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HIGH COURT OF JUSTICE.

TEETZEL, J., IN CHAMBERS. DECEMBER 3RD, 1909.

RE DOWLING.

Infant—Money in Court—Payment out to Testamentary Guardian —Directions of Will.

Application by William James Dowling, father of the infant William Loyal Dowling, for payment out of Court of money standing to the credit of the infant.

The money was paid in under the direction of the Judge of a Surrogate Court upon passing the accounts of the executor of the will of James Dowling, deceased.

The testator bequeathed $500 to the infant, "to be kept out at interest until he becomes of age—I devise William James Dowling to be paid the $500 willed to his son William Loyal above and he to be his guardian and to keep this money at interest as above mentioned."

J. T. White, for the applicant.

J. R. Meredith, for the infant.

TEETZEL, J.:—Notwithstanding that the money is in Court, and notwithstanding the many judicial rulings that money properly in Court belonging to infants will not be paid out except for maintenance of infants until they attain their majority, I think in this case the money should not have been paid into Court, but that the will of the testator should have been respected and the legacy paid to the applicant in accordance with the wish and direction of the testator, in the absence of strong reasons for not doing so.

In this case I can see no danger of the money being lost or misapplied by the father and testamentary guardian.

I think the case is within Re McDougall's Trusts, 11 P. R. 494, and that the application should be granted. Costs out of the fund.

LATCHFORD, J. DECEMBER 3RD, 1909.

HOGAN v. CITY OF BRANTFORD.

Pleading—Statement of Claim Disclosing no Reasonable Cause of Action—Con. Rule 261—Reference to By-law and Contract—Pleading Contradicted by Documents Referred to—Municipal Corporation—Contract with Company for Supply of Electric Light, etc.—By-law—Powers of Council—Assent of Electors—Statutes.

Motion by the defendants under Con. Rule 261 to strike out the statement of claim, on the ground that it disclosed no reasonable cause of action.

The statement of claim set forth that the plaintiff was a ratepayer of the city of Brantford and brought this action on behalf of himself and all other ratepayers and electors of Brantford to have by-law No. 1015 of the defendants the city corporation declared ultra vires and quashed. The by-law, passed on the 15th March, 1909, was stated to have authorised the making of the agreement therein referred to, of the same date, between the defendants, whereby the defendants the Western Counties Electric Company "agreed to supply the defendants the city corporation with electric arc lights, to supply and maintain electric current lamp poles, conductors, attachments, and all plant and apparatus required in connection with the said lights, and with electric current for power and lighting for municipal purposes, and with electrical current for power for private users." The plaintiff alleged that he protested against the passing of the by-law, yet the municipal council of Brantford passed it with knowledge that it was illegal, and the agreement between the defendants was thereupon entered into. And the plaintiff alleged that "the by-law is ultra vires and bad because the said electors have not sanctioned the moneys necessary to be expended in connection with the same."

W. T. Henderson, for the defendants the city corporation.

W. S. Brewster, K.C., for the defendants the Western Counties Electric Co.

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

LATCHFORD, J.:— . . . The by-law and agreement were produced upon the argument. As they are referred to in the statement of claim, they may, I think, be considered as forming part of it. The facts alleged in the pleading must, the defendants concede, be taken to be true for the purposes of this motion: Holme-

sted & Langton's Jud. Act, p. 465. But, if an averment regarding the by-law and agreement is found, upon reference to the by-law and agreement, to be untrue in fact, I think I must take notice of the untruth. It is alleged that by the agreement in question the electric company contracted to supply the city corporation "with electrical current for power for private users." There is in fact no such term in the agreement. The defendant company do undertake to furnish electric current to private users in and near Brantford, at prices not to exceed a certain maximum; but they do not agree to supply the city corporation with electric current for power for users, or for any but the public purposes of the corporation. The averment of fact in the pleading on this point, being contradicted by the very agreement upon which it is said to be founded, cannot, in my opinion, be regarded as true, even for the purpose of this motion.

The by-law is not, I think, invalid because not sanctioned by the electors. Neither the by-law nor the agreement falls within the prohibition of 9 Edw. VII. ch. 75 (O.), which applies only to by-laws and agreements passed or entered into after the 16th March, 1909. The by-law and agreement attacked escape by one day.

The by-law does not call for raising of money "not required for the ordinary expenditure of the municipality and not payable within the same municipal year," and sec. 389 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, has no application to it. Moreover, sec. 568 of the same Act empowers a municipal council to contract "for a supply of electric light for street lighting and other public uses for any number of years not in the first instance exceeding ten, and for renewing such contract from time to time for such period not exceeding ten years as the council may desire." The agreement attacked is but for five years, with the right on the part of the municipality, at its option, to extend the term for two successive terms, each of five years. The agreement falls within the scope of the power to make it, thus conferred on the municipality, and the averment—if such it may be called—in the statement of claim, that the by-law has not received the sanction of the electors, sets forth no ground upon which the by-law may be impeached.

Having regard to the provisions of the by-law, and the power of the municipality in the premises, I am of the opinion that the pleading discloses no cause of action, and should be struck out with costs. The plaintiff may, if he so desires, file an amended statement of claim within one week.

TEETZEL, J. DECEMBER 3RD, 1909.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLAY.

Mortgage—Interest post Diem—Compound Interest—Construction of Covenants—Items of Mortgage Account—Costs.

Appeal by the defendants the Leadlays from several rulings of the Master in Ordinary (see 14 O. W. R. 745) upon a reference to take mortgage accounts.

G. Kappele, K.C., and C. Kappele, for the appellants.

A. B. Cunningham, for the plaintiffs .

A. J. Russell Snow, K.C., for the defendants the Moores.

TEETZEL, J.:— . . . The Master, adopting the reasoning in Imperial Trusts Co. v. New York Security and Trusts Co., 10 O. L. R. 289, disallowed the appellants' claim to compound interest. . . . The language of the covenants here distinguishes this case from the Imperial Trusts Co. case, and is sufficiently comprehensive to shew that the parties intended that compound interest should continue to be computed not only during the term of the mortgage, but during the continuance of the security. . . .

I think the following portion of the covenant in this case, to which there was nothing corresponding in the Imperial Trusts Co.'s mortgage, marks the principal distinguishing features between the two cases, namely: "That interest in arrear and premiums of insurance or other sums of money paid by the mortgagees for the protection of this security, such as taxes, repairs, or other incumbrances, and all costs, charges, and expenses connected therewith, including the costs of any abortive sale or sales, shall bear interest at the rate aforesaid, and shall be compounded half-yearly, a rest being made on the said first day of November and May in each year until all arrears of principal and interest and such other sums are paid, and that we will pay the same and every part thereof."

It is impossible to read this covenant, associated with the covenant making the payments for taxes, etc., "a charge on said lands in favour of the mortgagees," as limiting the mortgagees' rights as to these payments to the period of the mortgage only. In other words, it is plain that such payments may be made by the mortgagees at any time either before or after the maturity of the mortgage. This being so, is it not equally clear that, when the mortgagors provide that "interest in arrear" and other sums which may be expended by the mortgagees "shall bear interest at the rate aforesaid and shall be compounded half-yearly," etc., "until

all arrears of principal and interest and such other sums are paid," etc., the parties intended that this covenant should extend to "such other sums" as might be expended and not repaid, both before and after maturity of the principal money?

It seems to me that making provision for compound interest until "such other sums are paid" is, by necessary implication, equivalent to saying that compound interest shall be computed until such sum for insurance, repairs, etc., which may be expended by the mortgagees at any time during the continuance of the security, are repaid.

The covenant at the end of the mortgage authorising payment of taxes, etc., and making such payments a charge upon the lands mortgaged, is co-extensive with the existence of the mortgage, and therefore the covenants for repayment must be similarly construed.

If this is the proper view, and I think it is, the case comes within the principle of Popple v. Sylvester (1882), 22 Ch. D. 98, which distinguishes In re European Central R. W. Co. (1876), 4 Ch. D. 33, which was the authority followed in St. John v. Rykert (1884), 10 S. C. R. 278. . . . See also Pringle v. Hutson, ante 153.

The covenant here, being, in my opinion, to pay compound interest until such other sums which the mortgagees may expend at any time during the continuance of the security are repaid, is in effect a covenant to pay compound interest during the same time.

Upon this item the appeal should be allowed. . . .

[On the question of appropriation of payments, appeal dismissed; on item of $4,600 surcharge, appeal allowed; on item of $3,279.22 surcharge, appeal allowed; on items of $800 and $441.87 surcharges, appeal dismissed; on claim for compensation during 1900 and 1901, appeal dismissed; on claim for annual allowances, appeal dismissed; ruling of Master as to apportionment of costs struck out by consent.]

No order as to costs of appeals, but counsel may speak to this if they desire.

DIVISIONAL COURT. DECEMBER 4TH, 1909.

RYAN v. McINTOSH.

Negligence—Injury to Person on Highway—Horses Left Unattended Running away and Causing Injury—Finding of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of BRITTON, J., 14 O. W. R. 482, dismissing the action, which was brought to recover

damages for injuries sustained by the plaintiffs by reason of the defendants leaving their horses unattended upon a highway so that they ran away and ran into the waggon in which the plaintiffs were seated, and so injured them. The case was tried without a jury, and the trial Judge found that there was no negligence on the part of the defendants.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

F. H. Thompson, K.C., for the plaintiffs.

J. M. Best, for the defendants.

FALCONBRIDGE, C.J.:—It appears to me that unless we can say that what defendant Ernest McIntosh did, or failed to do, here was negligence per se, this judgment cannot be disturbed. If there had been a jury, could they have been directed to find one way or the other? Surely not. The case must have been submitted to them, and if they had found in favour of the defendants, could we say that they were wrong? Here a Judge of great practical experience has found that the defendant was not guilty of negligence. His opinion ought to be treated with some deference. His finding is not based on misapprehension of any fact or facts, as was pointed out in Beal v. Michigan Central R. R. Co., 19 O. L. R. 502, at p. 506. Here the facts are clear, were not in dispute, and were fully grasped and apprehended by the trial Judge.

I think, therefore, on principle, that we ought not to interfere, unless we thought he was clearly wrong; but I am also of opinion that the learned Judge has come to the right conclusion.

The appeal must be dismissed, with the usual penalty of costs.

RIDDELL, J., agreed. He referred to and distinguished the case of Illidge v. Goodwin, 5 C. & P. 190, 192. He also referred to Myers v. Sault Ste. Marie Paper and Pulp Co., 3 O. L. R. 600, 33 S. C. R. 23; Clark v. Chambers, 3 Q. B. D. 327; Lynch v. Nurdin (1841), 1 Q. B. 29; Engelhart v. Farrant, [1897] 1 Q. B. 240; Melbourne Tramway Co. v. Spencer, 14 Vict. L. R. 95; Beven on Negligence, Can. ed., p. 545; Chase v. McDonald, 25 C. P. 129; Walton v. London Brighton and South Coast R. W. Co., 1 H. & R. 424, 14 W. R. 395; Sullivan v. McWilliam, 20 A. R. 627; Mann v. Ward, 8 Times L. R. 699; Frazer v. Vemler, 9 N. Y. 514; Wasmer v. Delaware Lackawanna and Western R. R. Co., 80 N. Y. 212; Wasmith v. Butler, 93 N. Y. 1; McMahon v. Kelly, 9 N. Y. Supp. 544; Dickson v. McCoy, 39 N. Y. 400; Griggs v. Flukenstein, 14 Minn. 81; Park v. O'Brien, 23 Conn. 339.

TEETZEL, J., dissented, saying that he felt bound to differ from the conclusion of the trial Judge, being of opinion that the admitted facts established a clear case of negligence against the defendant Ernest McIntosh, having due regard to the legal duty imposed upon every person who has charge of horses on a public highway to use reasonable and proper care and skill in their management and control, so as not to injure other persons using the highway. He referred to Dulieu v. White, [1901] 2 K. B. at p. 671; Illidge v. Goodwin, 5 C. & P. 190; Sullivan v. McWilliam, 20 A. R. 627; Fleuty v. Orr, 13 O. L. R. 59; Beal v. Michigan Central R. R. Co., 19 O. L. R. 502.

DIVISIONAL COURT. DECEMBER 4TH, 1909.

BORRETT v. GUESNER.

Fraud and Misrepresentation—Sale of Fruit Farm—Misstatement of Vendor as to Number of Trees—Absence of Actual Fraud—Executed Contract—Rescission—Damages for Deceit—Evidence—Failure to Shew Contract Induced by Statements of Vendor.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., dismissing with costs an action for rescission of a contract for sale by the defendant to the plaintiff of 7 acres of land in the township of North Grimsby, because of alleged false and fraudulent misrepresentation, or, in the alternative for damages for deceit.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and LATCHFORD, JJ.

E. F. B. Johnston, K.C., for the plaintiff.

P. D. Crerar, K.C., for the defendant.

The judgment of the Court was delivered by MULOCK, C.J., who, after setting out the facts and a portion of the evidence, said:—The plaintiff's case cannot be put any stronger than he puts it himself, and the only inference which it is safe to draw from the evidence is that the letter of Dr. Guesner (the husband and agent of the defendant) of the 8th March contains the only representations made by him. Although this letter was written after the actual signing of the agreement, still the plaintiff appears to have thought that he was not bound until Dr. Guesner repeated to him under his

hand his verbal representations, and the plaintiff accordingly refused to pay the deposit or to proceed with the contract until he obtained the written statement. When it was received, he was satisfied with its tenor, and carried out his contract. . . .

The letter reads as follows: " . . . The following varieties of peach trees are on fruit farm: peaches, 40 Wheatlets, 25 L. Free, 25 Fitzgerald, 10 Joe R. Pipe, 100 trees in all; cherries, Montmorency, Pickering, Rag, E. Morella, 75; plums, these are principally choice, fancy plums, and are composed of the following (varieties named), in all about 1,100; pears, these comprise the following, Bartletts (mostly), Duchess (few), Anjou (few), Flemish Beauties (2), Clapp's Favourite. . . ."

Analysing these representations, they are to the effect that there are on the land 100 peach trees, 75 cherry trees, and about 1,100 plum trees, and some pear trees. The letter does not represent the condition of the trees, whether young or old, thrifty, in bearing, or otherwise.

The onus was upon the plaintiff to shew any incorrectness in the statement contained in this letter, and he has not shewn that there were not the numbers of peach and cherry trees mentioned in the letter, and the evidence also establishes the fact that the peach and cherry trees spoken of by Dr. Guesner are those which he had planted the previous year, and which the plaintiff knew had not reached the bearing age.. Thus there has been no misrepresentation shewn in respect of the peach and cherry trees.

In his statement of claim the plaintiff admits that there were on the land 966 pear and plum trees. The letter does not give the number of pear trees, but simply enumerates 5 varieties, and it is not shewn that such pear trees were not upon the land. There was, therefore, no misrepresentation in regard to the pear trees.

The only remaining misrepresentation is in respect of the plum trees. For all that appears, plum trees of the variety named may be upon the land. As to the number, Dr. Guesner's letter does not speak definitely, merely stating "in all about 1,100." . . . It is for the plaintiff to shew to what extent the number of plum trees fell short of the approximate number mentioned in the letter. This he has not done. For all that appears, of the 966 plum and pear trees at least 950 may have been plum trees alone. Comparing this number with what Dr. Guesner states in his letter as to the number of plum trees . . . it cannot, I think, be said that there was any material misrepresentation. The letter does not pretend to state the precise number, but merely gives an approximate number, and is another way of saying that there may

be more or less than 1,100 plum trees, but that that is about the number. I fail to see how such a statement could have misled the plaintiff.

The question is, what effect is to be given to the representation . . . with reference to the number of plum trees. The evidence does not establish any positive fraud on Dr. Guesner's part. There is nothing to shew that he was not speaking in perfect good faith when saying that there were about 1,100 plum trees. . . . If his opinion was not an honest one, it was for the plaintiff to have given such evidence as would warrant that conclusion. . . . There was an absence of actual fraud.

The plaintiff has failed to prove that the estimate was not an honest one. The contract between the parties is an executed one, and has also been adopted by the plaintiff by his taking possession, cultivating, and gathering a crop of fruit from the land. In such a case, in the absence of actual, positive fraud, the Court will not, I think, set aside the transaction. . . .

[Reference to Bell v. Macklin, 15 S. C. R. 581; Brownlie v. Campbell, 5 App. Cas. 925; Petrie v. Guelph Lumber Co., 11 S. C. R. 450.]

The claim for a rescission must fail.

The next question is, whether the plaintiff is entitled to damages for deceit.

In an action of deceit the plaintiff must shew misrepresentations amounting to fraud on the part of the defendant, and also misrepresentations sufficiently substantial to warrant the inference that but for such misstatements the plaintiff would not have entered into the contract. . . .

[Reference to Smith v. Chadwick, 20 Ch. D. 27, 45, 9 App. Cas. 187; Derry v. Peek, 14 App. Cas. 373.]

No doubt, it was possible for Dr. Guesner to have informed himself accurately as to the exact number of plum trees, and, had he done so, and then represented that there were in all about 1,100 plum trees—the number in fact being under 966—there would be some evidence that his estimate was not made in good faith. But here, at least, he was merely loose in his representation. By the exercise of greater care he could have ascertained the exact number of plum trees. But, as stated by Lord Herschell in Derry v. Peek, 14 App. Cas. at p. 375: "Even making a false statement through want of care falls far short and is a very different thing from fraud, and the same may be said of the false representation honestly believed though on insufficient grounds.

Further, the evidence does not shew that the plaintiff would not have entered into the contract but for the representation as to the number of plum trees; for all that appears, the plaintiff might

have made the purchase even if he had known the exact number. Therefore, both on account of the absence of actual fraud, and also because it is not shewn that the plaintiff was induced to enter into the contract because of any misrepresentation, the action of deceit fails.

Appeal dismissed with costs.

FALCONBRIDGE, C.J.K.B. DECEMBER 6TH, 1909.

FEDERAL LIFE ASSURANCE CO. v. SIDDALL.

Mortgage—Redemption—Expenditures of Mortgagees in Possession—Insurance Premiums—Taking Possession, Expenses of—Lien on Mill Machinery—Payment in Settlement—Permanent Improvements Made by Agent.

Appeal by the defendant Robert H. Siddall from the report of a local Master allowing the plaintiffs, as mortgagees, for various expenditures and improvements which the defendants alleged to be unnecessary and made for the purpose of rendering redemption by the defendants more difficult.

J. M. McEvoy, for the appellant.

J. G. Farmer, for the plaintiffs.

FALCONBRIDGE, C.J.:—Paragraph 2 of the notice of appeal. If the alleged misrepresentation as to the occupation of the mill would have avoided the policy, and if there had been a fire and the insurance company had taken advantage of the mistake, the plaintiffs would have been liable to the defendant for their negligence in discharging a duty undertaken by them, even voluntarily: Baxter v. Jones, 6 O. L. R. 360. The defendant covenanted in and by the mortgage that the plaintiffs might effect and maintain insurance . . . and that the amount paid therefor should be a charge on the land. This item was properly allowed by the Master.

Paragraph 3. The policy, on its face, was effected by John W. Siddall, but the loss was payable to the plaintiffs, and the defendant Robert H. Siddall would get the benefit of the same, and the amount ($25) is properly chargeable.

Paragraphs 4 and 5. These items were properly allowed. The plaintiffs are entitled to the expenses which they have fairly incurred in consequence of having been obliged to take and keep possession: White v. City of London Brewery Co., 42 Ch. D. 237.

Paragraph 6. Amount paid one Whitelaw in settlement and compromise of his alleged lien on machinery, $350. The plaintiffs are entitled under the mortgage to satisfy any charge then or thereafter existing or to arise or be claimed on the lands and to add the amount paid to the debt. The Master has found that the amount was paid in good faith, and was a fair, just, and proper compromise of the claim. The evidence fully bears out the finding. Whitelaw swears he was entitled to a considerably larger sum. The mortgagees would be in no better position than the defendant as to the possession of the machinery, as against the vendor: Goldie and McCulloch Co. v. Town of Uxbridge, 13 O. W. R. 696.

Paragraph 7. Allowance of $325 for permanent improvements made by John W. Siddall, to whom plaintiffs assumed to sell before the time for redemption had expired. The Master has found, on sufficient evidence, that John W. Siddall did this work after his solicitors had accepted the title, and believing that he had a good title. The lands were enhanced in value to that extent, and defendant got the benefit thereof. Apart from the question of the sale to John W. Siddall, it was the right and the duty of the plaintiffs to do this work: White v. City of London Brewery Co., supra; the plaintiffs were liable to reimburse John W. Siddall under the deed which they gave him—and therefore he did it as the servant or agent of the plaintiffs. The amount allowed was not assailed in argument.

The appeal must be dismissed with costs.

DIVISIONAL COURT. DECEMBER 6TH, 1909.

LEE v. FRIEDMAN.

Company — Unsatisfied Judgment against, for Wages — Action against Directors—Ontario Companies Act, sec. 94—Action by Assignee of Servant—Equitable Assignment—Validity—Status of Assignee—Statute, Penal or Remedial.

Appeal by the defendants from the judgment of TEETZEL, J., 14 O. W. R. 457, in favour of the plaintiff.

The Wilbur Iron Ore Co. Limited, having their head office in Toronto, were sued on the 15th March, 1909, by Lee, Jackson, McGonigal, Richardson, and McMurtry, claiming as assignees of

wages due from the company to the labourers, servants, and apprentices of the company for services performed by them, the plaintiffs claiming as such assignees various sums. The company not appearing, judgment was signed on the 3rd April for the plaintiffs in one judgment for the recovery of the several sums claimed by the plaintiffs respectively. A fi. fa. was issued on the 5th April upon this judgment and returned "no goods or lands" by the sheriff of Renfrew.

Lee then brought this action against the directors under the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 94, for his claim, and obtained judgment as above.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

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

Frank Denton, K.C., for the plaintiff.

RIDDELL, J. (after referring to the facts), said that, whatever might have been the case under a slightly different state of circumstances, the men owed the plaintiff until he actually received the money from the company, the company owed the men until they actually paid the plaintiff, and the whole transaction was in effect an equitable assignment of the wages. The plaintiff rightly sued the company as an assignee of wages. The company did not object to the frame of the action; and the judgment, while irregular, cannot be attacked by a stranger for irregularity, in the absence of fraud, which is not here alleged: Balfour v. Ellison, 8 U. C. L. J. 330; Tait v. Harrison, 17 Gr. 458. This cures not only the irregularity of suing all claims as one, but also the irregularity (if it be one) of suing without the assignees being added as parties.

The judgment then is valid, so far as these proceedings are concerned; even if a judgment in another action can be attacked here at all by a sidewind.

The judgment, then, is by an assignee of wages, and the sole question open is, "Do the provisions of the Act extend to the assignee?"

The Act reads (sec. 94): "The directors of the company shall be jointly and severally liable to the labourers, servants, and apprentices . . . for all debts not exceeding one year's wages due for services performed. . . ."

The liability imposed by statute is not like a contract for personal service—there is no delectus personæ such as in British

Waggon Co. v. Lea, 9 Q. B. D. 149; nor is there a power given by statute for certain public reasons and for the advantage of the public to certain specified persons, such as in Great Northern R. W. Co. v. Eastern Counties R. W. Co., 9 Hare 306, and London and Brighton R. W. Co. v. London and South Western R. W. Co., 4 DeG. F. & J. 362. The workman is given a claim directly against the members of the board who are managing the business for whose advantage his work is given. The directors owe him a debt; and I am unable to understand why such a debt as this is not assignable, carrying to the assignee all the rights and remedies which the assignor previously had.

It is said that the statute is a penal statute and must be construed strictly. . . .

[Reference to Welch v. Ellis, 22 A. R. 255, 262.]

No doubt, from the point of view of the directors, the Act may be somewhat drastic—but what of the workman? The legislature had to face this situation. When a company fails and does not pay its workmen, are the workmen, who had nothing to do with the management of the company and could not know anything about the company's property, to suffer, or are those who had all to do with the management, either directly or through the man they appoint, and who knew or ought to have known all about its financial condition?

The answer given by the legislature is that the directors must bear some part of the loss at least—and, while that is "penal" as regards the directors, it is highly remedial as regards the workman. And, the director owing the workmen the money, it can make no difference to him, who sues, the workman or his assignee.

Appeal dismissed with costs.

BRITTON, J., reached the same result, his reasons being stated in writing.

FALCONBRIDGE, C.J., also agreed in the result.

LATCHFORD, J. DECEMBER 7TH, 1909.

RE PANG SING AND CITY OF CHATHAM.

Evidence—Motion to Quash By-law Regulating Chinese Laundries —Affidavits of Applicants—Statement that License Fee and Regulations are Prohibitive—Evidence in Answer to Shew Profits Made by Chinese Laundrymen—Irrelevancy—Bona Fides of Council—Objection that Deponents not first Cross-examined on Affidavits.

Motion by the city corporation, the respondents, to commit Ernest Fremlin, the manager of the Dominion Express Company at Chatham, for his refusal to produce books and records of the company in his custody under a subpœna duces tecum and notice to produce, and to answer questions relating to the sending to China by the applicants and other Chinese, through his company, of large sums of money realised from their business—that of laundrymen—which the by-law attacked by the applicants was passed to regulate.

The applicants had sworn, in affidavits filed on the application to quash the by-law, that the license fee of $50 imposed by the by-law, and the prohibition of the use of any part of the laundry premises as "an eating-room, living-room, or sleeping-room," would impose such heavy burdens upon the applicants and other proprietors of Chinese laundries, that it would be impossible for them to carry on their business. They said that the by-law, while affecting to regulate, really prohibited. In support of this contention they swore that their profits were very small, and that their business would be carried on at a loss if they had to pay the license fee and procure premises outside their laundries in which to eat and sleep. They swore that their only business was the laundry business.

The respondents desired to establish by the evidence of the manager of the express company, that the profits of the Chinese laundrymen in Chatham were in reality very large; and that the applicants and other of their countrymen affected by the by-law were in fact well able to pay the license fee and provide the accommodation which, for sanitary reasons, the by-law required.

The ground upon which the express company resisted disclosure was not that their officer was immune to the processes by which witnesses are ordinarily compelled to give evidence, but that he

should not be examined as a witness until the respondents had cross-examined those who had filed affidavits in support of the motion to quash.

H. L. Drayton, K.C., for the respondents.

Shirley Denison, for Ernest Fremlin.

LATCHFORD, J.:—The objection does not seem to me to be well founded. The decisions cited in support of it are based on a different principle. It is not, I think, open to a witness from whom evidence is sought to be obtained as of right, upon a motion of this kind, to say that other evidence should first be obtained. Ordinarily, no doubt, the adverse party would cross-examine the deponents. The respondents have, however, quite satisfactorily accounted for not cross-examining the laundrymen who made the affidavits. Any one who has observed the cross-examination of a Chinese witness through an interpreter—as it is sworn would be necessary in the case of the 3 deponents—knows the difficulty, if not the impossibility, of thus eliciting the truth.

I agree with the respondents that they could not improve their position by the cross-examination of the applicants or their fellow-countrymen. But I am of the opinion, at the same time, that they cannot hope to support the by-law by shewing that what the applicants have sworn in regard to their profits is untrue—that their profits have in fact been very large, as demonstrated by the amounts they have been remitting to China through the manager of the Dominion Express Co.

The true test, it seems to me, whether the by-law is valid or not, is whether the municipal council passed the by-law in the bona fide exercise of the powers conferred by sub-sec. 39 of sec. 583 of the Municipal Act.

The validity of the by-law depends, not on the profitable or unprofitable nature of the business of the applicants and others affected, but on the good faith of the council which passed the by-law: see Re Rowland and Town of Collingwood, 11 O. W. R. 805, and the cases there cited. In this view, the evidence sought from Mr. Fremlin cannot be relevant or material to the question at issue.

I therefore think the application fails. It is not a case for costs.

DIVISIONAL COURT. DECEMBER 9TH, 2909.

McKINNON v. SPENCE.

Will — Construction — Devise — Estates for Life—"Family" — Tenants in Common—Joint Tenants—Statute of Limitations —Remainder—Legacies—Improvements—Costs.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 13 O. W. R. 186, dismissing the action, which was brought for a declaration as to the true construction of the will of Archibald Spence, and for a declaration that the plaintiffs were entitled under the will to the possession of certain land occupied by the defendants and to other rights under the will.

The operative part of the will was as follows: "I give and bequeath to my . . wife the sole use of my farm . . . to use as she may think proper until my son (John Spence) has arrived to the full age of 21 years. He is then to get the east of the farm and half of all the property on the farm at that time. They may then work the farm together, or, if my wife is tired of working the place, John is to have the management of the whole farm and is to support his mother during her widowhood and his four sisters until they are of age or married, at which time each of the four girls are to get from the proceeds of my estate the sum of £10 currency, also bed and bedding with comfortable and decent wearing apparel and a good cow. The estate is to educate the family as far as consistent. The real estate to belong to the family as long as any of them are alive and to remain the property of my son's heirs."

The will was dated the 2nd May, 1855, and the testator died on the 25th June of the same year. At the time of the testator's death the son was 11 years of age; the daughters were younger.

The trial Judge found that the defendant John Spence senior (the son of the testator) had been in possession of the farm for 30 years, not accounting for debts and profits, and that the widow and the daughter Martha were not on the land as claiming ownership, but only as being supported under the will.

The appeal was heard by MULOCK, C.J. EX.D., MAGEE and CLUTE, JJ.

E. E. A. DuVernet, K.C., and F. A. McDiarmid, for the plaintiffs.

E. D. Armour, K.C., for the defendant John Spence senior.

A. J. Reid, for the other defendants.

The judgment of the Court was delivered by CLUTE, J.:—I have carefully read the examinations for discovery, which was the only evidence put in at the trial, and . . . I think it clear that the defendant John Spence senior was in and held possession until his mother's death under the will. After he became of age, he undertook the management of the farm and supported the family. Shortly afterwards he was married, and, at his mother's request, a double house was built, he and his wife occupying one portion and his mother and sisters occupying the other portion. Both families were supported from the proceeds of the farm. The daughters, while at home, assisted in the outdoor work of the farm, and Martha, the unmarried sister, continued so to assist till the mother's death in 1907. All that was done by the son John in the way of managing the farm was quite consistent with the terms of the will. . . . He was in possession as tenant for life under the will, and none the less so because he was permitted to act as manager by his mother during her lifetime.

I am, therefore, with great respect, of opinion that the Statute of Limitations would not run in his favour as against any of the children while they remained in possession. See Foley v. Foley, 26 Gr. 463; Bartels v. Bartels, 42 U. C. R. 22; Re Defoe, 2 O. R 623; Houghton v. Bell, 23 S. C. R. 498; Dalton v. Fitzgerald, [1897] 2 Ch. 86; Anstee v. Nelms, 1 H. & M. 225; and Board v. Board, L. R. 9 Q. B. 48. . . .

[Hartley v. Maycock, 28 O. R. 508, distinguiished.]

It is probable that the testator intended to give his son John the use of the east half of the lot. But the will does not say so. It says that the mother is to use the farm as she thinks proper until the son has arrived at the age of 21 years. He is then to get "the east of the farm." I think this language too indefinite to convey an estate, but, in the view I take of the whole will, it is not very material so far as John is concerned.

A clause providing for support and maintenance merely does not give an estate out of the land: Gilchrist v. Ramsay, 27 U. C. R. 500. It does, however, amount to a charge: Robson v. Jardine, 22 Gr. 420.

What interest, then, did the children take under the will? The last clause provides that "the real estate is to belong to the family as long as any of them are alive and to remain the property of my son's heirs." What is meant by the word "family?" In Stroud's Jud. Dict. it is said that the primary legal meaning is "children," and reference is made to the judgment of Jessel, M.R., in Pigg v. Clark, 3 Ch. D. 672 . . . [Reference also to Barnes v. Patch, 8 Ves. 604; Burt v. Hellyar, L. R. 14 Eq. 160.]

The word "family" may, however, be controlled by the context. . . . Blackwell v. Bull, 1 Keen 176; Jarman on Wills, 5th ed., pp. 941-4.

Taking the meaning of "family" to be "children," there is clearly a life estate as tenants in common given to them, and this life estate John takes with the rest, with a vested remainder in fee, under the rule in Shelley's case: Leith's Blackstone, 2nd ed., p. 276; In re White and Handle's Contract, 7 Ch. D. 201; In re Youman's Will, [1901] 1 Ch. 720; R. S. O. 1897 ch. 119, sec. 11.

After the sisters become of age or are married, the mother still living, where do the proceeds go? The sisters who are married or become of age are no longer entitled under the last clause to support. The mother is, of course, entitled to support. But to whom do the proceeds of the farm belong after providing for the support of the mother? In my opinion, to those who have the life interest, viz., the five children. . . . The right existed in each daughter from the time she married or became of age to have a declaration and to be paid the proceeds of the surplus. . . . They would thus hold as tenants in common, subject to the mother's right to support. . . . But the possession of one tenant in common does not enure to the benefit of those who are out of possession: R. S. O. 1897 ch. 133, sec. 11. . . .

[Reference to Littledale v. Liverpool College, [1900] 1 Ch. 21; Encyc. of the Laws of England, vol. 8, p. 318; R. S. O. 1897 ch. 133, sec. 15; Dawkins v. Lord Penrhyn, 6 Ch. D. 322.]

The Act having put an end to the doctrine of adverse possession, the only question is as to whether the time fixed by the statute has elapsed since the claimants' right accrued, whatever be the nature of the present holder's possession: Darby & Bosanquet's Statute of Limitations, 2nd ed., p. 275; Nepean v. Doe, 2 M. & W. 894, 911; 2 Sm. L. C., 9th ed. p. 628. The three sisters, having remained out of possession for the statutory period, are, in my opinion, barred by the statute.

In Re Livingstone Estate, 2 O. L. R. 381, where of five tenants in common of a farm three acquired a title against the other two by virtue of the Statute of Limitations, it was held that the title acquired by the three tenants was a joint tenancy, and that they were thus tenants in common of their original three-fifths and joint tenants of two-fifths. The reason for this is that R. S. O. 1897 ch. 119, sec. 11, has no application to a case of this kind, but refers only to lands granted, conveyed, or devised to two or more persons by letters patent, assurance, or will. See Ward v. Ward, L. R. 6 Ch. 791.

The result is that the defendant John Spence senior and the plaintiff Martha Spence are entitled to a two-fifths interest in the whole farm as tenants in common and are joint tenants of a three-fifths interest of the estate pur autre vie of the married sisters. John Spence senior is entitled to the remainder in fee.

I am further of opinion that any claim which the sisters had to the legacies given them by the will is barred by the Statute of Limitations, as the same was payable when they respectively arrived at the age of 21 years or were married, since which time more than the statutory period has elapsed. . . .

Claim of the defendant John Spence senior for improvements dismissed without prejudice thereto if a claim is made against him for occupation rent.

The judgment of the Court below should be modified by declaring that, according to the true construction of the will, the children of the testator took as tenants for life with remainder to his son John Spence in fee; that the interests of the three married daughters—Christina, Margaret, and Sarah—are extinguished and their claims are barred by the Statute of Limitations; that John Spence senior and Martha Spence are entitled to a two-fifths interest in the lands for life as tenants in common and a three-fifths interest for the lives of Christina, Margaret, and Sarah, as joint tenants, with remainder to John Spence senior in fee; that it be declared that the legacies given to the plaintiffs by the will are barred by the Statute of Limitations; that the judgment of the Court below as to the payment of $100 to Christina McKinnon and Martha Spence do stand; that the defendant John Spence do pay to the plaintiff Martha Spence a portion of her costs of this action, fixed at $100; and, except as aforesaid, that there be no costs awarded here or below.

BEATTY v. BEATTY—MASTER IN CHAMBERS—DEC. 3.

Interim Alimony and Disbursements.]—Upon a motion for an order for interim alimony and disbursements, the defendant relied on an agreement of separation, but the plaintiff swore that the defendant had never paid her anything and that she did not understand the agreement. The Master held that she was entitled to an order, referring to Atwood v. Atwood, 15 P. R. 425, and Lafrance v. Lafrance, 18 P. R. 62. Order made for $6 a week interim alimony, to begin from the date of the delivery of the statement of claim, and $30 for interim disbursements. T. N. Phelan, for the plaintiff. E. G. Long, for the defendant.

STAUNTON v. KERR—BOYD, C.—DEC. 6.

Solicitor—Costs—Company.]—An action by a solicitor to recover the amount of a bill of costs. At the trial judgment was reserved as to whether the plaintiff was entitled to recover against the defendant company. It was said that he was retained by the company as it existed prior to the sale of all the stock and assets to the company as now constituted, which assumed the liabilities of the old company as they stood on the books at a certain date. The Chancellor held that the plaintiff's claim did not fall within the terms of the engagement. Action dismissed as against the company without costs. W. M. Douglas, K.C., for the plaintiff. N. W. Rowell, K.C., for the defendant company.

FELKER v. MCGUIGAN CONSTRUCTION CO.—MEREDITH, C.J.C.P., IN CHAMBERS—DEC. 7.

Pleading—Embarrassing Reply.]—The order of the Master in Chambers, ante 224, was affirmed on appeal with costs to the defendants in any event. J. H. Moss, K.C., for the plaintiff. R. H. Parmenter, for the defendant company. A. W. Ballantyne, for the other defendants.

RACHAR v. MCDOWELL—MASTER IN CHAMBERS—DEC. 8.

Pleading—Want of Precision.]—A motion by the defendant to strike out part of the amended statement of claim as embarrassing, because not sufficiently precise, was dismissed with costs to the plaintiff in the cause. J. King, K.C., for the defendant. A. McLean Macdonell, K.C., for the plaintiff.