THE LATE HERBERT LANGELL DUNN

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THE LATE HERBERT L. DUNN.

Herbert Langell Dunn, a well-known Toronto barrister, who died on the 27th ult., was a son of James Murison Dunn, M.A., principal for many years of Welland High School, and was born at Peterborough in 1861. After a brilliant course at the University of Toronto, from which he graduated, in 1882, with the highest honours in classics, Mr. Dunn, having taught in the Lindsay High School for a year, began the study of the law in Toronto, and was called to the Bar in 1886, entering the firm of C. & H. D. Gamble & Dunn, and subsequently became a partner in the firm of Denton, Dunn & Boultbee. He was counsel for the Italian government in Canada, and had been examiner in equity for the Upper Canada Law School.

A member of the Anglican communion Mr. Dunn took an active part in church work in connection with St. Alban's Cathedral, where he took a special interest in a school for boys. Amid his multifarious professional and social duties, he found time to produce, in collaboration with Mr. Edwin Bell, two legal works, Practice Forms and a treatise on the Law of Mortgages, which were well received by the profession and widely sold throughout Canada. The Law of Mortgages is still a text book in the Ontario Law School course.

Mr. Dunn possessed an interesting and unique personality. Besides being a careful lawyer and well read in the musty tomes of legal lore he had a fine appreciation of literary excellence, and was equally at home with ancient and modern poets from Euripides and Virgil to Omar Khayyam, Wordsworth and Tennyson. He had a marvellous memory in which he stored the finest passages from a great variety of authors. Nor was he content merely to possess them himself; he inspired others

with admiration for his favourities, and often entertained his intimates with recitations delivered in an apt and impressive style. Many of his friends will recall his rendition of Lincoln's Gettysburg Address, Longfellow's Morituri Salutamus, Wordsworth's Intimations of Immortality, Tennyson's Ulysses, and many others. He was at his best, perhaps, in reciting passages of his own selection from the Bible, especially that one from St. Matthew commencing "consider the lilies." Unlike many of the votaries of Blackstone, he did not allow the petty dust to choke his soul and blur his vision of the finer things of life.

Mr. Dunn was a man who possessed many rare qualities. Combined with an even temper, a generous and lovable disposition, he had a vein of quiet and unobtrusive humour which made him a delightful companion. He leaves a host of friends, not only among the members of the profession which he adorned, but in other walks of life.

ONTARIO COMPANY LAW.

The Deputy Provincial Secretary (Thomas Mulvey, Esq., K.C.), considers and discusses in the April 1st number of this journal the comments on Ontario company law which I ventured to make in a previous issue (ante, p. 145). I appreciate the compliment at its full value, and continue the discussion in the hope that it may prove interesting to readers, and perhaps lead to some desirable amendments.

Admitting that "the Ontario Act may be improved," Mr. Mulvey is in doubt whether provincial law should follow the Imperial Act more closely than it now does, urging that in its present form it has been made fairly certain by judicial decisions. He admits that from the standpoint of a lawyer it may be wise to adopt the Imperial Act in its entirety, but possibly not from the standpoint of the business man. If "from the standpoint of a lawyer" means "from the standpoint of a man capable of understanding the true value of an Act," the admission covers my whole claim on this point, for in that view, the lawyer's standpoint includes the greatest good of the greatest

number. The business man may desire brevity and speed, and get both at great cost, in the form of little-considered and badly-expressed powers in letters patent. I am of opinion that both the lawyer and the business man would be benefited by the adoption of the Imperial Act, for the reasons which I shall presently give, and that so far as the element of certainty is concerned, the Ontario Act in its present form has not become nearly as certain as a new Act would be which closely followed the lines of the Imperial Act, for in the latter event certainty would be based upon the manifold and far-reaching decisions of the English courts.

The memorandum of association under the Imperial Act answers to the letters patent under the Ontario Act, and the Act itself, and the articles of association under the Imperial Act to the by-laws contained in or made under the Ontario Act, and Mr. Mulvey argues that letters patent are better than a memorandum of association "because (a) the former can be obtained simply, and without delay, (b) on an application made by an average accountant or an intelligent secretary," and because the specific powers mentioned in the letters patent, being supplemented by the general powers given in the Act, repetition of general powers in the letters patent is not necessary. Upon the point of cost, if it were true that an average accountant or an intelligent secretary could do everything necessary to obtain letters patent, it would be because the general powers given in the Act are so wide that to state the objects of the company with preciseness in the letters patent would seem to be unnecessary. But in view of an argument made later by Mr. Mulvey (p. 227-228), that a company whose main objects (as expressed in the letters patent) have been exhausted cannot continue to do business, it seems open to doubt whether it would ever be safe to leave the duty of applying for incorporation to any average accountant or intelligent secretary. But, anyway, the same accountant or secretary could as easily draft a memorandum of association as an application for letters patent, unless indeed the doctrine as to the exhaustion of powers is applicable only to

the statement of objects in a memorandum, which is not the opinion entertained by Mr. Mulvey. Then, as to articles of association, the Imperial Act provides them in table A much more fully than the Ontario Act provides rules, and, therefore, additional by-laws are more necessary under the Ontario practice than under the English, so that the supposititious average accountant or intelligent secretary has more to do under the provincial than he would have under the Imperial Act.

Mr. Mulvey also says that amendments by supplementary letters patent are "simple, expeditious and inexpensive." It may be remarked upon this point that it is doubtful if amendments are so simple as they sometimes appear to be. They cannot be obtained for a less fee than $100 payable to the provincial secretary on each occasion, and the charge of the lawyer who will probably be consulted on the occasion of every application for supplementary letters patent will not be inconsiderable, whereas if companies originally commenced operations on the basis of memorandums of association constructed by competent counsel supplementary applications would generally be unnecessary. The work done by average accountants or intelligent secretaries, where legal questions have to be dealt with, is not generally economical in the long run.

Mr. Mulvey points out that many provisions of the Imperial Acts have been adopted in Ontario from time to time, and he illustrates this by reference to several portions of the present Ontario Act. The answer is, that this fact affords the best argument for the adoption of the Imperial Act, 1908, as a whole, or at least as the basis of an Act for the province, with few departures from it. It would, in other words, be better to have the Imperial Act with provincial variations than a provincial Act with variations of Imperial Acts sandwiched throughout. I venture to say that a consideration of the Imperial Act, 1908, would shew that it is applicable to the circumstances of this province with very few variations. It seems to me that the British investor would be much strengthened in his favour towards investments in this province if he knew its company law to be identical in principle with that embodied in the Imperial Act.

In reply to my question why a company not offering shares to the public, but increasing its membership by more than ten, should be required to file a prospectus, Mr. Mulvey answers, as I understand him, that the Imperial Act, 1900, because its provisions relating to prospectuses did not include statements issued by brokers disposing of shares was a failure, whereas the Ontario Act does cover and include advertisements by brokers. This is not a good reason why a company not offering shares to the public should file a prospectus, but merely shews that a company bound to file a prospectus should not be permitted to escape from the obligation by employing a third person. There seems to be no good reason either in logic or practice why an increase in membership by more than ten should impose upon a company the obligation to file a prospectus which would not be equally applicable to an increase of less than ten; or, on the other hand, why if ten may be added without a prospectus, it should not be equally permissible to add twenty or thirty, or any other number. In other words, if filing a prospectus be a desirable practice, it should apply to any company which is at liberty to obtain new shareholders after incorporation.

In reply to my request for a definition of what amounts to "offering shares for public subscription," and my suggestion that individual subscriptions obtained by canvassers are not necessarily obtained through offering shares for public subscription, it is said by Mr. Mulvey that it is a question of fact whether in a particular case shares have been offered for public subscription. I submit that what amounts to offering for public subscription is a question of law purely, and that the only question of fact in a particular case would be whether things had been done which the law holds to amount to an offering for public subscription. In other words, in any action it would be necessary for the court to lay down some definition of what is public and what is private subscription. Now, deferentially, I suggest that if the offer of shares to one person by a director, or by an agent of a company, in a personal interview, would be a private subscription, and not an offering to the public, it would equally be an offering for private subscription if a thous-

and individual offers were so made, because no number of individual offers, which individually would be regarded as private, could, it seems to me, be regarded as an offering for public subscription. The phrase "offering for public subscription," in the Ontario Act, occurs in sections copied from the Imperial Act, 1900, in which Act there are also provisions to the effect that every prospectus issued by or on behalf of a company shall be dated, etc., though the Act does not make it obligatory for every company, or any company, to issue a prospectus, and I suggest that the phrase "offered to the public for subscription" means an offering to the public for subscription or purchase by a prospectus, or published advertisement, and was not intended to apply to subscriptions for shares obtained in any other way. In Palmer on the Company Act, 1900, it is said that "the phrase 'offering to the public for subscription' does not apply where the shares are only offered privately for subscription, but it is conceived that an offer made to the public or some section thereof will be an offer to the public for subscription."

If I apprehend aright the argument made by your learned contributor, based on the *Haggart Case* (ante, p. 229), he is of opinion that subscribers to the memorandum of agreement subsequent to the incorporation of a company become shareholders by force of law, and that the shares they subscribed for are not "allotted" within the ordinary meaning of that word; that is to say, I take it, that such subscriptions are not subject to ss. 106, 107, 108, 109, 110 and others to a like effect occurring in the Ontario Act. This somewhat startling argument seems to make all the provisions in the sections referred to misleading, and, therefore, dangerous, because they can be so easily evaded by simply obtaining the signatures of subscribers to the original memorandum of agreement. The sections mentioned impose certain conditions upon the allotment of shares, and are intended to secure the stability of companies. If the *Haggart Case* warrants the deductions made by Mr. Mulvey confusion worse confounded will speedily arise. It was there held that not only the persons named in the letters patent, but all

persons who had signed the memorandum on which the letters patent were based, became shareholders by virtue thereof. This would seem equally true, in view of s. 3, of the Ontario Act, to all who "thereafter" sign, if signatures thereafter be permissible, in view of all the sections which refer to the memorandum. The consequences which would follow give strength, I think, to my contention that as the agreement must be executed in duplicate, and accompany the petition for letters patent, it cannot subsequently be executed by any person. But only those who sign the memorandum (at some time) are by the Act incorporated a company; possibly those who afterwards sign may become shareholders, but not members. Mr. Mulvey has not dealt with my query as to what is the status of those persons who acquire shares (so far as they lawfully may) without actually signing the memorandum. Sec. 3 says that the persons who sign the memorandum become a body corporate; *Haggart's Case* says they become shareholders by virtue of the letters patent; what then is the status of those who never actually sign? They are, I think, the greater part of that body of persons who consider themselves to-day to be full members and shareholders in various companies. I doubt if they are either as the law now stands. If those who sign the memorandum become shareholders without allotment, and if those who do not sign do not become members, what becomes of ss. 106, 107, 108 et al?

The Deputy Provincial Secretary agrees with me that the provisions of the Ontario Act respecting mining companies are indefensible from a legal standpoint, and he is of the impression (apparently) that they are equally indefensible from a strict business point of view. He, however, does not concur in my suggestion that "any company by being incorporated as a mining company may issue its shares at a discount, yet carry on any kind of business," and cities a number of English decisions which, in his opinion, negative that contention, but which, I think, fall short of supplying a completely satisfactory answer. In *Haven Gold Mining Company,* 20 Ch.D. 151, *German Date Co.,* 20 Ch.D. 169, and other cases mentioned by him (ante, p. 228), it was decided that "a company under the Act of 1862, can

only do those things which are included amongst its specified objects, or are reasonably incident thereto, or are specially authorized by statute." It is at least worthy of consideration that by including general powers within the Act they should be construed somewhat more broadly than if they appeared in a memorandum of association under an Act. But in any case it is clear that within the strictest possible legal interpretation of the powers, a mining company can engage in a great variety of industries not generally regarded as mining; for instance, smelting and manufacturing ore into various forms of raw material or completed articles would appear to be branches of business which a company might conveniently carry on in connection with mining, but surely they are industries for which companies ought to be specially chartered under the general and not under the mining part of the Companies Act.

It is worthy of note that the English decisions quoted on this point (ante, p. 228), were all on applications for winding-up orders made by shareholders, and the result to directors and shareholders of proceedings ultra vires of the company was not adverted to in the decisions. Suppose all the shareholders had been willing to proceed with new business, what authority would or could have intervened to prevent the company doing business? The apparent broadness of the general powers may prove to be a trap for directors and shareholders, if Mr. Mulvey is right in his view that the breadth is apparent rather than real. If mining companies are to be permitted exceptional privileges would it not be well to more strictly define their general powers?

Dealing with the phrase "no personal liability," applicable to mining companies, Mr. Mulvey says: (1) When shares are issued at a discount a call is not made, and (2) if not issued at a discount, and if subject to call, the shareholder is not liable for the call, but the only recourse of the company is under s. 144. But the fact is that shares may be issued at a discount, and yet only partly payable on subscription, and that the shareholder is liable for calls up to the amount agreed to be paid for the shares

(s. 140); and, therefore, the words "no personal liability," which by s. 143 have to be engraved upon the seal of the company, are not true, in this respect at least. They clearly are not true in this respect, and certainly not in respect of unpaid calls on shares not issued at a discount, unless Mr. Mulvey is right in saying that the only recourse of a mining company for unpaid calls is under s. 144, as to which I entertain grave doubts. That section says that "in the event of any call or calls on shares in a company subject to the provisions of this part of the Act remaining unpaid by the holder thereof for a period of 60 days after notice and demand of payment, such shares may be declared to be in default, and the secretary of the company may advertise such shares for sale at public auction."

It will be noticed that this section says that the company *may* do certain things, but does not make it necessary that it should do so, and furthermore that it does not expressly say that if the company elects to do what is permitted by the section, it thereby exonerates the shareholder who is in default. On the contrary the provision that if the price of shares sold exceeds the amount due, the excess thereof shall be paid to the defaulting shareholder implies, apparently that he is liable for the call, and that if the price realized does not equal the amount due, he remains liable for the balance. And in this case (and in any case until the sale of the shares), the words "no personal liability" on the seal of the company are not true, if they mean that there is no personal liability on the part of the shareholders. It will be noticed that this s. 144 is applicable in reference to calls on any shares in a mining company, and Mr. Mulvey says that the remedy is the only one in the case of such a company. A mining company may issue shares not subject to discount, and calls thereon would surely be subject to the conditions of s. 56, which expressly says that after sale, the defaulting shareholder remains liable. If Mr. Mulvey be right in saying that s. 144 contains the only remedy for unpaid calls on shares in a mining company, there are three kinds of shares under the Companies Act, (1) shares in an ordinary company, (2) shares at a dis-

count in a mining company, and (3) shares in a mining company not at a discount. Is it the intention or the general understanding that ordinary shares in a mining company differ from ordinary shares in all other companies?

As to the election of directors, I quite agree that "if a board of directors has a proper object to serve in reducing and again increasing its number at one meeting, it would be an absurdity to prohibit such action." Why, then, say (s. 79), "The provisional directors shall be the directors until replaced by the same number of others," instead of "others" simply. Mr. Mulvey says that s. 80 applies (only?) to the election of first directors, and s. 84 (only?) to those subsequently elected. What authority has he for this assertion? Is it any more than his own explanation of what would otherwise be a contradiction in the Act? If the meaning be so, why not make the Act say the thing plainly?

A. B. MORINE.

NEWSPAPER LAW REPORTS.

The efforts of newspapers to report legal proceedings are sometimes productive of curious results. Everyone knows that law is a difficult and abstruse subject. It takes from three to five years to educate a lawyer and even then he is only at the beginning of what he ought to know; and yet the publishers of newspapers seem to think that men without any legal training whatever are able to give accurate reports of legal proceedings. The result is that the reports of legal proceedings in the newspapers are for the most part worthless, and utterly unreliable. The result of a decision is often stated to be exactly the opposite of what it actually is. This is not the fault of the reporters who with imperfect knowledge do the best they can; but one naturally asks, what is the good of publishing such reports at all? If the newspapers cannot afford to pay experts to do the work, it would be better not to attempt to do it at all. We give below some choice specimens of newspaper reports:—

"*B.* v. *McL.*, appeal allowed. *Held*, that a general restraint upon action alienation attached to advice in fee which if unlimited would be bad common law, is not rendered valid by being limited as to time."

From this a lawyer might possibly make out that it was "held that a general restraint of alienation attached to a devise in fee, which is unlimited, would be bad at common law, is not rendered valid by being limited as to time."

Here is another:—

"Mr. M. then contended that the 'just and generous' canon of construction was not applicable to the section under review." From which the expert lawyer might possibly conclude that the canon of construction evoked by the learned counsel was that known to lawyers as "ejusdem generis."

Still another.—It was recently reported that a learned judge had said:—"As to the claim that to deny the right of the plaintiff to have his claims passed upon by the King's Court is in breach of Niagara Charter. His Lordship remarks that much of Niagara Charter is obsolete, and the Imperial Parliament has not hesitated, whenever occasion called for it, to legislate away its provisions."

This information must certainly be very edifying to the public.

We sometimes wonder that newspapers do not send their reporters to the public hospitals, in order that the public may have their enlightened and truly erudite views, as to how surgical operations are performed. This might be made a delicious morsel for the curious public, and would be almost as amusing as their attempts at law reporting.

REVIEW OF CURRENT ENGLISH CASES.

MORTGAGE—EQUITABLE MORTGAGES—ASSIGNMENT FOR CREDITORS —REGISTRATION—PRIORITY.

Jones v. *Barker* (1909) 1 Ch. 321 was a decision under the Yorkshire Registries Act (47-48 Vict. c. 54), s. 14, which is somewhat similar in effect,, to the Ontario Registry Act. On October 3, 1906, one Cooper executed a legal mortgage to a bank of certain which was duly registered. He had previously created an equitable charge in favour of Hotham & Whiting, which was not registered until October 5, 1907. On August 30, 1907, Cooper executed an asignment of all his real and personal estate to a trustee for his creditors, which deed was registered September 11, 1907. There were other equitable charges created by Cooper prior to 1907 which were not registered. In 1908 the bank under its legal mortgage sold the property, and after satisfying their claim a balance remained in their hands. This balance was claimed by the trustee for creditors by virtue of the prior registration of the assignment to him; but Warrington, J., held that all that passed by the assignment was the beneficial interest which remained in the debtor after satisfying all equitable charges erected by him irrespective of whether they were registered or not and therefore the question of priority by registration di not arise.

TRADE MARK—REGISTRATION—REGISTABLE MARK—USE OF WORD "ROYAL" AS PART OF TRADE MARK.

Re Royal Worcester Corset Co. (1909) 1 Ch. 459 was an application made by an American company carrying on business in Worcester, Mass., as manufacturers of corsets to register in England the words "Royal Worcester" as a trade mark for their corsets. Notice of the application was directed to be served on the Worcester Royal Porcelain Co., registered owners of the words "Royal Worcester" as a trade mark in respect of china and pottery and also on the Royal Worcester Trading Co., a private firm, who had acted as the applicants' agents in England for the sale of their goods. Parker, J., who heard the application refused it on the ground that the words were not shewn to be in anyway distinctive of the applicants' goods from those of other persons, that taken alone they would rather suggest the manufacturers of the porcelain company, and did not in any way

refer to corsets, and there was no evidence that the words had been used by the applicants without additional words indicating that the goods to which they were applied were corsets made in America. Further he considered the use of the word "Royal" might suggest that the applicants enjoy Royal patronage, which was not the case, and would be misleading—the application was therefore refused.

MISTAKE—FORGETFULNESS—DEED POLL EXECUTED UNDER MISTAKE —RESCISSION.

Hood v. *McKinnon* (1909) 1 Ch. 476 was an action to set aside a deed of appointment as having been made by the appointor under a mistake of fact. The facts were that under the marriage settlement of the plaintiff she and her husband or the survivor of them had a power of appointment in favour of their children in respect of a sum of £20,000. There were two daughters only of the marriage, and, on the marriage of the elder, an appointment of one half the fund had been made in her favour by the plaintiff and her husband. Six years afterwards the younger daughter married, the plaintiff's husband having in the meantime died, and the plaintiff appointed two sums amounting together to £8,600 in favour of the younger daughter. Then in forgetfulness of the previous appointment in favour of the elder daughter, and intending as she supposed to place her on an equal footing with her younger sister, the plaintiff executed a deed poll appointing £8,600 in favour of the elder daughter. Shortly afterwards the previous appointment of half the fund in favour of the elder daughter was discovered, and this action was then commenced to rescind the second appointment of £8,600. Eve, J., held that in the circumstances, the forgetfulness of the plaintiff of the prior appointment was such a mistake of fact as entitled her to the relief prayed, and he accordingly set aside the appointment.

WILL—CONSTRUCTION—DIRECTION TO PAY ANNUITY OUT OF INCOME—INDEFINITE TIME—ABSOLUTE GIFT OF CORPUS "SUBJECT TO THE AFORESAID ANNUITIES"—CONTINUING CHARGE ON INCOME.

Re Howarth, Howarth v. *Makinson* (1909) 1 Ch. 485. This was a case to determine whether certain annuities given by a testator were a charge on the income or corpus of the estate, and if chargeable on income, whether arrears would be payable out of

the income until paid in full. By the will in question the testator gave the residue of his estate to his brother on trust "to pay out of the income thereof the sums following, that is to say," one clear annuity to each of the three defendants, "and subject to the aforesaid annuities" for his brother absolutely. The income of the estate was insufficient to meet the annuities which had consequently fallen in arrear. Joyce, J., held that the annuities were not a charge on the corpus, but that the words "subject to the aforesaid annuities" meant subject to the payment of the annuities, and that the annuities were a continuing charge upon the income of the estate until they were paid in full.

COMPANY—VOLUNTARY WINDING UP—AMALGAMATION AND RECONSTRUCTION — UNFAIR SCHEME — DISSENTIENT MINORITY — PETITION FOR COMPULSORY WINDING UP. COMPANIES ACT, 1862 (25-26 VICT., C. 89), S. 161—(7 EDW. VII., C. 34, S. 188(4) O.).

Re Consolidated South Rand Mines (1909) 1 Ch. 491. In this case a limited company had passed a resolution for voluntary winding up and sale and transfer of its assets to a new company to be formed. The resolution in favour of the scheme was passed by means of a large majority of votes held by a single shareholder. A minority of independent shareholders objected to it on the ground that it was unfair to them. Before the agreement was executed one of the minority shareholders brought the present proceedings for the compulsory winding up of the company, and Eady, J., held that he was entitled to the order and was not compelled to arbitrate as provided by s. 161 of the Companies Act, 1862: (see 7 Edw. VII., c. 34, s. 188(4)); the court being of opinion that the proposed scheme was unfair, and one which ought not to be carried out without the sanction of the court, which it could not be under a compulsory winding up.

FRIENDLY SOCIETY—OBJECTS OF FRIENDLY SOCIETY EXHAUSTED—SURPLUS ASSETS—BONA VACANTIA.

Braithwaite v. *Attorney-General* (1909) 1 Ch. 510 was an action to determine what should be done with certain surplus assets of a friendly society which had virtually come to an end. The society was called "The Benefit Society for girls educated at the School of Industry, Kendal," and was formed for the benefit of persons educated at the school. A fund was raised

by subscriptions of honorary members who were not in any case entitled to benefit from the funds, one half the income of which was to be applied for the benefit of girls in the school under fifteen and the other half of the income for relief in extraordinary cases not provided for by the general fund. The persons benefited were girls educated at the school, who also paid weekly contributions from the age of seven up to sixty-five, when all further payments ceased, and they then became entitled to a small annuity for the rest of their lives, the amount of which increased as they got older up to seventy. In 1845 the school was closed; and the only remaining beneficiaries were two women over 65 in receipt of annuities. There remained £1,901 of the fund contributed by the honorary members, and £304 of the fund contributed by the beneficiaries. Eady, J., held that after providing for the two current annuities the surplus of the £304 and the whole of the £1,901 belonged to the Crown as bona vacantia. The learned judge holds that the society was not a charity because the beneficiaries had a legal title to be paid the annuities out of the fund contributed by the beneficiaries, and that the contributions of the honorary members were absolute gifts to the society, in respect of which there would be no resulting trust in favour of the donors, and that the annuitants had no interest in the funds contributed by the honorary members.

COMPANY—WINDING UP—SURPLUS ASSETS—ACCUMULATED PROFITS—CUMULATIVE PREFERENTIAL SHARES—ARREARS OF PREFERENTIAL DIVIDENDS—NO DIVIDENDS DECLARED.

In re Hall & Co. (1901) 1 Ch. 521 was a winding up proceeding, in which there were surplus assets part of which consisted of accumulated profits. The company's capital consisted of common shares and cumulative preference shares, the latter having priority both as to capital and dividends, and the preferential dividend being payable before any profits could be carried to reserve. The articles provided that no dividend should be payable except out of profits and that in the event of winding up the surplus divisible assets should be applied first in repaying the preference capital, and secondly in paying arrears of the preferential dividends to the commencement of the winding up, the remainder of the assets to belong to the ordinary shareholders. No dividends were ever declared, but the profits accumulated till the company was wound up. Eady, J., held that

the surplus was applicable first in payment of the preferential capital and then in payment to the preference shareholders of their arrears of preferential dividends (though not declared) to the extent of the accumulated profits.

LANDLORD AND TENANT—COVENANT BY LESSOR NOT TO INFRINGE SPECIFIED BUILDING LINE ON ADJOINING PLOT—RESTRICTIVE COVENANT—COVENANT RUNNING WITH LAND—"ASSIGN"—BREACH OF RESTRICTIVE COVENANT.

Ricketts v. *Churchwardens of Enfield* (1909) 1 Ch. 544. In this case the defendants were owners of a plot of land part of which they leased to the plaintiffs' assignor for ninety-nine years and in the lease covenanted that they and their assigns would not erect or permit to be erected any buildings in front of the building line on the land adjoining the demised premises shewn on a plan. Subsequently the defendants entered into a building agreement with one Thomas whereby Thomas was to erect a building on a plot adjoining the plaintiffs' premises, of which, when completed, he was to get a lease; plans of the proposed building were submitted to, and approved by, the defendants; and the building was erected which was found to infringe on the building line referred to in the defendants' covenant. The present action was therefore brought for an injunction or to recover damages for breach of the restrictive covenant contained in the lease of which the plaintiffs were assignees. Neville, J., who tried the action held that the covenant in question was one which touched or concerned the thing demised and was within the second resolution in *Spencer's Case* (1582), 5 Rep. 16*b*, and therefore ran with the land, and the plaintiffs as assignees of the original lessors were entitled to maintain the action, and that Thomas was an "assign" of the defendants, but even if he were not, the defendants had permitted the erection compained of, and were therefore liable. He, however, did not grant an injunction, but awarded damages which he assessed at £58.

EXECUTION—MARRIED WOMAN DEBTOR—JOINT GENERAL POWER OF APPOINTMENT.

In *Goatley* v. *Jones* (1909) 1 Ch. 557, Neville, J., held that real property over which a married woman debtor has, jointly with her husband, a general power of appointment is not exigible under a writ of elegit against her separate estate. And it would seem not to be in any other way exigible in execution against her.

In this case the judgment had been recovered against the husband and the wife to be levied, as far as she was concerned, out of her separate estate; but the learned judge held that that could not be treated as a judgment against them jointly; but was in effect a judgment against the husband and against the separate estate of the wife.

TRADE UNION—BOOKS OF ACCOUNTS—INSPECTION—RIGHT TO EMPLOY AGENT TO INSPECT BOOKS OF TRADE UNION—TRADE UNION ACT, 1871 (34-35 VICT., C. 31), S. 14, SCHED. 1, CL. 6—(R.S.C., C. 125, S. 10, SCHED. 2, CL. 6).

Norey v. *Keep* (1909) 1 Ch. 561. This was an action by the members of a trade union claiming a declaration that the plaintiffs were entitled by their accountant or firm of accountants as their agent or agents to inspect the books of account of the union. The right was claimed under the Trade Union Act, 1871, s. 14, Sched. 1, Cl. 6 (see R.S.C., c. 125, s. 10, Sched. 2, Cl. 6). The defendants had offered to allow the plaintiffs to make a personal inspection but declined to allow their agent to inspect. Parker, J., held that the plaintiffs had the right to employ an agent to make the inspection. He, therefore, held that the plaintiffs were entitled to succeed in the action, but he held that the agent employed by them might be required to give an undertaking that the information derived from the books shall only be used for informing his principals.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Yukon.] [April 15.

CANADIAN BANK OF COMMERCE *v.* BARRETTE.

Trust—Banking—Hypothecation of securities—Terms of pledge —Duty of bank.

B. sold property to the Syndicat Lyonnais du Klondyke and took as security for price mortgages on real and personal property and a promissory note, and transferred such securities to the Canadian Bank of Commerce to secure his present and future indebtedness. He signed a document authorizing the bank to realize on the same in its discretion, to grant extensions and give up securities, accept compositions, grant releases and discharges, and otherwise deal with them as it might see fit, without prejudice to B.'s liability. The note not being paid at maturity the bank sued the syndicate and B. on it and on the covenants in the mortgages, and obtained judgment against both. In the same action the syndicate on counterclaim for damages for deceit had judgment against B. which was eventually set aside, but while it existed the bank made a settlement with the syndicate and discharged the latter from all liability on the judgment of the bank on payment of over $20,000 less than the debt. B. was not a party to this settlement and the bank afterwards refused to give him any information about it or to give him a statement of his account with the bank. In an action by B. for an account and to have the bank enjoined from further dealing with the securities,

Held, that the power given to the bank to deal with the securities was to be exercised for the purpose of liquidating B.'s debt and as to the surplus, for B.'s benefit; that the settlement having been made solely for the benefit of the bank and in sacrifice of B.'s interests the bank violated its duty to B.; and that the bank had not satisfied the onus upon it of shewing that had the whole

amount of the judgment been recovered from the syndicate, B. would not have benefited thereby.

Appeal dismissed with costs.

Anglin, K.C., and *Glyn Osler*, for the Canadian Bank of Commerce. *Holman*, K.C., and *Congdon*, K.C., for Barrette. *C. J. Bethune*, for Le Syndicat Lyonnais du Klondyke.

Ont. CLERGUE *v.* VIVIAN. [May 5.

Contract—Agreement for sale of land—Deferred possession—Payment of instalments—Default—Vendor's remedy—"Or" read as "and."

C. accepted an offer by V. for sale of land undertaking to pay certain instalments of the purchase money before receiving the conveyance. On default in payment,

Held, affirming the decision of the Court of Appeal (16 O.L.R. 372) which maintained the judgment of the Divisional Court (15 O.L.R. 330) that V. was not restricted to an action in damages for breach of contract but could sue for the unpaid instalments. *Laird* v. *Pim*, 7 M. & W. 474, distinguished.

The offer was accepted by C. for "myself or assigns."

Held, that to give effect to the intention of the parties to make a contract "or" should be read as "and." IDINGTON, J., dissenting. Appeal dismissed with costs.

Middleton, K.C., for appellant. *Douglas*, K.C., and *Lefroy*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [April 5.

FRASER *v.* PERE MARQUETTE R.W. Co.

Crops—Destruction by fire—Railway Act, s. 298—Liability of railway company—Marsh hay baled and piled at siding.

This was appeal by the defendants from the order of a Divisional Court affirming the judgment of TEETZEL, J., at the trial (see ante, vol. 44, p. 619), in favour of the plaintiff. The point

involved on the appeal was as to the proper construction of R.S.C. 1906, c. 37, s. 298, which says that when damage is caused to "crops, lands, fences, plantations, or buildings and their contents," by a fire started from a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage. On March, 1908, a quantity of hay or marsh grass, as it is called, belonging to the plaintiff, was destroyed by fire which escaped from a locomotive then being used by the defendants in an adjoining yard. The hay was grown on lands at some distance from the line of railway, and far enough away to have made it impossible that fire from a locomotive engine could have directly reached it there. The plaintiff had sold the hay, and had, for shipping purposes, teamed and placed it alongside the defendants' railway track, where, in the ordinary course of business, the defendants' locomotive engine was shunting when the fire occurred. Negligence was not alleged.

The Divisional Court agreed with the conclusion arrived at by TEETZEL, J., who construed the statute as applicable to "crops" wherever grown, if consumed by fire from a locomotive engine.

Held, that the language of the statute did not intend to cast upon the railway the burden of being insurers against fire of crops, no matter where grown, which the owner for his convenience chose to place upon anybody's land within the danger zone. The section only means to protect a husbandman in the use and cultivation of his lands lying along the route of the railway from the inevitable danger to his "crops," etc., from escaping sparks. It was not the intention to cover all property but only the property expressly enumerated of all which (unless it be "crops") has the quality of fixity or attachment to the land along the route of the railway. "Crops" mean crops grown and growing upon lands upon and along the route of the railway and actually situated upon such lands when destroyed.

A. B. Carscallen for plaintiff. *D. L. McCarthy*, K.C., and *W. E. Gundy*, for defendants.

Full Court.] THOMPSON *v.* SKILL. [April 10.

Vendor and purchaser — Contract for sale of land — Seal — Intention.

This was a consideration of an option to purchase which it was contended was not accepted or complied with and thereupon

came to an end. One of the points which arose was as to whether the document was or was not a sealed instrument.

Semble, a printer's scroll with the printed letters "L. S." within the scroll could not be considered as a seal, or the equivalent of a seal, in the absence of evidence of intention in that respect and consequently the document is not a deed.

J. B. Clarke, K.C., *C. Millar*, *J. M. Ferguson*, *J. M. Mitchell*, and *Gash*, K.C., for various parties.

HIGH COURT OF JUSTICE.

Riddell, J.] RE DAVIS. [April 13.

Infant—Custody—Adoption—Right of parents.

Application by father of an infant child for the delivery to him of the infant, which had been left with one Boon and his wife under a document signed by the parents as follows: "We hereby state that we will give Mr. and Mrs. A. J. Boon our child, Margery Davis, born October 15th, 1908, whereby we lose all claim of said child." The child was subsequently demanded of the Boons, which demand was refused; application was then made for the delivery of the child to the parents.

Held, 1. Admitting that it was the intention of all parties that the father and mother should give up the child permanently they nevertheless had the right to resume their control over it.

2. R.S.O. 1897, c. 259, s. 12, which provides that "where the parent of a child applies to any court for an order for the production of the child and the court is of opinion that the parents have abandoned or deserted the child, etc., the court may, in its discretion, decline to make the order," is not applicable in this case as the words "abandoned and deserted" involve a wilful omission to take charge of the child, or some mode of dealing with it calculated to leave it without proper care.

Luscombe, for applicant. *McEvoy*, for respondent.

Riddell, J.] HALL *v.* MCPHERSON. [April 17.

Jury notice—Action to set aside contract for fraud—Jurisdiction of Court of Chancery before 1873.

Appeal by the defendant from an order of the Master in Chambers validating a jury notice filed and served by the plain-

tiff. The plaintiff claimed the cancellation of a certain agreement and the recovery of a sum of money and the delivering up of certain things. The defence was a denial of the alleged evidence.

Held, the common law has no jurisdiction to declare documents void. This was a matter which before 1873 was within the exclusive jurisdiction of the Court of Chancery and constituted under s. 103 of the Judicature Act must be tried without a jury unless otherwise ordered. Sec. 103 applies and the case should not be tried by jury.

Proudfoot, K.C., for plaintiff. *R. C. H. Cassels,* for defendant.

Province of Nova Scotia.

SUPREME COURT.

Laurence, J.] [March 15.

NEPTUNE METER CO. *v.* CITY OF HALIFAX.

Municipal corporation — Contract — Construction of Act authorising.

Under Acts of 1907, c. 71, the defendant corporation was authorized to borrow money, including the sum of $135,000 "for the further extension and improvement of the water system." On July 22, following the city council passed a resolution to borrow the sum of $50,000 for the installation of water meters, under which a contract was made with plaintiff company for the purchase and delivery of meters. Some exception was taken by the brokers through whom the loan was negotiated to the wording of the Act and the money was only paid over by them upon an undertaking on the part of the city to procure confirmatory legislation, which was subsequently obtained. Before the date of the contract a large portion of the loan authorized under the Act had been received by the city, but the confirmatory legislation was not obtained until some time after. By s. 305 of the city charter it is provided that "no committee or board . . . shall make any expenditure for such civic year in excess of the amount to the credit of such committee or board," and by s. 330 it is provided that "if any debt is incurred or any money expended by the council or under its authority beyond

the amount provided by law such debt or expenditure shall not be recovered from the city."

Held, 1. The section first quoted applies to the expenditure of the ordinary annual revenues of the city and the second section to moneys borrowed for specific purposes.

2. The sections quoted are for the protection of citizens and that after the legislature from time to time authorizes the borrowing of money for specific purposes it is a "providing by law" of the moneys for the purposes mentioned, certainly after the money is received.

3. The installing of water meters was an improvement of the water system within the meaning of the Act.

4. The passage of a resolution by the city council declining to take delivery of the meters or pay for the same was a waiver of the condition precedent in relation to inspection entitling plaintiff to recover the contract price.

5. The provisions of R.S., c. 127, in respect to the registration of foreign companies were not applicable and that the defence that plaintiff company was not registered would not avail.

Harris, K.C., and *Henry*, K.C., for plaintiff. *W. B. A. Ritchie*, K.C., for defendant.

Full Court.] THE KING *v.* STEWART. [April 5.

County Court Judge's Criminal Court—Election to be tried before—Effect of—Fixing day for trial—Jurisdiction of judge.

The County Court Judge's Criminal Court is a Court of Record for the trial of certain criminal offences and the judge thereof for all purposes and proceedings connected therewith and related thereto has all the powers of a Court of Record, and a prisoner who elects to be tried before such court submits himself not to the particular judge, but to the County Court Judge's Criminal Court, which court does not lose jurisdiction over him until he is tried for the offence for which he is committed.

The mere fact that the judge of the court is not present on the day fixed for the trial cannot possibly affect the jurisdiction of the court, which arises and continues by reason of the prisoner's election to be there tried.

The fixing of a particular day for the trial has nothing to do with giving jurisdiction; it is simply a matter of procedure of a directory character.

The fact that the judge has named a day for the trial and does not then try the prisoner as intended, in no way prevents or limits his power to fix another day on which the trial takes place.

See B.N.A. Act. s. 92, sub-s. 14; R.S.N.S. c. 157, s. 2; Crim. Code 1892, ss. 753-781; R.S.C. c. 146, Part XVIII., s. 824, 827.

O'Hearn, for prisoner. *Cluney*, for the Crown.

Full Court.] THE KING *v.* PASSERINI. [April 5

Intoxicating liquors—Sale—Evidence supporting conviction.

Defendant was charged with keeping intoxicating liquors for sale contrary to the provisions of the Nova Scotia Liquor License Act. The evidence shewed that there was a barrel of beer in the back room of defendant's house, that there were glasses there and that there were persons drinking there at the time charged. If further appeared that the front room was occupied by a person said to be a shoemaker, and that the latter person served there and in a middle room and sold beer which he brought from the back room.

Held, 1. Under the Act s. 156, defendant was to be taken as the person who kept the liquor for sale and the occupant of the front room as a person who was suffered to be upon the premises or acting for defendant.

2. There was sufficient evidence to convict and that the judgment of the County Court judge setting aside the conviction must be reversed and the conviction of the magistrate restored.

Robertson, for appellant.

Full Court.] HOBKECKER *v.* SANDERS. [April 5.

Promissory note—Consideration—Recovery—Collateral security —Promotion of Act invalidating.

M. being indebted to the bank in a large amount upon a note of which plaintiff was indorser, and being about to leave the province, arranged with defendant to assume the debt which he did by making a note payable to plaintiff, who on defendant's assurance that M. had secured him and had arranged for money to meet the note, discounted the note and used the proceeds to discharge M.'s liability. When the note given by defendant fell due he made several payments on account but ultimately plaintiff had to take it up.

Held, that under these circumstances plaintiff was entitled to recover.

One of the grounds of defence was that plaintiff promoted the passage of an Act through the legislature under which certain stock which M. deposited as security for his indebtedness was rendered valueless.

Held, that if the Act had the effect contended for plaintiff could not be held responsible for it, and further that if the promoters of the Act were guilty of an improper action defendant was equally guilty with plaintiff.

Mellish, K.C., for appellant. *W. B. A. Ritchie,* K.C., and *Terrell,* for respondent.

Full Court.] HIRTLE *v.* KING. [April 5.

Husband and wife—Wife doing business in her own name—Effect of filing husband's consent—Set-off against husband pleaded to action by wife.

The effect of the filing of a husband's consent to his wife carrying on business in her own name must be restricted to the terms of the statute. It only protects the wife from having her property seized as belonging to her husband and the husband from being liable on the contracts entered into by his wife in connection with the business. It is not notice to anyone that the business is the business of the wife except for the purpose of affording protection from the consequences mentioned.

In an action by plaintiff to recover an amount claimed for the board of defendant's horse, and for other services it appeared that the largest amount in controversy was incurred under a contract made with plaintiff's husband and as to this defendant relied upon a set-off against the husband.

Held, unnecessary to determine whether the husband dealt as a principal with defendant, being in fact as to the particular transaction an agent for his wife, but not disclosing the fact, or whether he was making the contract on his own behalf, as in the first case the wife could not sue upon the contract without being subject to any defence that defendant was entitled to in respect to the set-off.

McLean, Q.C., for appellant. *O'Connor,* for respondent.

Full Court.] MATTINSON *v.* HEWSON. [April 5.

Contract for work and labour—Defence of defective workmanship—Abatement of price—Jurisdiction of justices in respect of.

Plaintiff sued before justices of the peace for work done and materials supplied in connection with the erection of an addition to a cottage owned by defendant. The defendant relied upon certain defects in the workmanship.

Held, 1. The implied contract that the work should be done in a workmanlike manner was not one going to the essence of the contract, but defendant was entitled to an abatement of the price on account of the defects shewn to exist.

2. If the magistrates had jurisdiction in respect to plaintiff's whole claim they had jurisdiction to consider how much the price should be abated for defective workmanship.

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

Full Court.] RE VICTOR WOODWORKS. [April 5.

Company—Organization—Conditional subscription to stock list—Right to recover amounts paid.

The project for the establishment of a company for the purpose of carrying on building operations involved the acquisition of the works of an existing company and the extension of the business by providing additional capital, buildings and machinery, the holders of stock in the existing company to surrender their stock and accept stock in the new concern. The authorized capital of the proposed company was fixed at $100,000 and the paid-up capital at $50,000.

A subscription list was opened and was signed by a number of persons for an amount something less than the proposed paid-up capital. A committee of subscribers to the new stock was appointed to act with the directors of the company in making arrangements with the company with a view to the immediate commencement of the new operations and a call of 25 per cent. on the stock subscribed was paid by 27 out of 49 subscribers.

After certain liabilities had been incurred for materials, machinery, etc., the project was abandoned and a petition was filed to have the persons who paid the call made upon the stock, made contributories in winding-up proceedings.

Held, 1. Refusing the application with costs, that the stock subscriptions being conditional upon the arrangement for the union of the two bodies going through as a whole, and the project having fallen through, there was a failure of consideration and there was nothing to prevent the subscribers from recovering back the amounts paid by them.

2. The payment of the call, under the circumstances, did not waive the condition.

DRYSDALE, J., dissented.

Mellish, K.C., for liquidator. *W. B. A. Ritchie*, K.C., and *Ralston*, for contributories.

Full Court.] THE KING *v.* WILSON. [April 5.

Intoxicating liquor—Evidence of sale supporting conviction.

The only point relied upon by defendant on appeal from a conviction for a violation of the Liquor License Act was that there was no evidence that a sale of the liquor in question took place in the town of B. as alleged.

The purchaser of the liquor swore that she bought the article from defendant and that it was delivered at her house in B. by the defendant's team, and another witness, the policeman of the town, swore that defendant's factory and residence were in the town of B. and that he put up bottled drinks there which were sold and delivered from there in the town of B.

Held, that the evidence was sufficient, and that the judgment of the County Court judge to the contrary should be set aside and the conviction affirmed.

Roberts, for prosecutor. *McLean*, K.C., for defendant.

Longley, J.] KING *v.* MCINTYRE. [April 26.

Liquor License Act—Evidence.

On the trial of an information or complaint for an offence against the provisions of the Liquor License Act, R.S.N.S., c. 100, the person charged is competent and compellable to give evidence but cannot be compelled to answer any question which may tend to criminate him.

The objection is a personal one and must be made by the party himself and not by his counsel.

Carroll, for plaintiff. *Harrington* and *Chisholm*, for defendant.

Longley, J.] [April 26.

SUTHERLAND v. GRAND COUNCIL OF PROVINCIAL WORKMEN'S ASSOCIATION.

Benevolent association—Election of officers—Right to vote—Credential to voter—Right to sue after ceasing to be a member of association.

Plaintiffs, who claimed to be members in good standing of the Provincial Workmen's Association, brought an action claiming a declaration that the meeting of the Grand Council of the Association held in September, 1908, at which the officers of the council were elected, was illegal, and that all the business transacted thereat was void, on the grounds that the officers who had not been elected delegates voted, that a minor office was filled by a person appointed temporarily for the purpose, and that delegates appointed by several lodges of the association were not permitted to sit or take part in the proceedings.

Held, 1. In view of the provision of the constitution that the council should consist of certain officers named, "and" regularly appointed delegates, the officers present in the discharge of their duties had the right to vote and to take part in the proceedings in every proper way.

2. The act of the person objected to sitting as a member of the council was presumptive evidence of his right to do so.

3. The question of the right of delegates to sit having been referred to the committee on credentials and reported upon, and the report having been adopted, this was a matter of procedure with which the court would not interfere.

4. With respect to one of the lodges which was held incompetent to appoint delegates by reason of the non-payment of certain dues, the matter was not affected by the fact that an officer of the council had written a letter intimating that, in spite of the failure to pay dues, if the lodge sent one or two delegates, the question might not be raised.

Semble, that plaintiffs having ceased to be members of the association could not maintain the action.

Robertson, Harrington and *Cameron*, for plaintiffs. *D. A. Cameron* and *Carroll*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [April 12.

HUNT *v.* GRAND TRUNK PACIFIC RY. CO.

Railway—Obligation to fence right of way—Injury to crops caused by cattle straying from railway line not fenced.

The duty of a railway company to provide, under s. 254 of the Railway Act, R.S.C. 1906, c. 37, fences and cattle guards suitable and sufficient to prevent cattle and other animals from getting on the railway, is prescribed only to protect the adjoining land owners from loss caused by these animals being killed or injured on the track; and, notwithstanding the general language of s. 427 of the Act, which gives a right of action to any one who suffers damages caused by the breach of any duty prescribed by the Act, an adjoining owner whose crops are injured by cattle straying on to his land from the railway track, in consequence of the absence of fences and cattle guards, has no right of action against the railway company in respect of such injury.

James v. *T.T.R.*, 31 S.C.R. 420; *Gorris* v. *Scott*, L.R. 9 Ex. 125, and *McKellar* v. *C.P.R.*, 14 M.R. 614, followed. *Winterburn* v. *Edmonton Ry. Co.*, 8 W.L.R. 815, not followed.

RICHARDS, J.A., dissented.

Card, for plaintiff. *Symington*, for defendants.

Full Court.] PICKUP *v.* NORTHERN BANK. [April 12.

Bills of exchange and promissory notes—Partnership for non-trading purposes—Holder for value without notice—Alteration in indorsement of promissory note—Estoppel in pais.

Judgment of CAMERON, J., noted ante, p. 49, varied by giving plaintiff judgment in respect of the two notes on which the special indorsement to the Home Bank of Canada had been changed without the knowledge of the plaintiff to an indorsement in blank by striking out the words, "Pay to the order of the

Home Bank of Canada," above the signatures. These notes had been discounted by the defendants for Davenport after Pickup's letter of 20th August, and it was held that the alteration in their indorsement was such as to put the defendants on their inquiry as to Davenport's right to discount them for himself.

RICHARDS, J.A., dissented.

Daly, K.C., and *Crichton*, for plaintiff. *Hudson*, for defendants.

Full Court.] [April 12.

PEDLAR *v.* CANADIAN NORTHERN RY. CO.

Railway—Negligence—Failure to blow whistle and ring bell on approaching crossing—Railway Act, 1903, *c.* 58, *s.* 224—*Onus of proof as to existence of by-law of municipality—New trial—Evidence by affidavit.*

Action for damages for the killing of plaintiff's horses at a highway crossing by an engine of the defendants.

The learned trial judge did not think it necessary to decide, upon the conflicting evidence, whether the whistle had been blown as required by s. 224 of the Railway Act, 1903, but he found that the bell had not been rung and that the defendants had, therefore, been guilty of negligence. He was, however, inclined to believe that the plaintiff's driver had been guilty of contributory negligence in not looking out for the engine. The action was dismissed on the ground that the plaintiff had not proved that there was no by-law of the city prohibiting the blowing of whistles and ringing of bells because, under that section, if such a by-law was in force, the whistle should not be blown nor the bell rung.

Held, that, upon the plaintiff filing an affidavit proving the non-existence of such a by-law, there should be a new trial, as the evidence strongly indicated negligence and there was no positive finding of contributory negligence.

Quære, whether the onus was on the plaintiff to prove the non-existence of such a by-law.

Semble. The trial judge might properly have allowed such proof to have been made by affidavit.

Fullerton and *Foley*, for plaintiff. *Clarke*, K.C., for defendants.

KING'S BENCH.

Mathers, J.] AMERICAN-ABELL *v.* TOUROND. [March 16.

Contract—Signature by person unable to read—Verbal agreement—Sale of Goods Act.

When a man capable of reading and understanding a document, and having an opportunity to do so, affixes his signature to it without reading it, he should be held bound by its contents. But that rule does not apply when a man, incapable of reading a document, is induced to sign it by a representation that it is an entirely different document.

The plaintiff's agent, in negotiating the sale to the defendant of a second-hand threshing outfit, assured him that the separator was in first-class condition and would do first-class work and, if not, he should be at liberty to return it. The defendant agreed to take it upon these terms and, not being able to read English, signed the usual order form upon being assured by the agent that it was a paper shewing the bargain made.

Held, that the defendant was not bound by anything contained in the order which was an addition to or inconsistent with the verbal agreement made between the plaintiff's agent and himself, and that he had a right to return the machines when he found that they were not as represented, and to have the promissory notes he had given delivered up and cancelled, as, under Rule 4 of s. 20 of the Sale of Goods Act, R.S.M. 1902, c. 152, the property in the goods had not passed to the defendant.

A. B. Hudson and *Anderson,* for plaintiffs. *Albert Dubuc,* for defendant.

Cameron, J.] RE MCGREGOR. [March 20.

Life assurance—Policy payable to beneficiary in case of insured's death within named period—Death of beneficiary before insured—Conflict of laws—Insurable interest in life.

A life insurance policy (not coming within the Act respecting Life Insurance for the benefit of Wives and Children, R.S.M. 1902, c. 83), and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and there is no power in the insured by any act of his, by deed or by will, to transfer to any other person the interest of the beneficiary which is a vested right in him or her, and, therefore, when the beneficiary dies before the

insured the right to the money passes over to the personal representatives of the beneficiary to the exclusion of the insured or his personal representatives at his death. *Central Bank of Washington* v. *Hume*, 128 U.S. 195, and *Am. & Eng. Ency.*, vol. 3, p. 980, followed. *Wicksteed* v. *Munro*, 13 A.R. 486, distinguished because based on the special Ontario statute.

A life insurance policy may be made payable to a person or beneficiary who is totally without any insurable interest in the life of the insured. *North American Life* v. *Craigen*, 13 S.C.R. 278, followed.

By virtue of s. 40 of the Manitoba Insurance Act, R.S.M. 1902, c. 82, the money payable under a policy of life insurance issued by a company licensed under the Act, when the insured resides in Manitoba, is payable there although the policy itself provides for payment at the head office of the company in another province, and in such a case the contract of insurance is subject to the laws of Manitoba and the money must be distributed in accordance therewith.

McKay, for administrators. *Macdonald*, K.C., for infants. *Card* and *Anderson*, for the other parties.

Phippen, J.A.] DURAND v. FORRESTER. [March 20.

Malicious prosecution—Determination of proceedings in plaintiff's favour—Termination of prosecution where two justices decide differently.

On the preliminary hearing of a charge of arson against the plaintiff, one justice decided that he should be committed for trial and the other that the information should be dismissed and nothing more was ever done in the matter.

Held, that it could not be said that the plaintiff had been discharged on the investigation so as to entitle him to bring an action for malicious prosecution against the informant. *Abrath* v. *North Eastern Ry. Co.*, 11 Q.B.D. 445; *Metropolitan Bank* v. *Pooley*, 10 A.C. 210; *Partin* v. *Hill*, 12 W.R. 754, and *Baxter* v. *Gordon*, 13 O.L.R. 598, followed.

Semble, the justices might have been compelled by mandamus to make an order of dismissal under the circumstances and, if they had made such an order, the plaintiff could have proceeded with his action: *Kinnis* v. *Graves*, 67 L.J.Q.B. 584.

Hagel, K.C., for plaintiff. *Coyne*, for defendant.

Mathers, J.] RE ROYSTON. [March 27.

Extradition—Preliminary hearing of indictable offence—Criminal Code, ss. 682-686—*Practice when evidence taken in shorthand.*

Under s. 13 of the Extradition Act, R.S.C. 1906, c. 155, which provides that the judge before whom the fugitive is brought should hear the case in the same manner as nearly as may be as if the fugitive was brought before a justice charged with an indictable offence, the proceedings are regulated by ss. 682-686 of Crim. Code and, under s. 683, if the evidence is taken in shorthand it is imperative that the transcript be signed by the judge and be accompanied by an affidavit of the stenographer that it is a true report of the evidence before there can be a committal of the accused for extradition and, if these be lacking, the prisoner is entitled to his discharge on habeas corpus, although there would be nothing to prevent fresh proceedings being taken against him.

In re Stanbro, 1 M.R. 325, and *Dale's Case,* 6 Q.B.D. 376, followed.

Matheson, for prosecution. *McKay,* for prisoner.

Macdonald, J.] [March 29.

ANGLO CANADIAN LAND CO. *v.* GORDAN.

Contract—Agreement to enter into an agreement for purchase of land—Description.

An agreement to purchase one of a number of parcels of land sufficiently described to be selected by the purchaser is not void for uncertainty of description and, after the selection had been made, the purchaser will be bound by the agreement.

There is, however, no binding contract where the writing signed appears to be only an agreement to enter into a formal contract for purchase of the land to be prepared in the future, although it sets forth the terms agreed on as the basis of such formal contract. *Frost* v. *Moulton,* 21 Beav. 596, followed.

Hansford, for plaintiffs. *Hogg,* for defendant.

Cameron, J.] [April 2.

CANADIAN FAIRBANKS CO. *v.* JOHNSTON.

Vendor and purchaser—Agreement of sale of land—Rescission of contract by notice pursuant to conditions thereof—Forfeiture—Time.

The defendant held possession of the land in question under

an agreement of purchase which provided that, in default of payment of any instalment of the purchase money, the vendor should be at liberty to determine and put an end to the agreement . . . and to retain any sum or sums paid thereunder as and by way of liquidated damages, by serving a notice intimating an intention to determine the agreement, and that, at the end of thirty days from the mailing or delivery of such notice if such default should not be remedied in the meantime, the purchaser should deliver up quiet and peaceable possession of the land to the vendor or his agent, and the agreement should become void and be at an end and all rights and interests thereby created or then existing in favour of the purchaser or derived under the agreement should thereupon cease and determine and the premises should revert to and revest in the vendor without any further declaration of forfeiture or notice or act or re-entry and without any other act by the vendor to be performed and without any suit or legal proceedings to be brought or taken and without any right on the part of the purchaser to any compensation for moneys paid under the agreement. The agreement also contained the clause: "Time shall be in every respect of the essence of this agreement."

Held, that a notice served upon the defendant by the vendors' assignee, after default in payment, that "the said agreement is hereby determined and put an end to and unless such default shall be remedied by you within thirty days . . . you shall then be required to deliver up quiet and peaceful possession of the said lands and premises and said agreement shall be absolutely null and void and all rights, etc., (following the wording of the clause quoted)," was not in accordance with the terms of the power and was therefore ineffectual to put an end to or determine the agreement or to entitle the vendor's assignee to an order of the court for possession of the land.

Such powers of rescission must be strictly followed and their exercise is subject to rigorous scrutiny in a court of equity just as in cases of notices under powers of sale in mortgages.

Held, further, that, even if the notice served had been worded in strict accord with the power in the agreement, the latter should be treated as in the nature of a penalty against which the courts will relieve. *In re Dagenham Dock Co.*, L.R. 8 Ch. 1022, and *Cornwall* v. *Henson* (1900) 2 Ch. 298 followed.

Semble, the plaintiffs' remedy would be to commence an action in the nature of a foreclosure to get the contract cancelled by decree of the court upon default after a time to be fixed by the

court: Per KILLAM, J., in *Hudson's Bay Co.* v. *Macdonald*, 4 M.R. 237, and JESSEL, M.R., in *Lysaght* v. *Edwards*, 2 Ch.D. 506.

Moran, for plaintiffs. *Jameson*, for defendants.

Mathers, J.] [April 14.

CITY OF WINNIPEG *v.* WINNIPEG ELECTRIC RY. CO.

Pleading — Amendment — Defences arising after delivery of statement of defence.

Defences arising after the delivery of the statement of defence should be allowed on the defendant's application to amend if they are such that they may be fully met by facts set up by the plaintiff in reply.

If, however, an amendment sought to be made to the statement of defence is of such a nature that it would, if made, put the plaintiff in such a position that he could not be compensated by costs or otherwise, it should be refused upon an application made for leave to make it after the lapse of the eight days from the delivery of the statement of defence within which, by rule 339 of the King's Bench Act, the defendant may of right make such an amendment. *Steward* v. *North Metropolitan Tramways*, 16 Q.B.D. 180, 558; *Lee* v. *Gallagher*, 15 M.R. 677, and cases collected in Annual Practice, 1909, p. 370, followed.

Wilson and *Hunt*, for plaintiffs. *Hudson*, K.C., and *Laird*, for defendants.

Mathers, J.] RE FERGUSON. [April 16.

Will—Sale of devised land by testator subsequent to will—Bequest of "cash, negotiable notes and mortgages"—Compensation to executors—Lapse.

Held, 1. Notwithstanding s. 21 of the Wills Act, R.S.M. 1902, c. 174, a devise of land specifically described fails when the the testator has, after making the will, entered into an agreement to sell the land, although no part of the purchase money has been received during his lifetime, and the devisee takes no interest in either the land or the purchase money. *Ross* v. *Ross*, 20 Gr. 203, and Jarman on Wills, p. 129, followed.

2. Unpaid purchase money of land sold by the testator in his lifetime will not pass under a bequest of "all cash, negotiable

notes and mortgages" if there were, at the time of his death, mortgages which would answer the description in the will.

3. A legacy lapses if the legatee dies before the testator unless it can be regarded as a legacy to a class: Theobald on Wills, p. 780.

4. The executors in this case should be allowed as compensation the following commissions: One half of one per cent. on cash in the bank, three per cent. on collection of all other sums, and one per cent. on all payments out.

Hoskin, for executors. *Macdonald*, K.C., for infants.

Province of British Columbia.

SUPREME COURT.

Full Court.] PIPER *v.* BURNETT. [April 29.

Security for costs—Order LVIII., r. 15a—Discretion.

The granting of an order directing appellant to give security for costs is a matter within the discretion of the judge applied to, and his decision ordinarily should not be interfered with.

Ward v. *Clark* (1896) 4 B.C. 501 overruled.

R. W. Hannington, for respondent. *Woods*, for appellant.

Full Court.] [April 28.

ANDERSON *v.* CITY OF VANCOUVER.

Examination of parties.

A park commissioner, being a legislative functionary, not subject to the control or direction of the municipal corporation, is not an officer of the latter body within the meaning of Order XXXIa, and is not examinable under said Order XXXIa before trial in proceedings against the corporation.

W. A. Macdonald, K.C., for the corporation. *Reid*, K.C., contra.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Hon. John Donald Cameron, puisne judge of the Court of King's Bench for Manitoba, to be judge of the Court of Appeal for that province, in the room and stead of Frank Hedley Phippen, Esquire, resigned.

United States Decisions.

GAS STOVE AS FIXTURES.—The few cases on the question whether gas stoves are fixtures are collated in a note in 17 L.R.A. (N.S.) 699, accompanying the Massachusetts case of *Hook* v. *Bolton*, in which it is held that a gas stove and window shades running on rollers, attached by the owner to his dwelling-house, designed for a single family, are not fixtures which will pass with a mortgage of the realty.

SUCCESSION TAX.—The liability to pay a succession tax in respect of property transferred by one belonging to an exempt or favoured class to one not a member of such class, in compromise of a dispute over decedent's estate, seems to have been passed upon by the courts for the first time in the recent Tennessee case of *English* v. *Crenshaw* (Tenn.) 17 L.R.A. (N.S.) 753, in which it was held that property thus transferred is not subject to tax.

REFUSAL OF TELEGRAPH MESSAGE.—There seems to be but little direct authority upon the right to refuse a telegraph message because of its character, the recent case of *Western U. Teleg. Co.* v. *Lillard* (Ark.) 17 L.R.A. (N.S.) 836, in which the right to refuse a message on the ground that it was improper was denied, being apparently the second case only in which the right to refuse a message on this ground has been specifically presented for adjudication; but it seems to be the undoubted rule of law, as stated in the note to this case, as gathered from these and some other cases, not strictly in point, that a telegraph company has no right to refuse a message unless it is couched in indecent or libellous language

RECOVERY FOR FRIGHT.—Another phase of the much-debated question of the right to recover for physical injuries resulting

from fright caused by negligence, which is the subject of a note in 3 L.R.A. (N.S.) 49, is presented by the recent Maryland case of *Philadelphia, B. & W.R. Co.* v. *Mitchell*, 17 L.R.A. (N.S.) 974, holding that the rupture of an artery, due to a muscular contraction in attempting to avoid injury from an article which falls upon one's umbrella, may be the basis of a recovery against the one responsible for the fall. This case is distinguishable from the other cases on the subject in that here the injury resulted immediately from the involuntary act of the plaintiff in throwing herself back to escape from impending danger, and thus twisting her body in such a way as to rupture an artery, and not from the effect of the impending danger on her mind and nervous system; but the case was argued and decided entirely on the theory that the injury was caused by fright or shock.

SHUTTING OFF GAS TO COMPEL PAYMENT OF AN ARREARAGE.—The question of the right of a public-service corporation to discontinue service to the representative, such as an assignee or receiver, of a delinquent customer, seems to have been considered for the first time in the recent Massachusetts case of *Cox* v. *Malden & M. Gaslight Co.*, 17 L.R.A. (N.S.) 1235, holding that assignees for creditors are not identified with the assignor so as to entitle a corporation which had been supplying gas to the assignor to refuse to supply it to the assignees, who desire temporarily to continue the business, until the amount due by the assignor is paid, under a statute giving it permission to shut off gas from the premises of one who refuses to pay the amount due therefor, but forbids it to do so merely because the bill remains unpaid by a previous occupant of the premises.

CODE OF ETHICS FOR LAYMEN.

A code of ethics for laymen will be reported to the Illinois State Bar Association at its annual meeting in Peoria next June, by Elmer E. Rogers, chairman of the committee on professional ethics. Among other things the report will say:—

"Probably the first duty of the citizen is obedience to law, which is none the less a moral, civic, and political duty as well as an ethical duty. If a law be unjust, then it is the ethical duty of the citizen, through the ballot box, to elect representatives who will repeal the offensive statute.

"Respect for the courts and their executive officers, while in performance of their duties, is an ethical duty incumbent upon every citizen. If any public official be derelict in performance of

his sworn duty, then the citizen should perform his ethical, civic, and political duty at the ballot box. It is wholly unethical and unwarranted to hold in contempt the office merely because of distrust for the man who happens to occupy that office."

Flotsam and Jetsam.

THE GROWTH OF PERJURY.—The frequently remarked increase of perjury in the large cities of America appears to be paralleled in England. In a recent interview Judge Edge, of the County Court, is reported to have said: "False swearing in the witness box is rampant. It has always been bad, but I am inclined to think it is on the increase. Certainly it is far worse in London than in the country, for in the provincial towns the communities are smaller than in London; witnesses are well known and are in consequence more careful of what they say. Something should undoubtedly be done to stop this wholesale abuse." This condition is chargeable in large measure to the spread of education and the breaking down of old superstitions, particularly the fear of hell fire. Until education has proceeded far enough to build up a general appreciation of "right for right's sake," it is difficult to see where any efficient remedy is to come from unless the psychologists bring their lie-detecting machines to perfection.—*Ex.*

From the following card one would judge that one Oklahoma lawyer at least is not suffering from business depression:

F. W. Temple, Attorney at Law, over Post Office, terribly busy, but come in anyway. I will be glad to see you. Idabel, Oklahoma.

HAD A SUFFICENT MOTIVE.—According to the *Boston Transcript* a line of jurymen appeared in a Missouri court and every man explained that it would mean disaster to him to serve at that term of court—all but a little fellow at the tail end of the line. This man was a hunter and he had lived in a cabin on the creek all his life.

"You have no excuse to offer?" asked the surprised judge.

"No, sir."

"Haven't got a sick mother-in-law needing your attention?"

"No, sir; I ain't married."

"What about your crop?"

"Don't raise anything."

"No fence to fix up?"

"Haven't got a fence on the place."

"You think you can spare the time to serve on a jury two weeks?"

"Sure."

The judge sat a while and meditated. Reaching over, he whispered to the clerk, who shook his head in perplexity. Then the judge's curiosity got the better of him.

"You're the only man who's got the time to serve your country as a juryman," he said. "Would you mind telling me how it happens?"

"Sure not," said the little man, promptly. "I heard you was going to try Jake Billings this term. He shot a dog o' mine oncet."—*Ex.*

RESPECTIVE RIGHTS OF PIGS AND AUTOMOBILES IN HIGHWAYS.—In the recent case of *Higgins* v. *Searle*, the Court of Appeal had to solve this question: When a horse, a motor-car, and a pig meet upon the highway and the horse shies at the pig, by reason of which the driver of the car is forced to run into a wall in order to avoid the horse, is the owner of the pig liable for the resulting damage to the car? After serious consideration the court reached the conclusion that the injury was not the natural and probable consequences of the pig's presence in the highway, and absolved the proprietor of the said pig from responsibility. This decision would seem to settle the principle that automobilists in venturing upon the highway must assume the risks arising from the presence there of animals cicuris naturæ such as the pig and the gentle but unintellectual hen. Possibly the court was influenced by the theory that prevails in certain quarters that all automobilists are hogs and therefore cannot be heard to object to the use of the highways by pigs.

A kind old gentlemen, seeing a very small boy carrying a lot of newspapers under his arm, was moved to pity.

"Don't all those papers make you tired, my boy?"

"Nope," the mite cheerfully replied. "I can't read."—*Youth's Companion.*