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APPELLATE DIVISION.

JANUARY 26TH, 1914.

*WILSON v. CAMERON.

Contract—Parent and Child—Oral Agreement to Convey Land —Ascertainment of Terms by Reference to Document Signed by Parties—Action for Specific Performance—Statute of Frauds—Part Performance—Conduct of Parties—Enforcement of Agreement by Son after Death of Father.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 234.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. Bicknell, K.C., for the appellant.

C. L. Dunbar, for the defendants, the respondents.

The judgment of the Court was delivered by MEREDITH, C. J.O.:— . . . The right of the respondent Donaven to specific performance depends upon whether: (1) the agreement upon which he relies is sufficiently evidenced to satisfy the provisions of the 5th section of the Statute of Frauds, R.S.O. 1897 ch. 338; (2) or, if not so evidenced, there have been such acts of part performance as to entitle the respondent Donaven to enforce the agreement notwithstanding the provisions of that section.

In my opinion, the second question must be answered in the affirmative; and it is, therefore, unnecessary to consider the first. . . .

[Reference to Fry on Contracts, 5th ed., pars. 582, 584; Halsbury's Laws of England, vol. 27, par. 49; Maddison v. Alderson (1883), 8 App. Cas. 457, 479.]

*To be reported in the Ontario Law Reports.

It was contended by Mr. Bicknell that before parol evidence is admissible it must appear, from the act relied on itself, that it is referable either to the very contract alleged or at all events to some such contract, and that in this case the possession of the respondent Donaven was or might be referable to his tenancy of the land during the lifetime of his father and mother; and in support of that contention the language of the Lord Chancellor (Selborne) in Maddison v. Alderson, where he says, "All the authorities shew that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged," was relied on.

It is plain, I think, that the Lord Chancellor did not, by the use of the words "some such agreement as that alleged," intend to state the principle in narrower terms than those in which it is stated in Fry on Contracts and Halsbury's Laws of England (loc. cit.); for he cites, in support of his statement of the law, Cooth v. Jackson (1801), 6 Ves. 12, 38; Frame v. Dawson (1807), 14 Ves. 386; and Morphett v. Jones (1818), 1 Swans. 172, 181; . . . Dale v. Hamilton (1846), 5 Hare 369, 381. . . .

[Reference also to the speech of Lord O'Hagan in Maddison v. Alderson, 8 App. Cas. at pp. 484, 485; Jennings v. Robertson (1852), 3 Gr. 513, 523, 524.]

The acts of part performance in the case at bar fall well within the principle which I take to be established by the cases; and, the terms of the parol agreement being clearly proved, are sufficient to take the case out of the Statute of Frauds.

The case was argued by Mr. Bicknell as if the agreement which is sought to be enforced consisted of two parts: one an agreement that the respondent Donaven should become tenant of the land during the lifetime of his father and mother and the survivor of them; and the other that he should have the land upon the death of the survivor of them; but that is not either the form or the substance of the agreement. It is an agreement to grant and convey the land to the son, upon condition that he shall pay what is called the rent and preserve and properly care for the land and buildings during the lifetime of the father and mother and the survivor of them, on breach of which the land is "to revert" to the father.

There was, therefore, but one agreement under which the son was let and entered into possession; and, even if the rule were as narrow as Mr. Bicknell contended it is, the case would have fallen within it.

In my opinion, the appeal fails and should be dismissed with costs.

JANUARY 26TH, 1914.

*SMITH v. NORTHERN CONSTRUCTION CO.

Negligence—Destruction of Fishing-nets in Waters of Stream by Tug and Boom of Logs—Side Channel—Lawful Setting of Nets—Fisheries Act, R.S.C. 1906 *ch.* 45, *sec.* 47, *sub-secs.* 2 *and* 4—*Duty to Use Care where Nets Unlawfully Set—Acts Amounting to Negligence—Findings of Jury—Absence of Finding that Negligence Found was Cause of Destruction—Finding by Appellate Court—Judicature Act,* 1913, *sec.* 27, *sub-sec.* 2.

An appeal by the defendant company from the judgment of the Judge of the District Court of the District of Rainy River, in favour of the plaintiff, upon the findings of a jury, in an action for damages for the destruction of the plaintiff's fishing nets by the negligence of the defendant company, as the plaintiff alleged.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LENNOX, J.

C. A. Masten, K.C., for the appellant company.

G. H. Watson, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent is a fisherman, having a license from the Provincial Government to fish with gill nets in the waters of Red Gut Bay, in the district of Rainy River, and he brings the action to recover damages for the loss sustained by him owing to his nets having been destroyed, as he alleges, by the negligence of the appellant.

The appellant was engaged in towing "a large boom of logs or saw timber and ties" upon the waters of the bay, and was using for that purpose "a tug or steam vessel known as an alligator," and in the process of towing and warping, "in addition to the usual methods of propulsion," a large steel cable and anchor were attached to a tree or other solid object upon the land, and the cable was wound up by steam power upon a drum on the alligator, and in that way the alligator and her tow were hauled along.

It is alleged in the statement of claim that "this method of

*To be reported in the Ontario Law Reports.

propulsion is in itself much more dangerous to other craft or other persons using navigable waters than are the ordinary methods,'' and that the ''cable and drum method of navigation and towing is illegal and improper,'' but there is no finding of the jury to support the allegation. It is also alleged and was proved that the respondent's nets were set out and properly buoyed and marked in accordance with the regulations of the Game and Fisheries Branch of the Public Works Department of Ontario.

The negligence charged is that ''the alligator and tow of logs . . . were so carelessly and negligently and unskilfully navigated or handled . . . as to cut and completely destroy'' the respondent's nets, ''together with all buoys, floats, leads, and tackle belonging to them.'' . . .

According to the undisputed evidence, the appellant was engaged in towing a boom or raft of logs and ties by the means mentioned in the statement of claim. The operation at the time the injury was done to the nets was in charge of an employee of the appellant named Edward Inwood, and he was assisted by two others, named Edward Butts and Thomas Quinn. The tow was being taken into the southerly end of Red Gut Bay through narrows called Pine Narrows. There is an island called Pine Island lying almost directly in front of the narrows and about half a mile south-west of it, and there are two channels into the bay, one to the east and the other to the west of the island.

The westerly channel is that which is used after passing from the narrows, but the easterly one was taken by Inwood, because, as he testified, owing to a north-west wind he could not take the raft through the westerly channel. . . .

The injury to the nets was done between 6 p.m. and midnight of the 22nd July, 1913, but at what hour the witnesses were unable to say, and it was done when the raft was coming into the narrows. As I understand the evidence, an anchor was put out in the water in front of the alligator, and upon an attempt being made to wind the cable to which the anchor was attached it was found that the anchor did not hold. The cable was then let go, and either then, or in taking it to the shore of the island to attach it to a tree, it caught the nets and destroyed them.

The proper conclusion upon the whole evidence is, I think, that the westerly channel was invariably used in the towing of rafts. . . .

There is no pretence that any look-out for nets was kept or that any care was taken to avoid injuring any that might be

come across in the course of the journey. The letting go of the cable after the failure of the anchor to hold must have resulted in the cable sinking, and probably reaching the bottom. That was the direct cause of the nets being taken up by the cable and destroyed, and the letting go of the cable appears to have been wholly unnecessary and a negligent act on the part of the appellant's servants.

There was, I think, ample evidence to warrant a finding in favour of the respondent entitling him to recover, unless, as was contended by counsel for the appellant, the nets were placed where they were set in contravention of the law; and, even if they were unlawfully there, there was evidence to warrant a finding in favour of the respondent.

That they were set in contravention of the law was contended by counsel for the appellant, and in support of his contention sub-secs. 2 and 4 of sec. 47 of the Fisheries Act, R.S.C. 1906 ch. 45, were referred to. . . .

Sub-section 2 and sub-sec. 4 must be read together; and, so reading them, it is plain, I think, that it is lawful to place nets or other fishing apparatus in a river or stream if they do not obstruct the main channel, and if one-third of the course of the river or stream, not being a tidal stream, is always left open, and "no kind of fishing apparatus or material is used or placed therein."

The place where the respondent's nets were set was in a river or stream, and they were not so placed as to contravene the provisions of sub-sec. 4. They were not placed in the westerly channel, which is the main channel, and more than one-third of the course of the river or stream was unobstructed.

It is probable, I think, that the first part of the sub-section was intended to apply to a river or stream which has more channels than one, and what follows, down to the proviso, to a river or stream that has but one channel. However that may be, there was clearly no contravention of sub-sec. 4. But, even if the nets were unlawfully set, the appellant was not justified in wilfully impinging upon or destroying them, and was "bound to use due care and skill in the navigation of his vessel so as not to do it unwittingly for want of these:" Colchester v. Brooke (1845), 7 Q.B. 339, 377; . . . The Swift, [1901] P. 168.

The man in charge of the tow knew or ought to have known that there were or were likely to be nets set in the eastern channel; he had been instructed to be careful to avoid injuring nets, and yet no precaution whatever was taken to avoid doing

so. There was . . . no reason why the cable which caught the nets and destroyed them should have been let go and permitted to ground. The channel which was taken was not the one used in such an operation as that in which the appellant was engaged, and there was no necessity for taking the eastern channel. If the wind was such that the alligator could not take the western channel, there was nothing to prevent it being anchored or fastened to a tree on the shore; but, in spite of the fact that the wind would not permit of the westerly channel being taken, and was so strong that the alligator was unable to keep to its course, those navigating it deliberately proceeded by the easterly channel, with which they were little acquainted, and that, too, upon a dark night.

It is clear, I think, that the destruction of the respondent's nets was due to the acts and omissions I have enumerated, and that they were such as to warrant a finding of negligence entitling the respondent to recover, even if his nets were unlawfully set.

I agree, however, with the contention of Mr. Masten that the answers of the jury are not sufficient to warrant a judgment in favour of the respondent. Apart from those relating to the assessment of damages, the answers were:—

1. That the nets of the plaintiff were destroyed by the defendant's alligator on the 22nd or 23rd July, 1913.

3. That there was negligence on the part of the defendant or its servants.

4. That the negligence was due to the company's foreman leaving the narrows at night with side wind blowing so that he would be driven from the regular channel into a strange channel.

Reading the answers to questions 3 and 4 literally, there is no finding that the destruction of the nets was caused by the negligence mentioned in the answers to those questions; and it by no means follows that the negligence found was the cause of the destruction of the respondent's nets.

A new trial must, therefore, be directed, unless the case is one in which the powers conferred upon the Court by sub-sec. 2 of sec. 27 of the Judicature Act (statutes of 1913, ch. 19) may properly be exercised.

The Court has before it all the materials necessary for finally determining the matter in controversy. The amount of the respondent's claim is comparatively small, the costs which would be occasioned by the new trial and possibly another appeal would add greatly to the costs of the litigation, with the result that they would be altogether out of proportion to the amount

involved; and it is quite probable that the jury, although they have not said so, intended to find the appellant guilty of the negligence with which, in my opinion, it is chargeable. The case is, therefore, one in which it is proper that the powers conferred by sub-sec. 2 of sec. 27 should be exercised.

I would, therefore, set aside the finding of the jury in answer to the fourth question, and find the facts as I have indicated, and give judgment for the respondent for the amount of the damages assessed by the jury, with costs; and there should be no costs of the appeal to either party.

JANUARY 26TH, 1914.

McINTOSH v. COUNTY OF SIMCOE AND TOWNSHIP OF SUNNIDALE.

Negligence — Highway — Construction of Sidewalk — Use of "Mixer"—Frightening Horse—Loss of Horse—Liability of Municipal Corporation—Object Likely to Cause Danger—Knowledge of Corporation—Independent Contractor.

Appeal by the plaintiff from the judgment of the Junior Judge of the County Court of the County of Simcoe, who tried the action in that Court without a jury, in so far as the judgment dismissed the action as against the defendant the Corporation of the Township of Sunnidale—the action having also been dismissed as against the other defendant, the county corporation.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LENNOX, J.

W. A. Boys, K.C., for the appellant.

A. E. H. Creswicke, K.C., for the Corporation of the Township of Sunnidale, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The claim of the appellant is, that his horse was injured owing to the presence on the highway on which it was being driven of a cement mixer which was being used for mixing cement to be used in the construction of a sidewalk; that the cement mixer was a thing calculated to frighten horses, and that it frightened the appellant's horse, causing it to run away and to be seriously injured by coming into contact with a plough which was lying upon the highway.

The sidewalk was being laid by Joseph Dumond, who had been employed by the respondent to lay it, the respondent supplying the materials and the work being done by Dumond; the mixer was used for the purpose of mixing the ingredients—gravel, cement, and water—and the mixture was used to form the sidewalk.

The learned Judge found that the injury to the appellant's horse was caused by its taking fright at the mixer, and that it was "negligent and improper to have a machine operating as this one was on the highway without proper precautions being taken to prevent horses from coming near enough to prevent fright:" and he acquitted the driver of the horse of contributory negligence, but held that the respondent was not liable because, as he also found, Dumond was an independent contractor.

The findings of fact of the learned Judge are supported by the evidence, but his conclusion that the respondent was not answerable for the negligence which caused the injury was, in our opinion, erroneous.

The law is well-settled that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous or is from its nature likely to cause danger to others, unless precautions are taken to prevent such danger:" Halsbury's Laws of England, vol. 21, sec. 797, and cases there cited: see particularly Halliday v. National Telephone Co., [1899] 2 Q.B. 392.

It is clear upon the evidence that it was in the contemplation of the parties that Dumond would use the cement mixer in the way in which it was used. He had been doing cement work for the respondent for several years, and during the last four years before the accident he had invariably used the cement mixer.

James Martin, the Reeve, and Henry Lawrence, a member of the respondent's council, were appointed by the council to construct the sidewalk, and they made the contract with Dumond; both of them knew that the mixer would be used, and Lawrence, whose place of business was near the work, saw it in use and knew that it was an object calculated to frighten horses.

This brings the case clearly within the rule of law I have mentioned, and the respondent is answerable for the negligence which it has been found caused the injury to the appellant's horse; and it follows that the appeal should be allowed and the judgment dismissing the action as against the respondent should

be reversed and judgment entered for the appellant against the respondent for $200 (the amount of the damages as found by the Judge) with costs, and the respondent should pay the costs of the appeal.

JANUARY 26TH, 1914.

BROOKS v. MUNDY.

Mechanics' Liens—Lien of Sub-contractor—Abandonment of Work by Contractor—No Sum Due by Owner to Contractor —Liability of Owner—Percentage to be Retained—Effect of not Retaining — Proceedings to Enforce Lien not Taken within Thirty Days after Abandonment—Mechanics and Wage Earners Lien Act, 7 Edw. VII. ch. 69, secs. 6, 10, 12.

Appeal by the defendant Mundy from the judgment of the Local Master at Ottawa, dated the 11th November, 1913, in a mechanic's lien action.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LENNOX, J.

J. G. O'Donoghue, for the appellant.

J. R. Code, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant employed his co-defendant Gagnon to build four tenement houses for $5,650, and Gagnon sublet the plastering work to the respondent. Gagnon abandoned the work on the 16th February, 1913, leaving the work he had contracted to do uncompleted, and it was afterwards completed by the appellant, whose outlay in doing so exceeded the amount of the contract price, which had not been paid to Gagnon.

The respondent had by the 1st February, 1913, completed the work he had undertaken to do, except such patching as it was his duty to do after the carpenters had completed their work, and on the 19th April following he sent men to do this patching. The men did some little work, when they were stopped from continuing what they had been sent to do, by the appellant. The lien was registered on the 15th May, 1913.

The Master gave judgment for the respondent, upon the ground that sec. 6 of the Mechanics' and Wage Earners' Lien Act (10 Edw. VII. ch. 69) gave to the respondent a lien for

the price of his work on the land of the appellant; that this lien continued to exist until the expiry of thirty days from the completion of the respondent's work; that the work was not completed until the 18th April, 1913; and that the lien, having been registered on the 15th May, 1913, was registered in due time.

The Master appears to have overlooked the fact that, by sec. 10, the lien of the respondent did not attach so as to make the appellant liable for a greater sum than the sum payable by him to Gagnon, and that, as there is nothing owing by the appellant to Gagnon, unless the respondent is entitled to look to the twenty per cent. which, by sec. 12, it was the duty of the appellant to retain, there is nothing upon which the lien can attach.

All that the appellant was required by sec. 12 to do was to retain for the period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service, and materials actually done, placed, or furnished, as mentioned in sec. 6, such value to be calculated on the basis of the contract price; and at the expiration of thirty days from the abandonment by Gagnon of his contract the duty of the appellant to retain the percentage was at an end unless in the meantime proceedings had been commenced "to enforce any lien or charge against" it (sub-sec. 5).

The fact, if it be a fact, that the appellant did not retain any percentage of the value of Gagnon's work for thirty days cannot put him in any worse position than if he had done so. The percentage which the appellant was required to retain was a fund to answer the liens of such of the sub-contractors and wage-earners as should take within the prescribed time proceedings to enforce their liens, but not to answer any other liens; and, not having taken proceedings to enforce his lien within thirty days after the abandonment of the contract by Gagnon, the appellant has no right to resort to the fund.

The appeal should be allowed with costs, and the judgment against the appellant should be reversed, and judgment be entered dismissing the action as against him with costs.

JANUARY 28TH, 1914.

MEDCALF v. OSHAWA LANDS AND INVESTMENTS LIMITED.

Fraud and Misrepresentation—Agreement to Purchase Land—Inducement—Statement as to Site of Proposed Railway Station—Statement of Intention of Third Party to Do a Certain Act—Representation of Fact—Reliance on—Failure to Prove.

Appeal by the plaintiff from the judgment of WINCHESTER, Co.C.J., dismissing an action for fraud and misrepresentation, brought in the County Court of the County of York. The plaintiff was ordered to pay the costs of the defendant company, but not of the defendant Newsom.

The plaintiff sought to set aside an agreement to purchase land and for the return of $504 paid by him to the defendant Newsom.

The appeal was heard by BOYD, C., RIDDELL, MIDDLETON, and LEITCH, JJ.

E. Coatsworth, K.C., for the plaintiff.

N. W. Rowell, K.C., for the defendant Newsom.

H. C. Macdonald, for the defendant company.

BOYD, C.:—In cases of claims based on misrepresentations made to induce a contract, the plaintiff should be held strictly to his pleadings as to what were the false statements he relied on. The Judge has not allowed an amendment to enlarge the allegations in the statement of claim.

But one point is relied on, apart from the exhibition of blue prints, and that is, that it was stated that the Canadian Pacific Railway station was to be placed on the grounds at a point indicated thereon. The place was marked on the plan (blue print) by the plaintiff in the office of the defendant company's agent before his purchase, as the contemplated site of the station, but there was at that time no representation of fact that the station would be built thereon. All the persons interested supposed, and were given to infer from the actions of the Canadian Pacific Railway Company, that the station would be on the Ritson property, and Newsom was so told before he dealt with the plaintiff, by a Canadian Pacific engineer.

I think that the Judge rightly concluded that the plaintiff

made inquiries and a general examination for himself, and was content to buy, and did not rely on the misrepresentations alleged in the pleadings.

The appeal should be dismissed with costs as to the company, and no costs as to Newsom—who fomented litigation.

MIDDLETON, J.:—I agree.

RIDDELL, J. (after setting out the facts):—I think, in view of the pleadings, of the letter before suit of the plaintiff, of the evidence, and of the Judge's findings, we should hold that the statement made by Newsom to the plaintiff inducing the contract was that in substance set out in the pleadings, that the Canadian Pacific Railway station was to be built on adjoining property. There is no finding (but rather the reverse) that this was to be done at once—and I think it quite plain that, had the plaintiff not been informed that the station was not to be built upon the suggested site at all, he would not have attempted to break his contract.

A statement such as this—a statement of the existing intention of a third party to do a certain act, may well be a statement of fact: Halsbury's Laws of England, vol. 20 p. 663, sec. 1621; Rex v. Gordon (1889), 23 Q.B.D. 354, at p. 360.

But, for the plaintiff to succeed, he must prove the falsity of the statement, and that he has wholly failed to do—the only evidence he has is that up to a certain time the station had not been built, and that is wholly insufficient. Indeed, we are told on the argument that the station is already built, or building, on the stated site.

Even if the representation had been that the Canadian Pacific Railway Company were at once to build the station, I do not think that the plaintiff should succeed. It is common knowledge that railway companies often move with great deliberation—the Toronto Union Station has more than once been about to be built, work to begin at once, without delay, etc.; and it may well be that there was an intention to build at once, immediately, in Oshawa, which intention was changed after the plaintiff bought his lots.

I think that the appeal should be dismissed with costs as in the Court below—the defendant Newsom has brought this litigation on himself by his own conduct.

LEITCH, J.:—I agree.

Appeal dismissed.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JANUARY 26TH, 1914.

CORNISH v. BOLES.

Lease—Option of Purchase of Demised Premises—Covenant not to Assign without Leave—Proviso—Leave Wilfully and Arbitrarily Withheld—Evidence—Finding of Fact of Trial Judge—Declaration—Damages—Costs.

Action for a declaration of the plaintiffs' rights in respect of assignments of a lease and option and for damages and other relief.

R. R. Waddell, for the plaintiffs.
H. M. Mowat, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B.:—By indenture of lease dated the 15th January, 1912, the defendant leased to the plaintiff McNeil for three years the lands in question, and it was "understood and agreed" in and by the said lease that the said lessee, McNeil, his heirs, executors, administrators, and assigns, should have the right to purchase the lands at any time during the said term, at a price per foot frontage on Murray street, in the city of Toronto.

And the lessee, McNeil, covenanted that he would "not assign or sublet without leave, but such leave shall not be wilfully or arbitrarily withheld."

After vainly endeavouring to get the defendant's consent to an assignment by the plaintiff McNeil to the plaintiff Cornish, the plaintiff McNeil, by indenture dated the 8th February, 1913, assigned the said lease and the said option to his co-plaintiff Cornish. And the plaintiff Cornish, after applying without success to the defendant for his consent to an assignment by him to a realty company, signed a memorandum agreeing to sell the said lease and option to the said company.

It is needless to say that both these assignments were at a profit to the vendors.

The plaintiffs now bring this action, claiming an order directing the defendant to execute such instruments as may be necessary to give consent to the above assignments and agreement.

Mr. Mowat announced that he offered no evidence to support par. 4 of the statement of defence (that the defendant signed

without competent and independent advice, and did not understand the meaning and effect of it, etc.).

Paragraph 5, as to the defendant's alleged understanding of the instrument, was not only not supported by evidence, but it was shewn to be utterly false, by the testimony of an independent solicitor and his stenographer, who proved that it was read to the defendant, and that he perfectly understood the same.

Then as to the facts in dispute—which are principally as to conversations with the defendant by different persons trying to get him to execute a consent—I have no hesitation in giving credence to the plaintiffs and their witnesses as against the defendant. This I do having regard to the demeanour of the deponents and by the application of the other standards adopted by jurists in determining the relative value of conflicting statements.

The pretension that there could be any personal element in the choice of a tenant, or that the tenant should live on the property, is, having regard to the nature and condition of the land and the dilapidated building thereon, utterly untenable and absurd.

I find, therefore, that the defendant did wilfully and arbitrarily withhold his consent to both assignments. His true reason for so doing was, of course, a dislike of seeing any one else make any money out of the transaction.

The law is quite clear. "The proviso is not construed as implying a covenant on the part of the lessor not to refuse his consent arbitrarily or unreasonably, but if in fact it is so refused, the result is that the lessee is at liberty to assign without the lessor's consent; and he can obtain a declaration by the Court of his right to do so:" Halsbury's Laws of England, vol. 18, p. 579, secs. 1111 et seq.; Woodfall's Landlord and Tenant, 19th ed., pp. 776 et seq.; Foa's Landlord and Tenant, 4th ed., pp. 270 et seq.; and cases cited in all these, and several Canadian cases which I have consulted.

Owing to the delay caused by the defendant's recalcitrance (I use the word advisedly because he had been advised by Mr. J. E. Jones, barrister and solicitor, that he, Jones, did not see any reason why he did not give his consent) the realty company assumed to cancel and rescind their agreement with Cornish; so that company is entitled to damages on that head.

At the trial an amendment was made to the statement of claim adding a claim for possession of the premises and damages or mesne profits. I find that the defendant did enter and

take possession without colour of right. Rent had been tendered, and he had no other right of forfeiture.

There will be a declaration that the plaintiff McNeil was entitled to assign the lease and option to the plaintiff Cornish, and that the plaintiff Cornish is entitled to assign the same to the Allen Edwards Spiers Realty Company Limited, without the consent, written or otherwise, of the defendant.

2. Damages for the defendant's refusal and neglect to give such consent.

3. Damages or mesne profits under the added count.

Reference to Master as to last two items.

4. Costs of action and counterclaim, which is dismissed, to the plaintiff.

5. Further directions and subsequent costs reserved until after the Master's report.

MIDDLETON, J., IN CHAMBERS. JANUARY 27TH, 1914.

REX v. FRIZELL.

Criminal Law—Receiving Stolen Goods—Magistrate's Conviction—Application of sec. 781 *of Criminal Code—Secs.* 401, 705-770, 771, 1035—*Amendment of Conviction—Striking out Fine.*

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

H. E. Rose, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—The magistrate has, I think, fallen into serious but not unnatural error in the construction of the Criminal Code. The accused was charged with receiving stolen goods, under sec. 401 of the Code, and became liable on summary conviction to the same penalty as a thief. Part XV. of the Criminal Code deals with summary conviction. It is confined to secs. 705 to 770. The magistrate has apparently thought that he was justified in acting under sec. 781, which is not applicable to summary conviction, but relates only to the summary trial of indictable offences. That is plain by reference to the section itself. The words "summarily tried" and the reference to sec. 771 so indicate. None of the sections in Part XVI. have application to proceedings before Justices under Part XV.

Section 1035 clearly has no application, as this is confined to the summary trial of indictable offences under Part XVI. and the trial of indictable offences in the ordinary way.

The case is one in which the conviction should be amended by striking out the provisions relating to the fine of $100. There should be no costs. The apparent hardship of this is lessened when it is borne in mind that, if the magistrate had known the true limitation of his powers, he would probably have imposed a much more severe imprisonment.

MIDDLETON, J., IN CHAMBERS. JANUARY 27TH, 1914.

RE WALKER v. WILSON.

Division Court—Territorial Jurisdiction—Motion for Prohibition —Power of Judge in Inferior Court to Transfer Case to Proper Court—Summons—Form of—Dispute-note — Waiver —Irregularity.

Motion by the defendant Wilson for prohibition to the Fourth Division Court in the County of Haldimand.

The motion was heard in Chambers on the 20th January, 1914.

J. B. Mackenzie, for the applicant.

J. H. Spence, for the plaintiff.

MIDDLETON, J.:—The cause of action did not arise in the territory of the Fourth Division Court; and neither defendant resides there; so the Court has no jurisdiction.

The defendant duly filed a notice disputing the claim and disputing the jurisdiction. The summons was for a Court sitting on the 7th January, 1914. Without making any application to transfer, a motion for prohibition was launched by the solicitor for the defendant Wilson. On the return of the motion, the absence of jurisdiction is admitted—the plaintiff expressing his intention to move before a Division Court Judge for transfer to a Court which has jurisdiction; but objection is taken to this motion as premature—the plaintiff contending that until the motion in the Division Court for a transfer has been made and refused or until the question of jurisdiction has been dis-

cussed and dealt with at the trial, a motion for prohibition cannot be made.

This is the effect of the judgments in Re Watson v. Woolverton (1889), 22 O.R. 586 (note), and In re Hill v. Hicks and Thompson (1897), 28 O.R. 390.

It is manifestly most inconvenient that a motion of this type, where the expense is entirely disproportionate to the amount involved, should be launched, where the Division Court will, without expense, set the matter right. The proceedings in the Division Court are not entirely without jurisdiction, as the Judge has power to transfer the case to the proper Court.

Objection is also taken to the form of the summons. It is possibly not entirely accurate; but the defendant has waived this by entering his dispute. Besides, prohibition will not lie for a mere irregularity in the proceedings in the Division Court; and nothing more than an irregularity exists here.

The motion is dismissed with costs.

MIDDLETON, J. JANUARY 27TH, 1914.

COWLEY v. SIMPSON.

Limitation of Actions—Possession of Land—Evidence—Preference Given to Affirmative Evidence—Agreement—Acknowledgment—Corroboration.

Appeal by the defendant from the report of GUNN, Jun. Co. C.J., Carleton, to whom this action was referred for trial. The action was for the recovery of possession of land.

J. E. Thompson, for the defendant.
W. J. Code, for the plaintiff.

MIDDLETON, J.:—Since the argument, the cross-examination of the witness Desormier upon his affidavit has been put in. The affidavit and cross-examination of this witness so completely answer the evidence now sought to be adduced that a new trial upon this ground is out of the question. This is a typical instance of the class of case in which the well-known rule as to the preference to be given to affirmative evidence can safely be applied.

The witnesses who so clearly remember the residence of

Lavan in Arnprior some forty years ago give evidence which is much to be preferred to the evidence of others, no doubt equally honest and reliable, who state that he did not live there at that time. They may not have known of his residence, or, more probably, knowing it at the time, have forgotten.

I see no reason why the evidence of Murphy as to the arrangement he claims to have made with Lavan should not be accepted. The Referee has accepted it, and it is quite consistent with all the surrounding circumstances and the probabilities of the case. If it is accepted, then Lavan became caretaker for the true owners, his possession was their possession, and he did not acquire possessory title.

Two matters were forcibly presented by Mr. Thompson in his very careful argument. First, he says, this is at most an acknowledgment of title; and, in order to prevent the statute running, the acknowledgment must be in writing. The defect in this is, that the agreement made is not relied upon as an acknowledgment. If the agreement was made, then Lavan had no possession which would avail him under the statute. The possession was changed. I think, further, that the evidence shews that Lavan was out of possession at the time of the making of the arrangement, and only resumed possession in his capacity of caretaker.

The other question is whether the evidence of Murphy, an opposite party, is sufficiently corroborated. I think it is, by the evidence of the witness Sheriff. He states in chief that Lavan said that he was in possession of the land as agent for Cowley and Murphy; and, while it is true that in cross-examination he does not repeat this expression, he does say that Lavan stated that the land was Cowley and Murphy's, and he also stated that he would report the cutting of the posts to them. Taking his evidence as a whole, and in view of the fact that on cross-examination his attention was not drawn to this point, I think that the Judge was well warranted in finding that the story told by Murphy was sufficiently corroborated.

The appeal fails, and must be dismissed with costs.

MIDDLETON, J. JANUARY 27TH, 1914.

RE ROBERT GEORGE BARRETT.

Will—Construction—Devise—Sale of Lands Devised between Date of Will and Death of Testator—Mortgage Taken for Part of Purchase-money—Claim of Devisees to Mortgage Denied—Conversion—Bequest of Unascertained Fund for Specific Purpose—Trust—Surplus not Required for Purpose, Resulting to Estate—Debt Due by Testator—Charge by Will on Real Estate—Liability of Whole Estate.

Motion by the executors for an order determining certain questions as to the construction of the will of Robert George Barrett, arising in the administration of his estate.

H. S. White, for the executors.
F. Arnoldi, K.C., for the testator's daughter Mrs. Mossom.
W. N. Tilley, for the other daughters.
I. F. Hellmuth, K.C., for the sons.
M. H. Ludwig, K.C., for Emily Barrett.

MIDDLETON, J.:—The testator died on the 2nd October, 1913. His will is a long and very carefully prepared document. Upon its construction three questions are raised, two of them arising from the changes that have taken place in the condition of the testator's affairs between the date of the will, the 25th November, 1901, and his death.

Under clauses 12, 13, and 14, the testator gave to his daughters Ada, Sarah, and Edith, each a house upon Bloor street, Toronto. After the date of his will, he sold these houses, taking back from the purchaser a mortgage to secure part of the purchase-money. The daughters, of course, cannot now have the houses, but they claim to be entitled to the mortgage.

I do not think that they can succeed in this. The sale of the property amounted to a conversion. The mortgage is personalty, and must be dealt with accordingly. This is determined by the Chancellor in Re Dods (1901), 1 O.L.R. 7. In re Clowes, [1893] 1 Ch. 214, a decision of the Court of Appeal, not cited in Re Dods, is more exactly in point. In re Slater, [1906] 1 Ch. 480, though not on precisely the same point, throws light upon the section of the Wills Act which is applicable.

The second question arises under clause 26: "I hereby give to my daughter Sarah Frances Barrett whatever sum or sums

of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease, for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping."

At the date of the will it is said that the testator had only a small sum to his credit in the bank; but, quite apart from the Wills Act, the testator here speaks of the money to his credit at the date of his death. He then had to his credit $17,200. The question is, does this all belong to Sarah? She claims it.

Counsel did not refer me to any case like this, nor have I been able to find one. Had the gift been to the daughter for her own use, an expression of the motive or object or purpose of the gift would not interfere with her absolute title; but here the testator has expressed a purpose which is not personal to the daughter. It is, I think, more than mere motive; it amounts to a trust. The testator was maintaining a household. His daughter was living with him. On his death he did not contemplate an instantaneous scattering of the family living with him; and the money on hand, either as cash in the house, or on deposit in the bank, was given to his daughter "to meet the immediate current expenses in connection with housekeeping;" not merely his household debts, but all that could fairly be regarded as falling within that designation during a reasonable time after his death, pending the family reorganisation. All money not needed for that purpose belongs to the estate as a resulting trust. In re West, [1901] 1 Ch. 84, collects the more important authorities.

The remaining question arises on the first clause of the will. Apparently Rebecca Barrett, the testator's wife, had borrowed $60,000, and placed a mortgage for this amount upon her property. This was done for the accommodation of the husband. He was a life-tenant of the wife's property under her will, and it is to be presumed, kept down the interest upon the mortgage during his life-tenancy. By the clause in question he charges all his real estate, including leasehold property, with the payment of the mortgage upon the wife's property, acknowledging that the mortgage was executed by the wife at his request to secure the debt due by him. The question submitted is, is the estate of Rebecca Barrett a creditor of the estate of the testator for the amount of the mortgage, or is the only effect of the charge and acknowledgment that the real estate of the testator is charged with the payment thereof? The wife during her lifetime was a creditor; upon her death her estate became

and still is a creditor; the husband by the will acknowledges the debt, and, in addition, charges it upon his real estate.

This may be so declared. Other questions may arise in connection with this sum, but counsel stated that they were not yet ripe for determination, so that the present declaration will be limited as above indicated.

Costs of all parties will come out of the estate.

MIDDLETON, J. JANUARY 27TH, 1914.

RE REBECCA BARRETT.

Will—Construction—Gift to Daughters—Annuity out of Rents of Land or Estate Tail in Land—Bequest to Granddaughter—Increased Rental—"Out of the Rental"—"Issue"—Limitation to Children—Residuary Clause—Tenants in Common.

Motion by the executors for an order determining a question as to the construction of the will of Rebecca Barrett, arising in the administration of her estate.

H. S. White, for the executors.

F. Arnoldi, K.C., for Mrs. Mossom, a daughter of the testatrix.

W. N. Tilley, for the other daughters.

I. F. Hellmuth, K.C., for the sons.

W. J. Boland, for Mrs. E. M. Russell, a granddaughter

MIDDLETON, J.:—The testatrix died on the 3rd August, 1893, leaving her surviving her husband (who died on the 2nd October, 1913), five sons, and four daughters, who now survive. Another daughter has, since the testatrix's death, died, unmarried and without issue. The granddaughter, Edith Emily, is now Mrs. Russell.

By the will of the testatrix, she first gave her husband a life estate in all her real and personal property. The difficulty arises in the clauses which operate upon his decease. These clauses are as follows:—

"I give and bequeath out of the rents and profits payable from all and singular the real estate at present owned by me, under and by virtue of the devise in that behalf contained in the will of my late father Lardner Bostwick, and consisting of

fifty-two feet of land on King street, in the said city of Toronto, wherein are erected the Adelaide buildings, the annual sum of £654. The £600 to be equally divided between my daughters, the £54 to Edith Emily, daughter of my son Frederick Albert Barrett, for life, provided always that at the expiration of the present lease and when a new lease is granted that the rent should the same be increased Edith Emily's share shall be increased to $600 a year for life, free from the control of any husband they or either of them my said daughters or granddaughter may at any time marry for and during the term of their natural lives.

"And after the death of my said daughters or any or either of them, then to their lawful issue, such issue to take the share or shares of their respective mothers.

"And should any of my said daughters die without leaving lawful issue, then the share of such daughter or daughters so dying without lawful issue to go to the survivors of my said daughters equally for and during the terms of their natural lives, and after their or either of their death leaving lawful issue then to such issue absolutely. Provided always that after the death of my dear husband my household furniture of every description shall go and belong to such of my daughters as shall then be unmarried equally share and share alike, trusting to their love and generosity to give each brother some article as remembrance of their dear mother.

"And that all my dear children may live in peace and love and as to the rest of my real estate and personal, whether in possession or expectancy, I give the same to each and every of my dear children, sons and daughters, to be equally enjoyed by them during the term of their natural lives and after their death to their heirs and assigns forever. And I direct as to the property at Victoria in the county of Welland known as Bertie Hall, the brick residence on the corner of Niagara and Phipps street and furniture to the extent of 120 feet frontage on Niagara street and extending back from the house fifty feet, shall be the share of my son Frederick Albert Barrett so far as the ten acre lot is concerned the balance of the said ten acre lot to be divided equally among my other children sons and daughters, subject to the conditions before mentioned."

The real estate mentioned in the first of these clauses was, at the time of the making of the will, under lease, the ground rental being $2,616.66 per annum. At the expiry of the then current term, the 12th July, 1893, the lease was renewed at the rental of $5,367 per annum; and upon the expiry of this

lease in the near future, further increased rental may be expected.

The question which arises upon this will is, whether the gift to the daughters is of an annuity of £600 per annum charged upon the rents, or whether they take the property in fee tail.

The will is not easy to understand, and looks as if the testatrix had attempted to adapt for her own purposes some other will, adopting from it formal clauses which appear mingled with her own inartificial language. The original was produced from the Surrogate Court, and it appears to be entirely in her own handwriting.

Upon the argument of the motion some question was raised as to whether the probate follows the will with respect to the amount given to the granddaughter Edith Emily. Some changes have been made in the will, to which effect is given in the probate. This is not a matter with which I am now concerned; I must take the probate as it stands. Counsel for Mrs. Russell desires that her position should not be prejudiced with respect to any application she may be advised to make in the Surrogate Court. I do not see how she could be prejudiced, but, if any reservation is necessary, it may be made.

The clause in question is so involved as to present greater difficulties than are found when it is analysed. The testatrix provides: "I give . . . out of the rents . . . of land on King street . . . the annual sum of £654. The £600 to be equally divided between my daughters, the £54 to Edith Emily . . . for life." This is followed by a proviso that upon the expiry of the present lease, if the rent is increased, Edith Emily's share is to be $600 a year for life.

The daughters' contention is, that this is a gift to the daughters of the rental, less what Edith Emily takes; and, as it is followed by the provision that after the death of the daughters their lawful issue take, they take an estate tail.

After very careful consideration, I cannot accept this. The whole argument is based upon the statement that this amounts to a gift of the rents. Assume that £654 is the then amount of rent. There is nothing but a gift out of these rents of the exact amount of the rent, not as the amount of the rent, but as the named sum of £654. The daughters take the £600, and no more. The increased rental above that sum, and above the provision for Edith Emily, will pass to all the children, sons and daughters, under the residuary clause.

The testatrix evidently reckoned in pounds currency, for she treats the pound as equivalent to $4, and the £654 would

then be $2,616, the amount of the rent except 66 cents. I am inclined to think that she ignored this small sum, and really thought that she was disposing of the whole amount of the then rental; but I think that she had then present to her mind the probability of an increased rental being thereafter obtained, and that the use of the expression "out of the rental" was deliberate, and that what she intended to give the daughters and the granddaughter was the amount of the then rental, leaving the amount of any increase to fall under the residuary clause. She then probably realised that, while an increased benefit was being yielded to her sons and daughters, the granddaughter, not being named in the residuary clause, would not receive any increased sum, so she inserts in the first clause a proviso dealing with the share of Edith Emily in the event of an increased rental being obtained.

This, I think, was what was in the mind of the testatrix; and it explains all the clauses of the will and does not fail to give effect to the words "out of," which are evidently of prime significance.

The annuity given to the daughters is for the life of each daughter, and on the death of any daughter leaving issue—i.e., children—the children will take the annuity for life. If the daughter leaves no children, then the surviving daughters and their children take the annuity for their life. "Issue" in this will is, I think, limited to children—as they take the share "of their respective mothers."

Subject to these annuities and the father's life estate, the property became vested in the sons and daughters as tenants in common under the residuary clause.

This is, I think, in accordance with In re Morgan, [1893] 3 Ch. 222, which is now the governing authority, and Going v. Hanlon, I.R. 4 C.L. 144, which gives the true effect of the words "out of." Ward v. Ward, [1903] 1 I.R. 211, and In re Smith, [1905] 1 I.R. 453, are of value as shewing that the annuity is not perpetual.

The costs of all parties will come out of the estate.

KELLY, J. JANUARY 27TH, 1914.

GODKIN v. WATSON.

Trusts and Trustees—Breach of Trust—Mixing Assets of Estate with Trustee's own Property—Death of Trustee—Liability of Executor of Trustee—Knowledge — Account — Appointment of New Trustees.

Action for an account, the appointment of new trustees, and other relief.

J. Jennings and J. A. Rowland, for the plaintiffs.
H. E. B. Coyne, for the defendant.

KELLY, J.:—The defendant is the sole executor of the will of his father, George Watson, who devised all his estate to the defendant, subject to the payment of $500 to another beneficiary.

The testator died on the 24th September, 1909; and probate of his will was issued to the defendant on the 7th October, 1909.

George Watson was the surviving executor of the will of Robert Ford Lynn, who died on the 10th May, 1890, and who, after making certain bequests, bequeathed the whole income arising from the balance of his estate to his three daughters, Agnes Lynn, Amelia Margaret Lynn, and Lavinia Russell Lynn, for their lives and the life of the survivor of them; on their death the capital from which such income is derived becomes divisible equally amongst the grandchildren of the testator. The plaintiffs are two of these grandchildren, and they sue on behalf of themselves and of all the other beneficiaries under the will. The three daughters above-mentioned are still living.

A short time after the death of George Watson, proceedings were instituted in which the defendant was required to bring in his accounts and the accounts of the estate of George Watson in respect of the Lynn estate for the purpose of having the same investigated. The investigation took place before the Judge of the Surrogate Court of the County of Simcoe on the 14th February, 1910, with the result that it was found that the balance of the assets of the Lynn estate then amounted to $5,439.41.

Following this, proceedings having been taken for the administration of the Lynn estate, negotiations were entered into between the defendant and the plaintiffs for a settlement by

which the defendant would pay the amount so found or secure it. These negotiations reached the stage where the documents necessary to carry out the proposed settlement were prepared, but at this point the defendant became indifferent, and the matter rested there.

The evidence shews that George Watson did not keep the assets of the Lynn estate, of which he was executor, separate from his own property, and the assets of the two were so mixed that it was not possible to separate them.

In his defence the defendant sets up that he has no knowledge of the estate of Robert Ford Lynn or of the administration thereof or of the matters referred to in the statement of claim. This contention is absolutely without foundation. Apart from any other means of knowledge he may have, the records in the registry office of the state of the title of certain lands with which the defendant has dealt since he assumed the office and responsibilities of executor of his father's estate, indicate clearly that the Lynn estate had some right, title, or interest in these lands. That of itself was sufficient to have put him on inquiry. He has also set up that he is ready and willing to execute and deliver any conveyance that may be called for, or necessary, of certain property referred to in his statement of defence. But he has not delivered or tendered any such document.

The case is a flagrant one of mixing trust funds and trust assets with assets belonging to the trustee personally, and I entertain no doubt that much of the assets enumerated in the inventory of George Watson's estate, filed on the application for probate of his will, belonged to the Lynn estate. I am equally clear that the defendant had knowledge of this, and that there came to his hands assets in excess of the sum found by the Judge of the Surrogate Court. These he dealt with in a manner not satisfactorily explained in his evidence.

It is unnecessary to review the evidence or further comment upon it; but, to say the very least of it, there was a reckless disregard of the rights of the beneficiaries of the Lynn estate, both on the part of George Watson, the executor, and his son, the defendant, in their manner of dealing with the assets of that estate. For this both the estate of George Watson and the defendant are accountable.

The plaintiffs ask for the appointment of new trustees of the estate of Robert Ford Lynn. The defendant does not object.

There will be judgment for an account of the amount ($5,-439.41) found by the Judge of the Surrogate Court, and a reference to the Master in Ordinary to take the account, including

interest, the reference to include the appointment of new trustees of the estate of Robert Ford Lynn, they giving the usual security to the satisfaction of the Master, and for payment by defendant and the estate of George Watson to the new trustees of the amount which may be found by the Master

Further directions and costs of the reference are reserved until after the Master's report.

FALCONBRIDGE, C.J.K.B. JANUARY 29TH, 1914.

LEMON v. GRAND TRUNK R.W. CO.

Railway—Carriage of Goods—Breach of Contract—Condition of Goods on Delivery—Damages—Value of Goods.

Action for damages for breach of a contract for the carriage of eggs.

W. S. Middlebro, K.C., for the plaintiffs.

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

FALCONBRIDGE, C.J.K.B.:—On the 14th February, 1913, the plaintiffs, produce merchants at Owen Sound, shipped 300 cases of eggs from that town by the defendants' railway, consigned to the order of the Royal Bank, Toronto, for the Harris Abbatoir Company. A bill of lading was delivered to the plaintiffs by the defendants' agent at Owen Sound, and this with a draft on the Harris company was sent to the bank. In the ordinary course the eggs should have arrived in Toronto on Saturday morning the 15th February; but, for reasons best known to themselves, the defendants placed the car containing the eggs on a siding belonging to the Harris company, who found it there on Monday the 17th. Thus the defendants delivered the eggs without obtaining surrender of the bill of lading, and, of course, without presentation of the accompanying draft on the Harris company. The draft was presented to the Harris company on Tuesday the 18th, and acceptance thereof was refused.

In the meantime the Harris company had unloaded the eggs and put them in the warehouse; and they claim that on inspection the eggs were not up to sample.

They reloaded the eggs on the car on or about the 3rd March, and they remained there for two or three days and then were

put back into cold storage. The defendants then assumed to take steps under the provisions of the Railway Act to sell them, and did sell them, realising the sum of $615.59, which sum they paid into Court.

I was very favourably impressed with the evidence of Frank McKee, who had charge of the cold storage eggs for the plaintiffs, and also of Morley D. Lemon, one of the plaintiffs; and I find that, when the eggs were shipped by the plaintiffs, they were in accordance with the sample which had been furnished to the Harris company. The delivery by the defendants of the eggs to the Harris company without the production and surrender of the original bill of lading was a breach of their contract with the plaintiffs, and the defendants are responsible for, or at least cannot set up as a defence, the alleged condition of the eggs on delivery.

There will, therefore, be judgment for the plaintiffs for $1,665 with interest from the 14th February, 1913, and costs.

The plaintiffs may take out the money paid into Court and credit the amount on their judgment.

I refer to Tolmie v. Michigan Central R.R. Co. (1909), 19 O.L.R. 26.

MEREDITH, C.J.C.P., IN CHAMBERS. JANUARY 30TH, 1914.

RE GODSON AND CASSELMAN.

Vendor and Purchaser—Title to Land—Originating Notice under Vendors and Purchasers Act—Title Derived from Devisee under Will—Condition in Restraint of Alienation —Validity—Determination of—Parties—Notice to Persons Concerned—Rule 602.

Motion by the vendor, by originating notice under the Vendors and Purchasers Act, for an order declaring that the vendor could make a good title to land, the subject of an agreement for sale, under a conveyance from one Ellen McCabe, devisee under the will of Patrick Trainor; alleging that she took a fee simple under the devise, notwithstanding a restraint upon alienation.

Fisher (Lennox & Lennox), for the vendor.
J. H. Campbell, for the purchaser.

MEREDITH, C.J.C.P.:—It seems to me to be plain enough that, having regard to the present state of the cases on the question of the validity, or invalidity, of conditions in restraint of alienation, the title in question in this matter should not be forced upon an unwilling purchaser unless first adjudged good, in a proceeding in which a judgment in the vendor's favour would be binding upon all who might take the land if the vendor's deed would cause a forfeiture of her right to it by reason of the condition against alienation—contained in the will in question.

In more than one way such a binding judgment can be had. It may be in such a proceeding as this: see Rule 602.

But it does not appear that all persons concerned in the question of the validity of the condition, involved in this application, are now before the Court.

Therefore, if the vendor desires it, the motion may be renewed, when such persons are all made parties to it, and have had due notice of it; otherwise the matter will be disposed of adversely to the vendor, and costs will go with the result.

If the application be renewed, it must be then distinctly and circumstantially proved who are the heirs-at-law of the testator; and the notice of motion, served upon them, must plainly state that, if they fail to appear upon the motion, it may be adjudged, in a manner binding upon them, whether or not they have any estate, right, title, or interest in or to the lands in question, which must be described plainly in the notice.

MEREDITH, C.J.C.P. JANUARY 30TH, 1914.

*WILLSON v. THOMSON.

Mortgage—Action to Enforce by Foreclosure—Claim upon Covenant for Payment—Part of Mortgage-moneys not Payable till Majority of Person Interested in Land—Effect as to Remedies of Mortgagee—Parties—Infant.

Motion by the plaintiff for judgment on the pleadings in a mortgage action.

McGregor Young, K.C., for the plaintiff.
S. H. Bradford, K.C., and T. Hislop, for the defendants.

*To be reported in the Ontario Law Reports.

MEREDITH, C.J.C.P.:—On this motion for judgment, upon the pleadings, in this action, the single question raised is, whether the plaintiff is entitled now to enforce in foreclosure her claims under the mortgage security in the pleadings set out.

The plaintiff agreed to sell to the defendant Thomson the land in question, in the year 1912, for $10,000, to be paid as follows: $500 at the time of making the agreement; $2,000 in the following month of October; and the balance in three equal annual instalments thereafter; these three payments to be secured by a mortgage upon the land.

Some difficulty arose in making title, by reason of some interest, or supposed interest, of one of the vendor's children, in the land, and by reason of that child, though joining in the conveyance, being not then, nor until September, 1915, of full age.

The difficulty was overcome by another agreement, to which the infant was a party, under which the vendor and her husband were to become bound in the sum of $5,000 to procure a conveyance by the infant, after attaining his majority, to the purchaser of any interest he might have in the land; and the mortgage was to be modified so that $1,000 of the purchase-money should not be payable until the conditions of the bond had been performed. And bond and mortgage appear to have been given accordingly.

The cash payment and the next following payment seem to have been made in due course; so that there remain now unpaid the last three instalments of $2,500 each, the first of which is now overdue; the other two not yet payable.

The plaintiff's claim for the usual relief in a mortgage action, except possession; the claims are for foreclosure or sale and judgment upon the covenant to pay contained in the mortgage.

The single defence raised now is, that, because the $1,000 payment is not yet payable, there can be no foreclosure or sale.

Upon principle there is no reason, that I can perceive, why that should be so. . . . Here the plaintiff can reconvey all that was mortgaged to her. Upon payment, the mortgagor will enjoy all the rights he ever had, or was to have, in the land; title to all except any interest the infant may have, and, as to that, the security of the bond, and of the $1,000 of the mortgage-moneys which is not to be paid until that interest is conveyed to him.

On the other hand, if payment of the overdue instalment be not made, and foreclosure or sale take place, the mortgagor will be foreclosed or sold out of all the interest he has in the land. He could not enforce the bond; nor could he be compelled to pay the $1,000; that was all part of the one transaction which his default has brought to an end.

There does not seem to me to be any kind of difficulty in applying foreclosure or sale procedings to the case; nor any reason of any kind why they should not be applied to it.

But it was contended that the cases are against that view: Cameron v. McRae, 3 Gr. 311, and Parker v. Vinegrowers Association, 23 Gr. 179, being the cases relied upon.

As to each of these Ontario cases, it is enough to say that they were decided on the authority of the case Burrowes v. Molloy, 2 Jo. & Lat. 521, and were, to say the most of them, not intended to go beyond what was the opinion of Sugden, L.C., expressed in that case.

That which was decided in Burrowes v. Molloy was . . . that one who had expressly and plainly covenanted that the mortgage-moneys should not be called in before a certain time, could not call it in before that time: see Williams v. Morgan, [1906] 1 Ch. 804.

How then does that apply to this case? Merely to this extent, that the plaintiff cannot call in the $1,000 until the time fixed for payment of it, namely, on delivery of the deed of the infant's interest, if any, in the land; but, if foreclosure be had, this is never to happen; and so payment of that sum is not sought or demanded. If foreclosure take place, that executory contract will come to an end, as will all consequences that would have flowed from it. . . .

The agreement is for the reduction of the last payment by $1,000 if the deed be not delivered. Foreclosure, without having delivered the deed, has the effect of reducing the amount of the mortgage only.

Nor does foreclosure create any difficulty or work unjustly against any one. If foreclosure takes place, the mortgagee merely gets back that which she conveyed, and the mortgagor loses only that which he has paid—the usual case.

If the mortgagor desire a sale, the land can be sold, with his right to the deed before-mentioned, by assignment of the contract and bond, and the mortgagor will get the surplus purchase-money.

If the mortgagor pay up the arrears, the contract will go on as if nothing had happened: Con. Rule 485. . . .

The usual judgment will go, that is, for foreclosure or sale, and for judgment under the covenant for the amount due upon it; but not for possession, as that has not been claimed.

Mr. Bradford contended that, if the plaintiff be entitled to judgment, the infant should be added as a party to this action, and his interest, if any, in the land, conveyed to the purchaser in case of a sale; but no such effect could be brought about in any such way. If there be any way of getting a valid conveyance of the infant's rights in or claims upon the land, it must be under an enactment authorising a sale and conveyance of them: see Collier v. Union Trust Co., Re Leslie, An Infant, 4 O.W.N. 1465.

BRITTON, J. JANUARY 30TH, 1914.

BILTON v. MACKENZIE.

Negligence—Injury to and Death of Workman on Building—Action by Widow under Fatal Accidents Act—Negligence of Servant of Contractor—Defective Plank—Absence of Knowledge of Intention of Deceased to Use Plank—Absence of Contractual Relations—Licensee—Findings of Jury—Evidence.

Action by the widow of James W. Bilton, on behalf of herself and her two children, to recover damages for his death, caused, as she alleged, by the negligence of the defendant.

The action was tried with a jury at Toronto.

H. C. Macdonald, for the plaintiff.

Shirley Denison, K.C., for the defendant.

BRITTON, J.:—The owner of land at the corner of King and Dufferin streets, in Toronto, was erecting a building thereon. The painting of the outside parts of this building was given by contract to one Egles, and the deceased James W. Bilton was in the employ of Egles upon this work. The carpenter work was by the proprietor given by contract to the defendant. There were no contractual realtions between Egles and the defendant or between the deceased and the defendant.

On the 26th November, 1912, the deceased, without the knowledge of the defendant, was sent to do some outside painting. About the time the deceased and another painter were ready to begin work, rain set in, so that the outside painting could not

advantageously be done. The defendant had sent, with another carpenter, one George Hope to do some work in the second storey of the building. His work was to take the sash out and set the window by putting weights on. He reached the second storey by means of an elevator. The floor was being laid, but not wholly completed, from the elevator to the window, in reference to which he was to do the work, and, in order to reach that window, Hope placed boards or planks, as they are called, across the girders, forming a passageway. He walked safely over this passageway to his destination.

Because of the rain, the deceased decided to go to the second storey and to do from the window some outside painting of the building. The deceased ascended by the elevator, and attempted to walk upon the passageway which Hope had provided, and as Hope had done; but one of the boards broke, and, because of it, the deceased fell to the floor below and was killed. . . .

At the trial I left the following questions to the jury, which were answered as follows:—

"(1) Was the plank or board which broke when the deceased walked upon it, and caused the death of the deceased, weak and defective, and entirely insufficient for the purpose? A. Yes.

"(2) Was the workman Hope guilty of negligence in using that plank or board for the purpose for which it was used? A. Yes, but not intentionally

"(3) Was it, or ought it to have been, within the reasonable contemplation of the workman Hope that painters or others having work to do in or about the building would or might be in the second storey, and would or might use the passageway made by the plank or boards placed on the girders by Hope? A. Yes.

"(4) Was the deceased rightfully in the second storey of the building and rightfully from the inside of the building doing the painting on the outside of the window or frames? A. Yes.

"(5) What damages do you find should be paid by the defendant to the plaintiff, the widow, and her children, in case the defendant is liable? If you like you can apportion the amount between the widow and children. A. We have assessed the damages at $1,000, to be apportioned by your Lordship."

I agree with the findings of the jury as to all these answers except that to the third question. The defendant personally did nothing. Hope did not know, nor did he have any reason to know, that the painter or any one but the carpenters would be upon the second storey. The deceased did not need to go upon the second storey to do his work. It was expected that he would

do his work from the outside of the building. He was never directly authorised to go inside, nor was he prohibited. The highest right he had to be upon the second storey was that of a bare licensee. That, if nothing more, would bring the case within King v. Northern Navigation Co., 24 O.L.R. 643, affirmed in appeal 27 O.L.R. 79, and the plaintiff would fail in this action.

There remains the question of whether or not the defendant is brought within the rule laid down by Brett, M.R., in Heaven v. Pender, 11 Q.B.D. 503, 509 . . . : "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." . . .

The present case differs from the case cited. In that case the staging was, to the knowledge of the defendants, necessary in order to do the painting. It was to be used by the ship painter. In the present case the defendants' servant did not think that the painter would use the passageway or that any person other than carpenters would use it. The defendant did not know that any one other than the carpenters would be on the second storey until after the floors were laid, the laying of which was in progress when the accident happened.

In the case cited, the defendant was interested in the work being done; in the present case the defendant had no interest whatever in the work the painter was doing or proposed to do when the board broke.

It is a most unfortunate thing for the plaintiff, but it seems to me that I should be carrying the liability against the defendant further than it has yet been carried, were I to render judgment in favour of the plaintiff.

See also the following cases: Grand Trunk R.W. Co. v. Barnett, [1911] A.C. 361; Gregson v. Henderson Roller Bearing Co., 20 O.L.R. 584; Earl v. Lubbock, [1905] 1 K.B. 253.

The action should be dismissed, but, under the circumstances, without costs.

FELT GAS COMPRESSING CO. V. FELT—FALCONBRIDGE, C.J.K.B.—
JAN. 27.

Patent for Invention— Assignment — Validity — Execution Act, 9 Edw. VII. ch. 47, *sec.* 16(*O.*)—*Intra Vires—Property and Civil Rights.*]—Action for a declaration that the plaintiffs were entitled to certain patents for inventions, and that the assignment thereof to the defendants passed no interest therein. The learned Chief Justice said that he agreed with the contentions advanced by the defendants' counsel; and that the action should be dismissed with costs.—Neither the Minister of Justice nor the Attorney-General for Ontario appeared, although notified in that behalf, to discuss the constitutional validity of the Execution Act, 9 Edw. VII. ch. 47(O.) The learned Chief Justice finds in favour of the constitutionality of the section, treating it as legislation in regard to property and a civil right in the Province. J. W. Bain, K.C., and M. L. Gordon, for the plaintiffs. W. S. Brewster, K.C., and A. E. Watts, K.C., for the defendant Detwiler. J. M. Ferguson, for the defendant Brackin.