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CERTAIN POINTS IN CONNECTION WITH THE DEVOLUTION OF ESTATES ACT.

I. Introductory.

Probably not even its warmest friends, and they are undoubtedly many—and deservedly so—will venture to contend that the Devolution of Estates Act is an enactment devoid of defects.

Possibly no statute on our books is more far-reaching in its effects, or more radical in the changes it has wrought, and consequently of more general interest to the profession and the public at large, and if that is the case, it will be generally conceded that it is a matter of the utmost importance that all its provisions should be as perfect and as free from ambiguity of expression as possible.

To the writer it has always seemed that these desirable ends have been sadly missed in the framing of the Act and its num-

erous amendments, and our purpose in the present article is to consider a few isolated points in this connection.

II. Of the shifting of the legal estate from the personal representative to the beneficiaries.

The general idea introduced by the Act was, as is well understood, that at a certain period (originally one year from the death of the decedent, subsequently by amendment, three years from the death), the legal estate in realty should, without any act on the part of the personal representative, shift automatically from the latter to the various beneficiaries.

How was that sought to be accomplished? By the following words, viz.: "Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by the executors or administrators within twelve months after the death of the testator or intestate shall, subject to the Land Titles Act, in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the Registry Office, or Land Titles Office, where the land is under the Land Titles Act, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered."

It is necessary here to bear in mind exactly what the legal estate in land is. It is unquestionably a very definite en-

tity in the eye of the law, and we must not lose sight of the fact that it has always been held to require appropriate words of grant or vesting to convey or transfer it from one person to another.

The equitable estate is quite a different matter and may, as is well understood, be transferred with much less formality; a simple agreement for the sale of land, for instance, having the effect of transferring the equitable estate therein to the vendee; but such vendee can never be invested with the legal estate until a formal conveyance, with appropriate words of grant, has been executed.

Bearing this distinction in mind let us now see how the legislature has set about to transfer the legal estate at the period mentioned. Referring to the Act as above quoted we find that the provision is that, at the period mentioned, the real estate shall be "deemed thenceforward to be vested in the devisees or heirs, etc.

Now with all possible deference for the framers of the Act, one is naturally inclined to ask why the expression "deemed to be vested" is used, and we are driven to enquire what is the exact meaning and effect of those words, and why they were used instead of the more obvious and intelligible expression "shall thereupon vest" or words to that effect.

Surely the intention was that, at the period, and under the conditions mentioned, the land should actually become vested in the parties named.

There must be a distinction between realty being actually vested and being merely deemed to be vested in certain persons. The former is apparently what was intended, but the latter is what has been enacted. We should suppose the accurate meaning of the latter form of expression to be that the land was not to become actually vested in the persons named, but that certain legal consequences should ensue as though it were vested in such persons. Just as though the legislature should enact that such and such a person should be deemed to be dead. The person

would not really be dead, but all legal consequences would ensue, such as devolution of his estate upon his heirs or next of kin, as though he were dead. But if that is the correct interpretation of the words of the Act, matters are left in an unfortunate state of confusion, inasmuch as the legal estate, even though only a bare legal estate, would still remain in the personal representative after the expiry of the prescribed period of shifting, and so, for instance, in every such case a purchaser would be entitled to call for a conveyance from the personal representative as well as from the beneficiaries, and his title would never be perfect until he had received it.

One readily calls to mind the stereotyped words of a vesting order of the Court, viz.: It is ordered that such and such lands "be and the same are hereby vested in so and so, his heirs and assigns for all the estate, right, title and interest" of the parties therein and thereto. There is no ambiguity about that form of expression. The Court does not say the lands shall be deemed to be vested. It actually vests them. The legislature has the same power as the Courts. Vesting enactments are quite common, and they almost invariably use the same form of words as the Courts. It is difficult, therefore, to understand why the peculiar and ambiguous form of expression under discussion was adopted in this Act, or to what it owes its origin.

It is curious and worthy of remark that the Act now under discussion is not the only instance of the use in our statutes of this peculiar form of expression. We find it occurring in other Acts. See, for example, the Loan Corporations Act, R.S.O. 1897, c. 205, s. 49, a section also relating to the vesting of property. The words there are, "In the case of the amalgamation of corporations so assented to, the several corporations parties thereto shall as from the date of the said assent be deemed and taken to be consolidated and amalgamated," etc., and further on in the same section "and . . . all and singular the business, property, real and personal, . . . shall be taken and deemed to be transferred and vested in such new or

such continuing corporation without further act or deed," etc. (*a*).

It is true that the peculiar form of expression under comment has apparently been universally accepted by the judiciary and the profession as being sufficient to effectuate its professed object, and the matter has always been treated as though an actual vesting of the legal estate in the beneficiaries took place at the period prescribed from the "shifting."

Whether this acceptance is warranted or not seems to be a question not free from very serious doubt.

It would be interesting to have it brought fairly before our Court of Appeal for decision.

Should the decision in such case be that the words were insufficient to effectuate their intended object (and it seems, in the writer's opinion to be extremely likely that it would be so), it is needless to point out the confusion worse confounded that would be thereby introduced into our real estate law.

III. Of the registration of belated cautions and the re-shifting of the legal estate from the beneficiaries to the personal representative.

1. Defective language of the Act in that connection.

By the expression "belated" cautions we mean those registered after the expiry of the period (one year or three years as the case may be) intervening between the death and the period of shifting of the legal estate.

The provision relating to the registration of these belated cautions was not found in the original Act, but was introduced by 56 Vict. c. 20, s. 2, and the effect of such registration was expressed in the following words, viz.: "Such caution shall have the same effect as a caution registered within twelve months

(*a*) The same ambiguous form of expression is found in sec. 16 of the Devolution of Estates Act, where it is provided that the personal representatives "shall be deemed to have as full power to sell and convey such real estate for the purpose not only of paying debts but also of distributing," etc.

from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them, and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators."

It will be observed that the provision of this enactment is, shortly, that the registration of a belated caution is to have the same effect as the registration of an ordinary caution. Let us see then what is the effect of this latter registration.

Its definition is found in section 13 of the Act, the provision there being that the legal estate in the realty of a deceased shall shift after one year to the beneficiaries, "unless such executors or administrators, if any, have caused to be registered in the Registry Office or Land Titles Office where the land is under the Land Titles Act, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate or part thereof under their powers and in fulfilment of their duties in that behalf, and in case of such caution being so registered this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered."

We learn then that the effect of registration of an ordinary caution is purely negative—that is to say, it does not cause any shifting of the estate to take place from any one person or set of persons to any other person—it merely keeps matters in statu quo for another year (now three years).

The provision of the later enactment, viz: That relating to the registration of belated cautions is that such registration shall have the same effect as the registration of an ordinary caution. How can it possibly have such effect?

In order that the registration of a belated caution may have the same effect as the registration of an original caution the existing conditions must be the same. But here they are entirely different. In the case of the ordinary caution the estate had not yet shifted from the personal representative, and the object of the caution was to prevent it from so shifting. In the case of the belated caution, on the other hand, the estate had already shifted from the personal representatives to the beneficiaries, and what was required was, not some provision that should hold matters in statu quo for a further period, but some provision that should have the effect of taking the estate out of the beneficiaries and revesting it in the personal representative. How can the words of the Act, even by the most strained construction, be held to accomplish that? It is submitted, with all possible deference, that they cannot do so, and that nothing short of appropriate words of revesting in the statute can have that effect. The legislation on the subject has, apparently, entirely missed its mark. It is as though the legislature should purport to enact that a reprieve received by the sheriff after the criminal had been executed, should have the same effect as though received before that interesting event. No doubt, it is sufficiently apparent what the legislature meant to accomplish by the words they have used, but the simple fact remains that they have not done it. The fact that ever since the passing of the Act the words in question have by common consent been treated as effectually accomplishing the desired object, seems to be just one more instance of the good nature and complaisance of the judiciary and the profession towards the legislature.

It was plain what was intended to be done, and the matter has been generally accepted as though it had been effectually accomplished. It has been another case of taking the will for the deed.

We would venture to respectfully suggest that, when amendments are next made to the Act, appropriate words of revesting should be embodied.

2. Can the procedure relating to belated cautions be properly resorted to where there are no debts?

In discussing this branch of the subject it may be well to mention that this belated caution procedure has been quite commonly resorted to where there are no debts. It may be even said to be quite the customary practice to resort to it when occasion arises. It has repeatedly received the sanction of the Official Guardian of infants, and, though we are not aware of any case in which it has been directly approved by the Court, we think it has on many occasions come under the Court's notice without adverse comment.

In that condition of affairs it seems almost presumptuous to raise any question as to the validity of the practice, and yet, with all possible respect, the writer ventures to think there is room for grave doubt whether the procedure was ever intended to be resorted to under the circumstances mentioned, in fact whether it can under such circumstances be validly adopted. The provision of the Act, so far as it is material to the present question, is that where the personal representatives have "through oversight or otherwise" omitted to register the ordinary caution they may register a belated caution, provided they register therewith a further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate under their powers and in fulfilment of their duties in that behalf.

One readily sees why it was important that a provision of this kind should be introduced into the Act. Cases occasionally arose where, after the estate had been allowed to shift into the beneficiaries, it turned out that there were still valid claims against the estate, of which the personal representative had not been aware at the time he allowed the estate to shift. It would be eminently proper in such cases that the personal representative should be placed in a position to deal with such claims by having the estate revested in him and it was to meet emergencies of that kind, it is submitted, that the legislation was introduced. The language used seems to indicate that clearly. It

is where they have through oversight or otherwise omitted to register, etc. In such cases the personal representative can quite properly make the required affidavit, viz., that he finds or believes it is or may be necessary to sell the realty under his powers and in fulfilment of his duties as such personal representative.

But take the case of a personal representative who has satisfied all the debts and performed all his other duties, except the distribution of the estate, prior to the arrival of the period of shifting. Nothing then remained for him to do but to distribute the estate among the beneficiaries. He might do this either in specie by conveying the land in the appropriate shares, or in the form of money after conversion. If the former method were decided on he might, instead of making conveyances, allow the law to vest the realty in the beneficiaries under the shifting process (assuming the shifting provisions of the Act to be efficacious), but surely having adopted either the one course or the other, he is then effectually functus officio. Surely after he had once performed all his fiduciary duties, and distributed the estate, and thus become functus officio, the law never intended that he should ever get the estate back into his hands merely that he might distribute it over again in some different form.

It is submitted that under such circumstances he could not have recourse to the belated caution procedure, for the simple reason, if no other were forthcoming, that he could not properly make the requisite affidavit that he found it might be necessary for him to sell the real estate under his powers and in fulfilment of his duties as personal representative.

Suppose the personal representative to have fully performed his duties by paying the debts of the estate, etc., and thereafter to have executed a conveyance of the realty to the beneficiaries. It would, in that case, be readily admitted on all hands that he was effectually functus officio, and no one would ever dream of attempting thereafter to have recourse to the belated caution procedure. And yet it is obvious that under such circumstances the position attained is precisely that which would have resulted

had the personal representative executed no conveyance, but simply allowed the statute to have its shifting effect. Why then should a locus penitentiæ remain to the personal representative in the latter case any more than in the former?

It seems clear that the belated caution procedure can only have place when it becomes apparent that the personal representative has not fully performed his fiduciary duties, and that therefore in the supposititious cases referred to it is wholly excluded.

It is submitted that it could never have been intended that after the estate had been wound up and the realty distributed, the personal representative, after a lapse of perhaps ten or fifteen years, should get it back into his hands again for the sole purpose of saving a few dollars in the making of title to a purchaser. And yet that is the practice that is in vogue and has been commonly pursued.

IV. Dower in "re-shifted land."

The expression re-shifted land, though no doubt inelegant, is used for convenience to designate land that has shifted to the beneficiaries and afterwards been brought back to the personal representative (assuming, as is largely done throughout in this article, the words of the Act to be in each case efficacious) by registration of a belated caution.

It will be observed that the words of the Act defining the effect of the registration of belated cautions are as follows: Such caution when registered "shall have the same effect as a caution registered within twelve months" (now three years) "from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them for improvements made after the expiration of twelve months from the death of the testator or intestate if their lands are sold by such executors or administrators."

A question arises here which seems, singularly enough, so far as the writer is aware, to have been entirely overlooked in dealing with cases where the title is made under the belated caution procedure. It relates to the position of the wives of the beneficiaries to whom the estate has shifted on expiry of the statutory period. It is well understood that even momentary seisin is sufficient to cause the right of dower to attach. Upon the shifting of the legal estate, therefore, to beneficiaries who happen to be married it seems clear that the inchoate rights to dower, attach at once. But marriage is a valuable consideration and the Act expressly excepts from its re-shifting operation (assuming for the moment that it has any) "persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees or some of them." The wives, therefore, would seem to fall clearly within this saving clause, and their rights to dower inchoate or consummate as the case might be, would remain unaffected by any re-shifting that might take place. Should the personal representatives thereafter sell the realty it would seem that the title of the purchaser would remain in a defective condition until releases were obtained from the wives of the beneficiaries.

The writer has always acted upon that view in his practice, and required releases from the wives under the circumstances in question, but the point does not seem to have met with general recognition, the common practice appearing to be to accept the conveyance of the personal representative without any enquiry as to whether the beneficiaries were married or not.

V. Summary.

If the writer's views as above expressed are correct these main conclusions seem to follow.

1. It is extremely doubtful whether the words of the Act which provide for the shifting of the estate in the realty from the personal representatives to the beneficiaries after the statutory period are sufficient to effect their purpose.

2. It is even more doubtful whether the words of the Act

which purport to effect a revesting of the estate in the personal representatives in the case of the registration of a belated caution are of any efficacy whatever.

3. Assuming that no doubt existed on either of the foregoing questions, Quære, whether title can be made to a purchaser under the provisions relating to the registration of belated cautions where there are no unsatisfied debts.

4. Quære, whether, in case where title is properly made under the provisions relating to the registration of belated cautions (assuming that any such cases exist) it is not necessary to obtain releases of dower from the wives of married beneficiaries before the title can be deemed complete.

It is obvious that if the doubts above expressed as to the efficacy of the words of the Act to accompany its purpose are well grounded, the result is that inextricable confusion has been introduced into a very large number of titles in this province, and that such titles and all future titles similarly dealt with under the Act will remain defective until confirmed either by the execution of appropriate conveyances, or by the operation of the Statute of Limitations.

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THE UNWRITTEN LAW.

In accounting for the rapid increase of crime in the United States, dealt with in our number for Nov. 1, because of its bearing upon our own population, American writers dwell much upon the effect of what they call the "unwritten law," a subject which has been frequently referred to in the public press and which is deserving of more than passing notice. It is as an echo from the times when "the earth was filled with violence," and tells us that human nature is the same in this so-called cultured and civilized twentieth century as it always has been. It means that, as regards certain offences, any man, or any body of men, are justified in making a law for themselves, and carrying it

into effect without any respect for the ordinary tribunals, or the rules and principles by which they are governed, and this is done, not under the spur of sudden provocation, but by premeditated action, and defended as necessary for the protection of society.

In obedience to this barbarous code we find that in the United States a certain class of offenders may be dealt with by those whom they have aggrieved, and the death penalty inflicted, without the aid of judge, jury, or executioner, without any enquiry into the merits of the case, and without any fear of ulterior consequences. Thus rape, adultery, seduction, slander and defamation of character, especially of a woman, may be punished by a shot from a revolver, or stab from a dagger, without the formality of a trial, and with perfect impunity to the person who undertakes the duty of thus giving effect to public opinion. The survivor of a fatal duel must be acquitted if the duel was fairly conducted, and a man who kills another in a fair fight must equally be held blameless. No wonder that where such doctrines prevail Judge Lynch is supreme, and cases of homicide are of frequent occurrence. This doctrine of the unwritten law has also received the sanction of regular judicial authority. In a recent case a judge of the State of Virginia, when a jury had, in a trial for murder, given a verdict of not guilty, thus addressed them: "Gentlemen of the jury, I thank you for a verdict which I think will be approved by the public. It is an established precedent in the State of Virginia that no man tried for defending the sanctity of his home should be found guilty."

Commenting on this case, the *Albany Law Journal* says: "By the written law of Virginia and of every other State it is a crime for any man to take the life of another through private revenge, or for any other cause save in the extremity of defending his own life. When a jury renders a verdict of "not guilty" on a confessed violation of that law, they bring the law and the courts into contempt. They have violated their oaths, and the judge who commends them is a self-confessed anarchist."

Under this code the right of every man, whether white or colored to have a fair trial, is denied. There is no security for life or property, both are alike at the mercy of a mob, or of an individual acting under the influence of some outrage committed, and wrecking vengeance without time being taken, or effort made, to find out the truth. Under such a system, what protection is there for the innocent, what assurance that this rash assumption of judicial authority may not be made a weapon for private revenge, rather than the punishment of crime. As is well said by an American writer: "The flagrant violation and open defiance of law involved in the practice sets all law and authority at naught. It degrades the courts, debases the administration of justice, brings judges, juries and lawyers into contempt, and strikes at the very roots of all social order."

By the same writer the whole case is thus summed up: "One of the most deplorable results of such open and violent infractions of the law is their baleful educational influence. Apart from their evil influence upon the formation of the character of the youth of the country, apart from the fact that men who have participated in such an execution have now stained their hands with human blood, and will be all the more ready to share in other executions of the same kind, these men who have done this and escaped punishment, and even heard themselves applauded for it, are apt to think that, if they have in this case administered justice so much better than the courts, they are able to do equally as well in all other cases, and that the courts of justice are mere useless survivals of an effete and decadent civilization which may as well be abolished or, at least, entirely ignored. Thus the road to anarchy is opened wide with the gaunt, grim figure of the red spectre grinning in the distance."

As said in a previous article we do not refer to the conditions above described for the sake of making any comparison as between them and those prevailing on our side of the border. We refer to them by way of warning lest we ourselves should fall into the same class of error. We are liable to the same influences, and to the same temptations, and it is for those wh

may have any power of controlling or directing public opinion to use that power and that influence so that the spirit of law shall not yield to the spirit of lawlessness. Those in authority should make it manifest that by the power of law, as exercised through the regular courts of justice, the right of every man, no matter of what crime accused, to a fair trial is secured—that no crime, no matter how trifling or how serious, shall escape punishment, that by no hasty judgment shall there be any fear of the innocent being confounded with the guilty, and lastly, that the course of justice shall be swift as well as certain, and that no influences, or mere technicalities, shall interfere with or impede the execution of its judgments.

To the legislature we have to look for the enactment of such measures as shall provide for the good government of the country, and the welfare of the people—to the executive for the appointment of good and well qualified men to carry out the laws which may be enacted—to the Bench for the dignity and purity of the courts, and the impartial administration of justice—to the Bar for a high sense of personal honour which will not allow its members to use their great privileges in any way that shall be inconsistent with the responsibilities attaching to those privileges. Their duty is to promote the ends of justice, not to defeat them; to aid in enforcing obedience to the law, and causing it to be looked up to as the best security for life and property; to avoid those theatrical displays so much indulged in elsewhere, and the substitution of a shallow sentimentalism for those deep and enduring principles by which alone the happiness of a people can be secured. Lastly, we must ask the people themselves to have confidence in their own institutions, firm in the belief that even an imperfect administration of law is better than the ill-regulated action of any self-constituted tribunal. Of all laws, mob-law is the worst, and of all Courts, the Court of a mob is most liable to acts of injustice and tyranny.

RUSTICUS.

WHAT BREACHES OF CONTRACT DO NOT GO TO THE ENTIRE CONSIDERATION.

We have recently discussed the breaches of a contract which might be taken as going to the whole consideration and some of the principles which were involved in determining the question. Keeping in mind that no hard and fast rule may be laid down to proceed by, because the nature of contracts differ, so that practical experience has demonstrated that to a greater or less extent each case must stand by itself and be determined by the particular objects to be attained, the nature of the breach and all the surrounding circumstances, we now proceed to the consideration of those breaches which are not sufficient to give rise to the right to regard a contract at an end.

The case of *Mersey Steel & Iron Co.* v. *Naylor*, 9 H.L. App. Cas. 438, is a case where a breach was relied upon for the right to rescind. In that case there was a contract for steel to be paid for in installments. At the time one of the installments fell due the company was forced into liquidation, pending which Naylor was advised not to pay the installment. There was no refusal to pay the amount due or anything said or done by which Naylor evinced an intention not to pay for the remainder of the installments as they fell due. It was held that such a breach did not evince an intention not to be further bound by the terms of the contract and did not go to the whole consideration. In the course of the opinion the Court reviewed the case of *Withers* v. *Reynolds*, 2 B. & Ad. 882, with marked approval. This celebrated case shews very clearly where the line is to be drawn as to what amounts to a total failure of consideration. The contract was for several loads of straw in installments, each to be paid for upon delivery. After some of the loads had been delivered the party to whom delivery was being made refused to pay for the last delivered, saying he would hold one payment in hand to have a check on the one delivering. It was properly held that the refusal to pay for the delivery of the remaining installments upon delivery as agreed, was an abandonment of the contract. It was a total

failure. The difference in the breach between the Naylor case and the Reynolds case was, that in the former there was merely a failure to pay at time of delivery and no refusal to pay for either the installment delivered or any intention evinced not to pay for future deliveries contracted for; while in the latter there was an attempt to substitute something materially different from that agreed upon, that is, a refusal to pay upon delivery as agreed during the remainder of the contract to be performed. In the case of *Franklin* v. *Miller*, 4 A. & E. 599, Coleridge, J., commenting on the *Withers* v. *Reynolds* case, said: "Each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for the loads upon delivery, that was a total failure, and the defendant was no longer bound to deliver. In such a case the party refusing has abandoned the contract."

Right here is a proper place to refer again to an erroneous idea that obtains among many lawyers and judges, that there are breaches of contract which would give rise to the right to rescind, and not at the same time the right to regard the contract as abandoned so as to recover damages. This opinion no doubt has arisen through the fact that in many cases parties have not sought damages for the breach, for there are many where rescission alone has been sought and obtained, in fact, in all probability, no damages could have been proved, and yet, damages might have been recovered because of the breach if they could have been proved. When Mr. Justice Coleridge said of the Withers case that such a breach amounted to an "abandonment of the contract" a "total failure," he meant that damages might have been recovered had they been shewn in the Withers case.

To further illustrate our point we take the case of *Palm* v. *Railway Company*, 18 Ill. 217, where there was a contract to furnish locomotives at stated periods, to be paid for when delivered. There was a mere failure to pay for one of the installments and an attempt was made to recover as for a total breach, the profits which might have been made from full performance.

The Court in refusing to allow such a recovery because of the mere failure to pay upon delivery as agreed, unless by express provision in the terms of the contract itself, said that such a breach might give rise to the right to rescind. But that is clearly a mistake, which the more recent decisions definitely shew, and yet the idea exists that a contract may be rescinded, though for the same breach there could be no recovery of damages other than those arising out of that particular breach. Suit could have been brought to recover for the particular installment not paid for in such a case.

The Courts are now definitely settled upon the rule that rescission can only take place when the acts and conduct of one party evince an intention not to be further bound by the terms of the contract, and that means that there has been a total failure, and is a question of fact for a jury. See Corbin's Ed. Benjamin on Sales, sec. 908. Also 62 Cent. L.J. 161. In this connection we advise the reading of a very able recent article by Mr. Graham B. Smedley, 65 Cent. L.J. 292. If the breach is not such as to evince an intention not to be bound by the terms of the contract it may not be regarded as going to the whole consideration. But whether or not it does is a question generally for a jury or Court sitting as a jury.—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

PROBATE — CODICIL — FORM AND POSITION OF TESTAMENTARY PAPER.

In *Olroyd* v. *Harvey* (1907) P. 326 the validity of a codicil was in question. The peculiarity about it was that it commenced at the end of a prior codicil, and the first paragraph of it was written in a small space on either side of the testator's signature to the first codicil. Deane, J., held that the first paragraph of the writing could not be regarded, as was contended, as an interlineation of the first codicil, but that the two paragraphs of which the codicil was composed were entitled to be admitted to probate.

WILL—CONSTRUCTION—GIFT TO A PERSON FOR LIFE AND THEN "TO HIS SONS AND THEIR SONS IN SUCCESSION"—ESTATE TAIL—RULE IN SHELLEY'S CASE—DECLARATORY JUDGMENT—COSTS OUT OF ESTATE.

In re Buckton, Buckton v. *Buckton* (1907) 2 Ch. 406. This was an action for the construction of a will whereby the testator had devised certain real estate to trustees to the use of his eldest son George for life, and after his decease for the latter's eldest son for life "and then to his sons and their sons in succession" and in default thereof then to the other sons of George, and their sons in succession, according to the priority of their birth, and in default of male issue of George then to the testator's second son William for life, with remainder to his first and other sons and their issue in succession. The testator's son George had died and his eldest son had executed a disentailing deed so as to bar the entail and vest the land in fee simple in himself, and for the purpose of facilitating his future dealings with the land he brought the present action for the construction of the will making the trustees and the testator's son William a party. Kekewich, J., considered that the devise was governed by the rule in Shelley's case, and the decision of the House of Lords in *Van Grutten* v. *Foxwell* (1897) A.C. 658, and that the effect of it was to create an estate tail in the plaintiff, which had been effectually barred. Upon the

question of costs he gave a considered judgment in which he discusses the principles on which costs should be awarded in cases for construction of wills, and gave all parties their costs as between solicitor and client out of the estate of the testator.

TRUSTEES—SETTLEMENT—POWER TO RETAIN INVESTMENTS—SHARES IN COMPANY—PROFITS DERIVED FROM OPTIONS TO TAKE NEW SHARES—SUBSTITUTION OF SHARES IN DIFFERENT COMPANY — UNAUTHORIZED INVESTMENT—ACCRETION—CAPITAL OR INCOME.

In re Anson, Lovelace v. *Anson* (1907) 2 Ch. 424. By a marriage settlement made in 1902 certain investments were vested in trustees upon trust either to allow the same "to remain in the present state of investment thereof" or with specified consents to sell, and invest proceeds in certain other investments, and pay the annual income of the trust property to the husband for life; after his death to his wife for life, and after the death of both, upon the usual trusts for the children of the marriage, and in the event of there being no children, for the husband absolutely. By clause 11 of the settlement, the trustees were authorized to exercise any preferential right that might be offered to them to subscribe for new or other shares in any company in which they held shares or stock, and dispose of the same, and the profits derivable therefrom were to be treated as income. One of the investments transferred to the trustees of the settlement consisted of 109 shares in the Northern Securities Company which was formed to acquire and hold shares in other corporations and held a large number of shares in the Great Northern Railway and the Northern Pacific Railway. In 1904, 99 per cent. of the Northern Securities Co.'s capital was cancelled, and the trustees received in lieu of their 109 shares, 32 fully paid shares in the Great Northern Railway and 42 shares in the Union Pacific and 1 share in the Northern Securities Company. In 1905 and 1906 the trustees received three options to take up new stock in respect of the shares held by them in the Great Northern Railway and Union Pacific Railway, and in the exercise of these options paid certain instalments, and in one instance sold the option. The husband having died the wife claimed the profits of these options as part of the income under clause 11 above referred to; but Kekewich, J., held that that clause did not apply because the shares of the two railways were new shares and not within the terms of

the clause authorizing the trustees to retain investments. He held, therefore, that they were in fact unauthorized investments and that the profits of the options were consequently not within clause 11, but must be deemed to be accretions of capital.

TRADE MARK—"MOTRICINE"—SIMILAR WORD ON REGISTER—"CALCULATED TO DECEIVE"—ONUS OF PROOF—"MOTORINE" TRADES MARK ACT 1905 (5 EDW. VII. c. 15) s. 9, s.-s. 4, ss. 11, 19, 21—(R.S.C. c. 71, s. 17).

In re Compagnie Industrielle Des Petrole (1907) 2 Ch. 435. This was an application to register the word "Motricine" as a trade mark for a spirit for motive power purposes derived from petroleum. The application was opposed by a company which had previously registered the word "Motorine" as the trade mark for a lubricating oil used for motors and other machines. The company disclaimed any exclusive user of the word motor. The applicants claimed that the word "motorine" should be removed from the register. Warrington, J., held that the word "motorine" resembled "motricine," and the onus lay on the applicants to shew that it was not "calculated to mislead or deceive the public," which onus he held they had not satisfied. The application to register "motricine" as a trade mark was therefore refused. He also held that the word "motorine" had "no direct reference to the character or quality of the goods," and was, therefore, a good trade mark under s. 9, sub-s. 4, of the Act, and the application to expunge it was refused.

COMPANY—DIRECTOR—LIMITED COMPANY APPOINTED DIRECTOR—COMPANIES ACT 1862.

In re Bulawayo Market Co. (1907) 2 Ch. 458. Warrington, J., held that there is nothing in the Companies Act 1862, to prevent a limited company from being appointed director and manager of another limited company, and that there is nothing in the Act which requires a company registered thereunder to have any directors. A petition presented for the compulsory winding-up of a company on the ground that it had appointed another company its director and manager, was refused.

INSURANCE—"WHILST AT PORT OR PLACE."

Maritime Insurance Co. v. *Alianza Insce. Co.* (1907) 2 K.B. 660 was an action on a policy of marine insurance whereby a ship

was insured against losses "whilst at port or ports, place or places in New Caledonia." Whilst within the geographical limits of New Caledonia, and on her way to a port in that island, the vessel struck on a reef and incurred losses; but Walton, J., held that such losses were not within the policy, and that the words "place or places" meant place or places at which the vessel might arrive with some object and not a place or places passed merely while on her way to some other point.

AUCTIONEER—PARTNERSHIP—BILL OF EXCHANGE—IMPLIED AUTHORITY TO PARTNER TO ACCEPT—TRADER.

In *Wheatley* v. *Smithers* (1907) 2 K.B. 684 the Court of Appeal (Williams, Moulton and Buckley, L.JJ), have reversed the judgment of the Divisional Court (1906) 2 K.B. 321 (noted ante, vol. 42, p. 635), on the facts. The question was whether a partnership of auctioneers were bound by a bill of exchange signed by one of the partners for the firm. The Court of Appeal found that the bill was for a purchase made for the benefit of the partnership and was authorized by the articles. It was therefore unnecessary to discuss the question, raised in the Court below, as to whether auctioneers can be considered to be traders.

PAWNBROKER—NEGLECT TO DELIVER TO PLEDGOR—REASONABLE EXCUSE—LOSS OF PLEDGE——PAWNBROKERS' ACT, 1872 (35-36 VICT. C. 93) S. 31—(R.S.O. C. 188, S. 21).

Allworthy v. *Clayton* (1907) 2 K.B. 685 was a case stated by a magistrate. The proceeding was under the Pawnbrokers' Act, s. 31 (R.S.O. c. 188, s. 21), against pawnbrokers for refusing to deliver up an article pledged, on tender of the amount loaned and profit. The magistrate found as a fact, that the defendants had lost the article and were unable to account for it, and that it was not in their possession; and the question was whether this was "a reasonable excuse" within the Act. The Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.), held that it was and quashed the conviction.

SHIP—CHARTER PARTY—LAY DAYS—EXCEPTION OF SUNDAYS AND HOLIDAYS—LOADING DONE ON HOLIDAYS—IMPLIED AGREEMENT—DESPATCH MONEY—DAYS SAVED.

Nelson v. *Nelson* (1907) 2 K.B. 705 was an action to recover despatch money for days saved in loading a ship. By the

charter party "seven weather working days (Sundays and holidays excepted)" were "to be allowed by owners to charterers for loading" and for each day saved in loading the charterers were to be paid or allowed by the owners £20. The loading was proceeded with on two holidays excepted by the charter-party, but there was no evidence of any express agreement under which the work was carried on. The question was whether the two holidays were to be accounted as "days saved." An arbitrator agreed with the shipowners that such days were not to be accounted as "saved days," but he stated his award in the form of a special case. Bray, J., affirmed the decision of the arbitrator and the majority of the Court of Appeal (Williams and Buckley, L.JJ.) affirmed the decision of Bray, J., holding that an agreement must be implied that the work done on the holidays should be reckoned as "working days" under the charter party, and that consequently the charterers were not entitled to despatch money in respect of those days. Moulton, L.J., however, dissented on both points.

PRACTICE—JOINDER OF CAUSES OF ACTION—WAIVER.

Lloyd v. *Great Western Dairies* (1907) 2 K.B. 727 was an action originally commenced by the husband of a married woman, who was not a party, for recovery of possession of a house and for damages for wrongfully entering and depriving the plaintiff of the profits of a dairy business carried on there, and for mesne profits, and for an account of the profits of the business, and for an injunction to restrain the defendant carrying on the dairying business at the premises in question. No leave had been obtained prior to the issue of the writ to join the other causes of action with the claim for possession as is required by the English rules. The defendant entered an unconditional appearance. On notice to defendants a receiver was appointed of the profits of the business carried on by the defendants. This order was subsequently discharged on appeal, on the ground that the business was the property of the plaintiff's wife. Subsequently leave was given to add Mrs. Lloyd as co-plaintiff. Statement of claim was thereafter delivered and defendants obtained time to plead; they then applied to set aside the writ and statement of claim for irregularity, because of the joinder of other causes of action with the claim for possession without leave. Walton, J., granted the order; but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) re-

versed it, holding that having regard to the order which was made adding the wife, leave had been impliedly granted to join the causes of action, and that such leave might be granted after writ issued, and that in any event their joinder without leave was merely an irregularity which it was competent for the defendants to waive, and that they had waived it.

PROMISSORY NOTE—SIGNATURE IN BLANK—DELIVERY TO AGENT FOR CUSTODY—FRAUDULENT NEGOTIATION OF NOTE BY AGENT—BONA FIDE INDORSEE FOR VALUE—ESTOPPEL.

Smith v. *Prosser* (1907) 2 K.B. 735 was an action on two promissory notes. The defendant denied liability. From the evidence it appeared that the defendant had signed the notes in blank and left them with an agent in anticipation that funds might be required to be raised in an emergency for the purpose of the defendant's business in South Africa, the defendant being about to visit England. The agent's instructions were that the documents were to be filled up for such amounts and negotiated in such manner as the defendant should direct by letter or telegram. In fraud of the defendant, and without any instructions from the defendant, the agent filled up and negotiated the notes and used the proceeds for his own purposes. The plaintiff was indorsee for value without notice of the fraud. Grantham, J., who tried the action, gave judgment in favour of the defendant, and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) upheld his decision, holding that the defendant was not estopped from denying the validity of the notes as between himself and the plaintiff.

INSURANCE—ACCIDENT POLICY—CONDITION—IMMEDIATE NOTICE OF ACCIDENT—OMISSION TO GIVE NOTICE—INSURERS' LIABILITY.

In re Coleman's Depositories and The Life & Health Assurance Association (1907) 2 K.B. 798 was an appeal from Bray, J., reversing an award of an arbitrator on a stated case. By a policy of insurance issued to an employer to insure him against liability for accidents to his employees, it was provided that in case any accident occurred immediate notice of it should be given to the insurers, and the policy also provided that the observance and performance by the employer of the times and

terms set out in the policy so far as they contained anything to be done by him, were the essence of the contract. The circumstances in which the policy came to be issued were as follows. On December 28, 1904, the employer signed a proposal form for insurance, and received a covering note which contained no conditions. On January 3, 1905, the insurers sealed, and on January 9, delivered the policy in question to the employer, covering a period from 1st January, 1905 to 1st January, 1906, and contained the conditions above referred to. On January 2, 1905, a workman of the assured was injured, of which no notice was sent, at that time, to the insurers. Dangerous symptoms supervened, and on 15th March, 1905, the workman died. Notice of the accident was given to the assured on the 14th March, 1905, the assured paid compensation to the widow of the deceased, which he claimed to recover under the policy. The insurers repudiated all liability. The arbitrator was of the opinion that the condition as to giving notice was a condition precedent to the insured's right to recover, but Bray, J., reversed his award, and the Court of Appeal (Williams, Buckley and Moulton, L.JJ.) affirmed his ruling, but Moulton, J., dissented from the rest of the Court. The majority of the Court thought that, in the absence of evidence, that the employer knew of or had an opportunity of knowing of the existence of the condition as to notice at the date of the accident, the condition was one with which it was impossible for him to comply, and that as regards an accident happening before the assured had knowledge of the condition, the proper inference was that the insurers never validly imposed the condition on the insured, and, therefore, he was entitled to recover on the policy. Moulton, L.J., took the view that when the policy came to the hands of the assured he then knew of the condition, and if he had then, within a reasonable time complied with it, it would have been sufficient, but that a delay from the 9th of January to the 14th of March was inexcusable. He was also of the opinion that as the assured had accepted the policy in its present shape it was not open to him to rely on the prior interim receipt as being in any way a waiver of conditions actually contained in the policy.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] LOGAN v. LEE. [Oct. 17.

Evidence—Provincial laws in Canada—Judicial notice—Conflict of laws—R.S.C. 1906 *c.* 145, *s.* 17—*Negligence—Common employment—Construction of statute—*3 *Edw. VII. c.* 11, *s.* 2, *s-s.* 3 (*N.B.*)—"*Longshoreman*"—"*Workman.*"

As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the Courts below, or although the opinions of the judges of the Supreme Court of Canada may differ from the evidence adduced upon those points in the Courts below. *Cooper* v. *Cooper*, 13 App. Cas. 88, followed. The plaintiff, a longshoreman, was engaged by the defendant, in Montreal to act as foreman on his contracts as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway where he was injured by a heavy weight falling upon him on account of the negligence of the winchman in passing it across the upper deck. The winchman had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court at Montreal, *Held*, that the plaintiff was entitled to recover either under the law of the Province of Quebec or under the provisions of the New Brunswick Act, 3 Edw. VII. c. 11, as he came within the class of persons therein mentioned to whom the law of the latter province relating to the doctrine of common employment does not apply.

Atwater, K.C., and *Duff*, for appellant. *Lafleur*, K.C., and *H. U. P. Aylmer*, for respondent.

Que.] WINDSOR HOTEL CO. *v.* ODELL. [Nov. 5.

Finding of jury—Questions of fact—Duty of appellate Court.

In a case where there is conflicting evidence and the jury, on evidence properly submitted to them, have accepted the evidence on one side and rejected that adduced upon the other, the Supreme Court refused to disturb their findings.

Appeal dismissed with costs.

Heneker, K.C., and *Marechal*, K.C., for appellants. *R. C. Smith*, K.C., and *G. H. Montgomery*, for respondent.

B.C.] NEWSWANDER *v.* GIEGERICH. [Nov. 5.

Champerty—Maintenance—Malicious motive—Cause of action—Costs of unsuccessful defence—Damages.

A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the suit by a third party who has not thereby been guilty of maliciously prosecuting unnecessary litigation. *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1, distinguished. *Giegerich* v. *Fleutat*, 35 S.C.R. 327, referred to. Judgment appealed from, 12 B.C. Rep. 272, affirmed.

Davis, K.C., for appellant. *Lewis* (*Smellie* with him), for respondent.

Man.] MANITOBA FREE PRESS CO. *v.* NAGY. [Nov. 5.

Defamation — Printing report of ghost haunting premises — Slander of title—Fair comment—Disparaging property—Special damages — Evidence — Presumption of malice — Right of action.

The reckless publication of a report as to premises being haunted by a ghost raises a presumption of malice sufficient to support an action for damages for depreciation in the value of the property, loss and rent and expenses incurred in consequence of such publication. *Barrett* v. *Associated Newspapers*, 23 Times L.R. 666, distinguished. Appeal dismissed with costs.

Ewart, K.C., and *Hudson*, for appellants. *J. E. O'Connor*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] RIDEAU C[illegible]B *v.* CITY OF OTTAWA. [Sept. 17.

Assessment—Social club—Liability for "business assessment."

The object of s. 10 of the Assessment Act, 4 Edw. VII. c. 23(6) is to reach the income derived by the land holder from the various occupations mentioned in the section carried on by him upon the land and perhaps indirectly the stock in trade and personal property belonging to the business, and "business" is something which occupies time and attention and labour, and is followed for profit, and a social club, having no capital stock and no dividends, profits or earnings to be divided among its members, although it furnishes meals and liquors to them and their guests, is not a club within the meaning of the section, and is not liable to a "business assessment."

Judgment of MABEE, J., reversed.

Travers Lewis, for the appeal. *McVeity*, contra.

Full Court.] [Sept. 23.

HAMILTON STEAMBOAT CO. *v.* MCKAY.

Appeal to Supreme Court—Extending time for appealing—Necessity for leave—Powers of Court of Appeal.

Time for allowing appeal extended and appeal allowed under section 71 of the Supreme Court Act, R.S.C. 1906, c. 139, *i.e.*, the security proposed to be given, approved of and allowed, although this might have been done by a single judge of this Court, seeing that the delay in procuring it to be done during the proper time, 60 days from the pronouncing of the judgment complained of (section 69), would seem to have arisen from the impression—probably a mistaken one—that leave to appeal was necessary, and no Court was sitting during that time to which the application for leave could have been made. Also leave to appeal granted, if necessary, quantum valeat under section 48 (*e*) of the Supreme Court Act.

Shepley, K.C., for plaintiffs. *F. Dickson*, for defendants.

Full Court.] RE NORFOLK VOTERS' LISTS. [Nov. 3.

Ontario Voters' Lists Act—Case stated by County Court Judge —"General question"—Specific cases.

Section 39 of the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, only authorizes a County Court Judge to state a case for the consideration of the Court of Appeal upon some "general question" which has arisen or is likely to arise in the revision of the lists by the judge.

It is not competent for a County Court Judge to ask the Court to determine simple questions of fact arising in any particular case, nor within the competence of the Court to relieve him of his duty to find, in such particular cases as were here stated, whether, at the times necessary to confer a right to vote, a particular person was in good faith a resident of and domiciled in some particular municipality, and had continuously resided in the electorial district, as the Ontario Election Act requires.

Re Voters' List, Township of Seymour (1899), 2 Ont. Elec. Cas. 69, distinguished.

Cartwright, K.C., for the Attorney-General.

HIGH COURT OF JUSTICE.

Court of Appeal.] REX v. HARRISON. [Oct. 11.

Criminal law—County Court Judge's Criminal Court—Court of record—Right to issue writ of habeas corpus to—Certiorari in aid of refusal to discharge prisoner—Non-filing of papers in High Court and their non-return to County Judge's Court—Validity of conviction.

A prisoner charged with perjury, elected to be tried without a jury, and was tried at the County Judge's Criminal Court and convicted. An application to the judge to reserve a case was refused, but the judge postponed judgment to enable the prisoner to appeal to the Court of Appeal, which was accordingly made and refused. Subsequently a writ of habeas corpus for the discharge of the prisoner was obtained in the High Court, and a writ of certiorari issued in aid thereof, to which

a return was made, and an application then made for the prisoner's discharge, which was refused, on the ground that the writ of habeas corpus and the certiorari in aid thereof had been improvidently issued in that a writ of habeas corpus did not lie to the County Judge's Court, it being a Court of record, and the prisoner was remanded for sentence, which was subsequently moved for and pronounced, without any objection on behalf of the prisoner. Some time afterwards it was objected that there was no jurisdiction to pronounce sentence, in that the papers brought into the High Court under the writ of certiorari had not been returned to the said County Judge's Court. It appeared that the return to the writ and the said papers had never been filed in the High Court, but were apparently in the hands of one of the officers.

A motion for leave to appeal from the conviction, and for an order requiring the county judge to state a case was, under the circumstances, refused.

J. B. MacKenzie, for the motion. *Cartwright*, K.C., for the Crown.

Divisional Court.] ALLAN *v.* PLACE. [Oct. 12.

Appeal—County Court—Divisional Court—Time.

If the judicial opinion or decision in a case, oral or written, is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it within the meaning of section 57 of the County Courts Act, R.S.O. 1897, c. 55, requiring appeals from the County Court to be set down for the first sitting of a Divisional Court commencing on or after the expiration of one month from the judgment order or decision complained of.

Kilmer, for plaintiff. *R. McKay*, for defendant.

Divisional Court.] VIVIAN *v.* CLERGUE. [Nov. 7.

Sale of land—Payment by instalments—Deed to be delivered when three-fifths paid—Right to use for instalments without tendering conveyance.

A vendor of land under an agreement of sale providing for payments of the purchase money in annual instalments with

interest, and that the purchaser so soon as he has paid three-fifths of the total purchase money with interest, shall be entitled to call for a transfer of the said lands upon executing a mortgage back to secure payment of the balance, is entitled to sue the purchaser for the payments falling due prior to three-fifths being paid, without alleging and proving that he has tendered a conveyance of the lands to the purchaser.

In the absence of special agreement the actual conveyance of the land, delivered or ready for delivery, is a condition precedent to the recovery of purchase money, but here by express agreement the conveyance was not to be made until three-fifths of the purchase money together with all interest had been made.

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

Anglin, J.] REX v. FARRELL. [Nov. 13.

Liquor License Act—Conviction for second offence—Imprisonment—Habeas corpus and certiorari in aid—Right of Court to go behind regular conviction—Police magistrate—Territorial jurisdiction — Warrant of commitment — Clerical error—Depositions before magistrate—Absence of proof of previous conviction—Affidavit of magistrate—Defendant not allowed reasonable opportunity to make defence.

Held, 1. On a motion upon habeas corpus for the discharge of a person imprisoned under a conviction regular on its face, the Court will not re-hear the case or weigh the evidence or sit in appeal, but will examine the depositions returned upon certiorari granted in aid of the habeas corpus, to see if there is any evidence to sustain the conviction, and, if none is found, will discharge the prisoner; this is required by the language of R.S.O. 1897, c. 83, s. 5.

2. The police magistrate for the town of Brampton has jurisdiction, at the request of the police magistrate for the township of Toronto, to try a person accused of an offence committed in the township.

3. A prisoner will not be discharged because the warrant of commitment returned, by a clerical error, bears a date before that of the conviction upon which it is found.

4. The conviction of the prisoner returned purported to be

for second offence of selling intoxicating liquor without a license, contrary to the Ontario Liquor License Act, and the sentence was four months' imprisonment as for a second offence. By section 99 of the Act the magistrate is required to reduce to writing the evidence of the witnesses, which is to be read over to and signed by them. The depositions returned failed to shew any proof of a previous conviction.

5. The magistrate's affidavit that proof of the previous conviction was, in fact, properly given, could not be accepted on the motion for discharge of the prisoner, and no evidence being returned to warrant the conviction for a second offence, which was essential to support the adjudication of imprisonment for four months, the prisoner was entitled to his discharge.

6. The prisoner was also entitled to his discharge on the ground that he was not allowed fair or reasonable opportunity to make his defence; he was served with a summons to appear the next day after service to answer the charge; he did so; the information was then amended so as to charge an offence upon a day other than either of those mentioned in the summons, and he was refused an adjournment; all of which, as well as other things in the proceedings before the magistrate, was contrary to natural justice.

T. J. Blain, for defendant. *Cartwright*, K.C., for Attorney-General.

Anglin, J.] [Nov. 13.

CANADA SAND, LIME AND BRICK CO. v. OTTAWAY.

Mechanics' Liens—Statement of claim—Computation of time for filing—Commencement of action—Long vacation.

The 90 days allowed by s. 24 of the Mechanics' Lien Act, R.S.O. 1897. c. 153, for commencing an action to realize a claim, are not to be computed exclusively of long vacation. Although such an action is begun by a proceeding called a "statement of claim," the Rules of Court with respect to the filing of the statement of claim in an action begun by writ of summons, are not applicable to it.

Where the last of the materials in respect of which the plaintiff claimed a lien were furnished on May 30, 1907, and the lien was registered within a month, but the action for the enforce-

ment was not begun by the filing of a statement of claim until September 23, 1907, it was held that the lien had ceased to exist.

Proudfoot, K.C., and *R. G. Agnew*, for plaintiffs. *W. A. McMaster*, for defendants.

Anglin, J.] RE SILVERTHORN. [Nov. 14.

Will—Construction—Devise to wife—Life estate—Power of Sale—Use of proceeds—Income.

The testator gave and devised to his wife "all my personal estate of every description for her own use and that my landed property and the balance that may be coming due on the . . . mortgage shall be disposed of after the death of my wife and shall be made into fifteen parts of which fifteen parts each of my sons shall receive two fifteenth parts and each of my daughters one fifteenth part, and that so long as my wife . . . lives she shall have the use of the landed property and either use it, rent it or sell it and use the money as she thinks best."

Held, that the interest of the wife in the landed property was a life interest only, with a power to sell the land, if she so desired, and, in that event, a right to invest the proceeds as she should deem best, and enjoy the income derivable therefrom during her life.

Middleton, for the executors. *W. H. Blake*, K.C., for the widow.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] MYERS *v.* WEBBER. [Nov. 7.

Married Woman's Property Act, R.S. (1900), *c.* 112, *s.* 18—*Wife carrying on business—Failure to file consent—Liability of goods to execution—Word "machinery."*

The goods of an insolvent were sold by the official assignee to W. who transferred them to the wife of the former owner

under the following agreement: "I hereby agree to allow Mrs. Elizabeth Webber to sell my goods amounting to $1,300 and the use of the machinery for 12 per cent. payable yearly, and if not satisfactory to me at any time I can demand my goods and machinery, and what is sold of goods must be made good by money."

Held, 1. As to all goods the character of which was changed either by labour or the addition of other materials they became the property of the wife and liable to be taken under execution against the husband because of failure to file the proper certificate (consent to wife doing business in her own name) with the registrar of deeds, but as to goods unsold or the character of which was not changed, and machinery they remained the property of W. and could not be taken.

2. Under the term "machinery" there must be held to be included everything that by the intention of the parties was not to be sold to purchasers.

Kenny, for claimants. *Whitman*, for respondents.

Longley, J.] BELL v. INVERNESS COAL & RY. CO. [Nov. 12.

Negligence—Operation of mine—Conveying workmen—Contributory negligence—Employers' Liability Act, R.S. 1900, *c.* 179, *s.* 3, *sub-s.* (*e*).

Defendant's coal mine was operated by means of a slope extending down some three thousand feet at an angle of about twenty degrees with levels and landings at each five hundred feet. Coal was brought to the surface by means of box cars running on rails up and down the slope, and the workmen were conveyed up and down by means of a "rake-of-cars" consisting, usually, of five cars. The cars were in charge of men known as "chain runners," whose duty it was to give signals for the starting and stopping of the cars to the engineer in charge of the motive power at the surface. Under the rules of the mine, when cars were standing still, one tap on the signal wire communicating with the surface, indicated to the engineer that the cars were ready to start, and when the cars were in motion, a similar signal notified the engineer to stop. Where workmen were to be brought to the surface, four taps indicated that the men were all in. Plaintiffs, who had concluded their

work on one of the night shifts, went to the landing of the level upon which they were working and asked to be allowed to board a "rake-of-cars" which passed down and were told by the man in charge that they were going further down to get two cars and would be back. On their return, plaintiffs boarded the car and the chief chain runner, instead of giving the usual signal required to be given when men were on board the cars, gave a single tap, and the engineer at the surface started the cars at a speed equivalent to that used when hauling coal. Plaintiffs had the opportunity of getting off at two levels at which the cars stopped to take on other men, but omitted to do so. In each case the cars were started with the same signal and, after leaving one of the levels, known at No. 4, ran off the track with the result that one man was killed and another so seriously injured as to incapacitate him for work for some months. The evidence shewed that the cars by which the men were proceeding to the surface were not the regular train or rake sent down for the purpose of bringing men to the surface.

Held, 1. The men having been permitted to get on the cars and not warned to get off, were not precluded from recovering, and that the man in charge of the signals was bound to use proper care in the protection of life.

2. The position of the chain runner in charge of the cars was equivalent to that of a person in charge of points, signals, etc., upon a railway within the meaning of the Employers Liability Act, R.S. c. 179, s. 3, sub-s. (*e*) and that the company was liable for his negligence.

3. The failure of the workmen to get off immediately when they noticed the error in the signal given, or, later, when the cars stopped at other landings and the same signal was given, was not such contributory negligence as to prevent them from recovering.

D. McNeil, for plaintiff. *D. McLennan*, for defendant.

Full Court.] CHISHOLM *v.* CHISHOLM. [Nov. 12.

Parent and child — Guardianship — Contract to pay money— Condition—Public policy.

Defendant offered to allow plaintiff a fixed sum of money per annum, payable quarterly, provided she would place her

daughter (defendant's grandchild) in one of two institutions named, and allow her to remain there until she had finished her education. Defendant stipulated that he should be appointed the child's guardian as a guarantee that her education should be continued in the institution in which she was placed until she had finished it, but added: "I have no desire to part you from your child; you can live in either place with her, or in any other place you may wish." In an action by plaintiff to recover an instalment due,

Held, that the contract was not illegal as against public policy, and that plaintiff was entitled to recover. *Humphreys* v. *Pollock* (1901), 2 K.B. 385, distinguished.

Harris, K.C., and *Stairs*, for plaintiff, appellant. *McInnes*, K.C., for respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] CARR *v.* CANADIAN NORTHERN RY. CO. [Oct. 18.

Contract—Sale of land—Statute of Frauds—Part performance by taking possession—Mandamus.

After fruitless negotiations between the plaintiff and the defendant's right of way agent for the purchase of the land necessary for the construction of the railway through the plaintiff's farm, the plaintiff refused to allow possession to be taken until the terms of sale should be settled. He then handed to the agent a written statement of the terms upon which he would sell and permit possession to be taken, at the same time notifying the agent that if the company took possession of the land he would understand from that act that the company accepted and agreed to his terms. A few days afterwards, and without any further communication with the plaintiff, the company took possession and proceeded with and thereafter completed the construction of its railway across the plaintiff's farm.

Held, 1. The defendants had accepted the plaintiff's offer by their acts, and that a binding contract had been thus entered into. *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256, followed.

2. The taking possession of the land under the circumstances was a sufficient part performance of the contract by the defendants to take the case out of the Statute of Frauds.

3. If there had been no contract between the parties, the plaintiff would have been entitled to the alternative relief claimed by way of mandamus to compel the defendants to proceed to have the compensation for the land taken determined under the provisions of the Railway Act.

4. Relief by mandamus may be obtained by commencing an action for it under Rule 879 of the King's Bench Act. *Morgan* v. *Metropolitan Railway Co.*, L.R. 4 C.P. 97, followed.

Rothwell and *Blackwood*, for plaintiff. *Clark*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] TAYLOR *v.* CITY OF REVELSTOKE. [Nov. 14.

Health Act, R.S. 1897, *ch.* 91—*Isolation of infected premises by Medical Health Officer—Liability of Municipal Council for expenses of maintaining quarantined premises and inmates.*

Where a Medical Health Officer (appointed by a Municipal Council) acting in pursuance of a provincial statute, places a quarantine upon a building and its inmates, within the limits of a city municipality, the latter cannot be held liable for the cost of provisioning and heating the building during the period of isolation.

Martin, K.C., for appellants. *W. A. Macdonald*, K.C., for respondents.

Full Court.] BANK OF MONTREAL *v.* THOMSON. [Nov. 19

Practice—Special indorsement on writ.

Plaintiff made application under Order XIV. for judgment for $2,056.48 upon a specially endorsed writ claiming on an endorsement of a promissory note and a guaranty. The affidavit in support of the application referred only to the note. Particulars being ordered, were delivered, but not verified, and they included the guaranty. They also shewed that certain moneys had been paid, which had been appropriated on account of the guaranty, and judgment was given for $1,382.04, and leave given to amend the indorsement on the writ by adding thereto the particulars delivered.

Held, on appeal, that the indorsement was bad, following the dictum of Cockburn, C.J., in *Walker* v. *Hicks* (1877), 3 Q.B.D. 8, that where a person is placed in a position of having judgment signed against him summarily, sufficient particulars must be given him to enable him to see whether he should pay or resist.

EXCHEQUER COURT—ADMIRALTY.

Martin, Lo. J.A.] CABLE *v.* SHIP SOCOTRA. [Nov. 8.

Wages of seamen left in port en route—Lawful discharge, what constitutes—Left behind—Merchant Shipping Act, s, 166 (1); *ss.* 30, 31, 32, 36, 37, 38, 39.

Plaintiff, shipped for a voyage from Shields, England, to Victoria, B.C., and return, was left at Los Angeles for medical treatment and remained there in hospital fifty days. The master left with the Vice-Council at Los Angeles on the 18th of July, a certificate of discharge under section 31, but this was not filled out until the 22nd of August, when plaintiff called at the consulate. The master also made an error in computing the amount of wages due. In an action for recovery of wages,

Held, that, in the circumstances, the leaving of the certificate with the "proper authority" was a sufficient "giving" thereof to satisfy section 31, but that, as there had been an error, though unintentional, in computing the wages, thus ne-

necessitating plaintiff bringing action therefor, he would be awarded his costs.

Lowe (*Moresley & O'Reilly*), for plaintiff. *Peters*, K.C., for defendant ship.

Irving, J.] IN RE SIMPSON. [Nov. 11.

Lunatic—Application by relatives for management of property of lunatic without security.

On an application under section 27 of the Lunacy Act for an order committing the management of the property of a lunatic, not so found, to the son and daughter, without security.

Held that the usual undertaking and security should be given.

Luxton, K.C., for the application. No one contra.

Book Reviews.

The law of Married Women's Contracts. By M. R. EMANUEL, Barrister-at-law. London: Butterworth & Co. 11 and 12 Bell Yard, W.C., Law Publishers. 1907.

This is a collection of authorities on the above subject, handy of reference and convenient. These good ladies have, entirely innocently, been an affliction as well as a source of much profit to the profession; or perhaps, it may be said, that the absurd conservatism of the judges who have persistently declined to pay any attention to the wishes of legislators, is really at fault. We trust the necessity for more law books on this subject will soon cease.

The law relating to Riots and Unlawful Assemblies. By the late EDWARD WISE. Fourth edition, by A. H. BODKIN and L. W. KERSHAW. London: Butterworth & Co. 11 and 12 Bell Yard, W.C., Law Publishers. 1907.

This is a very useful little book of 250 pages which ought to be in the hands of magistrates and others concerned in dealing with these matters. It includes the Treason Felony Act of 1848, and other enactments of a cognate character.

United States Decisions.

STREET RAILWAYS.—A street car company which carries a passenger beyond his announced destination, in a strange place, on a dark night, and refuses to carry him back, but compels him to leave the car, is held, in *Kentucky & I. Bridge & R. Co.* v. *Buckler* (Ky.), 8 L.R.A. (N.S.) 555, to take the risk of his injury in attempting to follow the directions of the conductor to walk back along the track, which course will take him past obstructions from which injury may result to him.

A passenger who went upon the platform of a car when his station was called, so as to be ready to alight, was held, in *Turley* v. *Atlanta, K. & N. R. Co.* (Ga.), 8 L.R.A. (N.S.) 695, not to be chargeable with negligence, as matter of law, where, when the train slowed down but failed to stop, he attempted to alight to avoid being carried beyond his destination, and was thrown to the ground by a sudden jerk of the train and injured.

APPURTENANCES.—The sale of a steamer and appurtenances was held, in *Gazzam* v. *Moe* (Wash.), 8 L.R.A. (N.S.) 793, not to carry a rudder which had been made for the boat while the old one was yet serviceable, but which had not been placed on board and might be used elsewhere, or an old crank shaft which had been displaced by a new one, but at the time of the sale was still on board. The question of what articles will pass as appurtenances upon sale of chattels is the subject of a note to this case.

PROXIMATE CAUSE.—The proximate cause of the injury to a passenger who is shoved from a crowded car by a seated passenger against whom he is pushed by the conductor's attempting to pass through the car, thereby causing the assailant to become angered, is held, in *Snyder* v. *Colorado Springs & C. C. D. R. Co.* (Colo.), 8 L.R.A. (N.S.) 781, to be the act of such passenger, for which the carrier is not responsible.

NEGLIGENCE.—A person who employs a livery team with a driver to carry him to a specified place is held, in *Cotton* v. *Willmar & S. F. R. Co.* (*Minn.*), 8 L.R.A. (N.S.) 643, not to be chargeable with the negligence of the driver in driving upon a railway track without taking proper precautions to ascertain the approach of a train. With these cases is a note reviewing the other authorities on imputed negligence of driver to passenger.

ANALYTICAL INDEX

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