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While it is a matter of regret that a name almost historical as a law publishing house in this Province should have passed off the scene, the profession will doubtless now receive in the publication of the reports the full benefit of the up-to-date energy and careful management of the same firm that publishes this journal. The Law Society has done well in giving to the Canada Law Book Company the printing and publishing of all the Ontario Reports as well as the binding of the Law Reports and books of the Society, which were thrown on the market by the late firm of Rowsell & Hutcheson going out of business. The new firm has also acquired the large stock of back volumes of the Upper Canada and Ontario Reports, some 9000 in all.

Mr. Justice Matthews, in his address at the Romilly Society on the administration of Criminal Law, suggests that on the conclusion of each Assize and Quarter Session a return should be made of the sentences pronounced on prisoners, to endeavour thereby to obtain a greater uniformity in sentences, which, as he says, are glaringly unequal. Whilst we all recognize these inequalities, we doubt whether the suggestion will be found of much value. In this Province Crown Counsel make returns such as above spoken of to the Attorney-General, as well as to one of the offices at Osgoode Hall, and we think it may safely be said that no notice is taken of them, except possibly when an application is made to reduce a sentence in some particular case.

There have been some notable changes in the English judiciary. Lord Morris retires from the position of a Lord of Appeal in Ordinary, closing a judicial career of over thirty years. He was appointed as a Judge in Ireland in 1867 and succeeded the late Lord Fitzgerald in the House of Lords in 1839. Though he may have been surpassed in legal erudition he was remarkable for a sound common sense and knowledge of men and affairs which made him a very useful Judge. Possibly a greater loss to the

Bench is the unexpected resignation of Sir Nathaniel Lindley, of whom it has been said he was the pivot of the Court of Appeal, commanding the full confidence of the public and the profession. He had held judicial office for twenty-five years, and his charm of manner as well as his great ability will long be remembered by those who practised before him. His services, however, will not be entirely lost as he takes his seat in the House of Lords, Lord Morris also being given an hereditary peerage. Sir Nathaniel Lindley is succeeded by Sir Richard Webster, the late Attorney General, who has had one of the most successful careers of the century, the most natural and proper appointment. Sir Robert Finlay, Solicitor General, takes the position thus rendered vacant. He, as his predecessor was, is one of the best lawyers and one of the ablest men that the Bar of England has produced for many years, being, as Lord Beaconsfield said of Lord Cairns, "great in counsel." It thus happens that neither the Attorney General nor the Solicitor General of England are Englishmen, Sir Robert Finlay being a Scotchman born in 1842, and the Right Honorable Edward Carson, the new Solicitor General, being an Irishman born in 1854 and educated at Trinity College, Dublin. He is a man of brilliant talents, as well as having political prominence, and has, at an earlier age than usual, attained the high position which he now occupies.

SUPREME COURT PRACTICE.

Referring to the article by Mr. C. H. Masters, on this subject (ante p. 324), it may be observed that the Ontario Act, 62 Vict., 2nd sess., c. 11, s. 27, seems to settle the question which gave rise to the difference of opinion in the Supreme Court in the case *Farquharson* v. *Imperial Oil Co.*, now reported in 30 S.C.R. 188, viz., whether there was any intermediate appeal to the Court of Appeal, when the appellant had elected to appeal to a divisional court from the judgment at the trial and his appeal had failed.

The Legislature has now declared that such an appeal has always lain when leave has been given therefor.

Mr. Justice Gwynne's view (concurred in apparently by the full Court), of the Judicature Act, R.S.O. 1897, c. 51, s. 77, as it stood previous to the above amendment, was that no intermediate appeal to the Court of Appeal could, in the case put, be brought even

by leave, but he held, the Chief Justice concurring with him, Taschereau and Sedgwick, JJ, contra, that leave to appeal to the Supreme Court per saltum might nevertheless be given.

Inasmuch, however, as an intermediate appeal may now, on condition of leave being granted, be maintained, there seems no longer any room to deny the power of the Supreme Court under s. 26 (3) of the Supreme Court Act to grant leave to appeal per saltum to the unsuccessful appellant in the Divisional Court.

The amendment referred to was in force when the appeal to the full court from Mr. Justice Gwynne's decision in Chambers was argued, and as it is expressly required to be construed retrospectively to the 7th April, 1896, when the Judicature Act was passed, it might be thought that the ground for the difference of opinion referred to had already been removed. Probably the amendment was not brought to the attention of the Court, as it is not referred to in the report of the case.

THE JUDICIAL COMMISSION.

The appointment of a commission of Judges to enquire into the acts of fraudulent dealing with ballots, and other misdoings, which are alleged to have taken place in connection with certain elections in the Province of Ontario, opens a wide field for discussions, and suggests several questions of much importance. It may be stated as a general proposition, from which none will dissent, that it is not desirable that Judges should be called upon to act in any matter of a quasi political character, or in which the interests of political parties are in any way concerned. Nor is it desirable that, for any purpose, political or otherwise, the Judges should have their regular work, which is quite sufficient to occupy all their time and attention, interfered with by the imposition of other duties, no matter how important. It is indeed a striking proof of the extent to which the virus of party has eaten into the very vitals of our system of government, that, in so many matters directly affecting the management of our public affairs, we apparently dare not intrust ourselves with their control, and, instead of reforming our own pernicious ways and striking at the root of the evil, we throw the disagreeable duty upon some other body which we can trust to perform it with efficiency and integrity. Under such circumstances it is indeed fortunate for us that, in our judiciary, we have a body

in whose freedom from the corrupting influences which affect ourselves we can absolutely rely.

Certainly if anything could justify the present appointment of a judicial commission the state of things existing, as shown by recent disclosures, would do so, but if the disease is to be cured some more potent remedy than the appointment of a commission must be found. The commissioners may fix the guilt upon the proper shoulders, and show how far the responsibility for it extends, but unless the public at large, irrespective of party, exert their proper influence, resolved that in future party interests shall not be an excuse for wrong-doing, the judges may just as well be allowed to confine themselves to their proper duties, and avoid the risk of being mixed up in party conflicts. The people have the remedy in their own hands and should use it, and not fall into the easy habit of calling upon judges, or any other functionaries, to get them out of the troubles which are entirely due to their own indifference, and, too often, to their connivance.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE — PARTICULARS — DISCOVERY — INSPECTION PRIVILEGE — RULE 203 (ONT. RULE 299)—RULE 358 (ONT. RULE 460).

Milbank v. *Milbank* (1900) 1 Ch. 376, is a case which exemplifies the fact that documents which may be privileged from production for the purpose of discovery may, nevertheless, be subject to the provisions of Rule 203 (Ont. Rule 299), so that the party in whose possession they are may be bound to give particulars thereof to the opposite party. The plaintiff claimed a declaration that she was entitled (subject to incumbrances) to an estate in fee simple in the lands in question in the action of which the defendant was in possession, and claimed by his defence to be in as owner under a sale made by mortgagees under a power of sale in their mortgage, and that he had purchased in good faith without notice of the plaintiff's title, and he relied on his title as such bona fide

purchaser, and alleged that he had re-mortgaged the land to his vendors, and that the action could not be maintained in their absence. The defendant made an affidavit of documents in which he sufficiently claimed protection for a bundle of documents, which included the deeds by which the transactions referred to in his defence were carried out. The plaintiff, however, applied for the delivery of particulars of those transactions, namely, the date of the sale and conveyance to him by the mortgagees, and what was the valuable consideration for the same; the date of the re-mortgage by him, and for how much it was given. Kekewich, J., was of opinion that, because the documents were privileged from production by way of discovery, the defendant could not be required to give particulars nor permit inspection of them, as asked; but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) came to the conclusion that the right to discovery, and the right to particulars of documents referred to in a pleading, are distinct and independent rights, and the mere fact that the documents are privileged from production for discovery does not render them also exempt from the operation of the Rules relating to particulars, but the appeal from Kekewich, J., so far as he refused inspection of the documents, was dismissed.

PRACTICE — DECEASED JUDGMENT DEBTOR — ORDER TO ISSUE EXECUTION AGAINST EXECUTOR—CHARGING ORDER—CLERICAL ERROR.

In *Stewart* v. *Rhodes* (1900) 1 Ch. 386, the original defendant having died after judgment, an order was made for leave to issue execution against his executor, and also charging the defendant's interest in certain stock unless sufficient cause should be shown to the contrary on a day named. Before the order was made absolute, an order for the administration for the estate of the deceased judgment debtor was granted; and on the motion to make the order absolute, it was objected that the order was wrong, because it purported to charge the debtor's interest in the stock, and not that of his executor, and that, after an administration order had been made, it would not be proper to amend the order nisi. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) held the order nisi to be erroneous, and proceeded on the ground that it could not be properly made in any case as against an executor until a judgment had been obtained against him, and they seem to suggest that an order for leave to issue

execution against an executor of a deceased judgment debtor is not equivalent to recovering a judgment against the executor, but simply dispenses with the necessity of a judgment against him for the purpose of issuing execution; but unless there is a judgment recovered against the executor, the Court considers there is no jurisdiction to make a charging order against him under 1 & 2 Vict., c. 110; and the judgment creditor's remedy, unless he does obtain a judgment, is to bring an administration action. The effect of an order to continue proceedings and for leave to issue execution against the personal representation of a deceased judgment debtor was recently under consideration in a Divisional Court of this Province in the case of *Allison* v. *Breen*, where we think the court came to the conclusion that the order was equivalent to a revivor of the judgment as against the executor, who thereby became bound as a party to the action; and we should think the practice defective, if it should be held that an action in the nature of a sci. fa. is still necessary in order to make a judgment, under such circumstances, a judgment against the personal representatives of a deceased debtor.

PRACTICE -SECURITY OF COSTS—FOREIGNER RESIDENT ABROAD CLAIMING FUND IN COURT—GENERAL INQUIRY—CLAIMANT OF FUND IN COURT -INTERPLEADER.

In re Milward & Co. (1900) 1 Ch. 405, a solicitor was ordered to pay into court a fund in his hands belonging to a client, subject to the claims of certain alleged incumbrances thereon, and, an inquiry was directed who was entitled thereto. A foreigner resident abroad claimed to be entitled to a charge on the fund. The client applied to Kekewich, J., for an order requiring this claimant to give security for costs, but that learned judge considered that it was the case of a direction for a general inquiry, in which it was not the course of the court to require claimants seeking to prove claims, even though resident abroad, to give security for costs. The Court of Appeal, however, considered that as the fund clearly belonged, prima facie, to the client, the proceeding was really in the nature of an interpleader, in which the foreign claimant was in the position of a plaintiff, and that, therefore, he should be ordered to give security.

COMPANY—VOLUNTARY WINDING-UP—LIQUIDATOR -APPOINTMENT.

In re Trench Tubeless Tyre Co. (1900) 1 Ch. 408, discusses the validity of the appointment of a liquidator for the purpose of a

voluntary winding-up. It appeared that at a meeting of the company held on the 1st November, 1899, a resolution was passed for the voluntary winding-up of the company and the appointment of a Mr. Walker as liquidator. Notice was then given to the shareholders that a meeting would be held on 16th November when the subjoined resolutions, duly passed at the previous meeting, would be submitted for confirmation, viz., that the company be wound up and that Mr. Walker be liquidator. At the meeting on the 16th November, however, the resolution proposing Mr. Walker as liquidator failed for want of a seconder, and a resolution was then proposed and carried appointing Mr. Marreco the liquidator. Kekewich, J., considered that it was not competent for the meeting to change the liquidator, and that Marreco's appointment was therefore invalid; but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) held that it was perfectly competent for the meeting to elect some other liquidator than the one named in the notice calling the meeting, without adjourning the meeting or giving any further notice.

RESTRICTIVE COVENANT—BUILDING ESTATE—RESTRICTION AS TO NUMBER OF HOUSES—FLATS.

In *Kimber* v. *Admans* (1900) 1 Ch. 412, Cozens Hardy, J., has determined that a house built for the purpose of being rented in flats is only one "house," and not a violation of a restrictive covenant against erecting more than one "house," unless there is something in the context which cuts down or alters the ordinary meaning of the word. The plaintiff's contention that each flat was a house was rejected.

WILL—CONSTRUCTION—"ISSUE"—"CHILDREN."

In re Birks, Kenyon v. *Birks* (1900) 1 Ch. 417. In this case the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.) have been unable to agree with Kekewich, J., on the construction of the will, (1899) 1 Ch. 703, (noted ante, vol. 35, p. 484.) It may be remembered that in this case the testator had given twelve distinct legacies, with gifts, over to the issue of the legatees dying in the testator's lifetime, and in all except the eleventh legacy the gifts over were qualified by words restricting the word "issue" to children. In the eleventh legacy there were no such restrictive words, and the question was whether there was any canon of

construction requiring the word "issue" in the gift over of the eleventh legacy also to mean "children." Kekewich, J, held that its meaning was not to be so restricted; but the Court of Appeal were unanimous that, as the testator had already indicated the sense in which he used the word "issue" as regards the other legacies, it was reasonable and proper to assume that he intended it to have the same meaning when used in reference to the eleventh legacy, consequently the gift over of that legacy was also confined to children of the legatee, and did not extend to his descendants generally.

COMPANY—PROSPECTUS, UNTRUE STATEMENT IN—MISLEADING STATEMENT IN PROSPECTUS—DIRECTOR, LIABILITY OF, FOR FALSE PROSPECTUS—DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT., C. 64), S. 3, SUB-S. 1; (R.S.O. C. 216, S. 4)—WAIVER CLAUSE IN PROSPECTUS.

Greenwood v. *Leather Shod Wheel Co.* (1900) 1 Ch. 421, was an action by a shareholder against a joint stock company and its directors to rescind a contract to take shares in the company and for rectification of the company's register by removing the plaintiff's name from the list of shareholders, and to recover the amount paid by plaintiff, and for damages against the directors for the loss sustained by the plaintiff by reason of his having subscribed for the shares in question, relying on the statements contained in the prospectus, which were alleged to be untrue and misleading. The prospectus also contained a clause whereby subscribers for stock were to be deemed to have notice of all agreements which might fall under s. 38 of The Companies Act, 1867, which requires agreements between the company and promoters to be specified in the prospectus, even though such agreements were not actually so specified. The principal objection to the prospectus was that it alleged that orders had been received for wheels which the company was formed for the purpose of manufacturing, whereas the orders referred to were merely orders for trial or sample wheels; also, that there were agreements between the company and the promoter, which were not specified on the prospectus, as required by The Companies Act, s. 38. As to the latter, the defendants contended that the plaintiff had contracted himself out of the right to complain of the omission. The defendants also contended that the statements in the prospectus were true in the sense in which they were used by the directors, and they could not

be held to be untrue, because the plaintiff had otherwise understood them. These arguments failed; and Kekewich, J., gave the plaintiff the relief claimed, and his decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.). The waiver clause in the prospectus was held to be 'tricky' and 'fraudulent,' and inoperative as against the plaintiff; and the statements that 'orders' had been received were held to be 'a misleading and untrue statement' within the meaning of the Directors' Liability Act, 1890, and it was held to be no answer to say that in a certain sense they were true, and that the directors could only relieve themselves from liability by establishing that they had reasonable ground for believing, and did believe, the statements were true in the sense which they would be likely to be understood by the public.

WILL—FOREIGNER—POWER OF APPOINTMENT—EXECUTION OF POWER BY WILL VALID ACCORDING TO LAW OF TESTATOR'S DOMICIL.

In re Price, Tomlin v. *Latter* (1900) 1 Ch. 442, discusses whether a will of a domiciled foreigner, validly executed according to the testatrix's place of domicil, but not executed in accordance with the English Wills Act, was a valid execution by the testatrix of an English power of appointment over personal estate, which she was empowered to exercise by will. In other words, must the will in exercise of the power be a will executed in accordance with the Wills Act, or was it sufficient, if validly executed according to the law of the testatrix's domicil? This question Stirling, J., decided in accordance with *D'Huart* v. *Harkness* (1865), 34 Beav. 324, and the will having been recognized as a valid will in England by the Probate Division, which had granted letters of administration with the will annexed, he held it to be a valid execution of the power.

COMPANY—WINDING-UP—RECEIVER APPOINTED BY DEBENTURE HOLDERS—SURPLUS IN HANDS OF RECEIVER—SUMMARY APPLICATION BY LIQUIDATOR TO RECOVER SURPLUS IN HANDS OF RECEIVER—JURISDICTION.

In re Vimbos, Ltd. (1900) 1 Ch. 470, was a summary application by a liquidator in a winding-up proceeding to recover from a receiver who had been appointed by certain debenture holders of the company in liquidation to recover a surplus alleged to be in his hands, after satisfying the claims of the debenture holders. The

power to appoint the receiver did not contain any direction as to what the receiver was to do with the surplus, and he claimed to retain it for his remuneration. The liquidator asked that his remuneration might be fixed by the Court, and that he should be ordered to pay over the balance. Cozens-Hardy, J., was of opinion that the receiver was the agent of the mortgagees, and not of the company, and as such was not amenable to the summary jurisdiction, and that, even if he were to be regarded as the agent of the company, he would not be subject to the summary jurisdiction of the court, but an action must in either case be brought.

SOLICITOR—UNDERTAKING—ENFORCING SOLICITORS' UNDERTAKING.

In re Coolgardie Goldfields (1900) 1 Ch. 475, may be referred to as illustrating the summary way in which the court is accustomed to enforce the undertakings of solicitors. During the hearing of an application to the Court by two shareholders to strike out their names from the register of a limited company some documents were tendered in evidence by the company which ought to have been, but were not, stamped. Counsel for the company gave the undertaking of a member of the firm of the company's solicitors to pay the duties. The order was made striking out the applicants' names. The duties not having been paid, the shareholders were unable to get the order issued, and they applied to commit the solicitor for breach of his undertaking, and for leave to issue the order, notwithstanding the documents were not stamped. Cozens-Hardy, J., directed the order to be drawn up without entering the unstamped documents, the company undertaking not to appeal from the order. He also ordered the solicitor to cause the documents to be stamped within four days after service of the order, and reserved liberty to the Inland Revenue Commissioners to apply in case the solicitor made default, and the solicitor was ordered to pay the costs.

PRACTICE — SOLICITORS' UNDERTAKING — ENFORCEMENT OF UNDERTAKING — SERVICE OF ORDER CONTAINING UNDERTAKING.

D. v. *A. & Co.* (1900) 1 Ch. 484, is a case similar to the last. In this case, the undertaking of the solicitors was embodied in an order. On a motion for liberty to issue an attachment against the solicitors for breach of the undertaking, it was objected that the order containing the undertaking had not been served, and,

secondly, that the remedy was by committal and not by attachment, and that in that case personal service of the notice of motion was necessary. As to the first point, Cozens-Hardy, J., held that service of the order was unnecessary; but on the second point he was of opinion that the proper remedy for breach of an undertaking, whether positive or negative, is committal, and that personal service of the notice of motion was necessary, and he refused the motion, with costs.

POWER OF APPOINTMENT—EXERCISE OF POWER BY WILL—FOREIGNER.

Pouey v. *Hordern* (1900) 1 Ch. 492, presents some features of similarity to *Re Price*, noted ante, p. 369. In this case, also, a domiciled Frenchwoman had a power of appointment by will over a fund under an English settlement. She made a will in France reciting the power and purporting to execute it in favour of her daughter, the plaintiff. It was contended that, inasmuch as the testatrix had married a domiciled Frenchman without a settlement, any property she was entitled to was subject to the French law as to comity of goods, and therefore that she could not dispose of or appoint the fund in question in favour of her daughter. Farwell, J., however, was of opinion that the distinction between power and property is well settled, and that the exercise of a power is not a disposition of property, and that the exercise of the power was in no way affected by any disability which the testatrix may have been under as to the disposition of her own property.

LANDLORD AND TENANT—FORFEITURE OF LEASE—BREACH OF COVENANT—NOTICE OF BREACH, BAD IN PART—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41), S. 14—(R.S.O. C. 170, S. 13(1)).

In *Pannell* v. *City of London Brewery* (1900) 1 Ch. 496, the point discussed by Buckley, J., was whether a notice of breaches of covenant in a lease given under the Conveyancing & Law of Property Act, 1881, s. 14, (R.S.O. c. 170, s. 13 (1)), is bad in toto if it turns out that, although some of the alleged breaches have occurred, others alleged, have not taken place, or that the lessor is not entitled to rely on them. This point he determined in the negative, and in doing so distinguishes *Horsey* v. *Steiger* (1899) 2 Q.B. 79 (noted ante, vol. 35, p. 672), where the notice he considers was held bad, not because it included an alleged breach, which

had not in fact taken place, but because the time allowed for remedying the breach properly alleged was too short, a distinction which is not very apparent on the face of the report, and which seems to have escaped the notice of the writer of our note of the case.

WILL—CONSTRUCTION—ESTATE, DEVISED—ESTATE TAIL—INTENTION—WILLS ACT (1 VICT., C. 26), S. 28—(R.S.O. C. 128, S. 30).

Crumpe v. *Crumpe* (1900) A.C. 127, was an appeal from the Irish Court of Appeal, upon the construction of a will, whereby the testator devised his fee simple estates to trustees to give the rents to his nephew, Silverius Moriarty; but in case Silverius encumbered the lands or rents at any time, the testator revoked the gift of the rents "from Silverius Moriarty and from his heirs male," or should Silverius not forfeit the same, and should "die without male issue him surviving," he bequeathed the rents and estates to William Moriarty and his issue in tail male. Silverius executed a disintailing deed and died, without heirs male of his body, having devised the land to the respondent. The appellant claimed to be entitled as the heir male of William Moriarty, and the question presented for decision was whether Silverius took an estate in fee simple under the Wills Act, s. 28 (see R.S.O. c. 128, s. 30), subject to an executory devise over, as the appellant contended; or whether he took an estate in fee tail, as the respondents claimed and as the Irish Courts had held. The House of Lords (Lord Halsbury, L.C., and Lords Ashbourne, Macnaghten, Morris, Shand, James and Brampton) unanimously agreed with the Irish Courts that, according to the true intention of the testator, an estate in fee tail male was devised to Silverius, and that, consequently, a "contrary intention" sufficiently appeared by the will so as to prevent the estate devised being a fee simple as provided by s. 28.

INSURANCE—GUARANTEE OF SOLVENCY OF SURETY—CONCEALMENT OF MATERIAL FACTS—UBERRIMA FIDES.

Seaton v. *Burnand* (1900) A.C. 135, is the case known as *Seaton* v. *Heath* in the courts below. The action, it may be remembered, was brought on a policy guaranteeing the solvency of a surety for the payment of a loan made by the plaintiff to a third party at a high rate of interest, about 40 per cent. The Court of Appeal

(1899) 1 Q.B. 782 (noted ante, vol. 35, p. 409), set aside the judgment in favour of the plaintiff and directed a new trial, because they thought that whether the non-disclosure of the circumstances of the transaction to the defendants (more particularly the high rate of interest to be paid by the borrower) was material to the risk, was a question for the jury; and Romer, L.J., expressed the opinion that such a contract was like a contract of insurance, in which the party who induces the contract is bound to exercise uberrima fides. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, Davey, Brampton and Robertson) took a very different view of the matter, and considered that there was no concealment of any material facts, inasmuch as the guarantors made no inquiry as to the circumstances under which the loan was made, and evidently did not regard it as material to the risk they were asked to undertake, which was to guarantee the solvency of a man who was at the time of unimpeached credit. The Lord Chancellor humbly remarks in regard to the verdict found in favour of the plaintiff: "I think Mr. Lawson Walton went so far as to say that no reasonable jury could have found the verdict they did. I was sorry to hear him say so, because I should certainly have found the same verdict, and I am afraid the inference is unfavourable to me when I say that."

WILL — CONSTRUCTION — DIRECTION TO ACCUMULATE — TENANT FOR LIFE — REMAINDERMAN — CONVERSION.

Wentworth v. *Wentworth* (1900) A.C. 163, is a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of New South Wales upon the construction of a will. The points at issue turned upon a clause in the will, whereby the testator devised his residue upon trust to convert, with power to postpone conversion for twenty-one years, and with a direction that the surplus income of the unconverted estate during the twenty-one years, and all accumulations thereof should go in augmentation of the capital. The residue was settled upon trusts for tenants-for-life and remaindermen. The trustees under power in the will granted a mining lease, and retained the leased property unconverted for more than twenty-one years. Two questions were determined in the court below—(1) that the rents and royalties received between the testator's death on March 20, 1872, and March 20, 1893, under the mining lease, were subject to a trust

for accumulation, and that the income, therefore, was also to be accumulated; and (2) that the rents and royalties received under such lease after March 20, 1893, were to be treated as capital. On the appeal to the Privy Council, it was contended on behalf of the tenants-for-life that the income derived from the rents and royalties received during the twenty-one years were not subject to the trust for accumulation, which it was claimed only applied to the income of his unconverted real and personal estate, and that as between the tenants-for-life and remaindermen the former were entitled to the income derived from the investment of the rents and royalties received during the first twenty-one years; that, after the lapse of the twenty-one years, there was no power in the trustees to postpone conversion, and that the estate must be treated as then converted, and that a sum equal to the income which would have been devised had the estate been converted was payable to the tenants-for-life. The Judicial Committee (Lords Hobhouse, Macnaghten, Morris, Davey and Robertson) agreed with the court below as to the first point, and held the income of the rents during the twenty-one years to have been properly accumulated by the trustees. On the second point, however, they decided in favour of the appellants and varied the judgment appealed from by declaring that the appellants were entitled to receive out of the rents and royalties accrued and accruing after March 20, 1893, such an annual sum as in the opinion of the court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received by them if the residuary estate had been sold on March 20, 1893, and the proceeds invested in accordance with the will.

ACCOUNT—SCOPE OF REFERENCE, EXCEEDING.

Bennicourt v. *Le Gendre* (1900) A.C. 173, is a decision of the Judicial Committee (Lords Hobhouse, Davey and Robertson, and Sir R. Couch) on a comparatively simple point. The appellant's claim by his writ of summons was "to have an account taken of what is due to the plaintiff, under a certain agreement dated in January, 1892, for pitch dug and won from the plaintiff's land and land of one Eugenia Bennicourt (since deceased) at Le Brea." An order was subsequently made that the "accounts in this matter" be taken. The judge to whom the reference was directed took the account not only of the pitch dug from the lands of the

plaintiff and Eugenia Bennicourt, but also from the lands of one Joasse, and there was no evidence of any relation between those transactions and the Bennicourts, which made them relevant to the account ordered. At the close of the evidence this fact was pointed out by the appellant's counsel, but disregarded by the judge. The judgment pronounced on the erroneous certificate was therefore set aside, and the cause remitted with a direction to vary the certificate by disallowing all entries in the account relating to the pitch dug on the lands of Joasse, or otherwise than from the lands of the Bennicourts.

CABLEGRAMS—CONTRACT IN CYPHER—CONTRACT, MEANING OF—ONUS PROBANDI—MISTAKE.

Falck v. *Williams* (1900) A.C. 176, was an appeal from the Supreme Court of New South Wales. The action was brought on a contract concluded by telegram in cypher, which, according to the plaintiff's understanding of it, meant one thing, and according to the defendant's something else. The plaintiff contended that the telegram was so plain as to admit of no other interpretation than that which he put upon it; but the Judicial Committee of the Privy Council (Lords Hobhouse, Davey and Robertson, and Sir R. Couch) were of the opinion that the telegram was ambiguous, and that the onus was on the plaintiff to make out that the construction he had placed upon it was the true one, and in that he had failed, and the action was held to be rightly dismissed.

CONTRACT—CONSTRUCTION—EXTRINSIC EVIDENCE, ADMISSIBILITY OF

Bank of New Zealand v. *Simpson* (1900) A.C. 182, was an action brought by Simpson against the bank on a contract relating to a railway of which Simpson was engineer, and which provided inter alia that he should be allowed a certain additional percentage "on the estimate of £25,000, in the event of [his] being able to reduce the total cost of the works below £30,000." It was for this additional percentage the action was brought, and at the trial the defendants adduced evidence extrinsic to the written contract, to show that in arriving at "the total cost of the works" the cost of lands bought for the railway, and the plaintiff's fees under the contract, were to be included in the calculation, and being so included, the total cost had not been reduced below £30,000. On this evidence a verdict was given for the defendants.

The court below, however, granted a new trial on the ground that the case must be decided on the written contract alone, and that the expression "the total cost of the works" was so clear and unambiguous that no extrinsic evidence was admissible to construe it, or explain the meaning given it by the parties, and that 'works' meant and must be confined to "construction works." From this decision the Judicial Committee of the Privy Council (Lords Davey and Robertson and Sir R. Couch) dissented, and held that the evidence objected to was admissible, and that the verdict of the jury ought not to have been disturbed, and the appeal was consequently allowed.

CONTRACT—LUMP SUM—NON-PERFORMANCE OF CONTRACT—PART PERFORMANCE—VARIATION OF CONTRACT—AGENT, AUTHORITY OF—RATIFICATION—NOTICE OF APPEAL.

Forman & Co. v. *The Liddesdale* (1900) A.C. 190, was an action commenced in the Admiralty Court of Victoria to recover for repairs effected by the plaintiffs upon a steamer. The steamer in question was stranded, but subsequently got off; but having been condemned by the Marine Board of Victoria, her owners, who resided in England, authorized the master of the vessel to enter into a contract with the plaintiffs to repair the damage occasioned by the stranding for a lump sum, which he did. The plaintiffs proceeded in part performance of the contract to do a large amount of repairs, but they never completely performed the contract, but they did work which they claimed was equivalent to that called for in the contract, or better. They sued for the contract price, and also for a large amount for extras and other repairs not included in the contract. It appeared that the master's authority was expressly limited to making a contract for repairs of the damage occasioned by the stranding, and that some of the extras and other repairs were done with the knowledge of the master, and were authorized by him, though not in writing, as required by the contract. It appeared that as to part of the claim, which had been disallowed by the court below, the plaintiff's notice of appeal did not extend, and the Judicial Committee held that the appellants were in consequence debarred from raising any question as to that on the appeal. As regards the main ground, the committee (Lords Hobhouse, Davey and Robertson and Sir R. Couch) agreed with the court below that where a contract is

for a lump sum, and has not been performed, no part of the contract price is recoverable. The law as laid down by Lord Blackburn in *Appleby* v. *Myers* L.R. 2 C.P. 651 on this point is approved, viz., that a contractor for a lump sum who has not performed the stipulated work can only recover something under his contract where he has been prevented by the defendant from performing his work, or where he has made a new contract that he shall be paid for the work he has actually done, neither of which conditions were found to exist in the present case. The fact that the defendant had accepted the ship and sold it was held to be no ratification on their part of any contract for repairs made by their agent without their authority.

CANADA TEMPERANCE ACT, 1864, s. 17—CONSTRUCTION.

In *Wentworth* v. *Matnieu* (1900) A.C. 212, the Judicial Committee of the Privy Council (Lords Hobhouse, Davey, Robertson, and Sir R. Couch) have reversed a decision of the Superior Court of Quebec upon the construction to be placed on the Canada Temperance Act, 1864, ss. 15 and 17. The defendant had between June 9 and July 20, 1898, been convicted twenty-nine times for breaches of the Act, and penalties had been imposed on him, amounting in the aggregate to $1,400. Having paid the fine in respect of the first conviction, he obtained a certiorari as to the second, and it was quashed on the ground that by s. 17 it was permitted to include any number of offences in one complaint, and that the maximum penalty for all offences committed within three months prior to prosecution was not to exceed $100. The Judicial Committee was unable to agree with this construction of the Act, and held that the provision in s. 17 enabling several offences to be included in one complaint is permissive and not compulsory, and that s. 15 did not, as the court below assumed, fix $100 as the maximum amount of penalties that could be imposed for all breaches of the Act for a period of three months preceding the prosecution. The order quashing the second conviction was therefore reversed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que]. GRIFFITH *v.* HARWOOD. [May 8.

Appeal—Jurisdiction—Final judgment—Plea of prescription—Judgment dismissing plea—Costs—R.S.C. c. 135, s. 24, art. 2267 C.C.

A judgment affirming dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies in the Supreme Court of Canada. *Hamel* v. *Hamel*, 26 Can. S.C.R. 17, approved and followed.

An objection to the jurisdiction of the Court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed, the respondent may be allowed costs of a motion only.

Appeal quashed with costs.

Atwater, Q.C., and *Duclos*, for appellant. *Ryan*, for respondent.

Que.] BANQUE JACQUES-CARTIER *v.* GRATTON. [May 8.

Will—Powers of executors—Promissory note—Advancing legatee's share.

M., who was a merchant, by his will gave a special direction for the winding up of his business and the division of his estate among a number of his children as legatees and gave to his executors, among other powers, the power "to make, sign, and endorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of thirty years, the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors, and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts,

Held, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. Appeal dismissed with costs.

Brousseau, for appellant. *Aime Geoffrion*, for respondent.

Que]. CULLY *v.* FERDAIS. [May 17.

Appeal—Jurisdiction—Servitude—Action confessoire—Execution of judgment therein—Localization of right of way—Opposition to writ of possession—Matter in controversy—Title to land—Future rights.

An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal.

Langevin v. *Les Commissaires d'Ecole de St. Marc*, 18 Can. S.C.R. 599; *O'Dell* v. *Gregory*, 24 Can. S.C.R. 661; *Riou* v. *Riou*, 28 Can. S.C.R. 53; *Chamberland* v. *Fortier*, 23 Can. S.C.R. 371; *La Commune de Berthier* v. *Denis*, 27 Can. S.C.R. 147; and *McGoey* v. *Leamy*, 27 Can. S.C.R. 193, 545 discussed. Appeal quashed with costs.

Lajoie, for motion. *Lafleur*, Q.C., contra.

Que.] NOEL *v.* CHEVREFILS. [May 17.

Appeal—Jurisdiction — Matter in controversy—R.S.C. c. 135, s. 29 (b)—Tutorship.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children. Appeal quashed with costs.

Bisaillon, Q.C., for motion. *Fitzpatrick*, Q.C., contra.

B.C.] DUNSMUIR *v.* LOWENBERG. [May 18.

Contract—Parol agreement — Evidence — Withdrawal of questions from jury—New Trial.

D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5 per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale.

Held, affirming the judgment appealed from, that in an action by H. to recover expenses incurred in an endeavor to make a sale and reasonable remuneration, parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought properly to have been submitted to the jury. Appeal dismissed with costs.

Aylesworth, Q.C., for appellant. *S. H. Blake*, Q.C., for respondents.

Ont.] CANADIAN PACIFIC R.W. CO. *v.* CITY OF TORONTO. [May 30.

Appeal—Vendor and Purchaser Act—Reference to Master—Admission of evidence—Appeal from certificate—Final judgment—R.S.C. c. 135, s. 24 (e).

Where a Master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to show what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling, it not being a final judgment and the case not coming within the provisions of s. 24 (*e*) of the Supreme and Exchequer Courts Act relating to proceedings in equity. GWYNNE, J., dissenting. Appeal quashed with costs.

Robinson, Q.C., and *Fullerton*, Q.C. for motion. *Aylesworth*, Q.C., and *MacMurchy*, contra.

Ont.] CANADIAN PACIFIC R.W. CO. *v.* CITY OF TORONTO. [May 30.

Appeal—Vendor and Purchaser Act—Reference to Master—Admission of evidence—Appeal from certificate—R.S.C. c. 135, s. 24 (e).

By agreement in writing the City of Toronto undertook to acquire certain land and lease it to the railway company for 50 years renewable in perpetuity. An abstract of title having been refused, the company obtained an order of the Court under the Vendor and Purchaser Act, for its delivery, and a reference of all matters respecting the title to a Master. The title was made out and a draft lease presented to the Master containing a covenant by the company to pay taxes to which exceptions were filed. The city then proposed to give evidence of negotiations prior to the written agreement, showing that the covenant should be inserted, which the Master allowed, and granted a certificate therefor, from which the company appealed. The certificate having been sustained by the Divisional Court and Court of Appeal, the company appealed to the Supreme Court;

Held, GWYNNE, J., dissenting, that the judgment appealed from was not a final judgment within the meaning of the Supreme and Exchequer Courts Act, nor was it a decree or decretal order in a judicial proceeding in the nature of a suit or proceeding in equity under sec. 24 (*e*) of that Act; the Court had, therefore, no jurisdiction to hear the appeal. Appeal quashed, with costs.

Armour, Q.C., and *MacMurchy*, for appellant. *Robinson*, Q.C., and *Fullerton*, Q.C., for respondent.

EXCHEQUER COURT.

Burbidge, J.] [April 17.

IN RE METROPOLITAN RAILWAY COMPANY.

Railways—Making order of Railway Committee of Privy Council a rule of Exchequer Court—Condition—Ex parte order.

This was an application of the above railway to connect its tracks with the tracks of the Canadian Pacific Railway Company by means of a switch in the City of Toronto.

By s. 29 of the Railway Act, 51 Vict., c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of Court; but where there are proceedings depending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule may suspend its execution until further directions.

2. The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere ex parte application, and required that all parties interested in the matter should have notice of the same.

Barwick, Q.C., and *Glynn Osler*, for motion. *H. L. Drayton*, contra.

Burbidge, J.] [May 7.

GENERAL ENGINEERING COMPANY *v.* DOMINION COTTON MILLS COMPANY.

Patent—Expiry of Foreign Patent—R.S.C., c. 61, s. 8—55-56 Vict., c. 24, s. 1—Construction—"Foreign Patent"—"Exist."

By the Patent Act, R.S.O., c. 61, s. 8 (as amended by 55-56 Vict., c. 24, s. 1) it is enacted that "under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires." J. filed an application for a Canadian patent for new and useful improvements in boiler and other furnaces on the 1st of March, 1892. On the same day he applied for a British patent and also for an Italian patent in respect of the same invention. The British application was accepted on the 30th April, 1892, and the patent issued on the 12th July, but was dated, as is the practice in England, as of the date of the application, viz., 1st March, 1892. The Italian patent was issued on the 19th of March, 1892, and was granted for a term of six years from that date. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of certain fees and annuities due thereon on the 1st March, 1897. The inventor was in default in respect of payment of fees on the Italian patent in 1895, and while there was some doubt whether such default operated a forfeiture ipso facto under the Italian law, there was no doubt that it

expired at the expiry of the six years when no steps were taken by the inventor for its renewal.

Held,—1. The Canadian patent was void.

2. The words "Foreign patent," as used in the above enactment include all patents that are not Canadian.

3. The word "exists" has reference to the date or time when the Canadian patent is granted, not when it is applied for.

4. The words "shall expire at the earliest date on which any foreign patent for the same invention expires" are not to be limited to the expiration by lapse of time of the potential term of the foreign patent, but include any ending at a time earlier than the end of the term for which the patent is granted.

Rowan and *Ross*, for plaintiffs. *Macmaster* and *Maclennan*, for defendants.

Burbidge, J.] McHUGH *v.* THE QUEEN. [May 7.

Public Work—Bridge—Maintenance—Minister of Public Works—50-51 Vict., c. 16, s. 16 (c).

There is nothing in the Public Works Act (R.S.C. c. 36) in relation to the maintenance and repair of bridges belonging to the Dominion Government, by the Minister of Public Works, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub.-s. (c) of s. 16 of the Exchequer Court Act.

J. A. Lougheed, Q.C., for suppliant. *E. L. Newcombe*, Q.C., for respondent.

Burbidge, J.] [May 16.

REG. EX REL. ATTORNEY-GENERAL FOR THE DOMINION *v.* FITZGIBBON AND THOURET.

Revenue Laws—The Customs Act, s. 192—Penalties—Jurisdiction of Exchequer Court—Discretion of Judge—Remission of Penalty.

The penalty enforceable under the provisions of s. 192 of the Customs Act in the Exchequer Court is a pecuniary one only, the other remedies open to the Crown thereunder cannot be prosecuted in this Court.

2. The Court has no discretion as to the amount of the penalty recoverable under such enactment.

3. If a case is established against any defendant the whole penalty prescribed by the statute must be enforced. The power of remitting such penalty is vested in the Governor in Council by The Audit Act, R.S.C., c. 29, s. 78. In view of this state of the law, it is proper for the Crown, if it sees fit, during the pendency of an action for penalties, to agree upon terms of settlement of the action with the defendant; but those acting on behalf of the Crown should see that the judgment asked for in confirmation of the

settlement is for a sum which will vindicate the law and will conserve the public interest.

Solicitor-General and *E. L. Newcombe*, Q.C., for Crown. *Madore* and *Guerin*, for defendants.

Province of Ontario.

HIGH COURT OF JUSTICE.

Street, J.] RE OTTAWA PORCELAIN & CARBON CO. [March 16.

Company—Liquidation—Taxes and water rates—Right to prove for—35 Vict., c. 80, ss. 11, 13 (o), 42 Vict., c. 78, s. 7 (o).

The right to prove a claim for taxes against an incorporated company in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by the Assessment Act, as, for example, by distress, or sale of land.

Where therefore a claim was made for arrears of taxes against a company in liquidation, and it was shown that before the date of the winding up order the taxes might have been, but were not recovered by distress, the claim was disallowed.

A Board of Water Commissioners by s. 11 of 35 Vict., c. 80 (o) were empowered to fix water rates payable by the owner or occupant of any house or land which were to be a charge thereon; and by s. 13 to make and enforce all necessary by-laws for the collection thereof, and for fixing the time or times and the places for payment, which, on default, was to be enforced by shutting off the water, suit at law, or distress and sale of the occupant's goods. The rights and powers of the water commissioners, including the right to pass necessary by-laws, were transferred to the municipal corporation of a city by 42 Vict., c. 78, and by s. 7 uncollected water rates were made a lien on the premises and made collectable by sale thereof. A by-law was duly passed by the corporation fixing the rates to be paid, and the company were from year to year duly assessed therefor:—

Held, reversing the judgment of the Local Master, that a corporate liability was imposed on the company to pay such rates and a claim therefor constituted, on which the corporation could prove as ordinary creditors.

Shepley, Q.C., for the corporation of Ottawa. *C. J. R. Bethune*, for the liquidator.

Meredith, C.J., Rose, J., MacMahon, J.] [April 23.

RE LUCAS TANNER & CO.

Assignment for the benef' of creditors—Examination of assignor—Unsatisfactory answers—Committal—R.S.O. (1897) c. 147, s. 36; 58 Vict., c. 23 (O).

The provisions of above section do not apply to acts of the assignor. disclosed on examination as having been done before the date of the passing of the original Act, 58 Vict., c. 23 (O). Judgment of FALCONBRIDGE, J., reversed.

John A. Ferguson and *O. A. Langley* for appeal. *Aylesworth*, Q.C., contra. *John Cartwright*, Q.C., Deputy Attorney-General.

Street, J.] JAMES *v.* GRAND TRUNK RAILWAY CO. [April 27.

Railway—Culvert—Right to fence—Negligence.

A watercourse, which flowed through a culvert under a railway track, became dried up in the summer, and to prevent cattle from passing through it, the railway company had placed gates in the culvert, but which they had neglected to keep up, and by reason of the absence thereof, of which the company was duly notified and required to supply, the plaintiff's cattle, which were pasturing in a field on one side of the track, the watercourse being dried up, got through the culvert into a field on the other side of the track, and from thence on to the railway track where they were injured.

Held, that the railway company was liable for the damages sustained thereby by the plaintiff.

Teetzel, Q.C., and *Thompson*, for plaintiffs. *H. S. Osler*, for defendants.

Street, J.] FARR *v.* HOWELL. [April 28.

Mortgage—Conveyance of equity of redemption by mortgagor—Expropriation proceedings—Right of mortgagor to notice of.

A mortgagor who has conveyed away his equity of redemption is not entitled to notice of expropriation proceedings taken by a railway company with regard to part of the mortgaged lands, and therefore the absence of such notice does not constitute any defence to an action brought against him by the mortgagor on a covenant to pay the mortgage money.

D'Arcy Tate, for plaintiff. *P. D. Crerar*, for defendant.

Divisional Court.] THOMPSON *v.* MCCRAE. [May 10.

Division Court—Trial—Adjournment, if costs paid in ten days, otherwise judgment for defendant—New trial—Motion for—Commencement of fourteen days.

Where, at the sittings of a Division Court, a case was "adjourned for

plaintiff on payment of costs within ten days, otherwise judgment for the defendant," the two weeks within which a motion can be made for a new trial, the costs not being paid, does not commence to run until the expiration of the ten days, for until then there is no judgment.

C. C. Robinson, for plaintiff. *Boys* (Barrie), for defendant.

Meredith, C.J.] RE NILICK *v.* MARKS. [May 10.

District Courts—New trial—Limitations to fourteen days—Inherent power to grant new trial.

A judge of a District Court in an action in the Division Court within the District, apart from the jurisdiction confered by s. 152 of the Division Court Act to grant a new trial within the fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud and to order a new trial; and where the judge so assumed to act, an order for prohibition was granted.

A. Grayson-Smith, for defendant. *McMichael*, for plaintiff.

Boyd, C., Ferguson, J., Robertson, J.] [May 26.

GIRARDOT *v.* WELTON.

Costs—Counterclaim — Relief obtainable without cross-action—Set-off—Rules 1164, 1165—Order of revivor.

Decision of ARMOUR, C.J., *ante* p. 311, as to the costs taxable by the plaintiff upon a judgment dismissing a so-called counterclaim, affirmed.

Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.

Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs, should be taxed to him and added to his other costs and set off against the defendant's costs.

F. E. Hodgins, for the plaintiff. *S. White*, for the defendant Welton.

Armour, C.J., Falconbridge, J., Street, J.] [June 4.

IN RE NILICK *v.* MARKS.

Division Courts—New trial—Limitation to fourteen days—Inherent power—Fraud.

Decision of MEREDITH, C.J., ante, affirmed on appeal.

A. F. McMichael, for the plaintiffs. *Grayson Smith*, for the defendant.

ARMOUR, C.J., STREET, J.,] [JUNE 13.

REGINA *v.* ROCHE.

Municipal corporations — By-law — Transient traders — Conviction — Penalty—Costs—Imprisonment—Distress.

The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of $50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the justice the sum of $11.45 for his costs in that behalf; and if the sums were not paid forthwith, she was adjudged to be imprisoned.

The first clause of the by-law provided that every transient trader who occupied premises in the municipality and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for the imposition of a penalty for a breach of any of the provisions of the by-law and that in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress.

Held, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these ommissions were fatal to the conviction.

Regina v. *Caton*, 16 O. R. 11, followed.

Held, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice instead of to the informant, and the award of imprisonment upon default in payment of the penalty.

The conviction was quashed, and costs were given against the informant.

F. J. Roche, for defendant. *G. W. Lount*, for informant.

Boyd, C., Ferguson, J., Meredith, J.] [June 14.

KELLY v. DAVIDSON.

Master and servant—Foreman—Negligence—Evidence—Finding of jury.

An appeal by the plaintiff from the decision of MACMAHON, J., ante 214, was allowed with costs, and judgment ordered for the plaintiff for

$500, the damages assessed by the jury, with costs, the Court holding that there was evidence sufficient to support the finding of the jury in answer to the third question, and that finding could not be interfered with or disregarded.

H. E. Irwin, for plaintiff. *Clute*, Q.C., and *A. R. Clute*, for defendant.

Boyd, C., Ferguson, J., Meredith, J.] [June 15.

CAMERON *v.* OTTAWA ELECTRIC R.W. CO.

Trial—Jury—Bias of juror—Relationship to party—Deaf juror—Juror not in panel—New trial—Costs.

The plaintiff was injured in September, 1898, in alighting from a car of the defendants, by reason of a sudden jerk. There was conflicting evidence as to whether the car was in motion when the plaintiff got off. There was an alarm that the car was on fire, which caused the plaintiff to endeavor to alight. She was thrown to the ground and her arm severely hurt. At the trial of an action to recover damages for her injuries a verdict was given for the defendants. The plaintiff asked for a new trial on the ground that the verdict was against evidence, and also upon the ground the foreman of of the jury was formerly a shareholder in the defendant company and connected by marriage with persons largely interested in it; also that another juryman was hard of hearing and did not hear the evidence of plaintiff's witnesses; and also that a third juryman was not in the panel at all.

Held, that it was essential to the maintenance of public confidence in the jury system, not only that the trial should be fairly conducted, but that it should appear to the parties and those interested to be fairly conducted, and that element was lacking in the present case.

A juror with pecuniary or personal interest in the case of either litigant would do well to disclose this fact at the outset; then, if no objection is made, he can be sworn and try the case without risk of suspicion. In the present conjunction of errors, it was impossible to say that the result had not been effected by the composition of the jury. The trial was not satisfactorily conducted, in regard to the presence on the jury of the three jurymen to whom objection had since been made, and while the plaintiff was not entitled to relief as a matter of right, the discretion of the Court might well be exercised to permit her to have a new trial on payment of costs. Order accordingly; MEREDITH, J., neither concurring nor dissenting.

Aylesworth, Q.C., and *G. F. Henderson*, for plaintiff. *Riddell*, Q.C., and *H. E. Rose*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] ROGERS *v.* REED. [Jan. 9.

Practice—Security for costs of appeal— How application should be made.

Motion to the full Court at Victoria on 8th January, 1900, for security for costs of appeal from an order under Order XIV.

The application was remitted to Chambers, the court holding that applications for security for costs of appeal to the full Court should be made to a judge in Chambers and not to the full Court.

Full Court.] [Jan. 15.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE NEW VANCOUVER COAL MINING CO. *v.* ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Crown, prerogative of—Right of Attorney-General to injunction to restrain action—Public harbour.

Appeal from injunction order. On 27th January, 1898, the defendants brought an action against the New Vancouver Coal Mining and Land Company, Limited, for a declaration that they were entitled to the coal under the sea opposite the lands known as the Newcastle Townsite Reserve, claiming them under letters patent from the Dominion dated the 21st of April, 1897. The action was ready for trial and on 5th September, 1899, the Attorney-General for British Columbia and the coal company commenced this present action against the Esquimalt and Nanaimo Railway for a declaration that the right of coal under the foreshore and opposite to Newcastle Townsite Reserve was vested in the Crown in right of the province, and for an injunction to restrain the defendants from further prosecuting their action against the coal company. On the application of the Attorney-General the Chief Justice made an order restraining the further prosecution of the action against the coal company until the determination of this action.

Held, on appeal (MARTIN, J., dissenting), that the order was properly made.

The Supreme Court of British Columbia has all the powers of the Exchequer Court in England, and all the machinery necessary for the exercise thereof.

Per MARTIN, J.: The Crown in right of the Province of British Columbia has no interest in the property in litigation, and is not entitled to exercise any prerogative in relation thereto.

The minerals under the waters and bed of Nanaimo harbour at the time of the Crown grant of 21st April, 1887, were the property of the Dominion. Appeal dismissed.

Bodwell, Q.C., and *Duff*, for appellants. *Davis*, Q.C., for respondent.

Book Reviews.

The Division Courts Act, by BICKNELL & SEAGER. Second edition, Toronto, Canada Law Book Co., 32 Toronto Street.

The above has just been issued from the press and will be welcomed by the profession. It will be referred to more at length hereafter.

The Law of Bailments, by EDWARD BEAL, B.A., Barrister-at-Law, with notes of Canadian cases by A. C. Forster Boulton, Inner Temple and Osgoode Hall, Toronto, Barrister-at-Law. London, Butterworth & Co., 12 Bell Yard, Temple Bar, Law Publishers, 1900.

This is a new book on a most important subject, embracing the law of bailments as to deposits, mandates, loans for use, pledges, hire, innkeepers and carriers. Its value to the Canadian lawyer is largely enhanced by the notes to Canadian cases contributed by Mr. Boulton, and it will be found to be one of the most useful law books of the year. Mr. Beal follows the same plan as pursued by him in his works of Cardinal Rules of Legal Interpretation, viz.: "That of supporting and elucidating general principles, doctrines, propositions and rules by giving, ipsissimis verbis, English judicial statements as reported, together with occasional extracts from well-known text-books." This method is an excellent one and the selections have been carefully made by the author. This of course saves a great deal of time and labour and gives to the reader the learning of other writers on the subject discussed without having to consult a number of authors. With a volume of 736 pages of such excellent material we have no cause perhaps to complain that some matters which would seem to come within the scope of the title of the book are not dealt with or only so to a limited extent, and the excellence of the work as a whole disarms criticism. It is gratifying as well as useful to notice the prominence given to Canadian authorities and trust that in future other books published in England may give us the same advantage. The printer and publisher have done their work excellently well.

The Principles of the Interpretation of Wills and Settlements, by ARTHUR UNDERHILL, M.A. and J. ANDREW STRAHAN, M.A., Barristers-at-Law, London: Butterworth & Co., 12 Bail Yard, Law Publishers, 1900.

This is a praiseworthy attempt to write a book on an almost impossible subject, inasmuch as it is almost impossible to lay down any rules except perhaps of the most elementary character. As the Master of the Rolls recently said: "When I see an intention clearly expressed in a will and find no rule of law opposed to giving effect to it I disregard previous cases," and we therefore see how little value are so-called "authorities;" and the editors themselves say that as to the interpretation of wills which are

ambiguous or equivocal in their language, the true way is to form an opinion apart from cases, and then to see whether the cases necessitate the modification of that opinion. The book must necessarily be therefore an attempt to extract from the decisions some broad general principle which will assist the practitioner in the interpretation of ambiguous wills and settlements and to show the reasons which have led to the adoption of these principles. The propositions set out by the authors are clearly stated and with sufficient fullness, and are then illustrated by extracts from modern judgments. The work has no intention of being a compendium of case law, but it will, be found an excellent book for students and for practitioners and counsel wherewith to refresh the memory as to general principles of interpretation.

The Law Quarterly Review, edited by SIR FREDERICK POLLOCK, M.A.; April, 1900. London: Stevens & Sons, 119-120 Chancery Lane.

This number contains the usual notes on recent cases written in the editor's masterly style. There is apparently no branch of the law with which he has not made himself familiar, and in these notes he shows his intimate knowledge of the various subjects therein discussed. The articles in this number are as follows: Penalties for failure to perform within a Limited Time under a Substituted Contract. This comes from Tasmania. Negotiability and Estoppel, a chapter out of the forthcoming work of Mr. John S. Ewart, Q.C., of Manitoba; Negligence in relation to privity of contract, which was published in the *Law Quarterly* simultaneously with its appearance in this journal, written by Mr. C. B. Labatt, of Toronto In addition to these contributions from various parts of the Colonial Empire, we are given the Near Future of Law Reform, with special reference to the position of legal matters in England; Election between alternative remedies, criticising the conclusion arrived at in *Rice v. Reed* (1900), Q.B. 54; Husband's liability for his wife's torts, and the Married Women's Property Act, discussing recent cases on this much debated subject.

Subject Index to the Books in the Library of the Law Society of Upper Canada at Osgoode Hall, Toronto, compiled by W. G. EAKINS, M.A., Barrister-at-Law, Librarian, 1900.

It is said that the best thing next to knowing the law is to know where to find it. The usefulness of the volume in this respect is manifest. As stated in the preface, pains have been taken to make it as serviceable as possible by entering each work not only under the heading of its known title, but also under such headings as its contents seem to justify. The profession is greatly indebted to Mr. Eakins for this most carefully prepared and useful index, and it will add largely to the value of the Library of our Law Society. This Library, it may be observed, contains some 20,000

bound volumes, of which about 12,000 are reports of cases, 2,000 statutes 800 legal text books, periodicals and works of reference, 3,000 are parliamentary publications, and 5,000 works of general literature, including many encyclopædias and other books of reference.

Kime's International Law Directory.—Edited and compiled by PHILIP GRABURN KIME. London: S. & J. Brawn, 13 Gate Street, Lincoln's Inn Fields, Holborn, W. C. 1900.

This useful directory continues its good work. It contains a representation of selected legal practitioners in most of the principal towns throughout the civilised world, with telegraphic code and short appendix. This edition has undergone complete and careful revision. We need not refer particularly to the need of such a book; every lawyer knows it already. A very useful chapter is the epitome of British and Foreign Colonial Patent Laws, carefully prepared by a gentleman who is evidently familiar with the subject.

Flotsam and Jetsam.

The existing Great Seal being worn out, it has been stated in Parliament that a new Great Seal is to be designed and cut at a cost of about 400l.; and inquiries are being made as to what will become of the present seal when the new one is approved and put into use. Since the time of Elizabeth, though theoretically there might be a Keeper of the Great Seal as distinct from the Chancellor, the two offices have never been full at the same time, and since 1760 no Lord Keeper has been appointed, and the custody of the Great Seal has always been with the Lord Chancellor of Great Britain. He is bound always to have it in his custody, and may not take it out of the realm. Wolsey was impeached for disobeying this rule. But it is said that Lord Brougham took it to Scotland with him, which was perfectly legal, and, when there, used it as a frying-pan to make an omelette.

The practice when a new seal is made is to approve its use by Order in Council; and then the old seal is broken (or in modern practice damasked—*i.e.* given a formal tap with a hammer), and is disposed of at the Sovereign's will—*i.e.* according to inveterate practice as the perquisite of the Lord Chancellor then in office. On this subject also Lord Brougham made the leading case; for he fell out with Lord Lyndhurst on a claim for possession of the seal of George IV. because when the seal was ordered Lyndhurst was in office, and when it was finished and approved Brougham had succeeded him. The King had to give the judgment of Solomon, and present one part of the seal to each of the contesting Chancellors. By the

Crown Office Act and the Orders in Council made under it many grants formerly made under the Great Seal are now made under the Wafer Great Seal.—*Law Journal (Eng.)*

NOT LONG AGO a man who manifested his disapproval of a performance at a place of public amusement in Kansas City, Mo., by hissing, was arrested at the instance of the manager and arraigned before a police magistrate on the charge of disorderly conduct. We are told that the judge promptly discharged the accused with the remark that "If a man has the right to applaud in a theater, he certainly has a right to hiss." This seems to be sound sense, and ought to be equally good law. Applause is the usual mark of approval and its antithesis, the hiss, is the customary way of indicating disapproval of a play, act or scene. The audience is not permitted to give articulate expression to its pleasure or displeasure—no one can get up in the auditorium and give his ideas of the play or the players without imminent danger of being ejected for having disturbed the peace and enjoyment of the remainder of the audience. The spectators are the critics for whose benefit the performance is given, and if the management permit applause on the part of those who are pleased, they should also permit expressions of disapproval by those others who do not like it.—*Albany Law Journal.*

ONE OF THE most novel and curious actions at law we have come across in some time originated not long ago in Stroudsburg, Pa. Among the residents of that city is the Rev. E. E. Dixon, who, in a public prayer, invoked the divine vengeance upon a brewery that had been erected in that town. In his prayer the Rev. Dixon, after calling down curses upon the aforesaid brewery and its proprietors, according to newspaper reports, specifically urged God to strike it with lightning. Sure enough, not long afterward, during a violent storm, a bolt from heaven struck and partially wrecked the building; thereupon the owners brought suit for damages against Mr. Dixon, claiming that through his intercession and appeals the divine wrath had been brought down upon their property. The clergyman, in his answer, it is understood, puts forth the claim that he should not be held responsible for an act of divine providence, and this is the novel question with which the court will be compelled to wrestle. Such a plea would seem to indicate a woeful lack of faith in the power of prayer, yet perhaps it was the only plea he was able to make under the circumstances. The trial of this novel suit, if it ever comes to trial, ought to prove decidedly interesting. The Good Book tells us that all that one needs in order to have his prayers answered is faith. Did the Rev. Dixon possess it, and was that faith potential in calling down the divine vengeance upon the brewery referred to, or was its destruction so soon after the prayer a mere coincidence—one of those strange correspondences with which the busy world is filled? Here is a question which is calculated to cause the average juryman's hair to turn gray.—*Albany Law Journal.*