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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 6TH, 1920.

DIETT v. ORECHKIN.

Vendor and Purchaser—Agreement for Sale of Land—Provision for Reduction of Price on Payment of Full Balance on or before Day Named in Agreement—Offer to Pay after Day Named—Tender—Evidence—Necessity for Strict Compliance with Contract—Waiver—Action for Specific Performance—Counterclaim—Recovery of Instalments of Purchase-money, Interest, and Taxes—Appeal—Reduction of Amount Recovered on Counterclaim.

Appeal by the plaintiff from the judgment of KELLY, J., 17 O.W.N. 332.

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

H. J. Scott, K. C., for the appellant.

A. C. McMaster, for the defendant, respondent.

THE COURT reduced by $36.72 the amount awarded to the defendant upon his counterclaim, and, with this variation, dismissed the appeal with costs.

SECOND DIVISIONAL COURT. APRIL 8TH, 1920.

VICTORIA ELECTRIC SUPPLY CO. LIMITED v. PALTER AND NELSON.

Judgment—Agreement Made after Commencement of Action in County Court—Payment of Money-claim by Instalments—Default in Payment after Half of Amount Paid—Judgment Entered for Full Amount Claimed—Irregularity —Practice—Setting aside Judgment—Costs.

An appeal by the defendant Nelson from an order of DENTON, Junior Judge of the County Court of the County of York, in an action in that Court, commenced by a writ of summons specially endorsed with a claim for $806.76 for the price of goods sold and delivered.

After the writ had been served, the parties agreed that the debt should be paid in instalments, represented by promissory notes given at the time of the agreement and maturing at different dates. The president of the plaintiff company asserted that he agreed to accept payment by instalments on the express understanding that in the event of default the plaintiffs should be at liberty to sign judgment and issue execution, and that he never agreed to withdraw the action. This was denied by the defendant. Upon default occurring after $415 had been paid, the plaintiffs entered judgment for the whole original debt, $806.76, and $24 taxed costs, and issued execution for that sum, but directed the Sheriff to levy only $415.76 and costs.

The defendant Nelson applied to the learned Junior Judge for an order setting aside the judgment; and the learned Judge ordered that upon, payment into Court by the defendant within one week of $415, the judgment should be set aside, and that the costs of the application and judgment should be costs in the cause; but, upon default of payment into Court, that the action should be dismissed with costs.

This was the order from which the defendant Nelson appealed.

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

W. D. M. Shorey, for the appellant, cited F. J. Castle Co. Limited v. Kouri (1909) 18 O.L.R. 462.

B. Luxenberg, for the plaintiffs, respondents.

THE COURT held:—

(1) That, on the plaintiffs' own shewing, they could enter judgment only for the proper amount.

(2) Following Hughes v. Justin, [1894] 1 Q.B. 667, and Muir v. Jenks, [1913] 2 K.B. 412, that the judgment should not have been entered for the full amount, and was therefore irregular.

(3) That the appellant was entitled to have the judgment set aside.

(4) It was alleged by the plaintiffs that the entry of judgment for the full amount claimed was in accordance with the practice of the County Court, and on the advice of the Clerk of the Court; but it was held that the practice was irregular, and the judgment was not validated by it; and it was immaterial that this objection was not raised below.

The appeal should be allowed with costs and the judgment should be set aside as irregular, with costs.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 9TH, 1920.

*RE JOYCE AND CITY OF LONDON.

Municipal Corporations—By-law—Agreement between City Corporation and Street Railway Company—Increase in Rates for Passenger Service—Amendment of Former By-law Validated by Statute 59 Vict. ch. 105—Former By-law not Made Part of Statute—Limit for Rates not Exceeded by New By-law—Necessity for Submission to Electors—Absence of Fraudulent or Improper Purpose—Dismissal of Motion to Quash By-law.

An appeal by the Corporation of the City of London from an order of FALCONBRIDGE, C.J.K.B., in the London Weekly Court, quashing city by-law No. 5935.

The London Street Railway Company was incorporated by the Act (1873) 36 Vict. ch. 99 (O.), and sec. 13 of that Act gave power to the council of the city and the company to make agreements for certain purposes. Section 8 provided that the fares should not exceed 6 cents for any distance not more than 3 miles, etc.; but otherwise the rate was not fixed by statute. Agreements were made that the cars should be drawn by horses or mules only. After electricity had become available, an agreement was entered into between the city corporation and the company for electrical equipment, and this agreement and by-law No. 116 giving it effect were declared "valid and effective in all respects" by the Act (1896) 59 Vict. ch. 105, sec. 2 (O.) The agreement and the by-law are set out in schedule A. to the Act, and are interpreted by sec. 2 as having a certain effect therein set out. Section 25 (*d*)

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

of the by-law provides for the fares to be charged by the company, these being less than the maximum mentioned in the Act of 1873, sec. 8. In 1919 the company and the city corporation entered into a new agreement whereby the rates were increased; and the by-law attacked, No. 5935, was passed for the purpose of bringing the new agreement into operation. The by-law was not submitted to the people.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

I. F. Hellmuth, K.C., for the appellants.

W. R. Meredith, for Joyce, the ratepayer who applied for the order quashing the by-law.

CLUTE, J., in a written judgment, said that the principal ground for the motion was that the by-law attacked, No. 5935, purported to amend by-law No. 916, which had become a part of an Ontario statute, 59 Vict. ch. 105; and that by-law 5935 was therefore ultra vires of the council. But by-law No. 916 was not incorporated in the Act of 1896. The provision of sec. 2 of that statute is: "The agreement ... and by-law No. 916 therein referred to, which are set out in schedule A to this Act, are hereby declared to be valid and effective in all respects...." There is no clause in the statute which has the effect of making the by-law a part of the statute.

By sec. 25 (*d*) of by-law No. 916 the limit of the change which the railway company may make is fixed, and by-law No. 5935 does not go beyond that. For anything that appeared in by-law No. 916 or the statute validating it, the city corporation and the company had a perfect right to agree to any rate they saw fit, provided it did not exceed 5 cents.

There was no necessity for submitting the new by-law to the electors—it was quite within the contemplation of the former by-law, which had their approval.

By-law No. 5143, which was confirmed by the Hydro-Electric Railway Act, 6 Geo. V. ch. 37, sec. 5 (3), had no application to the present case.

There was no reason whatever for the suggestion that the by-law was passed for any fraudulent or improper purpose.

The original by-law fixed a limit not exceeding 5 cents for fares. The by-law here in question did not exceed that limit; it was not contrary to any other by-law or any Act of the Legislature; and it was within the original intendment of by-law 916.

The by-law was, therefore, valid; and the appeal should be allowed with costs and the order quashing the by-law should be set aside with costs.

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

SUTHERLAND, J., agreed with CLUTE, J.

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

MAGEE, J.A., read a dissenting judgment.

Appeal allowed (MAGEE, J.A., *dissenting.*)

HIGH COURT DIVISION.

ORDE, J., IN CHAMBERS. APRIL 7TH, 1920.

WASH TOM v. WONG SING.

Summary Judgment—Rule 57—Claim for Possession of Goods under Chattel Mortgage—Specially Endorsed Writ of Summons —Defences Set up by Affidavit of Merits—Goods Owned by Partnership Mortgaged by one Partner—Description of Goods—Insufficiency—Leave to Defend—Counterclaim for False Imprisonment—Striking out—Prejudicing Trial of Plaintiff's Action—Rules 115, 124, 137—Jury Trial—Judicature Act, sec. 53—Costs.

Appeal by the defendant and cross-appeal by the plaintiff from an order of the Master in Chambers, upon a motion made by the plaintiff for summary judgment under Rule 57, allowing the plaintiff to enter judgment against the defendant for the possession of certain goods, but directing that proceedings upon the judgment be stayed until after disposition of the defendant's counterclaim. The plaintiff also asked that the counterclaim be struck out as frivolous and vexatious.

J. R. Roaf, for the defendant.
D. P. J. Kelly, for the plaintiff.

ORDE, J., in a written judgment, said that the plaintiff's claim, as specially endorsed upon the writ of summons, was limited to a claim for the recovery of certain goods under and by virtue of a chattel mortgage made by the defendant to the plaintiff and a claim for an injunction. The defendant in his affidavit of merits set up by way of defence that he was not the sole owner of the mortgaged chattels, but only one of three partners, the true owners; also that the chattel mortgage was defective in that it did not contain such a description of goods that it could be learned from the mortgage, which goods, if any, were covered thereby; also that

no renewal of the mortgage appeared to have been filed; and also, by way of counterclaim, a claim against the plaintiff for $3,000 damages for alleged false imprisonment.

The order of the Master could not be supported.

If the defendant's contention that the goods are partnership property should be substantiated, the chattel mortgage, if operative at all, could affect only the interest of the mortgagor, the defendant, as a partner. In that case, whatever might be the remedy of the mortgagee as to the mortgagor's interest in the goods, it would not be to recover possession of the goods, for no such possession could be granted as against the other partners. The defence thus raised had not been shewn by any material before the Court to be so untenable as to deprive the defendant of the right to go down to trial.

It was not necessary to deal with the defence as to the description of the goods; but the learned Judge questioned whether the principle of McCall v. Wolff (1885), 13 Can. S.C.R 130, and Hovey v. Whiting (1887), 14 Can. S.C.R. 515, had any application to a case where really no goods at all were described in the mortgage, and it was only by inference from other clauses that it could be suggested that the mortgage was intended to cover all the goods in a certain place.

The counterclaim could not be considered either frivolous or vexatious under Rule 124; but it tended to prejudice and embarrass the fair trial of the plaintiff's action: Rule 137.

By Rule 115, a defendant may set up by way of counterclaim any right or claim whether the same sounds in damages or not. But the counterclaim here had no such connection with the subject-matter of the plaintiff's action as to affect the plaintiff's rights under the mortgage. Sufficient was not shewn to justify the embarrassment to the plaintiff involved in allowing a counterclaim of this nature to be tried in what was in effect a mortgage action. See Dunlop Pneumatic Tyre Co. v. Ryckman (1902), 5 O.L.R. 249.

Apart from all other grounds, the fact that an action for false imprisonment must be tried by a jury, unless the parties waive the right (sec. 53 of the Judicature Act), would be a sufficient ground for refusing to allow the counterclaim to be tried in the plaintiff's action.

The order of the Master should be set aside, and the plaintiff's motion for judgment dismissed. The counterclaim should be struck out, but without prejudice to the defendant's right to bring an independent action. The costs of the motion for judgment before the Master and of the appeals from his order should be costs in the cause. The costs of the plaintiff's motion to strike out the counterclaim should be costs in the cause to the plaintiff in any event.

KELLY, J. APRIL 7TH, 1920.

RE PETERS AND WADDINGTON

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Sale and Conveyance of Lots Shewn on Plan of Subdivision—Building Restrictions—Covenants—Release—Sufficiency—Failure to Establish Requisites of Building Scheme.

Application by a vendor of land for an order, under the Vendors and Purchasers Act, declaring that an objection to the title raised by the purchaser was invalid.

The motion was heard in the Weekly Court, Toronto.
H. E. McKittrick, for the vendor.
J. L. Cohen, for the purchaser.

KELLY, J., in a written judgment, said that in November, 1910, Louisa Standish, being possessed of a parcel of land, subdivided it into 17 lots, and registered a plan of the subdivision; on the 5th April, 1911, she conveyed two of these lots—Nos. 16 and 17—to Robinson, a predecessor in title of the present vendor, the purchaser covenanting therein, for himself, his heirs, executors, administrators, and assigns, to observe certain building restrictions with regard to the property so conveyed to him; at the time of the conveyance to Robinson other lots on the same plan had been conveyed to other purchasers with similar restrictive covenants; after that conveyance Louisa Standish conveyed the remaining lots on the plan to still other purchasers, the conveyances to whom contained similar covenants; and in May, 1914, she released lot 17, of which the land now in question forms a part, from the operation of the restrictive covenants contained in her conveyance to Robinson.

The purchaser upon this application questioned the sufficiency of that release as a discharge of the lands from the covenants imposed by the deed to Robinson.

The learned Judge said that the material completely failed to establish the requisites of a building scheme; there was not any evidence of definite reciprocal rights and obligations extending over the lands subdivided by the plan, or to any other of the lots comprised in it, except those described in the conveyance itself; and there was nothing before the Court from which such a scheme could be inferred, or to shew that purchasers of other lots were aware of the existence of these covenants in the conveyance to Robinson or obtained an assignment thereof as part of their purchases.

On the other hand, it was quite conceivable that Louisa Standish, while she held any of the lots unsold, desired to protect her interests, by prohibiting, so far as the covenants of her several purchasers could give her protection, the use by the purchasers of the lands so purchased by them otherwise than in accordance with the covenants. The separate and distinct covenants by each purchaser gave her such protection in respect to the land conveyed to that purchaser; and, the covenants by each purchaser being without any reference to or suggestion of reciprocal rights and obligations as between that purchaser and the purchasers of other lots or parcels, there was no implication that any such rights and obligations arose or were intended to be established.

There was no legal obstacle in the way of Louisa Standish releasing the purchaser's covenants contained in the conveyance to Robinson; and giving this release after she had parted with the other lots was consistent with the view that she exacted the covenants in the first place in her own personal interests and not as establishing a building scheme over the whole area embraced in the plan. See Reid v. Bickerstaff, [1909] 2 Ch. 305; Halsbury' Laws of England, vol. 25, p. 458.

On the material submitted the learned Judge was of opinion that the objection raised by the purchaser to the covenants referred to in the solicitor's affidavits was not a sufficient ground for rejecting the vendor's title. There should be no order as to costs.

LENNOX, J. APRIL 8TH, 1920.

GOODALL v. SMOKE.

Husband and Wife—Ante-nuptial Agreement—Money Contributed by Wife towards Purchase-money of Home—Death of Husband—Promise of Husband to Make Will in Favour of Wife—Agreement Made in Contemplation of Marriage—Statute of Frauds—Ontario Evidence Act, sec. 12—Action against Executors—Evidence—Corroboration—Costs.

Action by the widow of John Goodall against the executors of his will for specific performance of an alleged agreement (not in writing) entered into between the plaintiff and her deceased husband before marriage.

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

A. C. Kingstone and M. A. Seymour, for the plaintiff.

Thomas Hobson, K.C., for the defendants.

LENNOX, J., in a written judgment, said that the agreement alleged by the plaintiff was an agreement in consideration of marriage, and the hope of success was rested solely upon proof of performance of the agreement by the plaintiff, within the meaning of the Statute of Frauds. She put it thus: "I agreed to pay the deceased testator and paid him $1,000, in consideration that it was to be put into the purchase of a home, of which I would be a joint owner, and that he would make a will in my favour." This was in contemplation of marriage, but marriage did not appear to have been specifically a term of the agreement. There was no doubt that the plaintiff actually contributed $1,000, before marriage, to the purchase of the home. This was abundantly proved by two trustworthy witnesses. But there was no corroborative evidence of the bargain set up by the plaintiff: see the Ontario Evidence Act, sec. 12.

The action should be dismissed without costs. The defendants should have their costs, taxed on a solicitor and client basis, paid out of the estate, that is, charged ratably against all the beneficiaries under the will, including the plaintiff.

KELLY, J. APRIL 8TH, 1920.

*McDOUGALL v. BLACK LAKE ASBESTOS AND CHROME CO. LIMITED.

Company—Annual General Meeting—Adoption of Important Agreement Affecting Interests of Company and Shareholders—Notice of Meeting not Specifying Consideration of Agreement as Part of Business to be Transacted—Payment to Director — Resignation of Directors—By-laws of Company—Action by Shareholders to Restrain Company and Directors from Carrying out Agreement—Meeting not Properly Convened—Invalidity of Agreement —Declaration—Directors Acting in Good Faith—Costs.

Action by certain shareholders of the Black Lake Asbestos and Chrome Company Limited, suing on behalf of themselves and all other shareholders of the company, against the company, one Jacobs, a holder of shares and bonds of the company, the directors of the company, and the National Trust Company Limited, to restrain the defendants from carrying out the provisions of a certain agreement, and particularly to restrain the defendants Massie and others, the directors, from appointing or installing a new board of directors as provided in the agreement, and to restrain the Black Lake company from paying any of its moneys to the trust

company, or otherwise under para. 12 of the agreement, and to restrain the trust company from delivering to the defendant Jacobs the resignations of the five directors, and for a declaration that the agreement was invalid.

The hearing was upon the motion for judgment in the Weekly Court, Toronto.

A. W. Anglin, K.C., and R. C. H. Cassels, for the plaintiffs.

I. F. Hellmuth, K.C., and Joseph Montgomery, for the defendant Jacobs.

M. L. Gordon, for the defendant the National Trust Company.

Hamilton Cassels, K.C., for the other defendants.

Kelly, J., in a written judgment, said that at the annual general meeting of the Black Lake company, held on the 3rd March, 1920, there was submitted an agreement (or form of agreement between the five persons who were then the directors of that company, of the first part; the defendant Jacobs, of the second part; the trust company, of the third part; and the Black Lake company, of the fourth part; by which it was witnessed that the parties agreed that Jacobs purchase from such shareholders and bondholders of the Black Lake company—other than the directors—as might agree to sell in the manner and on the terms set forth, shares of stock and bonds in the company up to a specified amount, and that each of the directors should place his resignation on deposit with the trust company to be delivered over to the defendant Jacobs and to become effective upon payment by him to the trust company of the amount of the purchase-money of such shares and bonds within 5 days after the 29th March, 1920. Jacobs was also to agree to purchase all shares and bonds deposited for sale, in the manner specified, with the trust company, on or before the 30th April, 1920, by holders thereof residing in Great Britain and Ireland. It was also provided that, on payment by Jacobs of the amount required to be paid by him, within 5 days from the 29th March, the defendant Massie, in addition to resigning as director, should resign from all offices held by him in the Black Lake company, that company undertaking to pay him $10,000 in full payment and satisfaction of all claims and demands under his contract with the company as manager and sales-agent; and to pay the trust company its fees and disbursements in connection with the duties it should perform under the agreement, and to pay also all reasonable and proper costs and expenses of the directors and Jacobs.

The agreement was adopted by a resolution unanimously passed at the meeting.

The only information as to the business to be transacted given to the shareholders by the notice calling this annual meeting was

in general terms—the notice referred only to such business as is usually transacted at an annual meeting—receiving the directors' report for the past year, election of directors, and such other business as may properly be brought before the meeting. The Black Lake company's by-law provided that the annual meeting shall be held for the election of directors "and for all other general purposes relating to the management of the company."

Less than 50 per cent. of the shares issued by the Black Lake company were represented at the meeting.

The consideration of the agreement was a matter of business of special and unusual importance to the company and to all the shareholders, and did not relate to the management of the company in the sense intended to be conveyed by the by-law. The transactions involved in the agreement were not included in the notice of the meeting.

The learned Judge referred to a number of authorities, including Halsbury's Laws of England, vol. 5, p. 718, para. 1278; Kaye v. Croydon Tramways Co., [1898] 1 Ch. 358; and Tiessen v. Henderson, [1899] 1 Ch. 861.

The conclusion must be that the meeting, so far as it related to and dealt with the agreement, was not properly convened, and that the agreement must, in consequence, be held invalid. That the transaction might be one largely benefitting the shareholders was not a reason for a different conclusion; nor was it material to the validity of the agreement that the parties acted in good faith.

There should be judgment for the plaintiffs as prayed with costs.

The directors acted in good faith and in the honest belief that the agreement would be of advantage to the company and the shareholders; accordingly there should be no order as to costs.

LOGIE, J. APRIL 9TH, 1920.

*CROSWELL v. DABALL.

Ship—Collision of Motor-boats in Inland Waters—Proximate Cause of Collision—Evidence—Finding of Fact of Trial Judge—Negligence—Disregard of Rules of Road—Contributory Negligence—Both Boats at Fault—Joint Liability—Damages—Apportionment—Loss of Business—Canada Shipping Act, R.S.C. 1906 ch. 113, secs. 5, 6, 918, 921 (d)—Interest—Costs.

Action for damages for the loss of the plaintiffs' motor-boat in a collision with the motor-boat of the defendant Alonzo W. Daball, in the Georgian Bay, on the 22nd July, 1919.

The action was tried without a jury at Parry Sound.

McGregor Young, K.C., and H. E. Stone, for the plaintiffs.

R. McKay, K.C., and W. L. Haight, for the defendants.

Logie, J., in a written judgment, said that the plaintiffs and the defendant Alonzo W. Daball were boat-liverymen at Parry Sound, and the defendant Byron Daball was the son of his co-defendant.

Both motor-boats were equipped with and carried the lights directed by rules 41 and 42 of the rules concerning motor-boats, as set forth in the Rules of the Road for the Great Lakes, including the Georgian Bay, adopted by order in council of the 4th February, 1916, and issued by the Canadian Department of Marine.

It was admitted by both plaintiffs and defendants that on the night of the collision neither boat had its white light shewing.

The plaintiffs' boat, carrying 10 passengers, was in charge of one Willett, an experienced master mariner. The defendant Alonzo W. Daball's boat was in charge of his son, the defendant Byron Daball, a young man of little experience and uncertificated.

The testimony as to how the collision occurred was conflicting: the learned Judge accepted the testimony of Willett, and found that the proximate and efficient cause of the collision was the disregard by Byron Daball of rule 32 of the Rules of the Road.

The learned Judge was, however, of opinion that the infringement by the plaintiffs of the rule requiring them to shew a white light might have and did in fact contribute to the accident: Canadian Lake and Ocean Navigation Co. Limited v. The "Dorothy" (1906), 10 Can. Ex. C.R. 163, 174; Canadian Sand and Gravel Co. v. The "Key West" (1917), 38 D.L.R. 682, 16 Can. Ex. C.R. 294.

The learned Judge accordingly finds both boats at fault and that there is a joint liability.

This being so, the damages must be apportioned in accordance with the decision in Shipman v. Phinn (1914), 32 O.L.R. 329, having regard to sec. 918 of the Canada Shipping Act, R.S.C. 1906 ch. 113.

Each of the boats was a "ship" under that Act—neither was registered under sec. 6, but both were, under sec. 5, exempt from registration.

The owner of the boat doing the damage was the defendant Alonzo W. Daball, and the plaintiffs' loss fell under sec. 921 (*d*) of the Act. See The "Warkworth" (1884), 9 P.D. 145.

Both boats were entitled to limit their liability under sec. 921 (*d*).

The learned Judge assesses the damage done to the plaintiffs in respect of the loss of their boat at $1,500 and the money loss in

respect of their business at $500—in all $2,000. He does not accede to the defendants' contention that the plaintiffs are not entitled to substantial damages for the deprivation of the use of their boat because they had another in readiness: The "Mediana," [1900] A.C. 113. But the damages for loss of business are not within the limitation set forth in sec. 921.

The wrongdoer in a collision is liable for all the reasonable consequences of his negligence—such damages as flow directly and in the usual course of things from the wrongful act: Lake Ontario and Bay of Quinte Steamboat Co. v. Fulford (1909), 12 Can. Ex. C.R. 483.

The defendants' damages were assessed at $100.

There should be judgment against the defendant Byron Daball for $2,000 with costs, and against the other defendant for $602.33, being $500 for loss of business and $102.33, the amount calculated under sec. 921, without costs, and with interest on these sums from the 22nd July, 1919, till judgment.

The old rule that each litigant vessel bears her own costs is still in force: The "Bravo" (1912), 29 Times L.R. 122.

LOGIE, J. APRIL 9TH, 1920.

RE DILLON.

Will—Construction—Devise and Bequest of Residue of Estate, "Including my Life Insurances," to Widow—Substitution of Sons in Event of Remarriage of Widow—Absolute Gift to Widow, Subject to be Divested upon Remarriage—Effect of Will as Declaration under Insurance Act, R.S.O. 1914 ch. 183, sec. 171 (5)—Power of Insured to Deprive Widow of Interest in Favour of others of Preferred Class upon Happening of Future Event—Investment of Proceeds of Sale of Real Estate—Wish of Testator—Inoperative Provision—Duties of Executors.

Motion by the executors of the will of Robert George Dillon, deceased, for an order determining certain questions arising as to the proper interpretation of the will.

The motion was heard at a sittings of the Court at Brockville.

W. B. Mudie, for the executors.

J. A. Jackson, for the widow and adult son.

M. M. Brown, for the Official Guardian, representing an infant.

Logie, J., in a written judgment, said that the testator left an estate of about $4,000, consisting of realty valued at $1,500, two life insurance policies for $1,000 each, and some Victory bonds.

His widow and two sons, one of age and one an infant, survived the testator.

In his will, after bequests of $250 each to his sons, he proceeded:—

"The balance of my estate both real and personal, including my life insurances, I give . . . to my wife . . . Provided however that in case my said wife marries the said balance of real and personal property, including my life insurances, is to revert to my two sons . . . share and share alike. Provided however that my said wife may dispose of the real estate at any time and use the proceeds if required for living expenses or invest the same as directed by my executors during the time she remains my widow."

Then followed a provision that his wife is to "support and maintain" the younger son until he attains the age of 21; then a gift and devise of all the residue of his estate to his wife; and lastly the appointment of the applicants as executors.

There was no provision as to the disposition of the property upon the death of the widow if she should not have married again.

No difficulty arose with regard to the real estate and the personalty other than the proceeds of the life insurance policies—they were the property of the widow absolutely, subject to being divested if she should marry again.

Reference to In re Mumby (1904), 8 O.L.R. 283.

The words "including my life insurances," where first used, operated as a valid declaration under sec. 171 (5) of the Insurance Act, R.S.O. 1914 ch. 183: Re Harkness (1904), 8 O.L.R. 720; Re Lester (1909), 13 O.W.R. 343; and the same words, where again used, operated in the same way. The wording of sub-sec. 1 of sec. 179 is wide enough to enable the testator to control by a later declaration, to take effect in case of the remarriage of the widow, the earlier declaration in her favour, and enables him to divest her of the insurance moneys upon that event happening by nominating others of the preferred class to take these moneys in substitution for her.

Reference to In re Canadian Home Circles (1907), 14 O.L.R. 322.

The statute gave the insured, the testator, power, by express variation of the allotment of the insurance money, to deprive the widow of her interest therein in the event of her remarriage and give it to others of the preferred class. He did this in the latter part of the paragraph under consideration.

This being the case, and the widow being still alive, the gift over to the sons is valid, but only upon the happening of the event upon which the widow is to be divested.

Even without the authority of Re McGill (1913), 4 O.W.N. 565, and the cases there followed, the vague indication of the wish of the testator as to the investment of the proceeds of the real estate, "as directed by my executors," would be inoperative. It is an alternative only—the widow may, if necessary, use the whole for living expenses.

In the result, the whole of the proceeds of the life insurance policies and the whole of the residue of the real and personal estate of the testator, after debts and legacies paid, vest absolutely in the widow, subject as to both to be divested if and when she remarries—and, if she dies without having remarried, she may dispose of all by will.

The duties of the executors are limited to the payment of debts and legacies and the conveying and transferring of the real and personal estate to the widow.

Costs of all parties, those of the executors as between solicitor and client, to be taxed and paid out of the estate.

ONTARIO POWER CO. OF NIAGARA FALLS V. TORONTO POWER CO. LIMITED.—MIDDLETON, J.—APRIL 6.

Contract—Supply of Electrical Energy—Payment for—Ascertainment of Amount—Settling Judgment.]—Judgment in six actions between the same parties was given by MIDDLETON, J., on the 27th March, 1919: see 16 O.W.N. 94. In settling the terms of the judgment to be entered counsel were heard, and the learned Judge made a memorandum as follows: The question now raised upon the settlement of the amount payable is concluded by the judgment given. The amount contracted for is the output of one generator at its normal rating of 10,000 K.V.A. The purchaser must pay not for the K.V.A. but for the energy taken, i.e., the K.W. (unless the power factor falls below 90 per cent.), and the difference between K.V.A. and K.W. must be the vendor's loss. There is no obligation to take under the contract when the K.V.A. exceed 10,000. If more electricity should be taken, and no other right to take existed, it might be deemed to be under the contract, but when the right to have more than the contract called for did exist, then the excess is attributable to that other right. This is the effect of the former judgment, and the learned Judge does not attempt to reconsider it.

PERRY V. BRITISH AMERICAN SHIPBUILDING CO.—LENNOX, J. —APRIL 8.

Master and Servant—Wrongful Dismissal of Servant—Evidence—Findings of Jury.]—Action for damages for the wrongful dismissal of the plaintiff, who was engaged by the defendants to work for them as a skilled mechanic. The action was tried with a jury at Welland. Questions were submitted to the jury, who answered them favourbly to the plaintiff. The parties agreed upon $925 as the amount which the plaintiff should recover for damages if he was entitled to recover. LENNOX, J., in a written judgment, said that there was no basis for imputations made against the plaintiff. The preponderance of the evidence was that the plaintiff was a skilled and efficient mechanic; and there was no evidence whatever that he did not serve the defendants faithfully and to the best of his ability. There should be judgment for the plaintiff for $925 and costs. D. B. Coleman and H. W. Macoomb, for the plaintiff. L. B. Spencer, for the defendants.