The
# Ontario Weekly Notes

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## COURT OF APPEAL.

MOSS, C.J.O., IN CHAMBERS. MAY 19TH, 1910.

### RE GOOD AND JACOB Y. SHANTZ & SON CO. LIMITED.

*Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Question of Importance to Company Applying for Leave—Terms—Respondent's Costs.*

Motion by the company for leave to appeal to the Court of Appeal from an order of a Divisional Court ante 770, affirming an order made by TEETZEL, J., ante 508, requiring the company to transfer in its books five fully paid-up shares of its stock assigned by one Isaac Good, a shareholder in the company, to the applicant, J. S. Good.

A. H. F. Lefroy, K.C., for the company.

H. S. White, for the applicant.

MOSS, C.J.O.:—The amount in controversy in the appeal is much below the statutory sum of $1,000, but the question involved is, doubtless, of general importance as respects joint stock companies. In this proceeding it has been definitely determined that it is beyond the power of a company incorporated under the provisions of the Dominion Joint Stock Companies Act to enact a by-law, through its directors or otherwise, which prevents shareholders from transferring any of their fully paid-up shares except with the consent of the directors. This appears to be the first express decision to that effect, though the point has been several times before the Court. It was not dealt with in In re Smith and Canada Car Co., 6 P. R. 107; Richards, C.J., saying: "The question was not discussed before me how far the directors had power to make such by-laws as being inconsistent with the provi-

sions of the charter as to the assignable character of the stock." Neither was it in In re Macdonald and Mail Printing Co., 6 P. R. 309, where the power to pass the by-law seems to have been taken for granted.

In the present case Teetzel, J., considered himself bound by the decision in In re Imperial Starch Co., 10 O. L. R. 22. But that case, in turn, appears to have been dealt with as governed largely, if not altogether, by the decision in In re Panton and Cramp Steel Co., 9 O. L. R. 3; a case in which there was no by-law, and the decision seems to have turned upon the absence of a by-law. The passage from the judgment of Osler, J.A., to which MacMahon, J., refers in In re Imperial Starch Co., is not correctly given there. In the report in 9 O. L. R. it reads (p. 4): "The transfer being in order and the stock paid in full, the directors, in the absence of a by-law under sec. 4 (a) regulating the transfer, had no discretion to exercise in the matter, or option but to comply with the demand of the transferee to record the transfer." So that the decision of the Divisional Court in this case may be said to be the first determination of the precise question. That, of course, is not in itself a sufficient ground for a further appeal. But it is urged that, as the question is one of much consequence to companies, many of which seem to have a by-law similar to that in question here, the case is one that may well bear further discussion. That may be so. But the position and rights of the proposed respondent must also be considered. He has the judgment of the Judge of first instance and a Divisional Court in his favour, and, according to the general rule, is entitled to claim that there shall be no further appeal, especially as the amount at stake, which is all he is concerned in, is small. If the company desire to obtain a further opinion, the respondent should not be required to incur the expense incidental to that proceeding. The order I make is that upon the company undertaking to pay the respondent's costs of the appeal, as between solicitor and client, in any event of the appeal, they be at liberty to appeal upon the sole question of the power to restrict the transfer of fully paid-up shares in the manner provided by the by-law in question.

The costs of the application will be costs to the respondent in any event.

If this be not accepted, the application is dismissed with costs.

## HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 16TH, 1910.

## *MORLEY v. PATRICK.

*Libel—Discovery—Person Libelled not Named—Examination of Defendant — Questions as to Person Intended — Defence of Privilege—Malice.*

An appeal by the defendant from an order of SUTHERLAND, J., of the 24th March, 1910, upon a motion by the plaintiffs heard at London, directing the defendant to attend at his own expense for re-examination for discovery and answer certain questions which he refused to answer upon his former examination, and to pay the plaintiff's cost of the motion in any event.

The action was for a libel said to be contained in a letter written by the defendant to the husband of the plaintiff. The defences were: (1) a denial of all the allegations of the statement of claim; (2) that, if the words were written and published as alleged, it was without malice and upon a privileged occasion.

The defendant, on being examined, admitted the authorship of the letter, but, under advice of counsel, refused to answer several questions put to him by counsel for the plaintiff.

The questions which SUTHERLAND, J., ordered him to answer were the following:—

"34. By 'lady friend' in this letter you meant the plaintiff in this action, Thomas Morley's wife?"

"113. Did you intend when you wrote that letter that Morley should understand who you meant?"

"114. Do you know now who you meant,"

"115. Did you ever say on any occasion who it was Denham had made these statements about?"

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

G. S. Gibbons, for the defendant.

P. H. Bartlett, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J., who said the order was rightly made and should be affirmed; re-

* This case will be reported in the Ontario Law Reports.

ferring to Wilton v. Brignell, [1875] W. N. 239, and distinguishing Jones v. Hulton, [1909] 2 K. B. 444, [1910] A. C. 20.

The learned Chief Justice then concluded:—

The alleged libel does not refer to any person by name, but makes a reference that can only be understood having regard to extraneous circumstances. Now, might it not be a most cogent argument, supposing there was evidence pro and con, to lead the jury to a conclusion as to which view to take, that the defendant had admitted, when interrogated, "I intended to refer to the plaintiff"? It would tend to strengthen the view that the plaintiff was the person who would be understood by the associates of the plaintiff, or persons acquainted with the circumstances, to have been referred to.

Then privilege is pleaded; and I do not know why, privilege being pleaded, and it being essential to prove malice, if the occasion is shewn to be privileged, the evidence would not be admissible on that issue to shew that the defendant intended to strike at the plaintiff.

The fact referred to by Mr. Gibbons, that that issue does not arise in the course of the trial until it has been shewn that the occasion was privileged, is wholly immaterial. It is one of the issues on the record, and discovery is not confined as the argument would confine it, but it is open upon any issue on the record which may in the course of the trial go to the jury.

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DIVISIONAL COURT. MAY 16TH, 1910.

## RE FEE AND ADAMS.

*Landlord and Tenant—Overholding Tenants Act—Termination of Tenancy—Demand of Possession—Necessity for—Jurisdiction of County Court Judge—Determination of Disputed Question of Fact.*

Application by one Adams, as tenant, to set aside an order made by the Judge of the District Court of Nipissing for the issue of a writ for the delivery of possession of certain lands to one Fee, as landlord, pursuant to the Overholding Tenants Act, R. S. O. 1897 ch. 171; an order for the removal of the proceedings into the High Court having been made by MEREDITH, C.J.C.P., and the proceedings removed accordingly.

The motion to set aside the order was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

J. A. Macintosh, for Adams, the tenant.

G. H. Kilmer, K.C., for Fee, the landlord.

MEREDITH, C.J.:—I regret that we have to hold that this motion is entitled to succeed, and that the proceedings must be set aside, but, in the circumstances, it will be without costs.

When the application to remove the proceedings into the High Court came before me, the only objection taken was that the case did not come within the Act, because there was a conflict of testimony as to the right of the tenant to possession, and the case was not, therefore, one coming under the true intent and meaning of sec. 3 of the Overholding Tenants Act. Nothing was said about the other objection, which is now for the first time made. I would not have granted the order but for the argument that the cases were conflicting, and that there was no decided case in which it had been held that the Judge has jurisdiction under the Act to try questions of fact where there is a bona fide dispute and a conflict of testimony.

My brother Middleton, who, fortunately, is sitting with us this morning, tells us that in Re Graham and Yardley, argued on the 28th April, 1909, noted 14 O. W. R. 30, a Divisional Court determined that the Judge has jurisdiction under the Act to determine questions of fact, and that when the fact is determined by him in favour of the landlord, the case is clearly one coming under the true intent and meaning of sec. 3. That must be taken to be the law, as far as this Court is concerned, and we must hold that this objection fails.

The tenant is, however, entitled to succeed upon the other ground taken—the absence of a demand of possession after his tenancy was determined, which is necessary to give jurisdiction under the Act: Re Grant and Robertson, 8 O. L. R. 297.

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MIDDLETON, J. MAY 19TH, 1910.

## RE McDONELL, McDONELL v. SHANKIE.

*Will—Construction—Bequest of Annuity to Widow—Claim to Dower in Hands of Deceased—Implication—Intention.*

Appeal by George McDonell, Walter McDonell, Angus McDonell and James McDonell, four of the sons of Peter McDonell,

deceased, and beneficiaries under his will, from the report of the Local Master at Chatham upon a reference for the administration of the estate of the deceased.

The ground of appeal was that the Master had improperly found that the plaintiff, the widow of the deceased, was entitled to dower in the lands of the deceased as well as to an annuity of $50 given her by the will.

The will was made on the 29th May, 1906, and the material parts were as follows:

"I give devise and bequeath all my real and personal estate . . in the manner following that is to say:

"I own the west half of lot 57 . . . comprising 100 acres more or less, and one acre off the north-west corner of lot 56. . . I value the 101 acres at $5,000, and will the same to my family as follows: to Emma Roberts, my daughter, and my sons Walter, George, James and Angus, five of my children, are each to receive . . $500; to my son Sylvester, . . $300, and my son Peter . . $70. To my wife . . . I leave her $1,000 in cash or its equivalent in real estate. To my five sons Sylvester, Walter, George, James, and Angus whatever residue is remaining after the above allotments are paid I will that it shall be divided pro rata share and share alike among my said five sons. The chattels I request shall be divided as follows: . . . The amount willed to my wife in the event of her becoming married again she is to pay back $600 of the money so willed to her to my executors and by them to be equally divided between Sylvester, Walter, James, and Angus. All the furniture in our residence is to belong to my wife."

A codicil made on the 20th August, 1906, was as follows:

"In the body of this my will I give my wife $1,000. Since then I have purchased a house and lot in Thamesville, and the deed is made to my wife in fee simple. This is made in lieu of the $1,000 willed to her and cited therein. Hence that sum is cancelled and not to be paid. My wife is to receive a sum of $50 annually from my estate as long as she remains my widow, but ceases on her becoming again married. All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my surviving sons and daughters."

J. M. Ferguson, for the appellants contended that the plaintiff could not have both dower and the annuity.

E. D. Armour, K.C., for the plaintiff and the executor.

MIDDLETON, J.:—I cannot find in the will any intention expressed by the testator "so to dispose of the estate that the claim for dower would be inconsistent with that disposition."

Cases can, no doubt, be found with expressions of opinion favourable to Mr. Ferguson's contention. All his arguments are met and answered by Re Shunk, 21 O. R. 175.

The onus is upon the appellants to "raise a necessary implication that the gift is in substitution of dower:" per Kindersley, V.-C., in Gibson v. Gibson, 1 Dr. 42, adopted by a Divisional Court in Re Hurst, 11 O. L. R. 6.

The appeal is dismissed with costs.

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MIDDLETON, J. MAY 19TH, 1910.

## RE SMITH.

*Will—Questions Submitted to High Court—Documents Admitted to Probate—Jurisdiction — Surrogate Court—Revocation of Probate—Residuary Clause — Construction — Inclusion of Money in Bank, though not Specified.*

Motion by Thomas R. Langrill and William S. Scott, executors of the will of William Smith, late of the township of Dereham, farmer, deceased, for an order determining the following questions:—

(1) The testator having purported to make a disposition of his estate by two separate documents, bearing the same date, both of which have been admitted to probate, and each containing the provision, "I revoke all former wills or other testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last will and testament," does one of these documents revoke the other? If so, which one stands, or do they both co-exist and form one testamentary disposition?

(2) Does the clause, "Sixthly, I direct my farm stock, implements, chattels, and effects shall be sold by my executors by public auction, and the proceeds of the sale thereof shall form part of the residue of my estate, also all notes or mortgages held by me, shall be converted into cash as soon as due, and the whole shall be divided into eight equal parts, to be divided as follows: one part to my son Robert Smith; two parts to my son John H. Smith; two parts to my son Levi Smith; one part to my daughter Sarah A. Fletcher; one part to my daughter Montelina Pollard; one part to my daughter Lela Smith: but, in case any of the children predecease me, I direct that share coming to such child shall be divided equally among the remaining children, and the divi-

sion referred to shall be made by my executors immediately after my decease"—attached to one of said testamentary dispositions—form part of the will, it not forming part of the document above the signature of the testator?

(3) If said clause "sixthly" forms part of the will, does it dispose of the whole residue, including the cash in the bank.

S. H. Bradford, K.C., for the executors.

V. A. Sinclair, for R. H. Smith.

MIDDLETON, J.:—The probate issued by the Surrogate Court conclusively determines what documents constitute the last will and testament of the deceased: Gann v. Gregory, 3 D. M. & G. 777; Re Cuff, [1892] 2 Ch. 229.

On this application I cannot enter into the questions raised by the first two clauses of the notice of motion. The question suggested by the notice whether the clause "sixthly" was properly included in the probate appears to me important, and one which the parties ought to have an opportunity of agitating if so advised. There being some doubt as to the jurisdiction of the High Court under sec. 38 of the Ontario Judicature Act, this attack can best be made by taking proceedings in the Surrogate Court for the revocation of the probate granted. The executors ought to (and no doubt will) facilitate these proceedings; and all persons interested should be brought before the Surrogate Court so that the question may be finally determined. The executors would have been well advised had they proved the will in solemn form in the first instance—a course ought always to be adopted when there is, as here, a grave question as to what document should be admitted to probate.

The declaration in answer to the first two questions submitted will be that it is not open to this Court upon this application to go behind the letters probate to determine what documents constitute the last will and testament of the deceased.

Upon the third question, assuming that the clause "sixthly" is properly included in the probate, I think that the testator has in effect directed a sale of his chattel property, and that the proceeds thereof shall form part of his residuary estate, as shall also the proceeds of his notes and mortgages, and "the whole," i.e., the whole residuary estate, shall be divided and distributed as therein directed.

The answer to this question will, therefore, be, that the money on deposit in the bank to the credit of the testator, according to

the true construction of the clause marked "sixthly," falls to be divided and distributed as directed by the said clause.

If this clause upon any proceedings that may be taken is declared not to form any part of the testator's will, this is not intended to be and is not an adjudication upon the rights of the parties. All I am called upon and am entitled to do is to construe the will as it appears in the probate.

Costs out of the estate—executors' costs as between solicitor and client.

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TEETZEL, J. MAY 19TH, 1910.

## MOFFATT v. GLADSTONE MINES LIMITED.

*Author—Report of Mining Engineer — Unrestricted Publication by Author—Common Law Rights—Divestment—Acts of Broker—Ratification—Injunction.*

Action for damages and for an injunction restraining the defendants from issuing, publishing, or distributing copies of a report on two mining claims owned by them, prepared by the plaintiff, a mining engineer.

W. H. Irving, for the plaintiff.

R. S. Cassels, for the defendants.

TEETZEL, J.:—The plaintiff prepared the original report for one Warden, to assist him in forming a syndicate to purchase the claims. The report and five or six copies, signed by the plaintiff, were given to Warden with the intention that he should circulate them among persons likely to join the proposed syndicate.

After disappointment in the formation of the syndicate which he had in view when the report was obtained, Warden continued to use the report with the plaintiff's consent, and eventually formed a syndicate which organised the defendant company. It was part of the syndicate agreement that the defendant company should be organised with a capital of $1,000,000, divided into 1,000,000 shares of $1 each, and that the company should purchase the two mining claims by the issue to the vendor of 500,000 fully paid-up shares and $30,000 in cash to be derived from the sale of 100,000 of the balance of the shares.

Pursuant to an agreement made with the syndicate, Warden was employed by the company to obtain subscriptions for 300,000 shares of the stock at 30 cents per share, and was to be paid in shares for his services in that connection.

Very shortly after the formation of the company, Warden caused to be printed a large number of copies of the report, which, with the prospectus of the company, he proceeded to distribute among members of various stock exchanges in the United States and Canada, and it is in respect of this printing and publication that the action is brought.

That until publication by himself the plaintiff would at common law have the right to restrain an unauthorised publication of his report, was not questioned by counsel for the defendants, but it was contended that the arrangement between the plaintiff and Warden was such a publication by the plaintiff as to divest him of the right to maintain this action.

The plaintiff's contention is that the arrangement between Warden and himself restricted the use of his report to the purpose of enabling Warden to form a syndicate to purchase the claims, and therefore the publication was not such as to divest the plaintiff of the right to restrain the use of the report by general circulation thereof for the purpose of selling stock in a company to be formed.

The evidence of the plaintiff and Warden, whom he called as a witness, differs substantially as to the terms of the arrangement between them. . . .

I think the common interests of the plaintiff and Warden in the two claims, and the fact that the purpose of the report was to assist Warden in realising upon their joint interests, support the position taken by Warden, and I accept his evidence where it conflicts with the plaintiff's.

I conclude, therefore, that no restrictions were imposed upon Warden in the use he might make of the report in connection with either the formation of the syndicate or the flotation of the defendant company, or otherwise, and that such arrangement, and what was done by Warden thereunder, was such an unrestricted publication of the report as to divest the plaintiff of his common law rights as author.

As to what is a divestitive publication by an author, see authorities collected on p. 37 of McGillivray's Law of Copyright; Am. & Eng. Encyc. of Law, 2nd ed., vol. 7, p. 522.

If I am wrong in this view, I think, upon all the evidence, the only one responsible would be Warden because, I think the evidence established that he distributed the copies of the report in his

capacity as broker, endeavouring to sell the shares of the company, and not as an officer of the company. There is no evidence that the defendants knew or authorised the use he was making of the plaintiff's report, or in any way ratified what he did in reference to it; and, so far as appears by the evidence, the defendants never got any benefit from the use made of it by Warden, he having failed in his efforts to sell the shares.

The action must be dismissed with costs.

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SUTHERLAND, J., IN CHAMBERS. MAY 21ST, 1910.

## McCAMMOND v. GOVENLOCK.

*Writ of Summons—Service out of Jurisdiction with Statement of Claim—Time for Delivering Statement of Defence—Ex Parte Order of Local Judge—Power of Master in Chambers to Vary—Con. Rule 358—Time for Moving—Extension—Costs—Appeal.*

On the 7th February, 1910, the plaintiff obtained from a Local Judge of the High Court an order authorising the issue of a writ of summons for service out of the jurisdiction upon the defendant at Vancouver, British Columbia, directing that service of the writ of summons, the statement of claim, and the order, upon the defendant at Vancouver, be good and sufficient service upon him, and directing that the time for appearance and defence be within 15 days after service. The writ was issued on the same day, and the plaintiff then obtained from the same Local Judge an order, in the action, providing that service of copies of the last order, the writ, statement of claim, and first order, might be made by serving the same upon J. L. Killoran, a solicitor residing in Ontario, and by sending copies thereof in a registered letter addressed to the defendant at Vancouver.

On the 9th February, 1910, copies were served upon Mr. Killoran.

On the 22nd February, 1910, the defendant applied to Mr. Lee, one of the Registrars of the High Court, sitting for the Master in Chambers at Toronto, for and obtained leave to move before the Master on the 24th February for an order striking out so much of the first order as limited the time for delivery of the defence to 15 days after service, or for an order extending the time for delivery of the defence, and when the leave was obtained from Mr.

Lee, he directed that the time for the delivery of the statement of defence be extended until after the motion had been disposed of.

On the return of the motion pursuant to such leave, the Master made an order amending the first order of the Local Judge by striking out the part limiting the time for the delivery of the statement of defence to 15 days, extending the time for delivery of the defence for 10 days from the date of the order, and directing that the costs of the application be costs to the defendant in the cause.

The plaintiff appealed from this order upon the grounds: (1) that the Master had no power to review an order of the Local Judge; (2) that the motion to the Master was not made within 4 days, as required by Con. Rule 358, and that there was no power to enlarge the time thereafter; (3) that the Master should not have directed that the costs of the application to him should be costs to the defendant in the cause.

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

H. S. White, for the defendant.

SUTHERLAND, J.:— . . . It was conceded in argument, as I understood, that the clause in the order fixing the time for appearance and defence to the writ and statement of claim within 15 days after the service thereof, is, so far as the delivery of the statement of defence within that time is concerned, improper. See Con. Rule 246 and Armstrong v. Proctor, 14 O. W. R. 765, 767.

The first objection is not tenable under Con. Rule 358, as the Master seems to have jurisdiction in such a case as this. See Williams v. Harrison, 40 C. L. J. 80.

As to the second objection, the same rule seems to apply, if advantage was as a matter of fact taken of it by the defendant, as appears to have been the case. Leave was given after the 4 days by Mr. Lee . . to make the motion later before the Master, and in the meantime extending the time for filing the statement of defence; and in the order made by the Master . . he also disposed of the question of time within which the statement of defence is to be filed.

As to the question of costs and the disposition made thereof by the Master, I do not think it is a case for me to interfere, even if I were so disposed. An ex parte order is obtained at the risk of the party seeking it, and in this case the one in question contained a provision which should not have appeared therein. The order appealed from . . . rectified this, and the provision as to costs seems appropriate.

The appeal will be dismissed with costs . . to the defendant in any event.

MIDDLETON, J. MAY 21ST, 1910.

## RE HAM AND CAMERON.

*Vendor and Purchaser—Title to Land—Covenant Running with Land—Building Restriction Affecting Title of Vendor—Risk of Action for Damages for Breach.*

Motion by a vendor under the Vendors and Purchasers Act for a declaration that the purchaser's objections to the title were not valid, and that the vendor could make a good title free from restrictions.

One Mary O'Hara in May, 1903, sold to one J. G. Whitacre the lands in question, in Roncesvalles Avenue, Toronto. The deed contained a covenant against building thereon any house other than brick, detached or semi-detached, not worth at least $3,000. Whitacre afterwards sold to the York County Loan Co. and conveyed without any building restrictions, and the vendor derived title under that sale. Mary O'Hara not being in a position to give a release, and no longer owning any lands in Roncesvalles avenue, the question whether the lands were subject to the covenant was brought up for the opinion of the Court.

H. J. Martin, for the vendor.

Alexander MacGregor, for the purchaser.

MIDDLETON, J.:—The covenant, according to its terms, is to run with the lands—that is, the grantee of the lands and those claiming under him, during the ten years for which the covenant is operative, undertake not to build upon the land save in conformity with the provision of the covenant.

The object of inserting such a covenant in a deed by which the vendor parted with all her lands is by no means clear. She cannot obtain an injunction, and for breach of the covenant can only obtain nominal damages.

There is no "building scheme," and, if the different lots are ultimately held by different owners, these owners will not acquire any rights against each other by virtue of this covenant.

If the purchaser is content to assume the risk of a personal action against him by Mary O'Hara for damages for breach of the covenant, which damages must, I think, be merely nominal, or if the vendor can arrange to indemnify him, he may well accept the title, but I cannot compel him to accept any risk, no matter how nominal, or to accept any indemnity, no matter how substan-

tial. As the parties appear to be acting reasonably, the expression of this opinion may enable them to arrange to carry the sale out.

See Reed v. Bickerstaff, [1909] 2 Ch. 305, and Wiley v. St. Johns, [1910] 1 Ch. 84, 325.

Formby v. Barker, [1903] 2 Ch. 539, shews how slight the risk assumed by the purchaser would be.

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TEETZEL, J. MAY 23RD, 1910.

## TELFORD v. SOVEREIGN BANK OF CANADA.

*Contract — Construction — Sale of Business — Covenant of Purchasers to Make Annual Payments—Covenant of Vendors not to Engage in Similar Business — Independent Covenants — Performance of Substantial Part of Contract.*

Action by the surviving members and the representatives of a deceased member of the firm of Telford & Co., who for many years carried on business as private bankers at Owen Sound, to recover certain sums of money alleged to be due under an agreement dated the 31st May, 1906, between the firm and the members thereof, of the first part, and the defendants, of the second part, the material parts of which were as follows:—

1. For the consideration thereinafter mentioned, the firm sold and transferred to the bank the business carried on by the firm at Owen Sound, the assets of which should be deemed to consist of loans to customers, with the collateral securities attaching thereto, notes, drafts, and other instruments discounted by the firm, and the goodwill of the firm, and the liabilities of which should consist of all deposits and balances to the credit of customers at the date of the agreement.

2. The firm guaranteed the payment of all the notes, loans, etc., discounted by the firm, until assumed and taken over by the bank, the bank having the right to refuse to assume any of the loans. . . .

5. "For and in consideration of the present agreement, the said bank does hereby undertake and agree to pay each of the members of the said firm . . . or their respective heirs executors, etc., the sum of $250 per annum for ten years from the date hereof. Provided that if the deposits to the credit of the customers of the said bank at the branch at Owen Sound do not amount to a steady average of $400,000 on or before the 1st day

of June, 1908, the amount payable to the parties of the first part . . . shall be reduced to $200 per annum on and after the said 1st day of June, 1908."

6. The bank agrees and undertakes to take John C. Telford and William M. Telford, son and nephew of W. P. Telford, one of the firm, into service at Owen Sound at a salary of $1,000 each per annum for the first year, the said W. M. Telford to be made manager of the said branch from the 1st June, 1906; and it was provided that the agreement should not prevent the bank exercising the usual supervision over John C. Telford and W. M. Telford, who should be subject to the rules and regulations of the bank the same as other managers and members of the bank staff. . . .

8. The firm undertook and agreed to use their best efforts to enable the bank to retain the whole of the deposits transferred to it, and to do all in their power to assist the bank in maintaining the banking business and to make a success of the branch generally.

9. "The vendors (firm) do jointly and severally undertake and agree not to engage either directly or indirectly in any private banking business in the province of Ontario for a period of five years from the date hereof, and not to become directors, officers, or managers of any chartered bank of Canada in Owen Sound or within a radius of fifty miles therefrom." . . .

Pursuant to the agreement, the private banking business at Owen Sound was duly transferred to the defendants, who opened a branch there, and W. M. Telford was installed as its manager.

Upon realisation of the assets of the private banking business, a surplus was obtained and paid over to Telford & Co., and the first annual payment provided for in paragraph 5 was made on the 1st June, 1907.

The defendants having become embarrassed in January, 1908, their entire business was taken over under an agreement with other banks, and the branch at Owen Sound was closed, and its business transferred to a branch of the Merchants Bank in that city.

On the 21st January, 1908, W. M. Telford was notified by the defendants' general manager that at the expiration of three months his services would not be required, and on the 4th February, 1908, he forwarded to the general manager his resignation, and informed him that he had received an offer of a position with the Merchants Bank at Owen Sound.

The resignation was duly accepted on the 6th February, and, no objection to his taking a position with the Merchants Bank being made, he on the same day took the position of accountant in the local branch of that bank, and, until the defence in this action, the

defendants never raised any objection that his entering into the service of the Merchants Bank was a violation of the agreement.

The action was to recover the annual payment of $250 to each of the seven members of the firm, due on the 1st June, 1908, under clause 5 of the agreement.

In answer to the action the defendants pleaded that W. M. Telford, who was one of the plaintiffs, entered into the employment of another bank, in contravention of paragraph 9 of the agreement, and, the covenant therein contained being joint and several, the defendants were absolved from further liability upon the agreement by reason of the plaintiffs' breach thereof.

A. G. MacKay, K.C., for the plaintiffs.

F. Erichsen Brown, for the defendants.

TEETZEL, J., after setting out the facts as above, said that the fundamental question was whether the covenant contained in paragraph 9 was an independent covenant, or whether its observance was in the nature of a condition precedent, for, if the defendants' covenant in paragraph 5 was not dependent upon the plaintiffs' covenant in paragraph 9 being strictly observed, the plaintiffs were entitled to enforce the performance of the covenants contained in paragraph 5, and therefore entitled to recover in this action.

He then referred to Beal's Cardinal Rules of Legal Interpretation, 2nd ed., pp. 179-181; Hamilton's Law of Covenants, 2nd ed., pp. 42-50. . . .

Having regard to the main purpose which the parties had in view, namely, the acquisition by the defendants of the plaintiffs' well-established private banking business as a going concern, and the payment therefor of the substantial annual sums to plaintiffs, and having regard also to the arrangement and language of the whole agreement, I cannot say, in the absence of an express provision to that effect, that the parties intended that the observance by the plaintiffs of the provisions of clause 9 . . . was to be a condition precedent to the defendants' liability to pay a single dollar for the consideration money provided for in clause 5. . . .

The construction that the plaintiffs' covenant contained in clause 9 is not precedent to the covenant of the defendants contained in clause 5, but is an independent covenant, going only to a part of the consideration, and for breach of which the defendants could be awarded damages with an injunction, is, I think, strikingly demonstrated to be the correct construction by the judgment in Carpenter v. Creswell, 4 Bing. 409, 411. . . . Bettini v. Guy, 45 L. J. Q. B. 209, is also a strong authority along the same line in the plaintiffs' favour. . . .

After one party has performed a contract in substantial part, and the other party has accepted the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability. In such case he must perform the contract on his part and claim damages in respect of the defective performance: see Carter v. Scargill, L. R. 10 Q. B. 564; Leake on Contracts, 5th ed., p. 468, and cases there cited.

Judgment for the plaintiffs for $1,750 and interest from the 1st June, 1908, and costs.

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BOYD, C. MAY 23RD, 1910.

## *STAVERT v. McMILLAN.

*Promissory Notes — Consideration — Transfer of Bank Shares—Illegal Trafficking by Bank in its own Shares—Directors—Bond—Notes Given to Repair Wrongdoing—Holder in Due Course—Acquisition of Several Notes after Maturity—Notice of Illegality as to Others—Evidence—Onus—Costs.*

Action by the curator of the Sovereign Bank of Canada on a promissory note for $33,110, made by the defendant, a director of the bank, and for interest, etc. The defendant claimed indemnity from the bank, pursuant to an alleged agreement therefor.

Several other actions by the same plaintiff against different defendants were tried with this, and the judgment disposes of them all.

J. Bicknell, K.C., and F. R. MacKelcan, for the plaintiff.

W. Nesbitt, K.C., F. Arnoldi, K.C., H. S. Osler, K.C., and J. Wood, for the defendants.

I. F. Hellmuth, K.C., A. W. Anglin, K.C., and W. J. Boland, for the bank.

BOYD, C.:—That which underlies and affects the whole litigation is a series of dealings by which the money of the Sovereign Bank was used in purchasing shares of its own stock to the extent of about $40,000. The shares so acquired stood in the names of various nominees of the bank—brokers, officers of the bank, and others—who undertook no personal responsibility and whose names were in

* This case will be reported in the Ontario Law Reports.

some cases used without their knowledge. The whole transaction was managed by the then general manager, Stewart, and there is no doubt that the money was illegally withdrawn from the funds of the bank and used in violation of the statute—the Bank Act, R. S. C. 1906 ch. 29, sec. 76. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits. This process amounted to an illegal trafficking in the shares, was ultra vires, in disregard of the public policy forbidding banks to engage in such a line of business, and placed in jeopardy the charter of the bank. . . .

The notes . . . were given for value, represented by the transfer of shares apportioned to each, and in the whole representing in value the $400,000 of the bank's money illegally expended.

This was, I think, the whole consideration as between the bank and the defendants; but, even if it was only a part, it is enough to raise the next important question: in how far can an action to enforce payment be entertained by the Court? . . .

We start with a transaction or series of transactions illegal in every sense. There was an unwarrantable misapplication of the bank's money, which was ultra vires, in the teeth of the Bank Act, and in violation of the public policy to be observed and maintained in the public interest. The Act says that an incorporated bank shall not, except as authorised by the Act, directly or indirectly purchase or deal in or lend money or make advances upon the security or pledge of any share of its own capital stock: sec. 76 (2b). There was clearly a purchasing of shares, and the purchase was in order to their being again sold. That is a trafficking in its own shares, which is forbidden. For that, authority will be found in Hope v. International Financial Society, 4 Ch. D. 327, 339, and Trevor v. Whitworth, 12 App. Cas. 409, 417, 419, 428. The original acquisition of the shares was not merely voidable but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders. This was so held by Lord Shand in General Property Investment Co. v. Matheson's Trustees, 16 Rettie 282, approved by Collins, M.R., as good law in English Courts, in Bellerby v. Rowland & Marwood's S. S. Co., [1902] 2 Ch. 14, 27; and to the same effect under our Bank Act by the Supreme Court of Canada in Bank of Toronto v. Perkins, 8 S. C. R. 603.

Then what was the transfer of these shares to the defendants, in exchange for the notes sued on, but a sale of the shares? . . .

Going back to the bond given by the directors to guarantee the payment and to take over or otherwise dispose of the stock, it could not have been enforced in any court of law or equity. The reason is succinctly given by Bramwell, B., in Geere v. Mare, 2 H. & C. 339,

346: "The indenture declared on was executed as a security for the payment of a debt founded on an illegal consideration, and as the debt could not be enforced against the debtor, neither can it be enforced against the person who has executed the security for its payment." The result is the same if part of the consideration is illegal, for, as said in one of the cases, where the parties (as, e.g., the bank and the directors) have woven a web of illegality, it is not part of the duty of Courts to unwind the threads.

Considered as between the bank as holder and the defendants (directors and others, their friends), the case appears to be that of the bank adopting the shares bought with its own money and selling them to strangers for a price sufficient to recoup the first illegal outlay. . . .

I think the bank has not power to transfer these shares or enforce payment for them against an unwilling purchaser. The bank has no legal title to the shares, and can confer none; so that in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes cannot be enforced by action.

This legal result of the facts indicates the practical impossibility of the bank undertaking to indemnify the defendants in regard to their having become holders of the stock. The expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money.

Upon the evidence it appears that fifteen of the notes sued on required to be indorsed to the plaintiff after the 18th January, 1908, before he would acquire title thereto or become a holder in due course. . . . My conclusion is as to these fifteen notes that he had sufficient notice of the situation as between the directors and the bank as to this stock being purchased with the bank's moneys and as to the way in which the notes sued on were given.

As to these fifteen notes, the actions fail and should be dismissed; but no costs are given where the defence is illegality.

As to the other nine notes, a case of illegal consideration is shewn, and in that event the law casts the burden of proof upon the holder to prove both that value has been given, and that it has been given in good faith without notice. See Bills of Exchange Act, sec. 58; and Tatam v. Hasler, 23 Q. B. D. 345. Suggestive circumstances are in evidence as to these notes, e.g., the refusal of the Morgans to accept them as commercial security for advances, and the fact that Mr. Stavert was in touch with the Morgans, so that he may have been well advised in not tendering any evidence on this head. In ordinary circumstances, there would be jurisdiction, on a proper application, to open up, on terms, for a further

trial. But, having regard to the situation of the defendants, who came in as parties in aid of the directors, and who are entirely volunteers, relying on credible assurances that their signatures were mere matters of form, and to the situation of the directors, who are open to be pursued for their alleged privity with the general manager, in respect of the whole sum involved, as joint tort-feasors, and to the common danger of both sets of defendants to be called upon, in the event of winding up proceedings, to make good the amounts represented by the shares they hold, and also for the double liability of shareholders, I think it more advisable not to litigate further on this record as to the knowledge or notice possessed by the plaintiff when the notes payable to bearer came to his hands. It is better, in my opinion, to dismiss this part of the controversy also without costs.

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MIDDLETON, J. MAY 25TH, 1910.

## RE DREDGE.

*Will—Construction—Legacy — Death of Legatee—Bequest Falling into Residue—General Bequest of Chattels Construed as Including whole Residue.*

Motion by the executors of the will of George Dredge for an order determining certain questions as to the disposition of the estate, involving the construction of the will.

The testator made a bequest to Harriet Wansborough, his sister, or, in the event of her death, to her daughter. The sister and her daughter died before the testator. There was also a general bequest of chattels to the testator's wife.

The questions submitted were whether the legacy to the sister and daughter fell into the residuary estate, and whether the language used in the bequest to the wife gave the residuary estate to her.

E. A. Dunbar, for the executors.

H. Guthrie, K.C., for the widow.

J. R. Meredith, for the official guardian.

MIDDLETON, J.:—The testator did not mean to die intestate, as his will purports to be a disposition of all his estate. Harriet Wans-

borough (the testator's sister) and her daughter having died in the lifetime of the testator, the legacies to them lapse, and will fall into the residue, and will pass to the wife, if the bequest to her can be regarded as residuary.

It is in these words: "I give to my wife my household effects, including beds and bedding, also any other chattels or personal effects I may die possessed of." The legacy which lapses is of "all moneys on hand or in the bank and all other securities for money."

In Re Way, 6 O. L. R. 614, Osler, J.A., has collected the cases which go to shew that general words such as these used in the bequest to the widow must receive a large and liberal meaning, when it is necessary to avoid an intestacy. I would also refer to the language of Knight Bruce, V.-C., 1 Y. & C. Ch. 290, adopted by the Court of Appeal in Anderson v. Anderson, [1895] 1 Q. B. 749, as indicating the true principle applicable.

The order will therefore declare that, Harriet Wansborough and her daughter having died in the lifetime of the testator, the bequests to them lapsed and pass to the widow under the residuary bequest.

Costs of all parties out of the estate—executors' and Official Guardian's as between solicitor and client.

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DIVISIONAL COURT. MAY 26TH, 1910.

## ARNOLD v. STOTHERS.

*Negligence—Injury to Person—Unsafe Condition of Sand Pit—Knowledge of Danger — Assumption of Risk — Master and Servant — Duty of Master — Owner of Premises — Duty to Person Lawfully Entering.*

Appeal by the defendants from the judgment of BOYD, C., in favour of the plaintiff, upon the findings of a jury, in an action for damages for personal injuries sustained by the plaintiff owing to the negligence of the defendants, as the plaintiff alleged.

The plaintiff, who was a teamster in the service of the defendant Stothers, on the 11th December, 1908, in the ordinary course of his employment, went to the defendant Gaby's sand pits to obtain a load, arriving there shortly after 5 p.m. At the place

where the sand was being taken, the wall of the pit rose to a considerable height, 30 or 40 feet. Sand had been loosened from the wall by Gaby and was lying on the floor of the pit ready to be removed. While the plaintiff was placing it in his wagon, a lump of clay or frozen sand, "the size of his head," fell from the bank and struck his leg, breaking it.

This action was brought against both Stothers and Gaby, the plaintiff alleging that the pit was in an unsafe and dangerous condition, which he (the plaintiff) was ignorant, and that the defendants knew or ought to have known of the danger and ought to have taken steps to guard the plaintiff or warn him.

The jury found that the defendant Stothers was negligent in "failing to see that the pit was not kept in safe condition," and that the defendant Gaby was negligent in "failing to remove the projections of clay." This question was also put: "Was there any special danger at the sand bank known to the defendants or either of them which was not equally known to the plaintiff—if so, what was it?" And they answered, "Yes, by knowing the pit best."

Upon these findings judgment was entered against both defendants for $800, the damages assessed.

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

R. S. Robertson, for the defendants.

C. Millar, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J. (after setting out the facts as above):—There is no reason given for the falling of the lump of clay or sand other than the suggestion that, the day having been warm and damp, the bank may have thawed sufficiently to loosen it.

The plaintiff knew the pit well; he had drawn sand from it two or three years, on an average twice a day. He knew well the danger of sand falling from the bank. He did not think the pit was dangerous when he went in, and knew that the fall of sand or clay might happen in any sand pit at this time of the year, and that the only precaution he could suggest; i.e., having the bank more sloping, had not been adopted. The pit was then in its usual condition, and, although he "thought it was kind of dangerous-looking all the time," he also "thought it was the same as it was other times, and took the same chances." There is nothing

placing the plaintiff's case in any better light than his own evidence above summarised.

The danger of going close under a bank of the kind in question, particularly on a wet, thawing day, is obvious, and must have been quite as apparent to the plaintiff as to the defendants; and, apart from the question of contributory negligence suggested, by the plaintiff, a dray-man, having chosen to go into a situation of such obvious danger in the dusk of a winter evening (for he chose his own time), we think the plaintiff must fail.

The whole situation was as well known to the plaintiff as to the defendants.

The master was under no obligation to his servant to guard him against the suggested negligence on the part of Gaby.

Gaby's obligation to the plaintiff must be measured by the standard applicable when one invites another upon his premises for the purposes of business in which both are participating. If the place is not safe, if there is a danger that is not obvious to any person coming there, that person ought to be warned of his peril. He must be placed in the same position as if he had been told, "If you come, you must come and take the place as you find it, for the situation is such that there is danger." The duty to the customer is to apprise him of the existence of danger, unless the danger is obvious or known to him. See Lax v. Darlington, 5 Ex. D. 28. Here the plaintiff knew and assumed the risk.

The appeal must be allowed and the action dismissed. The defendants will probably not ask for costs.

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MACDONELL v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION—MASTER IN CHAMBERS—MAY 19.

*Particulars—Statement of Claim — Better Particulars—Contract.*]—Motion by the defendants, before delivery of the statement of defence, for better particulars of the statement of claim. The plaintiff's claim was for a sum of $1,770,000 for overhauls under his construction contract with the defendants. The plaintiff gave certain particulars on demand, and further particulars under an order of the 18th March. The Master, upon consideration of the terms of the contract and of the statement of claim and

the particulars given, thought it was not quite clear whether the order of the 18th March and the provisions of Con. Rule 268 had been complied with; but was of opinion that further particulars, at this stage, were not necessary. If at a further stage, when the cause is at issue and discovery has been given, the defendants are still in doubt as to what the plaintiff is going to prove, the motion can be renewed. With that proviso, motion dismissed; costs in the cause. Strachan Johnston, for the defendants. A. M. Stewart, for the plaintiff.

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ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.—RIDDELL, J.—MAY 19.

*Contract—Construction—License to Take Water from River for Generating Electricity — Rate of Payment.*]—In this case, noted ante 127, the plaintiff applied to have the matter reopened and evidence taken. An order was accordingly made to that effect, and the case came on again for trial before RIDDELL, J. The evidence of Mr. Finlay, manager of the defendant company, was taken, and certain statements were put in, and also copies of the forms of the contracts the defendants make. Admissions were also put in which, it was argued for the plaintiff, taken in connection with other admitted or proved facts, shewed that the conclusion formerly arrived at was erroneous. RIDDELL, J., after an elaborate discussion of the evidence, said that he saw nothing in the new material to vary his former opinion. The plaintiff to pay the costs. Sir Æmilius Irving, K.C., C. H. Ritchie, K.C., and C. S. MacInnes, K.C., for the plaintiff. W. Nesbitt, K.C., A. Monro Grier, K.C., and A. M. Stewart, for the defendants.

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GOSNELL v. MCTAMNEY—DIVISIONAL COURT—MAY 21.

*Landlord and Tenant—Distress—Removal of Goods by Bailiff —Agreement to Store for Tenant — Abandonment of Distress — Rights of Chattel Mortgagee.*]—Appeal by the defendant from the judgment of DENTON, one of the Junior Judges of the County

Court of York, in favour of the plaintiff, in an action in that Court to recover possession of a piano. One Bonter, the owner of the piano, mortgaged it to the plaintiff. The piano was in Bonter's possession on premises demised to him by a Mrs. Orchard. Rent being overdue, Mrs. Orchard issued a distress warrant and placed it in the hands of the defendant for execution. The defendant distrained Bonter's goods, including the piano. Bonter, in order to obtain time, executed a bond in favour of the defendant, which provided that if the defendant would withdraw from close possession and if Bonter should fail to pay $42 the defendant might repossess the goods. The defendant, on obtaining the bond, withdrew temporarily from possession, leaving the goods in possession of Bonter. The latter paid only a fraction of the $42, and the defendant again placed a man in possession. Bonter went to the defendant's office, and, as the defendant said, "he arranged that I should take the piano and store it, and he would make payments until he should pay it all up." As a result of this arrangement, the defendant, according to his own evidence, removed the piano from Bonter's custody, and placed it in storage, where it continued to be until the trial of the action on the 22nd October, 1909. Held, by a Divisional Court (MULOCK, C.J., MAGEE, J.A., SUTHERLAND, J.), that so soon as the piano, in accordance with this arrangement, was removed from the demised premises, the distress was abandoned, the landlord's lien upon the piano ceased, and the plaintiff was entitled to possession of it under the mortgage. Appeal dismissed with costs. G. Grant, for the defendant. A. R. Lewis, K.C., for the plaintiff.

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MCKEE v. VERNER—MASTER IN CHAMBERS—MAY 23.

*Stay of Proceedings—Action on Foreign Judgment—Stay in Foreign Court.*]—Motion by the defendant to stay all the proceedings in the action, which was upon a foreign judgment. The judgment in question was obtained on "a judgment-note" similar to that in question in Metropolitan Trust and Savings Bank v. Osborne, 14 O. W. R. 135, ante 785. The defendant had made petition to the foreign (Pennsylvania) Court to set aside the judgment and to be allowed to enter a defence. Upon this a rule to shew cause had been granted and all proceedings upon the judgment stayed. The Master referred to Huntington v. Attrill, 12 P.

R. 36; Scott v. Pilkington, 2 B. & S. 11, 41; Re Henderson, Nouvion v. Freeman, 35 Ch. D. 704; and made an order staying the action until after the disposition of the rule staying proceedings, without prejudice to an application by the plaintiff to remove the stay, if good reason is shewn therefor. Costs in the cause. Grayson Smith, for the defendant. J. Bicknell, K.C., for the plaintiff.

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MARKS v. MICHIGAN SULPHITE FIBRE CO.—FALCONBRIDGE, C.J. K.B.—MAY 23.

*Principal and Agent—Contract—Failure to Prove Agency—Sale of Goods—Ratification—Costs.*]—Action to recover $438.75, a balance alleged to be due on 525 cords of pulpwood said to have been sold by the plaintiff to the defendants. The Chief Justice referred to the judgment of MEREDITH, C.J.C.P., in this case, ante 208, upon an appeal from an order of the Master in Chambers setting aside a default judgment and letting the defendants in to defend. The oral testimony adduced at the trial did not add much to the documentary evidence nor assist the plaintiff's case substantially. The Chief Justice's reading of the correspondence is that the defendants did not contract with the plaintiff, nor was Nesbitt the defendants' agent or employee, but that Nesbitt bought from the plaintiff and sold to the defendants. Two of the defendants' officers of 1894 swore that Nesbitt never was their agent or in their employment; and there was no holding out nor subsequent ratification to effect an adoption by the defendants of the contract or of Nesbitt's acts. The plaintiff therefore fails; but the defendants' conduct in the action has been such as to disentitle them to costs. Action dismissed without costs. J. L. O'Flynn, for the plaintiff. W. J. Hanna, K.C., and W. H. Hearst, K.C., for the defendants.

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PULLAN v. JONES—JONES v. PULLAN—MASTER IN CHAMBERS—MAY 25.

*Consolidation of Actions — Practice — Stay of one Action—Convenience.*]—Motion by the plaintiffs in the first action for an

order consolidating the two actions or staying the second. The first action was for damages for breach of a contract by the defendants to perform certain work within a specified time and in accordance with specifications. The second action was to enforce a mechanics' lien for the work done under the contract in question in the first action. The plaintiffs in the first action stated that they might ask for a jury. The Master said that it was at least doubtful whether a jury could be called in an action under the Mechanics' Lien Act: Trussed Concrete Co. v. Wilson, 9 O. W. R. 238. As Pullan & Co. began their action first, and as that action is one proper to proceed in the High Court in the usual way, it is most convenient to let it proceed, and stay the other. This is not to interfere with the contractors' lien; and the plaintiffs should, if desired, give particulars now of their claim, so that the defendants may know what they have to meet. Costs in the cause. E. J. Hearn, K.C., for the applicants. Casey Wood, for the respondents.

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CURRAN v. COLLARD—MASTER IN CHAMBERS—MAY 26.

*Payment into Court—Moneys of Plaintiff in Hands of Defendant—Alleged Mental Incapacity of Plaintiff—Con. Rule 419—Inquiry as to Mental Condition—Jurisdiction—Residence abroad.*]—This action was brought by a mother, resident in the State of Ohio, for the return by her daughter, the defendant, of money deposited, with the plaintiff's consent, in a bank at Brantford, Ontario. The defendant did not deny that the money was the plaintiff's, but alleged that the plaintiff was in fact non compos mentis; and now moved for leave to pay the money into Court and for an inquiry as to the mother's mental condition. The Master said that, if the defendant wished to be relieved from the burden of the acknowledged trust and escape any further responsibility, she should pay the money into Court under Con. Rule 419; and, if the defendant wished to take action in respect of her mother's mental condition, that could only be done in the Court having jurisdiction where the mother resided. Motion dismissed. Costs in the cause. Grayson Smith, for the defendant. H. W. Shapley, for the plaintiff.

LYON v. MARKS—MASTER IN CHAMBERS—MAY 26.

*Lis Pendens—Failure to Prosecute Action—Writ of Summons not Served and not Renewed—Dismissal of Action.*]—Motion by the defendants Karensky to dismiss the action for want of prosecution. The action was begun by writ issued on the 13th November, 1908. A certificate of lis pendens was registered. The writ was never served. On the 10th May, 1910, the plaintiffs began an action in a County Court for the debt sued for in this action. The Master said that this action was in effect at an end under Con. Rule 132 (1), as no order had been applied for to renew the writ. Order made dismissing the action and vacating the registry of the lis pendens. Costs reserved till after the determination of the action in the County Court, or to abide the result of that action, as the applicants may prefer. H. E. Rose, K.C., for the applicants. J .R. Code, for the plaintiffs.