The
Ontario Weekly Notes

VOL. XVI. TORONTO, MAY 23, 1919. No. 10

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 28TH, 1919.

*WILLIAMS v. TORONTO AND YORK RADIAL R.W. CO.

Street Railway—Injury to Passenger Alighting from Car, Jostled and Thrown down by Persons Boarding Car—Duty of Street Railway Company to Afford Safe Carriage to Passengers—Passengers Alighting on Property of Municipal Corporation—Findings of Jury—Negligence—Proximate Cause of Injury—Evidence.

An appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff, upon the findings of a jury, in an action for damages for personal injury sustained by the plaintiff, an elderly woman, who, when in the act of alighting from a car of the defendants upon which she was a passenger, was jostled and thrown to the ground by incoming passengers upon the arrival of the car at the terminal stopping place of the defendants' cars at Sunnyside, Toronto.

The jury found that the plaintiff's injury was caused by the negligence of the defendants; that that negligence consisted of "allowing passengers to enter at both doors;" and that the plaintiff was not guilty of contributory negligence. They assessed the plaintiff's damages at $500; and judgment for the plaintiff for that sum and costs was directed by the trial Judge to be entered.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

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

H. H. Dewart, K.C., for the plaintiff, respondent, was not called upon.

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

MEREDITH, C.J.C.P., delivering the judgment of the Court at the conclusion of the argument for the appellants, referred to Rex v. Toronto R.W. Co. (1911), 23 O.L.R. 186; approved in the Appellate Division, Rex v. Toronto R.W. Co. (1915), 34 O.L.R. 589; which was reversed in the Privy Council, Toronto R.W. Co. v. The King, [1917] A.C. 630.

The plaintiff was injured before her journey ended and whilst her contract for safe carriage with the defendants was in full force and effect.

It was urged that, as the defendants have no stations such as greater railway companies have, their liabilities are less—that the end of the journey of the car in this case was on the property of the Corporation of the City of Toronto, over which the defendants had no control—and therefore they were not answerable in damages in this case. But the question of title was not one in which passengers were concerned. Under the contract for safe carriage, boarding and alighting were included in the journey—and any place at which cars are stopped for boarding or alighting is made a station for such purposes.

And, if it could be said that the defendants were not liable for a wrong done on the premises of another, the wrong here was in fact done on the car; and no kind of precaution or care was taken to prevent it. No attempt was made to prevent the rush upon the car.

The jury thought that the common and simple method of receiving passengers at one door and discharging them at the other was the proper method and that it would have saved the plaintiff from injury. Other simple methods would have been equally successful, such as one man at each door to see that there was safety in boarding and alighting.

It was a case of gross neglect by the defendants of their duty towards their passengers, a neglect which was the proximate cause of the plaintiff's injury, and which they made no attempt to excuse or explain in evidence at the trial.

The jury's answers were sufficient to support the judgment, and their finding was such as reasonable men could make upon the evidence.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MAY 12TH, 1919.

*RE GIBSON AND CITY OF HAMILTON.

Assessment and Taxes—Income Assessment—Income of Estate of Deceased Person in Hands of Trustees not Presently Payable to any one—Whether Assessable at all—Where Assessable—Place of Residence of Trustees—Place of Residence of Deceased—Assessment Act, secs. 5, 10, 11, 12, 13—Interpretation Act, sec. 29 (x)—"Person."

An appeal by the trustees of the estate of William Gibson, deceased, from the order of the Senior Judge of the County Court of the County of Wentworth dismissing an appeal by the trustees from the decision of the Court of Revision for the City of Hamilton whereby an assessment of the estate of the deceased for taxable income at $9,200 in the year 1918, was affirmed. The appeal was upon a case stated by the County Court Judge. The assessment was made by the Corporation of the City of Hamilton, where two of the trustees and one beneficiary resided.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

John Jennings and George C. Thomson, for the appellants.

F. R. Waddell, K.C., for the Corporation of the City of Hamilton, respondents.

MULOCK, C.J.Ex., read a judgment in which he said that the testator by his will directed that all the income of his estate from time to time not required for the purposes of maintenance of his children should be added to and form part of his estate, called in the will the "general trust estate;" and directed that his trustees should hold the "general trust estate" and all other trust premises (if any), and, after having carried out the terms of any declaration or declarations of trust, upon trust, on his youngest living child attaining 25 years, to divide the "general trust estate" among his children then living and the children then living of any deceased child, etc.

It was admitted that no portion of the $9,200 income was required for the maintenance and education of any child of the testator.

By sec. 5 of the Assessment Act, R.S.O. 1914 ch. 195, all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation, subject to exemptions, none of which applied to the income in question.

By sec. 11, subject to the exemptions provided for in secs. 5 and 10, every person not liable to business assessment under sec. 10 shall (*a*) be assessed in respect of income; and (*b*) every person although liable to business assessment under sec. 10 shall also be assessed in respect of any income not derived from the business. By sec. 12, every person assessable in respect of income under sec. 11 shall be so assessed in the municipality in which he resides either at his place of residence or at his office or place of business. By sec. 13, every agent, trustee, or person who collects or receives or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario, shall be assessed in respect of such income.

Income in respect of which any one is liable to taxation must be either income derived by such person, he being resident in Ontario, or income received by an agent or trustee for a non-resident. In the former case the person assessable is the beneficiary—in the latter, his representative. The beneficiary "derives" the income—the representative merely receives it. Income, to be assessable, must fall within one or other of these two classes.

By the terms of the will, no one at present is entitled beneficially to the income in question, nor until a future period can it be determined who shall be entitled to take beneficially.

There can be no taxation of income without previous assessment of some person in respect of such income. A person liable to assessment becomes personally liable to pay the tax. At the present time no one is liable to assessment in respect of the income in question or entitled to it beneficially.

It was said that the trustees were assessable under sec. 13. But to bring the case within that section it must appear that the trustees are collecting or receiving the income for or on behalf of a person and that that person is resident out of Ontario. In this case it may be that the person who will ultimately become entitled to the income in question is yet unborn; while the words of sec. 13 imply a person living at the present time and resident out of Ontario.

In view of the facts, the trustees are not assessable in respect of the income in question—and no one is assessable in respect of it—the inference being that the Legislature did not intend that such a fund should be liable to assessment.

The appeal should be allowed.

RIDDELL, J., agreed with MULOCK, C.J.Ex.

CLUTE, J., read a judgment in which, after stating the facts, and referring to the provisions of the Assessment Act, he said

that the trustees in this case came within the definition of the word "person" in sec. 29 (*x*) of the Interpretation Act, R.S.O. 1914 ch. 1, and that the portion of the revenue of the estate received by them was assessable in their hands as income. The statute does not expressly declare in what municipality such income shall be assessed; but as, under secs. 11 and 12, every person in respect of income shall be assessed in the municipality in which he resides, either at his place of residence or place of business, and as the trustees represent the estate of the deceased person, by analogy and implication from the wording of the statute the income should be assessed by the municipality wherein the testator resided and carried on his business at the time of his death—and that was not Hamilton.

Therefore, the assessment should not have been confirmed.

SUTHERLAND, J., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. MAY 12TH, 1919.

MORRISSEY v. THOMPSON.

Contract—Money Due under—Payment into Court—Reference—Ascertainment of Persons Entitled—Lien on Land—Sale on Default—Costs.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., ante 39.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

F. D. Davis, for the appellant.

A. R. Bartlet, for the plaintiff, respondent.

THE COURT varied the judgment by adding Douche, Martinette, and Howard, as parties; by directing that the balance due be paid into Court; and by referring it to the Local Master at Sandwich to ascertain the persons entitled to the money. Costs up to the present time to be paid by the defendant; subsequent costs to be in the discretion of the Master. On default of payment into Court, the land to be sold.

SECOND DIVISIONAL COURT. MAY 13TH, 1919.

BARRY v. CANADIAN PACIFIC R.W. CO.

Railway—Collision—Negligence—Death of Person Travelling as Caretaker of Livestock at Reduced Rate—Special Contract—Approval of Railway Board—Exemption from Liability—Knowledge of Deceased—Action under Fatal Accidents Act.

Appeal by the plaintiff from the judgment of LENNOX, J., 15 O.W.N. 455.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

J. A. Hutcheson, K.C., for the appellant.

R. A. Pringle, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MAY 13TH, 1919.

NIBLOCK v. GRAND TRUNK R.W. CO.

Sale of Goods—Contract—Action for Price—Defence—Adverse Claim of Railway Company to Price of Goods—Counterclaim—Security—New Trial—Costs.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 72.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

George Lynch-Staunton, K.C., and G. H. Levy, for the appellant.

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

THE COURT varied the judgment by directing payment to the plaintiff of the amount claimed with interest. On security being given by the plaintiff for any counterclaim which the defendants may establish, a new trial of the counterclaim is directed. The trial Judge to dispose of all the costs except the costs of this appeal, which are to be paid by the defendants.

SECOND DIVISIONAL COURT. MAY 16TH, 1919.

*TORONTO HYDRO-ELECTRIC COMMISSION v. TORONTO R.W. CO.

Negligence—Defendants Leaving Electric Street-car on Highway Unattended and Capable of being Put in Motion—Trespasser Setting Car in Motion—Injury to Property of Plaintiffs—Proximate Cause—Malicious Act Intervening—Fresh Independent Cause.

Appeal by the defendants from the judgment of COATSWORTH, Junior Judge of the County Court of the County of York, in favour of the plaintiffs in an action in that Court to recover damages for the destruction of a pole of the plaintiffs, standing in a highway, broken by a street-car of the defendants, which ran off the track and into the pole.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Gideon Grant, for the appellants.

C. M. Colquhoun, for the plaintiffs, respondents.

MIDDLETON, J., read a judgment in which he said that a car of the defendants was left standing upon Frederick street at 12.30 a.m. on the 12th July, 1918. The current was off the motors, as the circuit-breaker was open and the hand-brakes were set. The car remained in the street until shortly after 4 a.m., when some one boarded the car and set it in motion. The car was taken west along Front street, north to Queen street, and then east along Queen street, and, after it had passed over the Don bridge, was finally derailed at Broadview avenue, where it ran into and broke one of the plaintiffs' poles. Whoever started the car in motion abandoned it before this point had been reached.

This action having been brought to recover the damages sustained, the learned Judge found for the plaintiffs, holding that the defendants were guilty of negligence in allowing the car to remain in the street unattended and unsecured and in leaving the controller-key in the car so that an evilly disposed person might start the car.

When the proximate cause is the malicious act of a third person which intervenes between the negligence of the defendant and the injury to the plaintiff, the defendant is not liable unless it is shewn that he ought to have foreseen it and provided against it.

The difference of opinion in Geall v. Dominion Creosoting Co. (1917), 55 Can. S.C.R. 587, arose from the fact that, in the opinion of the majority, the defendants ought to have anticipated that boys might release the cars standing at the head of the incline. The majority were of opinion that this was something that ought not to have been anticipated.

Reference to Ruoff v. Long & Co., [1916] 1 K.B. 148.

Here the action of the trespasser who entered the car and set it in motion was "a fresh independent cause" which, in the circumstances, the defendants had no reason to contemplate.

Reference to the authorities collected in the Geall case, and particularly to Rickards v. Lothian, [1913] A.C. 263; also to Hudson v. Napanee River Improvement Co. (1914), 31 O.L.R. 47.

Shortly, the plaintiffs failed because the negligence found was not the proximate cause of the damage. The sole proximate cause was the action of the trespasser.

The appeal should be allowed and the action should be dismissed, both with costs.

BRITTON and RIDDELL, JJ., agreed with MIDDLETON, J.

LATCHFORD, J., also agreed, for reasons briefly stated in writing.

MEREDITH, C.J.C.P., read a dissenting judgment. After a full statement of the facts and a review of the authorities, he said that the defendant's negligence need not be the proximate cause of an injury to give a right of action: it is enough if it be a proximate cause, or effective cause. The defendants' wrongdoing was surely proximate enough and effective enough; without it the injury could not have been caused—the third person was powerless; and, more than that, the defendants' negligences were the proximate and effective cause of the third person's wrong—they tempted and induced the impulse to do the wrong, as well as supplied, all ready at hand, the means to give effect to it.

Appeal allowed (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. MAY 16TH, 1919.

*JOHN HALLAM LIMITED v. BAINTON.

Sale of Goods—Sale by Sample—Inferior Goods Delivered—Acceptance—Warranty—Condition—Breach—Damages.

Appeal by the defendants from the judgment of MIDDLETON, J., 15 O.W.N. 82.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

D. L. McCarthy, K.C., and L. E. Dancey, for the appellants.

W. N. Tilley, K.C., for the plaintiffs, respondents.

RIDDELL, J., in a written judgment, said that this was a case of a contract for sale by sample, and the law in such a case is accurately stated in Halsbury's Laws of England, vol. 25, p. 161, para. 288: "In the case of a contract for sale by sample the following conditions are implied: (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

The second condition is for the purpose of enabling the buyer to determine whether he will take the property in the goods at all. If, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the goods into his possession or deals with them, he will not be allowed to repudiate the bargain in toto and assert that the property has never passed, but is driven to rely upon the implied warranty that the bulk shall correspond with the sample (the condition to that effect becoming a warranty on change of ownership: Behn v. Burness (1863), 3 B. & S. 751; New Hamburg Manufacturing Co. v. Webb (1911), 23 O.L.R. 44).

The purchaser taking the goods into his possession and dealing with them, after an opportunity to inspect or even after a partial or casual inspection, will not necessarily be considered an acceptance of the goods as answering the contract and a waiver of the term that the goods shall correspond with the sample.

The rule caveat emptor does not apply to a sale by sample: Barnard v. Kellogg (1870), 10 Wall. (U.S.) 383, 388.

If there has been no acceptance by the purchaser of the goods as answering the contract, although there be acceptance sufficient

to pass the property, he may still rely upon the warranty that the bulk shall correspond with the sample: Khan v. Duché (1905), 10 Commercial Cases 87.

There was nothing in the present case indicating that there was an acceptance by the plaintiffs of the goods as answering the warranty, and the action lay.

The damages were assessed on the proper principle; and the appeal should be dismissed.

BRITTON, J., agreed with RIDDELL, J.

LATCHFORD, J., agreed in the result, for reasons stated in writing.

MEREDITH, C.J.C.P., read a dissenting judgment. He was of opinion that the damages awarded were excessive, and that the matter of assessment of damages should be referred to the proper local officer of the Court.

Appeal dismissed (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. MAY 16TH, 1919.

RE BRITISH CATTLE SUPPLY CO. LIMITED.

McHUGH'S CASE.

Company—Winding-up—Contributory—Application by Land Corporation for Shares—Acceptance by Directors—Allotment of Shares to Nominee of Corporation—Question whether Shares Paid for by Effect of Agreement between Company and Corporation—Independent Agreement—Liability of Nominee as Shareholder—Estoppel—Companies Act, R.S.C. 1906 ch. 79, sec. 41—Trustee.

Appeal by George P. McHugh from the order of LOGIE, J., ante 62.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

R. J. McLaughlin, K.C., for the appellant.

J. H. Fraser, for the liquidator, respondent.

RIDDELL, J., read a judgment in which, after stating the facts, he said that the argument of the appellant, reduced to its essence, was simply this: the supply company accepted, in payment for their stock, the note and the promise and covenant of the land corporation to convey the land in Alberta to the supply company. This seemed, without disrespect, almost an absurdity. The appellant himself, being asked, "How was the stock considered to have been fully paid-up?" answered, "By the conveyance of the land to be given." Putting the case most favourably for the appellant, he knew that the stock was unpaid for (at least pro tanto) unless and until a conveyance of the land was made, whereby the land would vest in the supply company.

This knowledge distinguished the case from Carling's case (1875), 1 Ch. D. 115.

Nor had the case anything in common with Henderson v. Strang (1918), ante 7.

The appellant took the shares with his eyes open; he did not place on the books of the company the name of his cestui que trust in order to protect himself; and there was no reason why he should not be held liable.

The appeal should be dismissed.

BRITTON LATCHFORD, and MIDDLETON, JJ., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., read a judgment in which he discussed the facts of the case, and concluded by saying that he would dismiss the appeal on the ground that the shares were taken not as paid-up shares, but as shares to be paid for; and that they were never validly or really paid for.

Appeal dismissed with costs.

HIGH COURT DIVISION.

ROSE, J. MAY 12TH, 1919.

RE WALMSLEY.

Will—Construction—Declaration by Court of Intestacy as Regards a Sum of Money, Part of the Estate—Disposition of Fund—Legacies, Debts, and Succession Duties not Payable thereout—Right of Widow (Beneficiary under Will) to Share in Fund notwithstanding Satisfaction Clause in Will—"Claims against the Estate."

The decision, noted 15 O.W.N. 436, in regard to the disposition of the estate of Thomas Walmsley, deceased, that there was an

intestacy as to a sum of $6,000, gave rise to two supplementary questions, argument upon which was heard in the Weekly Court, Toronto.

R. G. Hunter, for the widow of the testator.

H. S. White, for the executors.

J. B. Clarke, K.C., for the executors of the will of James Walmsley, deceased.

R. J. Gibson, for David Charles Walmsley, Jesse Harvey Walmsley, and Arthur Cook Walmsley.

J. M. Bullen, for Alice Godwin and other residuary legatees.

A. B. Armstrong, for certain next of kin.

ROSE, J., in a written judgment, said that the supplementary questions were:—

(1) Are the legacies and the succession duties etc. which the 1st clause of the will directs the executors to pay out of the estate, devised and bequeathed to them to be paid out of the estate other than the $6,000, or must the $6,000 or part of it be applied in payment of such legacies, succession duties, etc.?

(2) Is the widow entitled to share in the $6,000, or is her right taken away by the 7th clause of the will, which directs that she is to accept the provisions in her favour in full satisfaction of all her claims against the estate?

(1) The learned Judge was of opinion that no portion of the legacies, debts, succession duties, etc., was to come out of the $6,000, which sum was, itself, a part of three of the shares into which the estate was to be divided after the legacies, debts, succession duties, etc., had been paid.

(2) The widow was entitled to her distributive share of the $6,000. Reference to Naismith v. Boyes, [1899] A.C. 495. This testator intended to dispose of his whole estate, and the clause in question was intended to secure to those, other than the widow, to whom he gave portions of that estate, the enjoyment of their respective portions free from any claim of the widow; and there is nothing which requires the clause to be held applicable to a portion of the estate of which he did not succeed in making a valid disposition. There are cases such as Lett v. Randall (1855), 3 Sm. & G. 83, which indicate that the limited construction given to the clause in Naismith v. Boyes is applicable only if the intestacy resulted from the happening of some unforeseen event, and not if the intestacy is apparent on the face of the will.

But, if such a distinction really exists—as to which see Jarman on Wills, 6th ed., p. 561, note (*o*)—this case, in which there was in the first instance a valid disposition of the whole estate and in which the intestacy arises from what is, apparently, an ineffective

attempt to make by the codicil another disposition of a portion of the estate, seems to fall into the class of cases to which Naismith v. Boyes belongs, rather than into the class represented by Lett. v. Randall.

There should be a declaration accordingly. If the order made on the main motion had not been issued, the declaration now made might be included in it. If, however, that order had been issued, and it was necessary to make separate provision for the costs of this supplementary declaration, such costs should be ordered to be paid out of the fund of $6,000.

FALCONBRIDGE, C.J.K.B. MAY 13TH, 1919.

GARNER v. TOWNSHIP OF GOSFIELD NORTH.

Highway—Injury to Traveller—Horse Shying at Object Left by Township Corporation at the Side of a Road but off the Road—Cause of Accident and Injury—Weight of Evidence—Negligence—Nonrepair—Absence of Notice under Municipal Act, sec. 460 (4).

Action for damages for injury sustained by the plaintiff by being thrown from a buggy upon a highway in the township, by reason, as he alleged, of an object negligently left near the highway by the defendants, the Municipal Corporation of the Township of Gosfield North.

The action was tried without a jury at Sandwich.

J. H. Rodd, for the plaintiff.

R. L. Brackin, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defendants were constructing a cement bridge across a drain leading from the 8th concession road to the town-line between their township and Colchester. The bridge was all complete except the railing, and no part of it was on the highway along which the plaintiff was driving when he met with the accident. There were remaining for the completion of the job 8 sacks of cement, each containing 94 lbs., being 30 inches in length and a foot across, piled 4 feet high about 30 feet back from the east side of the travelled part of the town-line. They were covered over with heavy canvas on Saturday night. The canvas was folded up, as it was much too large for the pile, and planking was put around the bottom to hold it down.

On Monday the 19th August, 1918, between 9 and 10 a.m., the plaintiff was driving north along the town-line. His story was, that, when he was about 70 or 80 feet south of the pile, the canvas rippled or fluttered so as to rise up 10 inches or a foot, which caused his horse to shy, and to take him and his buggy into the ditch, throwing him out, whereby he sustained severe injuries.

The weight of evidence on this point was strongly against the plaintiff. His claim failed on the facts.

If the finding on the facts had been in the plaintiff's favour, it would have been difficult for him to succeed upon the law, for the object complained of was not on the highway: see Denton on Municipal Negligence, pp. 83, 84; Meredith & Wilkinson's Canadian Municipal Manual, p. 611 et seq.

If the plaintiff's injuries were alleged to have been caused by any default to keep in repair—that is, if the horse took fright at some object which in itself constituted a defect in the highway, the plaintiff would have been faced by the difficulty that he never gave the notice required by sec. 460 (4) of the Municipal Act. It was also significant that neither in the plaintiff's letter of the 15th November to the defendants, nor in his solicitor's letter of the 7th December, was this specific complaint made as to the cause of the accident.

Action dismissed with costs.

MEREDITH, C.J.C.P., IN CHAMBERS. MAY 14TH, 1919.

RE H.

Infants—Custody—Welfare of Children—Order under Children's Protection Act of Ontario, sec. 9—Absence of Evidence to Support — "Neglected Child" — Order Quashed — Temporary Arrangements for Custody of Children.

Motion by Mrs. L. for an order for custody of her two infant nieces, orphans; and motion by Mrs. F., another aunt of the infants, to quash an order made by the Commissioner of the Juvenile Court, Toronto, with respect to the two infants, under sec. 9 of the Children's Protection Act of Ontario, R.S.O. 1914 ch. 231, and for an order giving her (Mrs. F.) the custody.

E. F. Raney, for Mrs. L.

A. W. Roebuck, for Mrs. F.

T. L. Monahan, for the St. Vincent de Paul Children's Aid Society.

MEREDITH, C.J.C.P., in a written judgment, said that it was admitted that the order in question was one which might be quashed under the provisions of the Judicature Act, sec. 63; and the first of these motions was a motion so to quash it.

The order was one made under sec. 9 of the Children's Protection Act of Ontario, and the grounds on which it was based were: "The parents of the said children are dead, and the children are without proper responsible care, in that, by reason of the neglect and cruelty of Mrs. F., their custodian, the home has been made an unfit place for them." And the single objection to it is, that there is no evidence upon which it can be supported: an objection which seemed to be well taken.

The character of the proceedings under the Act and the possibly far-reaching effect of an order made under it are such that much care should be taken before it is put in force against any one: and an order such as that now in question can be made rightly only against one who is a "neglected child" at the time when the order is made; it should be obvious that it is not enough to bring a child within the provisions of the Act that he or she once was a "neglected child," if that condition does not exist when the order is made.

There may have been evidence in this case upon which at one time such an order as that in question might have been well-made; but there was none upon which it could be well-made at the time when it was made: the evidence was quite to the contrary; and that evidence was given by competent persons concerned in childhood welfare, and persons who had no reason to support the then existing custody of the children.

The order must be quashed; but without costs, and with as full protection as can be given in respect of anything done under it, if anything were done.

In regard to the several applications for the custody of the children, certain things seemed to have weight at the present time, in the following order: bodily health and development; mental and moral growth and education; and their money.

And in none of these things could any choice be best made at the present time; as matters stood, it seemed to be a choice between their aunts L. and F., with a possibility of a State institution as a very formidable competitor before long. From a time beginning before the death of their father and mother, they have been in the care of the Fs., but their father, before his death, desired a change; and, whilst the children were with the Fs., that state of affairs developed which caused the magistrate to put the stamp of "neglected children" upon them; but on all hands it is admitted that the children are better cared for now and in no present danger of becoming neglected children; and the Ls. are

not yet firmly resettled in Ontario, and are members of a different religious body from that of which the children's father and mother were members; but it is a strong point in their favour that they are willing to keep and bring up these children as if they were their own children without seeking any money payment for it; thus allowing all that is coming to the children to be safely kept, with the interest upon it, until the children are of age.

In all these circumstances, it is best to postpone this motion for 6 months, without disturbing the present custody of the children, upon these terms, to which the Fs. give a very willing assent: that all moneys belonging or coming to the children be paid into Court to the credit of the infants severally and respectively; that the solicitor for the St. Vincent de Paul Society, who was also solicitor for the father of the children, or any one appointed by him, and Mrs. L. and Mr. L., their solicitor, or any one appointed by them for that purpose, shall be at liberty at least once a month to visit the children and make all such reasonable inquiry as they may deem needful to ascertain their state and condition in all respects; and that no application shall be made for payment out of the children's money of any sum for maintenance during such 6 months.

Liberty to any of the parties to apply as advised within the 6 months, upon any altered state of affairs. No order as to costs of this motion.

SUTHERLAND, J., IN CHAMBERS. MAY 14TH, 1919.

*REX v. DUCKER.

Criminal Law—Offence of Rendering Home Unfit Place for Children—Conviction of Paramour of Children's Mother—Jurisdiction of Commissioner of Juvenile Court—Stated Case—Children's Protection Act of Ontario, sec. 18 (d)—Juvenile Delinquents Act, 1908, sec. 30 (Dom.)—Criminal Code, sec. 220 A. (8 & 9 Geo. V. ch. 16, sec. 1).

Case stated by the Commissioner of the Juvenile Court, Toronto.

The defendant was charged before the Commissioner for that he did on the 4th November, 1918, and previously, in the city of Toronto, at 87 Peter street, in the home of Edward Hunter and others, all infants under the age of 16 years, by indulgence in sexual immorality, cause the said children to be in danger of being or becoming immoral, dissolute, or criminal, or the morals of the said children to be injuriously affected, and by such conduct

rendered the home of the said children an unfit place for such children to be in.

The Commissioner, on the 26th February, 1919, convicted the defendant of the offence charged in the information and complaint.

The opinion of the Court (Judge in Chambers) was asked as to whether the Commissioner had jurisdiction to try and convict the defendant of the offence charged.

J. E. Lawson, for the defendant.
W. L. Scott, for the Crown.

SUTHERLAND, J., in a written judgment, referred to the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. (Dom.) ch. 40, secs. 2 (*g*), 5, 29, 30; sec. 761 of the Criminal Code; the Children's Protection Act of Ontario, R.S.O. 1914 ch. 231, sec. 18 (*d*); Rex v. Davis (1917), 40 O.L.R. 352; sec. 220 A. of the Criminal Code, as enacted by (1918) 8 & 9. Geo. V. ch. 16, sec. 1.

The learned Judge then said that it was clear from the evidence that the mother of the children was having adulterous connetion with the accused in the house where the children were, in circumstances which justified the Commissioner in coming to the conclusion that the morals of the children might be injuriously affected and the home rendered an unfit place for them to be in. Reading sec. 30 of the Juvenile Delinquents Act, 1908, with the section added to the Criminal Code in 1918, sec. 220 A., it seemed plain that the Commissioner had jurisdiction to try and convict the defendant of the offence charged.

The question stated should be answered in the affirmative.

SUTHERLAND, J. MAY 14TH, 1919.

BRIGHT v. CANADIAN ORDER OF FORESTERS.

Insurance (Life)—Friendly Society—Insurance Certificate—Condition—Status of Member of Society at Time of Death—Suspension—Application for Reinstatement—Payment of Dues—Submission to Medical Examination—Report of Medical Examiner not Accepted by Medical Board until after Death—"Acceptance" Prerequisite of Reinstatement—Constitution and Rules of Society.

Case stated by the parties by consent for the purpose of determining the question arising in an action upon a life insurance

certificate issued by the defendants, a friendly society, to Hugh Ryerson Bright, who died on the 9th November, 1919.

The payment of the sum of $1,000, which the plaintiff sought to recover in this action, was subject to the condition that the insured should at the time of his death be a member in good standing of the defendant society, and that he should have complied with the constitution and rules of the society.

It appeared from the case that the deceased had failed to pay the sums assessed upon him, had been suspended, had applied for reinstatement, had paid all that was claimed, and had undergone a medical examination, but had died three days after that examination and before the report of the examining doctor had reached the head office of the defendants. The medical board of the defendants accepted the report, without knowing that the man was dead.

The case was heard in the Weekly Court, Toronto.

J. E. Lawson, for the plaintiff.

Lyman Lee, for the defendants.

SUTHERLAND, J., in a written judgment, said, after stating the facts, that it was argued for the plaintiff that his right of reinstatement arose when he had done all that it was incumbent upon him to do. But the concluding words of sec. 73 (2) of the constitution were, "the same to be accepted by the medical board," referring to the earlier part of the clause requiring the suspended member to undergo the medical examination by the physician upon the form prescribed. Thus acceptance appeared to be a prerequisite—a condition precedent—to reinstatement; and, as the suspended member was dead at the time that the medical board dealt with the matter and signified acceptance, and as a dead man cannot be reinstated so as to become a member, that acceptance was ineffective.

Reference to Robinson v. London Life Insurance Co. (1918), 42 O.L.R. 527, 535.

Judgment for the defendants upon the stated case, and action dismissed with costs.

CLUTE, J. MAY 14TH, 1919.

RE TOLL AND MILLS.

Will—Devise to Son—Devise over in Event of Death of Son "Leaving no Issue"—Devise to Son of Life-estate only—Application under Vendors and Purchasers Act.

Motion by William Toll, the purchaser, under the Vendors and Purchasers Act, for an order declaring that the vendor, Joseph William Mills, can give a good title to the west half of lot 9 in the 14th concession of Hullett.

The motion was heard in the Weekly Court, Toronto.

William Proudfoot, K.C., for the purchaser.

L. E. Dancey, for the vendor.

CLUTE, J., in a written judgment, said that the vendor was one of the sons of John Mills, deceased, and derived such title as he had to the land in question from a devise to him by his father of the west half of lot 9, followed by these words: "But should my son Joseph William die leaving no issue, then this property shall be equally divided between my then surviving children."

The learned Judge was of opinion that the vendor had not an estate in fee simple. If he should die without leaving any issue surviving him, but leaving brothers or sisters, all his rights in the land would cease, and the property would go to them.

Re Ronson (1918), 15 O.W.N. 1, followed.

The vendor had, at the time of the application, a son living, 19 years of age, but this did not affect the question.

Reference to Nason v. Armstrong (1894), 21 A.R. 183, in part reversed in Armstrong v. Nason (1895), 25 Can. S.C.R. 263, but on another point.

The vendor was willing to convey such interest as he had in the property without covenants. If the purchaser was not willing to accept such a conveyance, there should be a declaration that the vendor could not give a title to the land in fee simple.

No order as to costs.

FALCONBRIDGE, C.J.K.B. MAY 14TH, 1919.

HARRIS v. HARRIS.

Contract—Oral Promise of Father to Convey Land to Son—Consideration—Services of Son—Evidence—Corroboration—Possession Given to Son—Part Performance—Statute of Frauds—Subsequent Acceptance of Lease by Son—Undue Influence—Lack of Independent Advice—Summary Ejectment of Son by Order under Overholding Tenants Provisions of Landlord and Tenant Act—Damages for, not Recoverable—Order Standing Unreversed—Claim for Timber Taken by Father—Specific Performance of Agreement—Alternative Claim for Wages—Amendment.

An action by a son against his father for specific performance of an agreement to give the son a conveyance of lots 12 and 13 in the 2nd concession of Ferguson, known as the "homestead lots," for the plaintiff's work and services done for the defendant. The plaintiff also claimed wages, compensation for improvements, and other relief. The defendant counterclaimed payment for use and occupation of the lots and moneys paid for the plaintiff etc.

The action and counterclaim were tried without a jury at Parry Sound.

J. P. Weeks, for the plaintiff.

H. E. Stone, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff became of age on or about the 25th May, 1900. From the time he was old enough to do so until 1910 he worked for the defendant in farming, lumbering, and saw-mill operations.

The defendant's promise to give the plaintiff the two lots was well proved and well corroborated.

From about 1910 the plaintiff and defendant treated the two lots as the plaintiff's property.

In 1911 the plaintiff got married, and in the same year he went into possession of the two lots and began to clear the farm and put it in shape for cultivation; from that time until 1916 he paid school-taxes on the two lots.

In October, 1914, the plaintiff and defendant went to Parry Sound, and the defendant there gave a solicitor instructions to prepare a quit-claim deed of the two lots to the plaintiff. This the solicitor did, and enclosed the deed in a letter to the plaintiff of the 23rd October, 1914.

The defendant said that he was drunk when he gave the instructions to the solicitor on a street-corner, and had been made so by

the plaintiff; but this was opposed to the solicitor's statement—and the solicitor was not one who would take instructions from a drunken man on a street-corner.

The defendant kept putting off the execution of the deed. The plaintiff had gone into possession under the agreement—so that there was no question of the application of the Statute of Frauds.

The plaintiff had very few advantages in the way of schooling or otherwise, and was not endowed with much natural intelligence —not a match for his father, who devised a scheme to obtain from the plaintiff a release or waiver of his title to the farm. He got the plaintiff to go to his (the father's) house, and there delivered to him a document purporting to be an agreement for a lease of the lots to the plaintiff for two years, and induced the plaintiff to sign an acknowledgment and acceptance of the agreement or lease.

If the plaintiff appeared to assent to this arrangement, he did so not understanding its nature and effect and without independent advice and being unduly influenced thereto by the defendant, who had always dominated the plaintiff.

After the commencement of this action, the defendant took proceedings under the overholding tenants provisions of the Landlord and Tenant Act and ejected the plaintiff from the premises, under the supposed authority of the two documents referred to. The order made by the District Court Judge under that Act was not appealed from; and the plaintiff could not recover damages for the ejectment: Holmested's Judicature Act, 4th ed., p. 1141, and cases cited.

The plaintiff was entitled to recover $100 in respect of a claim for timber removed by the defendant from other lands of which the plaintiff was locatee.

There should be judgment for the plaintiff for specific performance of the defendant's agreement to convey lots 12 and 13 and for $100 with costs.

In the event of the plaintiff being hereafter relegated to his claim for wages, he should be allowed to amend in accordance with his notice of motion for leave to amend. The defendant should not be allowed to amend.

The counterclaim should be dismissed with costs.

SUTHERLAND, J. MAY 16TH, 1919.

RE ROWAN.

Will—Construction—Devise—Mistake in Numbers of Lots—Falsa Demonstratio—Evidence—Declaration in Favour of Devisee.

Motion by the executors of the will of Duncan Rowan, deceased, for an order determining a question arising as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.

P. A. Malcolmson, for the executors.

W. Proudfoot, K.C., for Duncan Rowan, a nephew of the deceased.

F. W. Harcourt, K.C., for the infants and the respondent adults other than Mary Ann Munro, who, although duly served, was not represented.

SUTHERLAND, J., in a written judgment, set out portions of the will and also quoted a conveyance of an interest in land made to the testator in February, 1899, and said that Duncan Rowan, the nephew of the testator mentioned in the will, was a son of James Rowan, and through him had become the owner of an undivided half interest in the land mentioned in the deed of 1899. If the construction of the will contended for by Duncan should be adopted, he would become the owner of the whole, under the devise to him of his uncle's undivided half interest therein.

The point of difficulty was that under the deed the testator became the owner of an undivided half of "park lot A, a subdivision of parts of lots numbers 32, 33, and 34 in concession A, lake range" of the township of Kincardine, and also of parts of farm lots 32, 33, and 34 therein; while in the will the land was described as, "park lot A, subdivision of lots 22, 23, and 24," etc., and also parts of lots 22, 23, and 24, etc.

The testator did not own any lands in a subdivision of parts of lots 22, 23, and 24, nor did he own parts of lots 22, 23, and 24 therein, nor indeed any lands in the township other than his undivided half interest in the land described in the deed.

Both in the deed and in the will the lands were described as containing 140 acres.

The testator had a definite intention apparent on the face of the will of dealing with and devising his half interest in lands owned by him in the township, containing 140 acres and consisting of two parcels. One of these was identified as "Park lot A, concession A, lake range." If not completely so, evidence was

admissible to shew that it was part of the 140 acres in the township, owned by the testator, and devised by him. As to the other parcel necessary to make up the 140 acres, it was also indicated as being in the same concession, range, and township, and, if it was not sufficiently identified, evidence was admissible to identify it. The reference to the lots by the wrong number was falsa demonstratio, which "may be removed by evidence as a latent ambiguity:" Re Clement (1910), 22 O.L.R. 121, 126; Smith v. Smith (1910), ib. 127.

Order declaring that Duncan Rowan takes under the will the half interest owned by the testator; costs of all parties out of the estate.

SUTHERLAND, J., IN CHAMBERS. MAY 17TH, 1919.

REX v. PATTERSON.

Municipal Corporations—By-law Requiring Weighing of Coal Sold in Village—Infractions of By-law—Magistrate's Convictions—Motion to Quash—Evidence of Offences—Costs.

Motion to quash three separate convictions of the defendant, by the Police Magistrate for the Village of Kemptville, for three separate offences against a by-law of the village requiring the weighing of coal or coke upon the municipal scales before delivery is made after a sale.

W. Lawr, for the defendant.

T. R. Ferguson, for the village corporation.

SUTHERLAND, J., in a written judgment, said, after setting out the facts, that it seemed clear that there were infractions of the by-law by the defendant; and the learned Judge had come to the conclusion, on the whole case, that the motion must be dismissed, though he had some hesitation in so holding owing to the meagre and somewhat involved character of the evidence on the record.

There should be no costs.

MASTEN, J. MAY 17TH, 1919.

*WALKER v. MARTIN.

Motor Vehicles Act—Injury to Person on Highway by Automobile Driven by Infant Daughter of Owner—Negligence—Onus—Motor Vehicles Act, R.S.O. 1914 ch. 207, sec. 23—Evidence—Liability of Driver—Liability of Owner—Vehicle in Possession of Daughter without Consent of Father—Daughter not "Person in the Employ of the Owner"—Sec. 19 of Act, as Amended by 7 Geo. V. ch. 49, sec. 14—Damages.

Action for damages for injury sustained by the plaintiff in consequence of having been run over by an automobile driven by the defendant Vivian Martin and owned by the defendant Edward E. Martin.

The action was tried without a jury at St. Thomas.

W. K. Cameron and E. A. Miller, for the plaintiff.

George Lynch-Staunton, K.C., and W. H. Barnum, for the defendants.

MASTEN, J., in a written judgment, after setting out the facts, said that the defendant Vivian Martin had failed to discharge the onus cast upon her by the Motor Vehicles Act, R.S.O. 1914 ch. 207, sec. 23, by proving that she was not negligent in the driving of the motor-vehicle which injured the plaintiff.

The plaintiff was not guilty of contributory negligence.

The defendant Vivian Martin was the daughter of the defendant Edward E. Martin, the owner of the car; and they both testified that on the occasion when the plaintiff was injured the daughter took out the car without the consent, and indeed against the express injunction, of the father. It was in her possession without the consent, express or implied, of the owner; and he was not liable: sec. 19 of the Act, as amended by (1917) 7 Geo. V. ch. 49, sec. 14. She was not a person "in the employ of the owner," although he was entitled to her services, she being an infant living with her father.

Damages assessed at $2,000.

Judgment for the plaintiff against the defendant Vivian Martin for $2,000 and costs.

RE EOLL AND HAMILTON—ROSE, J.—MAY 12.

Mortgage—Sale under Power—Surplus Proceeds of Sale—Distribution—Findings of Master—Appeal—Priorities—Syndicate—Equalisation of Payments.]—Three appeals from the report of the Local Master at Sault Ste. Marie upon a reference to him to ascertain the persons entitled, and the proportions in which they are entitled, to certain moneys in Court, being the surplus realised upon a mortgage sale over and above the amount required to satisfy the claims of the mortgagees. The appeals were heard in the Weekly Court, Toronto. ROSE, J., in a written judgment, said that a certain syndicate, consisting of those who had been held entitled to divide among them the moneys in Court and others, owned lands which they mortgaged to secure $15,000; they transferred the lands to a second syndicate, of which some of the members of the first became members; the second syndicate made a mortgage to the members of the first for $108,000; Eoll, a member of both, collected certain moneys from the members of the second, and distributed them amongst those members of the first whom he believed not to have gone into the second, but these moneys did not nearly satisfy the claims of the payees under the $108,000 mortgage; the moneys in Court were the surplus proceeds of a sale under the $15,000 mortgage. The Master found that the members of the first syndicate who became members of the second had no right to share in the fund. From this there was no appeal. The first appeal, by McDonald and Woodgate and others, was against a finding that Finlayson and Dear were entitled in priority to the other claimants to certain sums required to equalise the amounts received by all the claimants, including Finlayson and Dear. The learned Judge said that he could find no reason for disturbing the holding that those who had had too much must let those who had had too little draw out of the moneys now available for distribution such amounts as were necessary to establish an equality before distribution of the balance of the fund. This appeal should be dismissed. The second appeal was by Finlayson and Dear against a finding that Dawson was entitled to share in the fund. Dawson was a member of the first syndicate who did not go into the second. Dawson had made an assignment to one Dowler; but Dowler said that, whatever the form of the assignment, he did in fact acquire Dawson's interest in the fund; and it could not be said that the Master was wrong in finding that Dawson was entitled to rank. This appeal should be dismissed. The third appeal was by the Royal Bank of Canada against a finding that Dowler became a member of the second syndicate. The evidence amply supported the finding. As all the appeals failed, and every one concerned was appellant in one appeal,

there should be no order as to costs. O. H. King, for McDonald, Woodgate, and others. J. H. Moss, K.C., for Finlayson and Dear. J. H. Spence, for Dawson and the Royal Bank of Canada.

BRAGG v. ORAM—ROSE, J.—MAY 16.

Injunction—Subdivision of Land according to Registered Plan—Streets Shewn on Plan but not Opened on Ground—Purchase of Blocks according to Plan—Right of one Purchaser to Restrain another from Ploughing Lands Shewn as Streets—Special and Peculiar Damage—Costs.]—An action for an injunction to restrain the defendant from obstructing certain streets, shewn on a plan, by ploughing them and growing crops. The action was tried without a jury at a Toronto sittings. ROSE, J., in a written judgment, said that the plan was registered and shewed streets and small lots. The plaintiff bought, according to the plan, a block near the centre of the subdivision, bounded by four streets. The defendant bought, also according to the plan, nearly all the remainder of the subdivision. The streets shewn on the plan were not opened on the ground, and the defendant has been cultivating some of them with his own land. The defendant did not assert any right to plough up the streets, but said that what he was doing did not harm the plaintiff. There can be no injunction unless the plaintiff does suffer damage, and damage special and peculiar to himself. But the plaintiff desires to sell his land, and to that end takes persons to see it. As to the streets leading directly from his property to Bathurst street, the plaintiff makes a case. The access to his property from Bathurst street will be easier over grass land than over ploughed land and through crops of grain. The plaintiff is entitled to an injunction restraining the defendant from ploughing the streets leading directly to the plaintiff's property from Bathurst street; and the defendant admits that the plaintiff is entitled to keep open such parts of the streets as lie alongside his property. No sufficient reason was disclosed for withholding costs. Judgment for an injunction (limited as above) with costs. J. M. Ferguson, for the plaintiff. W. E. Raney, K.C., for the defendant.

RE HAY AND ENGLEDUE—SUTHERLAND, J., IN CHAMBERS—MAY 17.

Jurisdiction—Order in Chambers—Refusal of Motion to Set aside—Appeal—Renewal of Application—Dismissal.]—Application by E. F. Kendall and John S. Whiting to set aside a former order made by SUTHERLAND, J., on the 27th April, 1915. The learned Judge, in a brief memorandum, said that, having regard to the motion subsequently made and his order disposing thereof, dated the 30th March, 1918 (14 O.W.N. 90), his leave to appeal to a Divisional Court, and the order subsequently made by a Divisional Court on the 31st January, 1919 (15 O.W.N 391), dismissing the appeal from the order of the 30th March, he was of opinion that he had now no jurisdiction to entertain this motion, which was therefore dismissed with costs. M. L. Gordon, for the applicants. T. R. Ferguson, for the estate of Alexander M. Hay.

MCGIBBON V. CRAWFORD—BRITTON, J.—MAY 17.

Mortgage—Discharge—Authority for.]—An action for damages for the alleged wrongful discharge by the defendants of a certain mortgage held by the defendant Robert Crawford, without authority to discharge it and without payment of any money, as the plaintiff alleged. The action was tried without a jury at Brampton and Toronto. BRITTON, J., in a written judgment, said that, upon the evidence and the proper inferences to be made, the discharge was executed with the knowledge of the plaintiff; and the action should be dismissed with costs. William Laidlaw, K.C., for the plantiff A. G. Davis and G. W. Mason, for the defendants.