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HIGH COURT OF JUSTICE.

MIDDLETON, J. MAY 27TH, 1910.

*RE SOLICITOR.

Solicitor—Retention of Client's Money—Order for Delivery of Bill of Costs—Disobedience—Attachment—Settlement—Receipt in Full—Promise of Retainer—Agreement with Client—Costs.

Motion by a client to attach the solicitor for disobedience to an order made on praecipe on the 11th February, 1909, requiring the solicitor to deliver a bill within 14 days after the service of the order. The order was served on the 12th February, 1909, and had been neither moved against nor complied with.

R. McKay, for the applicant.

E. Meek, K.C., for the solicitor.

MIDDLETON, J.:—The applicant shews that on the 2nd October, 1908, the solicitor received for her, as the result of the settlement of some litigation, $2,600, and has paid her $625, retaining the balance, $1,975, presumably as representing the costs of this litigation, but no bill has ever been delivered.

The solicitor . . . sets up as an answer to the motion:—

(1) That the settlement of $2,600 was intended to include $740 costs agreed to be paid by the defendant in the action settled.

(2) A letter from the client to the solicitor of the 8th September, 1906, proposing to give him 50 shares (i.e., one-fourth) of the stock in question in the action, if the solicitor "would take the case up and bear all expense and run the risk"—a proposition which the solicitor did not accept.

* This case will be reported in the Ontario Law Reports.

(3) A document bearing date the 1st September 1906, but not signed till some time later, by which the client retained him in the contemplated litigation. This document, drawn by the solicitor, contains the clause "I agree to pay you a retainer of $2,000."

(4) The solicitor then says that on the 20th October, 1908 (the litigation having been settled on the 2nd), he paid the client $645 in full of all claims, and produces a copy of a cheque for $645 marked "in full of all claims." . . .

(5) The solicitor then says that, after the order in question had been served, he and his Toronto agent "protested that no bill of costs in the said action had been kept by me"—this forming one of a long list of matters said to have been "protested;" but the solicitor nowhere says that he is unable to prepare a bill of his costs against his client. . . .

If the solicitor choose to adopt the course taken in Re Griffith, , and to deliberately give up all claims and demands against the client either for remuneration for services rendered or moneys disbursed, in the event of his being unable . . . to maintain his claim to the $2,000 "retainer," the client cannot well object. In that event the reference will proceed for the purpose of ascertaining the amount due the client, and in due course an order for payment over will, no doubt, follow,

The settlement on its face does not bear out the solicitor's statement—the $2,600 is payable as one sum representing the dividends and costs. But, assuming that the defendant paid the plaintiff's costs, fixed at $740, the plaintiff's solicitor received this sum as agent and trustee for the plaintiff. The agreement of settlement is, as indeed it purports to be, a settlement between the parties to the litigation—the solicitor was not a party to the agreement. The solicitor does not set up any tripartite agreement by which the defendant assumed the client's obligation to him, and the client assented to his receiving such sum as the defendant might be willing to pay. The solicitor did not so understand the situation, for, instead of resting content with the $740, he retained $1,955, if he own figures are accepted.

The letter of the 5th September affords no answer; the client's proposition was not accepted. If accepted, the agreement would have been champertous and void.

The promise to pay a "retainer" is void . . . Re Solicitor, 14 O. L. R. 464. . . . A retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act.

With reference to the settlement suggested by the copy of the cheque produced: there was no bill, and there can be no binding settlement without a bill: Re Bayliss, [1896] 2 Ch. 107. . . .

It is fair to assume that this retainer was a factor in the settlement, if settlement there was, and . . . the client would not be bound by it. . . .

As to the suggested inability of the solicitor to prepare a bill—on the material this is not proved as a fact, and, if it were, it would not afford any excuse. . . .

Even if there had been a valid agreement, the solicitor owed a duty to his client to keep a proper record of the business done, as the preparation of a party and party bill might have been assumed to be, in the event of success, necessary in the client's interest. . . .

[Re Ker, 12 Beav. 390, and Re Whiteside, 8 Beav. 140, referred to, and the former distinguished. Reference also to Knock v. Owen, 35 S. C. R. 168, 172.]

The order will go for attachment. The attachment will not issue for two weeks; and if, in the meantime, the solicitor delivers a bill or a statement in writing that he makes no claim against the client for costs or disbursements, it will not then issue.

The solicitor must pay the costs of these proceedings in any event of the reference under the order already made; and the amount of such costs will be taken into account in ascertaining the balance upon the reference.

BRITTON, J. MAY 27TH, 1910.

LACROIX v. LONGTIN.

Deed—Rectification—Husband and Wife—Agreement by Husband to Convey Wife's Land—Conveyance by Husband—Wife Joining to Bar Dower—Estoppel—Specific Performance—Statute of Frauds—Damages—Breach of Covenant—Costs.

Action for rectification of a deed or for specific performance of an agreement for the sale of land or damages.

The defendant J. B. Longtin was the owner of the land in question, the west half of lot 30 in the 7th concession of Cambridge, on the 17th October, 1904, when he executed a mortgage on it to the Toronto General Trusts Corporation for $2,800, his wife, the defendant Zepherina Longtin, joining for the purpose of barring her dower. On the 4th August, 1905, the defendants executed another mortgage on the land for $1.000 to one Magee. On the 16th November, 1906, the defendant J. B. Longtin executed

a conveyance in fee simple, subject to the two mortgages, to his wife. The defendants lived together, occupying this land. On the 13th March, 1908, the plaintiff negotiated with the defendant J. B. Longtin for the purchase of the east half of the west half for $3,200. The plaintiff was to assume the first mortgage for $2,800 and give his promissory note for $400. Nothing was said about the mortgage to Magee. The defendant Zepherina Longtin was present during the whole of the negotiation, and assented to it. When the parties had arrived at an agreement they went on the same day to a local conveyancer, who at once drew a deed of the east half of the west half, assuming to convey it to the plaintiff, the defendant J. B. Longtin being named as grantor and his wife as a party only for the purpose of barring her dower. This was executed by both the defendants. It was understood that possession was to be given to the plaintiff on the 1st April, 1908. The note was made payable to the defendant J. B. Longtin or order, and signed by the plaintiff. The defendant J. B. Longtin took the note, and the plaintiff the deed. When the plaintiff came for possession, it was refused.

On the 10th August, 1908, the defendant J. B. Longtin wrote to the plaintiff that, as the contract was bad, he had no right to collect the note. On the 17th August the defendants' solicitor wrote to the plaintiff calling attention to the fact that the defendant J. B. Longtin was not, but his wife was, the owner, and expressing a willingness on her part to execute a proper deed, upon the plaintiff fulfilling all conditions. The conditions referred to were dicharging the west half of the west half from the $2 800 mortgage and paying the $400 in cash. The defendants insisted that it was one of the terms of the bargain that the plaintiff should have the west half of the west half discharged from the $2,800 mortgage. The plaintiff did not answer either letter. The defendants alleged that the plaintiff distinctly abandoned his purchase. The plaintiff denied this.

Early in September, 1908, the plaintiff, finding the house on the east half unoccupied, took possession and put a padlock on the door. During the following night the defendant J. B. Longtin broke the lock and regained possession, which he retained to the exclusion of the plaintiff.

The plaintiff asked for rectification of the deed of the 13th March, 1908, by substituting the name of the defendant Zepherina Longtin for that of the defendant J. B. Longtin as grantor and eliminating the dower clause, or for specific performance of an alleged agreement to sell the east half to the plaintiff, or for damages.

The action was first tried by CLUTE, J., on the 7th June, 1909, and dismissed. A new trial was directed by a Divisional Court, ante 342, on the ground mainly that the point in reference to the estoppel of the defendant Zepherina Longtin had not been fully presented to or considered by the trial Judge.

The new trial took place before BRITTON, J., without a jury, at Ottawa, on the 14th April, 1910.

N. A. Belcourt, K.C., for the plaintiff.

D. Danis, for the defendants.

BRITTON, J.:— . . . I find as a fact that in the negotiation and at the time the deed was signed by the defendants it was no part of the agreement that the plaintiff should immediately clear the west half of the west half from the $2,800 mortgage, any more than that Longtin should immediately clear the east half from the $1,000 mortgage. Neither party was able to do this. The plaintiff was simply to assume and eventually pay the trusts corporation mortgage, and Longtin was to assume and eventually pay the Magee mortgage. . . .

As to estoppel, the general rule is "that if a person by his conduct induces another to believe in the existnce of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that that state of facts does not in truth exist." There are qualifications to this rule. To create estoppel there must be knowledge of the facts as they really exist.

When the defendant stood by and heard her husband discuss the sale to the plaintiff, she, acting honestly, was for the time in ignorance of the true state of the title. She is an illiterate woman. There was no reason why she should remember as there were no creditors, and nothing special to cause her to keep it in mind. They lived together, the husband managing the farm and paying the interest upon the mortgages.

I find as a fact that there was no fraud on the part of either defendant. . . . It was not a case of standing by and allowing her husband to sell, she knowing the property was hers. She is not, therefore, estopped from setting up any defence that is available to her.

There was no contract in fact with her; therefore nothing upon which to found this action, unless it be estoppel, and that fails. See Bigelow on Estoppel, 5th ed., p. 448, et seq.

The plaintiff does not contend that the conveyance to him operates as a conveyance of the wife's land. That is why he

seeks rectification, and, for the reasons given, he is not entitled to that.

This case is on principle very different from Hoig v. Gordon, 17 Gr. 599. See also McClung v. McCracken, 3 O. R. 596.

The defendants plead the Statute of Frauds. That, in my opinion, is a good defence as to Mrs. Longtin. The deed signed by her merely to bar dower was not intended by her to authenticate any contract for the sale by her of land to the plaintiff. There was, therefore, no authentication in writing signed by her as to the contract which the plaintiff seeks to have performed.

There was no part performance by Mrs. Longtin. The possession by the plaintiff for the short time mentioned by him cannot be part performance. Taking the note was wholly by the husband. No unequivocal act of Mrs. Longtin was shewn in reference to part performance by her of any alleged contract, other than agreeing to bar dower.

Even as a matter of judicial discretion there could be no specific performance awarded. The plaintiff is not . . . in a position to clear the west half of this land from the $2,800 mortgage, nor are the defendants able to pay the Magee mortgage. . . .

Then the plaintiff has really sustained but trifling, if any, damage. At the highest the plaintiff valued his equity at $600; he was to pay $400; the difference is only $200. . . .

The plaintiff claims damages for breach of covenant for quiet possession. All the covenants are those of the husband alone. As the plaintiff seeks to remove from the deed the name of the husband as grantor and so as covenantor, and as this action is really not upon the deed but outside of it, and as he has not brought his action or asked any amendment to entitle him to recover against the defendant J. B. Longtin alone, he is not entitled to recover for that alleged breach. The damages for such would not be more than nominal even if the plaintiff were entitled.

The plaintiff should not pay all the costs of this litigation. The defendants' mistake or want of recollection has been in part the cause of it. Upon . . . Dickerson v. Radcliffe, 19 P. R. 223, and Murr v. Squire, ib. 237, I assume that I have authority to deal with all the costs of this action, and now do so by directing that the plaintiff pay only the costs of the last trial. There will be no costs of the first trial or of the application for a new trial payable by the plaintiff to the defendants. Action dismissed with costs of the last trial only. . . .

The plaintiff is entitled to the promissory note for $400 now in Court. The defendants are entitled to a declaration that the paper purporting to be a conveyance from the defendant J. B. Longtin . . . registered . . . is of no validity or effect.

RIDDELL, J., IN CHAMBERS. MAY 28TH, 1910.

FRASER v. ROBERTSON.

Lunatic—Action Brought in Name of, by Next Friend—Motion to Dismiss Action—Stay of Proceedings—Undertaking by Next Friend to Proceed for Declaration of Lunacy.

Motion on behalf of the plaintiff to vary the terms of the order proposed, ante 800.

John King, K.C., for the plaintiff.

A. McLean Macdonell, K.C., for the next friend.

RIDDELL, J.:—Mr. King is not satisfied with the order proposed, but Mr. Macdonell is. Mr. King insists that an order should be made now dismissing the action as frivolous, &c., and an abuse of the process of the Court. This order I refuse to make. In view of such cases as Lawless v. Chamberlain, 18 O. R. 296, and Burns v. Anderson, before Proudfoot, J., 10th November, 1883, it would seem that the main action will lie. And certainly the action could not be dismissed upon such an application as the present.

In my view, any person (and certainly a relative so near as the present next friend) may bring an action in the name of one alleged to be of unsound mind. Vano v. Canadian Coloured Cotton Mills Co., ante 763, contains some account of the position of a next friend. I decline to decide that any person, and a fortiori any relative, is acting improperly in bringing before the Court a case like the present, if the plaintiff is in fact of unsound mind.

And the question of the sanity of the plaintiff must now come up in some way for trial. I was under the impression (wrong, as one of the counsel now informs me) that both parties would be satisfied if the issues to be determined should be tried before myself in the week of the 6th June. But, as this course does not recommend itself to both, I shall make the order made in a very similar case, Palmer v. Walesby (1868), L. R. 3 Ch. 732, and stay all proceedings until further order, on an undertaking by the next friend to take proceedings to declare the plaintiff a person of unsound mind. The urgency of such proceedings, in view of the advanced age of the plaintiff, need not be emphasised.

Costs will be reserved until further order.

MIDDLETON, J. MAY 28TH, 1910.

RE SCHELLENBERGER.

Will—Construction—Meaningless Clause—Supplying Words "to Pay"—Legacy Charged on Lands Specifically Devised—Demonstrative Legacy—Proceeds of Sale of Chattels—Income of Farm—Maintenance of Children—Residuary Estate.

Motion by the executors of the will of Michael Schellenberger for an order determining certain questions as to the construction of the will and disposition of the estate.

The will was dated the 12th June, 1901, and was as follows:—

1. I direct my just debts, funeral and testamentary expenses, to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease.

2. I nominate, constitute, and appoint my friends Fred Meyers, of the township of Fullerton, in the county of Perth, farmer, and William Stoskopf, of the same place, farmer, to be the executors of this my will.

3. I am the owner of lot number 6 and the east half of lot number 7 both in the 3rd concession of Fullerton, containing 150 acres of land, and it is my wish that my son Edwin should come into possession of this farm on his reaching the age of 18 years, when he will be able to work the farm, should I die before he reaches that age, and I devise said farm to my son Edwin.

4. It is my wish that my son Edwin shall get all farm stock, farm implements, and farm produce on the farm at my death, or the value thereof, when he comes into possession of the farm. Should my son Edwin not be able to work the farm, my executors shall sell off all farm stock, implements, and produce, and rent my farm (allowing my family to occupy the house on the farm) to the best advantage, and expend the money arising therefrom in the maintenance and education of my children until my son Edwin arrives at the age of 18 years.

5. I direct my executors and I charge the land devised to my son Edwin with the payment of $5,000, and the sum of $5,000 and $1,500 from a mortgage which I hold I direct shall be divided as follows: to my daughter Ida Christina, $1,000, to my daughter Mary Ann $1,000, to my daughter Lydia $1,500, to my daughter Martha K. $1,500, and to my daughter Rosetta $1,500, having made provision for my two eldest daughters for an additional $1,000 to each of them by way of life insurance. There is a

policy of insurance on my life in favour of my son Edwin for $2,000, and I appoint my said executors trustees thereof, and the payment to my said trustees by the insurance company of the said sum as guardians of my son Edwin shall be considered a valid and lawful payment of the amount payable under said insurance policy.

All the rest and residue of my estate shall be given to my son Edwin when he comes of age.

R. T. Harding, for the executors and some of the children of the testator.

E. C. Cattanach for the Official Guardian, representing the infant, Edwin Schellenberger.

MIDDLETON, J.:—The construction of this will is by no means easy, and the difficulty is increased by the change in the testator's circumstances between the making of the will and his death. The farm devised to Edwin at the date of will was free from incumbrance. Subsequently the testator mortgaged it for $5,000. Under an order made by my brother Sutherland it has been sold, producing $3,646.85 over and above the amount due upon the mortgage.

Several questions arising on clause 5 of the will can best be first dealt with. I think this clause must be read as though the words "to pay" followed the word "executors" in the first line of this clause—unless this is done the clause would be meaningless. This is in accordance with the rule to be derived from the cases in Theobald, 6th ed., p. 724. See also May v. Logie, 23 A. R. 785.

So read, the gift, as to the $5,000 at any rate, is of a legacy payable generally out of the testator's estate, and collaterally charged for the protection of the legatees upon the lands specifically devised to Edwin, who is also the residuary legatee and devisee.

The $1,500 stands in a somewhat different position. The executors are to pay "$1,500 from a mortgage which I hold." At the date of the will the testator had a mortgage of $1,800—before his death this had been paid off. This legacy is demonstrative; the testator indicates the source from which the money to be used for payment of the legacy is to be derived. Had he given the mortgage or the money invested in the mortgage, the legacy would have been specified, and have failed by the failure of the particular fund: Dean v. Test, 9 Ves. 146.

Several questions arise upon the 4th clause. "The value" of the farm stock, &c., is equivalent to the proceeds of the stock, &c., when sold. This sum is to be Edwin's when he attains 18.

Edwin being unable to work the farm, the executors are directed to rent it and sell the stock and "expend the money arising therefrom," i.e., the income arising from the renting of the farm and the investment of the proceeds of the sale of the chattels, "in the maintenance and education of my children until Edwin arrives at the age of 18 years." This clause does not contemplate maintenance being given to those children who are adult or forisfamiliated—on the evidence Martha and Rosetta are the only two who are now entitled, and Martha is nearing the condition of independence.

As the $5,000 is charged on the farm, Edwin is entitled to have this resorted to before the residuary estate to meet the legacies.

The result will be a declaration that:—

(1) According to the true construction of the will of Michael Schellenberger, in the events which have happened, the daughters of the deceased are entitled to receive the legacies, amounting to $6,500, in full.

(2) The infants Martha (until she becomes self-supporting) and Rosetta are, until Edwin comes to the age of 18, entitled to receive for their maintenance the income derived from the proceeds of the farm stock, &c. When Edwin attains 18, this fund becomes his.

(3) The residue of the estate belongs to Edwin free of any charge for maintenance.

Costs out of the estate—executors' and Official Guardian's as between solicitor and client.

TEETZEL, J. MAY 28TH, 1910.

*MICKLEBOROUGH v. STRATHY.

Landlord and Tenant—Landlord Undertaking to Procure Subtenant—Vacant Premises—Temporary Letting by Landlord—Acts not Amounting to Eviction—Lease not Terminated.

Action for a declaration that a lease of part of a building by the defendant to the plaintiffs was determined by the acts of the

* This case will be reported in the Ontario Law Reports.

defendant, and that the plaintiffs were no longer liable for rent. Counterclaim for rent and interest.

A. C. McMaster, for the plaintiffs.

G. Bell, K.C., for the defendant.

TEETZEL, J.:—By lease dated April, 1907, the defendant leased to the plaintiffs the ground floor and cellar of 179 Bay street, Toronto, for five years from the 1st May, 1907, at $50 per month, under which lease the plaintiffs took possession and sublet to one . . . who occupied the premises for about a year, when . . . the premises became vacant. The defendant was engaged by the plaintiffs to secure another tenant for them, which he endeavoured to do by putting up a "to let" notice in the window of the vacant premises. The defendant also represented the owner of the adjoining premises, 177 Bay street, and other adjacent premises. During the first week of November, 1908, the defendant, being desirous of doing some repairs in No. 177, arranged with the tenant . . . Ritter, who was a cobbler, to remove his bench and some other trifling effects into No. 179 . . subject to the provision that he should remove therefrom upon request without delay, and during his occupancy, which was not of the entire premises, but only of the ground floor, he should pay a rental of $3 per week, and should allow the "to let" notice to remain up, and should shew the premises to prospective tenants who might call. The defendant did not consult the plaintiffs before putting Ritter into the premises, and, as soon as they discovered the fact that he was occupying them, they wrote the defendant notifying him that . . . they looked upon the defendant's act as at once releasing them from further liability under the lease, and since that notice the plaintiffs refused to pay further rent. . . .

I find, upon the evidence, that in putting Ritter in possession of a portion of the premises the defendant did not intend to terminate the lease which he had made to the plaintiffs, but that he intended Ritter's occupation to be only temporary, and, while it was for the convenience of Ritter pending the repairs to No. 177, it was also intended to be for the advantage and for the benefit of the plaintiffs, because it was Ritter's duty, under the arrangement, to shew the premises to prospective tenants, and he was also under obligation to leave immediately upon request; and I further find that immediately upon the defendant receiving the plaintiffs' notice, Ritter quitted the premises and was moved into another place owned or controlled by the defendant.

In order to entitle the plaintiffs to succeed, it was incumbent upon them to establish facts which would in law constitute an eviction by the defendant. It seems to me that the facts fall entirely short of such a result. To constitute an eviction, the lessee must establish that the lessor, without his consent and against his will, entered upon the demised premises and evicted him and kept him so evicted; and the act done by the landlord must be of a permanent character, and not a mere trespass or some act done for a temporary purpose, unless with the intention of depriving the tenant of the enjoyment of the premises. See Foa on Landlord and Tenant, 4th ed., p. 166. . . .

[Reference also to Upton v. Townsend, 17 C. B. at p. 65; Newby v. Sharpe, 8 Ch. D. at p. 49; Ferguson v. Troop, 17 S. C. R. 527, 579.]

Upon all the evidence and circumstances in this case, it is impossible to find that what was done by the defendant amounted to an eviction of the plaintiffs, especially because it is quite plain that the defendant never intended to terminate the lease or to evict the plaintiffs, or to do anything more than to permit a temporary occupation by Ritter in such a way as he believed it was in the interests of the plaintiffs that he should do.

Ritter paid $3 for his occupancy, which was credited to the plaintiffs.

The action must be dismissed with costs, and the counterclaim allowed with costs. . . .

MULOCK, C.J.Ex.D. MAY 28TH, 1910.

*LOBB v. LOBB.

Will—Construction—Bequest to "Children"—Previous Mention by Name of Illegitimate Children—Exclusion of Legitimate Children—Inference from Wording of Will and Circumstances Existing at Time of Making.

The plaintiffs claimed, as sons of Charles Lobb, a share in his estate under his will.

The defendant, Charles Garfield Lobb, an illegitimate son of Charles Lobb, denied that the plaintiffs were children of Charles Lobb, and set up that, even if they were, they were not entitled to take under his will.

* This case will be reported in the Ontario Law Reports.

At the trial it was found that the plaintiffs were children of the testator by his wife, Fanny Atwood, and were born in wedlock.

The evidence shewed that the testator was married to Fanny Atwood in England on the 2nd December, 1838, and lived with her there until 1853, when he deserted her, and came to America, since which time there had been no communication between them. Of this marriage there were six children, including the plaintiffs. Fanny Atwood survived the testator, who died on the 17th March, 1883.

About the year 1874 the testator became a resident of St. Catharines, living there with one Hannah Lobb as his wife, by whom he had four children, born at various times from 1864 to 1874. The eldest of these four predeceased the testator, and the three surviving children were infants, living with their parents, when the testator died. Their mother died in 1909. The three children were illegitimate, and the question was, who were entitled under the will to the benefits given by the testator to his "children."

The will was dated the 26th February, 1883, and by it he devised a farm to his son Charles Garfield Lobb, another farm to his son James Algie Lobb, a house to his daughter Annie Lobb, and two houses (one with the furniture therein, &c.) to his wife Hannah Lobb for life, "and after her death to go to and be divided between my children share and share alike, or the survivors of them. . . . The homestead and furniture to be kept for the use and support of my wife and children during her lifetime, but no sale to be made until my youngest child becomes of age." He also devised other lands to his executors to sell and apply the proceeds for the support and maintenance of his wife and children until the youngest should be of age and then to divide the proceeds, one-third to his wife and the balance between his children or the survivor of them share and share alike. "And all moneys belonging to me at the time of my decease and debts of every kind or description . . . I give to my executors to collect, sell, or realise . . . for the benefit and support of my said wife and children, and it is my expressed will and intention that, in the event of any of my children dying without issue before my youngest child becomes of age, his or her share of my estate shall go to the survivors, share and share alike, and I do hereby require my executors . . . to invest all moneys and apply the interest . . . for the support and maintenance of my said wife and children until the youngest child becomes of age and divide the amounts then in their hands or in trust between my said wife and children or the survivors of them." And he appointed his

wife Hannah executrix and his son Charles and Peter Algie executors.

H. H. Collier, K.C., for the plaintiffs.

E. D. Armour, K.C., and M. J. McCarron, for the defendant.

MULOCK, C.J. (after stating the facts):—During his residence in St. Catharines the testator treated and represented Hannah Lobb as his lawful wife and their children as their lawful issue, having them registered as such in the records of St. George's Church, St. Catharines.

The question to be determined is who of his children are included under the word "children" in his will. Prima facie the word "children" imports legitimate children only, but this interpretation yields where a contrary intention, which the law is entitled to regard, appears. . . .

[Reference to Hill v. Crook, L. R. 6 H. L. 276; Dorin v. Dorin, L. R. 7 H. L. 573; In re Haseldine, Grange v. Sturdy, 31 Ch. D. 519.]

In the present case legitimate as well as illegitimate children survived the testator, and both classes may share if it is established that such was the testator's intention. The word "children" is a generic term, including both classes. A testator is entitled to bequeath his property to his children, legitimate and illegitimate, or to any to the exclusion of the remainder, and if it is manifest that he intended the word "children" to include both classes, both may take.

A contrary view was held in Bagley v. Mollard, 1 R. & M. 581, but it is now well settled that in a gift to "children" both classes may take if that be the manifest intention of the testator. The authorities on this point are collected at p. 281 of the 6th ed. of Theobald on Wills.

The defendant contends that the word "children," as used in the will, was intended to include only himself, his brother James, and his sister Annie, to the exclusion of the testator's lawful issue. The onus is on the defendant to satisfy the Court that such is the proper interpretation. . . .

[Reference to Wort v. Cubitt, 19 Beav. 431; Megson v. Hindle, 15 Ch. D. 198; In re Walker, 2 Ch. D. 243; In re Byron, 30 Ch. D. 185; In re Horner, Eagleton v. Horner, 37 Ch. D. 695; In re Hall, Bartman v. Wightman, 35 Ch. D. 555; Smith v. Jobson, 59 L. T. R. 397; In re Brown, Brown v. Brown, 37 W. R. 473; In re Brown, Walsh v. Brown, 62 L. T. R. 890; Mansel v. Allen, [1901] 2 Ch. 447; In re Smilter, Bedford v. Hughes, [1903] 1 Ch. 199; In re Wood, [1902] 2 Ch. 543.]

I think that the word "children," wherever it appears in the will, means only those children of the testator who were to be entitled to occupy the homestead with Hannah Lobb, namely, the three illegitimate children, Charles, James, and Annie, to the exclusion of his legitimate children. . . . .

Taking into consideration, then, the language of the will itself and the surrounding circumstances . . . . at the time of its execution for the purpose of explaining the testator's language, there is, I think, so strong a probability of the testator's intention to include the three children of Hannah Lobb only in the word "children," wherever used in the testator's will, that a contrary intention cannot be supposed. . . .

Action dismissed without costs.

MIDDLETON, J., IN CHAMBERS. MAY 31ST, 1910.

RE WHITELAW.

Infants—Allowance for Past Maintenance—Exceptional Circumstances.

Motion on behalf of the guardian of infants for an order for an allowance out of the moneys in Court for past maintenance.

F. W. Harcourt, K.C., Official Guardian, for the applicant and the infants.

MIDDLETON, J.:—In this case the circumstances are quite exceptional, and, I think, warrant the order asked.

Let the order recite that "by direction of the Court the Official Guardian personally interviewed the infants, who are quite capable of understanding the nature of this application, and that the Official Guardian reports to the Court that the infants understand and approve of the allowance being made; that he recommends the making of the order; and the applicant, in view of this allowance, undertakes to maintain the infants until they are self-supporting and to make no further application for maintenance."

The making of this order is not intended to indicate a general relaxation of the rule prohibiting applications for past maintenance.

MAGEE, J. JUNE 2ND, 1910.

*SOMERVILLE v. ÆTNA LIFE INSURANCE CO. OF HARTFORD.

Life Insurance—Presumption of Death of Insured—Evidence—Proofs of Death—Insufficiency—Evidence on which Presumption Declared Obtained after Action—Premature Action—Return of Premiums—Pleading—Amendment—Statute of Limitations—Action not Commenced within 18 Months after Death—Ontario Insurance Act.

Action by Mary J. Somerville, as the declared beneficiary of two policies of insurance issued by the defendants on the life of and effected by her husband, William J. Somerville, who, as she alleged, died before the action was commenced and within a year after the 20th December, 1897, to recover the amounts of the policies and also the amounts paid by the plaintiff for premiums upon the policies since the 20th December, 1898.

Under each policy the insurance money was payable within 90 days after due notice and proof of the death of the insured.

By the Ontario Insurance Act, R. S. O. 1897 ch. 203, sec. 80, the money is payable in 60 days after reasonably sufficient proof.

There was no direct evidence of the death, but the plaintiff rested upon the presumption arising from the fact that the insured had not been heard of since the 20th December, 1897.

To the claim upon the policies the defendants pleaded: (1) that, under the circumstances and upon the evidence offered, the presumption of death did not arise; and (2) that the action was premature, as proper proofs of death had not been furnished before it was commenced. At the trial they also asked leave to plead (3) that the action was not commenced within 18 months after the death, in accordance with R. S. O. 1897 ch. 203, sec. 148, sub-sec. 2, amended by 3 Edw. VII. ch. 15, sec. 5, the policy itself making no stipulation as to the time within which any action should be brought.

To the claim for return of premiums the defendants said: (1) that the death of the insured, before the payment of any one or more of the premiums, was not proved; (2) that, even if proved, the premiums were, in the circumstances, not repayable. At the trial they also asked leave to plead (3) the Statute of Limitations.

The action was commenced on the 23rd March, 1907.

*** This case will be reported in the Ontario Law Reports.**

In December, 1906, the plaintiff first made claim for the insurance money. The proofs of loss forwarded to the defendants consisted of a statutory declaration of the plaintiff and copies of three letters annexed. The declaration stated that the plaintiff was the wife of the insured, and he had left his home in Toronto in or about November, 1897, and that she had received from him a letter dated the 15th November, 1897, and subsequently two letters from Chicago, one dated the 8th December, 1897, as appeared by the post-mark, and the other the 20th December, 1897 (the three letters copies of which were annexed), and that since that date she had not, nor had any member of his family, received any intimation whatever from him, and she verily believed that, if he had been living, he would have continued to correspond with her, and she was satisfied that his only reason for not continuing the correspondence was the fact that he was dead, and that he had three sons and one daughter, whose names were given.

The declaration and letters were the only formal proofs of death upon which the defendants were asked to pay. There was not laid before them any proof of search or inquiry made for the insured; indeed, none had been made.

Since action the defendants had advertised and made inquiries without result.

G. C. Gibbons, K.C., and G. S. Gibbons, for the plaintiff.

W. E. Middleton, K.C., for the defendants.

MAGEE, J. (after stating the facts at length):—As to whether, on the evidence here, the plaintiff's husband should be presumed to be dead, the answer, I think, must be in the affirmative, though I cannot help having some lingering doubt of the fact. Were it not for the efforts made by the defendants themselves since action, by advertising and following up many answers thereto, I should not have considered the evidence sufficient. But, of the plaintiff were to wait for 10 years more, what more could be done by her than has been done by the defendants? His own family and relatives have not heard from him. He corresponded with his wife frequently during the last six weeks of his known life. His letters give no indication of an intention to drop that correspondence, nor of any lessening of interest in his family. Nor do they suggest his going to any place from which it might be difficult to communicate, nor any probability of his changing his name, nor any reason for doing so. Though apparently recognising the inability to succeed at his own trade, or in Chicago, he does not appear hopeless of success in some other business and place. The

probability of his sending intelligence of himself is not rebutted by anything in the evidence so as to prevent the presumption of his death arising. . . .

Although one may have many doubts as to his death, and may recall instances (such as McArthur v. Egleson, 43 U. C. R. 405) of people turning up after long absence, and may recognise how unsatisfactory it is to an insurance company to have to pay merely on evidence of disappearance, yet, on the other hand, considering the bona fides of the insurance and the absence of any reason for suggesting an intentional fraud upon the company, I do not know of any principle in any of the authorities on which I can refuse to give effect to the fact that he has not been and cannot be traced and to declare that the presumption of his death should take effect. . . .

There are, no doubt, cases where the fact of not being heard from for even longer than seven years has not been considered sufficient. . . .

[Reference to Watson v. England, 14 Sim. 27; Bowden v. Henderson, 2 Sm. & Giff. 360; Hitz v. Ahlgren, 170 Ill. 60; Dun v. Travis, 56 N. Y. App. Div. 317; In re Ubrich, 14 Phila. 243; In re Hoppensack and New York Board of Education, 173 N. Y. 321; Prudential Assurance Co. v. Edmonds, 2 App. Cas. 487.]

But in the present case the wide advertising and inquiries by the defendants have, I think, cured any absence thereof by the plaintiff, and the weakness, if not absence, of any probability that the insured would cease to communicate with his family, differentiates this case from those in which the presumption was held not to arise.

Upon the other branch of the case, the sufficiency of the proof tendered to the company before action, my finding must be against the plaintiff. . . . I do not consider that it was proof as required by the policy, or reasonably sufficient proof as required by the statute. It would have been consistent with it that the plaintiff or her family might have heard in various satisfactory ways of the insured's existence without direct intimation from himself. See Doyle v. City of Glasgow, 53 L. J. N. S. 527.

As to the claim for return of the premiums, that would involve fixing the time of the death. No presumption arises as to that. It is a question of fact to be established by evidence or inference from evidence. Whether the death is to be supposed to occur at or near the beginning or the end of the period of silence must in each case depend on the circumstances. As was said in In re Phines Trusts, L. R. 5 Ch. 139, the last day is the most probable. If the proof of death depended solely on failure to com-

municate, the date might be assumed to be somewhat early, though not at the very beginning of the seven years; but here the proof is largely the failure of any result from the defendants' advertising and inquiry. When coupled with the previous silence, I do not think the plaintiff has established that the death took place before the date of payment of any of the premiums accruing before action. Even if that would entitle her to recover any of them back, they were not paid negligently or under mistake, but voluntarily with full knowledge of the doubt as to their being payable at all.

I allow the defendants' application to plead the Statute of Limitations to the claim for return of premiums, although it is, on my findings, unnecessary.

I do not allow the application to plead, as to the claim on the policies, that the death did not occur within 18 months. The plea would be an invalid one. The statute does not say that an action must be brought within 12 or 18 months, but that it may be so brought notwithstanding anything to the contrary in the contract. It was intended to prevent companies by their policies insisting upon actions being brought within unreasonably short periods. As no time is mentioned in these policies, the Act does not apply.

The judgment will declare that William J. Somerville should be and is legally presumed to be dead before the 25th March, 1908, but that the defendants had not received reasonably sufficient proof before action; and the action will be dismissed with costs, but without prejudice to another action.

If the defendants desire, before judgment is entered, to make an application in Chambers for a declaration of the presumption of death under sec. 148, sub-sec. 3, of the Ontario Insurance Act, as amended by 7 Edw. VII. ch. 36, sec. 3, so as to obtain the protection of that enactment, it may be done.

GREAT WEST LIFE ASSURANCE CO. v. SHIELDS—MASTER IN CHAMBERS—MAY 27.

Discovery—Production of Documents — Action on Foreign Judgment—Fraud—Absence of Particulars.]—Motion by the defendant for a better affidavit on production of documents from the plaintiffs. The action was upon a foreign judgment: see ante 393. In the affidavit filed no document was mentioned but an exemplification of the judgment sued on. When this document was looked at, it seemed to imply that all the books of the plain-

tiffs were before the Court which pronounced the judgment. The defendant pleaded that the judgment was obtained by fraud of the plaintiffs, but no particulars of the fraud had been given, though an order for particulars had been made. It was further alleged that the plaintiffs were indebted to the defendant for commission. The Master said that the books of the plaintiffs would be essential for the purposes of establishing the defence; but in an action upon a foreign judgment the defendant must shew some fraud before he can go behind the judgment into the merits. As no particulars of the alleged fraud had been given, the motion was at least premature, as it was impossible to say whether any investigation of the plaintiffs' books would be relevant: Parker v. Wells, 18 Ch. D. 485, 487; Graham v. Temperance and General Life Assurance Co., 16 P. R. 536. Motion dismissed, subject to renewal when the cause is at issue, if the defendant is so advised. Costs in the cause. M. Lockhart Gordon, for the defendant. J. D. Falconbridge, for the plaintiffs.

CASWELL v. TORONTO R. W. CO.—MASTER IN CHAMBERS—MAY 27.

Discovery—Examination of Servant of Defendant Company—Second Examination—Rule 439 (a) (2)—Costs.]—Motion by the plaintiff under Con. Rule 439 (a), clause 2, for an order for leave to examine for discovery, as an officer or servant of the defendant company, the conductor of a car of the defendants in which the plaintiff was a passenger when she sustained injury by a fall in the car on account of which this action was brought for negligence. The motorman of the car had already been examined for discovery, but it turned out that he did not see the accident. It was admitted that the plaintiff was injured by a fall in the car. The Master said that, following the principle of Dawson v. London Street R. W. Co., 18 P. R. 223, and Clarkson v. Bank of Hamilton, 9 O. L. R. 317, the order should be made; but as the motorman was examined at the plaintiff's suggestion, the costs of the order and the examination thereunder should be costs to the defendants in any event. J. W. McCullough, for the plaintiff. Frank McCarthy, for the defendants.

COLVILLE v. SMALL—MIDDLETON, J., IN CHAMBERS—MAY 27.

Writ of Summons—Substitutional Service.]—Motion by the defendant Small to set aside an order for substitutional service of the writ of summons. Held, that on the original material the order was improperly granted. The rule of practice laid down by the late Mr. Dalton, Master in Chambers, should not be departed from. He invariably held that no order for substitutional service should be made when it is said that the defendant is evading service, unless the writ has been placed in the hands of the sheriff to be served. The material as it now stands on this motion shews that the plaintiff could not with reasonable endeavour effect prompt personal service, and the motion should be refused, but the costs should be costs in the cause. The defendant to have two days to answer to the writ. J. L. Counsell, for the applicant. W. M. McClemont, for the plaintiff.

COLONIAL DEVELOPMENT SYNDICATE v. MITCHELL—LATCHFORD, J.—MAY 30.

Contract—Acquisition of Mining Lands—Agency or Partnership—Action to Compel Conveyance—Assignment — Account of Profits.]—Action by a corporation registered in England under the Imperial Companies Act, and licensed in December, 1908, to do business in Ontario, against William Stewart Mitchell, James Stewart Mitchell, and John Archibald Mitchell, to compel the defendants to transfer to the plaintiffs certain mining locations in the district of Nipissing. The plaintiffs alleged that W. S. Mitchell received from a firm of London brokers, Rose Van Cutsem & Co., over $100,000 to be expended by him on their account in acquiring lands and mining rights in the Cobalt district for them and the plaintiffs; that he paid out large sums for properties, taking conveyances in his own name and in the names of his co-defendants and others in trust for him; and that he and they now refuse to convey the properties to the plaintiffs, who have obtained an assignment of the interest of Rose Van Cutsem & Co. LATCHFORD, J., in an elaborate opinion, sets out the facts and his findings thereon, concluding: The defendant W. S. Mitchell was, I think, quite willing to convey to the plaintiffs or any other firm or corporation nominated by Rose Van Cutsem & Co., if that firm

accounted to him for the profits for which they are, in my opinion, bound to account under their contract with Mitchell, as varied, with his concurrence, by the reduction of his interest in the joint ventures from one-half to one-third. The onus is upon the plaintiffs of establishing that their assignors were relieved by Mitchell from any liability to fulfil their agreement with him, and that Mitchell accepted the plaintiffs as liable, instead of Rose Van Cutsem & Co., to account to him for the profits made by Rose Van Cutsem & Co., to one-third of which he was admittedly entitled under his contract with that firm. Notwithstanding Mitchell's want of candour and his frequent change of position, he has not, I think, so acted as to preclude himself from setting up against the plaintiffs the equities which he has, on firmly established principles, the right to set up against Rose Van Cutsem & Co. It would . . . be inequitable to allow the plaintiffs to succeed. The action should be dismissed with costs. If the plaintiffs desire, there may be a declaration that they, as assignees of Rose Van Cutsem & Co., are entitled to a two-thirds interest in the properties in question now held in the name of any of the defendants, and that the plaintiffs are entitled to a conveyance of such interest, upon Rose Van Cutsem & Co. or the plaintiffs paying to Mitchell any balance that may be due to him for moneys expended on their behalf, and one-third of the profits of the ventures in which that firm was concerned jointly with Mitchell. W. Nesbitt, K.C., and W. D. McPherson, K.C., for the plaintiffs. W. H. Blake, K.C., and R. C. H. Cassels, for the defendants.

AMERICAN STREET LAMP AND SUPPLY CO. v. ONTARIO PIPE LINE CO.—FALCONBRIDGE, C.J.K.B.—MAY 31.

Damages—Contract — Report — Appeal.]—Appeal by the defendants from the report of the Local Master at Hamilton, and motion by the plaintiffs for judgment on the report. The only substantial question argued was as to the amount of damages awarded for the loss on 35 lamps from the 23rd December, 1907, to the 1st September, 1908. The Chief Justice said that the plaintiffs were under contract with the city; the possibility of gain or loss to them on the installation and maintenance of the 35 lamps seemed to be beside the question; they would have been better off if the defendants had carried out their contract to the

extent of the $420.73 awarded by the Master, who was, therefore, right in his finding. Appeal dismissed. Judgment for the plaintiffs for the amount found due by the Master with costs of reference and of this appeal. H. E. Rose, K.C., for the defendants. Grayson Smith, for the plaintiffs.

GARNETT v. GARNETT—CLUTE, J.—MAY 31.

Payment—Dispute as to Fact—Action against Executrix.]—Action to recover from the executrix of the plaintiff's deceased brother, William H. Garnett, the sum of $355 and interest. The plaintiff and the deceased had dealt together in cattle, and the plaintiff alleged that he had paid the deceased $355 in the expectation that a certain cheque for $710, given to the plaintiff by a customer of the two, would be paid, whereas in fact it was not paid. The whole question was whether or not the plaintiff did in fact pay over the $355 to the deceased. Upon the whole evidence the plaintiff failed to satisfy the learned Judge that the amount was in fact paid. Action dismissed with costs. A. E. Watts, K.C., for the plaintiff. W. T. Henderson, for the defendant.

ECKARDT v HENDERSON ROLLER BEARING CO.—MASTER IN CHAMBERS—JUNE 1.

Summary Judgment—Rule 603—Lease—Company—Directors —Estoppel.]—Motion by the plaintiff for summary judgment under Rule 603 in an action for rent under a lease. The only defence alleged was that the lease was not approved of or executed under the instructions of the board of directors of the defendant company. In reply to this it was shewn that this lease was in question in an action for the first year's rent. In this the statement of defence denied execution by the company. The action came on for trial, and by consent judgment was given for the plaintiff. The plaintiff also exhibited a letter written by the defendant company's solicitor to the plaintiff's solicitors authorising the plaintiff to endeavour to lease the premises in question. The

Master said that unless summary judgment could be given, in these circumstances, the Rule had better be repealed. Order for judgment with costs. Grayson Smith, for the plaintiff. A. Ogden, for the defendants.

STAVERT v. MACDONALD—STAVERT v. BARTON—MASTER IN CHAMBERS—JUNE 1.

Pleading — Statement of Defence — Promissory Note — "Parental Influence."]—Motion by the plaintiff to strike out part of paragraph 7 of the statement of defence in each case, as embarrassing. In each action the plaintiff claimed upon a promissory note, and the part of the defence objected to (the same in each case) was that the note in question was "obtained from the defendant by the exercise of the parental influence of the vice-president of the Sovereign Bank and with the knowledge thereof of the general manager of the said bank." Held, that this was substantially the defence which was successful in Cox v. Adams, 35 S. C. R. 393. Powell v. Powell, [1900] 1 Ch. 243, referred to. Motion dismissed with costs to each defendant in the cause.
