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APPELLATE DIVISION.

First Divisional Court. June 10th, 1918.

*SHIELDS v. SHIELDS.

Mortgage—Action by Mortgagee for Recovery of Mortgage-moneys and for Possession—Proceedings under Power of Sale—Action to Restrain—Mortgages Act, sec. 29.

Appeal by the plaintiffs from the order of Meredith, C.J.C.P., ante 223.

The appeal was heard by Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A.

J. D. Shaw, for the appellants.

W. E. Fitzgerald, for the defendant, respondent.

The Court dismissed the appeal with costs.

First Divisional Court. June 10th, 1918.

*DINGLE v. WORLD NEWSPAPER CO.

Libel—Newspaper—Notice before Action—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 8 (1)—Notice not Addressed to Defendant—Dismissal of Action.

Appeal by the plaintiff from the order of Middleton, J., ante 200.

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

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

D. J. Coffey, for the appellant.

K. F. Mackenzie, for the defendant company, respondent.

THE COURT was divided in opinion.

MEREDITH, C.J.O., and HODGINS, J.A., were in favour of dismissing the appeal; MAGEE and FERGUSON, JJ.A., were in favour of allowing the appeal.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1918.

PERKINS ELECTRIC CO. v. ELECTRIC SPECIALTY AND SUPPLY CO.

Contract—Order for Goods—Acceptance—Failure to Deliver—Repudiation of Contract—Specifications—Election—Notice—Damages.

Appeal by the defendant company from the judgment of MIDDLETON, J., ante 190.

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

J. R. Roaf, for the appellant company.

J. H. Spence, for the plaintiff company, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JUNE 11TH, 1918.

*BRUNELLE v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Person Crossing Track—Foot Caught in "Split-switch"—Negligence—Contributory Negligence—Findings of Jury—Evidence—Inference as to Cause of Death—Statutory Authorisation of Switch—Exceeding Statutory Powers—Danger to Public—Order of Board of Railway Commissioners—Railway Act, R.S.C. 1906 ch. 37, sec. 238 (8 & 9 Edw. VII. ch. 32, sec. 5)—Protection of Crossing—Highway Crossing—Establishment of Highway.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $6,000 and costs, in an action by the administrator of the estate of Telesphore Desrochers, to recover damages for his death, which was caused, as the plaintiff alleged, by the negligence of the defendants.

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

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

H. J. Scott, K.C., for the plaintiff, respondent.

KELLY, J., reading the judgment of the Court, said that on the night of the 6th April, 1915, at about 10 o'clock, Desrochers was found to have met with an accident on the tracks of the defendants at their intersection with Queen street, in the town of Penetanguishene, from which his death resulted. He was found "lying beside the tracks with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch" of the defendants' tracks (evidence of the local physician of the defendants, who was summoned as soon as the man was found lying beside the tracks).

The jury, in answer to questions, found that the death was caused by the defendants' negligence, which (they said) consisted in having a "split-switch" on the public highway; they found against contributory negligence.

Queen street runs in a north-westerly direction, ending at the water's edge of Penetanguishene Bay, a short distance from the tracks. Running in a north-easterly direction across Queen street, the tracks lead to their terminus at the present station. The station was moved in 1913 from a place nearer to Queen street than that which it occupied at the time of the accident.

It was urged, for the defendants, that the approval by the Board of Railway Commissioners, by an order of the 16th May,

1914, of the plan for the removal of the station, was an approval as well of the location of the tracks, switches, etc., upon and adjoining Queen street. But what was before the Board was solely the removal of the station; the application before the Board had no reference to the location or disposal of the tracks or switches at Queen street. If there was an approval at all, it was an approval of a switch, not upon Queen street, but outside of it. Approval of the existence of the switch upon the street was not obtained; there was no positive evidence as to when it was first placed upon the street; but, assuming that it was there before the present sec. 238 of the Railway Act was enacted by 8 & 9 Edw. VII. ch. 32, sec. 5 (D.), the defendants were not relieved from liability or otherwise assisted by the provisions of that section, merely because no complaint or application had been made to the Board under that section, or because the Board had not made the order contemplated by that section.

Upon the evidence, Queen street must be regarded as a public highway; and it was used as such, to the knowledge of the defendants; who, therefore, should have protected the crossing as a highway crossing.

The "split-switch" was described by witnesses as a standard "split-switch" in use on different railways—in fairly general use, it might readily be inferred—but that does not imply that it was such a structure as might be placed or used upon a highway without danger to the public.

There was evidence for the jury of the defendants' negligence; and, in basing their conclusion on a consideration of that evidence, the jury were not usurping the jurisdiction of the Board. The finding was not in the nature of a direction as to what the protection to the public should be, but a finding that, from the kind and manner of construction of the switch, it was dangerous to persons using the highway, and that those responsible for its presence on the highway were negligent if it was the cause of injury.

In respect of the obligation of persons exercising rights conferred by statutory authority, the grantee of such powers is not in general responsible for injury resulting from that which the Legislature has authorised, provided it is done in the manner authorised and without negligence; but an obligation rests upon persons exercising such powers, not only to exercise them with reasonable care, but in such manner as to avoid unnecessary harm to others.

Reference to Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works, [1898] 2 Ch. 603, 611; Roberts v. Charing Cross Euston and Hampstead R.W. Co. (1903), 87 L.T.R. 732, 733, 734; Moore v. Lambeth Waterworks Co. (1886), 17 Q.B.D. 462, 465.

Not only must an authorised act be done in a reasonable way and without negligence, but the statutory or authorised power must not be exceeded. Whatever rights the defendants acquired in respect of this highway, they did not include the erection and maintenance thereon of this switch.

No one saw the accident happen; but it could have happened only from an engine or train passing over the man; it was open to the jury to draw the conclusion they did.

There was no evidence that the deceased was negligent.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 12TH, 1918.

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

Parties—Addition of Defendants—Rule 67—Improper Joinder—Distinct Contracts between Different Parties—Service on Added Defendants out of the Jurisdiction—Rule 25 (1) (g)—Discretion—Service Set aside.

Appeal by the plaintiffs from the order of MIDDLETON, J., ante 162.

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

Alfred Bicknell, for the appellants.

R. H. Parmenter, for W. Green & Son Limited and Stevens & Sons Limited, added as defendants, respondents.

R. T. Harding, for the original defendants.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JUNE 14TH, 1918.

*FORSYTH v. WALPOLE FARMERS MUTUAL FIRE INSURANCE CO.

Insurance (Fire)—Contents of Barn—Limitation of Liability to Two-thirds of Cash-value—Provision in Application—Insurance Act, R.S.O. 1914 ch. 183, sec. 156(3)—Statutory Condition 8—Mutual Insurance Company—Membership in, of Assured—By-law—Value of Property Destroyed—Absence of Proof of Excess over "Estimated Value."

Appeal by the defendants from the judgment of LATCHFORD, J., ante 114.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

T. J. Agar, for the appellants.

R. S. Colter, for the plaintiff, respondent.

HODGINS, J.A., read a judgment in which he said that he did not think that, upon the wording of the insurance contract sued upon, the question chiefly argued really arose. That question was, whether the provision in the application limiting the insurance to two-thirds of the cash-value controlled the operative words of the policy, because in the latter were contained the words, "the said application forms and is made part of this policy." It was not necessary to consider whether the application was, notwithstanding the provisions of the Ontario Insurance Act, by that reference incorporated as part and parcel of the policy. If the point had to be expressly decided, it would be proper to deal again with the difficulties caused by the Supreme Court of Canada's decisions referred to and discussed by this Court in Youlden v. London Guarantee and Accident Co. (1913), 28 O.L.R. 161, and Town of Arnprior v. United States Fidelity and Guaranty Co. (1914), 30 O.L.R. 618. These difficulties are not cleared up by Sharkey v. Yorkshire Insurance Co. (1916), 54 S.C.R. 92; see Beury v. Canada National Fire Insurance Co. (1917), 39 O.L.R. 343.

If the application were looked at, however, there was really no inconsistency. In it the respondent applied for insurance to the extent of $1,600 upon the ordinary contents of his barn. Very few of the questions asked were answered and little information was given. No statement of the cash-value appeared in the application. Hence, reading the clause, "Not more than two-thirds of the cash-value of any building or personal property will be insured

by this company in connection with any other company or otherwise," there was nothing to convey the impression that the request for $1,600 was beyond the amount for which an insurance could or would be granted, or that, when the policy should be issued, the amount insured would not be within the prescribed limit.

The policy insured against loss or damage to the extent of $1,600, to be estimated "according to" (not "as") "the true and actual cash-value of the said property at the time the same shall happen;" and on its back was printed the following statutory condition:—

"8. After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application unless the company point out in writing the particulars wherein the policy differs from the application."

The assured, having applied for $1,600 insurance on the contents of his barn, and having by his application indicated his agreement with the fact that the company would not insure more than two-thirds of the value—the by-law said "estimated value"—was entitled to rely on condition 8 and to treat the company's contract as based upon the fact that the amount of insurance which he applied for and which was granted was within the two-thirds limit. There was in fact nothing in the application to controvert or weaken this position; and so the case might be decided upon the terms of the policy without considering whether the application was really made part of the agreement.

It was argued that the respondent, being a member of the company, could not claim more than two-thirds of the loss. The by-law, as above pointed out, restricted the company from insuring more than two-thirds of the "estimated value," and there was no proof that $1,600 exceeded that estimated value.

The appeal should be dismissed.

MACLAREN and MAGEE, JJA., agreed with HODGINS, J.A.

FERGUSON, J.A., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 14TH, 1918.

*WANNAMAKER v. LIVINGSTON.

Will—Validity—Testamentary Capacity—Undue Influence—Relationship—Evidence—Action to Set aside Gifts of Property Made by Testatrix in Lifetime—Evidence—Onus—Presumption—Parties—Absence of Personal Representative—Amendment—Findings of Trial Judge—Appeal—Costs.

Appeal by the plaintiff and cross-appeal by the defendants Jane, David, and Minnie Livingston, from the judgment of KELLY, J., 13 O.W.N. 3.

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

W. C. Mikel, K.C., for the plaintiff and the defendant Frankie Detlor.

R. McKay, K.C., for the three Livingston defendants.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiff appealed from the part of the judgment by which the plaintiff's claim to set aside gifts alleged to have been made by Elizabeth Simpson, deceased, to the three Livingstons, was dismissed; and the Livingstons appealed from that part of the judgment which declared that a paper-writing dated the 4th July, 1913, purporting to be the last will of Elizabeth Simpson, was void.

The parties to the action were all the next of kin of Elizabeth Simpson, who died on the 7th April, 1916; the plaintiff, Eliza Wannamaker, and the defendant Jane Livingston were sisters of the deceased, and the other defendants were the children of Jane.

Down to the trial no personal representative of the estate of the deceased had been appointed, but the plaintiff had obtained, under Rule 90, an order allowing the trial to proceed in the absence of any person representing the estate of Elizabeth Simpson.

The trial Judge made findings in favour of the plaintiff both in regard to the will and the gifts inter vivos; he set aside the will and declared that the deceased died intestate, but he refused to set aside the gifts, on the ground that the right of action in that behalf was vested in the personal representative.

The plaintiff, relying on the order obtained under Rule 90, appealed; but, on the suggestion of this Court, the hearing of the appeal was adjourned to enable the plaintiff to obtain letters of administration. This was done and an application was made to add the plaintiff as a party in her capacity as administratrix. The respondents, the Livingstons, were willing that this should be done

on certain terms; and an order was made adding the administratrix as a party.

There was evidence on which the learned trial Judge could find that the Livingston defendants had it in their power to exercise a great influence over the deceased, and that the three gifts attacked were obtained when the defendants and each of them occupied that position. It is not necessary to the setting aside of such gifts on the ground of undue influence, that there should be proof of the exercise of undue influence. Undue influence is presumed, and it rests upon the donee to rebut that presumption by proving that the transaction was righteous and was fairly conducted as between strangers; that the grantor was not unduly impressed by the influence of the grantee; and by satisfying the Court that the grantor, knowing and appreciating the effect of the transaction, acted voluntarily and deliberately, free from the influence of the grantee: Halsbury's Laws of England, vol. 15, p. 420; Delong v. Mumford (1878), 25 Gr. 586; Vanzant v. Coates (1917), 39 O.L.R. 557, 40 O.L.R. 556.

In the case at bar, the Livingstons had failed to rebut the presumption and to satisfy the other requirements of the rule; and the trial Judge had found that undue influence was in fact exercised and that these gifts were all the result of the exercise of such influence. On that branch of the case, the finding of the trial Judge was sustained; and, the plaintiff being now before the Court as personal representative of the deceased, the gifts inter vivos should be set aside.

The will was executed in manner provided for by the Wills Act, and the trial Judge had found that the deceased did not lack mental capacity. It was contended that undue influence was not to be presumed, and that the will must stand unless it was produced by fraud or coercion, and Baudains v. Richardson, [1906] A.C. 169, 185, was cited. But, in the circumstances of the case at bar, those supporting the will were required not only to prove due execution and mental capacity, but to satisfy the Court that the document propounded was understood and appreciated by the testatrix, and was in truth the expression of her desire.

The Livingstons failed in their cross-appeal because they did not establish a case for the application of the rule in the Baudains case, and because, even if the rule in the Baudains case were applied, there was evidence upon which the trial Judge could find (as he did) against the Livingstons on the question of fact whether the will expressed the conscious desire of the deceased.

Reference to authorities, especially Fulton v. Andrew (1875), L.R. 7 H.L. 448, and Tyrrell v. Painton, [1894] P. 151, 157.

The appeal should be allowed and the cross-appeal dismissed, both with costs, except in so far as the costs of the appeal had been

increased by reason of the adjournments and amendments; and the form of the judgment should be such as to protect the defendants the Livingstons, and allow them to take proceedings, if so advised, to establish a prior will.

FIRST DIVISIONAL COURT. JUNE 14TH, 1918.

*GERARD v. OTTAWA GAS CO.

Negligence—Explosive Left by Workman in Street and Found by Boy—Injury to Boy—Negligence—Findings of Jury—Conflicting Evidence—Onus—Appeal.

An appeal by the defendants from the judgment of MULOCK, C.J.Ex., at the trial, upon the findings of the jury, in favour of the plaintiffs.

The action was brought by John Gerard, a boy of 9 years of age, by his father as next friend and as a plaintiff in his own right, to recover damages arising from an injury to the boy from an explosive said to have been negligently left in a tool-box on wheels, by the defendants' servants, on a side-street in the city of Ottawa, where they were digging a trench for the laying down of gas-pipes.

The jury awarded the boy $700 damages and his father $100, and judgment was given in their favour for these sums, with costs.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

G. F. Henderson, K.C., for the appellants.

A. E. Fripp, K.C., for the plaintiffs, respondents.

MACLAREN, J.A., in a written judgment, set out the facts and gave the questions submitted to the jury and their answers, which were as follows:—

1. Where did the infant plaintiff obtain the explosive which injured him? A. In the Ottawa Gas Company's tool-box.

2. (*a*) If from the defendants' tool-box, did the defendants know it was there? A. May not have known.

(*b*) Ought they, by the exercise of reasonable care, to have known that it was there? A. Yes.

3. Was the explosive in the possession of the defendants when the infant plaintiff obtained possession of it? A. Yes.

4. Were the defendants guilty of any negligence in the care of the explosive? A. Yes.

5. If so, in what did such negligence consist? A. In not locking their tool-box.

6. If the defendants did not exercise reasonable care, did such negligence cause or contribute to the accident? A. Yes.

7. Was the infant plaintiff guilty of any negligence which caused or contributed to the accident? A. No.

The main issue in the case was, whether the infant plaintiff had obtained the explosive from the defendants' tool-box. On the one side was the direct and positive affirmative statement of the boy and his elder brother; against that, the strong statement of the defendant workmen that there was no explosive in the box. It was peculiarly a case for the jury, and they had seen fit to accept the story of the boys, as they had a perfect right to do.

When the jury brought in their findings, counsel for the defendants urged that upon the answers to questions 2(*a*) and 2(*b*) they were entitled to judgment, on the ground that the defendants would be liable only in case there was actual knowledge on their part. In the opinion of the learned Justice of Appeal, the jury having found that the explosive was in the defendants' box, the onus was on the defendatns to shew that it had come there in some way for which they were not responsible, and this they had wholly failed to do.

The appeal should be dismissed.

Magee and Ferguson, JJ.A., agreed with Maclaren, J.A.

Hodgins, J.A., read a dissenting judgment. He was of opinion that the verdict was an unsatisfactory one, and that the defendants were entitled to a new trial.

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

First Divisional Court. June 14th, 1918.

NEW ONTARIO TIMBER CO. v. McDONALD.

Contract—Sale of Pulpwood—Breach by Vendor—Action by Purchaser for Damages—Defence—Repudiation of Contract because of Misrepresentations—Failure of Purchaser to Shew Damage—Relief of Purchaser from Loss by Transaction with Stranger.

An appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Algoma dismissing the action without costs.

The action was for breach of a contract, reduced to writing and dated the 31st October, 1916, whereby the defendant agreed to sell and the plaintiffs agreed to buy 1,500 cords of pulpwood, at prices and on terms set out in the document.

The defendant pleaded that the contract was induced by misrepresentation, which entitled him to repudiate, and that he did repudiate, the contract; in the alternative, that the plaintiffs suffered no damage.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. S. Maguire, for the appellants.

Grayson Smith, for the defendant, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that he was of opinion that the representations alleged by the defendant to have been made by the plaintiffs' manager, and found by the trial Judge to have been innocently made, were made to induce and did induce the defendant to enter into the contract sued upon; that the representations were in part statements of fact; that, in so far as they might be construed to be expressions of opinion, they must be taken as representations made by the manager in reference to matters in respect of which he had a special knowledge or which he specially guaranteed as accurate; and that the representations were untrue.

On learning that the representations were untrue, the defendant repudiated the contract; and that he was entitled to do: Halsbury's Laws of England, vol. 20, p. 737.

The trial Judge did not give effect to the defence of misrepresentation, taking the view that the defendant was not entitled to repudiate on account of innocent misrepresentations, and being also of opinion that the representations were statements of opinion rather than statements of fact; but he dismissed the action on the ground that the plaintiffs had not sustained any damage.

After entering into the contract sued upon, the plaintiffs, by writing dated the 25th November, 1916, agreed to sell all their pulpwood to the Diamond Pole Piling Company, at prices and on terms stated in the document.

Other buyers appeared in the market, with the result that the prices of pulpwood advanced, and it was impossible to secure pulpwood at the prices fixed in the contract sued upon. Thereupon the plaintiffs entered into negotiations with the Diamond Pole Piling Company and secured from them a modification of their contract, whereby they reduced the minimum amount of pulp which they had agreed to supply, and obtained an increase in the price of such pulp as they did actually supply; in this

way they mitigated the damage that they would have suffered had they been held to their contract and had the defendant defaulted in his.

The trial Judge, in estimating the plaintiffs' damage, took into consideration the dealings between the Diamond company and the plaintiffs, and came to the conclusion that these dealings had, in their result, relieved the plaintiffs from all the loss that they might otherwise have suffered by reason of the defendant's default, and that the defendant was, in the circumstances, entitled to the benefit of these transactions. That conclusion was right. See British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited, [1912] A.C. 673.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 14TH, 1918.

FOX v. PATRICK.

Promissory Note—Accommodation Maker—Surety—Liability to Endorsee who Advanced Money upon Security of Note—Note Made Payable to Bank—Title to Note—Holder in Due Course—Bills of Exchange Act, sec. 70—Estoppel.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 13 O.W.N. 400, dismissing the action without costs.

The appeal was heard by MACLAREN AND MAGEE, JJ.A., KELLY, J., and FERGUSON, J.A.

T. G. Meredith, K.C., for the appellant.

P. H. Bartlett, for the defendant, respondent.

MACLAREN, J.A., read a judgment in which he said that the judgment appealed from should be affirmed on the ground that the case was governed by sec. 70 of the Bills of Exchange Act, R.S.C. 1906 ch. 119, which says: "When an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it."

The note in question was dated the 25th August, 1909, and was made payable to the order of the Standard Bank, Lucan, two months after date, so that it became due on the 28th October,

1909. The plaintiff only became the holder of it when it was endorsed by him, on behalf of the bank, without recourse, under the authority of the letter to him from the assistant general manager of the bank, dated the 12th October, 1915.

The trial Judge found, and the evidence justified his finding, that the note was an offer to the bank to become surety to it for an advance to be made to his brother, J. H. Patrick; but the bank declined to make any such advance and never acquired any title to it; so that, when the bank, by its agent, the plaintiff, over 6 years later, endorsed the note to the plaintiff, it did not give him any title to the note, as it had no title to give.

Upon the findings of the trial Judge against the defendant on the other issues the learned Justice of Appeal expressed no opinion.

None of the authorities cited by counsel for the appellant went so far as to justify a reversal of the judgment, and none of them were under the Canadian Act, or the English Act, or even under the Negotiable Securities Act in force in any of the States of the Union.

The appeal should be dismissed with costs.

FERGUSON, J.A., agreed with MACLAREN, J.A.

MAGEE, J.A., in a short written judgment, said that, as the plaintiff never made known to the defendant that he was the beneficial owner of the note, which was made in favour of the bank of which he was the local manager, and which the plaintiff naturally supposed to have been discounted with and to be held by the bank, and as in fact the note was not endorsed by the bank to the plaintiff till long after the defendant was entitled as against the bank to suppose all liability to the bank was at an end, the plaintiff was estopped from asserting that he, and not the bank, was the owner or holder of the note. The learned Judge (Magee, J.A.) agreed with the other reasons and conclusion of Maclaren, J.A., and that the appeal should be dismissed.

KELLY, J., was of opinion that the judgment appealed from was correct and should be upheld.

Appeal dismissed.

FIRST DIVISIONAL COURT. JUNE 14TH, 1918.

*TYRRELL v. TYRRELL.

Executors and Trustees—Fraud—Failure to Prove—Sale of Share of Beneficiary—Adequacy of Price—Fiduciary Relationship—Executors Acting Honestly and Reasonably—Limitations Act—Personal Liability of one Executor—Bar by Statute—Case of Concealed Fraud not Made out—Claim to Share of Amount in Hands of Executors—Finding of Surrogate Court Judge—Finality—Interest—Costs.

Appeal by the plaintiff from the judgment of RIDDELL, J., 13 O.W.N. 105.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. Laidlaw, K.C., and Christopher C. Robinson, for the appellant.

W. D. McPherson, K.C., and Shirley Denison, K.C., for the defendants, respondents.

HODGINS, J.A., reading the judgment of the Court, said that he saw no reason for differing from the conclusion at which the trial Judge arrived, that no fraud or overreaching had taken place on the part of the respondents.

Accepting this finding, there remained several contentions to be considered.

It was clear that the deed to the respondent Robert Tyrrell of the homestead included lot 2, which was not a part of the homestead. It was said that lot 2 was used as a cow-pasture, and was in some way appurtenant to the homestead; but that was not established as having been brought home to the mind of the appellant, nor was it clearly made out on the part of the respondents.

It was also evident that there was in the hands of the trustees, at the time the appellant sold out, money belonging to the estate and undistributed.

It was argued that the inclusion of lot 2 in the deed of the homestead, while overlooked by the appellant, should have been clearly disclosed by the trustees; and it was suggested that knowledge of the additional lot might have affected the appellant's mind in regard to his agreement to sell for $1,000 his share in the Weston property, and that the price of $1,000 was an inadequate price for his share.

The evidence, however, failed to establish inadequacy of price;

and it was nowhere suggested by the appellant that he would have asked more had he known that lot 2 was still undisposed of; while the small amount realised from it, after the lapse of many years, led to the belief that, even if he had known all about it, it would have made no difference in regard to the amount which he was willing to accept.

The case narrowed down to two points: (1) the right of the appellant in regard to lot 2, included in the deed to Robert, but not mentioned by the executors as part of his share, and not noticed by the appellant when he signed the deeds without reading them; and (2) the right of the appellant to judgment of his share of the amount found by the Surrogate Court Judge to be now in the hands of the executors.

Assuming perfect good faith on both sides, lot 2 was still an asset of the estate and was conveyed by the executors to Robert without being actually mentioned as part thereof when the appellant was communicated with on the subject. Both parties appeared to have been to blame. The executors acted honestly. Did they also act reasonably? They were trustees of the property, which was vested in them, but the division of it was left entirely in the hands of the four brothers. There was no actual fiduciary relationship; the executors were bare trustees, bound to divest themselves of the legal estate in the way determined by the four brothers; and, although two of them were these trustees, in that capacity they owed no duty to the others which brought them within the well-known principle of equity relied on. But, if their position was comparable to that of the trustees in Denton v. Donner (1856), 23 Beav. 286, the respondents had discharged the onus there spoken of.

Assuming, however, that the respondents were trustees in that regard, it did not lie in the mouth of the appellant to say that they did not act reasonably, where he failed to do what they asked him to do, viz., read the deeds. They should be relieved from responsibility in any case, and the Limitations Act would be a bar as far as they were concerned.

But the question arose whether, as the lot was conveyed to Robert, he could hold it and not account for its value. He was one of the executors; he got the lot as part of his share; he had sold it and received the price. He should account personally to the appellant were it not for the Limitations Act, which was a bar; there was no concealed fraud which prevented Robert from claiming the benefit of the statute.

The trial Judge struck out the appellant's claim for the recovery of the one-quarter share of the amount found to be in the hands of the respondents as executors. The amount of the payments made by them in the lifetime of their father (the testator) in order to

preserve the property, although not strictly a debt of the estate, was deducted by the Surrogate Court Judge from the amount found to be in the hands of those who made the payments, and so was deducted from the amount with which the executors were charged. The evidence before that Judge warranted what he did; and his approval was final and binding upon all the parties represented except so far as fraud or mistake might be shewn: In re Wilson and Toronto General Trusts Corporation (1908), 15 O.L.R. 596.

The appeal should be allowed in part, and judgment should be entered for the appellant for $1,256.03, being one-quarter ot his share of the moneys in the hands of the executors, with such interest only as the amount had borne since it was paid into Court in this action, and less the costs to be mentioned.

In view of the way in which the charges of fraud and improper dealing were persisted in, it would be fair to award no costs of the action to the appellant and to allow to the respondents their costs as executors out of the estate down to the date of the payment of the $1,256.03 into Court, of which the share of the appellant should pay one-quarter. The appellant should also pay the costs after the date of payment into Court. There should be no costs of the appeal, as success was divided.

Reference to Bruty v. Edmundson, [1917] 2 Ch. 285, [1918] 1 Ch. 112, on the question of costs.

Appeal allowed in part.

HIGH COURT DIVISION.

SUTHERLAND, J. JUNE 10TH, 1918.

HOLMES v. HUSBAND.

Mortgage—Action by Administrator of Estate of Deceased Mortgagee—Defence of Mortgagor—Instrument not Intended to be Operative or Intended as Security for Interest only—Evidence—Gift—Delivery of Instrument—Registration—Registry Act, sec. 50—Possession of Instrument by Mortgagor.

Action by James Holmes, administrator of the estate of Jessie Holmes, deceased, to recover the principal and interest due upon a mortgage executed by the defendant in April, 1912, in favour of Jessie Holmes, to secure $3,500 and interest. The mortgage was registered in May, 1912. Jessie Holmes died intestate on the 23rd April, 1913. The action was begun in July, 1917.

The defence was: that no moneys were advanced by the deceased upon the mortgage; that, without request or consideration therefor, the defendant voluntarily executed the mortgage for the purpose of securing to the deceased, who was his aunt, an income during her lifetime; that the mortgage was never delivered; and that it came to the hands of the plaintiff with full knowledge on his part that there had been no delivery and that no moneys had been advanced.

The action was tried without a jury at Woodstock.

W. T. McMullen, for the plaintiff.

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

Sutherland, J., in a written judgment, after setting out the facts, said that he was asked by the defendant to find that there was a gift inter vivos of the $3,500; that there was an agreement between him and his aunt that he should pay interest on that sum for her life as part of her income; that there was in reality no advance of the consideration named in the mortgage; that the mortgage was intended to be and was in fact only a security for the interest or income; and that there never was any delivery of the mortgage to the aunt or for her which would make it an effective instrument.

The evidence fell short of that satisfactory proof necessary to make out a complete gift of the money by the aunt to the defendant. If there was no gift, there was consideration for the mortgage, as the defendant received the moneys, and so expressly admitted.

The mortgage was in fact registered, even though, as was said, the defendant did not give instruction to that end, and the solicitor employed to draw the mortgage registered it as a matter of usual practice. It came back into the possession of the defendant with the certificate of the registration on it, and that was prima facie evidence of the registration of the instrument and of its due execution: Registry Act, R.S.O. 1914 ch. 124, sec. 50.

The defendant admitted that the document was intended to be an immediate and effective security to his aunt to the extent at least of interest on the consideration-money named therein, for her lifetime, and he in fact paid interest up to a certain time, although he testified that his aunt was unaware of the existence of the mortgage. It was difficult to believe the story that the transaction was not intended to be just what it purported on its face to be, or that knowledge of it was not conveyed to the aunt in her lifetime. The instrument was in fact in the terms intended; and there was a delivery in the legal sense. The aunt was living with the defendant at the time of the execution and registration of the mortgage and when the defendant received it from the solicitor

after registration. Even if the mortgagor retain possession of the instrument there may be a delivery.

Reference to Halsbury's Laws of England, vol. 10, p. 403, para. 725; Exton v. Scott (1833), 6 Sim. 31; Fletcher v. Fletcher (1844), 4 Hare 67; In re Way's Trusts (1864), 2 De G. J. & S. 365; McDonald v. McDonald (1880), 44 U.C.R. 291; Zwicker v. Zwicker (1899), 29 S.C.R. 527; Norton on Deeds (1906), p. 13 et seq.; Armour on Titles, 2nd ed., pp. 336-9; Anning v. Anning (1916), 38 O.L.R. 277, 286, 293.

The mortgage should be declared a valid one and a security for the consideration named therein and inteerst as stated; and the plaintiff should have judgment for $3,963.96, with interest, as claimed, and costs.

ROSE, J. JUNE 10TH, 1918.

FOLEY v. LIPSON.

Vendor and Purchaser—Agreement for Sale of Land—Subdivision of Block—Objection to Title—Building Restrictions—Covenant of Grantee—Protection of Land Retained by Original Vendor—Covenant Enforceable against Purchaser from Covenantor.

Action by the vendor for specific performance of an agreement for the sale and purchase of land.

The action was tried without a jury at Toronto.
Shirley Denison, K.C., for the plaintiff.
J. Singer, for the defendant.

ROSE, J., in a written judgment, said that a land company was the owner of a block of land lying north of St. Clair avenue. Through this land Arlington avenue runs north from St. Clair avenue. The land company conveyed the lot in question and another lot to the plaintiff's predecessors in title, by a deed executed by the grantees, bearing date the 24th July, 1914, and duly registered, which contained a covenant in the words following: "To the intent that the burden of these covenants shall run with the land, the grantees, for themselves, their heirs, executors, administrators, and assigns, do hereby covenant and agree with the grantor, its successors and assigns, that (except with the written consent of the grantor) the said lands shall be used for no other purpose than as a site for private residences to be built of solid brick or stone and to be set back from the street line of

Arlington avenue at least 20 feet and to be of a prime cost of $2,500 for each dwelling, such dwelling to be either detached or semi-detached, and it is understood that a garage built of solid brick or stone may be erected for private purposes only." Similar covenants were contained in the deeds of other lots sold by the land company.

One of the many defences set up was, that the existence of this covenant created such a defect in the title as justified the purchaser in refusing to complete. The house standing upon the land was in conformity with the covenant; but the defendant said that he required a garage, and did not wish to be compelled to erect one of stone or brick. That did not seem to be his real reason for refusing to complete the purchase; but, if the covenant was one that could be enforced, the defence was good.

The land company had sold or agreed to sell all of its land on the west side of Arlington avenue. The frontage of its lands on the west side was originally (exclusive of the lots fronting on St. Clair avenue) about 853 feet; it had conveyed to purchasers the major portion of this land, but was still possessed of the legal title to some 273 feet, which it had agreed to sell but had not conveyed. The agreements as to the 273 feet were with 5 several purchasers, each of whom has paid a considerable portion of his purchase-price; but a substantial amount remained to be paid upon each purchase; and, by the terms of the agreement, the company was under no obligation to convey until the whole of the purchase-money was paid. Each of the agreements contained a covenant on the part of the purchaser similar in its terms to the grantees' covenant in the deed of 1914, above set out.

Upon this state of facts, it was not necessary to discuss the question whether the circumstances were such as would entitle a purchaser of one of the other parcels of land sold by the land company to enforce against the owner of the land in question the covenant entered into by the plaintiff's predecessors in title. The company refused to release the land from the covenant; it was a covenant for the protection of the land retained by the company; the plaintiff or his wife, the registered owner, bought with notice of it; the law, as established in Tulk v. Moxhay (1848), 2 Ph. 774, and restated in many cases, e.g., London County Council v. Allen, [1914] 3 K.B. 642, is that, in such circumstances, the covenantee can enforce the covenant as against a purchaser from the covenantor.

Upon this ground, without consideration of the other defences, the action should be dismissed. The defendant was entitled to a return of his deposit of $200.

LATCHFORD, J. JUNE 11TH, 1918.

McPHERSON v. NIAGARA GRAIN AND FEED CO. LIMITED.

Sale of Goods—Grain Sold by Sample—Appropriation to Contract of Particular Car-load Specified in Bill of Lading—Acceptance of Draft—Failure to Deliver Grain—Recovery by Buyer of Amount Paid—Wrong Car-load Delivered by Reason of Mistake as to Number of Car—Car-load Actually Delivered in Damaged Condition.

Action to recover $1,949.66, the price of a car-load of barley purchased by the plaintiff from the defendants, but, as the plaintiff alleged, never delivered.

The action was tried without a jury at Stratford.

W. G. Owens and W. E. Goodwin, for the plaintiff.

H. H. Shaver, for the defendants.

LATCHFORD, J., in a written judgment, said that on the 7th May, 1917, the defendants sold to the plaintiff, a grain broker in Stratford, two cars of "sample barley," one at $1.14 a bushel, and the other at $1.16 a bushel. The dispute between the parties was only as to the latter. The defendants had, at the time, no samples of the barley actually contained in the cars. They, however, sent a sample of the barley to the plaintiff early in May, before the 5th. They denied this, but the finding on the evidence must be against them. The sample sent was not taken from the cars, but was a fair sample of sound ungraded barley as ordinarily loaded on cars at Fort William.

On the 7th May, the plaintiff handed part of the sample received from the defendants to his selling agent, who, on the 8th, sold one of the car-loads to a Mrs. Dedels, of Breslau. On the 9th May, the plaintiff by letter directed the defendants to have a car-load of the barley delivered at Breslau, and asked for samples of the barley in each car, and for the numbers of the cars.

About the middle of May, Mrs. Dedels cancelled her order.

Car No. 296214 arrived at Breslau on the 3rd June, in a heated condition. The plaintiffs' agent sold the car-load to one Johnston, without examining the barley; and the plaintiff had no knowledge of its condition.

The defendants on the 25th May drew on the plaintiff for the price, $1,949.60, and he accepted the draft and paid it.

There was a mistake as to the number of the car. The invoice accompanying the draft specified car No. 296212, but the differ-

ence was not observed at the time. When car No. 296214 reached Johnston, the grain was steaming and mouldy, and he refused to accept it. The damaged barley was dried and sold for $983.44, which the plaintiff (by agreement) received and retained, and his demand was thus reduced to $966.16.

While up to the 25th May the plaintiff was not entitled to anything more than a car of barley equal to sample, the selection then by the defendants of car No. 296212, and the adoption of their act by the plaintiff, converted an agreement for the sale of any car of barley conforming to the sample into a completed sale of the grain in car No. 296212: Rohde v. Thwaites (1827), 6 B. & C. 388, 393.

Car 296212 was not delivered at Breslau, and the plaintiff never had an opportunity of examining it. Before the property in the barley contained in that car had passed to the plaintiff by his acceptance of the draft attached to the bill of lading for it, the defendants had intervened with the carriers and prevented the delivery of that car to the plaintiff.

There should be judgment for the plaintiff for $966.16, with interest from the 26th May, 1917, and with costs.

Rose, J. June 12th, 1918.

CLARKSON v. BONNER-WORTH CO. LIMITED.

CLARKSON v. VICTOR EDELSTEIN & SON LIMITED.

Assignments and Preferences—Creditors of Insolvent Receiving Payment in Full—Intent to Delay or Prejudice other Creditors—Evidence—Onus—Failure to Satisfy—Pressure—Sixty-day Presumption—Finding that Transaction did not Amount to Assignment or Transfer of Goods or Property—Claim to Recover Value of Goods—Assignee for Benefit of Creditors.

In these actions, the plaintiff, as assignee for the benefit of the creditors of D. F. Stewart, a manufacturer of knitted cloth, sought to set aside transactions which resulted in the defendants the Bonner-Worth Company Limited and Victor Edelstein & Son Limited, creditors of Stewart, receiving payment in full, in preference to the other creditors.

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

W. W. Vickers, for the plaintiff.

F. J. Dunbar, for the defendants the Bonner-Worth Company Limited and the executors of M. Rushforth, deceased.

W. J. McWhinney, K.C., for the defendants Edgar Worth and Victor Edelstein & Son Limited.

Rose, J., in a written judgment, after stating the facts, said that the onus of shewing intent to delay or prejudice the other creditors was, as to the transaction between Stewart and the Bonner-Worth Company, upon the plaintiff; and the plaintiff had failed to satisfy the learned Judge that there was any such intent. Moreover, the transaction was the result of pressure exercised by the defendant Edgar Worth; and, the 60-day presumption having no application, that fact was a perfectly good answer. The first action should be dismissed with costs to the defendants the company and Edgar Worth. The defendant Stewart was not represented at the trial, and was not entitled to costs.

As to the transaction in question in the second action, the learned Judge said, after stating the facts, that it did not relate back to a period more than 60 days before the assignment to the plaintiff; and, if what was done amounted to an assignment or transfer of goods, chattels, effects, or property, it must be presumed prima facie to have been made with the intent to give Victor Edelstein & Son Limited an unjust preference, and to be an unjust preference, and so null and void. If the statutory presumption arose, the transaction could not be supported merely by proof of pressure; it would be necessary to decide whether the fact that Stewart did not really want the wool as much as he wanted his money, and was glad to sell his wool at a profit, not because of any desire to benefit the Edelstein company, but simply to benefit himself, displaced the presumption.

It was, however, in the opinion of the learned Judge, not established that there was an assignment or transfer of goods, chattels, effects, or property, and so the statute did not apply, and the point mentioned did not really fall to be decided.

Unless it was found that Stewart owned the wool, what he did was not an assignment or transfer of it, but was at most a release of his right to insist upon the fulfilment of the contract of sale. The claim to recover the value of the wool failed.

There should be judgment for the plaintiff against the defendants Victor Edelstein & Son Limited, without costs, for the $415.12 admitted to be due. In other respects, the action should be dismissed. The said defendants should have their costs of the issues upon which they succeeded; and Rushforth's executors should have their costs. The defendant Stewart, who was not represented at the trial, and the defendant Thorpe, against whom the pleadings were noted closed, were not entitled to costs.

LATCHFORD, J. JUNE 12TH, 1918.

ONTARIO POWER CO. OF NIAGARA FALLS v. TORONTO POWER CO.

Injunction—Interim Order—Irreparable Loss—Contract for Supply of Electric Energy—Threatened Cancellation—Bona Fide Dispute as to Amount Due—Terms of Granting Injunction—Payment into Court of Amount in Dispute.

Application by the plaintiffs for an order restraining the defendants from discontinuing the supply of electric energy to the plaintiffs, under the terms of an agreement between the plaintiffs and the defendants of the 13th October, 1915, whereby the defendants agreed to supply the plaintiffs with electric energy as therein provided, and restraining the defendants from enforcing or attempting to enforce any right under the said agreement to terminate the same upon default in payment of the price of electric energy delivered by the defendants to the plaintiffs, under the agreement, during the month of March, 1918.

The motion was heard in the Weekly Court, Toronto.
G. H. Kilmer, K.C., for the plaintiffs.
R. McKay, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that the defendants, by the contract, agreed to deliver to the plaintiffs the output at normal rating, to be taken as 10,000 kilowatt amperes, of one electric generator, for a period of five years from the 15th October, 1915.

On or before the 15th of each month, the plaintiffs were to pay the defendants for the amount of energy supplied during the preceding calendar month.

For 75 per cent. of the normal rated capacity of the generator the plaintiffs were to pay at the rate of $13 per horse power.

For all energy delivered each month, in excess of 75 per cent. of the normal rated output of the generator, the defendants were entitled to be paid according to a scale which rose rapidly as the maximum of 100 per cent. was approached.

On the 8th April, the defendants rendered to the plaintiffs an account for March, 1918, claiming $41,724.06, a sum greatly exceeding the sum claimed in any previous month. The plaintiffs admitted $18,901.02 to be due, but disputed the difference, amounting to $22,823.04.

The defendants thereupon notified the plaintiffs that, in conformity with a term in the contract, they would treat the contract

as terminated, or, without terminating the contract, discontinue the delivery of current, unless the account rendered was paid by the 15th May, 1918.

The plaintiffs refused to pay the amount claimed; and, fearing that the contract would be treated as at an end, and that the supply of energy covered by it would be cut off, launched the present motion.

The dispute could not, in the opinion of the learned Judge, be regarded as originating in a mere desire to embarrass the defendants, however slight the love the real plaintiffs—the Hydro-Electric Power Commission—bore to the defendants. The dispute, upon the material before the Court, must be regarded as founded on good faith. The plaintiffs asserted that they had not received the amount of energy they had been charged with. It was only upon failure to pay for the energy so delivered, and not for failure to pay the account rendered—unless correct—that the right of cancellation arose. Suddenly to cancel the agreement, and thus cut off the supply to the plaintiffs and their customers of 10,000 horse power—in large part applied in manufacturing munitions of war—would, in the circumstances, cause irreparable loss to the plaintiffs and those dependent upon them for power. Damages would be no compensation.

Upon the plaintiffs paying to the defendants $18,901.02 and paying into Court $22,823.04 to await the determination of the dispute, the plaintiffs should have the injunction asked for. Otherwise motion dismissed.

Costs should be costs in the cause unless the trial Judge should otherwise order.

LATCHFORD, J. JUNE 13TH, 1918.

PENBERTHY v. CORNER.

Contract—Excavation Work—Difficulty in Completing—Work to be Executed "according to Plans" — Abandonment — Money Expended in Completion—Damages—Ascertainment of.

Action by the contractor for the erection of a Hydro-Electric sub-station in the city of Toronto, against the sub-contractor for the excavation work, to recover damages for the defendant's failure to complete the excavation. The defendant was paid $700 on account of the contract-price, and counterclaimed for the balance or part of it.

The action and counterclaim were tried without a jury at Toronto.

W. F. Kerr and C. W. Kerr, for the plaintiff.

W. R. Smyth, K.C., for the defendant.

LATCHFORD, J., in a written judgment, said that it was not disputed that the defendant did not complete the work under his sub-contract, which was to do certain excavation "according to plans." The defendant denied that he saw the plans referred to in the tender which he made to the plaintiff or that he received the letter notifying him that his tender had been accepted and enclosing specifications of the excavation work. Upon the evidence of the plaintiff's manager, the defendant did see the plans; and he probably received the letter, as it was sent to him by post.

Whether he received it or not, his contract was to do certain excavating according to plans. He did not perform his contract, owing to difficulties which arose after the steam-shovel work was completed. In sinking the sump and cable-pits, quicksand and water flowed in faster than they could be removed by the means which the defendant employed, and the defendant abandoned the work. He had received on account $700. The completion of the excavation cost the plaintiff much more than the $1,700 remaining in his hands and a certain allowance made to him by the owners of the building for the unusual difficulties encountered.

The plaintiff did not release the defendant from his obligations.

That the execution of the contract was difficult—not impossible—did not excuse the defendant's non-performance of it: Taylor v. Caldwell (1863), 3 B. & S. 826.

The contract was positive and absolute. It was subject to no express condition; and "a condition ought only to be implied in order to carry out the presumed intention of the parties:" per Romer, L.J., in Herne Bay Steamboat Co. v. Hutton, [1903] 2 K.B. 683, 691.

From the defendant's breach of his contract the plaintiff suffered damage which he estimated at $1,560.46. That amount was in excess of his loss; $1,000 would be a fair sum to allow him as damages.

Judgment for the plaintiff for $1,000, with costs, subject to the right of either party, at peril as to costs, to a reference to the Master in Ordinary.

The counterclaim should be dismissed with costs.