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MR. JUSTICE OSLER'S JUDICIAL FAREWELL.

Those who were present in the Court of Appeal on the morning of the 18th April, when Mr. Justice Osler made his final appearance as a member of the court in which he had been a familiar figure for so many years, must have felt that the occasion was a very memorable one. It has been already referred to in the LAW JOURNAL, but we feel sure that our readers will agree with us in thinking that further reference may well be made to an event so interesting to the profession and the public.

Unusual indeed was the scene which the court room presented to those whose duties call them from time to time to form part of that audience. Every seat was occupied and every corner of the room crowded with those who had not been able to secure those positions of advantage, to which the holders clung with even more than the proverbial lawyer's tenacity! Within the Bar, and outside of it, was an imposing array of King's counsel, for once assembled not that they might rise to the height of some ''great argument'' but for the purpose of shewing their esteem and affection for one who more than thirty years ago doffed his stuff gown for the judge's robes, which during all those years he has worn with honour to himself and to the great advantage of his profession and the country. It may be noted in passing that the strange omission of Mr. Osler's name from the list of those who have been chosen to ''take silk,'' to which attention was called in our columns more than thirty years ago, has only been rectified within the last few weeks, since his retirement from the Bench.

Returning, however, to the matter in hand, with which the difference between stuff and silk, however important it may be in some respects, has but little to do, it may be said that the address of Sir Æmilius Irving from which an extract has already been given in our columns, was felt by all who were present

to be a worthy expression of the sentiments of those on whose behalf he spoke. Reference was made by him to the fact that the Attorney-General, who was prevented by serious indisposition from being present and taking part, as he would so gladly have done, in the proceedings of the day, had requested him to speak on his behalf. It may be added that the venerable Treasurer of the Law Society, with other members of convocation, who had assembled at a special meeting of that body, came directly from that meeting, which had been adjourned for the purpose, to the Court of Appeal, and that he was also requested by the York County Law Association and the Ontario Bar Association, to act as their spokesman on the occasion. In feeling and appropriate terms, Sir Æmilius spoke of the desire of all those whom he represented to testify their loyalty and affection to one who was regarded by them not only as an illustrious member of the Bench, but as a friend whose familiar presence was highly valued, and whose withdrawal from amongst them would give everyone a sense of personal loss. In concluding his remarks, the treasurer stated that he was "directed by the Corporation of the Law Society and the Benchers in congregation to communicate (to the learned judge) that they hail with gratification the prospect of his taking his place as of right in their governing body, and that his accession thereto will be of great benefit to the province generally and to the profession." All who were present rose to their feet when Chief Justice Sir Charles Moss, on behalf of himself and his colleagues on the Bench, expressed his desire that they "should be associated in the most emphatic manner" with everything that had been said by the Treasurer, but that no words could adequately express their own sense of loss alike to the Bench, the Bar, and the public, and of personal loss to themselves occasioned by the retirement of their brother Osler." Then came the moment of chief interest in what was throughout a most impressive and memorable scene, when Mr. Justice Osler rose, and only controlling his manifest deep emotion by a strong effort, addressed the court and the members of the Bar in a few characteristically simple and modest words, in which

he expressed his high appreciation of the honour which had been done him, and of his gratification in feeling that he was leaving the Bench after his thirty-one years' service, not in the "cold silence of the most critical profession in the world," but with such a cordial expression of their approval. It was a moment of almost painful interest, when the judge, closing his brief address with a characteristic reference to his desire not to trespass unduly upon the time which belonged to the country, passed behind the chairs of his brethren on the Bench, and after receiving a kindly greeting from that other well-tried judicial veteran, the Chancellor, who was present as amicus curiæ, retired for the last time from the place that knew him so well.

Mr. Justice Garrow then moved to the vacant chair at the right hand of the Chief Justice, and Mr. Justice Magee was sworn in as "justice of appeal in the room and stead" of the retiring judge. Some case was then called, and the wheels of justice began again to revolve.

The memory of the scene, however, will linger long with those who were present, and it will not be out of place to offer a few reflections on the causes which have led to such a remarkable expression of the feeling of the Bar towards Mr. Justice Osler, a feeling, it should be added, which is shared by the public at large, and by the press which, no doubt, was a faithful mirror of the views of those to whom it speaks, when it headlined its report of the proceedings of which we have given an outline as the "farewell of a great judge." The proofs of this are to be found, not alone in that great body of careful and well-considered judgments which have been penned by him during these thirty laborious years, so many of which are found in the pages of our reports, and will, no doubt, be cited as leading authorities or helpful discussions for many a year to come, but also in considerations of a more general nature, which are well summarized in two apt quotations with which Mr. Justice Garrow enriched the genial and suggestive address delivered by him at a recent meeting of the Ontario Bar Association. One was from Socrates through the medium of his great interpreter Plato, and was to the following effect: "Four things belong to

a judge, to hear courteously, to answer wisely, to consider soberly, and to decide impartially." The other quotation was from the great Bacon, who unfortunately was not in all things an exemplar of the judicial virtues of which he speaks as follows: "Judges ought to be more learned than witty, more reverent than plausible and more advised than confident. Above all things integrity is their portion and proper virtue." We fully agree with Mr. Justice Garrow, when he goes on to say that "the Bench of Ontario, as a whole, both past and present, would fairly measure up to even these high standards," but it will be generally admitted that if an individual case is sought, in which these standards have been fully exemplified, such a case is furnished in the career of Mr. Justice Osler. From that career he has seen fit to retire while still in the full enjoyment of his bodily and mental powers, while, to use the feeling words of Sir Æmilius Irving, "he is surrounded with joys, he has around him honour, love, obedience, the affection of his children and troops of friends." It is pleasant to know that since his retirement he has been chosen to fill a position of high trust and responsibility in which no one can doubt that he will discharge the duties that fall to his lot with that thoroughness and fidelity which have ever been his leading characteristics. Of him it may surely be said, as of another who consistently followed the path of duty:—

"Whatever record leap to light,
He never shall be shamed."

THE CANADIAN CONSTITUTION.

Our excellent contemporary, the *Law Notes*, in a very intelligent article discusses the "Canadian Constitution," especially with reference to the difference between it and that of the United States, drawing attention to some similarities and some differences. The writer refers to the case of *Bank of Toronto* v. *Lambe*, 12 A.C. 588, as to there being, under the British North America Act, no residuum of power vested directly in the people. That

Act exhausts the whole range of legislation, so that whatever is not thereby given to the provincial legislatures rests with the Parliament of the Dominion. With reference to the distribution of legislative powers between a Provincial Legislature and the Federal Parliament the writer says: "The Canadian statesmen who discussed the terms of the proposed Confederation in the early sixties were close observers of the great struggle then being waged between the north and the south. Believing that the war was the result of the failure of the United States constitution to give to the Federal Government sufficient control over the States, they resolved to establish a strong central authority in the new Confederation. The British North America Act endowed the Federal Parliament with the right to legislate on all subjects not expressly reserved to the provinces. It also gave to the Federal Government the power of vetoing any Act of a Provincial Legislature. In recent years, however, the idea has been favoured that the Federal Government should not veto a provincial Act when such Act is clearly within the sphere of legislation reserved to the province. Under this principle the Federal Government has lately refused to disallow the Ontario Hydro-Electric Power legislation."

It is gradually becoming evident to intelligent observers that this principle, commonly called the doctrine of provincial rights, has seriously impaired the balance between Federal and Provincial powers and destroyed the safeguards against hasty, unrighteous or improvident legislation which the power of disallowance given under the British North America Act was intended to create; and has rendered the section a nullity for the purposes for which it was enacted. It was, in the opinion of the framers of our constitution, a wise and necessary provision, and especially so in provinces where there is no second chamber. The present interpretation of the section confines the power of disallowance to cases where there is a manifest encroachment by a Provincial Legislature upon the jurisdiction of the Dominion Parliament. It is manifest that such a power was unnecessary for such a purpose, and therefore it was not intended for that, but for something else. The Governor-General, to whom the right of dis-

allowance is given, has through his advisers, abrogated his rights under the section in question, and has refused to shoulder the responsibility thereby laid upon him. This subject has already been discussed in our pages, but it would not be inappropriate here to reproduce what has already been said on this point. Mr. Labatt in his article on disallowance (ante vol. 45, p. 300), says: "The more reasonable hypothesis would seem to be, that the framers of the Act regarded questions of jurisdiction as being preferably determined by decisions rendered in the ordinary course of litigation, and that it was their expectation that the validity of legislation in this particular point of view would normally be settled by the courts rather than by the Dominion authorities. This consideration may fairly be said to indicate that the special object of the section as to disallowance was to render possible the annulment of statutes which, although dealing with matters within the legislative domain of the Provincial Parliament, might be objectionable on other grounds." The subject is a most important one and must some day be dealt with in a statesmanlike manner, free from the pernicious entanglements of party politics.

From other observations in the article it is evident that the recent extraordinary legislation in the Province of Ontario referred to by the writer is becoming a subject of comment in other countries besides our own. He emphasizes his view of the defects of our system when he recites that the Canadians believed that substantial benefits were to be gained by leaving their legislatures unshackled, and relied upon public opinion and sound traditions of legislative action to prevent the passage of unjust laws, and continues: "It must be admitted, however, that a repetition of the recent high-handed legislation in the Province of Ontario in relation to the Hydro-Electric Power Commission and certain mining claims at Cobalt would likely shake their trust in the sufficiency of such safeguards." He adds, "It is interesting to note that because of the lack of restrictions on legislation, constitutional questions are, in comparison with their frequency in the United States, rarely raised in ordinary litigation, and constitutional law can scarcely be regarded as a bread-and-butter subject by the young practitioner."

ACTUAL POSSESSION.

That the popular definition of words and the legal meaning attributed thereto are frequently at variance cannot be gainsaid. And "possession" affords a specially notable instance of this peculiarity. To any person unhampered by consideration of the multifarious reported decisions which deal with that word, and who has not mastered their intricacies, the meaning it imports is a physical holding, and nothing less. It conveys, indeed, to the mind of such a one the notion contemplated when he employs the familiarly current phrase, "Possession is nine points of the law." But to the lawyer acquainted with those decisions, "possession" has a technical meaning of a particular nature. As was remarked by Mr. Justice Stirling (as he then was) in the case of *Re Egan; Mills* v. *Penton,* 80 L.T. Rep. 153; (1899) 1 Ch. 688, although lawyers may know the difference between an interest which is in possession and one which is in reversion, laymen do not use the word with reference to that distinction. His Lordship referred to the definition in Johnson's and other dictionaries—that is to say, the state of owning, or having in one's hands or power, property; adding that the fine distinction between "possession" and "ownership" is not one which would be present to the mind of an ordinary layman.

The definition, on the other hand, contained in the ancient law lexicon known as Termes de la Ley runs thus: " 'Possession' is said two waies, either actuall possession, or possession in Law. 'Actuall Possession' is when a man entreth in deed into lands or tenements to him descended, or otherwise. 'Possession in Law' is when lands or tenements are descended to a man, and hee hath not as yet really, actually, and in deed entred into them: And it is called Possession in Law because that in the eye and consideration of the law, he is deemed to be in possession, forasmuch as he is tenaunt to every man's action that will sue concerning the same lands or tenements." But, as Mr. Stroud points out in his inimitable Judicial Dictionary (2nd edit., p. 1513), after quoting the foregoing definition, generally where an estate or interest in realty is spoken of as being "in possession," that does not, primarily, mean the actual occupation of the pro-

perty; but means the present right thereto or to the enjoyment thereof (*Ren* v. *Bulkeley*, 1 Doug. 292), as distinguished from reversion, remainder, or expectancy, as illustrated by the old conveyancing phrase, "In possession, reversion, remainder, or expectancy." The learned author cites the case, which came before Mr. Justice North, of *Re Morgan's Estate*, 48 L.T. Rep. 964; 24 Ch. Div. 114, where his Lordship expressed the opinion that the words "in possession" in s. 58, sub-s. 1, of the Settled Land Act, 1882, 45 & 56 Vict. c. 38, clearly mean possession properly so called as distinguished from possession in remainder or reversion.

Whether by prefixing the word "actual" to "possession" any force or intensity is added to the meaning of that word is seemingly a matter of some uncertainty. It is noticeably a word much favoured by the legislature, appearing as it does in innumerable Acts of Parliament. And the manifest object of adopting it is to fortify and give emphasis to the expression to which it is prefixed. It is true that in the case of *Gladstone* v. *Padwick*, 25 L.T. Rep. 96; L. Rep. 6 Ex. 203, Baron Bramwell, speaking of the words "actual seizure" in s. 1 of the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, observed that the word "actual" is of no peculiar force, and that "actual seizure" means no more than "seizure." Singularly, in regard to "occupation," which is required by s. 18 of the Representation of the People Act, 1832, 2 Will. 4, c. 45. It was laid down in *Reg.* v. *West Riding Justices*, 2 Q.B. 505, that "occupation" —even "actual occupation"—does not, necessarily, mean residence, although, as was admitted by Mr. Justice Patteson in that case, "ninety-nine persons in one hundred would so understand it." But that "actual," when expressly used in statutes and legal instruments, is usually designed to accentuate the meaning of any words to which it is prefixed is scarcely open to question. For example, inasmuch as the statute 1 Will. IV. c. 18, requires in terms that a house or building or land shall be "actually occupied" for the purpose of a person acquiring a settlement in a parish, it was held in *Rex* v. *Inhabitants of St. Nicholas, Rochester*, 5 B. & Ad. 219, that a constructive occupation would not satisfy the statutory requirement.

Whether "actual possession" means something more than "possession" standing alone, is, however, by no means so free from doubt. Does it mean possession de facto—that is to say, physical possession as distinguished from possession in law; or does it mean possession de jure—that is to say, mere constructive legal possession, as that of one who has an estate in præsenti and not in reversion, remainder, or expectancy? According to the statement in Vaizey on Settlements (p. 1349), it is in order to avoid tenants in tail in remainder being treated as persons entitled to the possession of estates, so as to entitle them to personalty, that it has grown customary to prefix the word "actual" to "possession" in settlements of real estate. In some of the decided cases it has evidently been considered that "actual possession" has a somewhat more extended meaning than "possession" by itself. Thus, in *New Trinidad Lake Asphalt Company* v. *Attorney-General for Trinidad*, 91 L.T. Rep. 208; (1904) A.C. 415, the meaning of "actual possession" was attributed by the Privy Council to the word "possession" in contradistinction to control or right to control. So, also in *Leslie* v. *Earl of Rothes*, 71 L.T. Rep. 134; (1894) 2 Ch. 499, the suggestion that "possession" was used in contradistinction to reversion was rejected, and it was construed as "actual possession." And both words appearing in s. 26 of the Representation of the People Act, 1832, they were decided in *Murray* v. *Thorniley*, 2 C.B. 217, to mean possession in fact in contradistinction to possession in law. That decision was followed in *Hayden* v. *Twerton*, 4 C.B. 1, and likewise in *Webster* v. *Overseers of Ashton-under-Lyne; Orme's Case*, 27 L.T. Rep. 652; L. Rep. 8 C.P. 281.

There was a full discussion of the effect of prefixing the word "actual" in the arguments in the case of *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40, at p. 66. It was there held by Vice-Chancellor Page-Wood that the expression "actual freehold" must be construed as a technical term equivalent to and signifying "freehold in possession": (See Co. Litt., Harg., 15a, 266b, note.) Accordingly, it was decided that the person entitled to the "actual freehold" of an estate was the person in possession or in the receipt of the rents and profits. That decision was con-

sidered by Mr. Justice Kekewich in the case of *Re Angerstein; Angerstein* v. *Angerstein*, 73 L.T. Rep. 500; (1895) 2 Ch. 883. The expression there was "actual possession"; and the learned judge was of opinion that "actual" did make a very large and important difference when prefixed to "possession"; and that the two phrases "entitled to the actual freehold" and "entitled to the actual possession" meant the same thing—that is to say, referred to the person in possession of the estate to which the phrase applied.

In this state of the authorities, and the divergence of judicial opinion which they disclose, what Mr. Justice Joyce had to consider in the recent case of *Re Lord Petre's Settlement; Legh* v. *Petre*, 101 L.T. Rep. 847, was whether the fact that a tenant for life had previously assigned his life estate prevented him from becoming entitled to the "actual possession" of the settled estates under the limitations of the settlement there. Briefly stated, the facts in that case were as follows: By his marriage settlement Philip Petre was empowered, in case he should become entitled to the "actual possession" or the "actual receipt" of the rents and profits of the Petre estates under the limitations of a settlement, which was described as the Petre settlement, to revoke certain trusts contained in the marriage settlement. Philip assigned for valuable consideration the life estate to which he was entitled in remainder after Bernard and his issue under the Petre settlement to Bernard, the then tenant for life. On the death of Bernard without issue, Philip became entitled to the Petre estates, subject to the assignment by him. Later, Philip revoked the trusts of the marriage settlement. Mr. Justice Joyce came to the conclusion that "actual possession" did not mean physical possession, but possession under the terms of the settlement itself. Therefore his Lordship held that the assignment by Philip of his life estate to Bernard did not prevent the former, on the death of the latter, from becoming entitled to the actual possession of the Petre estates "under the limitations of" the Petre settlement; and that his power of revocation had consequently arisen and was effectually exercised.

In the course of his judgment the learned judge allowed

that, in ordinary language, Philip did not become entitled to the possession of the Petre estates, still less to the actual possession thereof, because if by "actual possession" physical possession was meant, upon the death of Bernard, the persons who became entitled to such actual possession and the receipt of the rents and profits were the assignees under the deed of assignment. But he pointed out that the words creating the power of revocation were "shall become entitled," and so on, "under the limitations of" the Petre settlement, and that those words limited and qualified the expression "actual possession." There seemed to his Lordship to be good ground for contending that in such clauses in this connection the expression "actual possession" had come to be used as opposed to presently entitled in reversion or remainder. His Lordship applied what was said by Sir John Romilly, M.R., in *Hogg* v. *Jones*, 32 Beav. 45, where there was a gift of heirlooms by reference to the actual possession of real estate; and the Master of the Rolls there held that the heirlooms went to a person who was, in fact, deprived of the possession of the real estate by disentail.

It is seen, therefore, that Mr. Justice Joyce attached no more meaning to "actual possession" than the purely technical one which is commonly ascribed by lawyers to "possession" when unenforced. But what the learned judges of the Court of Appeal would have held, if it had been determined to bring the case before that court, can only be conjectured. Whether they would have considered that "actual" makes a difference by adding something really of substance to the word "possession," or whether it ought to be regarded as a mere redundancy and superfluous, as Mr. Justice Joyce did, is wholly problematical. It is, consequently, extremely advisable to select some other word than "actual" where it is specifically desired that the technical meaning of "possession" shall not prevail. "Physical," or a word synonymous therewith, might advantageously be inserted—in substitution for, or as supplementary to, "actual"—before "possession," if a modification of the technical meaning generally ascribed to that term is intended. All the uncertainty which arises from the conflict of authority to which we have called attention would then be averted.—*Law Times.*

THE REGENCY ACT.

In the last reign there was no necessity for the passing of a Regency Act, inasmuch as the heir apparent to the throne, the present King, had on the accession of the late King reached the mature age of five-and-thirty. A Regency Act will now be rendered necessary owing to the tender years of the present heir apparent to the throne, the Duke of Cornwall. The fiction of law is that the King must always be in full maturity of intellectual power, and as such exempt from the ordinary disabilities and immunities of infancy. Testamentary guardianship is the creation of statute, and it has never been suggested that the prerogative enables a King to appoint a guardian to his successor, which must be effected by legislation. The only Regency Act providing for the case of an infant Sovereign which ever took effect was that of the reign of Henry VIII., 28 Hen. 8, c. 7, s. 23, which came into operation at the accession of Edward VI. On other occasions since the reign of Henry VIII. Regency Acts have been passed nominating or giving to the King the power of nominating a Regent or a council. But the duties of royalty have never since been discharged by a Regent in consequence of the infancy of the King (see Anson's Law and Custom of the Constitution, ii., The Crown, Part 1, pp. 247-249). The principles for the determination of the question of a Regency since the accession of William IV. in 1830 have not been of an abstract character, but have in each case been laid down with reference to the actual circumstances of the situation. The three cases the subject of legislation since that event were the death of William IV. in the minority of the Princess (Queen) Victoria; the death of the late Queen Victoria while her successor, the King of Hanover, was out of the realm; and the death of the late Queen before any child of hers, being her successor, had reached the age of eighteen. In the first case the provision was that the Duchess of Kent (the mother of the late Queen Victoria) should be sole Regent uncontrolled by any council other than the ordinary responsible Ministers of the Crown: (1 Will. 4, c. 2). In the second case, that of providing for the absence from

the realm of the late Queen Victoria's successor at the time of her decease, a precedent of Queen Anne's reign was followed (6 Anne, c. 7) by which the administration of the government was to be committed to "Lords Justices" till the King's arrival: (7 Will. 4 & 1 Vict. c. 72). In the third case, in the event of any child of Queen Victoria succeeding to the throne before the age of eighteen, the late Prince Consort as the surviving parent was to be Regent without any limitations upon the exercise of the royal prerogatives except an incapacity to assent to any bill for altering the succession to the throne or affecting the uniformity of worship in the Church of England or the rights of the Church of Scotland: (3 & 4 Vict. c. 22). The attainment of full age on the part of the late Queen's children during their lifetime rendered this statute of no effect, and no necessity arose for the passing of a fresh Regency Act at any subsequent period of Queen Victoria's reign or during the whole period of the reign of Edward VII.: (see Sheldon Amos' Fifty Years of the English Constitution, 1830-1880, pp. 212, 213).—*Law Times.*

PRINCIPAL AND AGENT.

In *Young* v. *Toynbee,* [1910] 1 K.B. 215, 79 L.J.K.B. 208, the Court of Appeal has taken a step further in developing the doctrine of *Collen* v. *Wright,* and justified the opinion thrown out by the late Kekewich, J., in *Halbot* v. *Lens,* [1901] 1 Ch., at p. 349. Where an agent, having had a continuing authority conferred upon him, purports to exercise it after it has in fact been revoked by the principal's lunacy or death, that fact being unknown to the agent as well as the third party, the agent is bound by an implied warranty of his authority as in other cases. *Smout* v. *Ilbery,* 10 M. & W. 1, 62 R.R. 510, is overruled, unless peradventure it was decided on the assumption that no reasonable man could suppose any agent to warrant that a principal who had gone to China was living; in fact the news of his death took five months to reach England. But if it were so, the case is still deprived of the general authority it has usurped for two generations, and decisions rendered on that supposed authority fall

with it. There remains untouched the anomalous rule of the common law, contrary to all other systems and deliberately reversed by British Indian legislation, that the death of the principal absolutely revokes the agent's authority without regard to the agent having notice of it. Perhaps this rule may be mitigated in the manner suggested by Brett, L.J., in *Drew* v. *Nunn* (1879), 4 Q.B. Div., at p. 668. Subject to that possibility, we now remedy our law's injustice to the creditor only by the not very just expedient of making a no less innocent agent liable.—*Law Quarterly.*

Not as a matter of news, but of record, we note that the Royal proclamation by which the British Colonies of Cape Colony, Orange River Colony, Natal and the Transvaal become the Dominion of South Africa was read at Victoria on May 31st. The day chosen was the eighth anniversary of the Boer acceptance of the British terms at the close of the war. Lord Gladstone was sworn in as Governor-General and the first Union Cabinet was formed under the Premiership of General Louis Botha, the oath being administered by Sir John H. De Villiers, Chief Justice of the Supreme Court of South Africa. We have already given a sketch (ante vol. 45, p. 309) of the draft Act of Union, and to this we would refer our readers.

Our exchanges refer in most complimentary terms to the late Mr. Justice Brewer of the Supreme Court of the United States. One writer says: "He died (at the age of 73) as all strong men and brave men would wish to die, in the full use of his superb faculties, mental and physical." Another writer says: "His death is especially untimely as it removes one of the members of the Supreme Court at a time when that tribunal is about to pass on some of the most important cases in the country's history." He was a worthy member of a most learned and august Bench. His successor is Charles E. Hughes, governor of the State of New York, whose appointment will meet with the universal approval of all honest men.

It is remarkable that the silk gown of the Bench and Bar owes its original use to its having been adopted as a form of mourning at the death of an English Sovereign. Up to the end of the seventeenth century, with the exception of the prescribed dress of the judges and serjeants, no custom was officially recognized in the courts of justice other than that in ordinary use in the halls of the Inns of Court—the cloth or stuff gown of the utter barrister, and the one with black velvet and tufts of silk worn by the readers and benchers—and this continued invariably to be the constant dress of an advocate till the death of Queen Mary in 1694, at which time the present silk gown was introduced as mourning, and, having been found more convenient and less troublesome than the other, has since been continued. The late Sir Frederick Pollock is said to have expressed an opinion in reference to the ordinary costume of the Bar that the Bench and Bar went into mourning at the death of Queen Anne, and have so remained ever since. The court dress —black silk gowns and large wigs—if not first brought into use at the funeral of Queen Anne, certainly came into fashion only about the time of the death of her elder sister, Queen Mary: (See Pulling's Order of the Coif, pp. 223-224.)—*Law Times.*

One of the most entertaining legal opinions we have ever encountered was that written by Mr. Justice Irving G. Vann of the New York Court of Appeals in the case of *Smith* v. *United States Casualty Company,* decided Feb. 8, 1910. This opinion, which was not less able than interesting, was announced in an insurance case, the court upholding without a dissenting voice the common law right of a man to change his name, and his right to recover a policy of insurance issued to him under an assumed name:—

''The history of literature and art furnishes many examples of men who abandoned the names of their youth and chose the one made illustrious by their writings or paintings. Melancthon's family name was Schwartzerde, meaning black earth, but as soon as his literary talents developed and he began to forecast his future he changed it to the classical synonym by which he is known to history.

Rembrandt's father had the surname Gerretz, but the son, when his tastes broadened and his hand gained in cunning, changed it to Van Ryn on account of its greater dignity.

A predecessor of Honoré de Balzac was born at Guez, which means beggar, and grew to manhood under that surname. When he became conscious of his powers as a writer he did not wish his works to be published under that humble name, so he selected the surname Balzac from an estate that he owned. He made the name famous, and the later Balzac made it immortal.

Voltaire, Molière, Dante, Petrarch, Richelieu, Loyola, Erasmus and Linnæus were assumed names. Napoleon Bonaparte changed his name after his amazing victories had lured him toward a crown, and he wanted a grander name to aid his daring aspirations. The Duke of Wellington was not by blood a Wellesley, but a Colley, his grandfather, Richard Colley, having assumed the name of a relative named Wesley, which was afterwards expanded to Wellesley.—*Green Bag.*

The third annual meeting of the New York Bar Association, held in Rochester, in January last, was as usual very interesting. Some of the papers read were: The necessity for a Court of Criminal Appeal; The dishonesty of sovereignties in reference to meeting their obligations on contract and tort as required of private corporations and individuals; The Employers Liability Act, etc. The committee on the commitment and discharge of the criminally insane was submitted and discussed. This report draws attention to the misuse of the right of habeas corpus whereby persons detained as insane in public institutions can obtain repeated hearings on an issue of regained sanity, unhampered by prior adverse adjudications. This evil has been so acute that the suggestion is made that insanity or other mental deficiencies should no longer be a defence against a charge of crime, nor should it prevent a trial of the accused, unless his mental condition is such as to satisfy the court, upon its own enquiry, that he is unable by reason thereof to make proper preparation for his defence. This is a somewhat drastic and ill-considered suggestion, and not likely to go into force without considerable discussion and amendments, but the evil exists, and Thaw cases are all too common.

REVIEW OF CURRENT ENGLISH CASES.

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SOLICITOR AND CLIENT—VERBAL AGREEMENT AS TO COSTS—NO COSTS PAYABLE BY CLIENT—RIGHT TO RECOVER COSTS FROM OPPOSITE PARTY—ATTORNEYS' AND SOLICITORS' ACT, 1870 (33-34 VICT. c. 28), ss. 4, 5—(9 EDW. VII. c. 28, ss. 24, 28).

Gundry v. *Sainsbury* (1910) 1 K.B. 645. This was an appeal from the decision of a Divisional Court (1910) 1 K.B. 99 (noted, ante, p. 124). The question being whether a plaintiff having a verbal agreement with his solicitor that he was not to pay any costs, could, nevertheless, recover costs against the defendant. The Divisional Court held that he could not, and the Court of Appeal (Cozens-Hardy, M.R., and Moulton and Buckley, L.JJ.) have affirmed that decision, on the ground that apart from the Act of 1870 a suitor cannot recover from his opponent more costs than he is liable to pay, inasmuch as party and party costs are only awarded as an indemnity; and that even had the Act been applicable it was not necessary for the purpose of applying the proviso of s. 5 (Ont. Act, s. 28) that the agreement should be in writing.

NEGLIGENCE—PUBLIC SCHOOL—DUTY TO MAINTAIN SCHOOL PREMISES—INJURY TO PUPIL CAUSED BY NEGLECT TO REPAIR.

In *Ching* v. *Surrey County Council* (1910) 1 K.B. 736, the plaintiff, a pupil at a public elementary school, was injured by his foot being caught in a hole in an asphalt pavement in the school premises, which it was the duty of the defendants, by statute, to keep in repair. The Court of Appeal (Lord Halsbury, and Moulton, and Farwell, L.JJ.) held, affirming the judgment of Bucknill, J., that the plaintiff was entitled to recover damages for the injury so occasioned.

SALE OF GOODS INDUCED BY FRAUD OF PURCHASER—PLEDGE OF GOODS BY PURCHASER—RIGHT OF VENDOR TO DISAFFIRM CONTRACT—BANKRUPTCY OF FRAUDULENT PURCHASER.

In *Tilley* v. *Bowman* (1910) 1 K.B. 745, a firm of Kirkness & Sons by means of fraudulent representations induced the defendant to sell them certain goods, which the purchasers then pawned with a pawnbroker, and Kirkness & Sons were shortly after-

wards declared bankrupts, and the plaintiff was appointed trustee in bankruptcy. The defendants having discovered the fraud went to the pawnbroker and redeemed the goods of which they then claimed to retain possession as against the plaintiff. The present action was then brought in which the plaintiff claimed the goods or the value thereof less the amount paid by the defendants to the pawnbroker for the redemption; but Hamilton, J., who tried the case, came to the conclusion that the defendants, on discovering the fraud of Kirkness & Sons, were entitled to disaffirm the contract and retake possession of the goods even after the bankruptcy order had been made, and that they were entitled to set-off the damages they had sustained by the fraud (in this case the amount they had had to pay the pawnbroker) against the part of the purchase money which they had received from Kirkness & Sons.

DISCOVERY—EXAMINATION OF DEFENDANT FOR DISCOVERY LIBEL—INNUENDO—INTERROGATORY AS TO THE MEANING IN WHICH DEFENDANT USED WORDS COMPLAINED OF.

Heaton v. *Goldney* (1910) 1 K.B. 754 was an action for libel, in which the plaintiff claimed to examine the defendant for discovery, as to the meaning in which he used the words complained of in the action. Bucknill, J., held that such an interrogatory was admissible; but the Court of Appeal (Williams and Farwell, L.JJ.), held that it was not, on the ground of want of precedent, and as being oppressive; but inasmuch as the object of all examinations for discovery is to draw, if possible, from the party examined admissions which will support the opposite party's case, the reasons for disallowing the interrogatory in question do not seem particularly cogent.

ADMIRALTY—COLLISION—DAMAGE—SOUND SIGNALS.

The Curran (1910) P. 184. This was an appeal from the decision of Deane, J., finding the appellant guilty of negligence causing a collision. The appeal was on the weight of evidence. It was proved that the other vessel had sounded fog signals, but the appellants proved that they had not heard them until within a very short distance, too late to prevent the collision; in these circumstances Deane, J., held that the failure to hear the signals was evidence of there not being a proper look-out; and the Court of Appeal (Lord Halsbury, and Moulton, and Farwell, L.JJ.) declined to interfere with his decision.

PRINCIPAL AND SURETY—RELEASE OF PRINCIPAL—DISCHARGE OF SURETY—AGREEMENT BY SURETY THAT CREDITOR MAY COMPOUND WITH DEBTOR.

Perry v. *National Provincial Bank of England* (1910) 1 Ch. 464 was an action by a surety claiming that he was released by reason of the creditors having discharged the principal debtors. The agreement of suretyship between the plaintiff and defendants expressly provided that the defendants might, without affecting their rights against the plaintiff "exchange or release any other securities held by the bank for or on account of the moneys thereby secured or any part thereof." . . . and "compound with, give time for payment of, and accept compositions from and make any arangement with, the debtors or any of them." The principal debtors were a firm of Perry Brothers, who, in 1908, being on the verge of insolvency, made an arrangement with their creditors, under which arrangement a company was formed to take over certain properties of the firm, and in consideration thereof they issued debentures to the creditors at the rate of 25 per cent. for each £1 of their debts in full discharge thereof. At this time the total debt due to the bank from Perry Brothers was £3,530, from which was deducted £1,630, the value of certain securities held by the defendants against the property of Perry Brothers, leaving a balance of £1,900 in respect of which the defendants accepted the debentures of the company. In making this arrangement the mortgages made by the plaintiff were not taken into account. It subsequently turned out that the defendants were unable to realize the £1,630 from the securities they held against the property of Perry Brothers, and the defendants then gave notice of sale of the property mortgaged to them by the plaintiff, who, thereupon, brought the present action to restrain the sale and for a declaration that the plaintiff had been released from his suretyship. Neville, J., who tried the action, considered that the principal debtors had been released by the defendants, and that they were not entitled to enforce the mortgages given by the plaintiff as to any part of the claim; but the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.) came to a different conclusion, and held that although the acceptance of the debentures for the £1,900 had released the debt as to that amount, yet as to the balance of £1,630 that was still unpaid, and under the agreement the defendants were entitled to recover against the plaintiff that amount.

LANDLORD AND TENANT—EXECUTION AGAINST LESSEE—JUDGMENT CREDITOR—LANDLORD'S RIGHT TO RENT AS AGAINST EXECUTION CREDITOR—"RENT"—PREMIUM FOR LEASE—LANDLORD AND TENANT ACT, 1909 (8 ANNE, c. 18), s. 1—(R.S.O. c. 342, s. 19).

Cox v. *Harper* (1910) 1 Ch. 480. Foreclosure action. An interpleader issue had been directed in the following circumstances. One Innocent was the lessee of a public house. He mortgaged his interest to Cox the plaintiff, and gave a second mortgage to his lessors, a brewery company. In 1901, Innocent became bankrupt and the defendant was appointed his trustee in bankruptcy. In 1902 the company went into possession as second mortgagees, and let the premises to a tenant for £150 rent, and an additional yearly sum of £1,250 in lieu of premium for goodwill. On 8th March, 1909, the company obtained judgment against this tenant for £960 and gave him a month's notice to determine his tenancy. On March 9th, 1909, before the tenancy had expired the plaintiff commenced this action for foreclosure, and on 12th March a receiver and manager was appointed to whom the company was directed to give up possession. Later on the same day the company the sheriff levied execution in respect of the company's judgment debt. The receiver claimed as against the execution creditors, payment of the £150 and £1,250 for a year's rent due to him as landlord, under 8 Anne c. 18, s. 1 (R.S.O. c. 342, s. 19). Joyce, J., gave effect to the receiver's contention as to £150, but held that the £1,250 was not rent, and his judgment was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.).

PRACTICE—ORDER DISMISSING ACTION AS FRIVOLOUS—FINAL OR INTERLOCUTORY—APPEAL.

In re Page, Hill v. *Fladgate* (1910) 1 Ch. 489. An order was made dismissing an action as frivolous and vexatious. By the Rules of court different periods are allowed for bringing appeals from interlocutory and final orders. An appeal was brought which was not in time if the order was to be regarded as interlocutory. The Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Buckley, L.JJ.), held that for the purpose of appeal such an order must be regarded as interlocutory. At the same time Buckley, L.J., is constrained to admit that it would be reasonable to say that such an order is a final order. It is somewhat difficult to reconcile with sound reason, that a final order is an interlocutory order for the purpose of an appeal.

Partnership—Breach of duty as partner—Dissolution of partnership—Notice.

Green v. *Howell* (1910) 1 Ch. 495. In this case the plaintiff and defendant were partners under a deed which provided that in the event of either partner committing any breach of the partnership articles or of his duty as a partner, the other might by notice terminate the partnership, provided that if any question should arise whether a breach had been committed it should be referred to arbitration in case the offending partner so requested in writing within a given time. Under this clause the plaintiff without any preliminary warning gave the defendant notice of dissolution, on the ground of his having committed a flagrant breach of his duty as partner. The plaintiff brought the action for a declaration that the partnership was duly determined by the notice, and for consequential relief. The action was tried before Neville, J., and the defendant disputed the validity of the notice, as having been given without first calling the defendant's attention to the alleged breaches of duty and giving him an opportunity to be heard, which objection was overruled and judgment given in favour of the plaintiff, which was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., and Joyce, J.), the dicta of Romer, J., in *Barnes* v. *Young* (1898), 1 Ch. 414, which supported the defendant's contention being overruled.

Industrial and Provident Society—Agreement to refer to arbitration disputes between members and society — Ultra vires—Stay of proceedings.

Cox v. *Hutchinson* (1910) 1 Ch. 513. The plaintiff in this case was a member of an Industrial and Friendly Society and brought his action for a declaration that certain resolutions passed by the society were ultra vires. By the rules of the society it was provided that all disputes between the society and its members were to be referred to arbitration. The defendants having moved that all proceedings be stayed, it was held by Warrington, J., that the plaintiff's claim was a dispute within the meaning of the rules, and must be referred to arbitration, and that the question of ultra vires made no difference.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [March 11.

ELECTRIC FIREPROOFING CO. OF CANADA *v.* ELECTRIC FIREPROOFING CO.

Contract—Assignment of patent rights—Implied warranty—Validity of patent—Novelty—Combination producing new and useful results.

Where no express agreement or special circumstances exist which might give rise to an implied warranty, an assignment of "all the right, title and interest" of the assignor in a patent of invention does not import any warranty on the part of the assignor as to the validity of the patent. Judgment appealed from, Q.R. 34 S.C. 388, affirmed.

Per IDINGTON, J.:—In the present case the patents were valid.

Appeal dismissed with costs.

Atwater, K.C., and *Duclos*, K.C., for appellants. *J. E. Martin*, K.C., for respondents.

Ont.] UNION BANK OF CANADA *v.* CLARK. [March 11.

Suretyship—Death of surety—Continuance—Powers of executors—Extension of time—Simple contract of suretyship—Release of one surety under seal—Confirmation of original contract.

C. and others executed an agreement not under seal, by which they undertook to guarantee payment of advances by a bank to an industrial company. The guarantee was to be continuing and the bank could deal with the securities for such advances as it saw fit, the doctrines of law and equity in favour of a surety not to apply thereto. One of the sureties wishing to be discharged, a document under seal was executed by the others for the purpose, and the parties thereby ratified and confirmed the said guarantee and agreed to be bound as if the discharged

surety had never been a party to it. C. having died, his executors and the surviving sureties and the bank executed an agreement acknowledging the amount due by him to the bank, consenting to a renewal of notes covered by the guarantee, and confirming the latter. More than six years after C.'s death, the bank brought action to recover from his executors the amount so acknowledged to be due.

Held, that the discharge of the surety by writing under seal did not convert the original guarantee into a specialty and that the claim of the bank was barred by the Statute of Limitations.

Per DAVIES, IDINGTON and DUFF, JJ., that the executors had no power to continue the guarantee and the claim against the estate was discharged by time for payment granted the principal debtor.

Appeal dismissed with costs.

Rancy, K.C., and *Hutchinson,* K.C., for appellants.

Watson, K.C., and *Lavell* for respondents.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Garrow, Meredith, and Magee, JJ.A.] [May 12.

REX *v.* YORKCMA.

Criminal law—Abduction of girl under 16—Evidence—Leave to Appeal.

The prisoner was convicted of unlawfully taking an unmarried girl under 16 out of the possession and against the will of her mother contrary to s. 315 of the Crim. Code.

Held, that the evidence was sufficient under the statute; but, apart from that, the prisoner's own intention in the matter were unimportant as under the section the object or intention with which the girl was taken, be it innocent or wicked, was unimportant. No question of the mens rea could arise, for the statute is prohibitive, and any one dealing with an unmarried girl under 16 does so at his peril. Application refused.

W. A. Henderson, for prisoner. *Cartwright,* K.C., for Crown.

Full Court.] REX *v.* FRANK. [May 12.

Criminal law—Evidence of accomplice—Corroboration.

Case reserved under ss. 1014, 1015, Crim. Code by the junior judge of the County Court of Wentworth.

The accused was tried before him, on the charge of unlawfully conspiring with one Morden to defraud the Hamilton Steel and Iron Company by falsely increasing the weight of scrap-iron sold by the accused to the company. The case stated that the principal evidence against the accused was given by Morden, that the learned judge believed his evidence, and was of opinion that it was sufficient to convict without corroboration. It further appeared that the judge was of opinion that Morden's evidence was corroborated in material particulars, and there was some evidence in support of this view. Two questions were submitted by the learned judge: 1. Had I the power to convict the prisoner on the evidence of an accomplice alone? 2. If not, was there sufficient corroborative evidence?

Held, that an accomplice is a competent witness, and there is no rule or statute which requires that his evidence must be corroborated. The consequence is inevitable that if credit be given to his evidence it may be sufficient of itself to convict the accused and no corroboration is necessary. The first question was therefore answered in the affirmative, the second calling for no answer. See *In re Meunier* (1894), 2 Q.B. 415; *The King* v. *Tate* (1908), 2 K.B. 180; *The King* v. *Warren* (1909), 2 Crim. Cas. 194, 25 Times L.R. 633; *Regina* v. *Beckwith* (1859), 8 C.P. 274.

DuVernet, K.C., for prisoner. *Cartwright,* K.C., for Crown.

HIGH COURT OF JUSTICE.

Riddell, J.] SCHWENT *v.* ROETTER. [May 6.

Gift—Money in bank—Transfer to joint credit of donor and daughter—Death of donor—Right of survivor—Claim of executor of donor.

Interpleader issue. John Schwent and his wife Magdalena had money deposited in a bank at Dunnville to their joint credit. On the 27th April, 1908, the wife died. John Schwent, on May 22nd, 1908, delivered a document to the bank in these words:

"This is to certify that I transfer the money in my name John Schwent and Magdalena Schwent in our savings bank account number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter Magdalena Schwent to be drawn by either of us. John Schwent." The money lay wholly undisturbed in the bank until the death of John Schwent on the 5th July, 1909. He had on the 25th September, 1900, made his will, whereby he appointed his daughter Magdalena and his son Christian executors. After the death Christian claimed this money in the bank as being part of the estate. Magdalena, who had married one Roetter, claimed it as her own. The bank were allowed to pay the amount into court, less the costs, and this issue was directed, with Christian Schwent as plaintiff and Magdalena Roetter as defendant, to determine the question "which of the said parties is entitled to the above-mentioned sum of money paid into court," amounting to $1,285.18. The real question to be decided was whether the money belonged to the executors as assets of the estate of John Schwent, deceased, or to the defendant as her own private property. The deceased had one son, the plaintiff, and four daughters, one of them the defendant.

Held, 1. Following *Re Ryan,* 32 O.R. 224, that the plaintiff should succeed unless there was some difference between the case of a wife and that of a daughter, but such a distinction had not been suggested. The issue must therefore be decided in the defendant's favour, both as to form and substance.

2. There is no necessity for another action as Con. Rule 1114 gives the trial judge the power to dispose of interpleader proceedings.

R. S. Colter, for plaintiff. *Douglas,* K.C., and *J. A. Murphy,* for defendant.

Divisional Court, K.B.] [May 6.

RUSHTON *v.* GALLEY.

Way—Private lane—Dedication—Acceptance by municipality—Sidewalk placed and repaired by former owner—Injury to person using—Negligence—Contributory negligence—Private liability—Notice of defect—Constructive notice.

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing the action. The plaintiff on the 24th October, 1908, met with an accident, as he alleged, by stepping into a hole in a defective sidewalk at what is called "Maderia Place," being an

open space extending easterly from Parliament Street, in the city of Toronto. The plaintiff alleged that the defendant was the owner of Maderia Place, that it was open to the public, and that the defendant was guilty of negligence in allowing this sidewalk to become and to continue out of repair so much so that, by reason of its bad condition, the accident happened to the plaintiff, and he claimed damages for his injuries.

The action was in part tried with a jury, who found that the defendant or her husband first have knowledge of the hole in the sidewalk on Saturday night, October 24th. That the sidewalk became out of repair on Thursday, October 22nd. That the defendant was negligent in not repairing the sidewalk, having sufficient time to do so before the accident, and that the plaintiff by exercise of reasonable care could not have avoided the accident.

BRITTON, J.:—As the defendant did not know of the defective condition of the walk until after the accident, the only negligence which the jury could find, and what they probably intended to find, was that the defendant did not keep such a watchful eye over the walk as to prevent its remaining in a defective condition for any longer time than was reasonably necessary actually to do the work of repair.

If the defendant was the owner, there was an invitation by her to the public to use the place for any purpose of walking or driving upon and over it, and she would be liable if she placed upon it, or allowed to remain upon it, after knowledge of its being placed by others, anything in the nature of a trap, dangerous to the users of the place. This hole in the walk was not a trap —the plaintiff was not using the walk as an ordinary person on foot would use it; so, as I view the case as presented by the plaintiff and upon the evidence, he is not entitled to recover.

On the other branch of the case, I agree with the trial judge that Maderia Place is a public street which ought to be kept in repair by the city corporation. So far as appears, it is not a street established by by-law of the corporation, but it has been "otherwise assumed for public user by such corporation" within the meaning of s. 607 of the Municipal Act.

The plaintiff contends that, even if this is a public street, the defendant, having done the work of repair, assumed the duty, and is therefore liable for neglect of such duty. I do not agree that the voluntary doing and doing continuously up to a certain date something that another ought to do, creates a liability for neglect or refusal to continue; and further, if there could be

liability for neglect to repair, it could only arise after knowledge of want of repair. Here there was no knowledge. Merely not knowing the want of repair before the accident happened is not sufficient to warrant a finding of negligence. The defendant was not as against the plaintiff bound to see that the walk was in a constant state of reasonable repair. It would be quite different if the defendant constructed a dangerous walk or placed an obstruction or caused a pit to be dug near the walk or a hole to be made in it—in such a case there might be liability.

In the present case, in my opinion, the defendant is not liable, and the appeal should be dismissed with costs.

RIDDELL, J., was of opinion, for reasons stated in writing, that the trial judge was right in finding that the owner of the land intended to dedicate this lane, and that the corporation had accepted the dedication long before the defendant became owner of the property adjoining; that the lane was a public highway; that the plaintiff had a right there; that he was not guilty of contributory negligence, the jury having so found; that the defendant placed the sidewalk upon the lane, and, if she could be called a trespasser, she was liable irrespective of negligence: *Dygert* v. *Johenck*, 23 Wend. 446, 447; *Calder* v. *Smalley*, 66 Iowa 219; *Congreve* v. *Morgan*, 18 N.Y. 84; Dillon on Municipal Corporations, ss. 1031, 1032; *Hadley* v. *Taylor*, L.R. 1 C.P. 53; *Place* v. *Reynolds*, 53 Ill. 212; *Portland* v. *Richardson*, 54 Me. 46; *Osborne* v. *Union Ferry*, 53 Barb. 629; *Jennings* v. *Van Schaick*, 108 N.Y. 530; that the defendant had not proved any express permission or license from the corporation to place or repair, but sufficient appeared to shew that the corporation tacitly licensed and permitted what was done. *Robins* v. *Chicago City*, 4 Wall. S.C. 657; and in such a case the private liability to repair is co-extensive with that of the city corporation, and not more onerous, that is, there must be ordinary care and diligence and absence of negligence. *Drew* v. *New River Co.*, 6 C. & P. 754, 756; *Peoria* v. *Simpson*, 110 Ill., at p. 301; *Hopkins* v. *Owen Sound*, 27 O.R. 43; *Weller* v. *McCormick*, 47 N.J.L.T 397, 398; and here, the jury having negatived all negligence except the failure to repair from Thursday, the day of the breaking, to Saturday, the day of the accident, it must be assumed that there was no defect in the original construction of the sidewalk; the jury could not be allowed to infer constructive notice or to charge negligence in not repairing what was not known to be defective: *McNirey* v. *Town of Bracebridge*, 10 O.L.R. 360; Denton, pp 243 et seq.; Biggar,

p. 835, note (e): and a jury cannot be allowed to find negligence in not repairing within a time which would not justify a court in inferring notice; and, therefore, the judgment was right, and the appeal should be dismissed with costs.

FALCONBRIDGE, C.J., agreed in the result.

MacGregor, for plaintiff. *Dewart*, K.C., and *Dunbar*, for defendant.

Divisional Court, Ex.] [May 10.

REX *v.* ACKERS.

Liquor License Act—Conviction—Jurisdiction of justices of the peace — Information laid before and summons issued by police magistrate—Oral request to justices to act—Jurisdiction not appearing on face of conviction—Warrant of commitment—Imprisonment—Habeas corpus—Amendment of conviction under s. 105—*Other defects in warrant—Costs of conveying to gaol.*

Motion on behalf of the defendant for his discharge from custody, on the return of a writ of habeas corpus.

The information was laid by Hugh Walker, license inspector, against James Ackers, before Stewart Masson, police magistrate in and for the city of Belleville and the south part of the county of Hastings, for an offence under the Liquor License Act. Upon the information the police magistrate issued a summons to Ackers to appear at the town hall of the village of Sterling, before him, as such police magistrate, or before such other justices of the peace having jurisdiction as may then be there, to answer to the said complaint, and be further dealt with according to law. The intention was that the case should be dealt with by the local magistrates. The police magistrate did not attend on the return of the summons, but verbally requested Magistrate Bird to get another magistrate to sit with him, which he did, and the case was heard by these two justices of the peace, at the village of Sterling, and before them the prisoner appeared and pledged guilty to the charge, and thereupon, on the 3rd March, 1910, he was convicted and ordered to pay a fine of $100, or, in default thereof, to be imprisoned for three months.

The objections taken are as follows:—

1. That the convicting magistrates had no jurisdiction to convict the prisoner, the initiatory proceedings having been taken before a police magistrate, and no request to act for him or his illness or absence appearing.

2. That the magistrates, having drawn up and returned to the clerk of the peace an order for the payment of money, could not afterwards file any conviction with him, and no minute of such order was served before commitment.

3. That an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment.

4. That it cannot be learned from the proceedings whether the informant was a license inspector or a private individual, so that the rightful distribution of the penalty should ensue.

5. That the warrant of commitment recites a bad conviction, and does not conform with either of the convictions returned.

Held, that the conviction could not be supported as it did not disclose upon its face that the magistrates were acting at the request of the police magistrate. The prisoner, however, should not be discharged, but detained under the commitment and conviction amended under the Liquor License Act, s. 105 and sub-ss. 1, 2, which was passed to cover a case of this kind. Order accordingly.

J. B. Mackenzie, for defendant. *Cartwright*, K.C., for Crown.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] McKINNON *v.* McPHERSON. [April 9.

Illiterate person—Document executed by—Burden on grantor to shew good faith—Consideration not expressed—Effect of leaving blanks.

Defendant obtained from plaintiff what purported to be a lease for a term of years of a tract of land for the purpose of carrying on certain mining operations thereon, with the privilege of taking wood, timber and coal necessary for such purpose. The number of years during which the lease should continue was left blank and the royalty to be paid as consideration for the lease was also left blank. Plaintiff was an illiterate farmer, speaking only the Gaelic language and unable to read and write, and defendant was his parish priest and enjoyed his full confidence.

The lease was signed by both plaintiff and his wife by their

marks and it did not appear that it was first read over and explained.

Held, 1. The circumstances of the execution of the document and the relation of the parties placed it in the category of instruments which have to be carefully scanned and the good faith of which must be fully established.

2. The burden was upon defendant of shewing that the transaction was fairly conducted as between strangers and that defendant understood the transaction, and that the deed contained the true provisions of the transaction so understood and that in the absence of such evidence the deed must be set aside.

3. It was not open to defendant to set up a consideration for the transaction not expressed on the face of the document.

Per DRYSDALE, J.:—The effect of the document as executed was a lease for years with an obligation on the part of the lessee to pay royalty not specified as to amount.

O'Connor, K.C., for appeal. *Robertson*, K.C., and *Phelan*, contra.

Laurence, J.] [May 5.

IN RE ESTATE OF LONGWORTH.

MACDONALD *v.* EASTERN TRUST CO.

Will—Construction—Bequests of shares in companies—Liability for calls—Dividends—Right to occupy land—Disposal of income.

By his last will testator devised his shares in a number of companies to the defendant company in trust to pay the net income arising therefrom to his daughter M. for the term of her natural life and upon her death to go as in said will directed. Testator further devised to his said daughter M. the use of his homestead at T. and such lands about it and his farm L. as she wished to occupy, so long as she wished to live upon the premises, with power to the executors to sell such portions thereof, for the redemption of liabilities and the purposes of his estate, as M. might decide. After testator's death calls were made in respect of certain of the shares devised in trust, and the opinion of the court was sought as to the construction of the two paragraphs of the will referred to.

Held, 1. It would be improper to require M. to pay the calls made upon the shares, when, at her death, the shares and the benefit of the calls would go to others, and that, for this reason, the calls should be paid out of the general funds of the estate,

and the amount paid recouped on the death of M. and the division of the shares.

2. Dividends on the calls so paid should not go to M., but should be held as part of the general funds of the estate.

3. M. was not entitled to receive rents and income arising from the homestead and other lands which she was permitted to occupy.

4. The executors had no authority to sell such lands during the lifetime of M.

5. In the event of a sale of such lands the income from the proceeds of the sale should go into the residuum of the estate.

Rogers, K.C., for plaintiff. *Robertson*, K.C., for Eastern Trust Co. and residuary legatees.

Drysdale, J.] [May 23.

ZWICKER *v.* LA HAVE STEAMSHIP CO.

Trial—Motion for postponement—Absence of material witness—Offer to admit facts—Disclosure.

Motion was made for the postponement of the trial on the ground, among others, of the absence of a material witness for the defence.

Held, that it was not a sufficient answer to the application that the witness in question left the province after he had been subpœnaed, where it appeared that the plaintiff was asked before the witness left to disclose what he was wanted to prove, accompanied by an offer to admit facts.

A party who wishes to hold a witness in the province or to bring him back must be reasonable, and must apply for an admission of facts before the witness leaves, or must disclose sufficient reasons for bringing him back.

Meagher, for plaintiff. *J. A. Maclean*, K.C., for defendant.

Graham, E.J.] NEVAY *v.* GILLIS. [May 30.

Foreign judgment—Fraud going to jurisdiction—Distribution of estate—Restitution of share improperly obtained—Jurisdiction of court to enforce—Administrator—Fraud of in suppressing facts and failure to give notice—Conflict of laws.

Defendant was a party to an application made by his brother L. J. G. to the Probate Division of the District Court of Salt

Lake Co., Utah, in the United States for a decree for the final settlement and distribution of the estate of a deceased brother of which L. J. G. had been appointed administrator. In the petition for the decree it was fraudulently alleged that, defendant, the administrator and two others were the sole surviving heirs and that each was entitled to one fourth of the residue, suppressing the fact that plaintiff, a sister of the deceased, was living and was equally entitled with the others. Plaintiff had no notice, actual or constructive. Defendant removed to the Province of Nova Scotia after having obtained payment of one fourth of the residue of the estate. In an action by plaintiff to enforce restitution of the proportion of her share received by defendant,

Held, 1. That fraud was one which went to the jurisdiction of the State Court and the validity of the decree.

2. Defendant could not make title to the excess over his own share received by him under the decree because it was not received bonâ fide and without notice, and that having been taken from the administrator who was guilty of a fraudulent breach of his duty the fund remained in his hands fastened with a trust which equity would enforce against him, and that he could not take advantage of his own wrong by setting up the finality of the decree.

3. A foreign judgment whether in rem or in personam is open to impeachment where it is fraudulently obtained.

4. As defendant and the administrator were equally participants in the fraud plaintiff was not obliged in the first instance to proceed against the administrator or resort to an action on the bond, but might proceed directly against defendant, and that the court of this province, where he was domiciled, would enforce restitution.

Rowlings, K.C., for plaintiff. *Gillies,* K.C., for defendant.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [April 25.

KNECHTEL FURNITURE CO. *v.* IDEAL FURNISHING CO.

Promissory note—Indorser—Holder in due course—Estoppel.

Held, 1. Under s. 131 of Bills of Exchange Act, R.S.C. 1906, c. 119, a person who indorses a promissory note not indorsed by the payee at the time may be liable as an indorser to the payee

Robinson v. *Mann*, 31 S.C.R. 484, and *McDonough* v. *Cook*, 19 O.L.R. 267, followed in preference to *Jenkins* v. *Coomber* (1898), 2 Q.B. 168, and cases following it. Difference between above section and the corresponding section (56) of the Imperial Act pointed out.

2. Although the defendant company had made the note in question in pursuance of an agreement to assume the debt of another to the plaintiff company, yet, as there was a good and valuable consideration given for that assumption, the plaintiffs were holders in due course and the defendant company was liable upon the note.

3. The other defendants, being directors of the defendant company, having indorsed the note and induced the plaintiffs to enter into and perform the agreement in consideration of which the note was given, were estopped from disputing the validity of the transaction or setting up that the defendant company had not power to give this note: Bills of Exchange Act, s. 133.

McDonough v. *Cook*, supra, at pp. 272, 274, and *Lloyds Bank* v. *Cooke* (1907), 1 K.B. 794, followed.

Hanneson, for plaintiffs. *Mulock*, K.C., and *Loftus*, for defendants.

Full Court.] FOSTER *v.* STIFFLER. [April 25.

Vendor, and purchaser—Right of purchaser to recover after conveyance in respect of incumbrances then discovered—Transfer under Real Property Act—Mistake as to amount of incumbrances—Misdirection in particulars of sale—Caveat emptor.

Appeal from judgment of MATHERS, J., noted, vol. 45, p. 755, allowed with costs on the ground that the agreement of the parties had only been partially carried out, could not be said to have been merged in the transfers, thus taking the case out of the principle of the cases there cited and relied on by the judge below.

Order for entry of judgment in the court below declaring the plaintiff entitled to a vendor's lien on the lands conveyed and to be conveyed by him for the balance due under the agreement including the $950 in dispute.

McLaws, for plaintiff. *Hoskin*, K.C., and *Montague*, for defendant.

Full Court.] EYRE *v.* MCFARLANE. [May 11.

Statute of Limitations—Acknowledgment to take case out of statute—Promise to "fix it up all right."

A promise to "fix it up all right" in a week or two, in a letter written by the debtor in reply to a written demand for payment of the debt, is a sufficient acknowledgment to take the case out of the Statute of Limitations and start it running anew. *Edmonds* v. *Goater*, 21 L.J. Ch. N.S. 290, and *Collis* v. *Stack*, 1 H. & N. 605, followed.

A promise to pay the debt as soon as the debtor could get the money is conditional only and, without evidence that the debtor had got the money, would not be a sufficient acknowledgment to prevent the statute running.

L. J. Elliott, for plaintiff. *Howell*, for defendant.

Full Court.] [May 18.

IN RE NORTHERN CONSTRUCTION CO.

Company—Winding up—Dividend.

Appeal from judgment of MACDONALD, J., noted, ante, p. 78, dismissed with costs.

KING'S BENCH.

Mathers, C.J.] FONSECA *v.* JONES. [April 18.

Settlement—Improvidence—Resulting trust upon conveyance by husband to wife—Trusts under Real Property Act—Parties—Uncertainty in trusts—Revocation—Independent advice—Acquiescence, laches and delay—Double possibility—Thellusson Act—Rule against perpetuities.

1. Where a man executes a voluntary conveyance of lands to his wife, there is no presumption of a resulting trust in his favour, but it is open to the grantor or his representatives to shew that under the circumstances there was such resulting trust, and in that case the lands will be deemed in equity to be his. *Childers* v. *Childers*, 3 Jur. N.S. 1277, and *Marshall* v. *Crutwell*, L.R. 10 Eq. 328, followed.

2. Trusts of lands under the Real Property Act will be enforced in a Court of Equity: *In re Massey* v. *Gibson*, 7 M.R. 172,

and where there has been a deed of settlement executed by husband and wife of lands which, although formerly conveyed by personal representatives of the deceased husband, or those who would take if there had been no settlement, would be necessary parties to an action brought by the widow to set aside the settlement and they are the only parties who could ask for a rescission of the deed.

3. Such a deed of settlement, although it transferred all the property of the settlers to the trustees without power of revocation in trust to pay the net income or part thereof to the settlers or the survivor of them until the death of the survivor, and afterwards to distribute the corpus or the income thereof between the children or some of them in the absolute discretion of the trustees, was held in the peculiar circumstances set forth in the judgment not to be improvident.

4. If the trusts declared in a deed of settlement are too vague and uncertain to be executed, a trust in favour of the next of kin would result by operation of law, and the trustees would not take for their own benefit: *Lewin*, p. 164.

5. The settler may wish to protect himself from his own improvidence or against importunities of relatives and in such a case the absence of a power of revocation in the deed is not a ground for setting it aside. *Toker* v. *Toker*, 3 D.G.J. & S. 487, and *Phillips* v. *Mullings*, 7 Ch. Ap. 244, followed, and *Coutts* v. *Acworth*, L.R. 8 Eq. 558, distinguished.

6. As the trustees were not beneficiaries under the deed, the absence of independent advice in the execution of it was not important. *Hugenin* v. *Baseley*, 14 Ves. 273, distinguished.

7. The plaintiff, one of the settlers, after the death of her husband, had, in the circumstances set forth in the judgment, estopped herself from complaining of the deed by acquiescence, laches and delay. *Turner* v. *Collins*, L.R. 7 Ch. Ap. 329; *Allcard* v. *Skinner*, 36 Ch.D. 145, and *Jarratt* v. *Aldom*, L.R. 9 Eq. Cas. 463, followed; *Sharp* v. *Leach*, 31 Beav. 491, distinguished.

8. As the deed in question required that the estate should be converted into money at the death of the widow, in contemplation of equity the estate conveyed consisted of personal estate: *Attorney-General* v. *Dodd* (1894), 2 Q.B. 150, and since the rule against a "double possibility" or "a possibility upon a possibility" has, according to *In re Bowles, Amedroz* v. *Bowles* (1902), 2 Ch. 650, no application to personal estate, therefore the deed was not objectionable as offending against such rule, al-

though it might have been in the absence of a direction for such conversion.

9. Under the deed there might be an accumulation of income beyond the period permitted by the Thellusson Act, if the trustees should exercise the power given them of withholding the shares of some of the beneficiaries and giving them to others, and an accumulation beyond the permitted period would be void under the Act, but the gift itself would not be void unless it would also infringe the rule against perpetuities. Godefroi on Trusts, 912; *Jagger* v. *Jagger*, 25 Ch.D. 729, and *Tench* v. *Cheese*, 24 L.J. Ch., at p. 55, followed.

10. The possibility of a power in a deed of settlement being at some future time exercised so as to infringe the rule against perpetuities does not make the power itself void, where it is such that it may be exercised in a manner entirely unobjectionable. *Clark* v. *Dakyns*, L.R. 10 Ch. Ap. 35; *Picken* v. *Matthew*, 10 Ch.D. 264, and *Re Bowles* (1905), 1 Ch. 371, followed; *Leake* v. *Robinson*, 2 Mer., at 389, distinguished.

11. As the widow and children of a deceased son would be entitled under the deed to a share of the estate, and so were interested in maintain the deed, they were necessary parties to the action attacking it, which therefore failed for lack of parties, notwithstanding that the executors of the will of said son had been made parties. These executors took nothing under the deed and did not represent the infant children of their testator, and therefore had been made parties unnecessarily.

McMeans, K.C., *Elliott* and *Macneill*, for plaintiff. *Aikins*, K.C., and *Dennistoun*, K.C., for defendant trustees. *Pithlado*, *Fullerton*, *O'Connor*, *Young*, *Blackwood*, *Chandler* and *Chalmers*, for the several other defendants.

Metcalfe, J.] ALDONS *v.* SWANSON. [April 29.

Principal and agent—Revocation of agency—Work done before revocation—Commission on sale of land—Quantum meruit—Distinction between power to revoke authority and right to do so.

An agent who has been given the exclusive sale of real estate for a limited period on terms of being paid a commission in case of sale is entitled to substantial damages upon revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts and the expendi-

ture of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser.

Prickett v. *Badger*, 1 C.B.N.S. 296, and *Rowan* v. *Hull*, 2 A. & E. Ann. Cas. 884, followed; *Simpson* v. *Lamb*, 17 C.B. 603; *Topin* v. *Healy*, 11 W.R. 466, and *Houghton* v. *Ogar*, 1 T.L.R. 653, distinguished.

Although the principal may have power to revoke the authority given to the agent, he has not always the right to do so without liability for damages.

Ferguson, K.C., and *Collinson*, for plaintiffs. *Nason* and *Thomas*, for defendants.

Macdonald, J.] [May 3.

RE ALBERTA AND GREAT WATERWAYS RY. CO.

Evidence Act—Order for attendance of witnesses for purposes of inquiry by foreign tribunal—Whether commissioners appointed by the government of another province under an Act of its legislature are a court or tribunal—Constitutional law—Ultra vires.

Held, 1. Commissioners appointed by the government of another province under an Act of its legislature to conduct an inquiry constitute a court or tribunal within the meaning of s. 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by 5 & 5 Edw. VII. c. 11, and an order may be made under that section at the request of such commissioners requiring the attendance of witnesses in Manitoba to testify as to matters within the scope of the commission.

2. If there is nothing to prevent such commissioners from coming to Manitoba to take evidence, the order may properly require the attendance of such witnesses before the commissioners themselves at any place within this province named by them, as well as before an examiner appointed by them.

3. Sec. 57 of the Manitoba Evidence Act may be regarded as relating to the administration of justice in the province, also to a matter of a merely local or private nature in the province, and so it is not ultra vires of the local legislature under the B.N.A. Act, 1867.

Re Wetherall and Jones, 4 O.R. 713, not followed.

Robson, K.C., and *Coyne*, for witness. *Pitblado*, K.C., and *Montague*, for the commissioners.

Mathers, C.J.] LONGMORE v. MCARTHUR. [May 4.

Negligence—Servant against contractor and sub-contractor—Recovery of judgment in action against one a bar to subsequent action against the other—Several tort feasors—Rights.

A workman injured in consequence of negligence of the sub-contractor by whom he was employed has the same rights against the principal contractor as he has against the sub-contractor, and he may sue either or both. *Dalton* v. *Angus*, 6 A.C., per Lord Blackburn, at p. 829, and *Penny* v. *Wimbledon* (1898), 2 Q.B. 212, (1899), 2 Q.B. 72, followed.

But, if the workman chooses to bring his action against the sub-contractor alone, the recovery of judgment in such action is a bar to a subsequent action against the contractor for the same cause of action. *Brinsmead* v. *Harrison*, L.R. 7 C.P., at 547, and Pollock on Torts, p. 199, followed.

Galt, K.C., for plaintiff. *Wilson*, K.C., for defendants.

Metcalfe, J.] THE KING v. SPEED. [May 12.

Criminal law—Information—Amendment of, after lapse of time limited by statute—Liquor License Act—Consuming liquor in local option district—Prohibition.

An information, under sub-s. 32 of s. 30, of 7 & 8 Edw. VII. amending the Liquor License Act, R.S.M. 1902, c. 101, for consuming liquor in territory under a local option by-law discloses no offence unless it alleges that the liquor was purchased and received from some person other than a licensee under said s. 30, and it becomes a new information if amended by adding such allegation. If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed under the information and prohibition should issue to prevent him from doing so.

Rex v. *Guertin*, 19 M.R. 33, 15 C.C.C. 251, followed.

Noble, for applicant. *Patterson*, K.C., D.A.G., for the Crown.

Bench and Bar.

We note that Mr. S. A. Hutchinson, barrister-at-law, late of Huntsville, in the Province of Ontario, is now practising in Swift Current, Saskatchewan.

United States Decisions.

CORPORATIONS.—Authority of General Manager: In the absence of proof as to the nature of services or powers of a corporation employee designated "General Manager," the words would simply import that he is a general executive officer for all the ordinary business of the corporation. An authority to purchase an automobile cannot be presumed. *Studebaker Bros. Co.* v. *R. M. Rose Co.*, 119 N.Y. Supp. 970.—Duress: Proof that the president of a corporation permitted it to execute a contract because of threats of the adverse party to criminally prosecute him and others for swindling unless the contract was executed, established a case of duress. *International Land Co.* v. *Parmer*, Tex. 123 S.W. 196.—Liability of Officers: While the vice-president of a corporation would be personally liable for injury to another caused by his actual fraud, such agent is not liable to third persons for negligence or nonfeasance. *Ray County Sav. Bank* v. *Hutton*, Mo. 123 S.W. 47.—Sale of Corporate Stock: Where a seller of corporate stock agreed unconditionally to sell it for the buyer within a year, so as to net her a certain amount, a tender of the stock to the seller for sale was unnecessary.—*Aken* v. *Clark*, Iowa 123 N.W. 379.

COPYRIGHTS.—Assignment: An assignee's copyright of certain cartoons entitled "Buster Brown" did not give to the assignee the exclusive right to the use of the title.—*Outcault* v. *Lamar*, 119 N.Y. Supp. 930.

FIRE POLICY.—Exceptions in Policy: Where a fire policy contained an exception that the company would not be liable for loss caused by explosion of any kind unless fire ensues and in that event for the damage by fire only, a loss occurring solely from an explosion, not by a preceding fire or by an explosion which occurred from the contact of escaping natural gas with a lighted match, held within the exceptions of the policy.—*Stephens* v. *Fire Ass'n of Philadelphia*, Mo. 123 S.W. 63.

FIXTURES.—Fences: If a fence on a farm appeared to be a permanent one, a purchaser of the farm was entitled thereto, though it was erected by a tenant under an agreement with a former owner that he might remove it at the end of the term, unless the purchaser had actual notice of such agreement.—*Esther* v. *Burke*, Mo. 123 S.W. 72.

FRAUD.—Representation: To enable a person injured by a false representation to sue for damages, held not necessary that the representation should have been made to him directly.—*Wells* v. *Western Union Telegraph Co.*, Iowa 123 N.W. 371.

INTEREST.—Right to Compound Interest: An express promise to pay compound interest included in an account stated would be a nulum pactum, and unenforceable, in absence of consideration therefor.—*Reusens* v. *Arkenburgh*, 119 N.Y. Supp. 821.

LIBEL AND SLANDER.—Actionable Words: The test whether a newspaper article is libellous per se is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge.—*Church* v. *Tribune Ass'n*, 119 N.Y. Supp. 885.

LIFE INSURANCE.—Breach of Warranty: A prior rejection of insured by another company was most material, and a false statement in respect thereto was a clear breach of his warranty as to the truth of statements on his application, offered as a consideration of the contract.—*Fletcher* v. *Bankers' Life Ins. Co. of City of New York*, 119 N.Y. Supp. 801.

MASTER AND SERVANT.—Contract of Hiring: A hiring for an indefinite term at so much per month or year is a hiring at will and may be terminated in good faith by either party at any time without incurring liability.—*Brookfield* v. *Drury College*, Mo. 123 S.W. 86.

Recent numbers of the *Living Age* (Boston, U.S.A.) contain some interesting articles upon the death of the late King and His present Majesty, and the home and foreign political question affected by the change of rulers in England. The selections from the leading magazines and periodicals continue to be as good as ever. Some that may be mentioned are, Compulsory insurance against unemployment; Travel sketch east of Suez; Chinese progress; Foreign policy of the United States; A church hymnal in the first century; The rubber boom, etc. Every article is selected with care from the best magazines and reviews in England.