The
# Ontario Weekly Notes

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## APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 22nd, 1916.

### *RE TOWNSHIP OF STAMFORD AND COUNTY OF WELLAND.

*Assessment and Taxes—Equalisation of Assessments—Fixed Assessments of Properties in Townships—Validation by Statute—Exemptions—Application to County Rates—Assessment Act, R.S.O.* 1914 *ch.* 195, *secs.* 3, 4, 40, 85, 86, 87, 89.

Appeals by the Municipal Corporations of the Townships of Stamford, Crowland, and Thorold, the Towns of Welland and Thorold, and the Village of Port Colborne, from an order of the Judge of the County Court of the County of Welland equalising the assessment for the county for the year 1916.

The appeals were heard by MULOCK, C.J.Ex., MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

D. Inglis Grant, for the Corporation of the Township of Stamford.

H. S. White and J. F. Gross, for the Corporations of the Townships of Crowland and Thorold and the Town of Welland.

T. F. Battle, for the Corporation of the Town of Thorold.

G. S. Macdonald, for the Corporations of the Villages of Port Colborne and Humberstone and the Township of Humberstone.

M. Brennan, for the Corporations of the Townships of Pelham and Wainfleet.

G. H. Pettit, for the Corporations of the Township of Bertie and Town of Bridgeburg.

L. C. Raymond, for the Corporation of the County of Welland.

MULOCK, C.J.Ex., in a written opinion, said that the Council of the Townships of Stamford and the Councils of other minor

*This case and all others so marked to be reported in the Ontario Law Reports.

municipalities in the county passed by-laws fixing the assessment of certain companies in respect of real properties situate in the respective minor municipalities at amounts less than the present values of such properties, for the purpose of promoting the establishment by these companies of industries in the municipalities, and these by-laws were by legislation declared valid.

The view of the County Court Judge, in making the final equalisation of the assessments of the county, as authorised by sec. 87, sub-sec. 8, of the Assessment Act, R.S.O. 1914 ch. 195, was that for equalisation purposes the actual value of all ratable property in each municipality, regardless of such fixed assessments, should be ascertained, and that the county rates should be levied ratably on the various municipalities in proportion to their aggregate value.

The appellants contended that the companies enjoying such fixed assessments were not assessable for county rates beyond the amount leviable in respect of the fixed assessments, and that for all except school rate purposes the fixed assessments must be taken as the actual value of the properties in question.

The learned Chief Justice, taking the case of Stamford as typical, set out its by-law, and the validating Act, 5 Edw. VII. ch. 78; and said that, in his opinion, the by-law was not open to the narrow construction contended for by the respondents, viz., that the limitation of the assessment and taxation of the Ontario Power Company of Niagara Falls is confined to assessment and taxation for the benefit of the township only, and does not apply to assessment and taxation for the purpose of county (other than school) rates.

Sections 40, 85, and 86 of the Assessment Act were referred to in support of the judgment below; and these sections, and also secs. 3, 4, and 89, were considered by the learned Chief Justice.

The solution of the question, he said, was furnished by giving effect to the evident intention of the by-law and validating statute. The excess in values of the properties over their fixed assessments, being thereby exempt from assessment or taxation, should be disregarded by the county valuators, as are places of worship, school properties, municipal buildings, and other properties which are not ratable. No distinction can be drawn between exemption by general Act and exemption by municipal by-law given effect to by special statute. Properties exempt from assessment and taxation by the general Act are not valued by the county valuators for equalisation purposes, and exempted values of the properties in question should in like manner be disregarded.

The appeal should be allowed with costs.

MEREDITH, C.J.C.P., and LENNOX, J., were also of opinion, for reasons stated by each in writing, that the appeal should be allowed.

RIDDELL and MASTEN, JJ., were of opinion, for reasons stated by each in writing, that the appeal should be dismissed.

*Appeal allowed;* RIDDELL *and* MASTEN, JJ., *dissenting.*

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SECOND DIVISIONAL COURT. MAY 22ND, 1916.

## *REX v. DUCKWORTH.

*Criminal Law—Murder—Misdirection and Nondirection—Evidence of Witnesses at Coroner's Inquest Read to them at Trial—Contradiction of Former Testimony—Jury not Warned against Accepting what was Read as Evidence against Prisoner—Canada Evidence Act, R.S.C.* 1906 *ch.* 145, *secs.* 9, 10, 11—*Substantial Wrong or Miscarriage—Criminal Code, secs.* 1018, 1019—*New Trial.*

The defendant was tried before KELLY, J., and a jury, in February, 1916, on an indictment for the murder of one Strutt on the 2nd November, 1915, and was found "guilty" and sentenced to be hanged.

Strutt was shot by the defendant; the defence was, that the shooting was accidental.

A coroner's inquest had been held on the day of the killing, at which Nellie Strutt, wife of the deceased, Olive Duckworth, wife of the defendant, and Hamilton Duckworth, brother of the prisoner, among others, gave evidence; the same three gave evidence upon the preliminary investigation at which the defendant was committed for trial; and at the trial, they all three again testified. Their testimony at the trial was in several respects contradictory of what they had sworn to on the previous occasions; and counsel for the Crown, in his examination of these witnesses, whose attitude was hostile, drew their attention to their testimony previously given, and read much of it to them.

The defendant applied to KELLY, J., for a reserved case, on the ground of misdirection, in that it was the duty of the trial Judge to instruct the jury that, while they could refuse to believe the evidence of any or all the witnesses called, they could not substitute for the evidence so rejected any evidence which had

not been sworn to before them, and bring in a verdict based on evidence given in the earlier proceedings, and that any such evidence must not weigh with them in arriving at their verdict.

The learned Judge reserved a case accordingly, stating the facts as above, and submitting the question: "Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them, given at the inquest or at the preliminary investigation?"

The case was heard by MEREDITH, C.J.C.P., CLUTE, RIDDELL, LENNOX, and MASTEN, JJ.

C. R. McKeown, K.C., for the defendant.

J. R. Cartwright, K.C., and Edward Bayly, K.C., for the Crown.

CLUTE, J., read a judgment in which he set out portions of the trial Judge's charge and portions of the evidence. He said that counsel for the Crown in effect placed before the jury evidence taken at the inquest, not by asking questions in the ordinary way—even leading questions—but by reading a large portion of such evidence before the questions were asked. It was not open to question, the learned Judge said, that, if the evidence of the witnesses taken at the inquest had been tendered at the trial as part of the Crown's case, it must have been rejected. It was not the case of secondary evidence being tendered, the witnesses being dead or out of the country. Here it was urged that what took place on the examination of the witnessess who had previously given evidence at the inquest entitled the jury at the trial to receive and give weight to the evidence so taken at the inquest, because (it was said) the witnesses, although called by the Crown, proving adverse and having denied their evidence given at the inquest, might be contradicted by the production of the evidence at the inquest; and, that evidence having been proved by the coroner and put in, the jury could treat it as evidence for all purposes, and therefore in support of the facts tending to prove the prisoner's guilt. This was a startling proposition.

The learned Judge then examined a large number of cases cited by counsel for the Crown, and said that none of them supported the argument; and that secs. 9, 10, and 11 of the Canada Evidence Act, R.S.C. 1906 ch. 145, did not in any way strengthen the Crown's contention.

The learned trial Judge told the jury that it would be for them to come to a conclusion with reference to the statements made by individual witnesses at the trial and on a previous oc-

casion—"whether the particular witness has told the truth to-day, or told it on another occasion under oath." Again, the learned trial Judge said: "Some witnesses have to-day told a different story—that which has been read to you—as having been sworn to by them on two previous occasions." Nowhere did he point out to the jury that the evidence taken before the coroner was inadmissible as such and was receivable only for the purpose of contradicting the witnesses. He should have treated the evidence taken at the inquest as inadmissible; and, to the extent that it might be used on cross-examination to contradict witnesses, he should have cautioned the jury not to receive it as affirmative evidence of the facts sworn to at the inquest.

The answer to the question stated in the case should be "yes;" by the misdirection or nondirection a substantial wrong or miscarriage was occasioned (Criminal Code, R.S.C. 1906 ch. 146, sec. 1019); and there should be a new trial (sec. 1018).

RIDDELL and MASTEN, JJ., reached the same result, each giving written reasons.

MEREDITH, C.J.C.P., and LENNOX, J., dissented, each giving reasons in writing.

*New trial granted;* MEREDITH, C.J.C.P., *and* LENNOX, J., *dissenting.*

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SECOND DIVISIONAL COURT. MAY 22ND, 1916.

## DAFOE v. McGUINNESS.

*Chattel Mortgage—Description of Goods—General Words Following Description of Specific Articles—Seizure under Execution in Hands of Transferee from Execution Debtor—Validity of Transfer—Chattel Mortgage Made by Transferee—Bona Fides—Interpleader Issue—Onus—Finding of County Court Judge—Appeal.*

Appeal by the defendant U. M. Wilson, claimant under a chattel mortgage dated the 7th January, 1916, from the judgment of the Judge of the County Court of the County of Lennox and Addington, in an interpleader issue as to the ownership of animals seized under the plaintiffs' execution against one Morgan. The issue was found at the trial in favour of the plaintiffs as to four of the animals seized.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

H. E. Rose, K.C., for the appellant.

J. L. Whiting, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.C.P., in a written opinion, said that the plaintiffs were merely execution creditors of Morgan, and had no better right to the goods in question than he had at the time of the seizure of them, in the possession of the McGuinnesses, on the 21st February. The goods being in the possession of the McGuinnesses, not in that of the execution debtor, the onus of proof was, in the interpleader proceedings, properly put upon the plaintiffs. The parties went to trial on pleadings in which the plaintiffs alleged that Morgan owned the goods in question until the 7th January, 1916, and then made a transfer of them to the defendant Sarah J. McGuinness, in fraud of his creditors. Upon such a claim as that, it was difficult to understand how the plaintiffs could hope to succeed if the goods in question were covered by the mortgage made by the McGuinnesses to the defendant Wilson, it never having been questioned that the defendant Wilson was a mortgagee in good faith, for value, and without notice of any ownership at any time by Morgan of the goods in question.

That the chattel mortgage was intended to cover all the goods the McGuinnesses possessed, no one could reasonably deny; nor could any one reasonably contend that it did not. It contained these very comprehensive words (following a description of specified chattels): "Together with all other the farm chattels, property, goods and effects, which are now upon the within-described premises." No question arose regarding the sufficiency or insufficieny of such a description to satisfy the requirements of the Bills of Sale and Chattel Mortgage Act. The goods in question were not on "the premises" when a bill of sale from Robert H. McGuinness was made to his sister, the defendant Sarah J. McGuinness, and the description in the mortgage was the same as that in the bill of sale; but it was not all the goods on the premises when the bill of sale was made, but when the chattel mortgage was made, that the general description covered.

There was no substantial evidence that the transfer of the property by Morgan to the McGuinnesses shortly before the 6th January, 1916, was made in fraud of creditors. That it turned out that Morgan was then insolvent, and soon afterwards absconded, was very far from proving that the McGuinnesses were fraudulent buyers.

The appeal should be allowed, and the finding of the trial Judge reversed, with costs throughout.

MASTEN, J., read a judgment to the same effect. Among other things, he said that such general words as were used in the chattel mortgage gave a good and sufficient description: Balkwell v. Beddome (1858), 16 U.C.R. 203; McCall v. Wolff (1885), 13 S.C.R. 130; and a general description, where locality is added, is in no way less effective because the instrument has previously described specifically and minutely other articles upon the locus in quo: Harding v. Coburn (1847), 12 Metc. (Mass.) 333.

LENNOX, J., agreed in the result.

RIDDELL, J., dissented, for reasons stated in a written opinion. He said that he entirely agreed with the County Court Judge that, if the animals now in question had been the property of Robert H. McGuinness, they would have been specifically named in the bill of sale and in the chattel mortgage; and that the Judge was amply justified in finding that the alleged transfer by Morgan to the McGuinnesses could not be supported.

*Appeal allowed;* RIDDELL, J., *dissenting.*

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SECOND DIVISIONAL COURT. MAY 22ND, 1916.

## GOULET v. CANADIAN NORTHERN ONTARIO R. W. CO.

*Fire—Setting out—Negligence—Railway—Spreading of Fire on Windy Day—Destruction of Buildings—Circumstantial Evidence—Findings of Jury.*

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages or compensation for the loss of buildings of the plaintiff burned by a fire said to have been caused by sparks from a fire set out by the defendants' servants. The plaintiff's judgment was for $1,400 and costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. F. Macdonnell, for the appellants.

C. G. O'Brian, K.C., for the plaintiff, respondent.

LENNOX, J., in a written opinion, said that on the 22nd October, 1915, a windy day, about ten o'clock in the morning, a foreman in the defendants' employment lighted a fire on the defendants' property within a distance of less than 200 feet of the plaintiff's

barn and stable. These buildings were discovered to be on fire, and were destroyed, shortly after one o'clock on that day. The jury found that the fire which destroyed the plaintiff's barn and stable was caused by the negligence of the defendants; that the negligence was, "should not have lighted the fire on such a windy day, or should have stayed and watched it till it was burned out;" and assessed the plaintiff's damages at $1,400.

It was impossible, the learned Judge said, to disturb these findings. There was ample evidence to support them, and they were brought in after a very able and explicit charge. The questions were entirely for the jury; and there was nothing in the evidence to suggest that they came to a wrong conclusion. There was absolutely no evidence to support the argument that the fire originated by sparks from tobacco pipes.

The appeal should be dismissed with costs.

RIDDELL and MASTEN, JJ., concurred.

MEREDITH, C.J.C.P., read a judgment in which he discussed the evidence, and referred to Furlong v. Carroll (1882), 7 A.R. 145, and the Accidental Fires Act, R.S.O. 1914 ch. 118. There was, the learned Chief Justice said, circumstantial evidence upon which reasonable men could find that the proximate cause of the fire which destroyed the plaintiff's buildings was the fire which was negligently lighted and attended to by the defendants' workmen in the usual course of the performance of their duties as servants of the defendants; and the appeal should be dismissed.

*Appeal dismissed with costs.*

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SECOND DIVISIONAL COURT. MAY 22ND, 1916.

## *BENSON v. SMITH & SON.

## *A. B. ORMSBY CO. v. SMITH & SON.

*Mechanics' Liens—Liability of School Lands and Buildings—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, secs. 2 (a), 3—Time for Registering Lien of Sub-contractors—Work Done by Direction of Architect long after Materials Placed in Building—Sec. 22 (2) of Act.*

Appeal by the defendant Mortimer, assignee for the benefit of creditors of the defendants Smith & Son (contractors), and cross-appeal by the plaintiff the A. B. Ormsby Company, from the

judgment of the Local Master at Welland in actions to enforce mechanics' liens.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., for the appellant Mortimer.

V. H. Hattin, for the appellants the Ormsby Company.

A. C. Kingstone, for the plaintiff Benson.

MEREDITH, C.J.C.P., in a written opinion, said that the land-owners were public school trustees, and the liens were registered against lands upon which a school-building had been erected. The land-owners had no interest in the controversy; they owed so much money to the contractors, apparently more than enough to pay all existing liens, and so were substantially unconcerned in the question to whom it should go, being able and quite ready to pay.

The defendant Mortimer had the right to appeal, and the one ground urged in support of his appeal was, that land held by public school trustees for public school purposes was not within the provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

The learned Chief Justice referred to secs. 2 (*a*) and 3 of the Act, and to General Contracting Co. v. City of Ottawa (1910), 1 O.W.N. 911; and said that there was no reason for excluding public school lands and buildings from the enactment; and all the later cases in the other Provinces held public schools to be within such an enactment.

The main appeal should be dismissed.

The plaintiffs the A. B. Ormsby Company were held by the Master at the trial to have lost their lien by failure to register it within the time-limit of the enactment. These plaintiffs' contract was to supply doors for the school; the doors were supplied in August; and, if the 30 days allowed for registering the lien ran from the day of the delivery or from the day when they were placed in the building, the lien was lost; but, towards the end of the year, the architect insisted upon some changes being made in the doors; these plaintiffs made the changes early in January, and registered their lien within 30 days from the date of making the changes.

The Chief Justice referred to sec. 22 (2) of the Act and to Kalbfleisch v. Hurley (1915), 34 O.L.R. 268, and cases there cited, and said that the question when the time finally ran out was mainly a question of fact.

After a review of the evidence, he said that, although it seemed

to him that the architect was wrong in his contention, and that the persons alone answerable for the neglect to get his approval regarding the doors were the contractors, and although he entertained the strongest suspicions that the architect's contention was acceded to mainly to retrieve the right of lien which these plaintiffs had lost by neglecting to register a lien earlier, yet there was the concurrence of contractors, sub-contractors, and owners, through the architect, in treating the sub-contract as incomplete and in having it completed early in January—a course which other creditors of the contractors could not prevent and could not successfully contend was not binding upon them.

Not without some hesitation, the Chief Justice was of opinion that these plaintiffs were entitled to enforce their lien, and that their appeal should be allowed with costs.

LENNOX, J., read a judgment (in which MASTEN, J., concurred) to the same effect, as regards both appeals, giving a review of the cases applicable to each.

RIDDELL, J., agreed in the result.

*Appeal dismissed; cross-appeal allowed.*

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SECOND DIVISIONAL COURT. MAY 23RD, 1916.

## REX v. BAUGH.

*Criminal Law—Application for Removal of Indictment from Sessions to Assizes—Postponement of Trial—Effect of.*

Appeal by the defendant from the order of SUTHERLAND, J., ante 261.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., RIDDELL, LENNOX, and MASTEN, JJ.

J. M. Godfrey, for the defendant.

Edward Bayly, K.C., for the Attorney-General.

THE COURT dismissed the appeal.

SECOND DIVISIONAL COURT. MAY 26TH, 1916.

## *RE PARKIN ELEVATOR CO. LIMITED.

## *DUNSMOOR'S CASE.

*Company—Winding-up—Creditor's Claim—Special Privilege over other Creditors—"Clerk or other Person"—"Arrears of Salary or Wages"—Winding-up Act, R.S.C. 1906 ch. 144, sec. 70—Sales-agent—Commissions.*

Appeal by the liquidator of the company from the order of FALCONBRIDGE, C.J.K.B., ante 66.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

M. A. Secord, K.C., for the appellant.

P. Kerwin, for D. A. Dunsmoor, the respondent.

MEREDITH, C.J.C.P., read a judgment in which, after stating the facts, he said that three things must be established before any one claiming a privilege under sec. 70 of the Winding-up Act, R.S.C. 1906 ch. 144, could have it given to him: (1) the claim must be one of a "clerk or other person" in, or having been in, the employment of the company, in or about its business or trade; (2) for "arrears of salary or wages due and unpaid" at the time of the making of the winding-up order; and (3) must not exceed "the arrears which have accrued . . . during the three months next previous to the date of such order."

Treating the enactment as remedial and giving it such liberal construction as will best ensure the attainment of its object according to its true meaning and spirit (sec. 15 of the Interpretation Act, R.S.C. 1906 ch. 1), the person seeking its benefit must bring his case fairly within its provisions: the onus is upon him.

Reference to the Wages Liability Act, R.S.C. 1906 ch. 98; the Companies Act, R.S.C. 1906 ch.79, sec. 166; the Wages Act, R.S.O. 1914 ch. 143; the Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 231; the Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 174; In re Earle's Shipbuilding and Engineering Co., [1901] W.N. 78; The Elmville (No. 2), [1904] P. 422; Re Klein, [1906] W.N. 148; Re Morlock and Cline Limited (1911), 23 O.L.R. 165; Re Hartwick Fur Co. Limited, Murphy's Claim (1914), 6 O.W.N. 363; and said that the cases had already gone to the furthest extent which the elasticity of the words of the enactment would permit—whether they had or had not been overstretched in any case.

It seemed to the Chief Justice to be quite contrary to any reasonable meaning that could be attributed to the words "salary or wages" which a "clerk or other person" has earned from the company, to include that proportion of the price of the goods which the respondent was to have for the sales made by him; although, having regard to that which the respondent was bound to do under his agreement, he might well be a person in the employment of the company, if there were not the other restricting words in the enactment in question: see Hamberger v. Marcus (1893), 157 Penn. St. 133; Brierre & Sons v. Creditors (1891), 43 La. Ann. R. 423; Henderson v. Koenig (1902), 168 Mo. 356; Castle v. Lawlor (1879), 47 Conn. 340.

The appeal should be allowed, and the ruling of the Local Master restored.

MASTEN, J., read a judgment in which he expressed the opinion, after a consideration of the facts and reference to authorities, that the respondent was an independent contractor, and not an employee entitled to the benefit of the statute.

The appeal should be allowed.

RIDDELL and LENNOX, JJ., agreed in the result.

*Appeal allowed.*

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## HIGH COURT DIVISION.

CLUTE, J. MAY 22ND, 1916.

## MATCHETT v. STOFFEL.

## STOFFEL v. MATCHETT.

*Promissory Note—Account—Interest—Reasonable Rate—Items of Claim and Cross-claim—Evidence—Hearsay—Admissibility as Part of Res Gestæ—Action and Cross-action—Consolidation—Judgment—Reconveyance of Land and Discharge of Mortgage—Costs.*

The first action was upon a promissory note for $1,267.96, dated the 23rd April, 1914, payable on the 1st May, 1914, with interest at 12 per cent. per annum after due until paid. This note represented a balance alleged to be due upon a long account represented by a series of notes made by the defendants, husband and wife, to the plaintiff. The defendants alleged that nothing was due to the plaintiff, and that no value or consideration was given for the note.

The second action was brought by the Stoffels, husband and wife, against Matchett, to recover moneys overpaid by reason of exorbitant charges for interest and to set aside certain conveyances and mortgages of land made by the Stoffels to Matchett, and for an account, and for other relief.

In the second action a reference had been directed and a report made by a Local Master; but this did not cover four items of the Stoffels' claim aggregating $861.

The two actions were tried together, without a jury, at Simcoe.

T. R. Slaght, K.C., for Matchett.

H. D. Petrie, for the Stoffels.

CLUTE, J., read a judgment in which he stated the facts at length. He held that the Master's report in the second action, not having been appealed against, was conclusive as to the matters disposed of by the Master; also that the Master's finding that 12 per cent. was a reasonable rate in the circumstances, was final and binding upon the parties.

The learned Judge then dealt with the four items above referred to. These were charges made by Barney Stoffel against Matchett. The first of these items, $351, the learned Judge reduced to $60; upon the second item, nothing was allowed; and upon the third, $39.

The fourth item arose out of a land transaction. Barney Stoffel was a timber-jobber. He wished to purchase certain timber lands, and asked Matchett to advance the purchase-money and to take the deed in his own name, upon the understanding that Matchett would convey to Stoffel when the advances were repaid. Matchett contended that the purchase was made by him, and that all that Stoffel was entitled to was to take off the timber. Matchett sold the land after the timber was taken off, for $350, which, the Stoffels contended, should be credited to them. The learned Judge finds that Matchett held the land in trust; that he was paid by the Stoffels the amount advanced with interest at 12 per cent.; and that he was accountable to them for the $350 which he realised for the land after the timber and wood had been taken off, with interest from the date of the sale.

In reaching this conclusion, the learned Judge accepted the evidence of a solicitor who acted for the vendors in the sale of the timber land to Stoffel. It was objected that what Stoffel said to Reid was not admissible—that it was hearsay evidence; but, the learned Judge said, it was admissible as part of the res gestæ—as a declaration of instructions which accompanied and explained the transaction in issue: Phipson on Evidence, 4th ed., p. 43;

Thomson v. Trevanion (1693), Skin. 402; Rouch v. Great Western R. W. Co. (1841), 1 Q.B. 51, 60; Perkins v. Vaughan (1842), 6 Jur. 1114; Fellowes v. Williamson (1829), Moo. & Malk. 306; Wright v. Tatham (1838), 5 Cl. & F. 670, 689.

The actions should be consolidated and judgment entered for Matchett against the Stoffels for $623.37, less $449, with interest on $350 at 12 per cent. from the date of the receipt thereof by Matchett to the 9th February, 1916; interest at 5 per cent. should be allowed on the balance to the date of the entry of judgment. Upon payment by the Stoffels of the amount found due, Elizabeth Stoffel is entitled to a reconveyance of the lands conveyed by her to Matchett and to a discharge of the mortgage made by her in his favour. No costs in either action.

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MIDDLETON, J. MAY 22ND, 1916.

## RE HORD.

*Will—Construction—"Farm Stock and Implements and other Personal Effects"—"Household Effects"—Money and Securities for Money—Residuary Bequest—Persons Entitled to Share—Legatees—Inclusion of Devisees.*

Motion by the executors of John Hord, deceased, for an order determining certain questions arising as to the construction of the will of the deceased.

After directing payment of his debts, the testator disposed of all his real and personal estate, first by giving to his son Peter a certain farm; then to his son John another farm, charged with certain provisions for the maintenance of the testator's widow. Then followed four legacies, one to each of the testator's four daughters, amounting in the whole to $1,500. He then directed that a third parcel of land should be sold, and that the legacies to the daughters should be paid out of the proceeds of the sale of his personal property, except his household effects, and out of the proceeds of this lot. The household furniture and effects, save two articles left to a daughter, were given to the wife. Then followed this provision: "I direct that should my son Peter . . . choose to take all my farm stock, and implements and other personal effects except my furniture and household effects and pay the hereinbefore mentioned legacies out of the same he may do so." All the residue of the estate not disposed of, he gave "unto my said legatees herein mentioned share and share alike."

Peter elected to take the farm stock, implements, and other personal effects, except the furniture and household effects, and undertook to pay the legacies.

The will was made nearly thirty years before the death of the testator.

At the time of the death of the testator, he owned the parcel of land given to John and the parcel directed to be sold; but he had conveyed to Peter the parcel given to Peter by the will. He left farm stock valued at $1,428, book-debts and notes $759, moneys secured by mortgage $582, and cash in bank $10,524—in all about $13,300. It was conceded that upon Peter's election he took the farm stock; but he claimed to be entitled to the other personal property specified. This claim was contested by the other members of the family. It was shewn by affidavit that at the date of the will the testator had about $4,000 invested in farm stock and equipment, and but little ready money.

The motion was heard at the London Weekly Court.

G. G. McPherson, K.C., for the executors.

J. M. McEvoy, for Peter Mark Hord.

T. G. Meredith, K.C., for all other parties.

MIDDLETON, J., in a written opinion, said that the word "effects" was of the widest possible significance, and would, unless controlled by its context, cover the entire personal estate of the testator. The mere fact that there is a residuary bequest, and that the giving of this wide meaning to "effects" would leave no residue to be disposed of, was not in itself sufficient to narrow the meaning of the word; nor should the ejusdem generis rule be applied to its full extent.

There was sufficient in the will, however, to satisfy the learned Judge that the testator did not mean "effects" to have the significance contended for by Peter—the testator regarded his personal effects as something other than his entire personal estate.

Reference to Hammill v. Hammill (1884), 9 O.R. 530; Gibbs v. Lawrence (1860), 7 Jur. N.S. 137; Re Pink (1902), 4 O.L.R. 718; Anderson v. Anderson, [1895] 1 Q.B. 749; Earl of Jersey v. Neath Guardians of the Poor (1889), 22 Q.B.D. 555; Larsen v. Sylvester & Co., [1908] A.C. 295; Hodgson v. Jex (1876), 2 Ch. D. 122; King v. George (1876), 4 Ch. D. 435; Lippincott's Estate (1896), 173 Penn. St. 368.

The will speaks of "other *personal* effects;" and to the use of "personal" great significance must be attributed, particularly when it is borne in mind that the testator had just spoken of his "household effects." "Personal effects" designates articles associated

with the person, just as "household effects" denotes articles belonging to the house—and this is emphasised when, in the immediately following sentence, the testator, having dealt with his household effects and his personal effects, proceeds to deal with the residue of his estate.

The determination should be adverse to Peter's contention.

The other question was: Who were entitled to share in the residuary estate? The conclusion was, that all those beneficially entitled under the will to either realty or personalty were intended to be included in the comprehensive expression "legatees." Reference to Termes de la Ley, sub verb. "Legacy;" Sutton v. Sutton (1882), 22 Ch. D. 511, 517.

Order declaring accordingly; costs out of the estate.

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MIDDLETON, J., IN CHAMBERS. MAY 22ND, 1916.

## RE ANNETT.

*Lunatic—Order Declaring Lunacy—Recovery of Sanity—Motion to Quash Order and all Proceedings thereunder—Mortgage Made by Committee with Approval of Court—Attempt to Invalidate—Irregularities—Amendment of Master's Report—Proof of Insanity—Affidavits—Rule* 226*—Protection of Mortgagee—Judicature Act, R.S.O.* 1897 *ch.* 51, *sec.* 58 (11)—*Order Superseding Declaration of Lunacy—Lunacy Act, R.S.O.* 1914 *ch.* 68, *sec.* 10 (5).

Motion by George Aaron Annett for an order quashing an order made by BOYD, C., on the 10th May, 1911, declaring the applicant a lunatic and referring it to a Local Master to appoint a committee and devise a scheme for maintenance, and to quash all proceedings taken under that order, particularly a mortgage placed upon the property of the applicant under the direction of an order confirming the report of the Master. The report stated that the Master had appointed the applicant's wife committee of his estate, and that, owing to the existence of debts, it was necessary that a mortgage should be placed upon a parcel of land owned by the applicant. The report was, by order, amended in respect of the description of the property to be mortgaged, but only in one part of the report; in another part the description was incorrect, and so remained. The mortgage was then made by the committee, and money advanced by the mortgagees, and used in paying the debts.

On the 26th May, 1914, an order was made by MEREDITH, C.J. C.P., declaring that the applicant had recovered his sanity; but no order had yet been made superseding the order of the 10th May, 1911.

The applicant in person.
N. S. Gurd, for the mortgagees.

MIDDLETON, J., in a written opinion, said that the order sought was not that provided for by the Lunacy Act, R.S.O. 1914 ch. 68, sec. 10 (5), but such an order as would invalidate the mortgage placed upon the applicant's property.

There was very clear evidence of his insanity at the time the original order was made; and it clearly appeared that he was served with the original petition. The formal order issued declared him a lunatic; if it had said "a person of unsound mind," it would have been sufficient. It was not necessary to serve the order upon him.

The error in the report did not invalidate the mortgage; if necessary, the report might be amended nunc pro tunc. The report having been confirmed before the amendment, it was not necessary that it should be again confirmed after the amendment.

The proof of insanity consisted entirely of affidavits; but the Consolidated Rules apply to all proceedings in Court, and Rule 226 provides that evidence upon a motion may be given by affidavit.

The position of the mortgagees, who advanced the money in good faith, upon the strength of the mortgage and the proceedings in Court, would not be affected if it were true that the money was not properly applied under the Master's report.

The proceedings were all substantially regular; and, even if they were not, the mortgagees were entitled to protection. A mortgagee is a purchaser pro tanto within the meaning of sec. 58 (11) of the Judicature Act, R.S.O. 1897 ch. 51.

Application dismissed with costs, unless the applicant desires to take an order superseding the lunacy save as to all matters and things done under the original order. If so desired, the order will be made, and the mortgagees should then be allowed to add their costs to their claim.

BOYD, C. MAY 25TH, 1916.

## *MARTIN v. JARVIS.

*Vendor and Purchaser—Agreement for Exchange of Properties—Terms of Payment of Balance—"Negotiable Paper or Cash"—Uncertainty—Specific Performance—Costs.*

Action to set aside and vacate a conveyance of land by the plaintiff to the defendant and its registration by the defendant, on the ground that it was made without consideration, and that it was fraudulently obtained and registered.

There was an agreement between the parties for an exchange of properties (lands and chattels). Upon the valuation of the properties, there was an overplus of $8,996 in favour of the defendant, and for this, by the agreement, the defendant was to take from the plaintiff "negotiable paper or cash."

The defendant counterclaimed for specific performance of the agreement.

The action was tried without a jury at Guelph.

R. McKay, K.C., for the plaintiff.

H. Guthrie, K.C., for the defendant.

THE CHANCELLOR read a judgment in which he set out the facts, and said that the plaintiff's contention was, that the agreement was too vague for specific enforcement because of the uncertainty and indefiniteness of the expression "negotiable paper or cash for the balance due on the property."

These words not having an absolute fixed meaning, parol evidence was admissible to explain the position of the parties, the subject-matter of the contract, and other surroundings: Pomeroy on Contracts, 2nd ed., pp. 226-8; Fry on Specific Performance, 4th ed., p. 164; Bank of New Zealand v. Simpson, [1900] A.C. 182, 187.

The case Reynolds v. Foster (1912-13), 3 O.W.N. 983, 21 O.W.R. 838, and, in appeal (1913), 4 O.W.N. 694, 23 O.W.R. 933. and Clement v. McFarland (1912), 4 O.W.N. 448, 23 O.W.R, 613, appeared to be in conflict with McDonald v. Murray (1883-85), 2 O.R. 573, 11 A.R. 101, and Lightbound v. Warnock (1882), 4 O.R. 187, and should not be accepted as decisive in this case, even if directly applicable. See also Christie v. Burnett (1886), 10 O.R. 609, 619; McDonald v. Murray (1884), 5 O.R. 559; Ozd v. Coombes (1884), 28 Sol. J. 378; Morrell v. Studd & Millington, [1913] 2 Ch. 648.

The contract might be treated as complete, and the provision as to "negotiable paper or cash" as a subsidiary stipulation; but, in any case, there could be no mistake as to the meaning of "negotiable paper." The plaintiff's own promissory note, without more, could not be regarded as "negotiable paper." The "paper" contemplated was something held by the plaintiff on which another was liable or which was secured substantially, as by mortgage on land.

The plaintiff's action should be dismissed with costs, including all reserved costs and costs of interlocutory proceedings up to this judgment. The defendant should have a judgment for specific performance, with a reference to the Local Master at Guelph to inquire and report as to title and as to the condition of the chattels and commodities included in the contract, and what is due to or payable by either party under the contract, and having regard to any changes or deteriorations that may have taken place pending litigation, and what, if any, damages are payable to the defendant upon the plaintiff's undertakings.

Costs of the reference and further directions reserved until after report.

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BRITTON, J. MAY 25TH, 1916.

## REID v. TOWN OF SAULT STE. MARIE.

*Municipal Corporations—Construction of Culvert—Lowering Grade of Street—Works Authorised by By-Law—Injurious Affection of Lands Fronting on Street—Remedy—Arbitration—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 325—*Encroachment upon Land—Damages—Payment into Court—Costs.*

Action for damages for trespass and injurious affection of the plaintiff's property, a house and lot fronting on Central avenue in the city of Sault Ste. Marie, by building upon a part of the plaintiff's land and by the construction of a bridge or culvert in the street and by raising the grade of the street, causing water to flow upon the plaintiff's premises.

The action was tried without a jury at Sault Ste. Marie.

U. McFadden and E. V. McMillan, for the plaintiff.

J. L. O'Flynn, for the defendant.

BRITTON, J., in a written opinion, said that the defendants did not expropriate any part of the plaintiff's property, nor were expropriation proceedings initiated. There was no by-law

authorising the raising of the grade of the highway; a by-law authorising the raising of $10,000 to provide funds for the erection of certain culverts, of which this was one, was passed by the council after submission to the electors. The raising of the grade was necessary to make a proper approach to the bridge, and there was no negligence on the part of the defendants in constructing the bridge or making the approach. The work was authorised by the by-law; and the plaintiff's sole remedy for the injurious affection of her land, if any, was under the arbitration clause of the Municipal Act, R.S.O. 1914 ch. 192, sec. 325: Pratt v. City of Stratford (1887), 14 O.R. 260; Taylor v. Gage (1913), 30 O.L.R. 75.

The plaintiff was entitled to compensation for a few inches of her land taken, which should be fixed at $100, the sum paid into Court by the defendants.

Judgment for the plaintiff for $100; in other respects action dismissed without prejudice to the claim of the plaintiff for compensation under sec. 325. No costs.

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BRITTON, J. MAY 25TH, 1916.

## WEDEMEYER v. CANADA STEAMSHIP LINES LIMITED.

*Negligence—Seaman Swept from Ship and Drowned—Action under Fatal Accidents Act—Failure to Prove Negligence Causing or Contributing to Death—Wages.*

Action under the Fatal Accidents Act, brought by the parents of William Wedemeyer, employed by the defendants as a seaman on board their steamship "C. A. Jaques," who, on a voyage from Sydney, Cape Breton, to Manchester, England, was, on the 19th July, 1915, swept overboard and drowned, to recover damages for his death.

The action was tried without a jury at St. Catharines and Toronto.

A. C. Kingstone, for the plaintiffs.

D. L. McCarthy, K.C., for the defendants.

BRITTON, J., in a written opinion, said that the negligence alleged was in overloading the vessel, in not providing a proper and sufficient life-line upon the deck which might have been caught

and held by the deceased, in not furnishing sufficient life-belts, in not properly distributing the life-belts, in not having life-boats ready to launch, and in placing incompetent men at the wheel to do the steering.

There was no doubt, the learned Judge said, that the plaintiffs' son was washed overboard by a wave; but, even if negligence in any particular was shewn, there was nothing to prove that that negligence was the cause of or contributed to the death.

In an effort to rescue the deceased after he was overboard, there was some delay in launching the life-boat by reason of its not being properly hung or the rope not being of the right strength; but there was nothing to shew that anything would have been accomplished if the life-boat had been launched in the quickest way. The sea was turbulent; it was a heavy gale; and the man was quickly lost to the sight of those on board. The chances were that the life-boat would have been lost rather than that the deceased would have been rescued.

Connolly v. Grenier, Connolly v. Martel (1909), 42 S.C.R. 242, distinguished.

Upon the evidence, it could not be found that the vessel was unseaworthy when she put to sea.

Reference to Hedley v. Pinkney & Sons S.S. Co. Limited, [1892] 1 Q.B. 58.

Assuming that there was defective equipment, unless the accident was caused by the defendants, there could be no liability. There was an adequate cause for the accident, and it was not lack of or defect in equipment.

There was no contributory negligence on the part of the deceased.

The plaintiffs were entitled, as administrators of the estate of the deceased, to $18.66 for wages.

The action should be dismissed except as to the wages, for which, if necessary, judgment should go. No costs to or against either party.

KELLY, J. MAY 27TH, 1916.

## RE BROMLEY.

*Deed—Settlement of Property—Application to Court to Confirm—Doubt as to Capacity of Settlor—Lunacy Act, R.S.O. 1914 ch. 68, sec. 37.*

Petition for an order confirming the appointment of the petitioners as trustees under a deed said to have been made by John Bromley and empowering them to administer his estate on the terms and in the manner set out in the deed. The application was professedly made pursuant to sec. 37 of the Lunacy Act, R.S.O. 1914 ch. 68.

The petition was heard at the Ottawa Weekly Court.

H. D. McCormick, for the petitioners.

G. F. Henderson, K.C., for the sons and daughters of John Bromley.

KELLY, J., in a written opinion, said that the deed was dated the 4th April, 1916; and the grantor's wife and four children, all of whom, as stated, were of full age at that date, were parties to it. In effect the deed was a settlement and disposal of the estate of the grantor; it gave the trustees power to do certain specified acts in the management thereof and to settle and compromise claims against the grantor; it provided for the maintenance and support of the grantor and his wife and of the latter during her widowhood, subject to which the estate was disposed of, on the death of the grantor, among his children in the manner therein set forth.

The petitioners and some of the children seemed to entertain doubts of the grantor's disposing capacity, and sought to overcome any difficulty that might arise in consequence thereof by obtaining the Court's confirmation of the deed.

If the grantor was, at the time of the execution of the deed, of disposing capacity, no confirmation would be necessary; if he lacked that capacity, and his condition brought him within the class of persons for the management and administration of whose estate and affairs sec. 37 made provision, the petitioners were asking something beyond the power of the Court to grant.

The application should be dismissed without costs; the dismissal to be without prejudice to any other application the petitioners or the other parties might be advised to make under the terms of the Act.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. MAY 29TH, 1916.

## RE CARPENTER LIMITED.

## HAMILTON'S CASE.

*Costs—Taxation—Proceedings under Winding-up Act—Contributories—Appeal—"Originating Motion in Court"—Tariff "A," Item 17.*

Appeal by D. Hamilton and four others from the taxation of their costs under the order of CLUTE, J., 35 O.L.R. 626, 9 O.W.N. 447, by which they were allowed their costs of proceedings before a Referee, in the winding-up of the company, in which the placing of their names on the list of contributories was confirmed, and of their successful appeal from the Referee's order.

K. F. Mackenzie, for the appellants.

J. A. Macintosh, for the liquidator, respondent.

FALCONBRIDGE, C.J.K.B., said that the taxation had proceeded upon a wrong basis—as under item 11 of Tariff "A," "Contested interlocutory motions in Court." The proceeding was not interlocutory, but, subject to the right of appeal, if any, resulted in a final judgment removing the names of these appellants from the list of contributories.

The matter should be remitted to the Taxing Officer to tax as under item 17 of Tariff "A" (originating motion). He should also tax and allow to the appellants the costs of this appeal.

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MORRIS v. MORRIS—MIDDLETON, J.—MAY 22.

*Contract—Agreement as to Land by Tenants in Common—Intention to Sell—Judgment for Partition or Sale—Postponement of Proceedings under, until Expiry of Period Mentioned in Agreement.*]—Action for an injunction and other relief, tried without a jury at Toronto. An incorporated company owned land used as a nursery-garden. The only shareholders were the plaintiffs (E. C. Morris and his wife) and the defendants (D. G. Morris and his wife). One Plumb proposed to purchase all the capital stock of the company and its assets except the land. The shares in the company were transferred to Plumb or his nominees; and the land was conveyed by the company to its shareholders as beneficial owners. They intended to sell the land, but had not

been able to do so. An agreement signed by the plaintiffs and defendants recited the conveyance of the land to them "with the intention of selling the same as soon as favourable opportunity shall offer" and provided for the management of the land until sold or till the 1st July, 1917. The learned Judge (in a written opinion) said that the only question to be determined was, whether, in the circumstances, there ought now to be a reference for partition or sale of the land, or whether there was an express or implied agreement suspending the right to a partition until after the 1st July, 1917. The proper inference from the agreement was, that the parties did agree that the property should be sold without any attempt to partition, and that this arrangement was to continue at any rate until the 1st July, 1917. During this period the management under the agreement is to continue until a sale shall be made. If, before that, there should be a difference of opinion concerning the desirability of selling, and that cannot be worked out without a reference, a supplementary order may be made referring that question to the Master. In the meantime the proper thing to do is to order a reference to the Master for partition or sale under the Partition Act, but directing the Master not to enter upon the inquiry until after the 1st July, 1917, and to reserve to the parties the right to apply for a supplementary order upon a difference arising as above or in case there is any difference as to the proceedings that should be taken in respect of a sale. H. E. Rose, K.C., for the plaintiffs. W. N. Tilley, K.C., for the defendants.

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STANDARD RELIANCE MORTGAGE CORPORATION v. BIETTE—RIDDELL, J., IN CHAMBERS—MAY 22.

*Mortgage—Actions for Foreclosure—Summary Judgment—Defences—Husband and Wife—Form of Judgment—Immediate Payment—Costs.*]—The plaintiffs brought six actions for payment or foreclosure upon mortgages made by the defendants Ellen M. Biette and Percy Biette, her husband, upon certain lands, the property of Ellen M. Biette. Affidavits were filed in which both defendants swore to merits, the husband that all the money had not been advanced, the wife that she was under the guidance of her husband and had no capacity for business. The Master in Chambers granted summary judgment, and the defendants appealed. RIDDELL, J., in a brief written opinion, said that from the examination of the wife the case was shewn to be the very common one of a wife placing all her business in the hands of her

husband as agent, the husband doing his best for the wife, but not succeeding so well as he anticipated. The wife knew what she was signing—she repudiated the thought that her husband was defrauding her—she trusted him implicitly, and he tried honestly to do his best for her. In these circumstances, the defence suggested for the wife could not succeed. But the judgment, as drawn up, contained a provision for immediate payment by the wife—that was wrong. Paragraphs 3 and 4 of the judgment must be cancelled. Instead thereof a clause might be inserted for the payment by the defendants forthwith after the making of the Master's report, etc., in the usual form (see Holmested's Forms, No. 905). In view of the mistake in the judgment, there should be no costs of the appeal. C. M. Herzlich, for the defendants. G. S. Hodgson, for the plaintiffs.

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HARVEY v. CITY OF TORONTO—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MAY 25.

*Appeal—Motion for Leave to Appeal from Order of Judge in Chambers—Rule 507—Particulars—Statement of Claim—Wrongful Acts of Defendants.*]—Motion by the defendants for leave to appeal from the order of SUTHERLAND, J., ante 260. The learned Chief Justice said that he had been unable to find any good reason for granting the leave sought under Rule 507. The case did not fall within any of the classes set forth in Holmested's Judicature Act, 4th ed., p. 1124. The defendants ought to know by what authority they did the acts complained of. There was, in the learned Chief Justice's view, no difficulty in pleading to the statement of claim without particulars. The examination for discovery of the officers of the defendant corporation would, no doubt, clear the atmosphere. Motion refused with costs to the plaintiff in any event. C. M. Colquhoun, for the defendants. R. C. H. Cassels, for the plaintiff.