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HIGH COURT DIVISION.

BRITTON, J. JUNE 22ND, 1914.

RE WOOD.

Will—Construction—Advice and Direction of Court—Executors—Discretion—Annuities—Insufficiency of Income—Resort to Corpus—Shares of Infants—Vested Estates—Period of Distribution—Costs.

Petition of the Toronto General Trusts Corporation, executors and trustees, for the advice and direction of the Court and the determination of certain questions as to the construction of the will of Alexander Wood, deceased, arising in the administration of his estate and the carrying out of the trusts of the will.

The petition was heard in the Weekly Court at Ottawa on the 11th April, 1914.

William McCue, for the petitioners.

A. C. T. Lewis, for the Official Guardian.

BRITTON, J.:—This matter in other aspects of it came before me at Toronto: Wood v. Brodie, ante 169.

It now comes up on the petition of the Toronto General Trusts Corporation, they having become executors and trustees of this estate.

This petition sets out the facts in connection with the management of the estate, presents a copy of the will of Alexander Wood, and asks certain questions. These questions are not easily answered in any brief way perfectly satisfactory to myself. An answer to them has become necessary by easy-going administration of the estate, extending over many years. The

Toronto General Trusts Corporation, having now taken hold under the particular circumstance of what I may call involved administration, are entitled to such advice and direction as the Court may be able to give.

The questions are:—

(1) Are any children of Stephen Wood born after the death of the testator entitled to share in the estate?

A. Yes. The interpretation of clause 8 of the will is, that all the children of Stephen Wood who attain majority are entitled to take.

(2) Do the children of Stephen Wood who may be found entitled to share in the estate take vested interests in the corpus?

A. Yes. The share of each child becomes vested on that child attaining majority.

(3) In the event of a surplus of income over and above the $2,500 mentioned in clause 8, does it vest in the children of Stephen Wood, as each attained or attains majority, so as to provide the annuity of $500 mentioned in clause 9?

A. Margaret became of age on the 25th December, 1905. Her father Stephen died on the 6th March, 1908. If the income had been sufficient, she would have been entitled to one year's annuity on the 25th December, 1906, and to another year's on the 25th December, 1907.

Mildred, the second daughter, was born on the 19th October, 1886, and became of age on the 19th October, 1907; and, as her father died before one year from her becoming of age expired, she would not be entitled to the year's annuity. Certainly not to the full year. The annuity of the widow of $2,500 continues until the youngest child becomes of age, and from the last-mentioned date the annuity of the widow drops to $1,000, and that sum is to be paid to her yearly during the remainder of her life. There will be no annuity of $500 as mentioned in clause 9 other than as mentioned above, as that was made payable only during the life of Stephen. After his death it is for division, if there is anything to divide, among the children who are over 21 years of age. It will not be necessary year by year to divide the surplus income, allotting shares to the children, but any surplus income over and above the amount required for the $2,500 annuity may be invested by the executors to meet a deficiency in subsequent years.

(4) In the event of the annuity in clause 9 in any one year not amounting to $500, does the oldest child of Stephen Wood, if 21, annually continue to take the amount up to $500 as the

case may be, and if, in subsequent years, the surplus exceeds $500, can the deficiency be made up to the annuitants who in previous years had received less than $500?

A. See answer to question 3. The annuity of $500 is out of the question, except the 2 years to Margaret. The executors may deal with surplus income, if any, by dividing it, or by payment on account to such of the children who are 21 and over, the same as if their shares were set apart.

(5) After providing a fund to produce the $1,000 annuity for the widow of Stephen Wood mentioned in clause 9, what children share in the balance of the corpus? Is it only those who were born in the lifetime of the testator, and the child *en ventre sa mère,* and who live to be 21? Are their interests vested interests?

A. All the children who attain to the age of 21, those born after the death of the testator as well as those born during his life. The interest of each child will vest upon his or her arriving at 21 years of age.

(6) Clause 8 provides that $2,500 shall be applied towards the support and maintenance of the wife and children of Stephen Wood, if he predeceases his wife. He has predeceased her. For several years, the family, who were growing up, lived with, and, with one exception, until recently, the widow of Stephen Wood. During these years, the income being insufficient to maintain the wife and family, the widow was obliged to mortgage her homestead and other property to the estate, and Margaret Wood, the eldest child, on attaining 21, joined with the mother in assisting the household. Are the widow and Margaret, the daughter, entitled to be recouped for money so spent, at least a proportionate share? As a result, the widow has been unable to keep the taxes paid on her own property. Is she not now entitled to be paid such liabilities as she can shew were so incurred, or a proportionate share of them, she having no other income than the annuity?

A. This is simply the unfortunate case of living beyond income. The insufficiency of income to meet all the expenses mentioned gives no claim to the widow or children for any lien on the corpus, or payment out of corpus, but all payments made by the widow for taxes, insurance, repairs, or which were made by the widow, but which under clause 15 were to be paid out of the testator's general estate, may be recouped to her out of the general estate.

(7) Is clause 15 wide enough to include succession duty pay-

able generally out of the corpus, or is the succession duty chargeable against legatees personally?

A. Clause 15 is not wide enough to relieve the annuitants from succession duty.

(8) In the event of the income not amounting to $2,500 a year, would the widow of Stephen Wood be entitled to draw upon the corpus to make up her annuity of $2,500?

A. The annuity is payable out of income. It is payable absolutely; and, if it requires all the income from the estate, the income must be so applied. The corpus cannot be resorted to.

(9) Is Margaret Wood, eldest child of Stephen Wood, being the first to attain 21, entitled to be paid the sum of $338.25 said to be surplus income over the $2,500 a year earned during the first three years of administration, and which was taken and used in subsequent years by the executors, when the income fell short of $2,500?

A. Assuming that Margaret Wood did not receive the first payment of her annuity of $500, and that there was income sufficient to pay the $2,500 to the widow in full, the executor might well have paid the $338.25 to Margaret. I am, however, not able to say that, in the face of deficiencies in after years, she has a right above that of the widow to this surplus of former years.

(10) The executors not having set apart, at the time of the death of Stephen, enough of the estate to provide for the annuity of $2,500 to the widow for the time she may be entitled to it, and of $1,000 for the time she may be entitled to the reduced amount of $1,000, and not having made any division, are the children of Stephen who may be found entitled to share, now entitled to demand such share?

A. The shares of the children of Stephen could not, at his death, be finally determined. The amount of each share depends upon the number of Stephen's children who attain 21. The share of each child vests upon that child attaining 21. The time of final distribution will be after the death of the widow and after all the children of Stephen are of age. If the executors are satisfied that the amount they set apart to produce the annuity for the widow is sufficient, a payment on account may be made to any child over 21.

It is no part of my duty to advise this, it is a matter for the executors, and may depend upon conditions, not the same at all times, in regard to the corpus of the estate.

If the assets of the estate are sufficient to warrant it, keeping

in mind the necessity of having income sufficient to pay the $2,-500 annuity, it will be quite proper for the executors to make a payment on account of the unpaid annuity to Margaret, or on account of the share of any child of Stephen over 21, as part of the share or on account of such share to which the child will ultimately be entitled.

Costs of all parties out of the estate; those of the executors as between solicitor and client.

The costs, as well as any of the items which the executors may pay as mentioned in my answer to the 6th question, should be paid out of the corpus, not out of income, unless income sufficient to meet all charges against income; and I understand it is not sufficient.

BOYD, C. JUNE 22ND, 1914.

RE CITY OF OTTAWA AND COUNTY OF CARLETON.

Municipal Corporations—Bridge across River Dividing City and County—Liability for Cost of Construction and Maintenance—Ascertainment of Boundary between City and County—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 452—*Territorial Division Act, R.S.O.* 1914 *ch.* 3, *sec.* 9—*Joint Undertaking — Originating Notice — Municipal Act, sec.* 465(1).

Motion on behalf of the Corporation of the City of Ottawa, upon originating notice, for a summary order determining and fixing the liability of the applicants and the Corporation of the County of Carleton, respectively, to contribute to the cost of the construction and maintenance of the temporary bridge over that portion of the waters of the Rideau river which lie between the southerly end of Bank street and a certain island designated C., and across that island, and to the cost of such bridge or bridges as may hereafter be erected in the place of the temporary bridge.

F. B. Proctor, for the applicants.

D. H. Maclean, for the county corporation.

BOYD, C.:—Disputes between two municipal corporations as to their joint or several obligation to erect and maintain

bridges may be brought up summarily before the Court on an originating motion: The Municipal Act, R.S.O. 1914 ch. 192, sec. 465(1). This was done on the present application before me at Ottawa, on materials which, so far as they go, shew the boundary-line between the city of Ottawa and the county of Carleton as fixed by the river Rideau. It was said that at the point where the bridge in question exists, "Billings Bridge," the true boundary is not the river, but the southerly limit of land on a small island in the river and near its north bank. This island was, by Crown patent, granted to Bradish Billings in April, 1857, as an island, reserving the line of road over it, which road forms part of street called Bank street, in Ottawa. The former bridge, now out of repair and calling for reconstruction, was from bank to bank of the Rideau, passing across the island and giving, as part of Bank street, means of communication between city and county.

The contention at present is by the county corporation that there are here legally speaking two bridges, one entirely within city limits from the north shore of the Rideau to the south side of the small island, over a shallow stretch of the river, and the second bridge, the real boundary-bridge contemplated by the statute in that behalf, runs from that south side of the island to the north bank of the Rideau, over the navigable part of the stream. The agreement is, that this northerly part of the bridge should be built and kept up at the sole expense of the city, and as to the southerly part the county agrees to share in the expense. It is stated that further evidence might be put in to clear up the question of the boundary of the city on this limit; but, as none has been furnished, I decide upon the materials now before me.

On the 10th December, 1907, upon the application of the city corporation, an order was issued by the Ontario Railway and Municipal Board extending the boundaries of the city of Ottawa to the northerly bank of the river Rideau. The order deals with that portion of the township of Nepean, in the county of Carleton, lying between the Rideau river and the Rideau canal and the westerly boundary of the village of Ottawa East and Concession street in the said city, produced to the Rideau river, and declares that portion of territory to be added and annexed to the city of Ottawa. It is conceded that this area includes the locus in quo of the bridge, and it appears to me conclusive as to where exists the boundary between the city and the county. That boundary is the whole river from bank to bank (the inter-

mediate small island is negligible and immaterial on this inquiry).

Section 452 of the Municipal Act declares "that where a river . . . forms or crosses a boundary-line between a county and a city . . . it shall be the duty of the corporations of the county and the city . . . to erect and maintain bridges over such river."

The very point before me has been passed upon by Mr. Justice Kelly in Ottawa and Gloucester Road Co. v. City of Ottawa (1913), 24 O.W.R. 344 (4 O.W.N. 1015), after the city boundary had been extended to the Rideau river. He treats it as settled that the centre of the river was the actual boundary-line between the city of Ottawa (as so extended) and the township of Gloucester (which is part of the county of Carleton): 24 O.W.R. at p. 346; and at p. 351 he says: "The northerly portion of the bridge became the property of the city, on the extension of the city limits . . .; and the city and the county are together now liable for the erection, repair, and maintenance of the whole bridge."

It was urged before me that this case was dealing only with "a certain bridge from an island within the township of Nepean and thence across the main stream of the Rideau river to the shore of the township of Gloucester and commonly known as Billings Bridge;" but the case itself shews that this section was regarded as only a part of the whole bridge from bank to bank and not a separate bridge. Thus the Judge puts it: "The Rideau river, where this road crosses it, then formed the boundary line between the township of Nepean (on the north) and the township of Gloucester (on the south), and the bridge was the connecting link between the parts of the road to the north and south of the river respectively" (p. 345.) The learned Judge also held that the statute cited by Mr. Maclean, 42 Vict. ch. 48, did not change the statutory liabilities of the contestants.

The river is the natural boundary between city and county, though the exact line of territorial subdivision may be in the middle of the main channel (ad medium filum aquæ), according to the Territorial Division Act, R.S.O. 1914, ch. 3, sec. 9. In this view, the small island on the north would be the property of the city, but its situation would not detract from the effect of the Municipal Act as to bridges over rivers which bound two municipalities.

The whole question as to this same and a like locality was passed upon by the Queen's Bench Division in 1882: Regina v. County

of Carleton (1882), 1 O.R. 277, where the three Judges, speaking by Mr. Justice Armour, thought that the duty of maintaintaining the bridge was cast upon the county and the city by the Municipal Act cited. Mr. Justice Armour continues in these words: "The river Rideau—that is, the whole river, without regard to the accident that Cummings Island is in it, and notwithstanding that fact—forms, in our opinion, a boundary-line between the county of Carleton and the city of Ottawa within the meaning of that section" (p. 284.) He refers to sec. 495 of R.S.O. 1877 ch. 174, which is sec. 452 of R.S.O. 1914 ch. 192. See also Harrold v. County of Simcoe (1868), 18 U.C.C.P. 9.

I hold, therefore, that the obligation to build and maintain Billings Bridge in its entirety across the river Rideau rests on the Corporation of the City of Ottawa and the Corporation of the County of Carleton.

It is a joint undertaking, but it is not my duty on this application to deal with questions as to the character of the work or the proportion of the expense to be borne by each; in regard to which the differing lengths of the bridge on each side of the mid-stream line may be a material factor.

The notice of motion does not ask for costs, and the question was not mentioned; and I, therefore, say nothing about them.

KELLY, J. JUNE 22ND, 1914.

McINTYRE v. GRAND TRUNK R.W. CO.

Master and Servant—Injury to Servant—Railway Brakesman—Negligence—Liability—Finding of Jury—Evidence.

Action by a brakesman employed by the defendants to recover damages for injuries sustained by him by reason of the negligence of the defendants, as he alleged.

The action was tried with a jury.

T. G. Meredith, K.C., and R. G. Fisher, for the plaintiff.

D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

KELLY, J.:—The plaintiff was a brakesman in the employ of the defendants, and on the 16th December, 1912, was injured by coming in contact with a poker which was being used by an-

other of the defendants' employees—a locomotive fireman. The plaintiff was what is known as a front brakesman, that is, a brakesman whose duties are on the forward part of a freight train. When not actually at work during the run, the front brakesman is assigned a place in the cab of the locomotive, with the engine-driver and fireman. This was the condition of things at the time of this happening, which took place about six miles east of Sarnia, while the train was running in an easterly direction. The train was approaching a station, and the plaintiff, as was his duty, stepped to the gangway or passage between the locomotive-cab and the coal-tender for the purpose of looking for signals and observing if there were any hot boxes in the trucks of the cars. Stepping backwards from having done this, he was struck or came in contact with a long poker then in use by the fireman in the performance of his duties. The blow threw the plaintiff from the train, and the cars, or some of them, passed over his left leg, injuring it so seriously that amputation was necessary about four inches below the knee.

He bases his claim upon what he alleges was the improper, careless, and negligent handling of the poker by the fireman, and claims further that the fireman was, as the defendants knew, or should have known, incompetent, unfit, and not a proper person to do the work which he was thus engaged in, and that he was not a proper person, as the defendants knew, or should have known, to have in their employ.

On the opening of the trial, the claim was amended by adding allegations that his occupation as a brakesman in the defendants' employ was a dangerous one, and that the defendants were bound to take all reasonable precautions for his safety, which they omitted to do; that the place provided for the plaintiff to do his work was not fit and proper; and that the defendants omitted to provide a proper system by which the dangerous character of the plaintiff's employment might be mitigated or lessened.

The jury's only finding of negligence was, that the "accident was caused by the lack of care by the fireman in handling his poker in the restricted place which he had to work in while the plaintiff was in a dangerous place in performance of his duty."

This action was not commenced within the time entitling the plaintiff to claim under the Workmen's Compensation for Injuries Act; moreover, the relationship between the fireman and him was not such as to entitle the latter to succeed under that Act.

The evidence lacks the essentials to constitute negligence for which at common law the defendants can be made liable, having regard to the finding of the jury. The duty of the defendants in the interest of the safety of the employee in respect to the act of a fellow-servant is to select fit and competent fellow-servants. The plaintiff was familiar with what was required of him, and was aware of the dangerous character of the employment. His own evidence and that of Greenleaf, a witness called on his behalf, is, that the fireman's time is practically fully taken up in shovelling coal and poking and otherwise attending to the fire. This may well be when we bear in mind the statement of Turner, another of the plaintiff's witnesses, that a locomotive drawing a heavily loaded train, while running from Sarnia to London (a distance of about 59 miles), will consume between six and eight tons of coal, which must be shovelled by the fireman.

The train from which the plaintiff fell was made up of fifty freight cars. The plaintiff stated in his evidence that the accident happened through the carelessness of the fireman in not looking at what he was doing; that he could have seen the plaintiff had he looked; and that, had he done so, the plaintiff would not have been struck.

I cannot see that, under the circumstances, this constitutes negligence on the part of the fireman; and, even if my conclusion were otherwise, I am satisfied that what the jury characterises as negligence was not negligence of the defendants. There is not evidence of incompetency or unfitness of the fireman, or even that the defendants believed that he was otherwise than fit and competent, or that they were negligent or wanting in care in selecting him for their employee. What the plaintiff's counsel contended is, that the place on the locomotive where the fireman and plaintiff were required to work was contracted in space, and therefore dangerous. If the inference is to be drawn from the answer of the jury that they intended their finding of negligence to extend to this place as being too restricted, and therefore an improper place to work in, the plaintiff's claim cannot be supported on that ground; for there is no evidence that this place was an improper one in the sense that it could have been made more spacious, or that there is any known method of operating locomotives, in respect of the place where these men necessarily work, superior to or safer than that in use in this locomotive.

Much as one regrets the unfortunate occurrence, which has

been attended with such serious results to the plaintiff, there is but one conclusion to be come to, namely, that the negligence found by the jury is not negligence of the defendants, or such as to entitle the plaintiff to succeed.

The action will, therefore, be dismissed with costs.

MIDDLETON, J. JUNE 24TH, 1914.

PERRY v. BRANDON.

Contract—Rent of Plant at Sum per Diem—Computation of Days—Construction of Written Agreement—Inclusion of Sundays—Deductions from Contract-price.

Action for money due under an agreement for the rent of an excavating plant.

R. H. Greer, for the plaintiff.
W. Laidlaw, K.C., and W. I. Dick, for the defendants.

MIDDLETON, J.:—The action is brought upon a written contract by which the plaintiff rented to the defendants a certain plant owned by him, for the purpose of excavating a siding and a site for a building upon the defendants' land. The plant consisted of a locomotive, shovel, and some cars; and the rental stipulated was $62 per day, "to start immediately on outfit leaving main line and to run each and every day."

The contention put forward by the defendants is, that this means excluding Sundays, and they contend that, if this is not the meaning of the contract, the contract ought to be reformed.

I am against the defendants on both contentions. The contract was deliberately and carefully prepared, and embodies the agreement arrived at. The intention was that Sunday should be paid for, and that is, I think, the true construction of the agreement.

Gibbon v. Michael's Bay Lumber Co., 7 O.R. 746, is, I think, conclusive. The argument that this would involve work upon Sunday is met by what is said by Wilson, C.J., at p. 751: "When Sunday is not computed . . . it is not because in England or in this country work is prohibited to be done on that day, but because by the contract it has been expressly excluded

from the computation named, or by the time being restricted to working days." It may be, as in the case referred to, computed as a day to be paid for, although the law will not suffer any work to be done upon that day.

The point that most strongly impressed me against this view was the fact that the $62 includes a sum to be paid for wages; but the parties have carefully stipulated that $62 is to be paid by way of rental, although certain men were to be supplied free by the lessor.

I do not think it necessary to deal with the other matters in detail. I accept the evidence of the plaintiff that it cost less to move the machine from the end of the siding than to move it from the place where the defendants contend it should have been brought upon their land, and no time was consumed in moving the cars and plant over the adjacent siding.

I do not think the credit given for the delay owing to the absence of the full quota of men contracted for, between the 9th and 14th October, is sufficient, and I have increased this sum to the $60 suggested by Mr. Laidlaw.

After making all adjustments, I think that there should be judgment for the plaintiff for $724, with costs.

KELLY, J. JUNE 25TH, 1914.

RE PALMER AND REESOR.

Vendor and Purchaser—Title to Land Agreed to be Sold—Building Restriction — Covenants — Intention — Building Scheme—Application under Vendors and Purchasers Act —Probability of Litigation—Title not one to be Forced on Unwilling Purchaser.

Motion by the vendor for an order, under the Vendors and Purchasers Act, determining a question of title arising upon a contract for the sale and purchase of land.

L. C. Smith, for the vendor.
D. Urquhart, for the purchaser.

KELLY, J.:—The material before me is in the form of a statement of facts submitted by counsel, the question involved being

whether there is any restriction binding on the vendor, Palmer, not to erect more than one house on lot 287 on the south side of Pleasant avenue, in Toronto, according to plan 895.

On the 26th April, 1907, Annie A. Moore, the owner of this lot and lot 288 adjoining it, and apparently the owner also of lots 289, 290, and 291 on the north side of Pleasant avenue, according to the same plan, conveyed lots 287 and 288 to George H. Tod, the conveyance containing covenants in the following form: "The party of the second part, the grantee, covenants with the party of the first part to erect only one dwelling and necessary outbuildings on each of the said lots, each building to cost not less than $2,500 when completed." "And the said party of the first part covenants with the party of the second part that any conveyance of lots 289, 290, and 291 on the said plan, or any of them, hereafter executed by her, shall contain the covenant immediately preceding this covenant, or words to that effect."

This conveyance was not executed by the grantee; but, having taken the benefit thereby assured to him, he was obliged to perform and observe all the covenants on his part therein contained: Halsbury's Laws of England, vol. 10, p. 401.

On the 8th December, 1909, Tod conveyed lot 288 to one Hamlyn, by deed which contained this covenant: "The party of the second part covenants with the party of the first part to erect only one dwelling and necessary outbuildings on said lot 288, such dwelling to cost not less than $2,500 when completed."

On the 18th April, 1910, Tod conveyed lot 287 to Palmer (a party to this application), the conveyance containing no express restrictions as to building. After Annie A. Moore had conveyed lots 287 and 288 to Tod (namely, on the 5th December, 1907), she conveyed to another person the above-referred to lots 289, 290, and 291, by deed which contains the following covenant by the grantee: "The party of the second part covenants with the party of the first part to erect only dwellings and necessary outbuildings on the said lands, and that each of the said dwellings shall cost not less than $2,500 when completed."

All of these conveyances are registered.

A further statement of fact is, that the purchaser has bought lot 287 for the purpose of erecting two houses thereon; and that he has been notified on behalf of certain property-holders in the locality that, if he begins to erect two houses, proceedings will be instituted to restrain him.

At the time of the conveyance from Annie A. Moore to

Tod of lots 287 and 288, the intention seems to have been that uniformity should be maintained in respect of the buildings on these lots and her other lots mentioned in the conveyances, namely, 289, 290, and 291, the same restrictive covenant as to the class and manner of building applying to all these lots, thus indicating a building scheme.

In Reid v. Bickerstaff, [1909] 2 Ch. 305, it is laid down that some of the essentials of such a scheme are definite reciprocal rights and obligations extending over a definite area. At p. 319 the Master of the Rolls, after having stated these essentials, adds: "A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area."

If, on a sale of part of an estate, the purchaser covenants with the vendor not to deal with the purchased property in a particular way, a subsequent purchaser of part of the estate does not take the benefit of the covenant unless he is an express assignee of it, or unless the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser, in which latter case the benefit of the covenant passes to the purchaser, it being in the nature of an easement attached to his property. Here the restrictive covenant is not in so many words expressed to be for the benefit and protection of the parcels purchased by subsequent purchasers, but there was an apparent intention of imposing upon the owners of all of the five lots the obligation to observe the reciprocal covenants and of conferring the benefits thereof, in so far as they were a benefit.

A clear explanation of the scope and effect of these restrictive building covenants is the following from the judgment of Buckley, L.J., in Reid v. Bickerstaff, supra, at p. 323: "There can be no building scheme unless two conditions are satisfied, namely, first, that defined lands constituting the estate to which the scheme relates shall be identified, and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate, with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condi-

tion identifies the class of persons as between whom the reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation."

I am inclined to the view that the facts of the present case shew a building scheme extending over these five lots, bringing it within the application of this statement of the law, and that there is a restriction against building more than one house on lot 287. If that view be correct, the restriction may be taken to extend to the other four lots; but as to that I do not offer any opinion intended to be binding, the owners not being parties to or represented on this application.

In the form the matter is submitted, it is sufficient to say that, owing to the reasonable probability of litigation, as indicated by the notification to that effect (I am assuming that the notification came from the owners of the other four lots or some of them), the title in respect of this restriction is such that it should not be forced upon an unwilling purchaser, especially as the owners of the other four lots are not before the Court.

Thus indicating my view, I do not make further order. I think this is not a case for costs.

MEREDITH, C.J.C.P. JUNE 26TH, 1914.

RE SOLICITORS.

Solicitor — Costs — Taxation — Retrospective Application of Tariffs of Costs Appended to Rules of 1913*—Appeal from Taxation of Local Officer—Right of Appeal under Rule* 508 *—Objections to Taxation—Procedure under Rules* 681, 682 *—Application of—Reference to Senior Taxing Officer at Toronto.*

Appeal by the client from the taxation of the solicitors' bills of costs by the Local Registrar at London.

J. I. Grover, for the appellant.

Featherston Aylesworth, for the solicitors.

MEREDITH, C.J.C.P.:—More questions than one, of some general importance, are involved in this appeal; as well as questions of very considerable importance to the parties to it.

The first question is, whether the former tariff of costs is at all applicable to any of the bills in question. The solicitors drew them, in the first instance, on the supposition that it was; the taxing officer who taxed them held that it was not; and the bills were accordingly redrawn and taxed in accordance with that ruling.

It is said that the practice throughout the Province is "at sixes and sevens" on the subject: those who exclude the former tariff, doubtless, relying upon a note at the foot of the present tariff, whilst those who take the other view doubtless do so relying upon the case of Delap v. Charlebois, 18 P.R. 417.

If that case were quite like this case, I should follow it, and the more readily because it probably guided the practice on the subject entirely until the new tariffs came into force; though it may be that, if the question had first come before me for consideration, I might not have been able to reach the conclusion arrived at by the learned Judge who decided that case, so easily and firmly as he seems to have reached it.

Whether a statute, or Rule, is or is not retrospective, is, of course, a question of intention; it must be given effect according to its true meaning; and the character of the enactment or Rule, as well as other circumstances, may be very helpful in reaching a true interpretation. Generally statutes and Rules respecting procedure are considered retrospective, in criminal as well as civil proceedings: see Rex v. Chandra Dharma, [1905] 2 K.B. 335.

My impression has always been that "costs are practice;" and I have some memory of an ancient decision in those words. The first work on the subject at hand, I now find, deals with it in these words: "Statutes governing costs are Rules of practice, and the power to award them, and the amount and items to be awarded, depend upon the statute in force, not at the commencement, but at the termination, of the controversy, or when the right to costs accrues. In the absence of any provision to the contrary, statutes regulating costs are usually held to apply to pending suits:" Encyclopædia of Pleadings and Practice, vol. 5, pp. 111-113; see also the case of Pickup v. Wharton, referred to in a foot-note to the case of Foreman v. Moyes, 1 A. & E. 338.

I am quite unable to give any weight to the contention that

there is to be implied an agreement between solicitor and client that the solicitor shall charge and the client pay for each service rendered a fee according to some particular tariff; the client, probably, has no knowledge of tariffs or any intention to contract for anything but to pay what the law allows, when, according to law, that which is so allowed becomes payable.

The case of Delap v. Charlebois was not like this case: it might have been a "hard case" if the ruling had been the other way. In it the party taxing the costs became entitled to them under a judgment pronounced in June, 1895; the taxation did not take place till the year 1899; the tariff relied upon to increase the fees came into force in September, 1897. In a case such as that, much, perhaps, might depend upon whether the costs there in question could and ought to have been taxed before the tariff of 1897 came into force; and it may be that it had much force.

But as to this case, a foot-note to the tariffs now in force shews that the draftsman of them intended them to be applicable retrospectively in the widest sense. It is in these words: "Note. Tariffs A and D shall be used in all taxations after these Rules come in force;" words which, doubtless, were intended to give a retrospective effect to such tariffs, though that might easily have been made plainer by the adding of, for instance, such words as: "and shall be applicable to all services rendered before as well as after such Rules come into force."

Then, these Rules and tariffs, having been given, by legislation, the same force and effect as if embodied in a legislative enactment, the foot-note I have read must be given the same force and effect as if part of such an enactment; and so there is the expressed intention, with statutory effect, that these tariffs shall be retrospective; and I rule, accordingly, that they are applicable to costs incurred before as well as after they came into force, not taxed before they came into force.

Another important question involves the rights of an inspector of an insolvent estate in respect of charges as solicitor and counsel for the assignee of the estate; the amounts involved being large.

Other questions involve the propriety of "additional allowances" made in the discretion of the local taxing officer, which are expressly made subject to review upon appeal.

There is also in this, as in all other cases, especially where large bills are in question, the desirable end of uniformity, as far as practicable, in regard to all taxations, to be striven for,

and which can best be attained through the interposition now and then of the taxing officers at Toronto.

I have, therefore, no doubt that the assistance of the senior taxing officer should be had before dealing finally with the several items in contest upon this appeal.

But, it is said, that cannot be done; that the appellant has not put himself in any position which gives him a right of appeal as to any of the items with which he is dissatisfied; that it was necessary to make objection in writing, delivered to the taxing officer and to the opposite party, respecting each item the allowance of which he objected to, and that there should have been a reconsideration and review by the taxing officer of the taxation, before there can be any appeal; in other words, that Rules 681 and 682 apply, and that they have not been complied with.

In that contention I cannot agree. Rule 508 gives a right of appeal against a solicitor and client taxation under the Solicitors Act, as if it were an appeal from a Master's report: the partial restriction contained in Rule 509, respecting items as to which objections in writing must have been filed, affects only appeals against taxations other than of a solicitor's bill under the Act; and the note to the tariff which authorises increased fees, in the discretion of the taxing officer, in solicitor and client taxations, also provides, as I have mentioned, that any exercise of such discretion shall be subject to review on any appeal.

I direct that the senior taxing officer make all necessary inquiries regarding the items in question, and report which of them, and to what amount, would be allowed by him in a taxation in accordance with the practice in his office—treating tariffs A and D as retrospective: after report the appeal shall be considered with any light that report may throw upon it, in addition to the light which the very full arguments of counsel have already thrown upon it.

MEREDITH, C.J.C.P., IN CHAMBERS. JUNE 26TH, 1914.

RE LANG.

Municipal Corporation—Transient Traders' By-law—Municipal Act, R.S.O. 1914 ch. 192, sec. 430(7)—*Company Occupying Warehouse and Selling Goods without Being on Assessment Roll or Having License—Conviction of Servant or Agent—Evidence—Quashing Conviction—Costs.*

Motion on behalf of J. D. Lang to quash a conviction made by a magistrate, upon the information and complaint of James Killoran, for an offence against a by-law of the Village of Chesterville.

O. H. King, for the applicant.
No one contra.

MEREDITH, C.J.C.P.:—The applicant, upon this motion to quash a conviction under a municipal by-law, was convicted "for that he did . . . as agent for the Wrought Iron Range Company of Canada Limited, occupying a warehouse in the said village and not being on the assessment roll, and not having a license, sell and deliver at their said warehouse one stove range . . . contrary to a certain by-law of the said village municipality. . . ."

It was the company, not the convicted man, which was found to be occupying the warehouse without having a license or being upon the assessment roll; that is put beyond any doubt by the evidence; and it was the man who was proved to have sold and delivered the range; such sale and delivery having been made by him "as agent" for the company.

Only those who might, and do not, obtain a license, are liable to punishment for selling without having a license: Municipal Act, R.S.O. 1914 ch. 192, sec. 430, sub-sec. 7; and only those who are not entered upon the assessment roll, or are entered upon it in respect of income or business assessment for the first time, are required to take out a license: see Regina v. Caton (1888), 16 O.R. 11.

That being so, it is plain that the conviction cannot stand. There is nothing to shew that the applicant had not a license, or that he was not entered upon the assessment roll in such a manner as to exempt him from the provisions of the law under

which he was convicted. So that, even if the legislation were applicable to an agent for the trader, in any case, far from enough to support a conviction of the applicant is proved or even asserted: see Regina v. Cuthbert, 45 U.C.R. 18.

Taking this view of the case, it is not necessary to consider any of the grounds urged on the applicant's behalf in support of the motion.

The conviction must be quashed; the order will go in the usual form, without costs; the complaint against the company was dismissed by the magistrate, and so, if an infraction of the by-law were committed, both master and servant escape—that is, escape altogether except from their own costs of this motion.

MEREDITH, C.J.C.P., IN CHAMBERS. JUNE 26TH, 1914.

REX v. ROACH.

Criminal Law—Magistrate's Conviction—Absence of Information or Specific Charge—Accused not Given Fair Trial nor Opportunity to Defend himself—Unsworn Testimony not Audible to Accused—Conviction for several Offences—Uncertainty—Invalidity—Motion to Quash—Impossibility of Amendment—Criminal Code, secs. 682, 686, 710(3), 714, 715, 721, 942, 943, 944—*Quashing Conviction—Protection of Magistrate—Costs.*

Motion by the defendant to quash a magistrate's conviction.

M. J. O'Reilly, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.C.P.:—There was no real trial, in a legal sense, of the applicant, though he was found guilty of a crime for which he might have been imprisoned with hard labour, for six months, and fined $50, on a summary conviction.

By the term "real trial" I mean that unprejudiced, full, and fair trial which every one charged with a crime is entitled to, and which the Criminal Code of Canada explicitly requires: see secs. 721, 714, 715, 942, 943, 944, 686, and 682; a trial none the less, but sometimes the more, necessary where preconceived notions of guilt exist, even though they may be well-founded.

Such a trial does not necessarily involve any waste of time, nor need more be expended in it than is sometimes spent in trials which have to be gone over again because not real trials. Waste of time is often the result of superfluous words, and other things not pertinent.

No information was laid against the accused man; no specific charge was made against him; only a general one of indecent exposure. Neither the shorthand notes of the trial, nor the magistrate's full report of the case, shews that there was any arraignment of the prisoner; see sec. 721 of the Criminal Code; nor that he was otherwise informed, in any formal way, of the charge against him. The school-girl witnesses were not sworn, although there does not appear to have been good reason for not taking their testimony under oath. According to the testimony of a bystander, who is described as a clergyman, the testimony of the girl-witnesses was whispered into the magistrate's ear; and the prisoner's request for an adjournment of the trial so that he could procure counsel to conduct his defence was refused, the magistrate telling him that a lawyer could do him no good. The only reason suggested for the whispered evidence is modesty; but modesty, whether properly described or false or not, cannot justly be permitted to deprive any person upon trial for a crime of his right to hear all the evidence adduced against him.

And, after the prisoner was represented by counsel, he was not permitted—as the shorthand notes of the trial clearly shew—to make his full defence, as, whether strictly regular or not, he ought to have been; but was restricted to evidence of his good character.

It ought not to be, and it may not be, necessary, even if excusable, to repeat again the oft-quoted words of the Lord Chief Justice of England, upon this subject, so forcibly expressed in the case of Martin v. Mackonachie (1878), 3 Q.B.D. 730, 775, but I do so lest we Justices, whether of superior or inferior Courts, forget; and because that case is in point upon the main question involved in this case, as the first words I intend reading shew: "It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument â convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice

has been done, but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of the law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has a right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself."

Amendments by the Legislature, from time to time, to the law have made escapes from substantial justice on mere technicality few and far between, if they ever need occur. And I may add that, as the provisions of the law exist for the purpose of making a case so plain that substantial justice can be done, how is it possible to assert that justice has been done when some of the means the Legislature has deemed necessary in reaching that end have been disregarded?

But, apart from all such irregularities, the conviction, upon its face, is plainly invalid. It is: for that the accused man, within two months prior to the 20th day of May, 1914, did, in the city of Hamilton, "at various times and in public places unlawfully commit acts of indecency . . ." That the conviction is invalid because it includes several offences, and is uncertain, seems to me to be too obvious to require, or excuse, much argument: and, unfortunately, it is not reparable under any of the wide powers of amendment by the Criminal Code conferred upon this Court on motions such as this; because the evidence relates to a number of offences, entirely separate from one another, extending over two years, most of them within "two months prior to the 20th day of May, 1914;" and it is impossible to pick out any one of them as one upon which the prisoner was found guilty: he has not been found guilty on all the occasions testified to, nor has the magistrate in any way indi-

cated any particular occasion regarding which he found the man guilty; indeed, it is hardly likely that he made any finding of that character; but is altogether likely that he merely found that, having regard to all the evidence, the man must have been, on some occasion or other, guilty. It is, therefore, quite impossible to change the generality of the conviction into a particular one out of all that were deposed to with more or less weight; which is enough to invalidate the conviction, without considering whether it would be proper to amend, in the circumstances of this case, were it possible.

The evidence should have been confined to one offence as also the charge should have been; there was no need for giving evidence of other offences to prove intent; and there was no such purpose or excuse in adducing it; the evidence in each case was given for the one and same purpose, namely, to prove the prisoner guilty of separate and distinct offences, in a trial upon all that might come out in the evidence.

Since the argument, Mr. Cartwright has referred me to the case of Rex v. Sutherland (1911), noted in 2 O.W.N. 595; but that case affords to me no assistance in this case. It was, doubtless, intended to be decided under the special provisions of the liquor license laws of this Province, and not intended for citation in support of a similar ruling in a case such as this: as to the liquor license laws, the well-known cases of Regina v. Hazen, 20 A.R. 633, and Regina v. Alward, 21 O.R. 519, deal with the subject to some extent. But, if not, I must hold the law to be quite too plain, that convictions must be, generally speaking, single and certain, to hold the conviction in question, which offends so much in these respects, to be supportable upon any case. The necessities of justice, as well as the laws of the land, require that they be single and certain: see the Criminal Code, sec. 710, sub-sec. 3.

It is, of course, quite true to say that the gist of the charge is the crime or other offence, whether indecent exposure or murder or an illicit sale, but none of these offences can be committed except in an actual concrete case, and there can be no legal conviction or regular prosecution except upon such a case. It ought not to be necessary to say so.

The conviction must be quashed, but without costs; and the usual protective terms may be inserted in the order quashing it. There is special reason for not awarding the applicant any costs; he might have appealed to a local Court, which Court would have had wider power upon the appeal than this Court has on this motion; and he ought to have done so.

MIDDLETON, J., IN CHAMBERS. JUNE 26TH, 1914.

FAWCETT v. CANADIAN PACIFIC R.W. CO.

Stay of Proceedings—Rule 523—Railway—Destruction of Timber — Action for Damages — Statutory Limitation of Amount Recoverable—Trial—Findings of Jury—Judgment —Issue Directed—Negligence—Order Staying Execution pending Trial of Issue.

Motion by the defendants to stay the operation of the judgment at the trial before MIDDLETON, J., and a jury.

Angus MacMurchy, K.C., for the defendants.
W. Laidlaw, K.C., for the plaintiff.

MIDDLETON, J.:—This action is brought to recover damages sustained by reason of the burning of certain timber lands. At the trial both counsel agreed that the main issue was whether certain lands owned by the plaintiff which had undoubtedly been burned over, were burned by a fire which undoubtedly originated from the defendants' railway, or whether they were burned by another fire which had a separate origin; in other words, was there one fire only or were there two independent fires?

The amount of the damage sustained by the destruction of the timber has been agreed upon. The figures were not mentioned. Both counsel also agree that, if there was only one fire, it would be necessary for the jury to ascertain whether there was negligence, as in that case the loss would exceed $5,000.

My recollection is clear that Mr. Laidlaw told the jury that it would not be necessary for them to ascertain whether there was negligence if they found that there were two fires, as in that case the loss sustained by his client and others within the area of the first fire would not exceed $5,000.

I submitted two questions to the jury, in effect: "Were there two fires?" "Was there negligence?" The jury found that there were two fires, but did not answer the question as to negligence.

When the jury came in with this answer, some discussion took place as to the necessity of obtaining an answer to the question of negligence. This was because I did not know whether the finding of the jury would be accepted as final. If

it was not so accepted, and a new trial should be had, then the $5,000 limit might become of importance with reference to the money payable in respect to the first fire. It is necessary to bear this in mind to understand what appears in the notes after the bringing in of the verdict. Mr. Laidlaw stated that he accepted the finding of the jury as conclusive; and I, therefore, gave judgment for the amounts payable in respect of the first fire, these being less than the $5,000.

Mr. MacMurchy has now ascertained that, contrary to what was supposed by every one at the hearing, there are claims made for losses which would make the total exceed $5,000, which, Mr. MacMurchy contends, fall within the area of the first fire; and he has applied to me for relief.

Even though there are these losses, it does not follow that the $5,000 limit applies. This depends upon the determination of the issue, not yet found, as to negligence; and of course Mr. Laidlaw has the right to test the existence of these other claims and to test the question whether these claims are in respect of the same fire or another and independent fire.

The only power that I have to deal with the matter is that conferred by Rule 523. I think that this is wide enough to enable me to deal with the situation, instead of driving the parties to an appeal to the Divisional Court. I therefore direct the parties to proceed to the trial of an issue at the next sittings of the Court at Bracebridge, for the purpose of ascertaining whether the fire which destroyed the plaintiff's timber was the result of negligence on the part of the railway company, and consequently to ascertain whether there are any other claims for damages recoverable from the fire in question, and, if so, the amount of such claims.

In the circumstances that exist in this case, I thought it proper to suggest the desirability of some arrangement avoiding the expense and delay incident to a further trial; but neither side would yield, so that no course is open save that now adopted.

Costs will be dealt with by the trial Judge.

The execution of the judgment will be stayed meantime, but the railway company should pay the plaintiff as much as can safely be paid, having regard to the amount of the claim.

MIDDLETON, J., IN CHAMBERS. JUNE 26TH, 1914.

FIELDING v. LAIDLAW.

Judgment—Motion to Continue an Interim Injunction Turned into a Motion for Judgment—Motion to Vacate Judgment so Obtained and Execution Issued thereon—Rule 220—Costs.

Motion by the defendants the Molsons Bank to vacate a judgment and set aside an execution.

K. F. Mackenzie, for the applicants.
R. Wherry, for the plaintiff.

MIDDLETON, J.:—The defendant Laidlaw, as a solicitor, was intrusted with certain clients' money. It was placed by him in the Molsons Bank to his own credit. For some reason—I am told arising out of a misunderstanding—the plaintiff desired to reclaim his money. He brought an action and sought an injunction to restrain the defendant Laidlaw from drawing the money from the bank and the bank from paying it out. An ex parte injunction was obtained. When this was served, the defendant Laidlaw took the position that, if Mr. Fielding wanted his money, he was welcome to it; and he drew his cheque for the $1,400 in question, upon the defendant bank, in the plaintiff's favour.

The bank had been served with the injunction; and, although the cheque presented indicated that the parties had settled their differences, the bank declined to pay, owing to the existence of the Court order. The bank's solicitor supported the bank in this attitude. The result was, that, on the return of the motion, the situation being explained, I suggested that the motion to continue the injunction be turned into a motion for judgment, and that the bank be directed to pay the money to the plaintiff as his own. The bank was not represented, and I understood that it desired simply the protection of the Court order or judgment. The judgment was drawn and issued, and was taken to the bank.

The bank manager declined to act upon the order until it had been initialled by the bank's solicitor to indicate his approval. The manager did not offer to submit it himself to the solicitor, but apparently sought to place the onus of consulting

the bank's solicitor upon the plaintiff. It was a matter of importance to the plaintiff to have the money and to have it at once; and apparently the patience of the plaintiff's solicitor was exhausted. He issued an execution and placed it in the hands of the Sheriff.

Motions of this kind are peculiarly disagreeable. Solicitors are sometimes impatient; bank managers are sometimes discourteous. I do not think that the bank manager acted properly when presented with a judgment of the Court for the payment of the money. It was not sufficient, I think, for him to answer, as he says he did, that he knew nothing about the order; nor had he any right to compel the plaintiff to consult the bank's solicitor.

The main question argued was the right to make this judgment upon the return of the motion to continue the injunction. Rule 220 provides that the Court may direct any application to be turned into a motion for judgment. When it was known to the bank that both parties desired the money to be paid to the plaintiff, I think that this result ought to have been anticipated; and, when the manager of the bank received a copy of the judgment, I cannot believe that he did not thoroughly understand its purport and effect.

In motions of this kind, where there is no spirit of give and take, and each party is insisting on strict right, I think it is better to refuse to award costs; and so I dismiss the motion without costs. There was probably temper on both sides, and disputes of this sort ought to be discouraged.

MIDDLETON, J. JUNE 26TH, 1914.

RE CANADIAN MINERAL RUBBER CO. LIMITED.

Company — Winding-up — Claims of Creditors—Preference — Contract—Construction—Assignment to Bank—Determination of Issues by Litigation outside of Winding-up Proceeding.

Appeal by the liquidator of the company, in a winding-up proceeding, from an order or direction of the Master in Ordinary to the liquidator to consent to the payment in full by the Corporation of the District of Burnably, out of the balance due

upon a certain contract for paving work in the municipality, of all claims arising out of or in connection with the contract, thus giving these particular creditors a preference over the other creditors of the company.

R. C. H. Cassels, for the appellant.
W. B. Raymond, for the claimants.
Featherston Aylesworth, for the district corporation.

MIDDLETON, J.:—The formal order of the Master is not put in, but an extract from the proceedings before him is filed. This states that the Master directs the matter of the construction of the contract to be referred to the Court.

By the contract it is stipulated that the municipality pay all claims for wages or material or otherwise arising out of the contract, before paying the contracting company, and that the engineer is not to certify until satisfied that all such claims have been paid off and discharged. Upon the argument it was admitted that the contract had been assigned by the company to the Canadian Bank of Commerce, and that the claim of the bank exceeds the balance due. The liquidator is, therefore, interested only indirectly; as, if the bank is entitled to demand the money without satisfying the outstanding claims, then the bank's claim will be so much the less.

I do not think that this is a matter which can be adjudicated upon at this stage. There will probably have to be litigation between the bank and the municipality. That litigation will take place in the British Columbia Court; and it appears to me that no good purpose would be served—in fact, that it would be most pernicious—to attempt to deal with the question which arises, in the way suggested by the present application.

I think the direction of the learned Master should be vacated, and that the liquidator should be instructed not to interfere until after the rights as between the bank and the municipality and other creditors are determined, in any litigation that may take place between them.

There should be no order as to costs, save that the liquidator may have his out of the estate.

MIDDLETON, J. JUNE 26TH, 1914.

BELL v. ROGERS.

Judgment—Satisfaction or Payment—Issue of Fact—Bills of Exchange Drawn on Judgment Debtor—Payment to Judgment Creditor—Presumption from Endorsement—Evidence—Opposite Party Called as Witness—Party Calling Opponent not Bound by Testimony.

Appeal by the defendant from the report of the Master in Ordinary upon a reference to him to ascertain the amount due upon the plaintiff's judgment against the defendant.

J. W. Bain, K.C., for the appellant.
J. P. MacGregor, for the plaintiff, the respondent.

MIDDLETON, J.:—J. W. Rogers and J. C. Bell many years ago carried on a partnership business. The plaintiff, Hannah Bell, wife of J. C. Bell, endorsed or became otherwise liable as surety for the firm. The firm sold out to a man named Ballantyne, and he gave promissory notes securing a portion of the purchase-money. Mrs. Bell sued to recover the amount of her claim, giving credit upon it for moneys received from Ballantyne. At the time judgment was recovered, the 19th March, 1898, some of the Ballantyne notes were outstanding. These were placed in the hands of Messrs. Pinkerton & Cooke for collection. The notes were then in the hands of Mr. J. C. Bell, the husband. Pinkerton & Cooke collected from time to time and remitted the proceeds by draft. The draft in each case was in favour of Pinkerton & Cooke, and endorsed by them, "Pay to J. C. Bell or order." The drafts are now produced, and bear the signatures of J. C. Bell and Hannah Bell. The drafts were paid, and bear the bank's stamp to that effect. There is no evidence to shew who received the money. An issue was directed to ascertain the amount due upon the judgment. Mrs. Bell stated generally that nothing had been paid. Upon being confronted with the drafts, her evidence is, in effect, that she knows nothing about them. She recognises her signature, but she does not know how it comes to be on the back of the drafts, and has absolutely no recollection of the matter.

The Master has taken the view that there is nothing to indicate any presumption that Mrs. Bell received the money from

the fact that her name appears upon the back of the draft. I cannot agree with this. Upon the documents being produced, the presumption is that the money was paid to her. The reasonable inference from her evidence is that she has forgotten that this money was received after the date of the judgment; for she has given credit upon the judgment for moneys received prior to its date in precisely the same way.

I do not think that it is necessary to discredit or disbelieve Mrs. Bell; and her failure to recollect is nothing to her discredit. Her evidence (p. 13, line 30, and p. 14) is that she knew that her husband was collecting the notes, and that, although there was no arrangement, what he collected he handed to her.

The learned Master, I think, is also in error in a statement that the plaintiff's evidence binds the defendant, because she was called by him. Since Stanley Piano Co. v. Thomson (1900), 32 O.R. 341, I had thought, the last ghost of this heresy had effectually been laid.

The appeal should, therefore, be allowed, with costs, and credit should be given for the amount of the three drafts in question. The interest account should be adjusted accordingly. There should be no costs before the Master, as there credit was claimed for further sums.

MIDDLETON, J. JUNE 26TH, 1914.

JOSS v. FAIRGRIEVE.

Appeal—Appellate Division—Order Pronounced in Court Issued as Chambers Order—Extension of Time—Leave to Issue Execution upon Judgment Twenty Years Old.

Motion by the plaintiff for leave to appeal to a Divisional Court of the Appellate Division from the order of FALCONBRIDGE, C.J.K.B., ante 401.

M. Wilkins, for the plaintiff.
O. H. King, for the defendant.

MIDDLETON, J.:—I think the case is one in which leave should be granted; and that, inasmuch as notice has already been given upon the assumption that the order was a Court order, it should stand as a notice of an appeal from the order actually issued.

A judgment for the recovery of money was given by consent, now more than twenty years ago. The judgment was not actually issued until recently, probably because the defendant was supposed to be worthless financially. There is no suggestion that the judgment has been paid. The judgment was settled upon notice to the defendant before the Senior Registrar, just before the expiry of the twenty years. An order was then made by the Master in Chambers, on the ex parte application of the plaintiff, permitting the issue of execution. The execution was issued and placed in the Sheriff's hands. The defendant appealed from the order of the Master in Chambers, upon the ground, inter alia, that the order was improperly issued ex parte. Although the motion by way of appeal was properly a Chambers motion, it was made in Court and heard in Court. The motion was out of time, but the learned Chief Justice of the King's Bench relieved the defendant from her default, and set aside the order and the execution based upon it, upon the technical ground that the order was improperly made ex parte.

The twenty years had then expired. The plaintiff desired to appeal, and, assuming that the order was a Court order, appealed. The order has now been issued as though it were a Chambers order, and this motion is made upon the theory that the order was rightly so issued.

I give leave to appeal, and extend the time so far as may be necessary to validate the notice already given, because the questions involved are difficult, and it appears to me questionable whether indulgence should have been granted to the defendant to avail himself of what was after all a technical error of the plaintiff's solicitor, and so defeat payment of a claim which undoubtedly exists; and also because in effect, though not in form, the order in question finally disposes of a right or claim.

A factor influencing my decision is the fact that it seems unfair to allow the motion to be made and heard in Court, the right of appeal from an order made in Court being untrammelled, and then, after an appeal is taken, to defeat it by issuing the order as a Chambers order.

The costs will be costs in the cause upon the appeal.

KELLY, J. JUNE 26TH, 1914.

RE BRADING.

Executors—Application for Advice and Direction of Court as to Disposal of Assets—Sale or Retention of Shares—Matter in Discretion of Executors—Refusal of Court to Entertain Application.

Application, upon an originating notice, by one of the executors of William Thomas Brading, deceased, for an order determining questions arising in the administration of the estate.

W. Greene, for the applicant.
W. C. McCarthy, for the widow of the testator.
A. C. T. Lewis, for the Official Guardian.

KELLY, J.:—What is sought on this application is an order declaring whether the executors should sell or abstain from selling certain shares of stock forming part of the testator's estate; and, in the event of the Court directing a sale, a further direction is asked as to what amount of the income to be derived from the proceeds of such sale should be paid to Marguerite Mitchell (the testator's widow), to whom the income of the estate is given for the purposes specified in the will.

The applicant has evidently misconceived the position and duties of the executors in a matter such as this. During the argument I pointed out that the Court was being asked to determine something which is altogether within the scope of the executors' duties. Executors are required to use their own good judgment and exercise with due care their own discretion, within the terms and directions of the will, in determining whether they should or should not make sale of the assets at a particular time or for a stated price. The responsibility is theirs, not the Court's.

The application is one that should not be made, and I cannot entertain it.

LATCHFORD, J. JUNE 26TH, 1914.

COFFIN v. GILLIES.

Contract—Sale of Valuable Animals—Selection by Vendor—Failure to Deliver—Construction of Agreement—"Unforeseen Occurrence or Accident"—Breach of Contract—Damages—Loss to Purchaser.

An action for damages for breach of a contract.

A. F. Lobb, K.C., and D. C. Ross, for the plaintiff.

W. M. Douglas, K.C., and J. E. Thompson, for the defendant.

LATCHFORD, J.:—Apart from the question of damages, no issue of fact arises in this case.

On the 15th May, 1913, by an agreement in writing, the plaintiff agreed to purchase and the defendant to sell "two black foxes—silver tips—male and female, whelped in 1913, on the ranch of the vendor near the town of Arnprior—the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000."

Ten per cent. of the purchase-money, or $1,200, was payable, and was paid, upon the execution of the agreement. Delivery was to be at Arnprior not later than the 10th September, 1913.

The agreement provided that, should the vendor be unable, "by reason of any unforeseen occurrence or accident," to deliver the foxes, the deposit should be returned, and the agreement should thereupon be null and void.

It was known to the plaintiff that the defendant had at his fox ranch in this Province at least four Prince Edward Island black foxes—one pair of Dalton ancestry and one pair of Oulton ancestry. The plaintiff does not appear to have known what other foxes the defendant had, as in his letter of the 7th May, written after the purchase had been made, though before it was embodied in the formal agreement, the plaintiff asks the defendant to "state breeding of parents and from whom purchased and when."

Each pair produced cubs in the summer of 1913. All the

Oulton litter died. Several, if not all, of the Dalton litter survived. The plaintiff was willing to accept a pair of the Dalton foxes, but the defendant refused to supply them, contending, as he now contends in this action, that, upon the true interpretation of the agreement, one of the foxes to be delivered was to be of the Dalton strain, and the other of the Oulton strain, and that, as, by an "unforeseen occurrence or accident"—the loss of the Oulton litter—he was unable to deliver an Oulton cub, the contract with the plaintiff, upon the return (which was made) of the $1,200, was at an end.

The defendant's original contention, made as early as the 24th May, or within ten days of the date of the agreement, was, that the plaintiff had but the "third option" on the litters of 1913—"the Dalton, also the Oulton" stock—and that, as the female of the pair the plaintiff was to receive—inferentially the third pair—had died, the agreement could not be carried out. That the inference mentioned is correct is shewn by a letter in evidence written by the defendant a few days later, on the 28th May, to J. Walter Jones, of Charlottetown, offering to supply a pair, a male and a female, from the Dalton litter of six puppies. It seems clear that, as the Oulton litter had perished, the defendant at first intended to supply the plaintiff with a pair of cubs from the Dalton litter. This litter must, on the defendant's statement, have contained at least two females—the one mentioned as having died, and the one the defendant was willing to sell to Mr. Jones.

Jones was—unknown to the defendant—interested in the purchase which the plaintiff had made, and informed the plaintiff of the offer of the Dalton pair made to him by the defendant. The plaintiff then claimed to be entitled under the agreement to a pair of the Dalton litter; and the defendant, after assuming a manifestly untenable position as to the order in which the agreement was to be fulfilled—after two other pairs had been set apart—ultimately, on the 9th July, in a letter to the plaintiff, set up the construction on which he now relies.

In my opinion, his contention cannot be upheld. The Dalton and Oulton strains were regarded as the best known to black fox breeders. They were the longest established, and their characteristic melanism was thought to be the most permanently fixed. The defendant was known to have purchased foxes of both strains. Any pair of cubs—a male and a female—from the Dalton or Oulton litters would have satisfied the description in the agreement as well as a pair one of which was of one

litter and the other of the other. The loss of the Oulton litter did not relieve the defendant from his obligation. He still had for sale, as stated, a pair, a male and a female, of the Dalton ancestry, which would have complied with the description, and should, I think, have delivered them to the plaintiff, as the plaintiff desired him to do.

There has been, in the view I have expressed, a breach of the contract; and the plaintiff is entitled to such damages as he has proved he sustained. The evidence on the point is not altogether satisfactory. While $12,000 seems an extraordinary sum to pay for a pair of fox cubs, it appears that they sold for even higher figures in the summer of 1913. In October of that year, the defendant advertised for sale, in a Charlottetown newspaper, a mated pair of Dalton ancestry, for which he asked $14,500. He received no offers. The plaintiff says that he could have obtained $16,000 for the pair. MacRae, a fox-company promoter from the Island, says that pairs of choice strains sold for $15,000 to $18,000. The defendant and his son were not in a position to contradict a statement read to them from a circular, manifestly issued by fox-company promoters, embodying a report, or what purports to be a report, of United States Consul Frost, stating that in 1913 quotations rose "convulsively from $13,000 in April to $14,000 and $15,000 in May, and finally to $17,500 and $18,000 in June. Numerous transfers were made at still higher figures, but the majority ranged at $15,000 and $16,000." In the same circular, however, in an estimate of the value of the fox industry. "Young Silvers," such as those mentioned in the agreement, are valued at $7,000 each. Having regard also to what is stated in the letter to the defendant from Mr. Jones, I think the fair value to the plaintiff of the pair which the defendant ought to have supplied, if they safely reached the Island, would not be more than $14,000. At Arnprior, the point of delivery, they would be worth less. Express charges, attendance during transportation, insurance—if they are insurable, and if not the possibility of loss—I am obliged to estimate in the absence of evidence. I place these probable charges at $250, bringing the value at Arnprior to $13,750. The damages sustained by the plaintiff are the difference between the $12,000 he was willing to pay and $13,750. There will, therefore, be judgment for the plaintiff for $1,750 and costs.

MIDDLETON, J. JUNE 26TH, 1914.

DUFFIELD v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Life Insurance—Failure to Give Affirmative Proof of Death of Assured—Presumption from Long Absence, Unheard of—Evidence—Time-limit for Bringing Action—Insurance Act, R.S.O. 1914 *ch.* 183, *sec.* 165—*Construction of—Absence of Limitation in Policy—Declaration of Death.*

Action to recover the amount due under a policy of insurance on the life of George M. Duffield, alleged to be deceased.

The action was tried without a jury at Toronto.

J. E. Jones, for the plaintiff.

F. Arnoldi, K.C., for the defendants.

MIDDLETON, J.:—By a policy of insurance bearing date the 20th May, 1901, the defendant company promised to pay $2,500 upon the death of George M. Duffield. By a supplementary memorandum, this money was made payable to Mary J. Duffield, mother of the insured. This policy is a paid-up policy issued upon the surrender of a former policy for a larger amount.

The insured . . . was . . . addicted to excessive drinking. He was married, and was living separate from his wife. At that time he was living with his brother-in-law, Mr. Heath. It was difficult for him to find occupation, owing to his physical unfitness resulting from dissipation. The last seen of him was when Mr. Heath met him in Toronto in 1903. He was then in very bad condition, and it was stated that he was employed upon an orchestra in connection with some theatre in Buffalo. Apparently Duffield was throughout on the best of terms with his own family, though his conduct had entirely estranged his wife. He, however, was not in the habit of communicating, at any rate with regularity, with any of them; and after this chance interview with him in 1903 no trace of him can be found. He was heard of in 1905, but the information then received was in connection with his movements some two years previously; so that it may safely be said that he finally disappeared in 1903 or 1904. Every reasonable inquiry has been made; and I think that the proper inference from the evidence is that he must be presumed to be dead.

The defendants have throughout taken the position that Duffield has not been shewn to be dead. They now take the alternative position that if, on the facts shewn, Duffield is to be presumed to be dead, that presumption arose at the expiry of seven years from his disappearance, that is, in 1910, or 1911, and that this action, brought on the 16th July, 1913, is too late, as it is more than one year and six months from the end of the seven years.

There is not in this case any shadow of doubt as to the bona fides of the claimants. Throughout, there has been a real and earnest desire to ascertain the fate of the insured. There is no room for suspicion or for the feeling that there has been any attempt on the part of those claiming to avoid obtaining information so as to allow the presumption of death to arise. The defendants from the beginning knew of the situation, and all possible information was given to them, and they made their own inquiries, all resulting in confirmation of what was said by Duffield's relatives. Negotiations were on foot looking to the payment of the money, upon a bond being given to indemnify the company against any possible claim that might turn up by reason of any change of beneficiary. This was an entirely imaginary danger, as the policy was payable to the preferred beneficiary, and all those within the class were concurring in the payment, except perhaps the wife, from whom Duffield was separated—and she would, no doubt, have joined if the suggestion had been made. Without any reason that has been disclosed, the defendants suddenly changed their attitude and refused payment; and this action at once followed.

I have come to the conclusion that the provisions of the Insurance Act now found as sec. 165 of ch. 183, R.S.O. 1914, do not afford an answer to this action. The policy is a contract to pay, and it contains no conditions or limitations as to the time to sue. Section 165 gives a time to sue, notwithstanding any agreement or stipulation limiting the time, to be found in the contract. It does not itself purport to limit the time within which an action may be brought; but, in ease of the assured, it gives the time there stipulated, notwithstanding the provisions of the contract.

I am glad to find a way to defeat what appears to me an unconscionable defence, and one which ought not to have been urged by the defendants in this case. Statutes of limitation are generally regarded as a means of protecting the defendant against a stale or unjust claim. To allow the statute to be

used to defeat a claim arising upon a policy which has for years been paid-up, where there is no shadow of doubt as to the justness of the claim, and where the time limited is supposed to have gone by during negotiations looking to a friendly adjustment of the whole matter, would be a thing so unjust and unreasonable as to shock the conscience of any right-thinking man.

There will, therefore, be judgment for the plaintiff for recovery of the amount, with interest from the date of the writ, and costs. If the defendants desire the protection afforded by sec. 165, sub-secs. 5 to 9, I am ready to make an order under that statute, upon the evidence already taken.

MIDDLETON, J. JUNE 26TH, 1914.

O'FLYNN v. JAFFRAY.

Trust—Seat upon Stock Exchange Held in Trust by Member—Practice and Rules of Exchange—Trust Property Used by Trustee for his own Benefit—Evidence—Absence of Injury to Cestui qui Trust—Damages—Costs.

Action to recover $10,000 damages, in the circumstances mentioned below.

I. F. Hellmuth, K.C., and A. C. McMaster, for the plaintiff.
W. N. Tilley and J. M. Langstaff, for the defendant.

MIDDLETON, J.:—The defendant was a member of the Toronto Stock Exchange, and held a seat therein in his own name. The plaintiff desired to purchase a seat from the Exchange. On the 14th October, 1905, he succeeded in making a purchase, but he could not take the seat in his own name, because that privilege is accorded only to members of the Exchange. He, therefore, had the seat placed in the name of the defendant. Contrary to the plaintiff's expectations, when he sought election to the Exchange, he failed. The seat remained in the defendant's name until its sale in July, 1912, when the defendant transferred it in accordance with the plaintiff's directions.

According to the regulations of the Exchange, a member may be represented by a business partner holding a power of

attorney. The defendant's partner, Mr. Cassels, acted for him as his attorney upon the Exchange. Owing to a change in the domestic affairs of the defendant's firm, it was desired that Mr. Cassels should be upon the Exchange holding a seat in his own right, and the defendant transferred to him his seat. During the occasional absences of Mr. Cassels, and, during one year, owing to Mr. Cassels's condition of health, the defendant desired to transact the firm's business upon the Exchange. He could not act as Mr. Cassels's attorney, because he had the seat which he held in trust for the plaintiff standing in his own name, and that made him a member of the Exchange. He, therefore, attended the Exchange and transacted the firm's business by virtue of the membership which he held in trust.

This action is now brought to recover $10,000 damages for the wrongful user of the plaintiff's property in this way.

Fees are payable where a member of the Exchange is represented by an attorney. Fees are also payable for carrying a seat on the exchange. What was done in this case by the defendant was to set one off against the other, so that the plaintiff's seat was carried for him without expense. The defendant is a conspicuously honest witness. He can recall no arrangement by which this was done. I feel satisfied that there must have been some understanding; but no one has proved it; and I think that it would be going too far to infer it from the facts which have been proved.

The claim put forward by the plaintiff is exaggerated and ridiculous. He has not in any way been damnified to the slightest degree; but I think that the defendant, having made some use of the property vested in him in trust, must make some compensation. Assessing this as best I can, and after making allowance for the carrying charges paid by the defendant, I award the plaintiff $400, with costs upon the County Court scale, subject to a set-off.

KEANE v. MCINTOSH—BRITTON, J.—JUNE 22.

Mortgage—Power of Sale—Exercise of—Absence of Notice to Mortgagor—Conspiracy—Landlord and Tenant—Rent—Surplus Proceeds of Sale.]—The plaintiff was the owner of a farm, subject to a mortgage to the defendant Helen McIntosh for $1,000. The plaintiff had paid interest up to the day of maturity, the 4th March, 1913; and he alleged that he arranged with the mortgagee, through her brother, for an extension of time for payment of the principal, and then went to the State of Michigan, renting the farm to his brother, the defendant James Keane, who went into possession and worked the farm. The plaintiff alleged that he left his address with the defendants James Keane and Bridget Keane (wife of James Keane); and that, during the summer of 1913, these defendants conspired with the brother and agent of the defendant McIntosh to have the farm sold to them or one of them. The farm was in fact sold at auction, under the power of sale in the mortgage, by the defendant McIntosh, and the defendant Bridget Keane became the purchaser at the price of $1,400. The plaintiff alleged that the defendants dissuaded and discouraged other persons from bidding. On the 5th September, 1913, the defendant McIntosh conveyed the farm to Bridget Keane, and on the 2nd September Bridget Keane and her husband mortgaged the farm to the defendant Janet Hardy for $1,600. It was said that out of the $1,600 Bridget Keane paid the plaintiff's mother $300 for a release of her dower in the farm. There was a surplus of $274.04 in the hands of the defendant McIntosh after paying her claim for principal, interest, and costs. The plaintiff was not served with notice of exercising the power of sale. This action was brought to set aside the sale and for damages and for other relief. At the trial, the plaintiff abandoned as against the defendant Janet Hardy, and the action as against her was dismissed with costs. The learned Judge reserved judgment after the trial, and now delivered a written opinion in which he dealt with the facts. He found that the farm was worth $2,500. He said that the circumstances were of a suspicious character, but he was unable, upon the evidence, to find that there was any conspiracy to sell without notice to the plaintiff, or that there was any representation to intending purchasers that the farm was being bought in by the defendants James and Bridget Keane for the benefit of the plaintiff. The defendant McIntosh was not liable in damages for sacrificing the property. The

defendants the Keanes knew the address of the plaintiff, and intentionally withheld it from the defendant McIntosh, but that did not create a liability to the plaintiff. They were not bound to inform the defendant McIntosh of the place where the plaintiff be found, nor were they obliged to inform the plaintiff of the notice which they had received of the exercise of the power of sale. The case did not fall within the provision of the Landlord and Tenant Act which compels the tenant to give notice to the landlord of any writ served upon the tenant for the recovery of the land demised. Judgment against the defendant James Keane for the rent of the land, $100, with interest and costs on the County Court scale without set-off. Judgment against the defendant Helen McIntosh for $274.04 with interest and without costs. Action dismissed as against the defendant Bridget Keane without costs. J. C. Makins, for the plaintiff. F. R. Blewett, K.C., for the defendant McIntosh. Leonard Harstone, for the defendant Janet Hardy. R. T. Harding, for the defendants James Keane and Bridget Keane.

RAIKES v. CORBOULD—MIDDLETON, J.—JUNE 25.

Principal and Agent—Solicitor Collecting Moneys for Client—Account—Evidence—Action by Executor of Client.]—Action by the executor of Edgar Hallen, deceased, for an account and payment of an amount claimed to be due in respect of seven mortgages which represented investments made by the deceased or his brother, through the defendant, a solicitor, to whom payments were said to have been made by the mortgagors on account of principal and interest, and not accounted for. MIDDLETON, J., after a long examination of the accounts and evidence, said that it had not been shewn to his satisfaction that the moneys claimed by the plaintiff had been paid to Edgar Hallen in his lifetime; and he gave judgment for the amount claimed with costs. D. W. Saunders, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendant.