NOTES.

PRESUMPTION OF DEATH.—Just what the Supreme Court of British Columbia meant to do in the recent case of *In re Ball*[1] is not wholly clear. (See also *In re Carlson*[2] to the same effect.) The Court made an order that a husband who was proven to have been absent and unheard of for seven years "be and he is hereby presumed to be dead," and that his wife (who was the petitioner) "is at liberty upon said presumption to marry again if she so desires." Does this really mean what grammatically it says, that the husband "be...... dead"? If the phrase that the wife "is at liberty *upon said presumption* to marry again" is read as modifying the first clause, no doubt the reasonable interpretation of the order is that the Court meant merely to say that on the evidence before it a *prima facie* case as to the husband's death had been made out, and that it neither presumed to encroach on the domain of Providence and order that the absent spouse *ipso verbo* "be dead" nor even purposed the more modest object of issuing a decree of civil death based on seven years' absence unheard of.

Nevertheless the form of the order made that the petitioner "is at liberty upon said presumption to marry again if she so desires" is grossly inaccurate and misleading, inasmuch as it suggests that as a result of the order such new marriage will be valid and the children of such a union legitimate. The exact effect of such an order is worth noting, even though, as is likely, its wording may have been inaccurately reported.

It is not the purpose of this note to give the history of the common law presumption of death arising from seven years' absence unheard of by those likely to hear from the absent person. Professor Thayer has shown how it developed from the judicial adaptation as a general rule of law of the provisions of the *Bigamy Act,* 1 Jac. I., c. 11, and the Act respecting estates dependent on lives, 19 Car. II., c. 6.—(*Preliminary Treatise on Evidence,* 319-324. *The Bigamy Act* made bigamy a felony, but it exempted from the scope of its provisions, and so from the guilt and punishment of a felon, two classes of persons: (1) those who had married a second time when the first spouse had been beyond the seas for seven years—it said nothing about knowledge of the absent spouse's existence, and consequently it was

[1] (1924) 1 W. W. R. 33.
[2] (1923) 2 W. W. R. 798.

construed as making such knowledge immaterial, 1 Hale P. C. 693; and (2) those whose spouse had been absent for seven years, although not beyond the seas, "the one of them not knowing the other to be living within that time." The other statute, 19 Car. II., c. 6, "for redress of inconveniences by want of proof of the deceases of persons beyond the seas or absenting themselves, upon whose lives estates do depend" provided that the person thus absenting himself should "be accounted as naturally dead" if there should be no "sufficient and evident proof of the life," and that the judge should "direct the jury to give their verdict as if the person......were dead." The *Bigamy Act* was replaced by sec. 57 of the *Offences against the Person Act,* 1861, and sec. 307 of the *Criminal Code* is substantially the same as the latter enactment. It is clear beyond cavil that the provisoes and exceptions made in the English statutes as to bigamy are meant merely as defences in prosecutions for bigamy, that they do not regard the absent party as dead absolutely for all purposes, and that they do not validate the second marriage. (See 4 Blackstone, *Comm.* 164n. Russell on *Crimes,* 8th ed. 973, Eversley on *Domestic Relations,* 3rd. ed. 80.) Such must also obviously be the interpretation of sec. 307 of the *Criminal Code.* And by the statute 19 Car. II., c. 6 if the absent party should not really have died, provision was made for a subsequent recovery by him. There is no authority or reason for holding or supposing that the common law presumption of death from seven years' absence which developed from the equitable application of the principle of these statutes to other cases should receive any other interpretation. On the contrary, the view here advanced has been acted on in such cases, and where administration was granted in a probate court on the presumption of death, it has been held void if the supposed person turn up alive, though he has been absent and not heard of for seven years. (*Hegler* v. *Faulkner,*[3] *Scott* v. *McNeal,*[4] *Devlin* v. *Comm.*[5]) And in some cases in England the court has required parties entitled to the legacies in the event of the death of the legatees to give security to refund, in case the legatee should return. (*Norris* v. *Norris,*[6] *Bailey* v. *Hammond,*[7] *Dowley* v. *Winfield,*[8] *Cuthbert* v. *Purrier.*[9])

It is clear therefore in law that the only effect of this presumption of death, as of any other presumption, is to shift the burden

[3] 153 U.S. 109, 118.
[4] 154 U.S. 34.
[5] 101 Penn. St. 273.
[6] Finch, R., 419.
[7] 7 Ves. 590.
[8] 14 Sim. 277.
[9] 2 Phil. Ch. C. 199.

of coming forward with evidence from the proponent to the opponent, and that the opponent will lose unless he rebuts the presumption, and it should be made clear to the party concerned that an order such as the one obtained in the instant case is neither a judicial homicide of the absent spouse, nor a dissolution or annulment of the first marriage, that if such party contract a second marriage he or she runs an excellent chance of having it declared invalid and the children thereof illegitimate, if the absent party should return. The only practical use of such an order is, in fact, to perpetuate testimony and make it available on a possible later prosecution for bigamy. J. T. H.

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CRUELTY IN MATRIMONIAL CAUSES.—The legal view of cruelty as a ground for affording relief in matrimonial causes has received a noteworthy extension in the Manitoba case of *Newton* v. *Newton*.[1] In that case proceedings taken by a husband to have his wife placed in a psychopathic ward of a hospital and the removal of their child so that the wife could not see it and was kept in ignorance of its whereabouts, were held in the wife's suit for judicial separation to constitute legal cruelty, even within the interpretation of that term adopted in *Russell* v. *Russell*.[2] Had this been the only result of the case there would have been nothing more to be said about it, but Galt, J., took the opportunity of reviewing the authorities and coming to a conclusion different from that reached by Mathers, C.J., of the same court three years ago, and also of giving a new interpretation of the term "cruelty."

A discussion of this subject usually begins with a reference to the classic judgment of Lord Stowell in *Evans* v. *Evans*,[3] in which he laid down the law in these terms:

"What merely wounds the mental feeling is in few cases to be admitted where not accompanied with bodily injury either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language or want of civil attention or accommodation, even occasional sallies of passion if they do not threaten bodily harm do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve." He goes on to say that the circumstances must be such as to create "an absolute impossibility that the duties of married life can be discharged."

[1] (1924) 1 W. W. R. 999.
[2] (1897) A. C. 395.
[3] (1790) 1 Hagg. C. C. 35.

This decision was followed by *Westmeath* v. *Weston*,[4] in which Sir John Nicholl stated that "there must be ill-treatment and personal injury or the reasonable apprehension of personal injury."

In 1857 The Divorce and Matrimonial Causes Act was passed. It provided by section 27 that divorce might be granted to a woman for, among other reasons, "adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro,* or . . . adultery coupled with desertion, without reasonable excuse, for two years or upwards." The divorce *a mensa et thoro* was abolished and replaced by judicial separation, and by section 16 "a sentence of judicial separation . . . may be obtained, either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards." By section 22 the divorce court is to give relief on principles and rules conformable, as nearly as may be, to the principles and rules upon which the ecclesiastical courts had been accustomed to proceed.

As might have been expected, the courts continued to follow the view of the legal cruelty which had been accepted since 1790, and *Tomkins* v. *Tomkins*[5] expressly recognized *Evans* v. *Evans* as still the ruling authority. In 1897 the famous case of *Russell* v. *Russell*[6] came before the House of Lords. The plaintiff, Earl Russell, founded his claim upon the cruelty practised by the countess in spreading abroad in the social circles in which they moved unfounded charges of unnatural crime, but their Lordships rejected his suit, re-affirming the rule by which the courts had been guided for upwards of a century, there being no evidence that the plaintiff's health had been affected by the slanders complained of.

Before *Russell* v. *Russell* it had been usual to charge personal violence as a necessary fact in asking the assistance of the court, but in that case it was recognized that if the health of the petitioner were injuriously affected by the conduct of the respondent, that circumstance would be sufficient without the presence of physical violence, actual or threatened. Subsequently in *Jeapes* v. *Jeapes*,[7] a wife was granted a decree of divorce because of unfounded charges of adultery made against her by her husband, which had the effect of injuring her health. *Baker* v. *Baker*,[8] and referred to in *Dorsett* v. *Dorsett*,[9] was another case in which the cruelty charged was of a moral kind, namely a practice of writing letters to the petitioner threatening to

[4] (1827) 2 Hagg., E. C., supp. 72.
[5] (1858) 1 Sw. & Tr. 168.
[6] [1897] A. C. 395.
[7] (1903) 89 L. T. R. 74.
[8] Reported in the *London Times* of December 11, 1919.
[9] (1921) 1 W. W. R. 708.

commit suicide, as a result of which her health was shown to have been seriously affected.

In Lovell v. *Lovell*,[10] it was held that legal cruelty, as regards the conjugal relationship, does not necessarily depend on physical acts or threats of violence but may arise from conduct operating entirely upon the mental condition of the aggrieved person, "provided there is conduct of such a character as to undermine health," per Moss, C.J.O. In the same strain were the decisions in *Whimbey* v. *Whimbey*[11] and *Pickell* v. *Pickell*,[12] both alimony cases, and in *Dorsett* v. *Dorsett*.[13]

In the same year, 1921, the question came before the Appellate Division of Alberta, and was decided in the same manner by Harvey, C.J., and Stuart, J., in *Torsell* v. *Torsell*,[14] but Beck, J., in a strong dissenting judgment, refused to be bound by *Russell* v. *Russell*. He held that while the substantive law of England as contained in The Matrimonial Causes Act of 1857, had been introduced into the province in 1870, the Supreme Court of Alberta was not hampered by the restrictions imposed upon the English Courts by section 22 of that Act, and he concluded that a husband persistently and publicly making unfounded charges of unfaithfulness against his wife was guilty of legal cruelty.

Galt, J., was, therefore, not without a precedent in his free treatment of the question. In the course of his judgment he said:

"The meaning given to cruelty originally must have been governed by the state of people's feelings at that time, their habits of life, and their general sensibilities. In 1857, and for years afterwards, men were often subjected, from boyhood onwards, to treatment which would to-day be regarded as hideously cruel; but it was not so regarded then. The treatment administered to men in gaols or suffering from any form of insanity was often diabolical—according to our modern standards—but it required reformers such as Charles Dickens to point it out, and then everybody recognized it."

He accordingly held that the meaning of the word "cruelty" in The Matrimonial Causes Act must be interpreted in the light of the feelings and opinions of the community at the present day and not of those which were prevalent at the time the Act was passed.

R. W. S.

* * *

EASEMENTS IN TAX SALES.—Does the sale of the servient tenement for taxes extinguish an easement annexed to the adjoining dominant

[10] (1907) 13 O. L. R. 569.
[11] (1919) 45 O. L. R. 228.
[12] (1922) 21 O. W. N. 313.
[13] (1921) 1 W. W. R. 708 (Man.).
[14] (1921) 1 W. W. R. 905.

tenement? The Appellate Division of Alberta says not. In *Hutchings* v. *Campbell, Wilson and Horne, Ltd.*,[1] the property sold for taxes consisted of a strip of land 13 feet wide, the fee simple of which was in the Great West Saddlery Co. but over which the defendants had, by grant, executed and registered, acquired a perpetual right of way as to 12 feet and the use of the remaining one foot for a party wall. The Calgary Charter, governing the matter, defines "land" as including fixtures and mines, minerals and quarries. It provides by section 54 that:

"The taxes accrued on any land shall be a special lien on such land, having preference to any claim, lien, privilege or encumbrance of any body except the Crown, and shall not require registration to preserve it."

Hyndman, J.A., thought it unreasonable, apart from the statute, that default in payment of the taxes, which the owner of the servient tenement ought to pay, should have the effect of destroying an interest or right in the dominant tenement which is absolutely essential to the enjoyment of the latter, the taxes upon the dominant tenement having been paid; and he found nothing in section 54 to support such a conclusion, an easement being something more than the "claim, lien, privilege or encumbrance" there mentioned.

Clarke, J.A., thought that the Court had power to order the sale of the strip of land to be made subject to the easement, and that it would be inequitable not to do so.

This conclusion is apparently not in harmony with the views of the Saskatchewan Court of Appeal as expressed in *Re The Land Titles Act* (London Saskatchewan Investment Co.'s Case).[2] There it was held that where land, over which an easement for right of way exists in favour of the owner of adjoining land, is assessed without regard to such easement, and sold for arrears of taxes, the registrar on the proper application of the tax purchaser or his assignee should issue to him a title freed from such easement, unless restrained by an action or proceeding in the Courts."

An explanation of the difference between the two judgments may be found in the fact that in Saskatchewan the question before the court was as to the duty of the registrar, who is precluded by statute from enquiring into irregularities in a tax sale or any of the proceedings prior to or connected therewith.

The City Act of Saskatchewan provides for the levy of taxes upon "lands," and "lands" are defined as including "lands, tenements and

[1] (1924) 1 W. W. R. 1070.
[2] (1919) 2 W. W. R. 33.

hereditaments and any estate or interest therein or easement affecting the same." From this Lamont, J.A., in the case last cited, draws the conclusion that "provision is made for the assessment of an easement," and he proceeds "upon this is based the appellants' contention, which is that the Legislature having made provision for the separate assessment of an easement, the appellant's right of way should have been assessed along with lot 4, &c."

As pointed out by Chief Justice Mulock in *Reach* v. *Crosland*,[3] "a right of way appurtenant cannot be transferred by tax deed apart from the dominant tenement. It exists solely for the benefit of the dominant tenement, and apart therefrom has no existence." The conclusion he came to was that there was only " one possible means for taxation purposes, of reaching such an interest in land, namely, by assessment of the servient tenement; and," he continued, "in my opinion, the assessment of the servient tenement creates a charge on every interest in the land itself."

If, however, as Lamont, J.A., says, the legislature has made provision for the separate assessment of an easement—separate, presumably, from the servient tenement—why should it not be assessed as an appurtenance to the dominant tenement, and the servient tenement be assessed as subject thereto? This is apparently the view of Lamont, J.A., himself, when he says:

"Had the appellants, upon receiving notice of the company's application to be registered as owner, brought an action against the municipality to set aside the tax sale in so far as it affected their right of way, because such right of way had not been properly assessed, it seems to me, at any rate as at present advised, that they might have expected to succeed. Where the legislature has provided for the assessment of an easement, it seems only reasonable that the owner thereof should be able to protect his interest therein by compelling its assessment to himself."

Further, in case no mention is made in the assessment roll of an easement, why should it not be presumed to be included in the assessed value of the dominant tenement to whose enjoyment it is essential and to which it is appurtenant? In *Essery* v. *Bell*,[4] Boyd, C., thought that:

"It would be an extraordinary state of the law if, by the sale of the servient lot, the title to the easement could be extinguished, and that without any notice to the person who uses it, or any opportunity given for him to exonerate the land by the payment of taxes," but this

[3] 43 O. L. R. 209.
[4] 34 O. L. R. 256.

seems to impose an unnecessary burden upon the owner of the dominant tenement. He is taxed upon the assessed value of his property, part of which value is derived from the easement, and in justice it would seem that he should be under no further obligation either to pay taxes upon the easement as such or to pay the taxes of the servient tenement in order to escape loss.

The Appellate Division in Alberta was much moved by equitable considerations, and the conclusion to which it came seems to meet the practical justice of the case. R. W. S.

* * *

ATTEMPTED REVOCATION OF WILLS.—Pope, Sur. Ct. Judge, held *in re Garton Estate*,[1] that where a testator, after making his will, which was duly executed, struck out a clause therein with the intention of substituting a clause which he wrote below the will, which last-mentioned clause was ineffective because signed only by the testator and one witness, the will as originally drawn must stand, and probate was granted accordingly.

This decision recalls another well known and interesting case, namely, *Doe d. Reed* v. *Harris*.[2] The facts were that John Reed, having made a will giving all his property to his niece and housekeeper, Alice Harris, afterwards changed his mind; and, intending to destroy the will, threw it into the fire. The niece, being present, rescued the paper and afterwards told the testator that she had burned it. Reed died without making another will. His niece thereupon produced the will and claimed the property. The heirs objected that the will had been revoked.

The judges, Lord Denman and Patteson, Coleridge and Williams, JJ., held that, in spite of the fraud of Alice Harris whereby the testator's wishes were frustrated, the will stood and the legatee was entitled to the property. Williams, J., said:

"It is argued that if the testator throws his will on the fire, with intention to destroy it, and some one, without his knowledge, takes it away, it is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire and he did not, the revocation was still good. Where could such constructions end? The effect of that would be to defeat the object of the statute (Statute of Frauds), which was to prevent the proof of a cancellation from depending upon parol evidence."

The Statute of Frauds was consequently the means of protecting the legatee and enabling her to retain the advantages derived from a fraudulent act. R. W. S.

[1] (1924) 1 W. W. R. 1023.
[2] 6 Ad. & El. 209.

The CANADIAN BAR REVIEW is not yet in possession of the full official programme of the meeting in London of the American, Canadian and English Bars; but it learns that the following events are settled upon by those in charge of the proceedings. On Sunday (July 20th) there will be special services for the visitors at Westminster Abbey, St. Paul's Cathedral and Westminster Cathedral. On Monday the official opening of the great meeting will take place at Westminster Hall. On that day there will be a series of dinners given by the Law Society and the Inns of Court. On Tuesday there will be a reception by the American Ambassador at Crewe House, and on that day a further series of dinners by the Law Society and the Inns will be given. On Wednesday the 23rd there will be a presentation of the Blackstone Memorial, and garden parties will be held at Lincoln's Inn and Gray's Inn. That evening the Lord Mayor of London will entertain the visitors at a banquet in the Guildhall. On Thursday evening, the 24th, there will be a reception by the Grocers' Company at the Grocers' Hall. It is interesting to know that Sir Ernest Pollock, Master of the Rolls, is head of the Grocers' Company. On Friday there will be excursions to Sulgrave Manor and Cleveden. On Saturday there will be visits to Oxford and Cambridge Universities. On Monday the 28th the Canadian visitors will separate into two parties, one visiting Edinburgh, and the other party proceeding to Paris. The Paris programme is not yet arranged. The visit to Edinburgh includes a reception at Parliament House and a ball at night. On each day of the meetings parties will be invited to visit the Law Courts and Records Office, guides being provided from the English Bar. Other entertainments are contemplated which we are not at liberty at the present moment to announce. A great deal of interest is being manifested by the Bar and the English people generally in the event. At the present time it looks as if the Canadian judges and lawyers will be present to the number of 300 and more. The Canadian headquarters will be the Medicis Room of the Hotel Cecil, and will open on Thursday morning, July 17th. A special programme will be arranaged for the ladies who attend the meeting. They will be invited to be present at all the garden parties and receptions. Many invitations to the American and Canadian visitors had to be declined in order to bring the programme within reasonable compass.