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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 13TH, 1916.

ELLIOTT v. FRABA.

Negligence—Injury by Motor Vehicle to Person Lawfully Standing in Public Place—Contributory Negligence—Emergency—Findings of Fact of Trial Judge—Liability of Driver of Vehicle—Appeal.

Appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Essex in favour of the plaintiff for the recovery of $450 and costs in an action for damages for personal injury sustained by the plaintiff from being struck by a motor vehicle driven by the defendant in a public place.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. H. Fraser, for the appellant.

T. G. McHugh, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering judgment at the close of the argument, said that the case seemed to be a very plain one. In the day-light—that is, while the day-light was still sufficient—in a public space, where there were persons on foot and persons in carriages, the defendant ran down, with his motor carriage, a young woman, who was standing by the side of a driving-track on grounds used for public purposes, in a place from which the defendant, driving his carriage, had been, a few minutes before, warned to keep off.

Counsel for the defendant contended that the young woman was guilty of contributory negligence in standing where she was. The trial Judge found that she was not; and in that the Chief Justice agreed. She was standing with a person who was to a certain extent a caretaker of the place. She was standing upon a place where no vehicle ought to have gone, and upon ground that the defendant had, shortly before, been warned against encroaching upon. The Court could not interfere with the find-

ing that the young woman was not guilty of contributory negligence.

Then it was argued that this was a case of an emergency—that the defendant, without time for reflection, had to act suddenly; and that, even if he took what turned out to be a wrong course, he ought not to be held answerable for it. The learned Chief Justice said that he could not agree in that, because it was quite plain that, if he had looked before him, before the "emergency" arose, he might have seen where the persons, of whom the young woman was one, were standing. He said that he did not look. It was his duty to keep a watchful look-out when driving, especially when driving in such a place; and, if there was an "emergency," the defendant brought it upon himself. Why follow so close upon the carriage in front of him? What reason for going past the carriage at such a rate of speed? There was no sufficient excuse for the conduct of the defendant which caused the plaintiff's injury.

LENNOX, J., briefly reviewed the evidence, and stated that it satisfactorily established the defendant's liability.

RIDDELL and MASTEN, JJ., concurred.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

GATCHELL v. TAYLOR.

Fraud and Misrepresentation—Sale of Land and Business — Material Misrepresentations as to Matters of Fact—Reliance on by Purchaser—Rescission—Return of Money Paid and Promissory Note Given—Infant Purchaser.

Appeal by the defendant from the judgment of CLUTE, J., at the trial, setting aside an agreement made between the plaintiff and defendant on the 11th December, 1914, for the sale to the plaintiff of a dwelling-house and blacksmith-shop in Sowerby, with certain tools and stock in trade, for $2,625, and directing the defendant to repay $800 paid to him on account of the purchase-price and to deliver up a promissory note for $200 also given on account of the price.

The plaintiff alleged that the agreement was obtained by false representations made by the defendant, to the effect that the business was the best paying business on the north shore,

and it would pay for itself in two years, and two men would not be able to do the work in connection with the business; that these representations were untrue to the defendant's knowledge, and it was upon the strength of them that the plaintiff entered into the agreement; that the plaintiff was an infant at the time the agreement was made, and that in June, 1915, he had repudiated it, both on that ground and on the ground of misrepresentation.

The plaintiff was still an infant when this action was commenced on the 29th June, 1915.

The defendant, inter alia, denied that he made any misrepresentation and that the plaintiff relied on anything but independent inquiries and investigations.

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

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

R. McKay, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by MAGEE, J.A., who, after reviewing the evidence, said that it was clear that the misrepresentations alleged were not as to a business existing at the time of the sale, and could not have been so understood. But they did relate to a condition existing at the time of the defendant's carrying it on. In so far, they were representations as to matters of fact, and not merely of opinion, nor mere commendation; and, as the learned trial Judge found that they were untrue, and disbelieved the evidence offered for the defence, there did not seem to be any ground for disturbing the judgment. The circumstances were, in a small way, and especially as to changes in the identity of the stock in trade, much like those in Adam v. Newbigging (1888), 13 App. Cas. 308, in which relief was given to the purchaser.

It was not necessary to consider the question arising out of infancy.

On the argument, the contention of the appellant that the plaintiff's father was the real or intended purchaser, and the only one affected by or entitled to set up the alleged misrepresentations, was disposed of adversely to the appellant.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*FRY AND MOORE v. SPEARE.

Limitation of Actions—Tenants in Common—Possession by one Tenant—Stepmother of Co-tenants—Bailiff or Guardian—Presumption—Question of Fact—Evidence — Limitations Act, R.S.O. 1914 *ch.* 75, *sec.* 5—*Equitable Rights—Estoppel.*

Appeal by the plaintiffs from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 63, 9 O.W.N. 196.

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

J. H. Spence, for the appellants.

G. H. Kilmer, K.C., for the defendant, respondent.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the question to be determined was one of fact; and, in his opinion, the fact that the respondent and her husband had for nearly 20 years been in occupation of part and in receipt of the rents and profits of the remainder of the land, and during all that time until quite recently no claim to or assertion of any right in the land or to an account of the rents and profits of it had been made by the children, was an important fact leading to the conclusion that the relationship of bailiff had come to an end, and that that was recognised by the children.

That view was strengthened by the further facts that during all that time the respondent had treated and dealt with the land as her own, had had it assessed in the name of herself or of her husband as owner, had paid the taxes, had made improvements at a cost of $700 or $800—nearly three-quarters of the present value of the property—and had, mainly by using her $200 of life insurance money and from the proceeds of her own labour, and partly with money obtained from her present husband, paid off a mortgage on the property which existed when McNab died, as well as paid the interest on it for many years, and that at no time had she kept any account of her receipts and expenditures, believing, as she did, that what she was receiving was her own, and what she was expending was being expended for her own benefit.

Reference to In re Maguire and McClelland's Contract, [1907] 1 I.R. 393.

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

There was, on the facts of this case, a sufficient break in the possession to dissolve the relationship of principal and agent or bailiff, or guardian and ward, that existed between the respondent and the appellants.

Again, the right of the appellants to treat the respondent, in respect to her possession, as bailiff for them, rested upon equitable principles; and, in the circumstances, they were precluded, by their acts and conduct, from invoking the equitable doctrine upon which they relied: Snider v. Carleton (1915), 35 O.L.R. 246 (P.C.)

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

WHITE v. GREER.

Contract—Purchase and Sale of Saw-logs—Oral Agreement—Subject-matter—Whole of Season's Cut—Property Passing—Acceptance of Logs—Appropriation to Contract—Time for Delivery—Reasonable Time—Counterclaim—Appeal—Reversal of Finding of Trial Judge.

Appeal by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing the action and awarding the defendant $2,200 upon his counterclaim.

The action was brought to recover a balance of $2,358.44 alleged to be due to the plaintiff for saw-logs and timber cut and taken out by the plaintiff during the season of 1913-1914, under an agreement not reduced to writing.

The counterclaim was for damages for non-delivery and for money overpaid.

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

J. M. Ferguson and J. T. Mulcahy, for the appellant.

T. Johnson, for the defendant, respondent.

GARROW, J.A., read a judgment in which he said that the plaintiff's allegation was, that what he sold and what the defendant bought was the whole of the plaintiff's cut for the season of 1913-1914; while the defendant contended that his agreement was to buy only so much of the cut as was passed down stream into Sucker Lake in the season of 1914.

There was no doubt at all, in the opinion of GARROW, J.A., upon the whole evidence, written and oral, that the defendant intended to buy and did buy the plaintiff's whole cut, and not merely a part of it; and that the effect of what took

place, in inspecting, measuring, and branding the logs, was to pass the property in the whole to the defendant, as finally appropriated and accepted under the contract: Craig v. Beardmore (1904), 7 O.L.R. 674; Wilson v. Shaver (1901), 3 O.L.R. 110.

There was no definite, fixed, and absolute bargain that delivery would be made in the season of 1914—no exact time for delivery was fixed, and the law would imply a duty to perform within a reasonable time. What is a reasonable time is a question of fact, and the finding should be that the final delivery made by the plaintiff in 1915 was, in the circumstances, made within a reasonable time.

The appeal should be allowed with costs, and the plaintiff should have judgment for his claim, with costs, including his costs, if any, upon the counterclaim, which should be dismissed.

If the amount is in dispute, it may be calculated by the Registrar and inserted in the judgment.

MACLAREN, J.A., concurred.

MEREDITH, C.J.O., agreed in the result, for reasons stated in writing.

MAGEE and HODGINS, JJ.A., dissented, for reasons stated in writing by HODGINS, J.A.

Appeal allowed; MAGEE and HODGINS, JJ.A., *dissenting.*

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

JOHNSTON v. HAINES.

Fraud and Misrepresentation—Purchase of Company-shares—Recovery of Price—Findings of Fact of Trial Judge—Evidence—Appeal—Reversal of Judgment.

Appeal by the defendant from the judgment of LENNOX, J., 8 O.W.N. 551.

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

R. McKay, K.C., for the appellant.

W. J. Elliott, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the action was brought to recover moneys alleged to have been paid by the plaintiff to the defendant in respect of six stock

transactions entered into in the years 1906, 1907, and 1908. The plaintiff alleged that the representations made by the defendant by which the plaintiff was induced to invest in the shares of certain companies were untrue to the knowledge of the defendant; that the defendant assumed the position of an adviser of the plaintiff as to his financial investments; and that the plaintiff, having confidence in the defendant, relied on him in that respect; that that confidence was abused by the defendant for his own advantage; that all the investments proved worthless, and all the money which the plaintiff invested was lost to him, and was in the possession of the defendant.

The learned Chief Justice, after a careful examination of the evidence, said that his conclusion upon the whole case was, that the plaintiff failed to make out his case, and that his action should have been dismissed In arriving at this conclusion, due weight was given to the findings of fact of the trial Judge, and his view as to the credibility of the parties was accepted; if it were not for the documentary evidence and the circumstances which led to the conclusion that the plaintiff's testimony could not safely be accepted, the judgment must have been affirmed, at all events as to some of the transactions in question.

GARROW, MAGEE, and HODGINS, JJ.A., concurred.

MACLAREN, J.A., also concurred, but grudgingly. He thought the evidence unsatisfactory, and would have preferred to have had further evidence on some points.

Appeal allowed without costs and action dismissed without costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

McLAUGHLIN v. MALLORY.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser for Specific Performance—Discretion—Advantage Taken of Vendor—Agreement to Rescind—Failure to Establish—Laches—Inability of Vendor to Convey—Evidence—Final Order of Foreclosure in Former Action—Conveyance of Land by Mortgagee—Parties.

Appeal by the defendant from the judgment of MASTEN, J., 9 O.W.N. 325.

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

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

D. L. McCarthy, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that he agreed with the conclusions, both of fact and law, of the trial Judge, and had little to add.

It was argued for the appellant that sufficient weight was not given to the testimony of the solicitor in whose office the agreement was prepared; but there was a categorical denial by the respondent (evidence, p. 158) of a statement attributed to him by the solicitor.

It was suggested upon the argument that the action was not properly constituted; but, in the opinion of the Chief Justice, neither Foster, the mortgagee, nor Mountjoy, to whom he conveyed, was a necessary party to the action. Foster, unless the final order of foreclosure in a previous action stands, is only a prior mortgagee; and, if it stands, he is the absolute owner of the land. In the latter case, upon a reference as to title, the result will be that it must be reported that the appellant cannot make title, and this action will be fruitless as to the claim for specific performance. Mountjoy took by his conveyance whatever interest Foster had, and stands in his position. If the final order of foreclosure is set aside, his position will be that of prior mortgagee; and, if the foreclosure stands, it may be that he will be the owner of the land, and the judgment for specific performance fruitless. He has no interest in the land except that which he acquired by the conveyance from Foster, no conveyance having been made to him by the appellant. If he has any agreement with the appellant for the purchase of the land from him, of which there is no evidence, it must have been entered into after the registration of the lis pendens; and, as he acquired that interest pendente lite, he is not a necessary party to the action.

The appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A., said that the agreement was one which should be specifically performed. As the judgment to that effect would enable the respondent to make application to open up the final order in the foreclosure action, the learned Judge expressed no opinion as to the necessity or propriety of having Foster or Mountjoy before the Court as a party to this action, as having acquired, before this action was begun, the vendor's title.

HODGINS, J.A., concurred.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*LATIMER v. HILL.

Parent and Child—Liability of Parent for Maintenance of Forisfamiliated Infant—Implication—Contract—Breach — Parent Inducing Child to Leave Foster-home — Findings of Fact of Trial Judge—Appeal—Damages—Costs.

Appeal by the defendant from the judgment of BOYD, C., 35 O.L.R. 36, 9 O.W.N. 236.

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

J. H. Rodd, for the appellant.

R. L. Brackin, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who, after briefly referring to the facts, said that it was clearly not intended that the appellant should have to pay in money for the support and upbringing of the boy; but it was equally clear that it was in the contemplation of the parties that the respondent should be compensated by having the benefit of the boy's services after he became old enough to render useful service to the respondent. A jury might properly infer from all that took place an agreement that the respondent should be compensated in that way, and that the appellant would do nothing to prevent the respondent from getting the benefit of the boy's services after he had attained an age when he would have become useful to him; the Chancellor, as judge of the fact as well as the law, might properly draw that inference; and, having drawn it, his finding should not be disturbed. It was also a fair inference that, if the appellant should take the boy away from or induce him to leave the respondent, the latter was to be compensated for his care of the boy and bringing him up.

The respondent did not take the risk of the boy, under the persuasion or compulsion of his father, leaving the respondent when he had become useful, and his services would have been of value to the respondent.

The Chancellor found that the boy was induced by his father to leave the respondent; and it was impossible to say that the Chancellor's conclusion was clearly wrong or one that might not reasonably be reached.

About two years after his wife's death, the appellant asked

the respondent what he was going to "tax him," and the reply was, "nothing." This was not inconsistent with the arrangement having been what the Chancellor found that it was. If the boy had been taken away at that time, the respondent would have been saved the expense of bringing him up, and he might well say that, in such circumstances, he expected nothing for the two years' care that the boy had been given.

The damages were assessed upon too liberal a scale: in the circumstances, $40 a year on the average would be adequate compensation for the care and bringing up of the boy during the seven years for which the Chancellor thought that compensation should be allowed.

The judgment should be varied by reducing the damages to $280; but the disposition of the costs of the action should not be disturbed—the respondent should have costs on the County Court scale without set-off; and each party should bear his own costs of the appeal.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*TOWNSHIP OF KING v. BEAMISH.

Contract—Municipal Corporation—Oral Agreement for Lease of Land with Privilege of Taking Gravel—Possession Taken and Gravel Removed — Part Performance — Statute of Frauds—Specific Performance — Completed Agreement — Terms as to Survey and Lease—Corporate Seal—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 249.

Appeal by the plaintiffs from the judgment of DENTON, Jun. J. of the County Court of the County of York, dismissing an action, brought in that Court, for specific performance of a parol agreement alleged to have been entered into by them with the defendant on the 5th June, 1915, by which the defendant, in consideration of $200, which they agreed to pay to him, agreed to demise to them land in the township of King, for the term of eight years, with the right during the term to remove the gravel in the land, the plaintiffs alleging acts of part performance by them sufficient to entitle them to have the agreement specifically performed notwithstanding the provisions of the Statute of Frauds. These acts were taking possession of the land and removal of gravel from it, with the knowledge and consent of the defendant.

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

McGregor Young, K.C., for the appellants.
W. T. J. Lee, for the defendant, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, stated the facts, and said that the basis of the learned County Court Judge's conclusion against the appellants was, that acts of part performance, to take a case out of the Statute of Frauds, must be such as to render it a fraud in the vendor to take advantage of the contract not being in writing. This, the Chief Justice thought, was based upon a misapprehension as to what was meant by "fraud" in the cases dealing with the effect of part performance. He referred to Fry on Specific Performance, 5th ed., pp. 294, 295, paras. 585, 586; Mundy v. Jolliffe (1839), 5 My. & Cr. 167, 177; Wilson v. West Hartlepool Harbour and R.W. Co. (1865), 5 DeG. J. & S. 475, 492, 493; Parker v. Taswell (1858), 2 DeG. & J. 559, 571.

Taking possession by a purchaser is an act of part performance. In order to exclude the operation of the Statute of Frauds, such a possession as the subject-matter of the contract admits of is sufficient; e.g., in the case of vacant land, entry upon it for the purpose of taking possession, with the consent of the vendor, is sufficient, although the purchaser does not remain upon the land, but goes upon it only when he has occasion to do so.

The term of the oral agreement that a "survey or description" of the land should be made and a lease prepared did not render the agreement incomplete.

The objection that, because there was no assent under the appellants' corporate seal to the terms that had been agreed upon between the respondent and the members of the council who made the arrangement with them, there was no agreement, could not prevail. The appellants having been let into possession, the respondent could not set up the absence of their corporate seal: Wilson v. West Hartlepool Harbour and R.W. Co., supra; Fry, p. 323, para. 648; and the rule was applicable to the case of a municipal corporation, notwithstanding the provisions of sec. 249 of the Municipal Act, R.S.O. 1914 ch. 192.

Waterous Engine Works Co. v. Town of Palmerston (1892), 21 S.C.R. 556, distinguished.

The appeal should be allowed with costs, and judgment should be entered for the plaintiffs for specific performance with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*HUNT v. BECK.

Water—Floatable Stream—Improvements Made by Crown Timber Licensees—Rivers and Streams Act, R.S.O. 1914 *ch.* 130, *sec.* 3 — *Lawful Detention of Water — Rights of Persons Floating Logs on Lower Part of Stream—Claim for Damages for Deprivation of Water—"Freshet."*

Appeal by the plaintiffs from the judgment of BOYD, C., 34 O.L.R. 609, 9 O.W.N. 187.

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

T. P. Galt, K.C., and U. McFadden, for the appellants.

G. H. Watson, K.C., and T. E. Williams, K.C., for the plaintiffs, respondents.

GARROW, J.A., read a judgment in which he said that it was evident from the course of the proceedings and the argument that the one supreme point in the case raised a pure question of fact and not of law, viz., did the act of the defendants by putting in the stop-logs in the dam at Carpenter Lake retain from the plaintiffs the freshet water, to the use of which they were entitled, to an extent sufficient to interfere with the process then under way of floating the plaintiffs' logs down-stream? If that was not established, no question of law could possibly arise, and the plaintiffs' case must fail. The burden of proof rested upon the plaintiffs.

The real matter was within a narrow compass. The defendants admitted putting in the stop-logs. The only dispute was, whether they were put in on the 9th May or the 11th. The real question was as to the probable condition of the spring freshet at the time the logs were placed in the dam—was it practically over then or was it still in sufficient vigour to have accomplished the plaintiffs' purposes if left alone? If it was not, then the act was harmless. The circumstance of chief moment was the actual condition of the water in the river for a few days before and immediately after the day when the logs were replaced in the dam. Assuming that the day was the 9th, the evidence shewed that the freshet for all useful purposes was then over, and the closing of the dam was practically harmless.

The appeal should be dismissed.

MEREDITH, C.J.O., and MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., also concurred, though with considerable hesitation.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 21ST, 1916.

*TAYLOR v. VANDERBURGH.

Evidence—Title to Land—Possession—Presumption of Ownership—Rebuttal—Acts and Conduct of Predecessor in Title—Admissibility.

Appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Lambton, in favour of the plaintiff, after trial, without a jury, of an action, brought in that Court, to recover possession of a strip of land 142 feet wide, forming part of a 50-acre lot, the south half of the south half of lot 6 in the 1st concession of Moore township. The plaintiff alleged that he was the owner of the strip, and that the defendant took possession of it in May, 1911, and had ever since wrongfully held possession of it.

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

A. Weir, for the appellant.

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

MEREDITH, C.J.O., read a judgment in which he said that the defence based upon the Statute of Limitations entirely failed, and was not seriously pressed upon the argument of the appeal; but it was contended for the appellant that his possession was prima facie evidence of ownership, and that the presumption of ownership was not rebutted, because—as the appellant now contended—the plaintiff had failed to prove title to the land; also that, if the plaintiff was entitled to recover, the appellant was entitled to damages from the respondent Sheppard, upon whom a third party notice claiming damages for deceit was served.

The appellant's possession of the land in question afforded evidence of his ownership entitling him to succeed unless the presumption of ownership arising from his possession was rebutted. It was shewn conclusively that, although the third party, the appellant's grantor, at first thought that the land conveyed to him extended to the west fence referred to in the

evidence, when informed that it did not, and that that fence was not upon the dividing line between the east and west halves of the 50-acre lot, he acquiesced, and that, while he continued to be the owner of the east half, the strip in question was treated and dealt with and acknowledged by him to be the property of the plaintiff.

Statements by persons in possession of property qualifying or affecting their title are receivable against a party claiming through them by title subsequent to the admission: Phipson on Evidence, 5th ed., p. 224; and, for the same reason, the acts and conduct of a predecessor in title inconsistent with the existence in him of a right or title which a person who derives title from him is asserting, are receivable; and the acts and conduct of the third party in this case were receivable in evidence against the appellant; and they, at all events when taken in connection with the existence of the easterly fence and the recognition of that fence as being the line fence on that side of the lot, displaced the presumption of ownership arising from the appellant's possession, and entitled the plaintiff to succeed.

The Chief Justice agreed with the County Court Judge's disposition of the claim against the third party.

MACLAREN, J.A., and RIDDELL, J., concurred.

MAGEE, J.A., also concurred, for reasons stated in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*HARRISON v. MATHIESON.

Trusts and Trustees—Husband and Wife—Breaches of Trust by Husband—Knowledge and Benefit of Wife—Liability of Wife to Repay Moneys Misapplied—Volunteer—Account—Interest—Annual Rests.

Appeal by the defendant Mary Mathieson from the order of LENNOX, J., 9 O.W.N. 170, varying the report of a County Court Judge upon a reference. There was also a cross-appeal by the plaintiff, which was dismissed at the argument.

Both the appellant and the plaintiff appealed from the report, and by the order now in appeal the appeal of the plaintiff was allowed as to certain items of his claim and dismissed as to other items, and the appeal of the present appellant was dismissed.

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

R. S. Robertson, for the appellant.

R. McKay, K.C., and R. T. Harding, for the plaintiff, respondent.

MEREDITH, C.J.O., read the judgment of the Court; he said that the present appeal was against the order of Lennox, J., in so far as it varied the report of the Referee and dismissed the appeal of the now appellant.

The items which were the subject of the appellant's appeal from the report were $1,900 and $206, for which the Referee found that the appellant was answerable, and which he directed to be set off against a mortgage from the plaintiff to the appellant. On this branch of the case, the learned Chief Justice entirely agreed with the conclusion of the Referee, affirmed by Lennox, J.

The first of the remaining items in controversy was $5,230, the proceeds of a loan company debenture which the appellant's husband held as trustee for the respondent, and which were applied by the husband in part payment of a promissory note for $10,500 made by him and the appellant. As to this, there was proved an agreement between the husband, the trustee of the fund, and the appellant, that a breach of trust should be committed; and the fraudulent conversion of the debenture which they had in contemplation was ultimately carried out, and the money realised from it was used at all events to discharge a debt for which the appellant was liable, if not to repay money borrowed by her and her husband to pay for shares which belonged to her, though they stood in her husband's name. On this state of facts, the appellant was liable to make good the breach of trust.

The items still remaining were three sums, $503, $623, and $1,347, belonging to the trust, which were applied to pay debts of the appellant—in the case of the last-mentioned sum, a mortgage-debt. While it was true that the respondent would not be entitled to follow these moneys into the hands of the creditors of the appellant to whom they were paid, the respondent was entitled to recover them from the appellant, she being quoad the transactions a volunteer: Jarman on Wills, 12th ed., pp. 1099, 1100, and cases cited.

What was done in this case was, in substance and effect, to make a gift to the appellant of so much of the trust fund as

was applied in payment of her debts; and so the appellant was a volunteer, and was bound by the trust which was impressed on the money so applied, even if—which was more than doubtful—she had no knowledge that the money which was being applied to pay her debts was trust money. The appellant entirely failed to establish that her husband was indebted to her for money of hers which he had received and should have had in his hands available to pay the sums which he paid on her account.

It was proper to take the accounts with annual rests, for the same reason that the trustee in Gilroy v. Stephens (1882), 51 L.J. Ch. 834, was so charged, viz., that it was the duty of the trustee to have invested the money which he misapplied; and, if he had done so, the investment would have produced 5 per cent. compound interest. In Owen v. Richmond, [1895] W.N. 29, Kekewich, J., declined to follow Gilroy v. Stephens, adhering to "the old rule allowing interest at 4 per cent." But the old rule is not applicable to circumstances in Ontario at this day; and the principle of Gilroy v. Stephens should be applied.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*CLELAND v. BERBERICK.

Land—Right of Land-owner—Lateral and Subjacent Support—Interference with Natural Condition—Excavation and Removal of Sand from Adjoining Lot—Operations of Nature Facilitated by Wrongful Act—Damages.

Appeal by the defendant from the judgment of MIDDLETON, J., 34 O.L.R. 636, 9 O.W.N. 198.

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

J. M. Ferguson, for the appellant.

R. W. Treleaven, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that what amounts to a wrongful interference with a land-owner's right to the lateral support of his neighbour's land must necessarily vary according to the nature of the soil. Reference to Corporation of Birmingham v. Allen (1877), 6 Ch.D. 284, 289.

The learned Chief Justice could see no difference in principle between the application of the law as to lateral support as it was applied in Jordeson v. Sutton Southcoates and Drypool Gas Co., [1899] 2 Ch. 217, and Trinidad Asphalt Co. v. Ambard, [1899] A.C. 594, and the application of it, on the facts, to the case at bar.

In the case at bar, it was the surface soil that was displaced, and the displacement was the result of the appellant's act combined with the operation of natural laws—indeed the case at bar seemed to be an a fortiori case for the application of the law as to lateral support, because it was the surface soil that was displaced.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*WHALEY v. LINNENBANK.

Mechanics' Liens — Improvements to Buildings — Work and Materials—Valid Lien against Estate of Owner of Equity of Redemption—Claim to Priority over Mortgages upon Increased Selling Value—Claim not Made until after Expiry of Time for Registering Claim of Lien—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 17, 23.

Appeal by the plaintiff from the judgment of NEVILLE, Official Referee, 9 O.W.N. 211.

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

J. Y. Murdoch, for the appellant.

V. Hattin, for the defendants Martin and Bowman, respondents.

J. F. Boland, for the defendant Linnenbank, respondent.

The judgment of the Court was read by MEREDITH, C.J.O. After briefly stating the facts, he said that the Court was of opinion that the ruling of the Referee was erroneous, and that the registration of the claim of the appellant was effectual to preserve his lien as against the respondents Martin and Bowman, the mortgagees.

The claim set forth everything which sec. 17 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, requires to be set forth and was in the form prescribed by the Act. The appellant had, therefore, complied with everything

which the Act required to be done by him in order to preserve his lien. The lien having been registered in strict compliance with the Act, sec. 23 could not be invoked against the appellant.

The respondents contended that the selling value of the land had not been increased by the work done and the materials supplied by the appellant; but the evidence on this point was conflicting, and the conclusion of the Referee, who saw and heard the witnesses, that the selling value was increased to the extent of $500, should not be reversed.

The appeal should be allowed with costs, and it should be adjudged that the appellant's lien attached upon the increased selling value in priority to the mortgages of the respondents Martin and Bowman.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

DOERR v. MILLER.

Fraud and Misrepresentation—Sale of Share in Business—Partnership—Liabilities and Assets—Agreements—Rescission—Findings of Fact of Trial Judge—Appeal—Indemnity.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., of the 2nd December, 1915, in favour of the plaintiff in an action to set aside two agreements and for the return of money paid and notes given to the defendants for the purchase-price of a share in a partnership business, and for damages, and, in the alternative, for an account and the winding-up of the partnership.

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

R. T. Harding, for the appellants.

J. C. Makins, K.C., for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the evidence fully supported the conclusion of the learned trial Judge as to the making and the falsity of the representations relied on. One was that the business was prosperous and that old debts were paid off; the other, that it was to be clear of debt.

The appellant George Miller admitted the making of the first statement, and the finding was based on his testimony, as well as that of the respondent. George Miller told the respon-

dent that he would pay off all the liabilities out of the money to be paid to him by the respondent, and that he had not agreed to lend the firm the $2,500. He testified that it would take $1,000 to pay these liabilities.

This statement, if accepted as true, made it clear that the business in which the respondent was buying an interest was to be clear of debt—not that George Miller was still to have a claim on the partnership for the amount paid to clear off the debts.

As to the appellant Milton Miller, the case for rescission was based upon the contention that he could not retain any benefit obtained from the fraud of his brother. While the purchase was, in form, the buying of one-half of his brother's interest in the partnership, his assent was got, as he said, on the terms that the $2,500 was to be lent to the new venture. This arrangement to treat the money as borrowed capital, if made, would shew that the statement to the respondent was wholly misleading, for the debts were, as to him, to be wiped out, and not to remain practically in the form of a loan from George Miller.

The partnership having run on, the respondent, becoming dissatisfied, served a notice to terminate, under the provisions of the partnership agreement. He was then unaware that the representations were untrue, and he remained in ignorance thereof when the second agreement was come to, by which the appellant George Miller was to purchase the shares of his co-partners and the assets, for $3,000, less his loans and advances.

It was established that, when this agreement was signed, and when the $50 was paid to the respondent, he was not, as the learned trial Judge found, made aware that the whole $3,000 which George Miller agreed to pay for the assets was to be wiped out by amounts claimed by him. The terms of the agreement indicated that there was to be a divisible surplus. It would be impossible, upon the evidence, to displace the trial Judge's opinion that the second agreement cannot stand, so far as the respondent is concerned.

The appeal should be dismissed with costs. As the representations were fraudulent, a clause should be added to the judgment, requiring the appellant George Miller to indemnify the respondent against the liabilities incurred by the partnership since the date of the first agreement.

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

GRAMM MOTOR TRUCK CO. v. WINDSOR AUTO SALES AGENCY.

Principal and Agent—Agent's Commission on Sale of Goods—Return of Goods by Purchaser under Agreement with Principal and Agent—Refund of Commission Paid to Agent.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Essex, in favour of the plaintiffs, after trial of the action without a jury, in an action, brought in that Court, to recover from the defendants $720 paid to them by the plaintiffs as a commission of 20 per cent. upon the sale by them, as agents for the plaintiffs, of one of the plaintiffs' motor trucks to a firm of Hefner & Stanfield for $3,600—the plaintiffs alleging a written agreement by the plaintiffs and defendants with the purchasers to return the purchase-money if the purchasers should desire to return the truck, which they did.

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

T. G. McHugh, for the appellants.

J. H. Coburn, for the plaintiffs, respondents.

MEREDITH, C.J.O., read a judgment in which, after reviewing the evidence, he said that the proper conclusion upon the whole case was, that the right of the appellants to receive the $720, whether it should be called a commission or a discount, was, and was understood by both parties to be, dependent on the ultimate result of the transaction with Hefner & Stanfield being to put the respondents in the same position as they would have been in if the truck had been ordered by the appellants under the terms of the agency agreement between the appellants and respondents, and sold by the appellants to Hefner & Stanfield.

The result of the appellants' contention—that they were entitled to retain the $720, although the truck had been returned—would be that, without any sale having been made either to the appellants, or, in the result of the transaction, to Hefner & Stanfield, the appellants would have been entitled to the remuneration they would have earned if such a sale had been made—and, looked at from a business point of view, such a transaction was a most unlikely one for the respondents to have entered into.

The appeal should be dismissed with costs.

MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., read a dissenting judgment. He said, among other things, that there was admittedly no agreement in fact for the return of the commission, and none was to be implied from the course of dealing; there was no fraud or mistake and no failure of consideration.

Appeal dismissed; MAGEE, J.A., *dissenting.*

FIRST DIVISIONAL COURT. MARCH 21ST, 1916.

*GREENWOOD v. RAE.

Landlord and Tenant—Eviction—Justification under Forfeiture Clause in Lease — Chattel Mortgage Given by Tenant—Landlord and Tenant Act, R.S.O. 1914 *ch.* 155, *sec.* 20—*Application of—Failure to Give Statutory Notice—Nominal Damages—Costs.*

Appeal by the plaintiff from the judgment of COATSWORTH, Jun. J. of the County Court of the County of York, dismissing an action, brought in that Court and tried by him without a jury, to recover damages for the wrongful entry of the defendant upon a farm demised by the defendant to the plaintiff and the wrongful ejection of the plaintiff therefrom.

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

J. M. Ferguson, for the appellant.

F. Arnoldi, K.C., for the defendant, respondent.

MEREDITH, C.J.O., read the judgment of the Court, in which he said that the appellant's lease was dated the 28th September, 1908; the term was seven years from the 15th March, 1909, and the rent was $125 for the first year, $150 for the second year, and $175 for each of the remaining five years.

The respondent justified his entering into possession because: (1) the appellant had made a mortgage of his chattels; (2) had removed his chattels from the demised premises in April, 1914; and (3), in the judgment of the respondent, the appellant in April, 1914, abandoned the demised premises and did not leave on them a sufficient distress for the rent then accruing; the respondent alleging that, by virtue of a clause in the lease, the term granted by it became, upon these happenings, immedi-

ately forfeited and void, and he became entitled to enter. The respondent also alleged that, by reason of the acts committed by the defendant, the then current and the next year's rent and the taxes for the current year became immediately due and payable, and he counterclaimed $350 for rent and taxes.

The defences of voluntary abandonment of the premises and surrender of the lease were not established upon the evidence.

The appellant relied upon sec. 20 of the Landlord and Tenant Act, R.S.O. 1914 ch. 155; the view of the trial Judge was that sub-sec. 2 of that section applies only where the landlord is suing for recovery of the premises. The learned Chief Justice was unable to agree with that view. It was held otherwise under the corresponding section of the Imperial Act (44 & 45 Vict. ch. 41) in In re Riggs, Ex p. Lovell, [1901] 2 K.B. 16; and that construction of the Act should be adopted in this Province, as it is by the leading text-writers in England: Woodfall's Landlord and Tenant, 19th ed., p. 384, note (*a*); Halsbury's Laws of England, vol. 18, p. 539, note (*n*); Foa's Landlord and Tenant, 5th ed., p. 741, note (*a*).

The giving of the chattel mortgage was, no doubt, a breach of the provision of the lease referred to which gave the respondent a right of re-entry and to put an end to the lease; and, but for sec. 20, that would be sufficient to entitle him to succeed. That right is qualified by sec. 20, and the respondent is not entitled to enforce it unless or until he had complied with the requirement of the section as to notice; and that he had not done. In entering he was, therefore, a wrongdoer.

The appellant was not entitled to more than nominal damages, however. It would be manifestly unfair that he should recover damages based upon his having been deprived of the premises, etc.—the damages to which he would have been entitled had there been no breach of the condition and no right in the landlord to evict him. If the measure of the damages is the loss the appellant has sustained by having lost the chance of succeeding in an application to be relieved from the forfeiture, that loss cannot be satisfactorily measured, having regard to the fact that the giving of the notice which the statute required the respondent to give before entering was not a condition precedent to the right of the appellant himself to apply for relief, which under sub-sec. 3 of sec. 20 he may do; and, upon the whole, no more than nominal damages should be awarded.

The appeal should be allowed and judgment be entered for the appellant for $5 with costs on the appropriate scale.

JASPER v. TORONTO POWER CO. LIMITED.

Master and Servant—Injury to Servant—Electric Shock—Negligence—Finding of Jury—No Evidence to Support—Dismissal of Action.

Appeal by the defendants from the judgment of MIDDLETON, J., 9 O.W.N. 191; and cross-appeal by the plaintiff as to the damages.

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

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

C. W. Bell, for the plaintiff.

MEREDITH, C.J.O., read the judgment of the Court. He said that all the acts of negligence relied on by the plaintiff, save one, were negatived by the finding of the jury, which was that the negligence of which the defendants were guilty was "in not taking the precaution to turn the power off the tower that the plaintiff was working on." Although the failure to turn off the power was one of the acts of negligence of which the plaintiff in his statement of claim complained, that ground did not appear to have been presented at the trial. Nothing was said by the trial Judge in his charge to the jury to indicate that counsel for the plaintiff had put forward in his address to the jury, or during the progress of the trial, the complaint that the defendants were negligent in doing that which, in the opinion of the jury, they ought to have done, or that what was alleged to be an act of negligence which the jury was called on to consider. It seemed to have been assumed at the trial, on both sides, that it was impracticable to shut off the current from both sets of wires at the same time.

There was no evidence to support the finding of the jury as to negligence, and it must be set aside.

It was not a case for directing a new trial, especially as there had been two trials.

The appeal of the defendants should be allowed and the action and cross-appeal dismissed, all with costs.

FIRST DIVISIONAL COURT. MARCH 23RD, 1916.

*REX v. FARRELL.

Criminal Law—Carnal Intercourse with Young Girl—Criminal Code, sec. 211—Two Offences Charged—Acquittal on First—Corroboration by Evidence of Second Offence—Proof of Previous Unchastity of Prosecutrix—Evidence as to First Offence—Stated Case.

Case stated by the Judge of the County Court of the County of Frontenac, by whom the prisoner was tried upon two charges for offences under sec. 211 of the Criminal Code: the first of which was alleged to have been committed on the 15th December, 1914; and the second in or about the month of May following.

The prosecutrix was examined as a witness, and testified that the prisoner had sexual intercourse with her on both of those dates. This was denied by the prisoner, and his evidence as to the first occasion was corroborated by other witnesses. The prisoner was acquitted on the first and convicted on the second charge.

At the trial, counsel for the Crown contended that the evidence of the prosecutrix as to the first offence charged was corroborated in a material particular by the evidence which was given of the prisoner having committed the second offence charged, but the trial Judge refused to give effect to the contention; and it was contended by counsel for the prisoner that, as the prosecutrix had testified that there had been sexual intercourse between her and the prisoner on the 15th December, 1914, the burden of proof of her previous unchastity was, in respect of the second charge, satisfied, and the prisoner should have been acquitted on that charge.

Both of these questions were now presented for the opinion of the Court in the stated case.

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

T. J. Rigney, for the prisoner.

Edward Bayly, K.C., for the Attorney-General for Ontario.

MEREDITH, C.J.O., read the judgment of the Court. He said that, upon the opening of the case, counsel for the Crown stated that he could not support the contention of the Crown at the trial as to corroboration. The Court agreed that it could not be supported; and the first question must be answered in the affirmative.

Upon the second question, the trial Judge thought that he was not bound to accept the statement of the prosecutrix as to what occurred in December as necessarily proving previously unchaste character: she might be mistaken, and, if not, the statement shewed only one act of carnal connection.

The learned Chief Justice agreed with that view; and pointed out, in addition, that the prisoner, having secured his acquittal on the first charge by his denial of the December offence, could not be acquitted on the second charge on the ground that he had proved the unchastity of the prosecutrix because of the very act of intercourse which, he testified, had never taken place.

The second question was confined to the single point whether or not the testimony of the prosecutrix that the prisoner had carnal intercourse with her on the 15th December, 1914, made it incumbent on the Judge to find that she was not, as respects the second charge, of previously chaste character. If the question to be determined was whether or not, upon the whole evidence, the prosecutrix was proved to be not of previous chaste character, the conclusion might be different.

The second question should be answered in the affirmative.

HIGH COURT DIVISION.

SUTHERLAND, J., IN CHAMBERS. MARCH 20TH, 1916.

*RE GEFRASSO.

Infant—Custody—Illegitimate Child—Rights of Mother—Interest of Infant—Foster-parents.

Application by Millicent Ratcliffe, the mother of an illegitimate child, Millicent Catherine Gefrasso, for an order awarding her the custody thereof.

The child was born on the 5th July, 1909, and was placed by her mother, a few months thereafter, with William Warwood and his wife, Jennie Warwood, on condition, as the applicant stated, that they would keep it until such time as she could arrange a home for it.

T. C. Robinette, K.C., for the applicant.

W. A. Henderson, for the respondents.

SUTHERLAND, J., said that the applicant was a Roman Catholic, and expressed herself as anxious that the child should be brought up in that faith, while the Warwoods were Protestants. The applicant was employed as housemaid in a rooming-house

in the city of Toronto; the proprietress of the house was willing to allow the child to live in the house with its mother. The applicant complained that the respondents were not giving proper care and attention to the child. This was denied by the respondents and others, and the respondents opposed the motion and desired to keep the child, bringing her up as a Roman Catholic if desired.

The learned Judge referred to In re Regina v. Armstrong (1856), 1 P.R. 6, 9; Re Davis (1909), 18 O.L.R. 384; In re Holeshed (1870), 5 P.R. 251; In re Brandon (1878), 7 P.R. 347; Barnardo v. McHugh, [1891] A.C. 388, 399; and stated that, upon the facts disclosed, he was not prepared to say that, in the interest of the infant, it would be better that she should be taken from the custody of her foster-parents and given to the mother, who had apparently taken little or no interest in her, and who was not, the learned Judge felt satisfied, as fit and proper a person to have charge of her as the respondents, and who was not able to give her as safe, comfortable, and appropriate a home. The best interest of the child would be served by leaving her with the respondents.

Reference to Re Longaker (1908), 12 O.W.R. 1193, 1197; Re Faulds (1906), 12 O.L.R. 245; Stourton v. Stourton (1857), 8 D.M. & G. 760, 771; In re W., W. v. M., [1907] 2 Ch. 557, 566.

No order, and no costs.

FALCONBRIDGE, C.J.K.B. MARCH 20TH, 1916.

*RE PARKIN ELEVATOR CO. LIMITED.

*DUNSMOOR'S CASE.

Company—Winding-up—Creditor's Claim — Special Privilege over other Creditors—"Clerk or other Person"—Winding-up Act, R.S.C. 1906 *ch.* 144, *sec.* 70—*Divided Employment —Sales-agent—Commissions.*

Appeal by D. A. Dunsmoor from the refusal of a Local Master, in the course of a reference for the winding-up of the company, to place the appellant upon the list of preferred creditors of the company.

The appeal was heard in the Weekly Court at Toronto.

P. Kerwin, for the appellant.

M. A. Secord, K.C., for the liquidator, respondent.

FALCONBRIDGE, C.J.K.B., held that a "clerk or other person in the employment" of the company need not be entirely and solely in the company's employment to be entitled to be collocated in the dividend-sheet by special privilege over other creditors: The Winding-up Act, R.S.C. 1906 ch. 144, sec. 70; and that the appellant was entitled to the special privilege in respect of his claim for commission on sales made by him as an agent of the company, although he did not give his whole time and services to the company's business.

Reference to Re Morlock and Cline Limited (1911), 23 O.L.R. 165; Re G. H. Morison and Co. Limited (1912), 106 L.T.R. 731; Re Western Coal Co. Limited (1913), 12 D.L.R. 401.

Appeal allowed with costs of the appeal and contestation in the Master's office.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. MARCH 21ST, 1916.

YOUNG v. ELECTRIC STEEL AND METALS CO. LIMITED.

HOWARTH v. ELECTRIC STEEL AND METALS CO. LIMITED.

Costs—Taxation between Party and Party—Items of Bill—Appeal.

Appeal by the defendants the Hydro-Electric Power Commission of Ontario from the report or certificate of a local taxing officer in regard to the allowance of certain items in the plaintiffs' bills of costs on taxation thereof between party and party.

M. H. Ludwig, K.C., for the appellants.

W. Lawr, for the plaintiffs.

FALCONBRIDGE, C.J.K.B., made the following rulings:—

(1) Where it is necessary for a plaintiff to apply for a fiat before bringing action, costs of the application for the same are properly taxable to the plaintiff, though the item is not specifically provided for in the tariff.

(2) Agency charges are intended to be, and are, covered by and included in the item of $10 for correspondence taxed to the plaintiffs.

(3) One of the actions should have been brought by the plaintiff as administratrix. The trial Judge made no order as to the costs of an application by the plaintiff for amendment.

The motion was rendered necessary by the plaintiff's default or mistake, and there should be no separate costs taxed to her for it.

No costs of the appeal.

KELLY, J. MARCH 21ST, 1916.

*WALKER v. BROWN.

Husband and Wife—Profits of Business Purchased by Wife with her own Money and Carried on by her Husband as Manager—Liability to Satisfy Judgment-debt of Husband—Pharmacy Business—Qualification of Husband as Registered Pharmacist—Pharmacy Act, R.S.O. 1914 *ch.* 164, *secs.* 17, 20, 22, 28 (*a*)—*Portion of Business Conducted for Husband's own Benefit—Reference to Ascertain Husband's Interest.*

Action by one Walker, who in 1895 obtained a judgment for the payment of money against the defendant T. F. Brown, and by one Guise-Bagley, to whom Walker had assigned the judgment against T. F. Brown and his wife, Effie F. Brown, for a declaration that the latter was a trustee for her co-defendant of certain property and assets; that these were liable to satisfy the judgment-debt; and (by amendment) that part of the earnings of the business purchased by the defendant Effie F. Brown from one Belfry were proceeds of a separate business of the defendant T. F. Brown.

The action was tried without a jury.

H. Cassels, K.C., for the plaintiff.

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

KELLY, J., read a judgment in which he said that the defendant T. F. Brown was a registered pharmacist in good standing and had been so since 1883; the defendant Effie, in 1889, bought (with her own money) a drug and stationery business in the village of Shelburne from Belfry, and had carried it on successfully ever since, supporting herself and her co-defendant, and accumulating a substantial amount of profits, part of which was invested in the securities or assets now sought to be reached; her husband managed the business under a power of attorney from her; the sale of drugs had always been and continued to be a part of the business, and the husband was the only one qualified to do dispensing and deal in certain commodities which

only a pharmacist may deal in; a label attached to the drugs sold in this business had upon it the words "T. F. Brown, chemist and druggist."

In 1910, T. F. Brown and his son (also a qualified pharmacist) entered into an agreement with a drug company by which they were given the exclusive right to sell certain drug merchandise in Shelburne, and they became the holders of one share of the company's stock; and in 1915 they became the holders of two shares of the stock of another drug company, whose goods they purchased and sold.

The learned Judge said that the fact that a married woman enjoys the services of her husband in the management of, or as an employee in, her separate business, does not of itself entitle him to a proprietary interest in it or in its proceeds; nor are the profits which arise from his labour or skill, by the simple fact of such labour or employment, deprived of the character of separate estate of the wife, or rendered subject to the claims of his creditors. Where other elements enter, they must be given consideration.

Reference to Campbell v. Cole (1884), 7 O.R. 127; Murray v. McCallum (1883), 8 A.R. 277; Harrison v. Douglass (1877), 40 U.C.R. 410; Laporte v. Costick (1874), 31 L.T.R. 434; Meakin v. Samson (1878), 28 U.C.C.P. 355; In re Gearing (1879), 4 A.R. 173; Baby v. Ross (1892), 14 P.R. 440; Rush v. Vought (1867), 55 Penn. St. 437; Arnold v. Talcott (1897), 55 N.J. Eq. 519; Guttmann v. Scannell (1857), 7 Cal. 455.

It might be, the learned Judge said, that the defendant Effie F. Brown, in carrying on the business as she conducted it, employing a qualified pharmacist to perform for her acts and services which she was prohibited by the Pharmacy Act, R.S.O. 1914 ch. 164 (see secs. 17, 20, 22, 28 (a)) from performing, had rendered herself liable to the penalties prescribed by the Act. That was not for determination here. The proceeds of the drug department of the business—except as afterwards mentioned—were not, in the circumstances, the property of the husband.

Reference to Regina ex rel. Warner v. Simpson (1896), 27 O.R. 603.

The dealing in commodities purchased by the husband from manufacturers and dealers, in the manner and circumstances in which purchases were made from the two drug companies, as above mentioned, was not a part of the wife's business, but was the husband's business, and the proceeds belonged to him;

and of those proceeds, so far as they came into the hands of the wife, she was a trustee for her husband, and they were liable to satisfy the plaintiffs' judgment-debt.

The assignment of the judgment by the plaintiff Walker to the plaintiff Guise-Bagley was void, being champertous, but the plaintiff Walker had the right to assert his claim, notwithstanding the assignment: Colville v. Small (1910), 22 O.L.R. 426.

The action should be dismissed except as to the one branch; and as to that there should be a reference to ascertain the value of the defendant T. F. Brown's proprietary interest in the business derived from the purchase of drugs and drug commodities from the two companies and from his shares in the companies, and to ascertain whether other similar purchases were made on similar terms and conditions, and the value of his further interest in the business as the result of such further similar purchases. Further directions and costs of the action reserved until after the Master's report.

BRITTON, J. MARCH 22ND, 1916.

PALMER v. PALMER.

Will—Codicil—Proof of Execution by Testator — Expert in Handwriting—Failure to Shew Testamentary Capacity—Undue Influence—Want of Independent Advice—Conveyances of Land by Testator to Sons—Actions to Set aside—Want of Understanding by Testator — Improvements to Land in Expectation of Devise—No Mistake as to Title—Judgment—Counterclaim—Costs.

Actions by two of the daughters, the executrices, of Thomas E. Palmer, deceased, against their two brothers William Palmer and Charles M. Palmer, to set aside conveyances of farms purporting to be made to the two brothers respectively by their father, shortly before his death, as forgeries or as having been obtained by fraud and undue influence, and to vacate the registry thereof. The defendants counterclaimed to set aside a codicil to his will executed by the deceased on the 7th August, 1913.

The deceased died on the 7th November, 1914; the deceased was then 85 years old; the two conveyances were dated the 23rd May, 1913, and registered three days later.

The actions were tried together, without a jury, at Toronto.

G. H. Watson, K.C., and J. Gilchrist, for the plaintiffs.

H. H. Dewart, K.C., and H. W. Maw, for the defendants.

BRITTON, J., read a judgment in which he stated his finding that each conveyance and each document put in at the trial purporting to be signed by the deceased was actually signed by him. The learned Judge stated that he attached no importance to the evidence of a certain expert in handwriting as to the deceased being worried or in trouble when he signed the documents. To express an opinion, from the handwriting alone, whether as agreeing with or differing from the ordinary handwriting of the signer, in regard to the perturbed or calm state of his mind, was to go quite beyond anything that an expert should profess.

As to the testamentary capacity of the deceased: relying, as the plaintiffs did, upon the codicil of the 7th August, 1913, they could not (upon the evidence) be heard to say that their father was not of sound and disposing mind or memory in May, 1913, when he executed the impeached conveyances.

Upon the evidence, the deceased did not fully understand the nature and effect of the documents signed by him; and, in reference to the transactions impeached in this action, was in need of and entitled to independent advice, and did not have such advice.

The defendants, in good faith and in expectation of ownership by devise of their father, had made valuable improvements upon the farms; but they were not entitled under the statute to compensation therefor, the improvements not having been made under a mistake of title.

The codicil of the 7th August, 1913, was also executed without being properly understood by the testator. He was suffering from senility, a progressive disease; and was not as capable on the 7th August as on the 23rd May; he had no independent advice. The codicil in effect was prepared by the plaintiffs—it was prepared for them—and they took a large benefit under it. Suspicion was raised as to the circumstances surrounding the preparation and execution of this codicil, and no evidence was adduced which removed such suspicion and satisfied the Court that the testator knew and approved of the contents of the instrument.

Reference to Parfit v. Lawless (1872), L.R. 2 P. & D. 462; Thompson v. Torrance (1883), 9 A.R. 1; Barry v. Butlin (1838), 2 Moo. P.C. 480; Fulton v. Andrew (1875), L.R. 7 H.L. 448; Brown v. Fisher (1890), 63 L.T.R. 465; Tyrrell v. Painton, [1894] P. 151.

Judgment for the plaintiffs setting aside the conveyances, declaring them void, and cancelling the registry thereof.

Judgment for the defendants upon their counterclaim setting aside and declaring void the codicil of the 7th August, 1913, and setting aside the grant of probate thereof.

No costs to either party.

BRITTON, J. MARCH 22ND, 1916.

SWAYZIE v. TOWNSHIP OF CLINTON MUTUAL INSURANCE CO.

Insurance — Fire Insurance — Policy — Statutory Condition— Variation—Additional Insurance Undisclosed—Absence of Fraud — Adjustment of Amount — Ratable Proportion of Loss—Insurance Act, R.S.O. 1914 *ch.* 183, *sec.* 194, *Conditions* 5, 9.

Action to recover the amount of the plaintiff's loss by fire in respect of a barn owned by the plaintiff and insured by the defendants for $600.

The defendants admitted a liability of $360 for loss upon the barn, and paid that amount into Court.

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

A. C. Kingstone, for the plaintiff.

J. H. Campbell, K.C., for the defendants.

BRITTON, J., read a judgment in which he said that the policy had endorsed upon it what were called statutory conditions; of those, No. 8, providing that the company should not be liable for loss if there was prior or subsequent insurance without assent, was not in the form prescribed by sec. 194 of the Insurance Act, R.S.O. 1914 ch. 183, as statutory condition No. 5, though similar in effect, and the plaintiff contended that the policy sued upon, by reason of the variation and because it was not stated to be a variation, must be treated as an unconditional policy, and therefore the defendants were liable for the whole $600.

In the body of the policy, as part of the contract, there was this clause: "It is hereby agreed that this policy is made and accepted subject to and in reference to the terms, conditions, and explanations stated hereon and upon the application for insurance, the statutory conditions, and variations in conditions printed in red ink on the other side hereof."

The learned Judge was of opinion that the policy was not unconditional, but that the statutory conditions applied.

There was an additional insurance of $400 upon the barn, in the London Mutual Fire Insurance Company, of which there was no notice to the defendants until after the fire.

There was no fraud on the part of the plaintiff—he did not for any fraudulent purpose fail to disclose the additional insurance; so an adjustment must be made under conditions 5 and 9. The defendants were not called upon to pay more than 60 per cent. of the plaintiff's loss upon the barn. The defendants contended that the value of the barn must be limited to $1,000, that being the plaintiff's own estimate put upon it in his application for this insurance; and upon that basis the plaintiff was willing to pay $360.

The learned Judge was of opinion that the plaintiff was not estopped from proving that his loss was greater than $1,000; upon the evidence, it was worth $1,200, and that was the amount of the plaintiff's total loss. Of that amount, the plaintiff is, by condition 5, precluded from recovering more than 60 per cent., or $720; and the defendants are liable to pay their ratable proportion (condition 9), i.e., $\frac{6}{10}$ of $720, or $432.

Judgment for the plaintiff for $432, with interest at 5 per cent. from the expiration of 60 days from delivery of the proofs of loss, and with costs. The $360 paid into Court to be paid out to the plaintiff as part satisfaction of the sum due.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. MARCH 22ND, 1916.

C. v. C.

Evidence—Foreign Commission—Expert Testimony—Corroborative Testimony—Alimony—Divorce—Evidence as to Domicile.

Appeal by the defendant from an order of the Master in Chambers allowing the plaintiff in an action for alimony to issue a commission for the examination of a witness in the City of Mexico.

R. McKay, K.C., for the defendant.

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

FALCONBRIDGE, C.J.K.B., read a judgment in which he said that there was a disinclination here and in England to grant commissions for the purpose of expert evidence: The M. Mox-

ham (1876), 1 P.D. 107; Attorney-General v. Gooderham & Worts (1884), 10 P.R. 259. It is going far afield to examine a witness in Mexico as to the law of the State of Illinois. Nor ought a commission to issue to obtain evidence which is only incidentally useful in corroboration of other evidence: Ehrmann v. Ehrmann, [1896] 2 Ch. 611. But it was said that the witness in Mexico could give evidence as to the domicile of one L., against whom the plaintiff obtained a decree of divorce in Chicago; and on this ground the order of the Master should be sustained.

Appeal dismissed; costs to be taxed with the costs under the order of the Master and paid by the defendant to the plaintiff.

RE TREADWELL—BRITTON, J., IN CHAMBERS—MARCH 23.

Insurance—Life Insurance—Designation of Mother of Insured as Beneficiary—Predecease of Mother—Intention to Assign to Father for Value—Payment of Premiums by Father—Equitable Assignment not Established—Lien of Father for Premiums Paid—Benefit Passing to Preferred Beneficiaries under Insurance Act.]—Pursuant to an order of the Master in Chambers dated the 15th January, 1916, the Independent Order of Foresters paid into Court on that day the sum of $480 in respect of a policy or certificate of insurance upon the life of Roy Wentworth Treadwell, deceased. Daniel S. Treadwell, the father of the late Roy Wentworth Treadwell, now applied for payment out to him of the said money. It appeared that the certificate of insurance was for $500 and $50 for funeral benefit. The deceased had other certificates of insurance—which were changed at or about the time of his marriage—but this one was not changed. It was, after his marriage, delivered to his father for his mother, with the request that his father should pay the assessments. The father consented to this, and did pay the assessments from that time. About two years later, the mother died, intestate. It was alleged—and for the purpose of this argument the learned Judge assumed it to be true—that the deceased Roy Wentworth Treadwell intended to assign and transfer the certificate to his father—and that the father, all the time from about two years prior to the death of Roy's mother, until Roy's death, paid all the assessments. The contention of the father was, that, apart from the insurance, this certificate, as a chose in action, was in fact assigned; that what was done amounted

at least to an equitable assignment—and he was entitled to the money. The learned Judge was of opinion, after considering the authorities, that the insurance contract must be viewed not as an ordinary chose in action, but as creating a liability under the Insurance Act, R.S.O. 1914 ch. 183, and under the special terms of the insurance contract. The person designated was the mother. The insured could change the beneficiary only to one or more of the preferred class. The father did not belong to that class. Motion dismissed without costs—with liberty to the applicant to apply in Chambers, upon notice to the Official Guardian, representing the two infant children of the deceased, for payment out of such part of the money in Court as would repay the applicant for assessments paid by him to keep the insurance alive and on foot. J. B. Davidson, for the applicant. F. W. Harcourt, K.C., for the infants.

RE RICHARDSON—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MARCH 23.

Infant—Custody—Application of Father—Facts not Sufficiently Shewn—Leave to Renew upon Further Material.]—The application made to LENNOX, J., 9 O.W.N. 142, by the father of the infant Frederick Richardson, for an order awarding the applicant the custody of the child, was renewed before FALCONBRIDGE, C.J.K.B., on the 14th March. The learned Chief Justice, after consideration, said that the position of the case did not appear to have been changed since the order of LENNOX, J., except that a notice of motion had been served on J. E. Arthur, to whom the boy was indentured as an apprentice by the Protestant Orphans Home. The father had handed over and delivered to the manager of that institution this child and another on the 22nd September, 1913. The only other new material was an affidavit of the father in which no complaint was made of "the conditions under which the boy was living, nor was it stated whether it would be to his advantage to have him removed to his father's home or not"—quoting from the judgment of LENNOX, J. The same disposition of the present motion should be made as was made by LENNOX, J., when the case was before him—the motion should be adjourned, with leave to the applicant to renew it on the material filed and such other material as he might be advised to bring in, within six months, upon service of notice; in default of this being done, the motion to be dismissed with costs, without further order. F. Regan, for the applicant. A. C. Heighington, for the respondents.

RE AUTO TOP AND BODY CO. LIMITED—FALCONBRIDGE, C.J.K.B.—MARCH 24.

Company—Winding-up—Disputed Claim of Trustee-assignee for Benefit of Creditors to Payment for Services—Direction for Litigation of Dispute in Action to be Brought.]—Appeal by the liquidator of the company from a ruling of the Master in Ordinary upon a reference for the winding-up of the company under the Winding-up Act, R.S.C. 1906 ch. 144. The learned Chief Justice said that the most important questions to be determined were (1) the right of the trustee-assignee to retain or pay to himself the sum of $600 for his services under the assignment, and (2) the question whether such sum was a reasonable amount for him to charge. As the only satisfactory way, under all the circumstances, to dispose of this matter, the learned Chief Justice directed the Master to order an action to be brought against the trustee-assignee for the repayment by him of the said sum, or such part thereof, if any, as should be determined to be excessive. Costs of this motion to be costs in the cause in the said action. J. P. MacGregor, for the liquidator. Shirley Denison, K.C., for creditors.