THE
ONTARIO WEEKLY REPORTER

VOL. 23 TORONTO, DECEMBER 19, 1912. NO. 8

JUNE 14TH, 1912.

KAISERHOF HOTEL CO. v. ZUBER.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Mortgage—Sale under Power—False Bidding—Withdrawal of Bid.

Appeal from a decision of the Court of Appeal for Ontario, 25 O. L. R. 194, affirming the judgment of a Divisional Court, 23 O. L. R. 481, by which the judgment at the trial in favour of the plaintiffs was reversed and the action dismissed.

The defendant Zuber was holder of a second and a third mortgage on hotel property, and the plaintiffs owned the equity of redemption. Under powers of sale contained in his mortgages Zuber took proceedings to sell the property, and the plaintiffs brought action to restrain the sale, and obtained an interim injunction which was afterwards discharged. The property was then put up for sale at auction. One Boehmer, acting for the appellants, instructed a man named Fish to bid, and he ran the price up to $43,500, the respondent Roos having bid $43,000. At request of Zuber's solicitor the auctioneer inquired of Fish if he was prepared to pay the money if the property was knocked down to him, and he requested and was given half an hour to satisfy the mortgagee of his ability to do so. He did not return at the expiration of that time and Roos withdrew his last bid. The property was offered for sale again and knocked down to Roos at $39,500, and was conveyed to him a few days later by Zuber.

The appellants then proceeded with their action to restrain the sale, adding Roos as a party, and alleged that it

was not conducted in a fair, open, and proper manner; that Roos was not the highest bidder; that the conditions of sale were unduly onerous; that there was collusion between Zuber and Roos to enable the latter to obtain the property for less than its value; and that Roos was acting as agent for Zuber and the sale was not *bonâ fide*.

The trial Judge gave judgment for the plaintiffs on the grounds that the conditions of sale did not furnish full information as to the first mortgage and as to existing leases and liens; that deposit to be made by the purchaser was fixed at twenty per cent.; and that only seven days were given for the purchaser to make objections to the title. This judgment was reversed by a Divisional Court, which held that no one was deterred from bidding by reason of the conditions and that there was no omission or misstatement of any fact material to be known; that the price obtained for the property was a fair one; and that Roos had a right to withdraw his bid when Fish failed to put up the deposit. This judgment was affirmed by the Court of Appeal, and the plaintiffs then appealed to the Supreme Court of Canada.

The appeal to the Supreme Court of Canada was heard by SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

Secord, K.C., for the appellants.

Watson, K.C., for the respondents.

THEIR LORDSHIPS, after hearing counsel for both parties reserved judgment, and at a subsequent date dismissed the appeal with costs.

Appeal dismissed with costs.

NOVEMBER 17TH, 1911.

RE HENDERSON AND THE TOWNSHIP OF WEST NISSOURI.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Leave to Appeal—Municipal By-law—High School District—Public Importance.

Appeal from a decision of the Court of Appeal for Ontario, 24 O. L. R. 517, affirming the judgment of a Divi-

sional Court, 23 O. L. R. 21, which maintained a Judge's order quashing a by-law for a continuation school in West Nissouri.

In 1888 the Middlesex County Council passed a by-law constituting East Middlesex a high school listrict, but nothing was done under it. In 1910, a by-law was passed establishing a continuation school in the township of West Nissouri, which was part of the high school district of East Middlesex, under the provisions of the present High School Act, 9 Edw. VII., ch. 91, sec. 4, which provides that when a high school district has existed in fact for three months it shall "continue to exist," and be deemed a high school district under the latter Act, whether regularly formed originally or not.

On motion to quash the by-law passed in 1910 all the Courts below held that the high school district of West Nissouri never "existed in fact" within the meaning of this Act, and it was, therefore, quashed.

The motion to the Supreme Court of Canada for leave to appeal from the judgment of the Court of Appeal for Ontario, was heard by SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

G. F. Henderson, K.C., for the motion.

Chrysler, K.C., contra.

THEIR LORDSHIPS refused the leave to appeal, considering that the case raised no question of great public importance, and that there was no other ground on which it could be granted.

Leave to appeal refused.

JUNE 14TH, 1912.

NOVEMBER 26TH, 1912.

RE RISPIN, CANADA TRUST CO. v. DAVIS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Will — Trust for Benefit of Son — Discretion of Executor — Death of Beneficiary—Funds not Disposed of.

Appeal from a decision of the Court of Appeal for Ontario, 25 O. L. R. 633, affirming the judgment of the Chancellor, on questions arising as to disposition of an estate under a will.

The will in question devised the testator's real estate and chattels to his son and the rest of his property to his executor in trust with directions as follows: "And I authorize and request him to pay the interest . . . and the principal in whole or in part to my son . . . as in the judgment of my executor as may be prudent with reference to the habits and conduct of my son, my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right, or to withhold the payment altogether." The son received various amounts from the executor while he lived, and after his death, a considerable sum remaining, the question arose as to its disposition, namely, whether it should go to the heirs of the son or to the next of kin of the testator.

The Courts below held that there was an intestacy as to this sum and that the next of kin of the testator, to be ascertained as at the date of his death, were entitled to it.

The executors of the son appealed to the Supreme Court of Canada, and were heard by SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

F. G. Meredith, K.C., and John Macpherson, for the appellants.

Betts, K.C., for the respondent.

W. R. Meredith, for the Official Guardian.

THEIR LORDSHIPS, after hearing counsel for the respective parties, reserved its judgment and, on a subsequent day, dismissed the appeal with costs, the testator's executor and Official Guardian to have out of the estate their solicitor and client costs incurred over and above the party and party costs, to be paid by the appellant.

Appeal dismissed with costs.

FEBRUARY 22ND, 1912.

BENNETT v. HAVELOCK ELECTRIC LIGHT CO.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Company—Purchase of Director's Property—Secret Profit.

Appeal from a decision of the Court of Appeal for Ontario, 25 O. L. R. 200, reversing the judgment of a Divisional Court, 21 O. L. R. 120, by which the judgment at the trial dismissing the action, was reversed.

Mathieson, a resident of the village of Havelock, purchased the only water power in the village capable of producing electric power, for $300. He offered it to the municipal council, or any company, at the same price, if either would undertake to establish a system of electric lighting and electric power, but could not induce any one to do so. He then associated himself with four other persons and a company was formed, the five pledging their own credit for the necessary funds. Mathieson sold the water power to the company for $5,000, which he divided with his four associates.

Bennett and another shareholder in the company brought action to have the sale set aside, and an account taken of the secret profit made by the five. His action was dismissed by the trial Judge, but maintained by the Divisional Court, where judgment was entered against the four defendants, Mathieson being discharged from liability, for $1,000 each. The Court of Appeal reversed the latter judgment, and the action stood dismissed.

The plaintiffs then sought to appeal to the Supreme Court of Canada, and were heard by SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

S. T. Medd, for the motion.

D. O'Connell, contra.

THEIR LORDSHIPS quashed the appeal on the ground that there was no joint liability of the defendants, and none of them was liable for a sum exceeding $1,000.

Appeal quashed with costs.

DECEMBER 6TH, 1911.

GRAND TRUNK PACIFIC RAILWAY CO. v. BRULOTT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Negligence—Railway Company—Findings of Jury—Volens—Pleading.

Appeal from a decision of the Court of Appeal for Ontario, 24 O. L. R. 154, maintaining the verdict at the trial in favour of the plaintiff (respondent).

The plaintiff Brulott, an employee of the defendant company, was assisting T., another employee, in repairing a car on a track in the yard, when other cars were propelled against it, whereby plaintiff was injured.

On the trial of an action against the railway company under the Workmen's Compensation for Injuries Act, a verdict was found for the plaintiff and maintained by the Court of Appeal. On appeal to the Supreme Court of Canada, the defendants contended that the verdict could not stand for two reasons. 1. That there was no finding that the injury to plaintiff resulted from his conformity to an order of a person in defendants' employ, which he was obliged to obey. 2. That the trial Judge, although requested by counsel for the defendants, to do so, refused to submit to the jury the question of whether or not the plaintiff voluntarily assumed the risk attendant upon working as he did when the accident happened.

The appeal to the Supreme Court of Canada was heard by DAVIES, IDINGTON, DUFF, and BRODEUR, JJ.

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

T. N. Phelan, for the respondent.

THEIR LORDSHIPS held, following the reasoning of the Court of Appeal as to the first objection, that the jury were sufficiently directed on the point as to the plaintiff being bound to obey the order of the employee whom he was assisting in repairing the car, and the evidence shewed that he did follow the latter's directions.

On the second objection Mr. Justice Davies dissented, holding that the question as to the plaintiff being *volens* should have been submitted. Mr. Justice Idington took the view that the issue as to *volens* should have been pleaded, while Duff and Anglin, JJ., were of opinion that it was covered by the finding that the plaintiff was not guilty of contributory negligence. Mr. Justice Brodeur held that as plaintiff was acting under the orders of a superior at the time the maxim *volenti non fit injuria* did not apply. The appeal was accordingly dismissed.

Appeal dismissed with costs.

MAY 7TH, 1912.

JUNE 4TH, 1912.

WARREN, GZOWSKI & CO. v. FORST & CO.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Evidence—Telephone Conversation—Corroboration.

Appeal from a decision of the Court of Appeal for Ontario, 24 O. L. R. 282, affirming the judgment of a Divisional Court, 22 O. L. R. 441, by which a verdict for the plaintiff was set aside and a new trial ordered.

The action in this case arose out of a stock transaction, which was initiated by a telephone conversation between the plaintiff Gzowski and a member of defendants' firm. There

was a dispute as to the date and terms of this conversation, and at the trial the defendants tendered the evidence of their stenographer, who was in their office where the telephone was when it took place. The trial Judge refused this evidence on the ground that the stenographer could not know who the other party to the conversation was. The verdict for the plaintiff was set aside and a new trial ordered, on account of the rejection of this evidence.

The appeal to the Supreme Court was heard by SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and BRODEUR, JJ.

Nesbitt, K.C., and Arnoldi, K.C., for the appellants.

Macdonnel, K.C., for the respondents.

THEIR LORDSHIPS, after hearing counsel for both parties, reserved judgment, and on a subsequent day dismissed the appeal and cross-appeal with costs.

Appeal dismissed with costs.

MAY 22ND, 1912.

TEMISKAMING MINING CO. v. SIVEN.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Negligence—Accident in Mine—Fall of Rock — Covering of Shaft—Fellow Servant.

Appeal from a decision of the Court of Appeal for Ontario, 25 O. L. R. 524, maintaining the verdict for the plaintiff at the trial.

The plaintiff, Siven, was working in the defendants' mine when he was injured by a rock falling down the shaft and striking him. The rock came through a man-hole above the shaft where men were engaged in stoking, and there was a trap-door over the mouth of the shaft which was open at the time. Before proceeding with the stoking the workman in charge sent a helper to see if this trap-door was shut, and when the latter called out "everything is all right," went

on with the work. If the trap-door had not been open the plaintiff could not have been injured.

The plaintiff brought action at common law and under the Mining Act, for damages, in which the jury found that the defendants were guilty of negligence for not providing a suitable pentice for the protection of workmen in the shaft (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario); they negatived contributory negligence by the plaintiff, and assessed the damages at $2,500, for which judgment was entered for the plaintiff.

The Court of Appeal maintained this verdict and held that the defendants could not rely on the doctrine of common employment, as the accident was caused by breach of a statutory duty to which that doctrine does not apply.

The defendants appealed to the Supreme Court of Canada, and were heard by SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

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

A. G. Slaght, for the respondents.

THEIR LORDSHIPS, without reserving judgment, dismissed the appeal with costs.

Appeal dismissed with costs.

JUNE 4TH, 1912.

BOECKH v. GOWGANDA QUEEN MINES.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Company—Subscription for Shares—Misrepresentations — Action for Calls—Charge to Jury—Misdirection—Objection—Pleading.

Appeal from a decision of the Court of Appeal for Ontario, 24 O. L. R. 293, affirming the judgment for the plaintiffs (respondents) at the trial.

The respondents brought action to recover calls upon shares of their capital stock claimed to have been subscribed for by appellant. The main defence was that the

subscription for the shares was procured by fraudulent misrepresentations upon discovery of which he had repudiated it. The jury found that he was not misled by any statements made to him and that he had delayed his repudiation for an unreasonable time after becoming dissatisfied. Judgment was entered for the plaintiffs at the trial and defendant appealed directly to the Court of Appeal, where he complained of misdirection and non-direction to the jury. His objections on these grounds were overruled for the reason that they were not taken at the trial and the jury were properly instructed as to the subject matter. Another objection was that a question, "Do you find in favour of the plaintiffs or the defendant?" should not have been submitted, as to which the Court of Appeal held that it was taken too late, and even if it had been raised at the trial it could not prevail, as the Judge had a right to put the general question if he thought fit, if his charge was such as to enable the jury to deal with the issues by a general verdict.

A third objection that there was no proof of a by-law authorised the sale of shares at a discount was disposed of on the ground that as such a by-law existed proof could have been easily made and the plaintiffs would be allowed to put in a copy before the Court of Appeal.

The Court also held that an allotment made without compliance with the provisions of sec. 106 of the Ontario Companies Act was voidable only and could not be avoided except upon a record properly framed for the purpose.

The defendant appealed to the Supreme Court of Canada and was heard by SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

John W. McCullough, for the appellant.

W. R. Smyth, K.C., for the respondent.

THEIR LORDSHIPS affirmed the judgment of the Court of Appeal for the reasons given therein.

Appeal dismissed with costs.

*Leave to appeal to Privy Council was refused, 25th July, 1912.—Ed.

DECEMBER 22ND, 1911.

CANADIAN GAS POWER AND LAUNCHES v. ORR BROTHERS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Sale of Goods—Express or Implied Warranty—Evidence.

Appeal from a decision of the Court of Appeal for Ontario, 23 O. L. R. 616, affirming the judgment at the trial in favour of the respondents (defendants).

The plaintiffs brought action for the balance of the price of an engine and dynamo sold to the defendants, who pleaded that they were sold under an express, or if not an implied, warranty that they would "run properly" and be fit for the special purpose for which they were intended, and alleged a breach of such warranty. The plaintiffs contended that all necessary conditions were fulfilled to entitle them to payment and that defendants knowing the capabilities of the articles sold deliberately accepted them, taking the risk of failure.

The trial Judge held that there was a warranty as alleged and that the plaintiffs had not fulfilled their part of the contract. He, therefore, dismissed their action and gave judgment for the defendants on a counterclaim demanding a return of the money paid on account with interest. This judgment was affirmed by the Court of Appeal.

The plaintiffs appealed to the Supreme Court of Canada, and were heard by SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

G. H. Watson, K.C., for the appellants.

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

THEIR LORDSHIPS after hearing counsel for the respective parties, reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

JUNE 14TH, 1912.

ANGLO-AMERICAN FIRE INS. CO. v. MORTON.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Appeal from a decision of the Court of Appeal for Ontario, 19 O. W. R. 870, reversing the judgment at the trial in favour of the defendants (appellants.)

This was an action on a policy insuring premises used at the time as billiard and pool rooms and a bowling alley, and the main defence was that a portion of the premises having been leased for a restaurant without notice to the company this was a change material to the risk which avoided the policy. The trial Judge gave judgment for the company on this ground.

The Court of Appeal reversed this judgment on the ground that the defendants had not proved that the change in the use of the premises was material and that, in the absence of evidence, it could not be said that a restaurant, even where gasoline is used, is more hazardous than a billiard room.

The defendants appealed to the Supreme Court of Canada, and were heard by SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

THEIR LORDSHIPS affirmed the judgment of the Court of Appeal by an equal division of the Judges.

D. W. Saunders, K.C., for the appellants.

Hamilton Cassels, K.C., for the respondents.

Appeal dismissed with costs.

DECEMBER 6TH, 1911.

TORONTO CONSTRUCTION CO. v. STRATI.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Negligence—Explosion of Dynamite—Evidence—Inferences.

Appeal from a decision of the Court of Appeal for Ontario, 19 O. W. R. 88, affirming the judgment at the trial in favour of the plaintiff (respondent).

The plaintiff brought this action as administrator of an Italian named Lanata, who was killed while in the employ of the defendant company, who were at the time engaged in construction work for the Canadian Pacific Railway Co., in Grenville county, Ont. Lanata at the time of the accident by which he was killed, was employed as powder monkey, and in charge of a shack in which frozen dynamite was thawed out. The shack was about 14 by 16 feet in size, with a wooden door, which was not kept locked when Lanata was out, and into which the foreman of the works and the workmen used to go to get warmed. There was a sheet iron stove in the centre of it, fed with wood from the top and the dynamite was placed on shelves around the walls and on a movable shelf about four feet from the front of the stove. On the day he was killed, Lanata had been sent by the foreman to get some dynamite from the shack, and according to the evidence had either not got inside or had got in and out again when an explosion took place, and he was found alive, his body intact and his clothing torn and burning, having apparently been thrown against the stump of a tree near the entrance to the shack.

Under these circumstances the trial Judge gave judgment against the defendants for $2,000, which the Court of Appeal affirmed on the ground that the mode of thawing the dynamite was dangerous and contrary to the directions issued with each box, which directions were not read to nor explained to Lanata, who could not read himself, though they were known to the foreman and other officials of the company.

The defendants appealed from the judgment of the Court of Appeal to the Supreme Court of Canada, and were heard

by SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

G. H. Watson, K.C., for the appellants.

W. N. Tilley and T. R. Allen, for the respondent.

THEIR LORDSHIPS dismissed the appeal with costs.

DECEMBER 22ND, 1911.

DOMINION LINEN MFG. CO. v. LANGLEY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

S. C. R.

Insolvent Company—Sale of Assets by Liquidator—Sale "Free From Incumbrances"—Conversion—Breach of Contract.

Appeal from a decision of the Court of Appeal for Ontario, 19 O. W. R. 648, reversing the judgment at the trial, 14 O. W. R. 1163, in favour of the plaintiffs (appellants).

The defendant, Langley, is liquidator of the Dominion Linen Mills, Ltd., which by an order of the High Court of Justice in January, 1906, was declared to be insolvent and liable to be wound up. Some time before the making of this order the company had hypothecated its principal assets, including its stock of manufactured linens to the Crown Bank of Canada, to secure advances, and the bank had taken possession. By order of Court the business was allowed to be carried as a going concern by the liquidator, and advances to be procured from the bank for wages, etc., to be repaid out of the first moneys coming into his hands. While so carrying it on he advertised for tenders for purchase of the assets, and in April, 1906, an agreement was entered into between the defendant and one Todd, by which the latter became purchaser of the property of the company "free from incumbrances" and transferred the same shortly after to the plaintiffs, a new company formed to take over the business. The defendant received $5,800 on account of the purchase money and, by direction of the plaintiffs, and on their undertaking to hold him harmless, paid it over to the Crown Bank.

It appeared that the insolvent company used to send their goods to Scotland to be bleached, and a quantity was there when the winding-up order was made. The bleaching firm wrote to the defendant, stating the amount of their account in respect to their goods and asking for instructions. After some further correspondence the liquidator wrote them full information as to what had been done, and stating that the proceeds of sale of the assets would hardly pay the bank's claim. He ended his letter by saying: "I, as liquidator, have no objection to your disposing of the goods on the highest market, applying the proceeds of such sale on your claim and advising me accordingly." Under the law of Scotland the bleachers had no right to sell the goods to satisfy their lien without complying with certain formalities, which they did not do.

The plaintiffs brought action against the liquidator, claiming damages for conversion of the goods so sold and, at the trial, were allowed to amend by adding a claim for breach of the contract to sell the assets of the insolvent company "free from incumbrances." At the trial they recovered judgment on the latter ground, which the Court of Appeal reversed, holding that there was no conversion, as the defendant's letter quoted above did not amount to instructions to sell, and that there was no breach of contract, as the term "free from incumbrances," as used in the contract with Todd, was not intended to apply to the charges for bleaching, but to the mortgage on the buildings and liens on the stock.

The plaintiffs appealed to the Supreme Court of Canada, and were heard by SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

J. W. Bain, K.C., and M. L. Gordon, for the appellants.

Anglin, K.C., for the respondent.

THEIR LORDSHIPS after hearing counsel for the respective parties, reserved judgment, and on a subsequent day dismissed the appeal.

Appeal dismissed with costs.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

TOWNSHIP OF ANDERTON v. TOWNSHIPS OF MALDEN AND COLCHESTER SOUTH.

4 O. W. N. 327.

Drains and Dykes—Report of Referee—Appeal from—Apportionment of Cost—Repairs to Drain—Instructions to Engineer—Report of Engineer not to be Lightly Disturbed.

Appeal by plaintiffs from the report of the Drainage Referee, assessing them with a portion of the cost of repairing and extending a drain. All parties to the litigation had been mulcted in damages by reason of the disrepair and insufficiency of a certain drain. The defendants, the township of Malden, initiated certain improvements to prevent the recurrence of the damage, and the engineer in charge reported that, as the plaintiff township was benefited by the proposed improvement, it should pay a proportion of the cost thereof. The report of the Drainage Referee accepted the engineer's proportion of the assessment as the correct one. Plaintiff urged that they could not be forced to pay for improvements which they did not want.

COURT OF APPEAL *held*, that the work was necessary, and, under the statute, plaintiffs were properly assessed with a portion of the cost.

Held, further, that the report of the engineer in charge, unless clearly erroneous, or involving a question of law, should not be disregarded, he being statutory officer sworn to do his duty.

Appeal dismissed with costs.

An appeal by the plaintiff against the report of the Drainage Referee in a matter arising under the Municipal Drainage Act.

The appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE MIDDLETON.

M. Wilson, K.C., and F. H. A. Davis, for the township of Anderton.

J. H. Rodd, for the township of Malden.

W. G. Bartlett, for the township of Colchester South.

HON. MR. JUSTICE GARROW:—Agreeing as I do with the conclusion of the learned Referee it is not necessary to repeat here at any length the facts, which are very fully set forth and discussed in his judgment.

The proceedings were initiated by the township of Malden. The township of Colchester did not appeal either to the Referee or this Court.

The instructions to the engineer are contained in the following resolution passed by the council of the township of Malden:—"Moved by Mr. Campbell, seconded by Mr. Young, that, whereas 'in a certain drainage action brought by one Mary E. Bondy and Gordon Bondy against the townships of Colchester South and Malden, the Drainage Referee held that the Long Marsh drain had not been carried to a sufficient outlet, and the said townships were therefore held liable in damages for overflow. That therefore, Alexander Baird, C.E., be and he is hereby instructed to make an examination and report upon the said drain, providing for the putting of the said drain in a proper state of repair, and carrying it to a sufficient outlet, so as not to further damage the lower lands.' Carried."

Fault is found by counsel for the appellant with the inclusion in this resolution of the enquiry as to the state of repair of the old drain, a subject provided for in the former by-law which could only be changed as pointed out in the Statute, see 10 Edw. VII. ch. 90, sec. 72. And the objection extends to what was subsequently done by the engineer under the resolution, which it is said has varied the provisions as to maintenance contained in the former by-law.

The mere reference in the resolution to the question of repair was at least harmless, and may even have been quite proper as being involved in the larger question of improved outlet. If, however, it had been followed by a variation of the former provisions as to maintenance a different and more serious question would have arisen. But, as is set out in the judgment of the learned Referee, whatever foundation the objection ever had was entirely removed before him by an amendment to the report, made with the consent of the engineer, so as to more clearly confine the provisions as to maintenance to the new work, which he said was what he had intended, but failed to clearly express.

The Bondy litigation had established that the Long Marsh drain had not been carried to a sufficient outlet and it was conceded on all hands that something should be done to correct the then existing state of affairs.

The engineer, Mr. Baird, C.E., a man of skill and experience in such matters, after, it must be assumed, a sufficient examination, was of the opinion that to properly and sufficiently improve the outlet it was necessary to do the work which by his report he recommended, and that as so improved the drain could be used by and would be of benefit to lands in the appellant township, such lands should contribute in the proportion at which he assessed them.

It is not disputed, and it could not be, that for the purpose of obtaining the necessary outlet the township of Malden might, under the statute, initiate proceedings under which the work might lawfully be extended into the adjoining township, and that lands in such township might be assessed if the circumstances otherwise justified an assessment. The wide propositions advanced by the learned counsel for the appellant, that one township cannot invade another township except by a strict compliance with the provisions of the Act, and, one township cannot impose a drainage system upon a neighbouring township, are not and need not be disputed, but seem upon the facts to be quite wide of the mark.

Whether what is proposed is more than is required for the purpose of obtaining the improved outlet, which after all must really be the main question, is not a question of law but of fact, depending upon the evidence, and practically upon that of the experts of whom there were five, three called by the appellant and two by the respondent. And a perusal of their testimony shews practical unanimity upon the main proposition, that Mr. Baird in what he proposed to do does not exceed his instructions to obtain a sufficient outlet. As an example, Mr. Newman, C.E., was asked in cross-examination: "Q. If what he was instructed to do was, namely, to take the waters of the Long Marsh drain to a sufficient outlet, what would you do that Mr. Baird has not done? A. Practically what he has done. Q. So that he has carried out in your opinion his instructions in that regard? A. Yes." Mr. McGregor, C.E., agreed generally with the evidence of Mr. Newman who preceded him in the examination. And Mr. Ure, C.E., the last to be called, said practically the same thing as Mr. Newman upon this subject. The criticism of all three was directed not so much to the question whether what is proposed is excessive,

as to the assessments in the appellant township which they all considered decidedly too large. On the other hand Mr. McCubbin, C.E., called for the defendant, substantially agreed with the conclusions of Mr. Baird, both as to the necessity of the work and the justice of the assessment.

Into the details of the criticisms of the assessment by the appellants' expert I do not propose to enter. It has in such matters of "much or little" been the custom in this Court, wisely in my opinion, to rely very much upon the conclusions of the engineer in charge. He is a statutory officer, sworn to do his duty. He has necessarily to make a close and careful examination and study of the whole premises, and his deliberate conclusions ought not, in my opinion, to be disregarded, except under clear evidence of error, or unless a question of law is involved.

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

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—The appellants were literally, as well as figuratively drawn to the last ditch upon the argument of this appeal, and had indeed, as was there forcibly—perhaps too forcibly—pointed out, no solid foundation for the appeal, in any respect, there.

The new drainage works were not only reasonably, but were necessarily, undertaken. The old drainage works proved to be insufficient because not carried to a proper and sufficient outlet. All parties to this appeal had been sued for damages arising from that defect, and such damages had been awarded against all of them in a judgment against which none of them appealed.

One of them then undertook the new scheme for the one purpose of relieving all, and all persons concerned, from the evil effects of the earlier scheme; and the report and scheme of the drainage engineer, which is now appealed against, are entirely to remove that defect in giving a good and sufficient outlet; whether in the long run they do effectually or not.

Then in order to get such an outlet the drainage engineer deemed it necessary to do all the work, and go to all the expense, that his report provided for; in the doing of which he found that lands in Anderton would be benefited

very largely; and he charged them accordingly with a share of the cost in proportion to the benefit to be had. In principle, I can see no reasonable objection to that course. What else could properly be done? And I have no doubt it is quite in accord with the purposes and the provisions of the drainage laws of this province.

Whether in fact the scheme is too large or too small or whether objectionable on any other question of fact, was threshed out very fully and carefully upon the appeal to the drainage referee, upon evidence which in its weight, is quite favourable to the drainage engineer's views; views which have been sustained by the drainage referee; and, views which have not been shewn to be wrong here.

It is true that a very considerable sum of money is to be expended upon the intended work, and that a large proportion of it is to be taken from Anderton and its ratepayers; and it is true too that great care should be taken by everyone concerned that the drainage laws are not made unnecessarily burdensome upon anyone, and especially anyone who is not bringing them into operation in the particular case.

Here, however, the work, bridges and all, seems to be necessary, indeed unavoidable, and it is obvious that Anderton and its inhabitants must be greatly benefited by it.

Indeed, as I understood the appellants, they eventually took their main stand upon the contention that the new scheme involved works which was work of repair duly imposed under the earlier scheme, from which those upon whom it was so imposed would be relieved; and that in such a case there could be no new scheme adopted because it disturbed the old one in such a manner. But the obvious answer to that is, that in the new scheme all these things are taken into consideration, and new burdens are imposed which carry with them the old liabilities as nearly as can be.

I am but repeating that which was said during the argument more than once, and must refrain from again covering the old ground upon other and minor phases of the case; all of which expressions of opinion were heard and fully understood by the appellants upon the argument here; so that not too little, but very likely, too much has been said.

The appeal, on all grounds, has failed.

HON. MR. JUSTICE RIDDELL. NOVEMBER 12TH, 1912.

WEEKLY COURT.

RE ROBERTSON v. TOWNSHIP OF COLBORNE.

4 O. W. N. 274.

Municipal Corporations—By-law—Establishing Telephone System—Motion to Quash—2 Geo. V., ch. 58—Two Competing Systems—Petition—Authority to Depart from—Discretion of Council—Endeavour to Withdraw—Practice of Councils—Time of Signing and Sealing By-law — Resolution of Indemnity — Charge of Partisanship.

Motion to quash a by-law of the township of Colborne establishing a municipal telephone system under the Ontario Telephone Act, 2 Geo. V., ch. 58. The objections to the by-law were numerous and are set out in the judgment.

RIDDELL, J., dismissed motion with costs.

"A by-law need not be signed at a council meeting, signing and sealing afterwards being quite sufficient."

Brock v. *T. & N. Ry. Co.*, 17 Gr. 425, at p. 434; *McLellan* v. *Assiniboin*, 5 Man. R. 127, referred to.

Application to quash a by-law (No. 2 of 1912), passed by the respondent on the 27th of April last, to raise $4,840 to pay for the cost of construction and installation of a telephone system, known as, "The Municipal Telephone System of the Township of Colborne." Also to quash the following resolution passed on the same day, namely: "And that a by-law be passed providing that, 'The Municipal Telephone System of Colborne' pay law costs or other expenses that may be incurred by the township with the passing of by-law No. 2."

W. Proudfoot, K.C., for the motion.

G. F. Shepley, K.C., for the township.

HON. MR. JUSTICE RIDDELL:—The history of the matters in question is about as follows: Prior to the month of April, 1910, a joint stock company known as, "The Goderich Rural Company," had procured from the said township a franchise to operate a telephone system in the township. In the month of April, 1910, it was understood that said company was not going to take advantage of said franchise, and a number of the ratepayers, desirous of having a telephone system established, on May 10th, 1910, presented a petition and agreement to the township council praying that a telephone system

should be established. On that date a resolution was passed, that the petition presented be granted with the exception of clause 2. A by-law was thereupon introduced, establishing the system and got a first and second reading. The final passing was put off until the next meeting. On the 26th of May, the council again met and passed the by-law. At this meeting a petition signed by applicant E. Maskell and others was presented to the council, asking that their names should be removed from the petition. The council passed a resolution that no action should be taken. The system thus created went on and built a system covering various concession lines in the township, and the township borrowed on two by-laws the sum of $3,800 and paid it over to the promoters of this system. The Rural Company also went ahead and built their lines.

Now the township has two systems, which on various concession lines has both systems in operation. The two systems are not in any way connected, and the result is that neighbours cannot converse. Considerable ill-feeling has been engendered, and the ratepayers are, as it may be termed, in hostile camps, with the reeve and some of the council backing the municipal system.

The individual applicants and several others who signed the petition to remove their names have not taken telephones from the municipal system. The by-law attacked embraces their land, and it is claimed an attempt is thereby being made to compel them to pay for something they have not taken and will get no benefit from.

The statute to be considered is the Ontario Telephone Act, which is, 2 Geo. V., ch. 58, where necessary with its forerunners, 3 Edw. VII., ch. 19, sec. 331; 8 Edw. VII., ch. 49; 10 Edw. VII., ch. 84, 92; 1 Geo. V., ch. 55.

Taking up the objections in their order:—

1. That the township changed the petition without the consent or authority of the applicants by striking out paragraph 2 thereof; and thereupon passed by-law 15 of 1910, establishing a system.

The petition after reciting that it was desirable to construct a local telephone system in the township; and at the expense equally shared by the subscribers, paid for by debentures, etc., etc.—went on to pray (1) the council to pass a by-law establishing such system under the Act 27, 1908, etc.; (2) that the council should take proceedings to secure

the right to extend the system beyond the boundaries of the township or make such alternative arrangements as will secure the same, and (3) that the expense shall be in equal shares borne by the members of the system, etc., etc.

The by-law No. 15, 1910, did not contain any such provision as is contemplated in the 2nd paragraph of the petition.

I do not think this fatal, 8 Edw. VII., ch. 49, secs. 3, 4, 5, 6, and 9; 2 Geo. V., ch. 58, secs. 9, 10, 11, 12, and 13, give the statutory provisions. A petition is to be presented praying for the establishing of a system, which petition shall set forth such particulars as the council shall require, "including a statement shewing the location of the proposed system and the manner in which it is proposed that it shall be constructed and maintained." This was done, and in addition the petition contained clause 2, asking the council to act under sec. 13 (now 9). The council thereupon did provide for the establishing, etc., under sec. 5 (now 1). The extension in sec. 5 (now 11) is not the extension in 9 (now 13); the former would be within the township; the latter without. I can see no necessity for the council doing everything at once; nor do I think a petition such as this must necessarily be given effect to in all its prayers at once or at all.

2. The second objection is thus stated:—

"2. Prior to the passing of said by-law No. 15, 1910, the respondent had granted to "The Goderich Rural Telephone System, Limited," a franchise to erect a telephone system in the said township, and it was on the understanding that the said company did not intend to use said franchise that the applicants (other than the said township) signed said petition. At the time said by-law was passed, it was known that the said company intended to proceed. With this knowledge the respondent should not have proceeded, as it was not in the interests of either the applicants or the ratepayers to have two systems paralleling each other in said township."

But this is a matter for the discretion of the council—they had the power, and given good faith, the Court cannot interfere. The council is a legislative body with certain statutory powers; it is in no sense subordinate to the Courts, and the *bona fide* exercise of statutory power should not be interfered with.

"3. The applicants and others (other than the township of Wawanosh) after the said petition had been presented and passed with the said change, and with the knowledge that said company intended to proceed, desired to withdraw therefrom, and for that purpose, before anything had been done thereunder or expense incurred, presented a request in writing to the respondent to permit them to withdraw therefrom, this the respondent improperly and illegally refused to assent to."

I do not find any provision for a petition striking his name from a petition—and in any case, there were sufficient petitions to answer the statute, if the objectors' names were removed.

"4. Before passing the said by-law, No. 15, of 1910, establishing the said system, it should have had a schedule or list of the petitioners annexed to and forming part of the said by-law and read and passed as part thereof. This was not done nor was the said list in any way attached to or made part of the said by-law."

The statute sec. 8 (now 14), provides for the cost of establishing and maintaining the system; and such being the case such an addition to the by-law is not only unnecessary, but improper.

"5. The applicants would not have consented to the change made in the said petition, and all steps, actions and proceedings thereafter taken by the respondent under the said petition were, so far as the applicants were concerned, illegal and void."

This has been already covered.

"6. The respondent's council, in passing the said by-law No. 2, of 1912, did not exercise their own will and judgment in doing so. Such by-law having been passed on the illegal resolution and understanding that if any expense was incurred by the township in upholding the same it would be paid by the Municipal Telephone System, and without the said understanding a majority of the said council would have voted against the passing of the said by-law."

The by-law here spoken of is the by-law really attacked in the present motion. It is based upon by-law 15, of 1910; after reciting that by-law it goes on to provide for the issue of debentures, etc., etc.

A resolution was passed at the special meeting, April 30th, 1912, in the following terms: "that by-law No. 2, 1912, as read a third time be passed; and that a by-law be

passed providing that the Municipal Telephone System of Colborne pay any law costs or other expenses that may be incurred on the township in connection with the passing of by-law No. 2." It is said that the council would not have passed the by-law without such an agreement of indemnity—probably that is so—and the Reeve thought the indemnity illegal though he did not tell the council so.

I do not see that this invalidates the by-law—whatever it was that induced the council to think it in the public interest that the by-law should carry, they did so; and that is enough. I cannot see that anything which is said in *Begg* v. *Dumvick* (1910), 21 O. L. R. 94, or *Re Angus* v. *Widdefield* (1911), 24 O. L. R. 318, has any bearing adverse to this conclusion.

Numbers 7 and 8 are to be dealt with together.

"7. The respondent at the time the said by-law was passed, did not have attached thereto and forming part thereof the schedule shewing the list of names or persons whose property was thereby being bound, nor was the said list read, and although it purports to form part of the said by-law, was not produced, nor read at the said meeting, and the respondent only in part, passed the said alleged by-law."

"8. The said by-law had not attached thereto at the meeting of the council when passed, the seal of the said corporation attached, said by-law was taken away by the Reeve of the said township from the custody of the clerk, where it properly belonged and remained in his possession without being sealed, and if sealed at all, was sealed, if at all without authority, on or about the time that a copy thereof was registered in the Registry Office for the county of Huron, about which said time the said schedule of names was for the first time attached thereto."

These are, in my opinion, rather matters of routine practice, than of substance—the schedule was lying on the table, everybody knew of it and its contents, the seal is kept at the clerk's office and not at the council chambers, and it was affixed at a convenient time, after the meeting and before anything was done under the by-law.

It never has been held that the signing and (or) sealing of a by-law must be done at the council meeting; the instances on which this is done are probably rather the exception than the rule. Section 333 requires the signing to be done by the person presiding at the meeting, but it does

not require the signing to be done at the meeting, and signature afterwards is quite sufficient.

Brock v. *T. & N. Rw. Co.*, 17 Gr. 425, at p. 434, per Spragge, C., *McMillan* v. *Assiniboin*, 5 Man. R. 127.

"9. The said by-law provides for the said debentures being issued as of the 21st of December, 1911, which is illegal and improper."

It is argued that the statute does not give any power to the council to issue the debentures as of the 21st December. I find nothing in the statute, sec. 11 (1) now 17 (1), to prevent the council fixing any convenient date for the debentures—the statutory authority is given to issue debentures, however, and that is enough.

"10. The respondent in passing the said by-law assumed to bind lands in the township of West Wawanosh. No authority was ever received by the respondent from the said township of Wawanosh to enter into or carry their lines into the said corporation, and the action of the respondents in doing so and in passing the said by-law, whereby an effort is being made to bind lands of ratepayers in the said township, is wholly illegal."

The applicants cannot complain of anything not affecting them—supposing the ratepayers of Wawanosh could.

"11. The resolution passed by the respondents on the 27th day of April, 1912, as hereinbefore fully set forth, was illegal. The respondents having no power or authority to either pass said resolution or to pass the by-law thereby provided for."

This has already been dealt with.

"12. The respondent without a vote of the ratepayers of the township of Colborne had no power or authority to pass the said by-law, creating, as it does, a liability for which the credit of the whole township is pledged."

The statute sec. 11 (1) now 17 (1), gives the power and authority so to do.

"13. The Reeve and Councillor Halliday, both being subscribers to said Municipal Telephone System, acted in a partizan manner and had no right to vote on said by-law.

I think they acted in good faith, which is enough—but in any case three of the councillors were beyond suspicion, and they acted in passing the by-law.

The attack fails on all grounds taken; and the motion must be dismissed with costs.

HON. MR. JUSTICE RIDDELL. NOVEMBER 11TH, 1912.

WEEKLY COURT.

RE SEATON.

4 O. W. N. 266.

Will—Construction of—Stationer's Form—"Real Estate At"—"At" not Synonymous with "In" — Punctuation — Presumption against Intestacy—Identity of Legatee—"Hatch, Jr."—Meaning of "Recipients of Will"—Reference as to Next of Kin.

Motion for construction of a will. Testator owned land on which stood a house known as 62 Muir Ave. Later he built a shop along side of the house, having for one of its walls part of the wall of the house. This shop was numbered 64 Muir Ave. He had no other real estate, and devised his "real estate at 62 Muir Ave.," and the question was whether this devise passed more than the actual house No. 62. There were other minor questions.

RIDDELL, J., *held*, that the devise of the real estate at No. 62 Muir Ave. included the shop and the adjacent land.

Review of authorities as to meaning of word "at."

Costs to all parties out of estate, reference to MASTER-IN-ORDINARY to report as to next of kin.

Motion by the executors of the estate of the late Herbert Alfred Seaton, for an order construing his will under Con. Rule 938.

J. H. Spence, for the executors.

W. N. Tilley, for Mrs. Hunt.

E. C. Cattanach, for several parties.

J. R. Cartwright, K.C., for Attorney-General.

HON. MR. JUSTICE RIDDELL:—The late Herbert Alfred Seaton left his last will and testament, dated March 19th, 1912, which I am now asked to interpret. I had the original will sent for and find that it is written on a law-stationer's blank—all the blanks have not been filled up—and the following is how the document appears:—

"This is the last will and testament of me Herbert Alfred Seaton, of the City of Toronto, 62 Muir Avenue, in the County of York, and Province of Ontario, made this nineteenth day of March in the year of Our Lord one thousand nine hundred and twelve.

I revoke all former wills or other testamentary dispositions by me at any time heretofore made, and declare this only to be and contain my Last Will and Testament.

I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease. Peter Humphrey and John McIntosh, each of the City of Toronto.

I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: 1. To Mrs. Hunt and her two sons my real estate at 62 Muir Ave., Toronto. 2. All the household furniture except the two parlors and the fast and loose fixtures of the store, including show cases, refrigerators, etc., to be sold by auction, and after all expenses being paid to be divided equally among five children of Mrs. James Hussy.

3. The sum of $2,000 insurance in the United Workmen as follows:—

(1) Five hundred dollars ($500) to Olivet Baptist Church through the trustees of Olivet Baptist Church, Toronto; (2) to Peter Humphrey $100; (3) to John McIntosh $50; (4) to Mrs. Hunt $100; (5) to William Hatch $50; (6) to Maggie Hatch $50; (7) Hatch Jr. $50; (8) to Olivet Baptist Sunday School, Toronto, $100 for enlarging and building of Sunday School in connection with Olivet Baptist Church.

4. The sum of $1,000 of the Sons of England as follows: I leave in the hands of the executors to carry out all payments of any money outstanding otherwise not specified in the estate and to divide the balance, if any, equally among the recipients of this will.

All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto

And I nominate and appoint

to be execut of this my last will and testament."

Then follows signature of the testator, a somewhat imperfect attestation clause and the signature of two witnesses.

1. The first question is as to the "real estate at 62 Muir avenue, Toronto."

The facts are that Seaton for many years owned a lot at the corner of Muir and Sheridan avenues, with a frontage of

some 46 feet on Muir and a depth of 109 feet 4 inches on Sheridan. At first he had a two-storey brick building, a dwelling house at the north-west corner of the two streets, and known as 42 Muir avenue, and he there resided. On the lot there was also a roughcast stable, and the rest of the lot he used as a vegetable garden. In 1907, he made up his mind to open a store on Muir avenue, having theretofore been carrying on a grocery business on Yonge street. He borrowed $2,000 on the whole lot and proceeded to build a one-storey roughcast building adjoining his house, which by that time had become 62 Muir avenue; this he used as a store till the time of his death. The new building was erected close against his dwelling house, the only material dividing them being a sheeting of wood nailed against the outside wall of the dwelling. The dwelling he continued to occupy till his death. The store was built on part of his former vegetable garden, but the rest he continued to use as a vegetable garden till the time of his death. The store was at the date of the will, and is now known as 64 Muir avenue. The stable is in the rear of part of 62 and part of 64; it was used by him for stabling his horse, and if the two numbers were divided according to the dwelling wall between house and store the stable would be cut in two. Photographs have been furnished me, which shew that the two buildings are in fact very closely connected. Although it cannot fairly be said that the buildings are one, the store would be in evil plight if the dwelling house were to be removed, not having any eastern wall of its own. I am satisfied that I must give effect to the words used by the testator (a) "my real estate" (b) "at." If it had been the intention to devise only the house, the word "house" would have been used—in clause 2, when he has to speak of the store he uses the word "store"—and I can see no reason for supposing that had he intended to devise the house as distinguished from the store he would not have used the word "house." Then if he had intended to devise only No. 62, there would have been no need to employ the word "at." The devise is not "my real estate 62 Muir avenue," but "my real estate at 62 Muir avenue."

It is contended that the word "at" in a will is synonymous with "in"—sometimes it is, but more often not. For example a devise of "all the estate . . . I have . . . in any lands . . . at Cosomb in the county of Gloucester,"

could not cover lands the manor of Farmsost, but only lands in Cosomb. *Doe* v. *Greening*, 1814, 3 M. & S. 171, so "lands situate at Dormstone," does not mean anything but lands situate within the parish and manor of Dormstone, per Fry, J., in *Homer* v. *Homer* (1878), 8 Ch. D. 758, at p. 764. "At or near" may mean "in or near." *Ottawa* v. *C. A. R.*, 2 O. L. R. 336; 4 O. L. R. 56; 33 S. C. R. 376.

But it is common knowledge that "at" very frequently indeed is not synonymous with "in"—it is not precisely synonymous with "in" in the present instance, but even if the argument of the Deputy Attorney-General be adopted, it means "that is" or something of the sort. "At" means often "near" *e.g.*, in *Wood* v. *Stafford Springs*, 74 Com. 437; *Howard* v. *Fulton*, 79 Tex. 231; *Harris* v. *State*, 72 Miss. 960; *Annan* v. *Baker*, 49 N. H. 161; *O'Connor* v. *Nadel*, 117 Ala. 595; *Bartlett* v. *Jenkins*, 22 N. H. 53; *W. C. St. R. Co.* v. *Manning*, 70 Ill. App. 239. And its original meaning is rather "near" than "in."

In any use of the word colloquial or scientific, I think it broad enough to cover the "real estate" not only 62 Muir avenue, but also that adjoining which is substantially one with 62 Muir avenue.

The ordinary presumption against intestacy helps in the same direction. I shall, therefore, declare that all "real estate" in the block passes by this devise.

2. The second question is what is excepted from the sale directed in clause 2?

In the will it reads thus:—

(2) All the household furniture except the two parlors, and, the fast and loose fixtures of the store, including show cases . . . " a comma appearing after "parlors" and another after "and." The punctuation rather assists the conclusion to which I had come without it, namely, that all that is excepted is "the two parlors." The regimen of "except" does not extend beyond "the two parlors," but is exhausted at the comma following these words—and the following noun "fixtures," is in the same construction as "furniture." In other words the word "except" is not understood, and is not to be supplied after the conjunction "and." The presumption against intestacy may perhaps be considered to help in the same direction.

3. In clause 3 the sum of $2,000 insurance in the A. O. U. W. is spoken of, but only $1,000 is disposed of. What of the balance?

As the sums are specifically mentioned which the beneficiaries are to receive, I can find no reason for increasing them in any respect. There is consequently an intestacy as to $1,000.

4. "Hatch, Jr." is given $50.

Mr. John Hatch has only two sons, William Hatch, who is admittedly the William Hatch or legatee of $50 in the same clause 3—and Nelson Hatch, now about 18 years old, and eight years younger than his brother. The testator was in the habit of referring to Nelson as "young Mr. Hatch" and "Hatch Junior." There can be no doubt that Nelson Hatch is the beneficiary named.

Lee v. *Pain* (1844), 1 Hare 201, at p. 251; *Dowsel* v. *Sweet Amb.* 175, and note; Theobald, 4th ed., p. 221; *Re Patrick Moran* (1910), 17 O. W. R. 578; *Re Catharine Gordon* (1911), 20 O. W. R. 528.

5. What does clause 4 mean?

One cannot congratulate the draftsman whoever he may have been, in making his meaning plain. The best I can do is to find that the $1,000 is to be applied in making all payments for and out of the estate which are not specified, but which are necessary. Such payments are not specified as have no fund specifically provided for them—*e.g.*, debts, funeral and testamentary expenses, costs of solicitors, etc., in administering the estate, executors' commission, etc., etc.

6. And who are the "recipients of this will?"

Literally speaking, the only recipients of the will are those who receive the will itself, the officers of the Surrogate Court; but no doubt what is meant is "beneficiaries under the will"—and that means all who receive any benefit under the will.

1, Mrs. Hunt; 2 and 3, her two sons; 4 to 8, Mrs. Jas. Hussy's five children; 9, Olivet Baptist Church; 10, Peter Humphrey; 11, John McIntosh; 12, William Hatch; 13, Maggie Hatch; 14, Nelson Hatch, and 15, Olivet Baptist Sunday School.

7. There is an intestacy as to (a) the household furniture of the two parlors; (b) $1,000 of the A. O. U. W. insur-

ance; (c) any property not specifically mentioned. It is not known that the deceased has any next of kin. An enquiry will be directed by the M. O. as to this.

Costs of all parties, those of executors between solicitor and client out of the residue in the first instance, but in any event out of the estate.