The
Ontario Weekly Notes

VOL. XV. TORONTO, JANUARY 3, 1919. No. 17

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 23RD, 1918.

*FLEMING v. TOWN OF SANDWICH.

Municipal Corporations—Opening Street through Land Owned by Plaintiff—Expropriation—Assessment of Cost of Opening Street—By-law Differing from Notice Given under sec. 11 of Local Improvement Act—Right of Appeal under sec. 9 (2) (4 Geo. V. ch. 21, sec. 42)—Invalidity of By-law—Necessity for Compliance with Statutory Requirements—Remedy by Appeal to Court of Revision—Sec. 36 of Act.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial at Sandwich on the 5th October, 1918, dismissing the action, which was brought for a declaration that by-law No. 735 of the defendants, the Municipal Corporation of the Town of Sandwich, and a certain assessment made in accordance with the by-law, were invalid, and for an injunction restraining the defendants from enforcing the assessment and proceeding with the work authorised by the by-law.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. H. Rodd, for the appellant.

John Sale, for the defendants, respondents.

The judgment of the Court was read by RIDDELL, J., who said that the plaintiff was the owner of land in the town of Sandwich—an irregular triangular block; he intended to subdivide this into lots and to put the lots upon the market. The defendants desired to connect two streets by a new street opened across the plaintiff's block, and to this the plaintiff had no objection. A committee of

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

the defendants' council made an agreement with the plaintiff in regard to the terms upon which the scheme should be carried out, and the agreement was approved by the council. The council passed a by-law for opening the new street and a by-law for the expropriation of the necessary land. A disagreement took place between the council and the plaintiff, in consequence of which the plan of subdivision of his block was not registered. The council then passed a by-law, No. 735, whereby the defendants were to pay only one-third of the cost of opening up the proposed street, the plaintiff to pay the remainder, except what was assessed against the non-abutting property. This was the by-law attacked by the plaintiff.

The learned Judge said that the by-law and the assessment purported to be made in pursuance of a statute, and the statutory provisions must be strictly complied with, "in the sense that non-observance of any of them is fatal:" Re Hodgins and City of Toronto (1909), 1 O.W.N. 31; Goodison Thresher Co. v. Township of McNab (1909), 19 O.L.R. 188, 214; Township of Barton v. City of Hamilton (1909), 13 O.W.R. 1118, 1131; In re Gillespie and City of Toronto (1892), 19 A.R. 713, affirmed in the Supreme Court of Canada on the 1st May, 1893: Coutlee's Digest, cols. 873, 874.

Here the notice given by the defendants differed from the by-law in the amount of money which the defendants must pay, and therefore also the amount which the plaintiff must pay.

That a prerequisite to a by-law being validly passed is publication of the notice of the council's intention under sec. 11 of the Local Improvement Act, R.S.O. 1914 ch. 193, is the opinion of the Ontario Railway and Municipal Board: Re Kemp and City of Toronto (1915), 21 D.L.R. 833, 835; and, by reason of the defendants proceeding without a new notice, the plaintiff was deprived of his right to appeal to the Ontario Railway and Municipal Board under sub-sec. 2 of sec. 9 of the Local Improvement Act, as enacted by 4 Geo. V. ch. 21, sec. 42.

The Courts are not becoming more lax in insisting on the requirements of statutes being strictly observed by municipalities: see Anderson v. Vancouver (1911), 45 Can. S.C.R. 425.

It was urged that the matter was for the Court of Revision under sec. 36 of the Local Improvement Act; but that section does not debar one interested from attacking the proceeding as invalid. Assuming that there might otherwise be some ground for the argument, it was wholly swept away by sub-sec. 2 of sec. 36.

The appeal should be allowed, and the prayer of the plaintiff as set out in his statement of claim granted, with costs here and below.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 23RD, 1918.

*RE LABUTE AND TOWNSHIP OF TILBURY NORTH.

Municipal Corporations—Drainage—Complaint of Ratepayer to Council as to Condition of Existing Drain—Resolution of Council Requiring Engineer to Make a Survey of the Drain and Report—Adoption of Survey and Report—By-law Passed to Carry Report into Effect—Report Going beyond Repair of Drain—Ratification by Council—Municipal Drainage Act, R.S.O. 1914 ch. 198, secs. 75, 77.

An appeal by the township corporation from an order of the Drainage Referee quashing a drainage by-law passed by the township council on the 8th May, 1918.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. H. Rodd, for the appellant corporation.

O. L. Lewis, K.C., for Claude Labute, a land-owner affected by the drainage scheme, upon whose application the order appealed from was made, the respondent.

RIDDELL, J., read a judgment in which he said that at a meeting of the township council on the 17th September, 1917, one Holland complained of the bad state of repair of the Macklem creek drain and asked the council to have it repaired. The council instructed the clerk to write to an engineer named Newman to make a survey of the drain and report. This engineer made a survey and reported to the council on the 16th February, 1918, a scheme for new work and new assessments; his report was adopted by the council, and the by-law in question was passed to carry it into effect.

The Referee's order quashing the by-law proceeded on the ground that the resolution authorised the engineer simply to report a scheme to repair the drain—it did not give him authority to vary the assessments or treat the work as a new work. The Referee followed his own decision in Gibson v. West Luther (1911), 20 O.W.R. 405.

Assuming that that case was good law, it did not apply here. There was no specific instruction to the engineer to report on the repair of the drain. The resolution was "to make a survey of the same," i.e., of the drain, "and report." The council had the right to require a report of the most extensive character without any petition or complaint from any one (Municipal Drainage Act,

R.S.O. 1914 ch. 198, secs. 75, 77), and there was nothing to prevent the council going beyond the complaint of Holland. Any complaint that the engineer went beyond his mandate should come from the council; and the council had approved and adopted the report, thereby ratifying and adopting the engineer's interpretation of his instructions.

The appointment of an engineer may be ratified by the adoption of his report: Tilbury East v. Romney (1895), 1 Clarke & Scully 261; Township of Camden v. Town of Dresden and Township of Chatham (1902), 2 Clarke & Scully 308, 313, 314, affirmed in the Court of Appeal, Re Township of Camden and Town of Dresden (1903), 2 O.W.R. 200.

The adoption of the engineer's report was a ratification of his making the report, and therefore equivalent to previous instructions. A subsequent ratification has a retrospective effect and is equivalent to a prior command: Broom's Legal Maxims, 8th ed., p. 673; Maclean v. Dunn (1828), 4 Bing. 722; Wilson v. Tumman (1843), 6 M. & G. 236, 242. The ratification can be only of an act which the party had the power to command at the time it was done: Ashbury Railway Carriage and Iron Co. v. Riche (1875), L.R. 7 H.L. 653; the ratification will not be effective if the statute requires a previous express mandate.

It was admitted that the council could command such a survey and report as were made in this case; and there was nothing in the statute requiring an express direction before the report was made.

Reference to Re Johnston and Township of Tilbury East (1911), 25 O.L.R. 242; Re Stephens and Township of Moore (1894), 25 O.R. 600, 605.

The appeal should be allowed and the case sent back to the Referee to deal with it on the merits. The respondent should pay the costs of the appeal—all other costs to be dealt with by the Referee.

CLUTE, J., agreed with RIDDELL, J.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed in the result.

KELLY, J., was of opinion that, in the circumstances of the case, the by-law should not have been quashed.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 27TH, 1918.

*JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. W. CO.

Constitutional Law—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140—Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Jurisdiction of Court to Award Personal Judgment where Lien-claim not Enforceable—Secs. 6 and 49 of Act—Charge on Percentage to be Retained by Owner—Sec. 12 (3) of Act.

Appeal by the defendants the Canadian Northern Railway Company and cross-appeal by the plaintiffs from the judgment of MASTEN, J., 43 O.L.R. 10, 14 O.W.N. 159.

The appeal and cross-appeal were heard by MULOCK, C. J. Ex., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

W. N. Tilley, K.C., and A. J. Reid, K.C., for the defendants the Canadian Northern Railway Company.

A. C. McMaster, for the plaintiffs.

H. S. White, for the defendants Foley Welch & Stewart.

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

The Attorney-General for Canada did not appear.

SUTHERLAND, J., read a judgment in which he said that the three questions before Masten, J., were: (a) Can a lien claimed under the Mechanics and Wage-Earners Lien Act, R. S. O. 1914 ch. 140, exist or be enforced against the property of the Canadian Northern Railway Company? (b) If not, can the plaintiffs proceed to obtain judgment under sec. 49 of the Act, or otherwise, in these proceedings? (c) Are the provisions of the Act conferring jurisdiction on the special officers referred to in sec. 33 of the Act intra vires?

The learned Judge below answered the first question in the negative, following Crawford v. Tilden (1907), 14 O.L.R. 572; and his decision was right.

In regard to the second question, Sutherland, J., said, after referring to the judgment of Masten, J., and the cases therein cited, that the prime purpose of the Act was to enable a person who had supplied labour or materials to establish a lien and thus acquire authority to sell so as to realise his claim therefor. The lien is created by statute; it was non-existent at common law.

Reference to King v. Alford (1885), 9 O.R. 643, 647, and to secs. 6 and 49 of the Act.

The lands in question not being subject to a lien under the Act, it cannot properly be held that the Act, which fundamentally aims at giving a lien to specified classes of persons who may assert and establish claims for work or materials, and who can as a result acquire liens thereon and utilise these to obtain payment of their claims, can be effectively resorted to by any person where the lands from the outset could not be made legally liable to any lien thereunder.

Sections 6 and 49 must, when read together, be construed to refer only to lands, including railway lands, to which the Act can apply, but not to railway lands to which liens can in no case under the Act legally attach.

If the construction now suggested as the proper one were not so, a person having a claim for work or material might, as a claimant under the Act, and by asserting that claim thereunder and in the manner therein provided, even though in no circumstances could he or any other claimant convert a claim into a lien, compel his adversary to fight the claim itself, whatever the amount, in the proceedings thus commenced and before the tribunal provided in the Act, being thus deprived of his right of defence before the usual tribunal.

Kendler v. Bernstock (1915), 33 O.L.R. 351, 353, distinguished.

A further argument advanced on behalf of the plaintiffs was, that a charge attached to the percentage required to be retained by the owner under sec. 12 of the Act. But, when sub-sec. 3 of sec. 12 is referred to, it is plain that it is the lien which is to be a charge upon the amount so directed to be retained; and, if no lien is established, the section cannot apply so as to aid the claimant.

It was unnecessary to deal with the third question.

The defendant railway company's appeal should be allowed with costs, and the plaintiffs' cross-appeal dismissed with costs.

MULOCK, C.J., Ex., agreed with SUTHERLAND, J.

RIDDELL, J., agreed in the result, for reasons stated in writing.

LATCHFORD and KELLY, JJ., agreed with RIDDELL, J.

Defendant company's appeal allowed; plaintiffs' appeal dismissed.

SECOND DIVISIONAL COURT. DECEMBER 27TH, 1918.

*HUBBS v. BLACK.

Cemetery—Right of Burial in Plot—Agreement between Owner and Near Relation—Consideration—Part Performance—Erection of Monument—Presumption—Admission of Oral Evidence—Statute of Frauds—Grant of Land—Possession for Ten Years—Occupation—Limitations Act—Easement or License.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action for trespass to a cemetery plot, and to compel the defendant to remove the body of her late husband from the plot, and to restrain the defendant from further trespassing on the plot.

The defendant claimed to be the owner of the eastern part of the plot and to have been in possession thereof for 15 years.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

E. G. Porter, K.C., for the appellant.

H. H. Davis, for the defendant, respondent.

CLUTE, J., in a written judgment, said that both the plaintiff and the defendant claimed title through William Babcock (now deceased), who was the brother of the defendant and the uncle of the plaintiff. The plaintiff claimed as devisee under the will of Babcock. Babcock, in or before 1904, purchased the plot for $10. His sister, the defendant, being then also about to buy a plot in the same cemetery, was informed by William Babcock that she need not do so; that he would give her the eastern part of the plot for the purpose of the burial of herself and husband. Thereupon the defendant refrained from purchasing a plot, and purchased a monument, and, with the consent and in the presence and with the assistance of William Babcock, proceeded to erect it on the easterly part of the plot, where it had ever since remained. At the time of the erection, the names of the defendant and her husband were inscribed upon the monument and so remained. In this way the defendant had been in possession of the easterly portion of the plot ever since.

The fact of the monument having been so erected by the defendant with the consent of Babcock raised a strong presumption of some agreement or arrangement existing between Babcock and the defendant sufficient to let in oral evidence of an agreement between the parties. The agreement was fully proven by the

defendant and amply corroborated by the erection of the monument upon the plot.

Reference to Lester v. Foxcroft (1701), Colles's P.C. 108, White & Tudor's L.C. in Eq., 7th ed., vol. 2, p. 460, Shirley's L.C., 9th ed., p. 127; Dickinson v. Barrow, [1904] 2 Ch. 339; Mundy v. Jolliffe (1839), 5 My. & Cr. 167.

In this case there was an agreement, for valuable consideration, and there was part performance which permitted that agreement to be shewn and parol evidence to be admitted for that purpose.

Again, the defendant had been in possession of the plot for more than 10 years, and under the Limitations Act her possessory title was valid. It was not denied that the possession and occupation by the defendant was complete so far as the portion of the land upon which the monument stood was concerned; but it was denied that this included that portion of the plot required for the burial of the defendant and her husband. In that the learned Judge was unable to agree. The defendant was not a trespasser in what she did. The placing of the monument had relation to the portion of the plot given to her by her brother for the purpose of the burial of herself and her husband; and the possession of the part occupied by the monument carried with it possession of the plot given to her by her brother.

It was contended by counsel for the plaintiff that the defendant had no more than an easement or license, referring to Bryan v. Whistler (1828), 8 B. & C. 288; but that case had no application to the present. The plot in this case was obtained for the express purpose of burial, and there was good consideration and a part performance in the defendant refraining from purchasing and by the erection of the monument. Some agreement was intended, and parol evidence was admissible to shew what that agreement was. If the grant was of an easement, there was an interest in land to which it could attach—it was not an easement in gross. The Bryan case was referred to in Ashby v. Harris (1868), L.R. 3 C.P. 523, 529; see also McGough v. Lancaster Burial Board (1888), 21 Q. B.D. 323, 327. However, upon the facts, the agreement was not for an easement, but constituted a grant of land for valuable consideration.

The appeal should be dismissed with costs.

RIDDELL and SUTHERLAND, JJ., read judgments agreeing in the result.

KELLY, J., also agreed in the result, for the reasons given by SUTHERLAND, J.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 27TH, 1918.

DOUGLAS v. BURY.

Contract—Sale of Timber—Agreement in Writing—Prices of Different Kinds of Timber—"Mill-run"—Meaning of—Terms Used in Document not Understood by Vendor—Fraud not Shewn—Case not Made for Reformation—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of BRITTON, J., 14 O.W.N. 241.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

E. G. Porter, K.C., for the appellant.

W. J. Elliott, for the defendants, respondents.

CLUTE, J., in a written judgment, said that the plaintiff's claim was to recover a balance alleged to be due on a sale of lumber by the plaintiff to the defendants, under a written agreement as follows:—

"We have this day purchased from you stock of birch, maple, elm, basswood, and ash at seller's mill at Wallace, Ont., sawn to buyers' order at $23.50 per M. mill-run, mill-culls and hearts out, and mill-culls at $8.50 f.o.b. cars Wallace, Ont. (dead culls and hearts not included in this sale).

"It is understood that buyers are to advance up to $12 per M. before stock is actually fit to ship. Shipment after 90 days on sticks. Advance to be in the form of drafts or notes at 3 months on buyers and to be discounted by seller and discount to be paid by seller.

"Inspection by Robert Bury & Co.

"Terms 2% 30 days from date of shipment.

"Robert Bury & Co.,
"per F. M. Thompson.

"Agreed—
"W. J. Douglas."

The plaintiff said that he had no experience in the manufacture, sale, or handling of lumber; and that, when the defendants, through their agent Thompson, who was an expert, desired to purchase his stock as "mill-run," he (the plaintiff) did not understand or know what the grading of the lumber would be on such a sale, and inquired of Thompson the meaning of the term "mill-run," and was informed by Thompson that "mill-run" meant all lumber that would contain 25 per cent. of sound lumber, and that anything

under that would be included as mill-culls except dead culls, which would not be included; and that Thompson produced and shewed the plaintiff a book called "National Association Rules for Scaling Lumber," by which he verified his explanation.

There was no dispute as to the measurement; the question was wholly one of grade. It was not disputed that the conversation alleged by the plaintiff took place, and that the book stated that "mill-run" meant "the full run of the log one-third common and better." "No. 3 includes all lumber which will cut 25 per cent. and over sound." Thus there was no dispute as to the accuracy of the plaintiff's statement and as to the information he received from Thompson and from the book.

The written agreement was prepared and signed by the parties after this conversation; and the agreement contained the words "mill-culls and hearts out." The plaintiff said that these words were not explained to him, that he did not understand them, and that they ought not to operate to his prejudice.

It was not disputed by the plaintiff that the measurement of the lumber as paid for by the defendants was correct if the agreement should stand as it reads.

The trial Judge found against the plaintiff; and there was evidence to support the finding.

Having regard to the whole evidence, independently of the finding of the trial Judge, the written agreement between the parties had not been successfully attacked. No doubt there was the conversation stated by the plaintiff, but he had not made out a case of fraud nor a case for reformation of the agreement.

There was a further question—as to tie-sidings. These were settled for at $12 per thousand, which was the ruling price for tie- sidings at the time of the contract; but the plaintiff contended that they were included in the agreement at $23.50 per thousand. This did not appear from the evidence. The price paid was the current price. The lumber included in the contract was sawn to order, and did not include tie-sidings; they were afterwards arranged for. What was said in respect of them was rather indefinite, but it was acted upon as a sale and paid for, without dissent by the plaintiff, at the current price.

The appeal should be dismissed with costs.

RIDDELL, J., for reasons stated in writing, agreed in the result.

SUTHERLAND, J., agreed with RIDDELL, J.

KELLY, J., agreed in the result, stating reasons in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 27TH, 1918.

ROBINSON v. ROBINSON.

Husband and Wife—Grain and other Chattels Seized on Wife's Farm under Execution against Husband—Claim by Wife—Interpleader Issue—Evidence—Finding of Trial Judge in Favour of Wife as to Grain Grown on Farm—Finding in Favour of Execution Creditor as to other Chattels—Reversal on Appeal.

Appeal by the defendant (claimant) from the judgment of LATCHFORD, J., 14 O.W.N. 199, finding an interpleader issue in favour of the plaintiff (execution creditor).

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and KELLY, JJ.

William Proudfoot, K.C., for the appellant.

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

The judgment of the Court was read by CLUTE, J., who said that the trial Judge had found that the farm stock and implements were exigible under the plaintiff's execution against Thomas Robinson, the defendant's husband.

The documents in evidence were joint promissory notes signed by the defendant and her husband, given for the chattels seized, and afterwards paid by the defendant. Having regard to the surrounding circumstances: to the fact that the husband had sold out his own farm and stock; that the property seized had been paid for entirely by the defendant; that she was in possession of the farm upon which they were seized and was receiving the produce thereof, and was found entitled to the crop seized; that there was no suggestion of fraud on the part of either husband or wife; that there were no outstanding debts of the husband to suggest that the arrangement was entered into to defraud creditors; that the judgment against the husband was not for debt, but for a tort; and that there was no evidence to contradict that of the defendant and her husband; it must be held that the plaintiff in the issue had failed to establish that the property seized was exigible under his execution.

The appeal should be allowed with costs and the issue should be found in favour of the defendant with costs.

Appeal allowed.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P., IN CHAMBERS. DECEMBER 23RD, 1918.

RE KRAFT.

Insurance (Life)—Designation of Father of Insured as Beneficiary—Assignment of Right by Beneficiary to Wife of Insured—Second Designation by Insured of Original Beneficiary—Effect of.

Motion by the Standard Life Assurance Company for leave to pay into Court certain insurance moneys arising from a policy upon the life of the deceased; and motion by Dilman Kraft, the father of the deceased, for payment of the insurance moneys to him.

G. L. Smith, for the Standard Life Assurance Company.

M. A. Secord, K.C., for Dilman Kraft.

J. M. Ferguson, for the widow of the deceased assured, asked that the money should be paid to her.

E. C. Cattanach, for the infant son of the deceased, asked for payment to him.

MEREDITH, C.J.C.P., in a written judgment, said that the single question involved was, whether the second designation, made by the insured, of his father, was valid.

After the first designation of the father, the father "assigned" his right under it to the son's wife, and afterwards he "designated" the son's son: but that "designation" was admittedly ineffectual, even if treated as an equitable declaration of trust, because of the prior "assignment" to the son's wife. The insured admittedly and obviously could change the beneficiary, but a beneficiary could not.

For reasons which, apparently, son and father considered imperative, they desired, and took steps, to deprive the wife and her son of all interest in the insurance: the means taken were the second designation by the insured of his father; which, if valid, had the desired effect.

But, though it was admitted and was obvious that the insured had power to deprive his son and wife, because he had power to deprive his father of his former right, and they took only under the father and had no higher right than he, it was contended that that object was not effected by the second designation of the father—that the insured had no power to make the later designation directly of him; in effect, that that could be effected only by first

a designation to some third person and after that a designation to the father again.

That contention the learned Chief Justice could not consider seriously. If it was to be held that the law required such useless, for any sensible purposes, "circumlocution," some other Court must put the stigma upon it.

If the "assignment" to the wife—assuming the interest of the father, a changeable beneficiary only, to have been assignable, without considering the point—though really in effect but a secondary designation, was an assignment or declaration of trust for value, effect should now be given to it, not because the second designation was invalid, but because equity would attach to the fund again in the father's hand for his own benefit the right of the wife in it previously acquired for value.

An order might now be taken out for payment of the money in question into Court, as sought, by the insurance company; and, should no appeal against the Chief Justice's ruling as to the right to the money be taken within 30 days, an order might then be taken out for payment out of Court of the money to the father of the insured, less the costs of all parties to this motion, to be paid to them respectively.

MIDDLETON, J. DECEMBER 23RD, 1918.

RE ROBB.

Will—Construction—Effect of Codicil—Revocation of Gifts Made by Will—Substituted Residuary Clause—Devise—Estate of Devisee—Fee Simple—Gift of Income for Limited Period.

Motion by the Toronto General Trusts Corporation, executors of George C. Robb, deceased, for an order determining certain questions as to the construction of his will arising in the administration of his estate.

The material parts of the will were as follows:—

"I give devise and bequeath my life insurance to my wife.

"I give devise and bequeath to my daughter Sophia L. J. the sum of one thousand dollars and to my son Alexander M. the sum of one thousand dollars and the vacant lots on St. Clair Ave. and Kendal Ave.

"To my wife and to my daughter Sophia L. J. during their joint lives and to the survivor of them I give devise and bequeath the house and property known as No. 239 St. Clair Avenue including the furniture and other contents of said house as are legally mine.

"To my son Alfred P. I give devise and bequeath the property in the town of Kerrville in the County of Kerr State of Texas.

"I give devise and bequeath all the rest of my estate to my executor in trust to pay to my wife during her life the income derivable from it and at her death to have the estate divided into eleven equal portions one such portion to be paid to my grandson John George Drummond and two portions to each of my children Alfred Pearce Robb Edward George Robb Alexander McNab Robb Davina Galbraith Menzies and Sophia L. J. Robb."

A codicil to the will was, so far as material, as follows:—

"As my wife has died before me I wish my life insurance to be collected and paid to my daughter Sophia and my son Alexander two-thirds of the money to my daughter and one-third to my son.

"The money belonging to my estate and other property not disposed by my will such as the property No. 6 Major St. and money loaned on mortgages I wish the income from these to be paid to my daughter Sophia and to my son Alexander one half to each till such time as the mortgages are repaid and No. 6 Major St. disposed of when my whole estate is to be divided into five equal portions and paid to each of my children."

The motion was heard in the Weekly Court, Toronto.

E. L. Middleton, for the executors.

J. A. Paterson, K.C., for Davina Galbraith Menzies.

G. A. Archibald, for other adult beneficiaries.

F. W. Harcourt, K.C., for the infant grandchild of the testator.

MIDDLETON, J., in a written judgment, said that the key-note of the codicil was the death of the wife. The insurance money given her by the will was to be divided between the daughter and son.

The other clause was intended to be a new residuary clause taking the place of the residuary provisions of the will, and not as a revocation of all the specific gifts found in the will. It operated upon the money and property not disposed of by the will. The gifts of $1,000 to the son Alexander and the daughter Sophia thus stood.

The gift of the house to the daughter Sophia was absolute, and she took in fee simple.

The construction of the residuary clause was not discussed. The mortgages were payable at maturity, and prima facie the testator intended them to be then paid, and the executors' year was prima facie the time within which the house No. 6 Major street should be sold, and thus would be ascertained the period during which Sophia and Alexander would enjoy the income, i.e., net income, for rents must meet the interest and taxes etc.

Order declaring accordingly. Costs out of the estate.

MIDDLETON, J. DECEMBER 24TH, 1918.

RE WINN.

Will—Construction—Legacies to Married Women, to be Settled upon them for their Separate Use—Payment to Legatees Directly.

Motion by the executor of the will of Helen Maria Winn for an order determining the meaning and effect of the 6th clause.

The motion was heard in the Weekly Court, Toronto.

T. D. Leonard, for the executor.

G. G. S. Lindsey, K.C., for several of the nieces of the testatrix and for creditors of the nieces.

J. W. Carrick, for C. G. Heward, a nephew.

K. W. Wright, for the Inspector of Prisons and Public Charities.

MIDDLETON, J., in a written judgment, said that the 6th clause directed all bequests and legacies in favour of nieces to be "settled upon the said nieces for their separate use in such manner and subject to such terms as my executors shall deem expedient."

The nieces desired the legacies and bequests to be given them absolutely, and contended that the only thing required by the will was that the legacies or bequests should be given them for their separate use, i.e., free from the control of their husbands.

The executor did not object to this, and did not desire to impose any terms and conditions upon payment unless required by law.

In this will no intention was expressed that the property was to be held for the nieces in such a way as to prevent anticipation or to benefit issue; and, in the absence of such intention, there was no reason why payment should not be made to the nieces direct, as, under the law as it now stands, they take their own property as separate estate.

Costs of all parties out of the estate, to be charged pro rata against the legacies and bequests concerned.

MIDDLETON, J. DECEMBER 24TH, 1918.

RE BLACK.

Will—Construction—Trust Fund Created by Will—Income or Part thereof to be Applied by Trustees in their Discretion to Maintenance of Daughter during Life—Division of Fund among other Children of Testatrix on Death of Daughter Named—Right of Daughter to Entire Income—Discretion of Trustees Uncontrolled by Court unless Dishonesty Shewn.

Motion by Ethel Martin for an order determining a question arising upon the terms of the will of her mother, Ann Jane Black, deceased.

The motion was heard in the Weekly Court, Toronto.
G. W. Morley, for the applicant.
G. W. Mason, for the executors and trustees under the will.
D. R. Hossack, for the other adults interested.
F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that the testatrix set apart $12,000, the bulk of her estate, with instructions to her trustees to use the income, or so much as might in the opinion of the trustees be necessary, for the comfortable maintenance of her daughter Ethel during her life, with power to encroach upon the corpus, if necessary in the opinion of the trustees. On the death of this daughter, the fund was to be divided between a son and another daughter or their issue.

Probably contrary to expectation, this daughter had married, and she now took the position that she was entitled to demand the entire income, and that the trustees had no discretion to refuse her any part of this.

The discretion was by the will vested in the trustees, and there was no appeal to the Courts from what they might do, so long as they acted honestly: Singer v. Singer (1916), 52 Can. S.C.R. 447; Gisborne v. Gisborne (1877), 2 App. Cas. 300.

There was here no room for doubting the bona fides of the trustees. They had a duty to perform which had been made very delicate by reason of the primary obligation of the husband to maintain his wife. The fund was not the fund of Mrs. Martin; she was only to have what, in the opinion of the trustees, was necessary for her comfortable support and maintenance: subject to this the fund belonged to her brother and sister. The trustees must discharge the duty they had assumed; the task was theirs

and theirs alone. The case In re Williams, [1907] 1 Ch. 180, was quite different, as the legacy was vested in the one seeking maintenance.

No order as to costs save that the trustees might have theirs from the fund, and might also pay the costs of the Official Guardian and adult respondents from the same source.

MIDDLETON, J. DECEMBER 26TH, 1918.

MOORE v. IMESON.

Vendor and Purchaser—Agreement for Exchange of Lands—Refusal of Defendant to Carry out—Action for Specific Performance—Unfounded Defence of Fraud—Defence that Bargain not Final—Failure on Facts—Sale of Plaintiff's Land by Mortgagee—No Surplus Existing after Satisfaction of Mortgage-claim—Award of Specific Performance Inequitable—Damages—Nominal Damages—Commission Payable by Plaintiff—Costs.

Action for specific performance of an agreement for an exchange of lands.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiff.

F. C. Kerby, for the defendant.

MIDDLETON, J., in a written judgment, said that Moore owned a farm, subject to mortgages; and Imeson owned a house, also subject to mortgages. An agreement in writing was made for an exchange. The plaintiff had the better of the bargain, but the charges of fraud made by the defendant were unfounded. The defendant inspected the farm and purchased on his own opinion, formed after the inspection.

After the making of the contract, the defendant changed his mind and declined to carry out his bargain, and now set up, in addition to the charges of fraud and misrepresentation, that the agreement was tentative only—and not final. This also failed upon the facts.

At the time of the agreement, the plaintiff was badly in default under his mortgages; and, when it became known that the sale to the defendant would not be carried out, the mortgagees sold, and there was no surplus.

To compel specific performance now would be to oblige the defendant to convey his equity for nothing. The defendant con-

tended that it was the duty of the vendor to keep himself in such a position as to be able to convey; and that, his equity having now disappeared, he could not obtain specific performance. The plaintiff replied that, had the defendant carried out his contract, the sale would not have taken place.

Whatever might be the solution of this controversy, the learned Judge was satisfied that the situation was such that it would be so inequitable to enforce specific performance that this relief should not be granted, but damages; and there was nothing to justify an award of more than nominal damages. The value of each equity of redemption was conventional, not actual; and it had not been shewn that the value of the defendant's property was greater than its nominal valuation in the exchange.

The plaintiff became liable for commission ($130.10) to the real estate agents, and he should have judgment for that sum and $10 nominal damages, $140 in all, and $125 costs. But for the unfounded charges of fraud, no costs would have been given.

MIDDLETON, J. DECEMBER 26TH, 1918.

LEE v. GUNDY & GUNDY.

Vendor and Purchaser—Agreement for Sale of Land—Action by Assignee of Purchaser for Specific Performance—Agreement Forfeited by Vendors and Land Resold before Assignment—Assignee (by Error) Assured by Vendors that Agreement in Force—Acceptance of Payment on Account of Purchase-money—Agreement not Capable of Performance by Reason of Intervention of Right of Third Person—Damages—Measure of—Recovery only of Money Paid by Assignee to Assignor and Money Paid to Vendors by Assignee—Set-off—Costs.

Action by the purchaser for specific performance of an agreement for the sale and purchase of land, or, in the alternative, for damages.

The action was tried without a jury at Sandwich.

A. B. Drake, for the plaintiff.

R. L. Brackin, for the defendants.

MIDDLETON, J., in a written judgment, said that the defendants owned a large number of lots in or near Ojibway, and on the 23rd September, 1913, agreed to sell three lots for $1,900 to Tung Tim

Fong & Co., three Chinamen who had formed a syndicate. On the 24th February, 1916, the purchasers being in default, an agreement was made by which the first agreement was reinstated and cut down to the purchase of one lot only. The purchasers again defaulted, and the new agreement was forfeited by reason of the default.

On the 6th March, 1917, the defendants sold this lot to one Ford, not a party to this action.

On the 5th February, 1918, Tung Tim Fong & Co., in consideration of $250, sold their agreement to the plaintiff.

The plaintiff, before this purchase, made inquiry at the Windsor office of the defendants, and was told that the agreement was in force. This was an innocent error, arising from the fact that the cancellation and resale had not been reported by the Toronto office to the Windsor office of the defendants.

Assuming that all was right after the purchase of the agreement, the plaintiff paid the defendants $250 on account of the balance assumed to be due.

When the error was ascertained, the defendants at once offered to return the money paid, but this was refused.

Specific performance could not be granted, as the right of a third person had intervened.

Damages might be recovered; the question was as to the measure of damages.

The relation of vendor and purchaser was not created between the parties, as the contract bought by the plaintiff was at an end by reason of its forfeiture.

The defendants unintentionally misled the plaintiff into paying money upon the faith of the contract being a valid and subsisting contract, and this they must recoup him. As to the $250 paid to the Chinese syndicate, it must, on the evidence, be found that it was paid.

The plaintiff was not content to have his recovery so limited; he sought to have also the profit which he would have made had he been able to carry out the purchase. No authority was cited warranting this, and it seemed to be contrary to principle. The defendants must put the plaintiff in the position he would have occupied had they told him the facts as they were. Had they told him that the contract he was about to purchase had become forfeited and void, and the land had been sold to another, he would not have parted with his money, and so his money must be refunded, but he would not have made the profit on the land transaction, and he could not recover it.

An alternative claim was made by the plaintiff, as assignee of the syndicate, to recover the money paid by the syndicate. Walsh v. Willaughan (1918), 42 O.L.R. 455, shews that, when a contract

becomes void by the purchaser's default, he cannot recover the money paid on account.

The plaintiff purchased other lands from the defendants, and was in arrear in his purchase-money. This debt might be set off pro tanto.

The plaintiff should recover the two sums of $250 and interest $22.18, in all $522.18. The defendants' set-off amounted to $422.18; and the judgment for the plaintiff should therefore be for $100.

As the amount recovered was so small, there would be a set-off of costs; but, as each party was in fault—the plaintiff asking too much and the defendant offering too little—a fair result would be to allow no costs.

Judgment for the plaintiff for $100 without costs.

MIDDLETON, J. DECEMBER 27TH, 1918.

*BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED.

Contract—Sale of Sets of Law Reports at Fixed Price per Volume—Estimate of "150 Volumes more or less"—Effect of upon Contract—Volumes as Issued Overrunning 150—Right of Vendor to Payment for Volumes in Excess of 150—Vendor not Responsible for Action of Publishers.

Action upon a contract for the price of 160 copies of volumes 151, 152, 153, and 154 of a law publication, the reprint of the "English Reports."

The many facts of the case are stated in the reports of decisions upon an interlocutory motion: 43 O.L.R. 13, 233.

The action was tried without a jury at a Toronto sittings.

W. N. Tilley, K.C., and Alfred Bicknell, for the plaintiffs.

R. T. Harding, for the defendants.

MIDDLETON, J., in a written judgment, said that the defendants agreed to take a certain number of copies "of each volume of the set (150 volumes more or less) at a price of 10s. 6d. per volume." When it was found that the number of volumes was going to overrun 150, there was protest by the defendants and communication with the publishers in Great Britain, but there was no modification of the contract rights of the parties. The position taken by the

defendants was, that they were not liable to pay for any volumes in excess of 150, and were entitled free of cost to all volumes in excess. When it was ascertained that the series would overrun 150 volumes, there was no repudiation of the contract; indeed that course would have been disastrous to all concerned.

The case must be determined entirely upon the terms of the contract itself. Unless the words in brackets "(150 volumes more or less)" controlled and dominated the contract, the obligation of the defendants to pay was obvious. No such potency could be attributed to those words. The sale was a sale of a certain number of complete sets of the work. A portion of a set would be of comparatively little value. Each party contemplated the complete set being furnished and paid for. The sale was a sale of an essential unity. The trouble was that the price payable for that unity was measured by an arbitrary gauge and was not fixed. This made it plain that the number of volumes given was an estimate. Neither party to this suit could control the action of the publishers; and the fixing the price by the volume, instead of naming a lump sum for the set, indicated that payment was to be based upon the actual number of volumes. There was not in the contract any room for the suggestion that the plaintiffs were to supply the volumes beyond 150 free.

When the excess was so large that it might be said to be beyond anything contemplated by the parties, if restitution had been possible, it might be that there was a right of rescission. If there had been any foundation for an action of deceit, there would have been a claim for damages. Those alternatives failing, the contract must govern according to its true interpretation. The first endeavour must be to ascertain the true subject-matter of the contract. When that was done, the interpretation of the contract became comparatively simple.

The plaintiffs were entitled to recover the price of the four volumes in question.

The counterclaim must be dismissed.

MIDDLETON, J. DECEMBER 27TH, 1918.

BURNS CEMENT GUN CO. v. NORMAN McLEOD LIMITED.

Sale of Goods—Machine Rented to Defendant—Subsequent Agreement for Purchase—Proof of by Oral Evidence—Statute of Frauds—Goods in Possession of Purchaser—Delivery and Acceptance—Replevin—Damages—Rent of Machine—Balance Due for Price—Costs.

Action for a declaration that the defendants had no right to a "cement gun" and accessories replevied by the plaintiffs, for recovery of $395 for rent of the gun and another gun, or for damages, and for delivery up of the plaintiffs' replevin bond.

The action was tried without a jury at a Toronto sittings.

John Jennings, for the plaintiffs.

B. N. Davis, for the defendants.

MIDDLETON, J., in a written judgment, said that in May, 1918, the plaintiffs rented the defendants two "cement guns" at $25 per day each. One of them had been returned; the other, as the defendants asserted, was sold to them by a later agreement. The agreement thus alleged was established by the evidence; but it was said that it could not be relied upon by reason of the Statute of Frauds. By an order of replevin made ex parte, the plaintiffs had obtained possession of the second machine.

There was some bungling about the return of the first machine and some controversy as to the rent due. There was due to the plaintiffs for rent $312.50 and for the amount short remitted on the price $20—in all $332.50.

The second machine being at the time of the alleged sale in possession of the purchaser, the completion of the sale operated prima facie as delivery of the goods, and acceptance could be shewn as soon as anything was done by the purchaser to shew that he retained the goods as owner: Halsbury's Laws of England, vol. 25, p. 206, para. 355. The remitting of the price was ample evidence of this.

It is stated in Benjamin on Sale, 5th ed., p. 215, 7th Am. ed., p. 160, that there is an actual receipt when the goods are in the possession of the purchaser at the time of the contract, "wherever it can be shewn that the purchaser has done acts inconsistent with the supposition that his former position has remained unchanged," and "these acts may be proven by parol."

In the result, the plaintiffs succeeded in recovering $332.50, and should have County Court costs of this branch of the case,

and failed as to the replevin branch of the case. The plaintiffs must be ordered to restore the second machine to the defendants and pay them damages, fixed at $50, and the costs of this branch of the case.

As apportionment of costs is not easy, and seldom attains real justice, the costs should be fixed at a lump sum; and, as the defendants succeeded on the more important branch of the case, the plaintiffs should pay the defendants $100 for costs.

ROSE, J. DECEMBER 27TH, 1918.

PEEL v. PEEL.

Husband and Wife—Conveyance of Land by Husband to Wife—Presumption of Gift—No Evidence to Rebut—Failure to Shew Agreement to Hold in Trust—Discharge of Mortgage upon Promise to Execute New Mortgage—Equitable Mortgage—Statute of Frauds—Performance of Contract on one Side—Interest—Charge on Land—Costs.

Action for a declaration that certain land was the property of the plaintiff or that the defendant held it as trustee for the plaintiff and subject to his direction and control.

The action was tried without a jury at a Toronto sittings.

Edward Meek, K.C., for the plaintiff.

W. J. McLarty, K.C., for the defendant.

ROSE, J., in a written judgment, said that the evidence did not satisfy him that, when the plaintiff conveyed the land to his wife, the defendant, there was any agreement that she should hold it in trust for him or that her title should be other than an absolute one. The presumption that a gift was intended was, therefore, unrebutted, and the action by the plaintiff in his personal capacity failed.

As to the claim by the plaintiff as executor of the will of Robert Peel, the evidence clearly established that the discharge by Robert Peel of the mortgage securing $800 upon the whole of the land was executed by Robert Peel in order to enable F. J. Peel (the plaintiff) and the defendant to procure a loan of $1,200 secured by a first mortgage upon the north half of the land, and upon the faith of an undertaking, given to Robert Peel by F. J. Peel, upon behalf and with the authority of the defendant, that the defendant would execute a new mortgage securing the $800 upon the south

half of the land; and the defendant had utterly failed in her effort to prove that the $800 was repaid or that Robert Peel in his lifetime released the defendant from her obligation to execute the new mortgage.

The question upon which judgment was reserved was the question whether the equitable mortgage created by the defendant's promise to execute a legal mortgage was enforceable notwithstanding the provisions of the Statute of Frauds, or whether the case was taken out of the statute by Robert Peel's performance of his part of the contract (see Halsbury's Laws of England, vol. 21, p. 74), or by the rule that the statute is not to be used as an instrument of fraud.

This question is answered in favour of the plaintiff by the Court of Chancery in Clarke v. Eby (1867), 13 Gr. 371.

The lender of the $1,200, one Dixon, subsequently advanced an additional $700, and the mortgage for $1,200 upon the north half of the land was discharged and a new one, for $1,900, executed, covering the whole of the land. So far as Dixon was concerned, this mortgage took priority over Robert Peel's equitable mortgage, and the declaration of the rights of the plaintiff in his capacity as executor must be expressly subject to the present registered incumbrances.

The evidence was that the interest on the $800 had been paid by F. J. Peel. He was under equal obligation with the defendant to pay it; and he could not, either as executor or individually, have it made a charge upon the land; but interest from the date of the judgment should be a charge.

There should be judgment declaring that the defendant's interest in the land is charged with the payment to the executor of Robert Peel of $800 and interest at 5 per cent. from the date of the judgment until payment, and that the charge may be enforced by foreclosure or sale; but, if the note for $800 given by F. J. Peel, either to Robert Peel in his lifetime or to his widow after his decease, is now current, the charge cannot be enforced until such note matures and is dishonoured.

The plaintiff's success was only partial; he failed upon the issue presented by the pleadings as originally framed, and succeeded only upon his claim as executor, which was added by amendment. An accurate adjustment of the rights as to costs would be impracticable; and there should be no order as to costs.

SUTHERLAND, J. DECEMBER 28TH, 1918.

*BURLINGTON PUBLIC SCHOOL BOARD v. TOWN OF BURLINGTON.

Municipal Corporations—Money By-law—Request of School Board for Sum for Purchase of Site and Erection of School—Submission to Electors—Vote Negativing Request—Renewed Request—By-law Passed by Town Council for Submission to Electors of Original Question and two Others—Duty of Council under sec. 43 of Public Schools Act, R.S.O. 1914 ch. 266—Municipal Act, R.S.O. 1914 ch. 192, sec. 398 (10).

Motion by the plaintiffs for an interim injunction restraining the defendants from submitting to the electors entitled to vote on money by-laws, certain questions in relation to the providing of funds for school and site purposes for the Port Nelson district of the town. The questions to be submitted were the following:—

(1) Are you in favour of school and site to cost $30,000?

(2) Are you in favour of school on old site to cost $23,000?

(3) Are you opposed to new school?

The plaintiffs objected to questions 2 and 3.

The motion was heard by SUTHERLAND, J., in the Weekly Court, Toronto.

George Lynch-Staunton, K.C., for the plaintiffs.

William Laidlaw, K.C., for the defendants.

SUTHERLAND, J., in a written judgment, said, after stating the facts, that the grounds set out in the notice of motion were: (1) that it was the duty of the council to submit the question of passing a by-law for borrowing $30,000, as required by the plaintiffs; (2) that the passing of by-law 372 on the 20th December, 1918, and the submitting of the three questions (as above) set forth in that by-law, was not a compliance with the duty of the defendants under sec. 43 of the Public Schools Act, R.S.O. 1914 ch. 266; (3) that it was improper for the defendants to submit questions 2 and 3, as the electors would thereby be misled and influenced to answer "no" to question 1; (4) that the questions submitted were so drawn as to preclude any true expression of the views of the electors upon the question which the plaintiffs asked to have submitted; and (5) that the questions were not being submitted to the vote of the electors in the manner provided by the Municipal Act.

The first question had already been submitted to the electors, and a majority voted "No." The plaintiffs asked the defendants

to submit the question again, on the day of the municipal elections, the vote polled on the first occasion having been small.

The learned Judge was of opinion that, in the circumstances, it was the duty of the defendants' council, on the application being renewed by the plaintiffs, to do one of two things, namely: (1) if the application commended itself, pass a by-law under sec. 43 (1) of the Act; or (2), if the council thought otherwise and refused to pass such a by-law, submit the question again to the vote of the electors. This should be done simpliciter. The council could not properly, in the submission to the electors, associate other questions; and questions 2 and 3 might and probably would tend to confuse the minds of the electors and to prevent a proper vote on the one question involved in the application of the plaintiffs.

Section 398 of the Municipal Act, R.S.O. 1914 ch. 192, deals with the subjects upon which by-laws may be passed by the councils of municipalities; and sub-sec. 10 provides for submitting any municipal question not specifically authorised by law to be submitted. But the real question which the council should submit is specifically authorised by sec. 43 of the Public Schools Act.

Davies v. City of Toronto (1887), 15 O.R. 33, has no practical application to this case. But a helpful case is Re Gaulin and City of Ottawa (1914), 6 O.W.N. 30, 16 D.L.R. 865, and note appended thereto.

Upon the argument of this motion counsel for the plaintiffs said that he would be content that it should be turned into a motion for judgment; but counsel for the defendants declined to accede to that.

Since the argument, counsel for the defendants had offered to consent to a judgment withdrawing the questions complained of and substituting others.

The learned Judge said that the matter was urgent in view of the nearness of the day for voting; and he thought it his duty to grant an injunction restraining the defendants from submitting questions 2 and 3 to the electors, with costs of the motion to be paid by the defendants to the plaintiffs.

HARCOURT v. MARTIN—MIDDLETON, J.—DEC. 24.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim to Rank as Preferred Creditor for Salary—Evidence.]—Action by Harry E. Harcourt against Norman L. Martin, assignee for the benefit of creditors of the Solophone Manufacturing Company, for a declaration of the plaintiff's right to rank upon the estate of the company as a preferred creditor for $450 for salary

for 3 months before the assignment, at the rate of $150 per month, and as an ordinary creditor for $677.60 for money lent, salary, and interest. The action was tried without a jury at a Toronto sittings. MIDDLETON, J., in a written judgment, said that he could not bring himself to accept the evidence that there was an agreement by which the plaintiff was employed by his father (for the company) at a salary of $150 per month. There was much in the surrounding circumstances that made this incredible. There should be judgment declaring the right of the plaintiff to rank for $408.30 as an ordinary creditor. No costs. R. G. Smythe, for the plaintiff. G. H. Shaver, for the defendant.

JANISSE v. CURRY—MIDDLETON, J.—DEC. 26.

Trusts and Trustees—Disposition of Fund Representing Surplus Proceeds of Mortgage Sale—Executors—Account—Settlement—Right of Children of Settlors.]—Action for an accounting by the defendants of the surplus proceeds of a sale of land under a mortgage made to the trustees of the Cameron estate, and for payment to the plaintiff. The plaintiff was the divorced wife of the defendant Charles A. Janisse, and the action was brought against him and the executors of one Curry, the active trustee of the Cameron estate. The action was tried without a jury at Sandwich. MIDDLETON, J., in a written judgment, set out the facts and made certain findings with regard to the disposition of the fund, having regard to a settlement made in favour of the plaintiff and her children. He was of opinion that the interest of the children of the plaintiff and Charles A. Janisse was confined to the right to receive maintenance during minority. Three of the children, who were of age, had released their rights in favour of their mother, and the one child still an infant was being maintained by the mother. The accounts of the Curry executors should be accepted as they stood, and the executors should be paid, out of the fund, their costs subsequent to the date of payment into Court. The executors should be ordered to convey the house property purchased for the benefit of the mother and children to the husband and wife, and, after the death of both, as to three-fourths (undivided) interest to the heirs of the wife as grantee of the three adult children, and one-fourth (undivided) to the infant and her heirs. The money in Court should be declared to be the wife's and subject to her obligation to maintain the infant daughter during minority. The money should be paid out to the wife after the Official Guardian had been consulted as to what should be

retained to answer the maintenance of the child. As between husband and wife no costs. R. L. Brackin, for the plaintiff. J. H. Rodd, for the defendants the executors. A. R. Bartlet, for the defendant Charles A. Janisse.

MELDRUM v. MARTENS—MIDDLETON, J.—DEC. 28.

Contract—Brokers—Sale of Company-shares—Dispute as to Share of Profits—Ascertainment of Net Amount Realised from Sale—Alleged Sale by Defendant to Employee and Resale by him—Accounting on Basis of Price Realised upon Resale.]—Action for a declaration of the plaintiff's right to a larger share of the profits on a sale of the stock of an industrial company than the defendant was willing to give him, and for an accounting. The action was tried without a jury at a Toronto sittings. MIDDLETON, J., in a written judgment, explained the transaction between the parties, both of whom were brokers. The defendant admitted the plaintiff's right to 25 per cent. of the net amount realised from the transaction; but the transaction was complicated by the defendant's dealings with an employee of his in Chicago; and the plaintiff contended that the net amount realised by the defendant was larger than the defendant stated. The learned Judge said that the defendant must account on the basis of the sale of the shares made to one Edwards at $3.75 per share, and not on the basis of the sale alleged to have been made to the Chicago employee at $3.33. The contract between the parties called upon the defendant to exert all his ability and to call into play all his resources, including the machinery of his Chicago office, and the defendant was to have as his remuneration the stipulated share of the profits. When the plaintiff entrusted the defendant with the right to act for him in the transaction, it was contemplated that the sale to an actual purchaser should be made by the defendant, and the defendant had no authority to hand the matter over to another. Such an arrangement as that said to exist between the defendant and his Chicago employee was a violation of the fundamental rule that no man may place himself in such a situation that his interest conflicts with his duty. An accounting must be directed upon the basis of the sale to Edwards and without any allowance for the remuneration of the Chicago employee. Proper expenses incurred in the Chicago office should be allowed. Unless the figures could be arranged, there must be a reference. G. H. Kilmer K.C., for the plaintiff. Frank McCarthy, for the defendant.