry and research of the author and his careful selection of authorities is very manifest; nor are we disappointed in his skillful analysis of some conflicting decisions; and in this connection we may refer to chapter VIII. which deals with the right of an insurer to exact conditions, and to chapter XII. which contains a valuable discussion as to the nature and character of the trust created in favour of a beneficiary. Mr. Hodgins has made a valuable contribution to the library of Canadian law books, and the publishers have well done the share of the work allotted to them.

A Treatise on Guaranty Insurance by Thomas Gold Frost, Ph.D., of the New York Bar. Boston: Little, Brown & Co., 1902. 550 pp. $5.00.

This is a work on a new branch of law which has come into prominence during the last few years. Before 1840 there were no companies organized for protection against loss by dishonesty of employees even in England, and none on this continent until about twenty years ago. The modern practice of giving private fidelity bonds had almost ceased, and persons desiring employment who have to secure their employers against loss do it now through the instrumentality of Guaranty Insurance Companies.

The book includes as subsidiary branches of the main subject the law of fidelity, commercial and judicial insurances—covering all forms of compensated suretyship such as official and private fidelity bonds, building bonds, court bonds, credit and title insurances. He claims the indulgence in view of his work being a "pioneer treatise" upon a new subject, but he seems to have done his work so well that he is likely to receive that "generous and charitable reception at the hands of the profession," which in his preface he hopes for.

One is surprised to see the number of cases that have accumulated on this branch of the law during these few years. These are gathered by the author with great diligence from all quarters, including our own Ontario Reports; and they seem to be carefully arranged and intelligently discussed with the modesty befitting a "pioneer." The typographical execution is in the publishers' best style.

UNITED STATES DECISIONS.

NEGLIGENCE.—The owner of a team in charge of a driver is held, in *Perlstein* v. *American Express Company* (Mass.), 52 L. R. A. 959, not to be liable for injuries caused by its collision with another on the highway, if at the time the driver has departed from the prescribed route for some purpose of his own.

RESEMBLANCE AS EVIDENCE OF RELATIONSHIP.—The exhibition of the jury, on a prosecution for bastardy, of a child nine months old for the purpose of showing its resemblance to the defendant, is held, in *State ex rel. Scott* v. *Harvey* (Iowa) 52 L.R.A. 500, to be error. With this case there is a note reviewing the authorities on the question of resemblance as evidence of relationship.

ABUTTING OWNER—COMPENSATION.—The occupation of a sidewalk with a trench and pipes for a conduit for telephone wires is held, in *Coburn* v. *New Telephone Co.* (Ind.) 52 L.R.A. 671, not to be an additional burden upon the fee, which entitles the abutting owner to compensation, although it is laid so close to the line of the abutting property as to interfere with the intended areas under the walk.

EXPULSION FROM CAR.—Recovery for injuries received by a passenger in resisting forcible ejection from a street car for refusing to pay fare or leave the car is denied, in *Kiley* v. *Chicago City R. Co.* (Ill.) 52 L.R.A. 626, although he tenders a transfer from another line, which should be valid, but is not, because of a mistake of the conductor from whom it was received, where no more force is used than is reasonably necessary to effect the expulsion.

COMPANY—MANAGER AND DIRECTOR.—The general manager of a corporation, who is also director, is held in *Bassett* v. *Fairchild* (Cal.) 52 L.R.A. 611, to have a legal claim for the value of his services, although there has been no resolution of the board of directors or any express contract fixing his compensation, where he devotes his entire time to the business, and his duties are numerous and onerous, and not such as pertain to his office as director.

BOOKS OF ACCOUNT AS EVIDENCE.—Books of a defendant sued for produce consigned to him, constituting the only ones kept by him, the entries in which were honestly made in the due course of business at the time the transactions occurred, and containing both debit and credit entries are held, in *Post* v. *Kenerson* (Vt.) 52 L.R.A. 552, to be admissible to show the acceptance of drafts more than sufficient in amount to balance the account. A very extensive note to these cases collates the authorities on the question of a party's books of account as evidence in his own favour.