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ANGLIN, J. OCTOBER 25TH, 1904.

CHAMBERS.

RE WRIGHTON.

Life Insurance—Preferred Beneficiary—Widow—Declaration by Will—Claims of Creditors.

Motion by executors under Rule 938 to determine the respective rights of the widow and the creditors of W. F. R. Wrighton, deceased, in regard to the proceeds of two policies of insurance upon his life, aggregating $3,000. These policies were in force when the deceased made his will. Upon their faces they were made payable to his personal representatives. The will contained this provision: "I devise, give, and bequeath to my dear wife Amelia Wrighton, her heirs and assigns, absolutely, all my real and personal estate and effects of every nature and description whatsoever and wheresoever situate and being . . . and including therein any and all policy and policies of life and other assurance . . . for the sole use and benefit of herself and of my dear children as well as for their maintenance, education, and training and advancement in life during minority, hereby giving unto my said dear wife full control and absolute disposal of the same in her discretion for the purpose aforesaid, subject to the payment of said debts and expenses and of all other proper and legal expenses and charges." In an earlier clause the testator directed his executors to pay his just debts and funeral and testamentary expenses out of his personal estate and cash on hand.

A. Weir, Sarnia, for the executors.

C. A. Moss, for the widow, contended that she was entitled as a preferred beneficiary to the insurance moneys in

question, to the exclusion of any claim thereupon of her late husband's creditors.

W. E. Middleton, for creditors, contra.

ANGLIN, J.—The contention of the widow cannot prevail. The very instrument conferring title upon the widow makes that title subject to the payment of the debts of the testator. The insurance moneys are in the gift itself blended with and treated as forming part of the general estate out of which debts are expressly directed to be paid. The testator has unmistakably expressed his intention that these insurance moneys should remain part of his general estate available to meet the claims of his creditors.

Costs of all parties out of the fund.

ANGLIN, J. OCTOBER 25TH, 1904.

WEEKLY COURT.

PLENDERLEITH v. PARSONS.

Costs—Mortgage—Action for Redemption — Opposition to— Former Foreclosure Proceedings.

Motion by plaintiff for judgment on the pleadings in an action for redemption of mortgaged lands.

T. Hislop, for plaintiff.

B. Morton Jones, for defendants, conceded that plaintiff was entitled to judgment as prayed, but contended that in its discretion the Court should withhold the costs of the action; that plaintiff might, at much smaller expense, have obtained full redress by a petition to open up former foreclosure proceedings, and should not therefore be allowed the costs of a new action for redemption.

ANGLIN, J.—The major part of the costs of the action have been occasioned by defendants' mistaken course in opposing plaintiff's claim which they now yield. Had defendants promptly acceded to plaintiff's demand, the costs would have been, at most, trifling.

The usual judgment for redemption will therefore be entered. The costs of the action down to and inclusive of judgment will be deducted from the mortgage claim of de-

fendants, by the Master in fixing the amount at which plaintiff shall be entitled to redeem. The mortgagees will have no costs of the former foreclosure proceedings. In other respects the usual practice as to costs in such actions as the present will prevail.

Reference to the Master in Ordinary.

ANGLIN, J. OCTOBER 26TH, 1904.

CHAMBERS.

RE BRAIN.

Will—Executors—Power to Carry on Business of Testator—Sale of Business—Lease of Premises.

Motion by executors for order under Rule 938 giving directions as to disposal of estate of testator.

B. F. Justin, Brampton, for executors.

W. S. Morphy, Brampton, for J. C. F. Brain.

F. W. Harcourt, for infant.

ANGLIN, J.—In the absence of any provision authorizing the carrying on of the testator's business by his personal representatives, no order can be made sanctioning that course. The will confers no power of sale on the executors and executrix. Under these circumstances, they may take whichever one of two courses they deem most advantageous for the estate. They may sell the chattels and lease the brewery premises until the period fixed for division of the estate, or they may sell the business—chattels and goodwill—as a going concern, giving to the purchaser a lease of the premises until the period of division fixed by the will, with an agreement for sale, if deemed advisable, subject to the approval of the beneficiaries when the infant attains her majority. For this latter purpose the executrix and executors may carry on the business, but only for such time as may be necessary and proper to effect a reasonably advantageous sale. Having regard to the nature of the business, the sale should be soon.

Costs to all parties out of estate.

MACMAHON, J. OCTOBER 26TH, 1904.

CHAMBERS.

RE BROOKS v. HUBBARD.

Division Courts — Removal of Plaint into High Court — Question Involved—Paternity of Illegitimate Child.

Motion by defendant for an order of certiorari to remove a plaint from the 1st Division Court in the county of Dufferin into the High Court.

Plaintiff's claim was to recover $62 for the maintenance and support of an illegitimate child of which defendant was alleged to be the father.

Plaintiff was the mother of the child. Defendant denied his paternity.

Section 82 of the Division Courts Act provides that in case the debt or damages claimed in an action brought in a Division Court amounts to $40 and upwards, and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case a Judge thereof grants leave for that purpose, the action may by order of certiorari be removed from the Division Court into the High Court.

The main ground upon which defendant sought the removal of the action was, that the liability with which plaintiff sought to charge him existed as a continuing liability which in time would involve him in a sum far beyond the jurisdiction of a Division Court.

J. E. Jones, for defendant.

D. L. McCarthy, for plaintiff.

MACMAHON, J.—The only question in the case is one of fact, namely: Is the defendant the father of the child? No question of law can arise on the trial, and it is only where difficult questions of law are likely to arise that certiorari will lie to remove an action: see Rees v. Williams, 7 Ex. 51; Longbottom v. Longbottom, 8 Ex. 203; and other cases referred to in Bicknell & Seager's Division Courts Act, 2nd ed., p. 128.

The motion must be dismissed with costs.

MACMAHON, J. OCTOBER 26TH, 1904.

WEEKLY COURT.

RE CANADA WOOLLEN MILLS, LIMITED.

Company—Winding-up—Sale of Assets—Acceptance of Tender of Inspector under Act—Powers of Referee—Sale not Recommended by Liquidator.

Appeal by W. T. Benson & Co., creditors of the Canada Woollen Mills, Limited, a company being wound up under the Dominion Act, from the certificate of James S. Cartwright, official referee, of his acceptance of an offer made by W. D. Long to purchase the assets of the company, upon the following grounds: (1) That the sale was not made by the liquidator of the company, as the statute requires, nor did he accept the offer of Long. (2) That Long was an inspector appointed under the Act, and could not purchase. (3) That the sale was made improvidently and at an undervalue, and not in accordance with the practice of the Court. (4) That the offer by Long and the acceptance by the referee did not constitute a definite bargain capable of being enforced, and there was no written evidence of the bargain, and its terms were not settled.

W. H. Blake, K.C., for appellants.

I. F. Hellmuth, K.C., for W. D. Long.

G. H. D. Lee, for the Dominion Bank and certain other creditors supporting the sale.

R. S. Cassels, for the liquidator.

MACMAHON, J.—. . . Mr. Long was one of the six inspectors in the liquidation, and was such when he purchased the assets of the estate for $253,000. . . .

[Reference to Segsworth v. Anderson, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699; Gantonguay v. Savoie, 29 S. C. R. 613; Ex p. James, 8 Ves. 345.]

Now, I find from the correspondence put in, that Mr. Long, having purchased on 22nd September, two days afterwards—on the 24th—telegraphed to George Moore at Waterloo offering the Waterloo mills for "$54,000, including all supplies in mill," and saying, "I will take five thousand with you, Seagram, Randall, and friends. Payments made easy. Wire me reply. Sold both Carleton mills." He sold the Carleton Place mills at $50,000.

He also, on the 24th, wrote the Penman Manufacturing Co. of Paris, in which he is a large shareholder and director, regarding the mills at Hespeler, giving a list of mill supplies on hand, amounting to $16,297, and then stating: "As a director of the Penman Co., I would recommend that you offer $130,000 for the mills, houses, lands, and everything connected with the place, on one year's time without interest. I could hold the deed and indorse your paper. If accepted, I would suggest putting a man in charge who is a carder and spinner and let him do all the work you can give him. . . . Next spring, if it is decided that you do not want them connected with your present mills, we could sell them, or, may be, get up a separate company to run them. I feel sure these mills will be worth double the day after the Penman Co. buy them, and I do not like to let these mills get into other hands until the Penman Co. has plenty of time to consider. The risk is so small in buying as I suggest. I think you should seriously consider the proposition."

There was at the time that Mr. Long made his offer $37,000 cash belonging to the estate in the bank, which was included in the assets sold; there were manufactured goods which Mr. Long immediately sold for $17,000; there were supplies which were necessary for the running of the mills, amounting to $26,000, but which were carried into account at $13,000; and bills receivable amounting to about $80,000, which were carried in at $75,000, as it was considered that they were good for that sum; then there was $4,800, rebate on insurance: these several items amounted to $146,500.

The Penman Co. had these mills under option at $125,000.

It is manifest that Mr. Long was in a position to know of people who were likely to be purchasers of the mills which he acquired, and the facility with which he was able to dispose of some of the properties shews that when the mills were being sold separately there was no great difficulty in disposing of them, and he seems to have been possessed of a knowledge as to intending purchasers which, if as inspector he had communicated it to the liquidator, would have been of very great value to the estate.

As to the point arising under sec. 31 of the Act. Upon the appointment of a liquidator, the estate of the insolvent

company became vested in him, and the duty devolved on him of receiving offers or tenders for the sale of the estate, and "he may, with the approval of the Court, and upon such previous notice to the creditors, shareholders, or members as the Court orders, sell the real, personal, heritable, and moveable property, effects, and choses in action, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels."

It is, I think, reasonably clear that it is upon the liquidator, as one of the officers of the Court, that the duty is cast of recommending—perhaps with the sanction of the inspectors—to the Court that the offer of a particular tenderer for the assets of the estate be accepted or rejected. The liquidator is to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

This, I think, is apparent from the interpretation put upon sec. 33, which provides that the liquidator may, with the approval of the Court, compromise all calls and liabilities to calls, debts, and liabilities, and all claims that are present or future, certain or contingent, etc. . . .

[Reference to sec. 100 of the English Winding-up Act; In re East of England Banking Co., L. R. 7 Ch. 309; In re Sun Lithographing Co., 24 O. R. 200.]

I therefore reach the conclusion that the referee could not dispose of the assets of the estate without the assent of the liquidator.

The offer made by Mr. Long to the learned referee of $253,000 was not sanctioned by Mr. Davidson, the liquidator. He thought that a better offer could be had, having regard to the prices at which the mills were purchased by the insolvent company (between $600,000 and $700,000), and he considered the sacrifice would be too great if Mr. Long's offer was accepted. The opinion he entertained has been fully justified by the celerity with which Mr. Long was able to dispose of some of the mills and other assets and the prices realized therefor. The probable profit to Mr. Long would, if the sale were carried out, be about $125,000.

The sale must be set aside, and Mr. Long must account to the liquidator for the profits arising from any portion of the assets sold by him.

The costs of the appeal must be paid by Mr. Long.

OCTOBER 26TH, 1904.

DIVISIONAL COURT.

FABIAN v. SMALLPIECE.

Negligence—Setting out Fire—Damage to Property—Causal Connection—Findings of Jury.

Appeal by defendant from judgment of MACMAHON, J., in favour of plaintiff, upon the findings of a jury, for $200 damages and costs in an action for negligence in setting out fire.

W. R. White, K.C., for defendant.

C. A. Moss, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

FALCONBRIDGE, C.J.—The law relating to setting out fire has been fully defined by a line of cases from 1846 (Dean v. Carty, 2 U. C. R. 448) to the present day, the fullest modern exposition being in Furlong v. Carroll, 7 A. R. 145.

This case could not have been withdrawn from the jury, and it went to them with a charge to which no exception was, or could reasonably have been, taken.

The answer to the 3rd question was faintly and unsuccessfully attacked, and the only point for consideration was as to the establishment of a causal connection between the fire kindled by defendant and the damage to plaintiff's property. This was placed beyond the range of mere speculation or conjecture by evidence that fire had been known to jump over an intervening space as large as that which was said to have existed here. No other reasonable theory of the cause of fire on defendant's premises was put forward.

These matters and the high wind which arose on the 30th were all placed before the jury.

As John Wilson, J., said in Wilkins v. Row, 15 C. P. 326, "the facts of the case were of a character familiar to the occupations of the jury, about which they were not likely to form an erroneous judgment."

Certainly they meted out scant justice to plaintiff in the matter of damages, and I question whether the grant of a

new trial (if we were to that extent dissatisfied with the result) would not prove damnosa hereditas to defendant.

Appeal dismissed with costs.

GARROW, J.A. OCTOBER 26TH, 1904.

C.A.-CHAMBERS.

RANDALL v. OTTAWA ELECTRIC CO.

Appeal to Court of Appeal—Special Leave—Case Tried with Jury—4 Edw. VII. ch. 11, sec. 76 (a).

Motion by defendants Ahearn and Soper, Limited, for leave to appeal to the Court of Appeal direct from the judgment at the trial before BRITTON, J., and a jury in favour of plaintiffs for $2,500: ante 240.

W. R. Riddell, K.C., for applicants.

H. M. Mowat, K.C., for plaintiffs.

GARROW, J.A.—The application is based upon sec. 76 (a) of the Judicature Act, as amended by 4 Edw. VII. ch. 11, which reads as follows: "In any case in which an appeal would lie from the Court of Appeal to the Supreme Court of Canada, any party may by consent, or by leave of the Court of Appeal or a Judge thereof, appeal to the Court of Appeal from a judgment, order, or decision of a Judge in Court at the trial or otherwise, or may apply for a new trial of the action."

It is not and could not be seriously contended that the case is not of sufficient importance and difficulty, in addition to the amount of the judgment, to justify an appeal.

But it is said that the section quoted does not apply to the case of a trial with a jury, but only to trials by a Judge without a jury.

Under sec. 67 (1) (d), as amended by the same statute, application for a new trial in the High Court, when the action has been tried with a jury, is to be made to a Divisional Court. And under sec. 76 (1) (b), as amended by the same statute, where the matter in controversy is of the sum or value of $1,000, exclusive of costs, an appeal lies to the Court of Appeal from the judgment of a Divisional Court.

So that in the present instance, the judgment being for $2,500, an appeal would lie to the Court of Appeal by either party from the judgment of a Divisional Court granting or refusing a new trial.

The plain object, and a laudable one it appears to me, of the new section 76 (a) was to avoid as far as possible the double appeal, first to a Divisional Court and then to the Court of Appeal, in cases likely from their nature and the amount involved to proceed to the Court of last resort.

And to this end liberty is given by the section to the parties themselves to consent, and thus simply to confer the necessary jurisdiction to hear the appeal.

The judgment at or following upon the trial where the issues of fact are tried by a jury is, in my opinion, the "judgment, order, or decision" of the Judge, within the meaning of the section.

The language is certainly wide enough to cover both jury and non-jury trials without any straining, and its construction should, I think, be in the direction of liberality rather than the reverse, in order to avoid, as far as possible, unnecessary expense.

The application is granted. Costs in the cause.

CARTWRIGHT, MASTER. OCTOBER 27TH, 1904.

CHAMBERS.

CRAMP STEEL CO v. CURRIE.

Parties—Company—Shareholders—Use of Corporate Name in Litigation.

Motion on behalf of plaintiffs, an incorporated company, to set aside the writ of summons issued in their name, on the ground that the company had not authorized the use of their name.

W. E. Middleton, for plaintiffs.

F. Arnoldi, K.C., for solicitors.

THE MASTER.—In this action the company are the sole plaintiffs. The writ issued 6th October, 1904, and was specially indorsed. The claim is to have certain proceed-

ings of the company set aside and an injunction to prevent certain other things being done which it is alleged are highly prejudicial to the company's interests. . . .

The whole question as to the proper form of action . . . is considered fully in International Wrecking Co. v. Murphy, 12 P. R. 423, and cases cited.

No doubt, prima facie the company is the proper plaintiff. But where it is alleged, as here, that the company is being improperly controlled by defendants or some of them, the only course to adopt is to strike out the name of the company as plaintiff and add it as defendant, with leave to Angus Smith or any other shareholders to be made plaintiffs and to serve such statement of claim as they may be advised. Costs of this motion to the company in any event. If such amendment is not made within a week, the writ will be set aside with costs as in Scribner v. Parcells, 20 O. R. 554, at p. 563. It is admitted that the company gave no authority for the action, and the indorsement shews that it would be idle to direct a meeting to ascertain the wishes of the shareholders, as one of the first grounds of complaint is that defendants or some of them are able "to outvote all the other shareholders" in the present condition of the company.

BRITTON, J. OCTOBER 27TH, 1904.

TRIAL.

BELLEISLE v. TOWN OF HAWKESBURY.

Way—Non-repair—Injury to Person—Negligence—Condition of Sidewalk during Construction Work.

Action for damages for injuries to plaintiff by reason, as alleged, of defective condition of sidewalk in town of Hawkesbury.

J. Maxwell, L'Orignal, for plaintiff.

D. B. Maclennan, K.C., and H. W. Lawlor, Hawkesbury, for defendants.

BRITTON, J.—The facts, undisputed, or as found by me, are as follows.

Plaintiff is a barber and grocer doing business on the north side of Main street in Hawkesbury. The municipal

corporation were doing extensive repairs to that street. These repairs included taking up the old board walk on the north side, raising the level of the street, and putting down a new walk on the higher level. The work was being done by a contractor, but under the supervision and direction of the town.

On Saturday 18th July, 1903, the new walk had been completed to a point in front of plaintiff's shop. . . . The workmen were taken away from this work to do something, said to be urgent, in another part of the town, and these men were away part of Saturday and all of Monday 20th July. The walk was to be and now is 4 planks wide, laid lengthwise, side by side, and resting upon sleepers laid with ends to the street. The ends of only each alternate plank rested upon the same sleeper. This was done "to break joints," as a more firm and better walk can in that way be made.

The work left in an unfinished state at the time of the accident consisted of the two alternate planks at the easterly end of the walk under construction, with the two alternate open spaces between. Plaintiff knew on Saturday and Sunday of this unfinished work, knew generally of its condition, and did not in any way object to what was being done or left undone.

On Monday 20th July goods of plaintiff were carted to his store, and he rode with the load on the cart. I find that plaintiff's own account of where and how he alighted from the cart must be accepted as correct. . . . When the cart stopped at the southern edge of the walk, in front or nearly in front of plaintiff's premises, he jumped or sprang or stepped from the cart, not in any reckless or careless way, but as an ordinarily prudent man would do, and his left foot landed upon the plank of the walk properly placed, and his right foot upon the sleeper beyond the easterly end of the next plank. His right foot slipped off this sleeper and went to the ground, a depth of 7 or 8 inches. This caused plaintiff to fall to the right and backwards, and by the fall one bone of the right leg was broken. This happened about 7.30 in the evening, when it was quite light and when everything there could be plainly seen by plaintiff.

The allegation of plaintiff is, that defendants failed to properly construct, maintain, and keep in repair the portion of the sidewalk in front of plaintiff's place of business.

Defendants, so far as they had constructed the new sidewalk, did so in a proper manner. It was good and free from

defect so far as it had been completed. Defendants were not negligently allowing the walk to get and to remain out of repair, but were complying with the statute by improving the condition of the street.

The distance from the plank or top of sleeper to the ground was not too great. It was not, in my opinion, in any way negligent to have the planking the distance of 7 or 8 inches above ground at that place. I do not think that the sidewalk, as left on the Saturday evening and as it was when the accident occurred, was unsafe for persons lawfully using it. . . . It could not fairly and reasonably be considered dangerous or a trap to persons having ordinary eyesight and going upon it in daylight.

As plaintiff knew all about its condition, a printed notice was not required.

Plaintiff was willing to use the walk as it was for access to his own premises. Had the accident happened in the dark to a foot passenger, the necessity of a light or barrier might have to be considered.

I do not think it was the duty of defendants to put barriers upon the outer or southern edge to prevent persons walking across from the street to the houses or shops on the north side. This is what plaintiff attempted to do.

I find that defendants were not guilty of negligence in leaving the work as it was when the accident happened. The accident was a mere misadventure. Plaintiff must have known at the time he jumped or stepped from the cart, the exact condition of the walk. . . . In some way, unknown to plaintiff, by mere accident, plaintiff's right foot slipped from the sleeper, causing him to fall and to fracture his leg. Neither the hole nor the sleeper was dangerous or unsafe to plaintiff or the public. If it is contended that defendants performed needed repairs in a negligent manner so as to make them liable, I find against that contention: see Macdonald v. Township of Yarmouth, 29 O. R. 259.

The action must be dismissed, and with costs, if defendants ask for costs.

In view of the case going further, and of the possibility of the Court finding that there is upon the evidence liability on the part of defendants, I find that plaintiff was not guilty of any contributory negligence; and, if plaintiff is entitled to recover at all, he should recover $200 damages with costs on the County Court scale without any set-off of costs by defendants.

OCTOBER 27TH, 1904.

DIVISIONAL COURT.

CRAIG v. McKAY.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Previous Mortgage by Insolvent—Preference—Purchase of Mortgaged Land by Assignee—Ignorance of Existence of Mortgage—Subsequent Action to Set aside—Status of Assignee—Statutory Presumption—New Trial.

Appeal by plaintiff from judgment of BRITTON, J., dismissing action brought by the assignee for the benefit of creditors of one Vandecar to set aside a mortgage upon land, made by Vandecar to defendants, as preferential and void under the Assignments Act. Plaintiff, as assignee, conveyed the land in 1897 to one Rose, and Rose conveyed to plaintiff, who then knew nothing of defendants' mortgage. Plaintiff paid $600, which was divided among the creditors. The trial Judge (at a trial without a jury) held that plaintiff could not maintain the action, and dismissed it without hearing evidence for the defence.

The appeal was heard by BOYD, C., MEREDITH, J., IDINGTON, J.

F. Arnoldi, K.C., and P. McDonald, Woodstock, for plaintiff.

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

BOYD, C.—Plaintiff is assignee in law of the Vandecar estate and sues in that character to vacate a mortgage to the defendants for $250 made by the insolvent, a few days before the assignment, upon a farm already mortgaged to the Huron and Erie Loan Co. for $3,600. The defence is, that the farm was sold by the assignee and purchased on his behalf for $4,200 in March, 1897, and is now vested in him as owner. The learned Judge has ruled that such is his legal position, and declines to regard his status as sufficient to justify the maintenance of this action. No doubt, qua owner, he could not attack the prior registered mortgage—qua assignee for creditors he can impeach the mortgage under the statute then in force, 54 Vict. ch. 20, sec. 2, sub-sec. 2 (b). The mortgage for $250 was to secure a bill of costs of the mortgagees; it was made on 15th October, 1896, but it was

not registered until 10th February, 1897. The assignment for creditors was executed on 21st October, 1896. The assets were all realized, and distribution of a dividend of 7 per cent. was made about 12th July, 1897. The farm was sold, subject to the first mortgage, on 13th March, 1897, and the conveyance taken, through a nominal purchaser, to plaintiff in August, 1897. After providing for the first mortgage, there came out of the purchase money a balance of $600, which was paid by plaintiff and distributed among the creditors. Defendants filed their claim as creditors (but without disclosing the mortgage) in December, 1896, and received their share of the dividend in June, 1897.

It is proved that plaintiff had no notice or knowledge of the $250 mortgage till October, 1897, after the estate had been wound up and distributed.

Plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until disturbed by notice of the exercise of the power of sale in defendants' mortgage, on 10th May, 1903, and then this action was begun to invalidate the instrument or to stay proceedings thereon.

The evidence, so far as given, was for plaintiff, and it disclosed sufficient to justify a declaration that the mortgage was null and void ab initio as against creditors. We were pressed to hold that it was invalid under the clause of the statute referred to, by virtue of an irrebuttable presumption.

I am not disposed to go to that length, having regard to the confused and conflicting state of judicial opinion, and in the absence of any determinative decision on the very point, binding upon this Divisional Court. . . . But it is not necessary to deal with this point of law, as I think the defendants should be allowed to exhaust their evidence upon the defence, if they wish to do so, upon a further hearing of the case.

I cannot affirm the ruling that plaintiff has no status to sue. He comes into Court as assignee, and he offers to account for the land purchased by him on the usual footing of trusteeship for the body of creditors, and this relief may be worked out by a reference.

The reason for entertaining jurisdiction is, that the distribution of the estate as settled in 1897 is being disturbed by the assertion of defendants' rights under the mortgage. The existence of that mortgage should have been divulged,

and would thereupon have been dealt with before any distribution was made. Defendants are to blame for the delay and concealment. The attempt now made is to get paid their claim in full—by virtue of a security which the statute declares to be an unjust preference.

To procure equitable adjustment in the interests of all creditors, plaintiff is the proper person to sue as assignee. The situation is not different from what would have arisen had the purchaser of the farm been a stranger to the insolvent estate. Had a stranger bought, he would, in the circumstances disclosed, have been obliged to pay defendants' mortgage, but would have fallen back for relief upon the assignee, to be recouped the amount of the mortgage; and the assignee would then have had recourse to the body of creditors to repay the dividends received by them—such proportion as would make good the amount he had overpaid in the distribution of the supposed assets. This would be the proper result of the equities between a stranger who purchased and the assignee, the vendor, having regard to the substance of the transaction divested from any special modifications that might result from the method of conveyancing.

This suit is or may be properly constituted so as finally to determine the validity of defendants' mortgage and to shape subsequent relief in accordance with whatever the result may be.

If defendants pay costs occasioned by the former partial trial and this appeal, the case will go down to be tried out on all the evidence that may be adduced, and subsequent costs will be dealt with on the new trial.

If defendants decline this proposition, the judgment will be to vacate defendants' mortgage, with costs of action and appeal, and to direct the assignee to sell the farm at its present advanced value, and to account for and properly distribute all gains received by him as part of the estate since his purchase. He should undertake to do this forthwith, and with leave to defendants or any other creditor to apply if the administration out of Court is not deemed satisfactory. As against creditors' claims the Statute of Limitations cannot be set up, nor should it be.

MEREDITH, J., gave reasons in writing for the same conclusion.

IDINGTON, J., dissented, giving reasons in writing.

IDINGTON, J. OCTOBER 28TH, 1904.

CHAMBERS.

SHEPPARD PUBLISHING CO. v. HARKINS.

Discovery—Examination of Defendant—Scope of — Contract —Breach—Denial—Damages.

Appeal by defendant from order of Master in Chambers, ante 250, requiring defendant to attend for further examination for discovery.

W. T. J. Lee, for defendant.

W. J. Elliott, for plaintiffs.

IDINGTON, J., dismissed the appeal with costs to plaintiffs in any event.

MACMAHON, J. OCTOBER 28TH, 1904.

CHAMBERS.

REX v. TORONTO R. W. CO.

Criminal Law—Indictment of Electric Railway Company—Nuisance—Endangering Lives of Public—Removal from Sessions into High Court—Difficult Questions of Law.

Motion by defendants for a certiorari to remove an indictment found at the General Sessions of the Peace for the county of York on 5th October, 1904, into the High Court.

J. Bicknell, K.C., for defendants.

J. R. Cartwright, K.C., for the Crown.

MACMAHON, J.—The indictment contains four counts, the first of which charges that defendants, during the years 1901, 1902, 1903, and 1904, down to the date of the indictment, have been operating in the city of Toronto an electric

railway, and have been running cars by electric power for the purpose of carrying passengers upon the public streets and highways in the said city on which the tracks of the railway were laid; and that defendants had and have a large number of cars used for the purpose of operating the said railway for the purpose of carrying passengers upon the said streets and highways; and that defendants were bound to use only cars of such design and equipped with such proper and sufficient fenders, guards, and brakes as would avoid danger to human life; and that, in the absence of reasonable precaution and care, the cars so operated and run by defendants as aforesaid, might endanger human life; and that defendants are under a legal liability to take reasonable precaution to avoid such danger to human life in operating such cars as aforesaid; but defendants, during the time aforesaid, unlawfully neglected and omitted to take reasonable precautions to avoid danger to human life in the operation of their said cars upon the said streets and highways, to wit, by having in their charge and under their control and by maintaining and operating cars which are not of such design, and without such proper and sufficient fenders, guards, brakes, and appliances as would avoid danger to human life, and by improperly, illegally, and negligently maintaining, operating, and running the said cars, in consequence whereof the lives, safety, and health of the public, as well foot passengers as also other subjects of our Lord the King, during the time aforesaid, using the said streets and highways in the said city of Toronto, were endangered; and in consequence thereof the said corporation did thereby, during the time aforesaid, in the manner aforesaid, cause grievous bodily injuries to certain individuals, namely, William John Lee (then follow the names of 25 other persons); and that defendants, during the time hereinbefore set out, in manner aforesaid, unlawfully did commit a common nuisance, thereby then endangering the lives, safety, health, property, and comfort of the public, as well foot passengers as other subjects of our said Lord the King, against the form of the statute in that case made and provided, and against the peace of our Lord the King, his crown and dignity.

The second count charges that defendants, during the time and in the manner in the preceding count set out, did unlawfully commit a common nuisance, thereby then occasioning injury to the persons of certain individuals, to wit, William John Lee (then follow the names of the 25 other persons), against the form of the statute in such case made

and provided, and against the peace of our Lord the King, his crown and dignity.

The third count charges that defendants did unlawfully and negligently maintain and run cars not of proper type for service and comfort and of a type dangerous to human life, and did unlawfully and negligently omit to supply the cars operated by them as aforesaid with proper fenders, guards, brakes, and appliances to avoid danger to human life, and did maintain, run, and operate the same without reasonable precaution and care, causing thereby grievous bodily injury to the said William John Lee (and the other 25 persons named) against the form of the statute, etc.

The fourth count charges that defendants ran a number of their cars without taking reasonable care to avoid danger to human life in the maintenance and operation of their cars, and without providing the said cars with proper and sufficient fenders, guards, and brakes to avoid danger to human life, whereby the lives and safety of the subjects of our Lord the King using the said streets were imperilled and endangered, and the said subjects of our Lord the King could not go, return, etc., with their horses, coaches, etc., through and along the said streets upon which defendants operated their railway and ran the said cars as they ought and were wont and were accustomed to do without great danger and common nuisance to all His Majesty's subjects going, returning, etc., through and along such streets upon which defendants ran their cars as aforesaid, to the evil example of all others, and against the peace of our Lord the King, his crown and dignity.

An affidavit is filed, sworn to by one of the solicitors for defendants, in which he states:—

"3. Nice and intricate questions or points of law will arise in the trial of the said indictment, and it is important that the same should be tried before one of the learned Judges of the High Court of Justice.

"4. Among the questions of law which will arise for determination are:—(a) what are the duties which, independent of the statute passed by the Ontario Legislature, 1 Edw. VII. ch. 25, are imposed upon electric railway companies to protect negligent people from injury by the use of life-guards or fenders; (b) whether the jury has the right to require an electric railway company to adopt any particular style or kind of brake; (c) whether, under the guise of

charging a nuisance, a number of separate and distinct alleged offences can be grouped together in one count of an indictment; (d) whether the indictment sufficiently charges any offences against defendants; (e) whether the said indictment is not multifarious; (f) whether defendants can be indicted as for a nuisance for want of reasonable care in the operation of their cars."

It being sworn that difficult questions of law are likely to arise, and the specific grounds on which legal difficulties will occur being stated, which are amply sufficient, the order for a certiorari should go: Short & Mellor's Cr. Pr., p. 96; The King v. Soule, 5 A. & E. 539; Regina v. Hodges, 9 Jur. O. S. 665; Regina v. Josephs, 8 Dowl. 128.

MACLENNAN, J. OCTOBER 28TH, 1904.

C.A.—CHAMBERS.

BURR v. HAMILTON.

Appeal to Court of Appeal—Leave to Appeal—Ignorance of Change in Law—Consent—Acquiescence.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of STREET, J., dismissing an appeal from a Master's report. The application was made under amended sec. 76 (a) of the Judicature Act. In ignorance of the change of the law which made it necessary to obtain leave, notice of intention to appeal was served in due time according to the old law, and that was followed by delivery of reasons of appeal and also of reasons against appeal without objection that leave had not been obtained. On discovering that leave was necessary, plaintiffs made the motion.

W. M. Boultbee, for plaintiffs.

C. A. Moss, for defendants.

MACLENNAN, J.A.—The reasons for and against appeal shew that the case is fairly arguable. Defendants could have consented to the appeal being brought to this Court,

and they have gone a long way towards consenting by accepting plaintiffs' reasons and answering them. Order made for leave as asked. Costs in the appeal.

MACMAHON, J. OCTOBER 29TH, 1904.

CHAMBERS.

RE MURRAY.

Life Insurance—Change of Beneficiary—Incomplete Instrument—Designation by Will—Validity—Infant—Payment into Court.

Motion by the executors of the will and codicil of Clara Louisa Murray for an order under Rule 938 directing the applicants as to the disposition of $500 arising from an insurance in the Independent Order of Foresters upon the life of the testatrix.

The testatrix died on the 14th May, 1904. The will and codicil were both executed on the day of her death. The will directed a sale of her goods and chattels and a division of the proceeds among her three children, and made the following specific bequests: "My wedding ring to Fanny Elizabeth, watch chain to May Lucy, silver brooch to Edna—life insurance to Edna."

On 27th February, 1903, the testatrix, during the lifetime of her first husband, Walter Wallen Gauen, applied for beneficiary membership in the Independent Order of Foresters. In her application she designated her three daughters as beneficiaries, and they were so named in the benefit certificate issued.

On 16th April, 1904, the deceased made a will by which she devised and bequeathed to her second husband, Wesley Everard Murray, all her "property and estate of every kind upon condition that he will out of the said property maintain my daughter Grace Edna Gauen during her minority, as long as my daughter continues to reside with him."

The deceased on 20th April, 1904, signed an application for change of beneficiaries in which she designated her hus-

band as beneficiary, adding "Grace Edna Gauen's support," but this was not sent in to the Order till after the death of the testatrix.

The husband claimed the money under this application, contending that it was a sufficient declaration of a change under secs. 151 and 160 of the Insurance Act.

The daughter Edna claimed the money under the last will of the deceased.

D'Arcy Tate, Hamilton, for executors.

F. W. Harcourt, for Grace Edna Gauen.

E. H. Ambrose, Hamilton, for the other daughters.

W. M. McClemont, Hamilton, for Wesley E. Murray.

MacMahon, J.—By sec. 160 (1) of the Insurance Act, R. S. O. 1897 ch. 203, "the assured may, by an instrument in writing attached to or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made so as to restrict or extend, transfer or limit, the benefits of the policy," etc.

That section also provides that the insured may by his will make or alter the apportionment of the insurance money; and an apportionment made or altered by will shall prevail over any other made before the date of the will, except so far as such other apportionment has not been acted on before notice of the apportionment by will.

Section 251 of the constitution of the Order of Foresters requires that the application for change of beneficiaries must be on form No. 14, filed in the "court" (or local branch) to which the insured belonged, filled in, and properly executed, setting forth fully and clearly the changes the insured desires to make, and surrendering to the "court" his benefit certificate.

The application for a change of beneficiary was not delivered to the record keeper of the local court, nor was the benefit certificate surrendered, so there was no compliance with sec. 251 of the constitution. . . .

[Reference to Ireland v. Ireland, 42 Hun 212; Knights of Honour v. Nairn, 60 Mich. 44.]

As the policy issued by the Foresters was the only life insurance held by the testatrix, the bequest to her daughter Edna

in the will of 14th May is, according to Re Cheesborough, 30 O. R. 639, sufficient under sec. 160 of the Act. So that, even if it could be held that there had been a valid apportionment by the application alleged to have been made by the instrument dated 20th April, 1904, the apportionment made by the will would prevail, unless the husband Wesley E. Murray is what he claims to be, a beneficiary for value. He alleges that he paid the premiums on the policy since his marriage to the deceased. Section 251 (c) of the constitution requires that before a change of beneficiaries takes place, the insured must furnish satisfactory evidence that the insured, and not the beneficiary, has paid the premiums on account of the benefit certificate; and in the application to change the beneficiary under which the husband claims, the insured states that she has paid the premiums. The application does not state that he (Wesley E. Murray) is a beneficiary for value; and by an amendment made by 1 Edw. VII. ch. 26, sec. 15, to sec. 151 (3) of the Insurance Act, it is provided that "a beneficiary shall only be a beneficiary for value when he is expressly stated to be so in the policy." Bunnell v. Shilling, 28 O. R. 336, is therefore no longer an authority.

In the will of 16th April, by which the testatrix devised all her property and estate of every kind to her husband, the life insurance is not mentioned, and it would not pass. But, even if it could be held to pass, it is upon condition "of his supporting the testatrix's daughter Edna Gauen during her minority, and he would therefore be a trustee for that purpose. And also by the application for a change of beneficiary he would, had the change been made, have been a beneficiary for "Edna Gauen's support," and a trustee of the $500 for that purpose. So that, if it were possible in either case to hold in favour of the husband, there would have been a direction to bring the amount into Court.

The change made by the will of 14th May, making Edna Gauen the beneficiary, must prevail. The Order of Foresters having paid the amount of the policy into Court, that sum will, less the costs of the executors and the official guardian, be transferred to the credit of this matter. See Re Humphries, 18 P. R. 289.

BRITTON, J. OCTOBER 29TH, 1904.

TRIAL.

HILL v. TAYLOR.

Negligence — Collapse of Municipal Building — Injury to Workman — Liability of Employers — Contractors for Work — Liability of Municipal Corporation — Employment of Architect—Independent Contractor.

Plaintiff was seriously injured in the collapse of a large building which was being erected by the corporation of the city of Ottawa for the purpose of an annual fat stock exhibition, and brought this action against Taylor & Lackey, his employers, who were the contractors for the carpenter work, and against the city corporation, to recover damages for his injuries.

The action was tried with a jury at Ottawa.

W. Wyld, Ottawa, and Glyn Osler, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendants Taylor & Lackey.

T. McVeity, Ottawa, for defendant corporation.

BRITTON, J.— . . . The city employed one M. C. Edy, an architect, to prepare the plans and specifications, and then let the work to different contractors for the erection of the building, in accordance with such plans and specifications. Defendants Taylor & Lackey were the contractors for the carpenter work, including putting on the roof and putting in the supports necessary to sustain it. Plaintiff was a workman employed by Taylor & Lackey, and at the time of the collapse was rightfully at his work inside the building.

At the trial questions were submitted to the jury, who found that the falling of the roof was occasioned by the breaking of the truss rods, and that the architect, M. C. Edy, was guilty of negligence in providing for truss rods of insufficient strength. The jury completely exonerated defendants Taylor & Lackey from any negligence and from any knowledge that the building was unsafe. The jury assessed the damages at $2,500 against the city corporation, in case plaintiff is entitled to recover from the corporation.

Is plaintiff, upon the undisputed facts and upon the finding of the jury of negligence on the part of the city architect, Edy, entitled to recover? At the trial I reserved my decision upon the motion of the city for a nonsuit, and also upon the city's motion for judgment. The case is one of considerable importance.

There was no evidence of knowledge on the part of the city of incompetence of the architect; indeed, apart from this particular work, there was no evidence that Mr. Edy was, in fact, in any way incompetent. He was an architect of good standing, of considerable experience, and had for a long time carried on his business or profession at Ottawa, having been employed in the construction of many buildings.

There was no evidence of any negligence or want of care in employing him. Edy was, as found, in fact negligent, or had not the requisite professional knowledge to enable him properly to specify for so large a building and with such a roof. It must be assumed for the purpose of this case that the city corporation were the owners of the land, and that the building was being lawfully erected thereon by them for the use of the public. This work was not necessarily dangerous. It was not in the nature of a nuisance—not in the natural order of things likely to injure any one. The architect was employed to do his part of the work in his own way and according to his supposed skill and knowledge. If he had properly done his work no damage would have resulted. If it had been part of the instructions of the city to the architect that the roof was to be of a certain span or size, and was to be supported by rods of a particular size, or if the city in any way interfered with the work of the architect, there might be liability; but here, putting in the rods found to be defective was not the necessary consequence of what the architect was employed to do. He was to determine the size and strength of the iron to be used, and he was an independent contractor as to that.

It was argued by counsel for plaintiff that the city in erecting the building owed a duty to the public that the building should be safe, and that duty could not be delegated. . . .

[Joliffe v. Woodhouse, 10 Times L. R. 553, Hudson's Building Cases, vol. 1, p. 71, Walker v. McMullen, 6 S. C. R. 241, referred to.]

What was the duty of the city to the public in the erection of the building in question? It was not that they should, by their permanent officers, whose duties are prescribed by statute, do the work. No member of the city council need have any skill in or knowledge of building. . . . The duty of the city was, to let the work in its different branches to persons supposed to be skilled therein.

What did the city undertake to do in erecting this building? It undertook to erect it, not by giving directions to any general officer or servant of the corporation or to a committee of the council, but to a skilled person. I think the city performed its duty, and answered its undertaking to the public, in being careful to employ an architect believed to be competent, and in letting the work to independent contractors. . . . The architect was employed "to produce a given result," but in the actual execution of that work he was not under the direction or control of the city. . . .

[Reference to Hall v. Lees, [1904] 2 K. B. 602; McCann v. City of Toronto, 28 O. R. 650; and cases cited by Mr. Labatt in his article on Liability of Employers in 40 C. L. J. pp. 532, 533.]

I think the weight of authority is against holding the city liable. I am of opinion that this is not a case for the application of the maxim "respondeat superior." I think there was not between Edy and the city the relation of master and servant such as to make the city liable for the injury to plaintiff which resulted from Edy's negligence. . . .

I must direct judgment to be entered for all the defendants.

If upon the evidence and the findings of the jury the city are liable, plaintiff will be entitled to recover the $2,500, as assessed, with costs. I understood that counsel for Taylor & Lackey did not ask for costs, and, for reasons which appear to me sufficient, I think judgment should be without costs as to all defendants.

BRITTON, J. OCTOBER 29TH, 1904.

TRIAL.

MAUGHN v. GRAND TRUNK R. W. CO.

Water and Watercourses — Railway—Riparian Proprietors—Diversion of Water—Sale of Water—Injury to Riparian Proprietor below — Injunction — Declaration of Right — Damages.

Plaintiff was the owner of part of lot 2 in the 1st concession from the bay in the township of York. On this land was a pond, fed by a natural stream flowing from the north. Defendants' line of railway crossed this stream in the township of York. Some years before action defendants erected a pumping station and plant on the bank of this stream, on the northerly side of their right of way, and interfered with the natural flow of the stream, and diverted water therefrom, putting the water into their tanks, and using it not only for their own purposes, for their locomotives, but selling it to the corporation of the village of East Toronto, and supplying that village and its inhabitants with water for fire protection and domestic and other purposes. This diminished the flow of water to plaintiff's pond, and the water in the pond, by reason of the diversion of water from the stream, became stagnant and foul, to plaintiff's damage; and he brought this action for an injunction and damages in respect of the diversion.

I. F. Hellmuth, K.C., and D. W. Saunders, for plaintiff.

W. R. Riddell, K.C., for defendants.

BRITTON, J.—The evidence shews beyond doubt that plaintiff's right to the flow of this stream has been interfered with by defendants. The case seems wholly covered by authority: McCartney v. Londonderry and Lough Swilly R. W. Co., [1904] A. C. 301. This case overrules Earl of Sandwich v. Great Northern R. W. Co., 10 Ch. D. 707; but, even if the latter case was authority, defendants could hardly hope to succeed, as here the water taken was largely not for defendants' own purposes, and the quantity taken was more than a reasonable quantity.

Defendants as riparian proprietors have no right to use the water of this stream, to the prejudice of plaintiff, to

supply East Toronto: see Wilts and Birts Canal Co. v. Swindon Waterworks Co., L. R. 9 Ch. 451, L. R. 7 H. L. 697.

Plaintiff is entitled to an inquisition as asked.

It appears from the evidence that plaintiff will not suffer any further damage or be inconvenienced by what defendants have done or are doing during the autumn or coming winter or during the freshets of 1905, so I think complete justice may be done by allowing defendants a reasonable time to make other arrangements with the village of East Toronto for a water supply.

The injunction should not issue until 1st May, 1905.

Judgment will be for plaintiff for a declaration of plaintiff's right to the flow of the water; for a declaration that defendants have wrongfully diverted the water which flows into and supplies the pond on plaintiff's land . . . ; for an injunction restraining defendants perpetually from further wrongful diversion; and for a reference to the Master to inquire and state what damages, if any, plaintiff has sustained by reason of such wrongful diversion of water as stated; damages to be limited to such as are not barred by the Statute of Limitations. Costs up to and inclusive of trial to be paid by defendants. Further directions and subsequent costs reserved.