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HON. MR. JUSTICE MIDDLETON. JUNE 16TH, 1914.

COOK v. DEEKS.

6 O. W. N. 590.

Company—Contracting Company—Contracts Taken by Majority of Directors as Individuals—Duties and Liabilities of Directors—Trust—Rights of Minority Shareholders—Evidence—Conflict—Finding of Trial Judge.

MIDDLETON, J., *held*, that directors of a company may act as individuals in their own interests with regard to business which might well be undertaken by the company, but which the company as a whole refuses.

Held, that there is no fiduciary obligation on the directors of a company to undertake business in behalf of all the shareholders at the instance of the minority against the will of the majority.

Held, that neither a company nor the minority shareholders thereof can compel the majority to render those personal services without which the enterprise must be a failure.

Action tried at Toronto 27th, 28th, 29th April, and 4th, 5th, 6th and 7th May, 1914.

Hon. Wallace Nesbitt, K.C., and A. M. Stewart, for plaintiff.

E. F. B. Johnston, K.C., and R. McKay, K.C., for defendants.

HON. MR. JUSTICE MIDDLETON:—The action is brought by Mr. A. B. Cook, one of the shareholders of the Toronto Construction Company, Limited, on behalf of himself and all other shareholders other than the individual defendants, against Messrs. Geo. S. Deeks, Thomas Hinds, George M. Deeks, the Dominion Construction Company, Limited, and the Toronto Construction Company, Limited, for an order declaring that the individual defendants and the Dominion Construction Company, Limited, are trustees for the

Toronto Construction Company of a certain contract entered into between the Dominion Construction Company and the Canadian Pacific Railway Company for the construction of a certain line called in the evidence the Shore Line; more accurately known as the Campbellford, Lake Ontario and Western Railway, and for ancillary relief.

In the year 1905 negotiations took place between Mr. Cook and the Messrs. Deeks and Hinds, and Messrs. Winters, Parsons and Boomer, looking to the undertaking of construction work in Canada, both east and west, and the United States, and more particularly to the undertaking of a contract for the construction of some work upon the Canadian Pacific Railway, Sudbury line. As the result the Toronto Construction Company was incorporated and the contract obtained. The firm of Winters, Parsons and Boomer shortly afterwards withdrew, transferring their interest to the other co-adventurers in equal shares. Messrs. Cook, Hinds and the Deeks each became entitled to one-quarter of the capital stock of the company; one share being held in the name of the wife of one of the parties for the purpose of preserving the due incorporation of the company. From that time on the company entered into several important railway construction contracts and has carried them through to completion, earning very large profits.

It was not contemplated that all the work to be undertaken by these gentlemen should be carried on in the name of the company. Mr. Cook undertook and carried on, for the benefit of the four, a contract known as the Livingston contract. This was taken in the name of Cook, Deeks, Hinds and Company; but practically the whole work was carried on by Mr. Cook. Other work was taken and carried on by Mr. G. M. Deeks in the firm name of Deeks & Deeks; but all four were equally interested in this.

In the carrying out of these various contracts, as well as in seeking for other work to be undertaken, there was not always harmony between the four contracting parties. Messrs. G. S. Deeks and Hinds had the great burden of the company business, both in Ontario and the Maritime Provinces, thrown upon their shoulders. Mr. G. M. Deeks devoted himself mainly to business in the Western States; and while Mr. Cook carried out the Livingston work, which took most of his time for two years, the feeling developed that

Mr. Cook was not taking his fair share of the burdens and responsibilities of the company; and he on his part probably entertained the view that Mr. G. M. Deeks was receiving more than he earned.

As far as Mr. G. M. Deeks is concerned, the feeling culminated in a letter of July 20th, 1909, when he wrote to Mr. Cook, notifying him that the contract work which the partnership firm of Deeks and Deeks had had was completed and that he did not intend to continue the partnership longer. All work that he should thereafter do, he said, whether carried on in his own name or in the name of Deeks & Deeks, would be treated by him as new business, not including Mr. Cook.

In the view that I take of the case I am not at all concerned with the merits of these internal controversies. Mr. Cook declined to undertake work which Messrs. Deeks and Hinds thought he ought to undertake. At different times he made some endeavour to obtain more congenial work in the north-west. No new contracts for the company or its associates resulted. All this appears to me also to be beside the mark.

Finally, Cook secured a contract called the Teeton contract, in Montana. Cook was undoubtedly willing to allow Mr. G. S. Deeks and Hinds to share in this, but they declined to join him. Mr. G. M. Deeks had no opportunity of sharing.

At the annual meeting of the company in January, 1910, feeling appears to have run pretty high. Messrs. G. S. Deeks and Hinds thinking that the situation was very unfair when Mr. Cook was doing nothing for the common benefit and was carrying on independent work on his own account. Mr. Cook suggested that this could be adjusted by payment of a salary to those actively engaged in the company's management. This appears to have been scoffed at by both Mr. Hinds and Mr. G. S. Deeks, who thought it was quite derogatory to place them in the position in truth of working for Mr. Cook at a salary. Their feeling in this respect may perhaps be gathered from the fact that while the capital of the company was only $200,000 the dividends declared in the six years of its operation amounted to $1,562,500, and there is still in the treasury a sum approximately equal to the capital. Nevertheless, at that meeting,

it was decided that the officers actually engaged in the management of the company should receive a salary to be agreed upon thereafter, the salary to date from the 1st May, 1909. No agreement has ever been made as contemplated by that resolution.

At this same meeting Mr. G. M. Deeks was elected President, Mr. Cook General Manager, and Mr. Hinds Secretary-Treasurer. This minute, it may be observed, was of a directors' meeting; and salary could not be given to directors without the assent of the shareholders; and, so far as the evidence discloses, the resolution was never confirmed by the shareholders. It is also important to notice that Mr. A. B. Cook was then re-elected to the office of General Manager, although not actively concerned in the conduct of the company's affairs in any way, and Mr. G. S. Deeks, who with Mr. Hinds bore the burden of the actual management, had no office save that of director.

Matters went on in much the same way, the feeling against Mr. Cook growing all the time stronger. A letter of September 14th, 1909, written shortly before this meeting, indicates the way Messrs. Deeks and Hinds regarded Mr. Cook; and the idea not unnaturally developed in the minds of the other three, particularly in the minds of Messrs. G. S. Deeks and Hinds—who took far more part than Mr. G. M. Deeks—that as soon as possible they must cut free from Mr. Cook and leave him to his own resources. The result was that no new contracts were entered into on behalf of the company, the whole energies of the concern being bent to the closing of the work then in hand.

Had this determination then been openly announced to Mr. Cook, no exception to the conduct of his colleagues could have been taken in law or in morals. He was reaping where he had not sown, and his conduct throughout was such as to justify, if any justification were needed, the determination of the defendants to part company with him. Nothing, however, was said to him, and matters were allowed to drift along quietly. As Mr. Hinds put it in evidence, "the fact that a change was impending must have been evident to everyone, and nothing but Cook's colossal egoism prevented him from apprehending it."

I do not go as far as Mr. Hinds in assigning the cause, but Mr. Cook apparently did not realize the situation.

Another cause of trouble arose in connection with the Livingston contract. The earnings in respect of this contract, in which all were interested, were considerable, but they were all retained by Mr. Cook; so, in August, 1909, when Cook was suggesting to Deeks and Hinds joining in the Teeton work, Deeks replied by wire, curtly, "Will participate in no more western work," and Hinds wired, "Prefer to have books here fixed up before assuming any new work." This referred to the books in connection with the western work, which had been taken to Ontario by Cook's bookkeeper.

This firm stand brought Cook to Toronto, and an adjustment was then made by which Cook submitted to have charged against his dividend in the Toronto Construction Company, the sum of about $100,000, which represented his liability to his co-partners for moneys drawn by him on the Livingston contract, according to a statement he then presented.

When the work in hand was drawing to a close in 1911, Mr. G. S. Deeks, whom for convenience I shall hereafter refer to as "Mr. Deeks," and Mr. Hinds, looked about for further work. As already stated, they had made up their minds to exclude Mr. Cook from participation in this, but they had not communicated this fact to him. Mr. G. M. Deeks took no active part in the matter, merely falling in with the views of his cousin and Mr. Hinds. The work done in Ontario had been exceedingly satisfactory to the Canadian Pacific Railway. That company apparently entertained a high opinion of the executive ability of Messrs. Deeks and Hinds. Their financial standing admitted of no question. For some time negotiations had been going on in a general way looking to the arrangement of a new contract for the Shore Line. This it was thought might be arranged without competition or calling for tenders. Mr. Deeks and Mr. Hinds told the C. P. R. officials that in any work thereafter to be taken Cook would have no part.

The result of all these preliminary negotiations was that in the middle of March, 1912, an agreement was arrived at between Mr. Deeks and Mr. Hinds on the one part and the railway on the other part. While these negotiations were on foot and in a critical position, Mr. Cook and Mr. Hinds met in New York. The accounts given by the par-

ties differ. At any rate, nothing was done by Mr. Hinds in any way to indicate his intention of excluding Mr. Cook, and it is hard to resist the inference that Mr. Hinds was careful to avoid anything which would waken Mr. Cook from his fancied security. Cook waited in New York to be advised of the result of the negotiations in regard to the contract.

Immediately after the contract had been secured by Messrs. Deeks and Hinds in their own names, Mr. G. S. Deeks sent the wire of March 13th to Mr. Cook, asking him to come to Toronto to meet him in relation to the affairs of the construction company. On the following day Mr. Hinds sent a similar invitation. Accordingly, Mr. Cook came to Toronto for the purpose of meeting them. Mr. Hinds called upon him at his hotel and advised him that the contract was being taken by Messrs. Deeks and Hinds and that he was to be excluded. In Mr. Cook's letter of March 16th, he expresses his astonishment at the situation, and it is characteristic that even in that letter he claims credit to himself for the prosperity of the company owing to his action as General Manager. In reply to this, Mr. Deeks points out that there is no attempt to exclude him from the company, but that the intention of Mr. Hinds and himself is to carry on business separate and apart from the company. Some negotiations took place looking to an amicable adjustment of the matter, with no result.

Thereafter the Dominion Construction Company was incorporated, it consisting of the Messrs. Deeks and Hinds and their associates. The formal contract was entered into between the Dominion Construction Co. and the Canadian Pacific Railway, and the business was actively undertaken by that company.

Contemporaneously, a meeting of the Toronto company was called for the purpose of arranging for the voluntary winding up of its affairs, but nothing was done, owing to Mr. Cook's protest and threatened litigation.

As the affairs of the company were wound up, its employees were in many instances re-engaged by the Dominion Construction Company. Some of them found employment with Mr. Cook, who had secured another contract which he was carrying out as an undertaking of his own. The plant of the Construction Company was sold to the new company

at a valuation which was not shewn to be unfair, and was probably advantageous.

At the trial and on the argument much was made of the theory that this was a dishonest scheme formed by Messrs. Deeks and Hinds for the purpose of appropriating to themselves the outfit, organization and good-will of the Construction Company. I am satisfied that this is not made out. The sole and only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly deemed, unsatisfactory from a business standpoint.

These three men could not against their will be compelled to continue to carry on business for the benefit of an uncongenial associate. The only question is whether they are able to free themselves from obligation to him by the course which they have taken. They represent seventy-five per cent. of the share value of the company. They are three directors out of the four. The substantial question is, can they in this summary way take in their own names and for their own benefit a profitable contract which they might, had they seen fit, have taken for the company? It is conceded that the position is not changed by the formation of the new company and the transfer of the contract to it.

Before considering the legal aspects of the question, the formal proceedings of the Construction Company ought to be mentioned. At a meeting of the directors on the 20th March, 1912, the question of the undesirability of taking any further contracts was discussed, and a general meeting of the shareholders was directed to be called. A meeting was called, and held on the 5th of April, and adjourned till the 9th, when, after discussion, the meeting adjourned without taking any action. The office of General Manager was abolished, and the sale already referred to of the plant was authorized.

This action was not begun until the 12th March, 1913, almost a year later. The next minutes produced are those of the meeting of the directors held on the 3rd April, 1913. The sale already made of the company's assets was confirmed; the action of the company in not entering into new contracts was confirmed; and the directors declared that the company was not in any way interested in the contract in question. This action is then dealt with, a defence is dir-

ected to be made to the action, and the proposed statement of defence is approved of. A dividend is then declared out of the money on hand, $400,000 being divided.

The annual meeting of the shareholders was held on the 26th of April. The sale of the assets was confirmed by the shareholders, the action of the company in not entering into any new contract, including that in question, was confirmed, and it was declared that the company did not desire any interest in the contract in question; the defence filed in the action on the company's behalf being formally approved. The four parties were again elected directors. At none of these meetings, it may be said, was Cook present, although he was duly notified.

There was at the hearing a good deal of discussion as to the exact position occupied by directors. Probably the most accurate statement as to the position of a director is that he is a trustee for the company of all the property of the company which may come to his hands and that he is the agent of the company for the transaction of all its business which he is called upon as director to transact. He occupies towards the company a fiduciary relationship, and it matters little whether he is called an agent or a trustee. He is under certain disabilities arising from the position he occupies. He cannot make personal profit out of transactions with the company. In all his transactions with the company he is called upon to act with absolute good faith; but there are many things which his position does not preclude him from doing.

The fundamental principle underlying all company law, that the majority must govern so long as there is no fraud upon the minority, must be accorded its due recognition; and when the majority determines that a company shall not go further and undertake no new business, this I think must bind the minority; and the directors, representing the majority, cannot by reason of any supposed fiduciary obligation be compelled to undertake business in behalf of all the shareholders, nor can they be prevented, if they see fit, from themselves undertaking profitable business which might well be undertaken by the company as a whole.

I accept to the full Mr. Nesbitt's statement that the directors in the discharge of the company's business must be absolutely loyal to the company; but when the business is

not the business of the company and when the company as a whole refuses the business there cannot be any fiduciary obligation which prevents the directors from acting as individuals in their own individual interest.

It must also be borne in mind that the right of action which may be asserted by an individual shareholder in a class action is a right of action vested in the company. A minority shareholder may in this way redress a wrong done to the company, or recover money due to the company, where the majority refuses to act; but in this case I think Cook, though he may have shown much to indicate that he was not treated with absolute fairness, has entirely failed to establish any right in the company. The company cannot, nor can the minority shareholders, compel the majority to continue to employ their capital in its ventures; nor can the company or the minority shareholders compel the majority to render those personal services without which the enterprise must be a failure.

For these reasons I think the action fails; and while I could wish that greater candour had been displayed towards Cook, on the whole I think his claim is absolutely devoid of merit. He has himself secured a contract from the railway; all the profit from this will go to him, as in the case of the other contracts he was carrying on; and he has no moral claim to share in the earnings of the defendants.

In a case like this, where there is some conflict of evidence, it is probably my duty to express my opinion as to the weight to be given to the witnesses. Although there has been some failure of memory on the part of the defendants with regard to some minor details, I am satisfied that in the main their statements are entirely correct and that their evidence can be relied upon. I think their personal interest has not affected their evidence to the same extent that Cook's interest has affected his.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 15TH, 1914.

RAYNOR v. TORONTO POWER CO.

6 O. W. N. 604.

Negligence—Master and Servant — Injury to Servant by Electric Current—Evidence.

FALCONBRIDGE, C.J.K.B., gave plaintiff $1,200 damages and costs.

Action to recover damages for personal injuries.

Tried at St. Catharines.

J. H. Campbell, for plaintiff.

D. L. McCarthy, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— Plaintiff on 6th September received severe injuries while painting on a certain unit, being part of a tower on which were strung the defendants' transmission wires, as the result of coming in contact with a wire charged with electricity. He had previously been assured that everything was safe; that is, that the electric current in that unit had been turned off and that the wires were dead.

Plaintiff swore positively that he did not touch any of the live wires on the adjoining unit. The evidence of plaintiff as to where he was standing just before receiving the shock was corroborated by Hamilton, by the foreman Mandsley, and I think by Bull, a witness called by defendants.

The direct testimony satisfies me that his injuries were caused by electric current on the supposed dead unit. Defendants' evidence is entirely of a negative character, from which I am asked to infer that plaintiff was the author of his own wrong in touching the live wire on the adjoining unit. I prefer the positive evidence.

Judgment after 30 days for plaintiff for $1,200 and costs.

HON. MR. JUSTICE LENNOX. JUNE 16TH, 1914.

MARCON v. COLERIDGE.

6 O. W. N. 608.

Contract—Purchase of Land for Speculative Purpose—Agreement to Divide Profits—Absence of Consideration—Misrepresentation—Secret Commission.

Plaintiff and S. induced defendant to enter into an agreement to purchase land for $30,000 upon the representation made by the plaintiff that he was the holder of an option to purchase said land. Plaintiff in reality was to receive a commission of $1,000 from the owner for selling the land. This was not disclosed to defendant. Subsequently, it was arranged that plaintiff, defendant, and S. would do what they could to re-sell the land, and that they would divide the profits equally. The land was sold by defendant, who was guilty of fraud towards the purchaser. Neither the plaintiff nor S. put anything into the transaction, nor assumed any obligation relative thereto. Action brought by plaintiff to recover from defendant one-third of the profits derived from the re-sale.

LENNOX, J., *held*, that the plaintiff could not recover upon a contract induced by the misrepresentation of one whose agent and associate he professed to be at the time of the making of said contract.

Held, that the plaintiff, who was guilty of misrepresentation, in stating that he had an option, and of concealment in withholding the fact that he was agent of the owner to sell at a commission, could not also earn a commission from the vendee.

Held, that a promise to divide the profits of a sale must be supported by consideration.

Held, that the plaintiff, the defendant and S. were each the agent of the other, and, therefore, the plaintiff could not be allowed to adopt the fraud of the defendant and at the same time repudiate the responsibility.

Action to recover from defendant one-third of the profits derived from a re-sale of 75 acres of land which the plaintiff brought to the attention of defendant, and which defendant bought for $30,000.

D. L. McCarthy, K.C., for plaintiff.

M. Wilson, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff was interested in some way in the sale of 75 acres of land near Windsor in the sub-division area known as the Pratt Farm.

On the 6th May, 1913, the plaintiff stated to the defendant that he was the holder of an option for the purchase of this land at $400 an acre, which would expire at 6 o'clock on that day, and that the owners, the Morton Syndicate, would then raise the price to $500 an acre; and he

and Dr. Smith induced the defendant to enter into an agreement to purchase the land for $30,000, the terms of payment being slightly modified at the instance of the defendant.

Just what the exact position of the plaintiff in relation to the Pratt Farm was at the time was not distinctly shown, for although an option was spoken of no writing between the syndicate and the plaintiff was produced at the trial, nor was it alleged, so far as I can recall, that there was a writing in fact, of any kind, or that the plaintiff had paid anything to the syndicate. The plaintiff is connected by marriage with one or more of the members of the syndicate, and it was shewn at the trial, though it was not disclosed at the time of the agreement for division of profits upon which this action is based, nor voluntarily disclosed by the plaintiff at all, that upon sale of the property by the time already mentioned and upon the syndicate's terms, the plaintiff would be paid or would retain $1,000 as commission, or by way of abatement in the price. Nothing by way of option or agreement was assigned to the defendant when the defendant entered into an agreement with the syndicate for the purchase of the farm. The whole evidence, as I say, as to exactly how the plaintiff stood in connection with the matter is singularly hazy and inconclusive; and confronted by this situation I am inclined to believe that the proper inference to be drawn is that in fact the plaintiff had no option in the recognized or legal sense of the term, and when he speaks of an option he only means that the property was in his hands or listed for sale on specified terms, and the more so as at the very beginning of his evidence he says: "I was agent for the sale of the Pratt Farm at $400 an acre, and on the 6th May they *notified me* that the price would be raised to $500 after 6 o'clock that evening." It was only when the action of Bell and Coleridge was being tried, after the property had been parted with, and after the defendant had given his undertaking of the 31st May, 1913, that it was discovered that the plaintiff had received a secret commission of $1,000.

Pending the plaintiff's agreement to purchase and afterwards, or after the agreement was closed, as the plaintiff puts it, it was arranged that plaintiff, defendant and Smith would each do what they could to sell the property, and would divide the profits equally. Neither Smith or the plaintiff

put anything into the transaction nor assumed any obligation. The land was sold by the defendant without the assistance of either Smith or the plaintiff within a few days; and the most that the plaintiff will say is that he thinks that, as he expresses it, he "put it up to some people in Detroit." I doubt if he did anything at all.

In considering whether the plaintiff is entitled to recover, I am confronted by several questions.

1. Are there any profits as a matter of fact?

When the defendant sold to Bell, when he deposited the cheque with the syndicate, and when he gave him his undertaking to the plaintiff, he *thought* there were profits; and during all that time he thought too that the plaintiff had acted honestly with him.

It is argued that the sale price being mutually agreed upon, the defendant having nominally disposed of the property and at a profit price, and the profits being remitted by reason only of the defendant's fraud, Smith and the plaintiff are not affected by the ultimate result. The answer is obvious, I think. Each was the agent of the other, not only as the result of the quasi-partnership but by specific agreement—each was to do all he could and each had an equal right to sell, and but for the fraud of the defendant, Bell would not have been a purchaser, his money would not have been received, the option could not have been taken up, there would be no land to be sold at any price and the so-called profit would not have come even temporarily in the possession of the defendant. The defendant's act was the act of them all, and the plaintiff cannot at the same time adopt the act and repudiate the responsibility. However, as it is at least a legal possibility that this judgment, now in appeal, may be reversed, I do not propose to rest my judgment solely or mainly upon this ground.

2. If the plaintiff falsely and faudulently represented and induced the defendant to believe that the syndicate's lowest price was $30,000 whereas it was only $29,000, should the plaintiff recover upon a contract, a voluntary contribution in effect, based upon the truth and good faith of this statement, the plaintiff at the time professing to act as the defendant's agent and associate? I do not think he should. How does it differ, if at all, in legal consequences from the other link in this chain of fraud, the misrepresentations of

the negotiator dealt with in the case referred to of Coleridge at the suit of Bell?

3. If, as I think the circumstances and evidence strongly point, the plaintiff had in fact no option, nothing in fact to transfer to the defendant, if he was simply the agent of the vendors, vitally interested in earning his $1,000 commission, can he by concealment and misrepresentation earn a commission from the vendee as well? I cannot see my way to sanction such a result.

4. And if he had no option, nothing in fact to give to the defendant, though it might be different upon distinct evidence that he had laboured long and earnestly to effect a sale, what consideration is there to support the defendant's promise of division of profits? I can find none. The issue of the cheque and execution of the undertaking were both before discovery of the secret commission, or misrepresentation of the terms of sale, had been discovered and ought not to be made to assist the plaintiff now.

There will be judgment, dismissing the action with costs.

HON. MR. JUSTICE LENNOX. JUNE 16TH, 1914.

ALLAN v. PETRIMOULX & CARNOOT.

6 O. W. N. 593.

Vendor and Purchaser—Agreement for Sale of Land—Assignment by Purchaser to Sub-purchaser—Rights of Sub-purchaser—Dispute as to Whether Water Lot Included in Agreement—Construction of Agreement—Estoppel—Evidence—Notice to Sub-purchaser of Terms of Bargain—Acceptance of Payments by Vendor—Specific Performance—Costs.

Defendant agreed to sell his farm, bordering on the Detroit River, to C., who assigned his contract to A. The conveyancer, in reducing their agreement to writing, erroneously inserted words including the water lot in front of said farm, when, in fact, the defendant did not bargain to give, and C. did not bargain to get, the said water lot. Before the assignment to him, A. was fully informed of the purport of the verbal bargain and of the circumstances attending the execution of the written agreement. Action by the executors of A. for specific performance.

LENNOX, J., *held*, that the plaintiffs could not succeed, since A. was in no better position than C., the assignor.

Held, that defendant's rights were not prejudiced by the acceptance of payments.

A. R. Bartlett, for plaintiffs.

F. D. Davis, for defendants.

HON. MR. JUSTICE LENNOX:—The plaintiffs sue as executors of W. H. Allan, deceased, and ask for specific performance of a contract entered into on the 27th March, 1911, by which the defendant Petrimoulx agreed to sell his farm, bordering on the River Detroit, to the defendant Carnoot.

Carnoot is an intelligent man, but he was born in Arabia, is of French parentage, and has a very imperfect knowledge of the English language.

He assigned his contract to W. H. Allan, deceased. The issue is as to whether the agreement of the 27th March did or did not include the conveyance to Carnoot of an estate in fee simple absolute in the water lot in front of Petrimoulx's farm, or alternatively, whether as a matter of estoppel the defendants are precluded from denying the plaintiffs' right to such a conveyance by reason of the wording of this agreement whatever may have been the actual bargain between Carnoot and Petrimoulx.

It is in evidence and not denied, that the verbal bargain was for the sale and purchase of the Petrimoulx farm, a parallel strip of land running westerly from a highway to a dike at the water's edge of the river Detroit; and within these boundaries and east of the dike, some 15 or 20 acres are covered by water. This is all that has been patented by the Crown, this is what the defendant Petrimoulx owned and verbally agreed to sell and make title to, and this is what the defendant Carnoot verbally bargained for and understood would be conveyed to him. Legally it included, of course, without mention, all easements, privileges and riparian rights appurtenant to the property. Carnoot is positive and explicit in saying that he never imagined at any time that he was getting any right whatever, not even an easement or privilege west of the dike or water's edge. These two men having reached this agreement, including terms of payment, occupation and the like, went to Mr. Giguac, a conveyancer, to have the agreement put into writing, and the instructions to Giguac did not go further than the verbal agreement; but Giguac, without instructions, incorporated an agreement to convey what is called the water lot. This he did by concluding the description with the words: "And the water lot in front thereof." Petrimoulx objected, saying that he did not own this, and the words were struck out, but the conveyancer had the idea that there should be some

words in the agreement so as to include any right or privilege of Petrimoulx incidental to ownership or occupation of the farm, and, evidently not being better able to express what he had in mind, after discussion, and with the consent of Petrimoulx, he restored the words he had already stricken out. Petrimoulx had no thought of agreeing to obtain a patent or, after discussion with Giguac, that the words employed would obligate him to do so. The attitude of the other contracting party, of course, has to be taken into account. But Carnoot, as he swears, had no idea that anyone could acquire any part of what appeared to him to be all a navigable river. He understood that all west of the dike was inalienably the property of the Crown or people, and in following the discussion—in which he took no part—as well as he could, he concluded that what was referred to as "a water lot" meant the land covered by water east of the dike, and as to this he understood that he would get it in some way, but by a less satisfactory chain of title; and with this he was content.

The result, as a matter of fact, is that Petrimoulx never bargained to give and Carnoot never bargained to get the water lot, and the result in law is that Carnoot could never compel Petrimoulx to obtain a patent for or convey this land to him. This is the situation as between the defendants. As between these two men their verbal agreement was never in fact varied, and in the working out of it in Court, the facts being undisputed, their rights *inter se* must be adjudicated upon this basis.

Are the plaintiffs then in any stronger position than Carnoot occupied at the time he assigned? It is conceivable that in certain circumstances they might have rights which Carnoot could not successfully assert. I am distinctly of the opinion, however, that in the circumstance of this case the plaintiffs are limited to the rights acquired by Carnoot. The plaintiffs do not and could not successfully claim under the agreement what might be said to have been wrested from Carnoot on the 2nd of January, 1913. The description in this instrument is admitted to be insufficient, and it was not put forward as a basis of this action either in the pleadings or at the trial. There was nothing to bind either party until execution of the assignment sued on the 6th January, 1913. Before this was obtained, the

plaintiff's testator and his solicitors were fully informed of the purport of the verbal bargain and of the facts and circumstances attending the execution of the agreement of the 27th of March, as above stated. More than this, both he and his solicitors knew that not only did the vendor repudiate any actual agreement to convey the water lot, but that Carnoot emphatically disclaimed any contract to get anything westerly beyond the dike. The right to the farm proper was all Carnoot professed to have or agreed to sell, and this is all the testator under the circumstances could acquire—except a law suit.

An argument was pressed based upon the acceptance of payments by Petrimoulx. But Petrimoulx had a right to payment without prejudice to his rights in Court based upon the undisputed facts. He had a right to accept the stipulated payments, and to say "I will leave it to the Court to say what I sold."

I was asked to relieve the plaintiffs from payment of costs in any event. I do not think this is a case calling for exceptional treatment of this character. There is more than a suggestion that the haste and urgency of Mr. Gauthier and the testator was actuated by a desire to obtain the property from an untutored foreigner before he would become aware of the sudden rise in the value of his farm. This is, of course, not illegal, but it is also not very commendable.

Carnoot was upon the verge of throwing up the whole transaction, but the plaintiffs insisted upon taking chances against the protests of both Carnoot and Petrimoulx.

The plaintiffs should be content with what they knew and know Petrimoulx agreed to convey. They repudiated the bargain and have failed in their attempt to substitute another. They are not now, strictly speaking, entitled to revert to the actual contract and claim specific performance of it, as admitted; and at the trial they were not even prepared to say then that they desired a conveyance under the contract as set up by the defendants.

If within fifteen days the plaintiffs serve notice in writing stating that they desire to obtain conveyance of the land without the water lot, there will be judgment for specific performance—limited in this way—in the usual form, and if

not the action will be dismissed, but the plaintiffs having caused the litigation the defendants must in any case be paid their costs of defence.

HON. MR. JUSTICE BRITTON. JUNE 18TH, 1914.

COOK v. BARSLEY.

6 O. W. N. 608.

Vendor and Purchaser—Agreement for Sale of Land—Oral Agreement—Possession Taken by Vendee—Payment of Taxes—Statute of Frauds—Part Performance—Agreement Enforced Against Grantee of Vendor with Actual Notice—Trespass—Injunction.

Defendant, wishing to purchase a lot and not being able to pay for it at once, verbally agreed with one H. that the latter should purchase it for him and sell it to him, giving him time to pay for it. H. purchased the lot, defendant entered into possession and performed sufficient acts of part performance to enable him to enforce his agreement with H. H., in violation of his agreement with defendant, sold to plaintiff.

BRITTON, J., *held*, that the plaintiff, being a purchaser for value, with actual knowledge of the agreement, was not entitled to the ownership of the lot, and that he must convey it to defendant upon receipt of the purchase price.

Action for trespass, and a declaration that plaintiff is owner of Park lot 21, in Forman's survey of lot 4 in the 1st concession of Downie, now in the city of Stratford, tried at Stratford without a jury.

R. T. Harding, for plaintiff.

J. J. Coughlin, for defendant.

HON. MR. JUSTICE BRITTON:—This lot of land prior to 4th May, 1908, belonged to one Howard Barker. He desired to sell and defendant desired to purchase. Barker wanted payment in the fall, and defendant had not the money, so the defendant approached the late Thomas Holliday and induced him to purchase the said land from Barker for him, the defendant, and sell to him, giving him time to pay for it, together with interest on the purchase price. Holliday agreed to do this, and, in pursuance of the arrangement paid to Barker $450 and on the 4th day of May, 1908, obtained a conveyance of said land. The verbal agreement between defendant and Holliday in reference to this land was as is

set out in the statement of defence. Following the agreement and in part performance of it, the defendant went into possession, paid the taxes, and paid the interest demanded by Holliday. Holliday never repudiated the agreement nor did he ever make a demand for payment of the principal. On one occasion, soon after Holliday purchased, when defendant was paying the interest, Holliday said in effect that he should have $50 additional for purchasing the land. Defendant assented to that and from that time defendant paid interest on $500 instead of on $450. The plaintiff purchased from Holliday and it is said paid $550, obtaining from Holliday a conveyance dated the 17th day of December, 1913.

The payments by defendant were irregularly paid both as to dates and amounts, but the receipts produced shew that apparently more than sufficient was paid to clear the place of rent or interest down to 1st January, 1913.

The deceased dealt with even years.

Reckoning the interest as rent upon the $500, and calling it $500 for all the time, it would be 4½ years to end of 1912, making for interest alone $135. The receipts produced by defendant shew payments by him to Holliday for rent or interest and taxes, $149.17. It was not disputed at the trial that defendant had paid in full for interest and taxes, at least up to 1st January, 1913.

The defendant made valuable improvements in his gardening and farming operations upon this property, so that by reason of part performance he could have enforced the carrying out by Holliday of the agreement made.

Holliday died since his sale to the plaintiff. The plaintiff knew of defendant's possession. Knowledge of possession by a claimant is not sufficient against a registered title.

I am of opinion, and so find, that the plaintiff had actual notice of defendant's agreement with Holliday. It is not necessary for the defendant to establish collusion between plaintiff and Holliday, but the whole transaction bears the appearance of it, and Mr. Holliday, although reputed to be a man of wealth, was perhaps tempted by the additional $50, which plaintiff is said to have given—to sell from under defendant.

Upon plaintiff's examination for discovery, which was in part put in, and upon his evidence at the trial, it seems to

me clear that the plaintiff had actual notice of agreement between the defendant and Holliday.

Plaintiff's actions corroborate defendant's evidence. It is not usual, or in the natural order of things, for a neighbour of a person in possession of and cultivating land, to buy and demand possession, without any previous notice to, or conversation with, the person apparently in possession as owner. The plaintiff evidently, when talking with Holliday, recalled the conversation between plaintiff and defendant. Holliday, it is said, denied that defendant had paid for the land and asserted that defendant had not paid the rent.

Upon no ground was the plaintiff entitled to the injunction granted, nor could he succeed in an action for trespass. The defendant, upon plaintiff's admission of what was told him by Holliday, was in possession as a yearly tenant. The plaintiff's action will be dismissed with costs. The injunction will be dissolved and all costs of interim injunction and of the motion to continue and the entire costs will be costs in the cause payable by the plaintiff to the defendant.

There will be judgment for the defendant upon his counterclaim. There will be a declaration that the plaintiff purchased from Holliday with actual notice of the agreement between Holliday and the defendant, and the plaintiff upon payment to him of $500 and interest thereon at 6 per cent. per annum from the date of his purchase from Holliday, will execute to the defendant a conveyance of said land free and clear, save as expressed herein, of any lien or encumbrance of any kind created by him. Arrears of taxes, if any, will not be considered an encumbrance, and if any taxes paid by plaintiff, the amount of such shall be added to the purchase money and be paid by defendant to plaintiff. If the plaintiff has executed a mortgage upon the property as a part of purchase money or for any other purpose, the defendant will assume that mortgage as part of his purchase money. If plaintiff has paid in full, payment by defendant will be of the $500, and interest in full.

If any difficulty arises in settling minutes or as to amount to be paid, application may be made to me to determine or to direct a reference.

Twenty days' stay.

HON. MR. JUSTICE LENNOX. JUNE 16TH, 1914.

ROBINETT v. MARENTETTE.

6 O. W. N. 606.

Contract—Conveyance of Land to Defendant—Security for Moneys Advanced—Binding Agreement to Convey—Tender of Amount of Advances—Interest Costs—Counterclaim.

Plaintiff and one J., who subsequently assigned his rights to plaintiff, with the intention of organizing and incorporating a company for the benefit of the Mutual Catholic Benevolent Association, purchased land and had it conveyed to defendant. The deed to defendant, although absolute in form, was in reality a mortgage to secure a loan for the purpose of paying for said land. The defendant at the time of the conveyance executed a controlling agreement. No stock had been taken and the company for which the land was intended was not organized or incorporated.

LENNOX, J., *held*, that defendant was not entitled to the land absolutely, and that plaintiff could compel defendant to specifically perform his agreement by conveying the land to plaintiff upon repayment of the loan.

F. D. Davis, for plaintiff.

J. H. Rodd, for defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff and Janisse, who assigned to the plaintiff, proposed to organize a company to take conveyance of a plot of ground and erect a library building for the benefit of the Mutual Catholic Benevolent Association, at Sandwich. The plaintiff had awakened the interest of some of the members of this Association, and these members had committed themselves so far as to approve of the plaintiff and Janisse canvassing the situation and finding out what could be done.

It was hoped that a sufficient number of members of the Association would subscribe for stock of the company at ten dollars a share to enable the scheme to be carried out. Relying upon this, or, rather taking chances of being able to carry the undertaking through, Janisse and the plaintiff purchased the land in question from Parent and procured the conveyance thereof to the defendant.

The deed to the defendant, though absolute in form, was in fact a mortgage to secure repayment to the defendant of a loan to Janisse and the plaintiff of $1,100, with interest at 7 per cent.

It is true that the primary object these men had in borrowing the money and buying the land was to obtain a site, organize a company, and build a library to be used in connection with the C.M.B.A.; but the only position the defendant asked for or obtained in connection with the transaction was that of mortgagee, as is clearly shewn by the agreement he executed at the time and his evidence at the trial.

It is beside the question to speculate as to how far the plaintiff would be bound if stock had been taken in sufficient sums and a company incorporated and organized. This has not happened, stock could not be sold, the whole scheme has fallen through, and the C.M.B.A. refuses to take over the property. At most, it was a dream of the plaintiff and perhaps of a few other members; the defendant may have been in sympathy with the proposal; but what he did was to loan money, take a deed as security, and execute a controlling agreement.

This agreement is binding upon the defendant. The plaintiff is assignee of the rights of Janisse. The money was twice tendered to the defendant; but in these days of speculation at Sandwich and the neighbourhood, I infer that the money in his possession has been worth interest charges to the plaintiff in the meantime. It will be equitable to allow the defendant interest to this date; and, although I am not so sure about this, to relieve him from payment of costs.

There will be judgment declaring this, and for specific performance in the usual form. The counterclaim will be dismissed without costs.

HON. MR. JUSTICE SUTHERLAND. JUNE 18TH, 1914.

FISHER v. THALER.

6 O. W. N. 586.

Execution—Stay Pending Appeal—Removal of Stay—Rule 496—Summary Judgment—Rule 57—No Real or Valid Defence.

SUTHERLAND, J., *held*, that, under Rule 496, there should be no stay of execution pending an appeal where no real or valid defence is deposed to.

Motion by plaintiff, under Rule 496, for an order removing the stay of execution upon the plaintiff's judgment consequent upon defendant's appeal from the judgment having been set down to be heard. Rule 496: "Unless otherwise ordered by a Judge of a Divisional Court, the execution of the judgment appealed from shall, upon an appeal being set down to be heard, be stayed, pending the appeal. . ."

M. L. Gordon, for motion.

J. P. MacGregor, *contra*.

HON. MR. JUSTICE SUTHERLAND:—This is a motion to remove stay of execution pending an appeal from an order of a County Court Judge granting the plaintiff's motion for judgment on a specially endorsed writ under Rule 57.

The learned County Court Judge, on the material before him, came to the conclusion that the defendants were really not *bona fide* contesting the plaintiff's claim, but merely seeking to gain time. It is said he was asked to stay execution pending an appeal and declined to do so. While in a case where a defendant has sworn to a valid defence, there is the right to an unconditional defence: *Jacob* v. *Booth's Distillery Co.*, 50 W. R. 49 (85 L. T. R. 282); *Castle Co.* v. *Kouri* (1909), 18 O. L. R. 462; a perusal of the material leads me to the same conclusion as the County Court Judge that no real or valid defence is deposed to and that there should be no stay of the execution.

The order will go as asked accordingly.

SECOND APPELLATE DIVISION. JUNE 17TH, 1914.

FEHRENBACH v. GRAUEL.

6 O. W. N. 584.

Vendor and Purchaser—Agreement for Sale of Land—Action for Instalment of Purchase-money—Ability of Vendor to Convey—Right to Rescission—Damages—Limitation of—Abatement of Purchase-money—Application of Payment—Costs.

Plaintiff agreed to execute a deed of 590 acres of land to defendant when the last instalment of the purchase-money was paid. An agreement was subsequently made whereby the price of 210 acres should be paid and land conveyed which under the agreement was not to be conveyed until the last payment of the purchase-money had been made. The money was paid on the "whole of the land contract." At the time of the payment of this sum defendant owed to plaintiff a note and about $3,000 balance of an instalment past due. There was also a debt consisting of future instalments, not then due. At the time of the payment of the purchase-price of the 210 acres defendant had no right under the contract to pay any sum except the amount overdue and unpaid. The question was: Could the balance of the purchase-price of the 210 acres, after deducting the amount already due, be appropriated to the payment of an instalment not due at the time of the payment of said money?

SUP. CT. ONT. (Sec. App. Div.) answered this question in the negative and held that defendant must be considered as having paid the excess under the agreement made especially as to the 210 acres and as part of the final instalment since the right to a conveyance accrued only when all the purchase-money was paid.

Appeal by defendant from the judgment of Lennox, J., ante 20.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

E. E. A. Du Vernet, K.C., and W. H. Gregory, for defendant.

R. McKay, K.C., for plaintiff.

HON. MR. JUSTICE RIDDELL:—By an indenture dated March 5th, 1912, the plaintiff conveyed to the defendant all his interest in certain lands, 590 acres in all, in Alberta, for the expressed consideration of $15,930, and certain chattels, so that the total "consideration price" was $18,030. This was payable as follows:—

1912 May 1 $1,000 and interest at 6% per annum.
" June 1 1,000 " " " " " " "
" July 1 1,000 " " " " " " "
" Nov. 1 4,000 or more.
1913 Nov. 1 3,000 or more.
1914 Nov. 1 3,000 or more.
1915 Nov. 1 "the balance of said purchase money

. . . with interest at the rate of 6 per cent. per annum, said interest to be paid annually on the 1st day of November until the said principal sum be fully paid and satisfied, the first payment of interest to be made on the 1st day of November next." The vendor covenanted upon payment of the full price to convey to the purchaser by a deed without covenants (except encumbrances by him.)

The first three payments were made by notes, and a part of the fourth covered by a note. The defendant made a sale of a part of the land at a considerable profit for the price of $8,100, 270 acres at $30 per acre. He desired to have this land freed from the plaintiff's rights under the agreement. On February 28th, 1913, he made a payment of $7,345 to the plaintiff with that object. He said at the trial that this was agreed to be applied on the past due debt and the balance on the payment due November 1st, 1913; but afterwards he corrected this and said that he "paid it on the whole of the land contract," (p. 22); and the learned Judge finds that he "made no application of the money at the time of payment excepting in so far as the wording of the cheque affects the question." The cheque which is all apparently in the handwriting of the defendant, reads, "Being payment in full for the E. ½, sec. 5, tp. 10, range 17, West 4th M." This is the description of the third of the three parcels in the indenture mentioned. The amount $7,345, was arrived at in this way:

The price of the land being $27 per acre:—

270 acres at $27	$7,290
Interest—March 1 to Oct. 1	255
Oct. 1 To cheque (allowance)	200
	$7,345

The "allowance" was made by the plaintiff to the defendant for delay in completing the title which will be spoken of more at length hereafter.

The plaintiff, November 1st, 1913, rendered a statement to the defendant shewing that he had applied the payment in such a way as to leave the payment due November 1st, 1913, of "$3,000 or more" unpaid.

The sale made by the defendant was to one Fleager of Chicago and was about September 9th. On that day the defendant wrote the plaintiff that he had sold 270 acres for all cash "so I wish you would get the title fixed up at once. . . . I hope you will see that this is not delayed or I might lose the deal." The plaintiff answered, September 13th, "I

hope you are real serious in the matter and that you have made well of it, I can easily get the matters fixed so far as title is concerned, only let me know by wire if mail is too slow within a month." No telegram or letter seems to have been sent in answer to this, but no doubt the parties saw each other.

Fleager, September 20th, 1912, sent a cheque for $8,100 to the Canadian Bank of Commerce at Berlin, Ont., to be credited to the defendant on receipt of papers shewing a proper transfer to him of the 270 acres. The plaintiff and defendant had been sued by one Zettel and a caveat lodged against some of the land sold by plaintiff to defendant. That action was got out of the way in November, 1912, not, however, to the knowledge of the defendant according to his story; but he had been aware at the time of his purchase of the transactions leading to the action. The caveat was withdrawn February, 1913.

Fleager telegraphed in November, 1913, to Grauel; he referred the matter to Messrs. Scellen & Weir, solicitors, who wrote Fleager, November 21st, that delay arose from the death of the original owner and non-completion of administration papers to enable a deed to be made to the plaintiff—the plaintiff had gone west in person to hasten the matter. December 23rd, Fleager wired Scellen & Weir to pass title in his name immediately. The trouble in the west continued, and, February 26th, 1913, Fleager wrote the Canadian Bank of Commerce at Berlin: "It is my understanding that this title is being perfected. Upon the guarantee of a perfect title from Mr. Scellen, barrister, and Mr. Grauel, it will be satisfactory for you to release this money."

On 28th February, the defendant and plaintiff, knowing of the state of affairs, joined with Mr. Scellen in a guaranty to the Canadian Bank of Commerce; "undertake and guarantee that the title to these lands will be perfected in the name of C. George Fleager . . . in consideration of you paying to the parties entitled to the same the sum of $8,100 and any interest . . . deposited with you as the purchase money . . . and we . . . agree to indemnify you from any demand or loss that may be made on account of your paying over the said money." Upon this, the bank paid over $8,100 to the defendant, and the defendant was thereby enabled to give the cheque for $7,345

(already mentioned) to the plaintiff. It was then a claim was made by defendant for delay and allowed at $200.

The sale to Fleager has fallen through and some of his money has been repaid him by the defendant. Although Scellen & Weir wrote, 20th December, 1912, saying that they had succeeded in clearing away the difficulty, in June, 1913, they are still saying "certificate of title will issue in the course of a few days." Fleager claimed to repudiate the purchase by reason of the delay, and demanded back his money from the bank in June, 1913. A transfer was sent Fleager in July, and sent by him to his solicitors in Berlin. He tendered to the plaintiffs a re-transfer from Fleager to the plaintiff, with the title papers, and demanded the repayment of the purchase price. When this was not paid, Fleager instructed his solicitor to bring an action against both plaintiff and defendant, basing his claim apparently upon the undertaking to the bank. A writ was prepared, but never issued. The defendant Grauel called upon Fleager at his office "and made promises which I thought would probably be fulfilled, and, therefore, I withdrew the suit." The defendant gave Fleager $1,500 in stock, which he accepted in part payment; and Fleager drew on him for $6,600, the balance, and Grauel accepted this draft. The plaintiff had no part in any of these transactions between Fleager and the defendant, and the defendant did not claim the right to repudiate the sale from the plaintiff.

November 1st, 1913, the plaintiff rendered a statement to the defendant claiming the instalment of $3,000 due that day and also interest on the balance not paid, in all $3,319.09. The amount not being paid, a specially endorsed writ was issued, November 21st, for:

1913.

Nov. 1—Agreement, etc., etc.....	$3,000 00
Nov. 10—Interest at 6%, Jan. 16th, on $6,740, principal still owing.....	319 10
Nov. 20—Interest on $3,319.10 at 6%, Nov. 1st to Nov. 20th.....	10 20
	$3,330 00

and interest at 6% till judgment.

The defendant filed his defence and counterclaim, alleging the contract, payment before action of $11,844.85 being

$873.64 interest in full to 1st November, 1913, and $10,971.21 applied on principal, and he, therefore, claims that $971.21 more than enough has been paid by him to meet all amounts accrued due. He further says that in addition to the incumbrance which he knew of and assumed, the plaintiff had sold to Zettel part of the land, and that Zettel had brought an action against him and the plaintiff and registered a caveat, which forms an incumbrance, although the plaintiff had covenanted against incumbrances. Then he sets out the sale to Fleager in September, 1912, of 270 acres at $30 per acre; but, by reason of the prior incumbrance to Zettel, he could not make title to Fleager, and so lost his profit of $810; that the plaintiff had not the right to convey; that the defendant is in possession of the land, and submits his rights to the Court, offering to deliver up the lands upon being given proper relief. He counterclaims for rescission, repayment of all he has paid, damages for $3,000 for breach of the agreement, and general relief.

The plaintiff answers by saying that he has received $11,844.85, but $11,290.00 was for principal and only 554.85 for interest;

$11,844.85

and that $3,000 or more is due under the covenant on 1st November, 1913, with interest; that he applied the $7,290 on principal and on the release by plaintiff of the 270 acres sold to Fleager; that the defendant knew of the Zettel agreement at the time of the purchase, and in any event the plaintiff is not called upon to convey till the full purchase money was paid, and he has now got rid of Zettel; that it was only to accommodate the defendant that he agreed to transfer the 270 acres to Fleager and any delay was due to circumstances beyond his control, and that after the difference had arisen over the Fleager matter, the plaintiff and defendant agreed that the plaintiff should allow the defendant $200 for all claims arising out of the delay.

At the trial, it appeared that the Zettel claim had no relation to the land agreed to be sold to Fleager, and that the defendant was allowed the sum of $200 for the delay. The learned Judge, Mr. Justice Lennox, held that the defendant was not entitled to damages by reason of the Zettel encum-

brance, and gave judgment for $3,000 and interest and dismissing the counterclaim.

The defendant now appeals.

The notice of motion restricts itself, and the argument was limited to a claim that it should have been found that there was nothing payable at the time of the issue of the writ. No appeal is taken against the dismissal of the counterclaim, and I have mentioned the facts on which the counterclaim is based only because some attempt was made to make them tell on the main question.

The state of affairs at the time of the payment in February, 1913, was this: The defendant owed to the plaintiff a note and about $3,000 balance of the payment due November, 1912; these were already payable. Then there was a debt not yet due, *debitum in praesenti, solvendum in futuro,* of over $8,000; all of this the defendant *might,* part of it, viz., $3,000, he *must,* pay 1st November, 1913.

An agreement was made whereby the price of 210 acres should be paid in February and land conveyed which under the agreement was not to be conveyed till the last payment of the purchase money had been made. The money was paid generally; as the defendant says he "paid it on the whole of the land contract," before any claim was made by the defendant as to any application to be made of this sum, the plaintiff applies it to the "whole of the land contract" by applying it, first, to pay the amount overdue and the balance on the whole contract. The defendant claims the right to apply the balance, after paying overdue claims, upon the instalment due 1st November, 1913, and so establish that there was nothing due at the date of the writ.

At the time of the payment, the defendant had no right under the contract to pay any sum, except the amount overdue and unpaid; even his right to pay more than $4,000, as of 1st November, 1912, had gone with the day. Consequently, he must be considered as paying the excess under the agreement made specially as to the land sold to Fleager. The land was then considered as actually sold to the defendant, and he entitled to a conveyance. The right to a conveyance accrued only when all the purchase money was paid, and it seems to me it must be considered that this amount was paid as part of the final instalment. The argument that the plaintiff had, after the payment, a balance of money in his

hands belonging to the defendant, cannot avail; neither considered the balance the money of the defendant, and, after payment, it was undoubtedly the money of the plaintiff and not that of the defendant.

The argument, which might be made, that the defendant, in making the excess payment, did so under the option given him of paying more than $4,000 in November, 1912, does not assist him. The application made by the plaintiff of the money has precisely the same effect as though he had been, in February, 1913, allowed to exercise the option he had in November, 1912.

None of the circumstances succeeding February, 1913, has displaced the right of the plaintiff to appropriate the payment as he has done, and I do not see anything inequitable or unfair in his insisting on his rights when he made a conveyance of the land at the request of the defendant.

Whether the defendant has any rights against the plaintiff not raised by his pleadings, we need not consider.

I think the appeal should be dismissed with costs.

HON. SIR WM. MULOCK, C.J., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE LENNOX. JUNE 16TH, 1914.

KINSMAN v. TOWNSHIP OF MERSEA.

6 O. W. N. 597.

Highway—Non-repair—Death of Child by being Thrown from Waggon—Liability of Township Corporation—Neglect to Fence Ditches—Evidence—Action by Parents under Fatal Accidents Act—Damages.

LENNOX, J., *held*, that failure on the part of a municipality to fence a highway 16 feet in width on either side of which was a deep ditch constituted non-repair, and allowed the plaintiff $1,400 damages for the loss of his son who was thrown from a carriage and killed by reason of the negligence of said municipality in failing to erect fences at the sides of the highway.

Action by the father of a boy who was killed by being thrown from a waggon on a highway in the township of Mersea, to recover damages, under the Fatal Accidents Act, for the death of the boy, the plaintiff alleging that the high-

way was out of repair, by reason of the negligence of defendants, the Corporation of the Township of Mersea.

M. Wilson, K.C., and W. T. Easton, for plaintiff.

J. H. Rodd, for defendants.

HON. MR. JUSTICE LENNOX:—The plaintiff exercised reasonable care. The horses, though young, were shewn not to be vicious, and, on the contrary, the way they acted when the disaster culminated and all were in the bottom of the ditch, shews that they were not. The circumstance that with his boy lying dead, the plaintiff took blame to himself, thinking that possibly he might have got the boy out of the waggon, proves nothing. Who of us when an accident befalls and calamity overwhelms us is there who does not feel and exclaim that we might have done something that we did not do and had not at the moment the power to think of doing?

The plaintiff had never before been upon this highway. It is enough, as I find the fact to be, that he is a competent and careful driver; was proceeding along the highway with reasonable care, and, unexpectedly placed in a situation of peculiar difficulty, acted as a prudent man might be expected to act. If the defendants were negligent, and their negligence was the cause of the peril; if they created an emergency calling for immediate action, what right have they to demand of the plaintiff the exercise of extraordinary judgment or exceptional intelligence or forethought? And the defendants were guilty of gross negligence in the construction and care of the highway in question.

Every municipal corporation is bound to keep the highways they have opened for traffic, in such a state of construction and repair as to be reasonably safe and sufficient for the requirements of the particular locality; regard being had, of course, to the means at the command of the council; the ordinary purposes for which they are likely to be used and the varying conditions which are likely to arise. They must not altogether overlook that the highways are liable to be used by the comparatively unskilled as well as the skilful driver, by the old and the middle aged and the young; by the stranger as well as the resident, and by night as well as by day. They should be made reasonably safe for all persons likely to have occasion to use them. *Lucas* v. *Township of Moore*, 3 A. R. 602; *Toms* v. *Whitby*, 37 U. C. R. 100; *Walton* v. *York*, 6 A. R. 181; *Plant* v. *Normandy*, 10 O. L. R. 16.

This road is in an old well-settled and prosperous township and county. It is not pretended that the municipality had not the means to put and keep it in a proper state of repair.

At the place where the accident occurred, the highway between fences was sixty-four feet wide, only sixteen feet of this or less were made available as a roadway, and the roadbed was exceedingly rounding—too rounding as I think. Alongside of it was a ditch on either side, and the ditch into which the waggon overturned and in which the plaintiff's son was killed, was 24 feet wide and 8 feet deep. This ditch was not constructed for the drainage of the highway, but in connection with a municipal drainage scheme by local assessment, primarily for the advantage of a section of the people only, and the assessment should have provided for the safeguarding of the highway as a highway. It does not follow the natural flow of the watershed. It is a cut-off ditch and diverts the water from its natural course. Even this narrow precarious roadway was encroached upon by cross cuttings made to facilitate the scraping out of the ditch. These were negligently allowed to remain there, as they happened to be made, for several years. There was no fence or guard of any kind. The horses had only swerved for a couple of feet from the beaten path, when two wheels dropping into the second of these ruts or cuts, the waggon upset and landed in the bottom of the ditch.

I have no hesitation in declaring that this road was dangerous and out of repair; the evidence upon the ground, as I might say, the cross-section filed in Court, even without the opinion testimony of the witness, would force this conclusion. The only wonder is that the municipality has been immune from damages for so long a time. But there was a lot of testimony and it was practically all one way. Some of the witnesses thought that it was "not very dangerous," that "with care and the right kind of horses it might be safe," and that you might pass along all right "*unless there was an accident* and the horses scared,"—the last proposition being hardly open to question I should think—but not one of them all ventured the opinion that it was actually safe. Aside from the question of fencing, I find as a conclusion of fact that the part of the highway available for travel was too narrow—narrower than it should have been—and narrower than, even with a municipal ditch carried along it, there

was any necessity for leaving it. But in any event, wide or narrow, with a ditch of this character on its margin, it should have been fenced. The defendants practically admitted this and for excuse pleaded the expense of fencing all their ditches of this class, yet 75 cents a rod was the highest cost suggested for fencing, and 6 miles of fencing or 1820 rods is the aggregate of it all for the whole township. It is waste of energy to discuss a question of this kind.

The plaintiff sues upon behalf of himself and his wife. It is more difficult to make a fairly accurate estimate of the pecuniary loss in the case of a child than for the loss of a parent or husband. The plaintiff's son was an active, ambitious little fellow, 10 years of age, and was beginning to be useful on the farm. The reasonable expectation of pecuniary gain or assistance from a boy on a farm is very different from what it is in the case of a town boy, at least in the majority of cases; as a rule the town boy is a charge upon his parents or his earnings find their way into his own pocket.

There will be judgment against the defendants for $1,400 damages, with costs, and I apportion the damages as follows: namely, $800 to the plaintiff and $600 to his wife, costs, if any, incurred by the plaintiff, not recovered, to be borne, *pro rata,* by the shares of each.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 20TH, 1914.

TANCOCK v. TORONTO GENERAL TRUSTS CORPORATION.

6 O. W. N. 609.

Evidence — Corroboration — Action against Executors — Damages — Costs.

FALCONBRIDGE, C.J.K.B., gave judgment for $152.50 for services rendered and $150 damages in an action by plaintiff against the executors of one Carter to recover $2,144 for services rendered to the deceased.

Action by Catherine Tancock, married woman, against the executors of James Irving Carter, deceased, to recover $2,144 for nursing and attending upon the deceased and for

performing other services and for damages for breach of contract.

Tried at Sarnia.

J. R. Logan (Sarnia), for plaintiff.

A. Weir (Sarnia), for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that there is some corroboration of portions of plaintiff's claim.

The first item—3 weeks' nursing in 1910—is abandoned. I have numbered the others in the margin of 12th par. of the statement of claim.

(1) 6 months' nursing, etc. She undoubtedly did some things for him as appears by the evidence of Slater and McPhee, witnesses for defence. She was not giving up her whole time.

I allow her for this	$100 00
(1) Baking and nourishment. I allow nothing as there is no corroboration.	
(3) Extra washing, 3 weeks	10 50
(4) Going few steps out of her way to take letters to hospital	10 00
(5) Caring for room—June to November, 1913	32 00
	$152 50
There is corroboration by Cook and Worsley of an intention on the part of testator to do something in the direction of assisting her in repairing or improving her house. Her house has been improved in value to a greater extent than the amount spent on it, but I allow her by way of damages the sum of	$150 00
Total	$302 00

Judgment will be entered for plaintiff for $302 with costs on the County Court scale and no set-off of costs by defendants.

Defendants on passing their accounts to have costs as between solicitor and client out of estate.

Thirty days' stay.

HON. SIR JOHN BOYD, C. JUNE 20TH, 1914.

WIRTA v. VICK.

6 O. W. N. 599.

Unincorporated Society—Property of Society—Dissident Members—Ultra Vires Action of Majority—Breaking-up of Society into Factions—True Line of Succession—Counterclaim—Damages.

BOYD, C. gave judgment for defendant as trustee of the Copper Cliff Young People's Society, declaring him entitled to money in the bank and to the ownership and possession of the society's hall, as against the plaintiff, who represented an opposing faction in the society.

Action by officers of Copper Cliff Young People's Society for a judgment declaring them entitled to $1,313.80 in a bank at Copper Cliff; declaring them owners of Finland Hall and entitled to possession thereof; and for $2,000 damages for the alleged wrongful and illegal taking and retaining possession.

W. T. J. Lee, for the plaintiffs.

J. H. Clary, for the defendants.

HON. SIR JOHN BOYD, C.:—As preliminary these dates and facts may be set down in order.

February, 1903. Copper Cliff Young People's Society, formed and organised as a voluntary unincorporated association of persons having for its chief object the promotion of temperance.

Lease of land for erection of a hall made 29th September, 1903, by the Canadian Copper Cliff Company to Herman Vick as trustee of the Finland Temperance Hall for a year at a nominal rent and the term to continue until the company should elect to discontinue the lease.

Up to 1910, hall and buildings erected at about cost of $3,000.

May 17th, 1911. Local Branch No. 31 of the Socialist Party of Canada was initiated and charter issued to members, some of whom belonged to the Young People's Society.

January 7th, 1912. Annual meeting of Young People's Society carried by vote of 79 to 24 a resolution to affiliate with the Socialist Party of Canada and thereupon a charter

was issued by the Socialists enrolling the society as "Local Young People's Society No. 31: Social-Democratic Party of Canada" (this is dated 1st January, 1912.)

February 6th, 1912. Action by Vick against this Socialist movement and to restrain alienation of the property of the Young People's Society to the new Local No. 31.

June 26th, 1913. Judgment of Kehoe, County Judge, dismissing the action of Vick reversed by Court of Appeal, and declaration that the action complained of was *ultra vires* and illegal.

September—October, 1913. No. 31 charter surrendered and another issued excluding Young People's Society.

December 25th, 1913. Resumption of possession of the hall by Vick—his party having been excluded since January, 1912, by the socialists.

January 2nd, 1914. Confirmatory lease by the company to the said Vick as trustee, etc.

Present action 10th January, 1914.

This action is an outgrowth of former litigation in connection with "The Copper Cliff Young People's Society." In the report of that former litigation the early history and organisation of the society is set forth in the judgment of Mr. Justice Maclaren: *Vick* v. *Toivonen*, 24 O. W. R. 802.

The society began in a voluntary association of 25 persons in February, 1903, and their local habitation was provided for by a lease of land from the Canadian Copper Company of Copper Cliff to Herman Vick as trustee of the Finland Temperance Hall of Copper Cliff, on which a hall or place of entertainment was put up by the associates.

This lease was renewed on 2nd January, 1914, to the same Vick (who is the defendant) as trustee of the Finland Temperance Hall of Copper Cliff.

The first action centred on proceedings taken at the annual meeting on 7th January, 1912, when the members resolved by a vote of 74 to 24 that the Young People's Society should unite with the Socialist Party of Canada. This was a packed meeting and the opponents of the socialistic movement were taken by surprise. Though the vote was on 7th, the charter affiliating this society with the Social-Democratic party of Canada bears date on 1st January, 1912.

This action of the majority was declared by the judgment in appeal *ultra vires* and in violation of the original constitution of the Young People's Society—the emphatic note in which was "Temperance."

After this date—7th January, 1912, the socialistic section practically ousted the original (temperance) section from the hall and associate property, and such was the physical situation till Christmas Day, 1913, when the manager of the hall gave up the key to the defendant and he took possession as trustee of the Temperance Hall and for the use of the faithful members of the Young People's Society.

In the County Court action brought by Vick to restrain the socialistic movement, judgment was against him in the Court below, but this was reversed on appeal and the ultimate decision, by judgment dated 26th June, 1913, was brought to the attention of those in possession by the defendant Vick towards the end of September, 1913. They then sought to neutralize or obliterate what had been done by procuring a repeal of the charter by which the Young People's Society had been enrolled as No. 31 of the Social-Democratic Party. The date of this was about the 1st October, 1913. The fact of this withdrawal or cancellation of the socialist charter was not made known to Vick or those who adhered to the original constitution and practically there was no change in the conduct of the meetings thereafter. The young people's element was slighted and minimized while questions of socialism were the controlling factor. To outward appearance the Young People's Society in the hall up to Christmas, 1913, was still Local No. 31 of the Democratic party. Thus we find ticket 803 (one of a series) giving on payment of 25 cents right of admission on December 15th, 1913, to a sale in aid of Copper Cliff's Young People's Society, Local No. 31.

The membership books have disappeared as to both lines of the opposing claimants, which for the sake of distinction may be concisely called the temperance as opposed to the socialistic, but it may be taken that the utmost number of the latter was 74, as disclosed in the vote of 1912; now that number has diminished to about 50. The aggregate of those who support the action of Vick is 70; so that counting heads and treating all as members of the original society, the clear majority is in favour of those now in possession. That ground is of itself sufficient to indicate that it is not the duty of the

Court to interfere actively by changing the possession of the hall. But *quaere,* were those adherents of the plaintiff's side to be reckoned as rightful members in regular succession to the associates of 1903? Guided by the reason assigned by the Court of Appeal I should take it that there was a distinct breach in the society occasioned by the *ultra vires* action of the then majority. They voted themselves out of the original body and established a new chartered entity bound together by obligations to and connection with the Social-Democratic Party of Canada. They separated themselves from the original body, and the true line of associated succession is to be found in the then minority, who have remained faithful to its principles throughout the whole period. Can the separated ones seek to retrace their steps to equal status with the faithful ones, without some inquiry as to their suitability. For instance, those represented by the plaintiffs are all or almost all members of the local body No. 31 of the Social-Democratic Party. Now, it is one of the rules laid down in the constitution of the Young People's Society that a person is "not able to act energetically enough in two societies at the same time;" and those who now hold the majority may think fit to invoke that provision to exclude outstanding socialists who are thought over-zealous in their propaganda. It is not necessary for the disposal of this case to pass definitely upon this question, for, I think, on other grounds, as now stated and as also stated *viva voce* at the close of the argument, that the *locus standi* of the plaintiffs does not call for the interference of the Court.

It is alleged by the plaintiffs that the defendants by fraudulent means obtained possession of the keys at Christmas, 1913. This has not been proved—so far as appears, the keys were yielded by the then holder as manager of the hall in obedience to the demand based upon the judgment of the Court of Appeal. A copy of the judgment was nailed up in the hall contemporaneously as the justification of the act. Though the judgment does not in terms pass upon this, it may be inferred that this result is to be reasonably deduced therefrom. At all events, the plaintiffs had no right to exclude the party of the defendants as they did unless they would submit to socialistic control.

In the line of true succession Vick has been elected president and treasurer of the society, and he is also the fiduciary

tenant under the lease; why should he be dispossessed by dissidents from the principles of the Young People's Society?

For the same reason the money held in *medio* and now paid into Court should be paid to him in preference to the claim of the plaintiffs to control it; he giving the security required by the rules.

The plaintiffs have no claim for damages for loss of exclusive possession as against the defendants. The counterclaim for damages made by the defendants against the plaintiffs cannot be maintained on the present record, nor do I encourage such claim to be made, though I do not foreclose that claim as the suit is now constituted. The socialistic party were at first in possession under the authority of the County Judge till his judgment was reversed; and during that time I do not know, nor has it been proved, who were then the ostensible legal possessors and occupiers of the hall. The body of officers is changed every six months—those on the record were the ones elected in December, 1913—the month in which the defendants obtained possession—who were the officers in the interval is not in evidence, and I do not know that they are the parties before me. My dismissal of the case with costs will be without prejudice to this claim for damages, if further litigation is sought.

I stated my general view of the situation at the trial; I adopt what I then said and make it part of my definitive judgment.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

McNALLY v. HALTON BRICK CO.

6 O. W. N. 548.

Negligence—Master and Servant—Death of Employee—Defective Floor of Brick Kiln—Findings of Jury—Evidence—Common Law Liability—Knowledge of Superintendent—Workmen's Compensation for Injuries Act—Damages.

KELLY, J., *held*, that defendants, a brick company, in permitting the floor of one of their kilns to fall into disrepair, whereby an employee was killed, were liable at common law for such negligence.

Sup. Ct. Ont. (2nd App. Div.) affirmed the judgment of Kelly, J. *Grant* v. *Acadia Coal Co.* (1902), 32 S. C. R. 427; *Canada Woollen Mills* v. *Traplin* (1904), 35 S. C. R. 424: followed.

Appeal from the judgment of HON. MR. JUSTICE KELLY, 25 O. W. R. 610, in which the facts sufficiently appear.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR. WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

E. E. A. DuVernet, K.C., for defendants.

H. Guthrie, K.C., and W. I. Dick, contra.

HON. MR. JUSTICE RIDDELL:—It cannot be said that the findings of the jury are not amply justified by the evidence. It may be that had the "setters" not removed the strut, the bricks would not have fallen, but this was done in the regular course of their trade, in order that they might go on with their work and without knowledge of danger; and had the floor been in proper condition, the accident would not have happened. The accident was caused by the unevenness of the floor some time after the removal of the strut; and, though the accident might perhaps have been prevented by leaving the strut in place, the unevenness of the floor was none the less a true *causa causans* and not merely *causa sine qua non*.

There can be no doubt of the liability of the defendants under the Workmen's Compensation for Injuries Act, and that is not seriously disputed; indeed, were the finding that the accident was due to the negligence of the "setters," the defendants would probably be liable under *Markle* v. *Donald-*

son (1904), 7 O. L. R. 376, 8 O. L. R. 682; *Story* v. *Stratford Mill Building Co.* (1913), 30 O. L. R. 271.

But it is claimed that the defendants are not liable at common law. This is the real dispute.

I think the case is concluded so far as this Court is concerned, by two cases in the Supreme Court of Canada.

In *Grant* v. *Acadia Coal Co.* (1902), 32 S. C. R. 427, it was held by the Supreme Court that, if a mining company failed to maintain their mine in a condition suitable for carrying on their work with reasonable safety, they could not evade liability by shewing that this condition was due to the neglect of the fellow-servant of a servant injured by such defective condition. It is true that there was a breach of a statutory regulation, but Sir Louis Davies points out (p. 434) that this was "nothing more than a statutory declaration of the common law duty of the mine owner;" and the case did not turn on the duty being statutory. "It is not enough," says Mills, J., "that the company shall have given people directions to its servants, but it is responsible for their performance" (pp. 440, 441).

In *Canada Woollen Mills* v. *Traplin* (1904), 35 S. C. R. 424, an elevator of the defendants had been allowed to become shaky, whereby a pin fell out and allowed the elevator to drop, injuring the plaintiff, a workman in the defendants' employ. A verdict for the plaintiff at common law was sustained by the Court of Appeal, and the case was taken to the Supreme Court. The appeal was dismissed. Mr. Justice Davies pointed out (p. 430) that this was a case of "breach of the employers' duty to his workmen to provide and maintain . . . proper . . . appliances for carrying on his operations with reasonable safety," and quotes Lord Herschell, in *Smith* v. *Baker*, [1891] A. C. at p. 382: "The contract between employer and employed involves, on the part of the former, the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition." The learned Judge adds (p. 431): "There is a broad distinction between the liability of the master for . . . the condition of his premises or machinery and that arising out of the negligence in the management or operation of that machinery by the servants to whom he has entrusted it." Page 433: "The employer cannot escape from liability to a third person for injuries caused by defective premises . . . on the ground that he has not personally

interfered . . . nor can he do so in the case of his employee." Page 435: "The defendants' negligence is proved when evidence is given shewing damages arising from a failure to provide and maintain that which the law says it is his duty to provide . . . in premises . . ." And he concludes that negligence of a fellow-servant to repair, etc., was no defence.

Killam, J., at p. 451, says: "The duty of an employer is not satisfied by the instalment of a sufficient set of appliances and by the instalment of a sufficient system of working, leaving them to managers or superintendents of apparently sufficient skill to manage or operate."

The Chief Justice and Sedgewick, J., concurred, while Mr. Justice Nesbitt gave an elaborate dissenting judgment, in which will be found all the propositions advanced to us and more.

These decisions fix the liability of the company defendant at the common law. The appeal should, therefore, be dismissed, with costs.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

BINGEMAN v. KLIPPERT.

6 O. W. N. 552.

Assignments and Preferences—Assignment of Policy of Life Insurance to Sister—Bona Fide Cash Advance—Lack of Knowledge of Creditor's Claim—Evidence—Findings of Fact—Lack of Fraud—Issue between Assignee and Execution Creditor—Costs.

LENNOX, J., dismissed an action by an execution creditor to set aside an assignment of the proceeds of an insurance policy upon the debtor's life, holding that there was an absence of fraud or of knowledge or notice of creditor's claims.

Sup. Ct. Ont. (2nd App. Div.) affirmed judgment of Lennox, J.

Appeal from a judgment of HON. MR. JUSTICE LENNOX, 6 O. W. N. 85.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

W. H. Gregory, for appeal.

E. P. Clement, K.C., contra.

HON. MR. JUSTICE RIDDELL:—Mrs. Klippert and Mrs. Boehmer were sisters. Mrs. Boehmer was in need of money and applied to her sister for a loan; she had previously lent her (Mrs. B.) money, which had not been returned, and said she would not without security. Mrs. B. had an insurance policy in a life company due, and it was arranged that Mrs. Klippert should lend her $1,000 and take an assignment of the policy for security. She gave a cheque for $1,000 to Mrs. B., who drew the money, and deposited it in a bank, and gave Mrs. Klippert a cheque on that account for $750, which Mrs. Klippert deposited to her own credit.

An attaching order at the instance of the plaintiff was secured on the insurance company shortly after notice of the assignment to the defendant, Mrs. Klippert.

An interpleader was taken and the money paid into Court; thereafter Mrs. Klippert, the defendant, paid to her sister the $750.

The interpleader was tried before Mr. Justice Lennox, who gave judgment in favour of the defendant.

The whole case depends upon the transaction between the two sisters. Their story is that the loan was really $1,000 and not $250, that the sum of $750 was given by Mrs. B. to her sister, the defendant, to keep for her until she required it.

There are a number of very suspicious circumstances in the case, but one and all are consistent with honesty. The question is purely one of fact, and the learned trial Judge might well have found the other way, but he saw the witnesses and gave credit to the account of the defendant, and was "satisfied that the defendant gave honest testimony as to this transaction."

That being so, I think we cannot interfere with the finding, respecting, as we must, the well-established rule as to Appellate Courts.

The cases are uniform. *Bishop* v. *Bishop*, 10 O. W. R. 177.

HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE BRITTON. JUNE 22ND, 1914.

RE ALEXANDER WOOD ESTATE.

6 O. W. N. 611.

Will—Construction—Advice and Direction of Court—Executors—Discretion — Annuities — Insufficiency of Income — Resort to Corpus—Shares of Infants—Vested Estates—Period of Distribution—Costs.

Petition by executors and trustees for advice and direction and for the determination of certain questions as to the construction of a will.

Single Court, Ottawa, April 11th, 1914.

Another aspect of this matter came before His Lordship at Toronto. See 6 O. W. N. p. 168.

Wm. McCue, for executors.

A. C. T. Lewis (Ottawa), for Official Guardian.

HON. MR. JUSTICE BRITTON:—This matter now comes up on the petition of the Toronto General Trusts Corporation, they having become executors and trustees of this estate.

This petition sets out the facts in connection with the management of the estate, presents a copy of the will of Alexander Wood, and asks certain questions. These questions are not easily answered in any brief way, perfectly satisfactory to myself. An answer to them has become necessary by easy-going administration of the estate, extending over many years. The Toronto General Trusts Corporation having now taken hold under the particular circumstances of what I may call involved administration, are entitled to such advice and direction as the Court may be able to give.

The questions are:

(1) Are any children of Stephen Wood born after the death of the testator, Alexander Wood, entitled to share in the estate?

My answer is "Yes." The interpretation of clause 8 of the will is, that all the children of Stephen Wood who attain majority are entitled to take.

(2) Do the children of Stephen Wood, who may be found entitled to share in the estate, take vested interests in the corpus?

A. Yes. The share of each child becomes vested on that child attaining majority.

(3) In the event of a surplus of income over and above the $2,500, mentioned in clause 8, does it vest in the children of Stephen Wood, as each attained or attains majority, so as to provide the annuity of $500 mentioned in clause 9.

A. Margaret becomes of age on the 25th December, 1905. Her father, Stephen, died on the 6th March, 1908. If income had been sufficient, she would have been entitled to one year's annuity on 25th December, 1906, and to another year's on 25th December, 1907.

Mildred, the second daughter, was born on 19th October, 1886, and became of age on 19th October, 1907, and, as her father died before one year from her becoming of age expired, she would not be entitled to the year's annuity. Certainly not to the full year. The annuity of the widow of $2,500 continues until the youngest child becomes of age, and, from the last-mentioned date, the annuity of the widow drops to $1,000, and that sum is to be paid to her yearly during the remainder of her life. There will be no annuity of $500 as mentioned in clause 9, other than as mentioned above, as that was made payable only during the life of Stephen. After his death, it is for division, if anything to divide, among the children who are over 21 years of age. It will not be necessary year by year to divide the surplus income, allotting shares to the children, but any surplus income over and above the amount required for the $2,500 annuity may be invested by the executors to meet a deficiency in subsequent years.

(4) In the event of the annuity in clause 9 in any one year not amounting to $500, does the oldest child of Stephen Wood, if 21, annually continue to take the amount up to $500 as the case may be, and if in subsequent years, the surplus exceeds $500, can the deficiency be made up to the annuitants who in previous years had received less than $500?

A. See answer to question 3. The annuity of $500 is out of the question, except the two years to Margaret. The executors may deal with surplus income, if any, by dividing it, or by payment on account to such of the children who are 21, and over; the same as if their shares were set apart.

(5) After providing a fund to produce $1,000, annuity for the widow of Stephen Wood, mentioned in clause 9, what children share in the balance of corpus? Is it only those who were born in the lifetime of the testator, and the child, *en ventre sa mere*, and who live to be 21? Are their interests vested interests?

A. All the children who attain to the age of 21. Those born after the death of the testator, as well as those born during his life. The interest of each child will vest upon his or her arriving at 21 years of age.

(6) Clause 8 provides that $2,500 shall be applied towards the support and maintenance of the wife and children of Stephen Wood, if he predeceases his wife. He has predeceased her. For several years, the family who were growing up, lived with, and, with one exception, until recently, the widow of Stephen Wood. During these years, the income being insufficient to maintain the wife and family, the widow was obliged to mortgage her homestead and other property to the estate, and Margaret Wood, the eldest child, on attaining 21, joined with the mother in assisting the household. Are the widow and Margaret, the daughter, entitled to be recouped for money so spent, at least, a proportionate share?

As a result, the widow has been unable to keep the taxes paid on her own property. Is she not now entitled to be paid such liabilities as she can shew so incurred, or a proportionate share of them; she having no other income than the annuity?

A. This is simply the unfortunate case of living beyond income. The insufficiency of income to meet all the expenses mentioned, gives no claim to the widow or children for any lien on the corpus, or payment out of corpus, but, all payments made by the widow for taxes, insurance, repairs, or which were made by the widow, but which, under clause 15, were to be paid out of the testator's general estate, may be recouped to her out of the general estate.

(7) Is clause 15 wide enough to include succession duty payable generally out of the corpus, or is the succession duty chargeable against legatees personally?

A. Clause 15 is not wide enough to relieve the annuitants from succession duty.

(8) In the event of the income not amounting to $2,500 a year, would the widow of Stephen Wood be entitled to draw upon the *corpus* to make up her annuity of $2,500.

A. The annuity is payable out of income. It is payable absolutely, and if it requires all the income from the estate, the income must be so applied. The corpus cannot be resorted to.

(9) Is Margaret Wood, eldest child of Stephen Wood, being the first to attain 21, entitled to be paid the sum of $338.25 said to be surplus income over the $2,500 a year earned during the first three years of administration, and which was taken and used in subsequent years by the executor, when the income fell short of $2,500?

A. Assuming that Margaret Wood did not receive the first payment of annuity of $500, and that there was income sufficient to pay the $2,500 to the widow in full, the executor might well have paid the $338.25 to Margaret. I am, however, not able to say that in the face of deficiencies in after years that she has a right above that of the widow to this surplus of former years.

(10) The executors, not having set apart, at the time of the death of Stephen, enough of the estate to provide for the annuity of $2,500, to the widow for the time she may be entitled to it, and of $1,000 for the time she may be entitled to the reduced amount of $1,000, and not having made any division, are the children of Stephen who may be found entitled to share, now entitled to demand such share?

A. The shares of the children of Stephen could not, at his death, be finally determined. The amount of each share depends upon the number of Stephen's children who attain 21. The share of each child vests, upon that child attaining 21. The time of final distribution will be after the death of the widow and after all the children of Stephen are of age. If the executors are satisfied that the amount they set apart to produce the annuity for the widow is sufficient, a payment on account might be made to any child over 21.

It is no part of my duty to advise this; it is a matter for executors, and may depend upon conditions, not the same at all times, in regard to the corpus of the estate.

If the assets of the estate are sufficient to warrant it, keeping in mind the necessity of having income sufficient to say the $2,500, annuity, it will be quite proper for executors to make a payment on account of the unpaid annuity to Mar-

garet, or on account of the share of any child of Stephen over 21 as part of the share or on account of such share to which the child will ultimately be entitled.

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

The costs, as well as any of the items which the executors may pay as mentioned in my answer to the 6th question, should be paid out of the *corpus,* not out of income, unless income sufficient to meet all charges against income, and I understand it is not sufficient.