The
Ontario Weekly Notes

VOL. XIX. TORONTO, FEBRUARY 25, 1921. No. 24

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 14TH, 1921.

CANADIAN STEWART CO. LIMITED v. HODGE.

Contract—Sub-contractor for Government Works—Work not Conforming to Specifications and not Satisfactory to Government Engineer—Approval of Inspector—Damages—Counterclaim—Failure to Do Portions of Work—Failure of Principal Contractors to Supply Proper Material—Timbers for Pile-driving—Insufficient Length—Loss to Sub-contractor—Objection not Taken—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of ROSE, J., 18 O.W.N. 417.

The appeal was heard by MEREDITH, C.J.C.P., MIDDLETON, LENNOX, and ORDE, JJ.

McGregor Young, K.C., for the appellant.

D. L. McCarthy, K.C., and A. W. Langmuir, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that it was admitted and was manifest that the work done by the defendant was not done in accordance with the contracts that were binding upon him in this respect, and that it was all removed and done again by others. The defendant took the position that his failure to do the work according to the contract was caused by the plaintiffs' failure to do those things which they contracted with him to do to enable him to perform his contract with them. It was said that the work was largely done with the approval and to some extent under the direction of one of the engineer-inspectors of those for whom the whole of the works, done by others as well as the defendant, were being constructed; but it was admitted and was plain that, having regard to the contracts, this inspector's conduct could not govern or affect the rights of the parties in

anything that was the subject-matter of this litigation. So that the defence to the action and the ground of the counterclaim really were that the plaintiffs did not supply the timber needed to enable the defendant to do his work in accordance with the contracts, though the plaintiffs had contracted with the defendant to supply it.

The learned Chief Justice's conclusion, upon the whole evidence, was that the plaintiffs did not fully comply with their undertaking in this respect; and that, if the defendant had refused to accept that which the plaintiffs did supply, he might well have been within his rights in treating the contract as broken and in seeking damages from the plaintiffs for the breach of it. But the defendant did not take that position; and in the end the length of the timbers had no substantial part in the rejection of the work. If the work had been well done, and all that was necessary had been cut off the piles, the only effect would have been that the plaintiffs should eventually have been paid only for the exact length, in the work, of the piles, not the whole length of the timber as supplied.

The main cause of the defendant's failure to do good work was the height of the water. The plaintiffs did not contract with the defendant to lower the water, and he did not, on his own account, lower it.

Knowing the terms of the major contract, it was the bounden duty of the defendant and the plaintiffs to perform the work substantially according to it—reliance upon the inspector's views of how the work might be done was inexcusable.

No objection was made to the form of the judgment, either upon the question of liability or that of damages.

The appeal should be dismissed.

LENNOX, J., in a written judgment, said that he concurred in the judgment of the Chief Justice. If the piles were in fact not long enough to enable the defendant to perform the work according to the plans and specifications, he was bound to take a far more definite stand than he did, for in his contract with the plaintiffs he bound himself to comply with all the terms and conditions imposed upon the plaintiffs under the main contract.

The learned Judge, however, upon this point, preferred to rest his judgment upon the finding of fact of the trial Judge that the piles furnished were of sufficient length to enable the defendant, properly handling them, to comply with his contract, and the additional fact that it was the method of execution adopted by the defendant, and not the alleged lack of length, that led to the ultimate rejection of the work under the terms of the overriding contract. Undoubtedly the trial Judge took all the

surrounding circumstances into account, including loss in trimming—if that is a necessary result of driving the piles—and the average shortage of a foot or so allowed on the work in place. He heard the evidence, and had the advantage of noting the manner of giving it. Unless he manifestly erred, unless his conclusions were unquestionably contrary to the evidence, his findings of fact should not be disturbed.

MIDDLETON and ORDE, JJ., agreed with LENNOX, J.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 18TH, 1921.

*PARLOV v. LOZINA AND RAOLOVICH.

Motor Vehicles Act—Collision of Motor Vehicle with Street Car—Injury to Passenger in Motor Vehicle—Non-paying Guest of Driver—Want of Ordinary and Reasonable Care—Negligence—Breach of Contract to Carry Safely—Vehicle Driven by one of two Co-owners—Liability of both—Motor Vehicles Act, secs. 11, 19.

Appeal by the defendants from the judgment of MIDDLETON, J., 47 O.L.R. 376, 18 O.W.N. 139.

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

R. T. Harding, for the appellants.

T. P. Galt, K.C., for the plaintiff, respondent.

HODGINS, J.A., in a written judgment, said that he agreed with the judgment appealed from in so far as it awarded the plaintiff damages against the defendant Lozina, the co-owner of the car and the driver of it at the time the plaintiff, who was a passenger in it, was injured.

The defendant Raolovich must be held liable as well. The ownership of the defendants was a joint tenancy, and there did not seem to be any doubt that each was an owner, albeit a joint owner. The liability of "the owner" is created by sec. 19 of the Motor Vehicles Act, R.S.O. 1914 ch. 207, amended by 7 Geo. V. ch. 44, sec. 14, and 8 Geo. V. ch. 37, sec. 8. There was no sug-

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

gestion that Lozina had not the consent of his co-owner, express or implied, to use the car; nor was the car in the possession of any person other than the owner of it. Why should a co-owner not be liable? He has all the rights of an owner, and why not the liabilities?

Wynne v. Dalby (1913), 30 O.L.R. 67, is no authority for holding that the defendant Raolovich is not included in the term "owner."

The appeal of both defendants should be dismissed with costs.

MEREDITH, C.J.O., in a written judgment, said that he agreed with the judgment of Hodgins, J.A., and the reasons therefor.

He was of opinion, approving the decision of Orde, J., in Gray v. Peterborough Radial R.W. Co. (1920), 47 O.L.R. 540, that sec. 19 of the Act renders the owner liable to an action as well as to the penalties imposed by the Act.

Lozina undoubtedly violated sec. 11; and, if his co-defendant was an owner of the motor vehicle within the meaning of sec. 19, he was responsible for that violation, and therefore responsible to the extent to which Lozina was responsible.

The plaintiff was entitled to treat the injury caused to him by Lozina's negligent act as a wrong done to him; and for that wrong, it being the result of a violation of sec. 11, the other defendant, being the owner of the motor vehicle within the meaning of sec. 19, was responsible.

MAGEE, J.A., in a written judgment, said that, if sec. 19 makes a co-owner liable to individuals, it is only for a violation of the Act which is negligence, and the fair meaning is that the co-owner is liable only where the action is based on negligence, and is not liable to one who has deliberately made a contract, whose rights are based on contract, and who can look to the party with whom he made it.

The appeal of Raolovich should be allowed and the action be dismissed as against him.

The appeal of Lozina should be dismissed.

FERGUSON, J.A., in a written judgment, said that Lozina was not an agent or servant of Raolovich. They were co-owners. One did not need the assent of the other to perfect his right to dominion and control of the automobile. Raolovich was not present when the plaintiff became an occupant of the car, nor was he present when the accident occurred. He had no knowledge of the accident nor of the circumstances leading up to it; and the learned Judge was unable to accept the view that, on the true construction of the

Motor Vehicles Act, it was intended to fasten liability upon a person who had neither the legal right nor the power to control nor an opportunity to do so.

The appeal of Lozina should be dismissed, and the appeal of Raolovich should be allowed.

By the unanimous judgment of the Court the appeal of Lozina was dismissed; and in the result, the Court being equally divided, the appeal of Raolovich was also dismissed.

FIRST DIVISIONAL COURT. FEBRUARY 18TH, 1921.

*DAUGHERTY v. ARMALY.

Landlord and Tenant—Lease of House—Informal Instrument—"Rent"—"Let"—Implication of Covenant for Quiet Possession—Displacement by Proof of Collateral Agreement—Condition—Proof by Oral Evidence—Interference with Enjoyment of House—Building in Front of it—Interference with Foundation-wall—Leaving Opening in Wall—Injury to Tenant—Damages—Finding of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff in an action for trespass, interference with, and injury to a house and premises rented to the plaintiff, and for an injunction; and cross-appeal by the plaintiff as to the damages.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

E. S. Wigle, K.C., for the appellants.

A. St. George Ellis, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the plaintiff was tenant of the defendants under a lease dated the 14th November, 1919, for one year, at the rent of $55 a month, payable in advance, and her action was brought to recover damages for an alleged interference with her quiet possession of the premises by the defendants excavating in the lawn in front of the house, tearing away a cement walk leading to the house, the front steps, and the front porch, and cutting a hole 4 feet by 14 feet in the foundation-wall of the house, entirely cutting off the entrance to the front of it, and proceeding to erect a restaurant against the

front of the house, the result of which will be to make the house unsightly, and to cut off the light from the downstairs front part of it.

The defendants said that, before the lease was made, the plaintiff had been for two months a monthly tenant of the premises, and that when the place was first rented to her the defendants would not rent to her the vacant ground in front of the house because they intended to build upon it a store or restaurant; that the lease was given subject to the defendants' right to build upon the vacant lot in front of the house; that they entered upon the vacant part of the lot and began to make the excavation complained of on the 28th November, and no complaint was made by the plaintiff until the 12th December following; and that they had not interfered with the tenancy of the plaintiff any more than what was agreed to previous to the time of the renting of the premises.

The lease was an informal document, reading: "Nov. 14, 1919. Mrs. Daugherty in account with M. D. Armaly. I rent the house No. 51 Sandwich street, Ford City, for one year at $55 per month payable in advance of each 14th the month. M. D. Armaly."

The learned trial Judge found that when the house was first rented by the plaintiff she understood from the defendant Armaly that it was his intention to put up a restaurant in front of the house. He also found that it was known to the plaintiff and was a condition of the lease which she afterwards obtained from Armaly that the restaurant building would be erected in front of the building which she rented from Armaly.

The trial Judge treated the arrangement as to the erection of the restaurant as a collateral agreement, and held that the proof of it was therefore not in violation of the rule which forbids the proof by parol of anything which varies a written instrument. He held, however, that, although the right to erect the restaurant involved the taking down of the porch, and the plaintiff could not therefore complain of the removal of it, the defendants in doing this work had removed a part of the basement wall of the house, which caused the cold air to enter, with the result that it became difficult to heat the house, and the pipes leading from a heater in the furnace to the bath-room were frozen and burst, causing some flooding in the cellar; and, having reached the conclusion that these acts were wrongful, he assessed the plaintiff's damages at $300.

It was open to serious doubt whether, assuming that the defendants had the right to build in front of the house, they had any right to interfere with the foundation-wall of the house; but, granting that they had, they had no right to leave the opening which was left, but should have provided means to have prevented the cold

air from entering through it under the house, and thereby causing damage to the plaintiff. There was no duty resting upon the plaintiff to do what the defendants should have done.

The defendants' appeal failed.

There has been considerable diversity of judicial opinion as to whether or not a covenant for quiet possession is to be implied from the use of the word "let." The Court should follow the decision of Swinfen Eady, J., in Markahm v. Paget, [1908] 1 Ch. 693, and hold that a covenant for quiet enjoyment is to be implied from the word "let"—and therefore from the word "rent," here used, which is a synonymous term.

Can the implication of the covenant be displaced by an express stipulation in the letting, on the part of the lessor, that it shall be subject to such a condition as that set up by the defendants?

Reference to Hoare v. Coambers (1895), 11 Times L.R. 185; Jones v. Lavington, [1893] 1 Q.B. 253, 256; Newman v. Gatti (1907), 24 Times L.R. 18.

There is no reason why, on principle, the implication of a covenant from the use of "let" or "rent" may not be displaced by proof of a parol agreement that the right to quiet enjoyment is to be subject to such a condition as that which the defendants set up, just as the implication of a resulting trust may be rebutted; and, therefore, upon the finding of fact as to the demise to the plaintiff having been agreed to be subject to the right of the defendants to build on the vacant ground in front of the house, the conclusion of the trial Judge was right.

The defendant Armaly testified that when the lease of the 14th November, 1919, was being arranged for, it was agreed that the defendants should have the right to build which they now claimed. The Judge accepted this testimony as true, and found in accordance with it, and it was impossible to reverse that finding.

The cross-appeal should also be dismissed.

Appeal and cross-appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 18TH, 1921.

*TOWNSHIP OF SOUTH GRIMSBY v. COUNTY OF LINCOLN AND TOWNSHIP OF NORTH GRIMSBY.

COUNTY OF LINCOLN v. TOWNSHIP OF SOUTH GRIMSBY.

Highway—Queenston and Grimsby Road—Liability of Township Corporation for Maintenance—Statutory Exemption—45 Vict. ch. 33, sec. 8 (O.)—Assessment—Legality of Levy upon Township—Action for Declaration—Previous Action in County Court—Improvement of Road under Good Roads System—County By-laws—Highway Improvement Act.

The appeal in the first action was by the plaintiff township corporation from the judgment of ORDE, J., 48 O.L.R. 211, ante 56.

The appeal in the second action was by the defendant township corporation from the judgment of the County Court of the County of Lincoln in favour of the plaintiff county corporation in an action to recover the sum of $453.43 levied by the county corporation against the township corporation by a by-law in respect of the Queenston and Grimsby road.

The appeals were heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

W. S. MacBrayne, for the appellant corporation.

A. W. Marquis, for the county corporation, respondent.

G. S. Kerr, K.C., for the Corporation of the Township of North Grimsby, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the question of res adjudicata was not important now that the judgment in the County Court action was in appeal before the Court, and the only question was, whether or not the principle of the decision in Village of Merritton v. County of Lincoln (1917), 41 O.L.R. 6, was applicable to the case at bar.

With great respect, the learned Chief Justice was of opinion that this case was not governed by the Merritton case, and that the principle of that case was not applicable. In that case, the liability from which certain municipalities were relieved was "any liability or expenditure connected with the assumption by the Corporation of the County of Lincoln of the Queenston and Grimsby road as a county road;" and the ratio decidendi was that the liability under the Highway Improvement Act was not a

liability connected with the assumption of the road as a county road, but a different liability arising out of the provisions of that Act.

The liability from which the appellant township corporation (South Grimsby) was relieved by statute was "any rate, tax, liability, or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable, and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby road." This language is of the most comprehensive character, and not, as in the Act under consideration in the Merritton case, limited to liability connected with the assumption of the road as a county road.

The liability from which the appellant sought to have it declared that it was relieved was a liability which, but for the passing of the Act, would have rested on the Corporation of Grimsby in respect or on account of the road, within the meaning of the special Act. The road was still the Queenston and Grimsby road, although it was maintained as part of the good roads system, and the county corporation was still under obligation to maintain it and make its assessments upon the ratable property in the county, just as it makes its assessments in the case of any other road under its jurisdiction.

Both appeals should be allowed with costs; the judgment of the County Court should be reversed and the County Court action dismissed with costs; the judgment of Orde, J., should also be reversed, and there should be substituted for it a judgment in the terms of paras. 1, 2, and 4 of the prayer of the statement of the claim, and in accordance with the prayer of para. 16 of the statement of defence of the county corporation, declaring that the defendant the Corporation of the Township of North Grimsby is liable to be assessed in respect of the expenditure to the extent to which it is declared that the appellant is relieved therefrom.

Appeals allowed.

FIRST DIVISIONAL COURT. FEBRUARY 18TH, 1921.

*RE SHEARD.

Will—Construction—Disposition of Residue—Distribution among Children in Equal Shares—Share of Child Predeceasing Testator to Go to Children of that Child—Application to Children of Child already Dead at Date of Will.

Appeal by the Official Guardian from the judgment of Orde, J., ante 65.

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

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

F. H. Snyder, for the executors.

W. A. McMaster, for Charles Sheard and Arthur Sheard.

J. M. Bullen, for Lillie Olive Mitchell, Mary Henson, and Laurena Braden.

MEREDITH, C.J.O., in a written judgment, said that the Court agreed with the conclusion of Orde, J., and also with the reasoning upon which it was founded.

In addition to the cases cited by Orde, J., the learned Chief Justice referred to Christopherson v. Naylor (1816), 1 Mer. 320; In re Hotchkiss's Trusts (1869), L.R. 8 Eq. 643, 648; In re Potter's Trust (1869), L.R. 8 Eq. 52.

The appeal should be dismissed, and the costs of it should be dealt with as in the Court below.

Appeal dismissed.

FIRST DIVISIONAL COURT. FEBRUARY 18TH, 1921.

RE COWAN AND BOYD.

Landlord and Tenant—Application of Landlord for Order for Possession under Overholding Tenants' Provisions of Landlord and Tenant Act—Extension of Term—Correspondence—Effect of —Offer and Acceptance.

An appeal by the landlord from an order of a Judge of the County Court of the County of York dismissing a summary application for an order under the overholding tenants' sections of the Landlord and Tenant Act for possession of the demised premises.

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

J. P. White, for the appellant.

William Proudfoot, K.C., for the tenant, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the respondent was tenant of the appellant of the premises in question, and, his term being about to expire, he wrote, on the

17th March, to the appellant, or her husband, with reference to an extension of the term. In answer to that letter, the husband of the appellant wrote, on the 24th March, saying that he would renew the lease for one year from the end of the present year, at an advance of $5 per month.

On the 31st March, the respondent replied to that letter as follows: "We received from Mr. Cowan a letter to the effect that a renewal of lease would be satisfactory at an advance of $5 per month. We are paying now as high a rent as we feel we should pay, so if you do not see your way clear to renew at the present rental, we would appreciate an early reply, as we purpose buying and would like time to decide on a house. We never received from you an answer to our question re the price at which you were willing to sell."

To this letter the appellant's husband rejoined on the 5th April, 1920, saying that he would be in Toronto between the 26th April and the 1st May, at which time he would call on the respondent.

On the 19th April, 1920, the respondent wrote to the appellant the following letter: "As it has become necessary for me to arrive at a decision at once with regard to re-renting your house, and cannot wait for Mr. Cowan's visit to Toronto, I have decided to accept your terms of $75 per month, beginning September 1st next."

To that letter the appellant's husband replied as follows: "Your letter to Mrs. Cowan received, and I wish to inform you we cannot renew your lease under $100 per month. I will be in Toronto on or about April 30th or May 1st. Under the high cost of taxes, repairs, etc., you will understand the necessity of this advance."

On the 27th April the respondent wrote to the appellant the following letter: "Mr. Cowan's letter of April 26th has been received. In his letter of March 24th he made a definite offer of renewal of lease at an advance of $5 per month. In my letter of April 19th, I definitely accepted that offer, which I must now regard as definitely binding on both parties."

The question for decision is whether or not the respondent's letter of the 31st March was a rejection of the offer of the appellant.

The Court is of opinion that the letter of the appellant's husband of the 5th April, in reply to the respondent's of the 31st March, left open the offer of the 24th March for further discussion; and, that being the case, that the respondent had a right to accept the offer, when he did so by the letter of the 19th April.

Appeal dismissed without costs.

HIGH COURT DIVISION.

LENNOX, J. MARCH 1ST, 1920.

BELL TELEPHONE CO. OF CANADA v. OTTAWA ELECTRIC CO. AND CITY OF OTTAWA.

Negligence—Employee of Plaintiff Company Killed by Touching Live Wire Left Hanging in Street—Payment by Plaintiff Company to Dependants under Workmen's Compensation Act—Liability to Reimburse Plaintiff Company—Electric Company—City Corporation—Liability for Acts of Servants of Electric Company—Joint Undertaking—Both Company and Corporation Sued—Company alone Found Liable—Costs.

A short note of the decision of LENNOX, J., in this case, appears in 18 O.W.N. 1.

His judgment was, upon the question of the liability of the defendant company, affirmed by a Divisional Court of the Appellate Division on the 20th September, 1920; but a new assessment of damages was directed by the order of that Court (ante 71); and an appeal by the defendant company from that order was dismissed by the Supreme Court of Canada on the 10th February, 1921.

In both appellate Courts there was also a cross-appeal by the plaintiff company against the defendant city corporation, and these appeals were also dismissed.

In the result, the judgment of LENNOX, J., as to the liability of the defendant company alone, was affirmed; and it is thought that a more extended note of his decision may be useful.

The action was tried by LENNOX, J., without a jury, at Ottawa.

W. L. Scott, for the plaintiff company.

G. F. Henderson, K.C., for the defendant company.

F. B. Proctor, for the defendant city corporation.

LENNOX, J., in a written judgment, said that the defendant city corporation engaged the defendant company to furnish certain appliances and two of their workmen, at a stated rate per hour, to be assisted by two men in the employment of the city corporation, at thawing out frozen pipes from time to time and as occasion might arise, and in such places in the city as a city official should determine and direct. The skilled men for the operations were furnished by the company. The men furnished by the city corporation were unskilled helpers. The thawing was accomplished by wrapped or covered electric wire, attachable and detachable, one

end being connected with the electric company's permanent or stationary wiring system (overhead and strung on poles), at a convenient point in the neighbourhood of the frozen pipes, and the other end, the movable wire, to the thawing apparatus. The attachment was made to a primary wire. The appliances referred to were used, and the company's men, with the helpers, were engaged in thawing service-pipes in a city street, on the 14th March, 1918. When the work of that day was completed, about 11 p.m., an attempt was made to detach the wire transmitting the current by pulling upon it. The wire broke, leaving a live wire, of 5 or 6 feet in length, hanging from the primary wire.

Joint user of poles in the city by the plaintiff company and the defendant company was secured by an agreement of the 16th September, 1909.

On the 22nd August, 1918, Eugene Gourgon, an employee of the plaintiff company, while acting in the course of his employment, came in contact with the wire negligently left hanging by the defendants, or one of them, and was instantly killed.

It was alleged that, by reason of the negligence of the defendants or one of them, and the consequent death of Gourgon, the plaintiff company had been compelled to pay Gourgon's dependants $5,427.07, under the Workmen's Compensation Act; and the plaintiff company claimed to be repaid that sum.

It was not in evidence that at any time any city official directed or controlled, or attempted to direct or control, the skilled men furnished by the electric company as to the manner of carrying out the work. There was nothing in the nature of the work or services to be performed to occasion injury to anybody, if carried out with reasonable care. Holliday v. National Telephone Co., [1899] 2 Q.B. 392, 399 (C.A.), and Black v. Christchurch Finance Co., [1894] A.C. 48 (P.C.), distinguished.

As in British Columbia Electric R.W. Co. Limited v. Loach, [1916] 1 A.C. 719, the defendant company started out to do its work with defective equipment, but, unlike the defendants in that case, had many subsequent opportunities of avoiding the consequences of its previous negligence, by the exercise of reasonable care.

The plaintiff company was not called upon to anticipate or be vigilant in detecting the defendant company's negligence—it was justified in assuming reasonable care: Daniel v. Metropolitan R.W. Co. (1871), L.R. 5 H.L. 45; Pollock on Torts, 10th ed., p. 499. The defendant company, on the other hand, was not only in a position more readily to discover a defect in the condition of its own line, and bound to be vigilant in inspecting it; but, in addition to this, having brought a dangerous agency into activity, upon fixed property of which it was one of the users, it came under

the principle of Rylands v. Fletcher (1868), L.R. 3 H.L. 330, and was bound at its peril to keep it under control.

A case very like this in principle was Saunders v. City of Toronto (1898-99), 29 O.R. 273, 26 A.R. 265.

The mere fact that supervision is exercised does not per se render the person who engages the service liable, where competent men are engaged: Reedie v. London and North Western R.W. Co. (1849), 4 Ex. 244; Cuthbertson v. Parsons (1852), 12 C.B. 304. And, as a general rule, when the work is of a lawful character, would ordinarily be executed without injury to others, and is not imposed upon the employer as a personal duty, directions as to the work to be done, not amounting to directions as to how it is to be done, do not impose liability upon the employer for the negligence of the contractor or his servants: Steel v. South-Eastern R.W. Co. (1855), 16 C.B. 550.

Reference also to Dallantonio v. McCormick (1913), 29 O.L.R. 319; Waldock v. Winfield, [1901] 2 K.B. 596; Consolidated Plate Glass Co. v. Caston (1899), 29 Can. S.C.R. 624; Fleuty v. Orr (1906), 13 O.L.R. 59; Bradd v. Whitney (1907), 14 O.L.R. 415; Dewar v. Tasker and Sons Limited (1907), 23 Times L.R. 259; Jones v. Corporation of Liverpool (1885), 14 Q.B.D. 890; Cairns v. Clyde Navigation Trustees (1898), 25 R. (Ct. of Sess. Cas.) 1021; and especially to McCartan v. Belfast Harbour Commissioners, [1910] 2 I.R. 470, [1911] 2 I.R. 143 (H.L.)

The last mentioned case destroyed the only argument on which it appeared possible to hold the city corporation liable, namely, the joint participation of the servants of both defendants in the work—if the turning off and on of the water and the loading and transfer of the apparatus could in any proper sense be regarded as part of the operation, which was by no means free from doubt.

It seemed clear to the learned Judge that the defendant company, and the defendant company only, was responsible for the negligence—it was the negligence of their servants, who were not to be regarded as the servants of the city corporation.

The plaintiff company alleged that it was unable to learn what were the arrangements between the two defendants, and there was nothing to shew that they were ascertained before the trial. It was not a case in which costs should be awarded to the city corporation against the plaintiff company.

There should be judgment for the plaintiff company against the defendant company for $5,427.07 with costs, and dismissing the action as against the city corporation without costs.

KELLY, J. FEBRUARY 14TH, 1921.

RE ROSS.

Will—Construction—Bequest of Residue to Daughter after Death of Husband—No Disposition of Income of Residue during Lifetime of Husband—Daughter and Husband only Persons Entitled upon Intestacy—Income to be Paid out as if Intestacy in Regard thereto.

Motion by the executor of the will of Lydia M. Ross, deceased, for an order determining certain questions as to the meaning and effect of the will.

The motion was heard at a sittings in Kingston, as in Weekly Court.

F. King, for the executor.

G. M. Macdonnell, K.C., for the husband of the testatrix.

A. B. Cunningham, for Alice B. Porteous.

KELLY, J., in a written judgment, said that Alice B. Porteous, the testatrix's daughter by a former marriage, was her only child. By the will the testatrix, after making specific bequests to her husband and others, bequeathed the residue of her estate, after the death of her husband, to her daughter.

The questions submitted were: (1) Is the husband entitled to the income from the estate during his lifetime? (2) If not, to whom is the income payable during his lifetime? (3) If to the daughter, should the executor wind up the estate forthwith?

A bequest after the death of a named person to a person presumptively at the date of the will entitled in case of intestacy of the testator, where the will contains no express disposition of the property during the lifetime of the first named person, impliedly gives such person a life-estate. The rule does not apply where the donee under the gift (after the death of such named person) is a stranger and not the heir, or where such donee is only one of several co-heirs or one of several persons presumptively entitled under the Statute of Distributions: In re Springfield, [1894] 3 Ch. 603; Halsbury's Laws of England, vol. 28, p. 847, paras. 1506, 1507.

Had the testatrix died intestate, her husband and her daughter, and they alone, would have been entitled to share in her estate. Assuming that, on an intestacy, the daughter alone would have been the person entitled, the bequest of residue would have gone to her only on the death of the husband, who in the meantime would have been entitled to a life-interest. But, the daughter

being only one of the persons who would be entitled upon an intestacy, the presumption of a life-interest in favour of the husband did not arise.

Though this rule stood in the way of the husband becoming entitled to the whole of the residuary estate for his life, the testatrix had shewn an intention that he should not be deprived of all benefit therefrom, and that the residuary estate which was to go to the daughter on the husband's death was that part of the estate, as it stood at the death of the testatrix, not augmented by the income arising from it during the husband's lifetime.

That being so, the residuary estate during the husband's lifetime devolved accordingly, and during that period the income thereon should go to the husband and daughter as on an intestacy with respect thereto.

The questions should be answered: (1) No; only to part of it. (2) To the husband and daughter as upon an intestacy in respect of the income. (3) No.

Order accordingly; costs of the application to be paid out of the estate—those of the executor as between solicitor and client.

MULOCK, C.J. EX., IN CHAMBERS. FEBRUARY 17TH, 1921.

DOUGHTY v. DOUGHTY.

Pleading—Statement of Claim—Particulars—Action for Alimony—Charges Made against Defendant—Rules 141, 142—Affidavit—Practice.

An appeal by the defendant from an order made by the Master in Chambers upon an application by the defendant for particulars of the statement of claim.

J. A. Macintosh, for the defendant.
G. T. Walsh, for the plaintiff.

MULOCK, C.J. EX., in a written judgment, said that the action was for alimony. The statement of claim did not give particulars of any act or acts relied upon, but simply charged the defendant with "adultery, infidelity, and misconduct." Under the former Chancery practice such particulars were required to be set forth specifically in the bill of complaint, and evidence of other acts was not admissible: Rodman v. Rodman, 20 Gr. 428.

Since the Judicature Act, the Consolidated Rules have perpetuated such practice; the present Rule 141 declaring that "pleadings shall contain a concise statement of the material facts upon which the party pleading relies."

The statement of claim in the present case not having complied with this Rule, the defendant demanded particulars of the acts relied upon; and, this demand not having been complied with, he moved before the Master in Chambers for an order directing that such particulars be furnished and for an extension of the time wherein to file a statement of defence. On that application the Master made the order complained of, namely: "that the defendant do deliver a statement of defence on or before the 11th day of February, 1921, and that such defence may contain a general denial of the charges of cruelty, adultery, infidelity, and misconduct," and "in the alternative that the defendant file an affidavit on or before the said last mentioned date in support of the motion for particulars."

Rule 142 declares that "a defendant shall not deny generally the allegations contained in the statement of claim;" and therefore it was not competent for the Master to permit the defendant in his statement of defence to make a general denial of the charges in question; and the order granting such leave should be set aside.

As to the other provision in the order that, in the alternative, the defendant might file an affidavit in support of the motion for particulars, the learned Chief Justice was unable to understand what useful purpose would be served by granting permission to the defendant to file an affidavit in support of the motion for particulars after the Master, instead of retaining the motion and not seeing fit to order particulars, had finally disposed of it. The whole order should, therefore, be set aside, and in lieu thereof it should be ordered that, within one month, the plaintiff should file and deliver particulars of the acts relied upon, and that such particulars be deemed to be incorporated in and to form part of the plaintiff's statement of claim, or, at the plaintiff's option, that the statement of claim filed be set aside with leave to the plaintiff to file a new statement of claim containing the particulars of the acts relied upon—the defendant to file his statement of defence within 10 days from the delivery of the statement of claim or particulars.

ORDE, J., IN CHAMBERS. FEBRUARY 18TH, 1921.

RE MCFARLANE.

Absentee—Money in Court to Credit of—Application for Payment out to Next of Kin—Presumption of Death—Evidence—Letters of Administration not Applied for—Proceedings under Absentee Act, 10 & 11 Geo. V. ch. 36.

An application by all the next of kin (except Daniel McFarlane) of the late Emily McFarlane, deceased, for payment out of Court of the sum of $574.19 now lying there to the credit of Daniel McFarlane, upon the ground that he must be presumed to be dead.

J. R. Roaf, for the applicants.

ORDE, J., in a written judgment, said that Emily McFarlane died on the 4th October, 1913, intestate and unmarried. Letters of administration were granted to Walter McFarlane, a brother of the deceased. In winding up the estate the share of Daniel McFarlane, another brother, amounting to $451.09, was paid into Court under an order of the Master in Chambers, owing to his whereabouts being unknown.

The evidence on the present motion was that Daniel McFarlane was an unmarried man and if now alive would be 81 years of age. When last heard from he resided in Chicago, U.S.A., at the Inter-Ocean European Hotel. The last seen or heard of him, so far as known, was on the 16th February, 1910, when he left the hotel and did not return. It was stated by the manager of the hotel that his health had been failing. The efforts of the police to find any trace of him then were unsuccessful.

Daniel McFarlane's share of the estate was one-ninth; and the applicants were the other brothers and sisters, and the issue of deceased brothers or sisters, representing the other eight-ninths of the estate.

The learned Judge did not know on what ground the Court had any authority to distribute the money in Court among the other beneficiaries. If Daniel McFarlane was to be presumed to be dead because of his prolonged absence, there was no presumption that he died either before or after his sister's death: Halsbury's Laws of England, vol. 13, p. 500. If he died before, without having issue, then he never became entitled to the money in Court. If he died afterwards, then before a distribution could be made of his share of the estate, letters of administration thereof ought to be granted by the Surrogate Court before any order is made for payment out of the moneys now in Court to his credit.

In the absence of some statutory authority vesting in the Court power to act upon the presumption of death at a certain time, and by a short cut to effect a distribution of his estate, the learned Judge did not think any such order should be made. The applicants must either apply for letters of administration or possibly take proceedings under the Absentee Act. The motion must be dismissed.

LOCKHART v. ONTARIO AND MINNESOTA POWER CO.—KELLY, J. —FEB. 14.

Appeal—Report of Referee—Grounds for Findings not Stated—Reference back.]—An appeal by the plaintiffs from the report of the Local Judge at Fort Frances and a motion for judgment upon the report. The appeal and motion were heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that no reasons were given by the Local Judge for the conclusions arrived at. The evidence was contradictory upon many points, and yet there was no finding as to credit. The learned Judge was unable properly to consider the appeal, and directed that the case should be remitted to the Local Judge in order that he might state upon what grounds he based his findings; costs of the appeal and motion reserved. C. R. Fitch, for the plaintiffs. W. N. Tilley, K.C., for the defendants.