THE

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SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. DECEMBER 17TH, 1913.

## RE SMITH.

5 O. W. N. 501.

*Will — Construction — Codicil — Overriding of Terms of Will by— "Supersede"—Meaning of—Income—Share in Corpus—Practical Revocation of Will—Inference against—Appeal.*

MIDDLETON, J., *held*, 24 O. W. R. 476, that a codicil giving a legatee a certain annuity superseded the provisions of the will giving her a share in the corpus of the estate.

SUP. CT. ONT. (1st App. Div.), *held*, that the intention of the testator was that the gift of income should be in addition to and not in substitution of the gift of the corpus.

Appeal allowed. Costs of all parties out of estate.

Appeal by Dale M. King as executor of his deceased wife, Bertha Smith, from a judgment of HON. MR. JUSTICE MIDDLETON, 24 O. W. R. 476, construing the will, and a codicil of her mother Emma Josephine Smith.

I. F. Hellmuth, K.C., and C. A. Moss, for the appellant.

E. D. Armour, K.C., and D. C. Ross, for Elias Smith, Carl Smith and Vernon Smith,

R. J. McLaughlin, K.C., for the executors.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

HON. MR. JUSTICE MACLAREN:—The facts are stated, and a very complete summary of the will given, in the judgment appealed from. In the paragraph summarizing the 9th clause of the will it is stated that the division of the

estate is to be made when the youngest child attains the age of "twenty-five." The will says "twenty-one," and twenty-five is first mentioned in the codicil; but in the result nothing appears to turn upon this. In the same sentence the word "realize" is used. This is not the word used in the will; the exact language there being the expression "sell and convert into money." This may be material when we come to consider the meaning of the same word in the codicil.

I think the codicil can be best construed by taking it as a whole and reading it with the will, endeavouring to ascertain from the language used what was in the mind of the testatrix, rather than by construing the different clauses or sentences separately without regard to the context.

The following is a verbatim copy of the codicil, with the punctuations in the copy certified by the Surrogate Registrar:—

"Not feeling satisfied with the provision made in my will for Bertha Hope Smith my only daughter, I hereby add this codicil.

"I desire that the sum of six hundred (six hundred dollars) dollars a year be paid her out of my estate by my executor or executors for her maintenance and education until she attain the age of twenty-five years, if at that time she should be married then for the remainder of her lifetime I desire my executor or executors to allow her for her own use and benefit the sum of four hundred dollars (four hundred dollars) a year unless the income realized through or by my property on division should yield more to each surviving child or children should such be the case then I authorize such division to be made, Bertha having attained the age of twenty-five years as aforesaid. Should Bertha remain unmarried then she is to be paid the sum of six hundred dollars a year in quarterly instalments by my executor or executors for the remainder of her life. Whatever my estate realizes over and above the payment of this bequest to Bertha and a provision made for my husband and executor J—— D—— Smith in my will is to be equally divided between my surviving sons or their surviving child or children as provided in my will.

"This bequest to Bertha is to supersede all others made in my will, with the one exception of the provision made for J—— D—— Smith my husband.

"Following the bequest to Bertha I solemnly charge my executor or executors with a provision for Vernon's education or profession until he attains the age of twenty-five years.

"(Sgd.) Emma J. Smith

"(Sgd.) Lillie Marie Burnham
"(Sgd.) M. Frances F. Bryson
Witnesses.

"Wildwood, July 16th, 1894."

It was agreed by the counsel on both sides that the real question to be decided was whether this codicil dealt only with the income of the estate of the testatrix or whether it also disposed of the corpus. It was argued on behalf of the appellant that it had reference solely to the income, while it was contended by counsel for the respondent that it practically revoked the whole will. The learned Judge has adopted the latter view, and held that "the whole will is abandoned excepting so far as it provides for the husband."

In the 1st paragraph of the codicil the testatrix states clearly what was her reason and motive for making it: "Not feeling satisfied with the provision made in my will for Bertha Hope Smith my only daughter I hereby add to this codicil." She says she adds a codicil to the will; no suggestion that she is practically revoking it except in so far as it provides for her husband. It is quite clear what she intended to accomplish by it; it remains to be seen whether there is anything in the language she used to prevent effect being given to her intention.

In the will she had given no preference to Bertha over her sons, either as to income or corpus. By the 2nd paragraph of the codicil she proceeded to carry out her expressed intention by giving to Bertha $600 a year until she was 25; and by the 3rd paragraph of the codicil she gives Bertha priority for this sum next after the provision made for her husband, and it would be payable out of corpus if the net income was not sufficient to give the husband his $750 a year and Bertha her $600.

If Bertha was married when she attained 25 years of age her preferred income was to be reduced to $400 unless the income of her estate realised on a division more than $400 for each child, in which case a division was to be made; each of her 4 children in that event receiving an equal sum

of over $400 a year. If Bertha remained unmarried then she was to be paid $600 a year for life.

I quite agree with my brother Middleton that down to this point the codicil deals exclusively with income, save that Bertha would be entitled to receive her $600 out of the corpus if the income were insufficient; but I fail to find anything in the concluding sentence of the 2nd paragraph or in the 3rd paragraph of the codicil to justify his conclusion that they refer to corpus and not to income.

There is nothing in the instrument itself to suggest that the testatrix was proceeding in the last sentence of the 2nd paragraph to take up a new subject or that she was about in a few words to write something that was entirely out of harmony with what she had previously written or with her expressed desire at the beginning of the codicil, or that she was about to practically revoke the whole will except in so far as it provided for her husband, as the learned Judge puts it. I am not surprised that he had hesitation in coming to such a conclusion or that he could not surmise why the testatrix should have so determined.

He seems to have been influenced almost entirely if not wholly by the meaning which he attached to two words used by the testatrix, namely, "realizes" in the last sentence of the 2nd paragraph and "supersede" in the 3rd.

He assumes that the testatrix used the word "realizes" in the sense in which he has used it in his judgment in his summary of the will: the conversion of real and personal property into cash. In my opinion the testatrix used it in the same sense as she had done in an earlier part of the 2nd paragraph, where she speaks of "the income realized through or by my property," and that she was simply providing for an equal division among her 3 sons or their children of the surplus income of the estate after payment of the annuities to her husband and to Bertha. Another difficulty is created by his conclusion that this division referred to the corpus. If so, when was it to take place? No time is mentioned; but the language points to an immediate division after the death of the testatrix, which is quite inconsistent with the scheme of both will and codicil.

It would appear to have been her use of the word "supersede" which chiefly led the learned Judge to the conclusion that the whole will was abandoned except in so far as it provided for the husband. I think a reading of the sentence with what precedes and follows makes it abundantly clear

that the testatrix used the word in its original and etymological meaning of "to sit above, be superior to, precede, or have priority over"—a meaning which, according to standard dictionaries, it still retains. She merely meant that the 3 preferred bequests were to rank as follows: 1st, her husband, 2nd, Bertha, and 3rd, her son Vernon for his education or profession.

Another objection to the interpretation put upon the codicil by the judgment appealed from is that it would indirectly revoke all the special bequests of heirlooms, jewellery, silver and furniture made by the testatrix to each of her children and would wholly deprive Bertha of any share in them, although her mother gave her an equal share of the furniture with her brothers and as much of the other articles as her 3 brothers together. These bequests are made in the will with great particularity and detail, giving special articles to each of her children, and occupy no less than 5 clauses of the will and nearly as much space as does all the rest of her real and personal property. It is little wonder that counsel for the sons shrank from the necessary application of their theory of construction to these portions of the will.

To my mind this theory of interpretation is wholly at variance with the entire scope of the codicil. It is quite apparent that the testatrix had one leading object and purpose, namely, that of assuring to Bertha a more generous income, and there is no language in the codicil to lead to the conclusion that she proposed to practically revoke the will in so far as it conferred benefits upon Bertha, but the contrary; that she meant simply, as she says, to add a codicil in the express interest of Bertha; and in my opinion the language used by her in the codicil carries out this intention, and effect should be given to it.

Furthermore, there is nothing in the codicil to suggest that there was any intention to revoke the will. If such had been intended it should have been expressed in clear and unambiguous terms. This canon of construction has been laid down many times by the highest authorities, and was well expressed by Chief Justice Tindal in *Hearle* v. *Hicks*, 1 Cl. & F. 20, at p. 24, where he says: "If a devise in the will is clear it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to shew that the intention to revoke is equally clear and free from

doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand."

I would, therefore, reverse the judgment appealed from, and make a declaration in harmony with the foregoing, that the executor of Bertha is entitled to share in the corpus of the estate equally with the sons of the testatrix. Costs of all parties out of the estate; those of the executor of the testatrix as between solicitor and client.

HON. SIR WM. MEREDITH, C.J.O., and HON. MR. JUSTICE HODGINS, agreed.

HON. MR. JUSTICE MAGEE:—The Court has to avoid making a will for this lady and must endeavour to ascertain what her own will was from her own language, interpreted in the light which the surrounding facts may when necessary throw upon it.

The will was made in 1889 and the codicil in 1894. By the first clause in the will Mrs. Smith appointed her husband sole executor and trustee, and by the last or 12th clause she empowered him to appoint a successor in the trust, and in default of his doing so appointed her 2 sons Elias and Carl to be his successors in the trusts, but she also authorised her husband to appoint a co-trustee with himself. Five clauses, 2, 3, 4, 5 and 6, made specific bequests of named articles; clause 10 gave the trustee power to make certain classes of investments and for the purposes of the will gave him power to sell, and execute conveyances and documents subject to the 2 eldest sons' approval.

Under clause 5 of the will there was an absolute specific legacy to Bertha of the articles there named. Under clause 7 at her father's death Bertha (like her 3 brothers) would, if living, be enabled to receive or to have expended for her benefit one-fourth interest in the real and personal property received from the estate of Robert Chas. Smith, subject to the proviso that if she died during minority her child would take her share. During the father's lifetime none of the 4 children would derive any income from this R. C. Smith property.

Under clause 8 Bertha (like her 3 brothers) would be entitled at her mother's decease, not later than the date

of attaining majority to one-fourth of the household goods and effects, subject to the like provision for her child taking her share in case of her death during minority.

Clause 9 dealt with the residuary real estate and what is said to be the residue of the personal estate. Under that clause until the children living were all over 21 years the net income from such residue was first to be applied to the education and support of the children who might be minors and out of any balance of the income their father was to have enough to make up with his income under clause 7 the sum of $600 per annum and any residue of the income would go to the child or children out of whose shares the same might have arisen (who presumably could only be those over 21 years of age). As soon as all the children living would be 21 years of age then the residuary property was to be sold and converted into money and divided equally among the children (the issue of a deceased child taking such child's share), first setting apart a principal sum enough to produce sufficient income to make up the father's income under clause 7, to $600 per annum. Clause 11 also gave the father the right to receive out of these residuary trust funds and estate a sum sufficient for the purpose of paying the premiums on his existing life insurance, being about $150 per annum.

With this will the testator remained satisfied till 18th July, 1894, when she made the codicil. At that date, Bertha, who was her youngest child, was in her 15th year, and Vernon, the youngest of the 3 sons, was about 6 years older. Under the will Bertha, therefore, would have the prospect of getting the whole net income, if necessary, of the residuary estate applied for her support and education in priority to everyone during her minority, and on her attaining 21 she would be entitled at once absolutely to at least one-fourth of the residuary estate subject to implementing her father's annuity, and one-fourth of the household goods and effects, and, under clause 7, one-fourth of the R. C. Smith property subject to her father's life interest. It does not appear what was the value of the R. C. Smith property or of the residuary estate at the date of the codicil, or what was then the yearly income from either; but for two years after the death of the testatrix in August, 1896, the executor puts the net income from the whole real and personal estate over and above taxes, insurance, upkeep and

other outgoings, at $1,350. The residuary real estate is said to be in Toronto and to have increased greatly in value, so that now the income is larger. The executor has paid himself each year the full $600 and the life insurance premiums, about $140.

The youngest son Vernon was of full age before his mother's death; thus about $610, the whole difference between this $740 for the father and the net income, about $1,350, would be available for the support and education of Bertha during her minority under clause 9, but so soon as she attained 21 Bertha's income would be only one-fourth of this surplus of $610, although she would, like her brothers, have one-fourth of the various classes of properties under the 7, 8, and 9 clauses as already mentioned.

It was apparently in such circumstances that the codicil was made in July, 1894, and the testatrix begins it by declaring that as she is not satisfied with the provision made in the will for Bertha she adds this codicil. She then proceeds: "I desire that the sum of $600 a year be paid her (Bertha) out of my estate by my executor or executors for her maintenance and education until she attains the age of 25 years." I stop to remark that it is at least singular how closely this approximates to the surplus of about $610 a year available (less expenses) under the will for the same purpose and until Bertha attained the age of 21 years. Then the codicil continues: "If at that time (the age of 25 years) she should be married, then for the remainder of her life I desire my executor or executors to allow her for her own use and benefit the sum of $400 a year unless the income realized through or by my property on division should yield more to each surviving child or children. Should such be the case then I authorize such division to be made." "Bertha having attained the age of 25 years."

Pausing here again, one has to notice that by using the words "executor or executors" the testatrix shews that she was contemplating the possibility of the death of her husband, in which case the R. C. Smith estate property devised by the 7th clause of the will would have become divisible among the four children like her other property. The words "my estate" also are not restricted to the residuary estate. Then we must bear in mind that under the will the control of the executor over all her property available for income for the children was to cease. Here is a direc-

tion which implies that the control is to continue, and hence if there were nothing more that the division among the children must be postponed. The annuity to Bertha evidently depends upon "income" for it is payable unless the "income" on division should yield more to each child. If it "should" yield more, then the testatrix authorizes such division to be made. What division and of what? With much deference it appears to me that what is referred to is the division among her four children of their shares of the corpus, the income-producing property referred to in the 7th and 9th paragraphs of her will. If her husband were alive the share of each child on division "should" bring one-fourth of about $610. If her husband were not alive each "should" have on division one-fourth of about $1,350. In either case the income which Bertha's share "should" realize would under the $400. So long as that continued, her income is to be made up to $600 or $400 from the income of the whole.

But the testatrix manifestly had in view that the income might become larger than $1,600, as it subsequently did, and so she provides that if that should happen, then the division contemplated by the will need no longer be postponed but may be made at once, because Bertha's own share will yield her the income which the testatrix desires to assure to her. The words "should yield" plainly, I think, mean "ought to yield" or "would yield." It seems to me that nothing was further from the mind of the testatrix than the doing away with the distribution eventually of her estate among her four children or doing anything other than the mere postponement of that division which here by the very words of the codicil she shews that she looks upon as a thing of course. The word "division" cannot, it would seem to me, refer to a division of income, for there was no division of income to take place under the will, and it is a division under the will and not under the codicil that the testatrix is here referring to.

The codicil then proceeds: "Should Bertha remain unmarried then she is to be paid the sum of $600 a year in quarterly instalments by my executor or executors for the remainder of her life."

It is quite possible that the testatrix did not think Bertha's own share would ever bring in or realize more than $600 per annum. Whatever may have been in her

mind, I do not think that we can read into this clause any such express provision as that which applied to the $400 income, that is that if the income from the share on division would exceed $600 the division should be made. The clause assures to Bertha, if unmarried, $600 per annum for her life. The effect is that the division is necessarily postponed as long as resort must be had to more than her own share to obtain that amount; but in thus giving her that larger income for her life, the testatrix has omitted (if she ever intended) any provision for a division while that larger allowance continues, and inasmuch as in the subsequent clause the remainder of the income of the whole is to go to the sons, the result is that Bertha is limited under this clause to $600, and so while she is entitled to look to her brothers' shares to make it up they in turn are entitled to look to her share for any excess which it alone might realize over $600, and thus the division is necessarily postponed by this clause during the whole of Bertha's life. But as the previous part of the codicil shews that the division was still contemplated though postponed, there is not in this clause any evidence of any intention to depart from that course.

Then followed these words: "Whatever my estate realizes over and above the payment of the bequest to Bertha and the provision made for my husband and executor in my will, it is to be equally divided between my surviving sons or their surviving child or children as provided in my will. It is quite evident that this word "realize" is not used in any sense which would imply conversion of the corpus, for no conversion is elsewhere hinted at in the codicil. It is the same word which previously appears in the codicil in the words "income realized," and is evidently in both places used in the sense of "yielded" or "yields" or "brings in," and is inapplicable to the divisions without conversion which were provided for by the will and which the testatrix, as I have said, clearly had in mind. The only part of the estate which the will directed to be converted was the residuary estate; but here in the codicil she is manifestly referring to the whole estate. If the clause is read in connection with the preceding provisions of the codicil interpreted as already mentioned, its meaning becomes clear. It is as if she said: "Whatever my estate realizes or yields in the way of income after paying the hereby assured income to Bertha out of the combined income of the shares

shall go to my sons or their issue while division is postponed." Thus if the whole income of the whole estate after payment or cessation of the husband's allowance were $610 or $1,350, and if Bertha were paid $600 per annum, the remaining $10 or $750 would properly be divisible among the sons. So construed it is a corollary of the previous parts of the codicil if Bertha's own share would not be sufficient for her yearly allowance, or at least if her share should prove more than sufficient it would be a reasonable compensation to the sons for the risk which they ran of her share being insufficient; whereas to construe it as giving to the sons the whole corpus of the estate would deprive Bertha of anything but income, and wholly deprive any child of Bertha of any possibility of inheriting any part of the estate. That would be a result which would be wholly inconsistent with the manifest disposition of the testatrix to care for her daughter and the issue and to make a better provision for her than had been made by the will.

The next clause reads thus: "This bequest to Bertha is to supersede all others made in my will with the exception of the provisions made for J. D. Smith my husband." The mention of the provisions for the husband as an exception to what is superseded shews that the testatrix does not mean to have superseded merely all other bequests to Bertha in the will, but that she means to have superseded all bequests. It is unthinkable that she could intend to annul all the bequests in the will, such, for instance, as the gifts of her father's goblet, her own watch and chain, trinkets, jewellery and rings to her daughter or her sons. If she has really said that she did so intend, then effect must necessarily be given to her codicil. But if I am right in reading from the early part of the codicil that nothing was farther from her mind than doing away with the division of her property among her four children, then she has shewn, not her intention to annul any of the bequests in the will, but only to insure to Bertha out of the income of her brothers' shares a certain yearly sum until her own share would be sufficient to yield that sum or more. Subject only to that, she manifestly intended every provision in the will to stand. Bearing that in mind, and bearing in mind that it is the bequest to Bertha which is to supersede all others, not that all others are to be superseded, and bearing in mind that in the codicil, except in so far as it confirms the

will, the express bequest to Bertha is only a possible addition to her income, one can only conclude that the word "supersede" is merely used in the sense of overriding, taking a place superior to, or, as in the Imperial and Standard Dictionaries, "suspending," or literally, sitting or being set above and in that sense displacing all other bequests but not destroying them.

In other words, next to her husband's income the income of her only daughter was her supreme care. It is out of the question to suppose that if Bertha were married and her share on a division would only yield, say, $399 per annum, she would receive $400 a year for her life only and lose all provision for her child; whereas if her share would yield $401 yearly, she would have the whole share itself with its full income. This affectionate mother would, I think, be startled to find that such a construction was put upon her words, and that her daughter would be held to lose her share because it was so small.

Even if the word "supersede" he read in the sense of annulling or setting aside all the bequests (including devises) in the will and not merely setting them below the provisions of the codicil, it could, I think, literally only apply to the specific bequest in the fifth paragraph. The codicil, as I have said, refers to and implies a division and the division which the will directed, that is, among the four children, and that division is merely postponed. The codicil cannot be read without keeping the will in mind to ascertain its meaning, and the codicil in effect by its reference to division confirms or at least necessarily embodies the provisions of the will as to division. Those provisions gave Bertha a share, therefore the codicil in its earlier part confirms and thereby gives her that share. So that if the will is to be set aside its contents must at least be referred to in order to construe the codicil, and then the codicil must be considered as giving Bertha the share originally given by the will. There is nothing in the codicil to restrict the meaning of the word "division," and therefore it would, I think, apply to and give Bertha a share in all the property which was under the will to be divided among the four children, that is, the property disposed of by the 7th, 8th and 9th clauses. This would leave only the specific bequest of articles in the 5th clause to be superseded in the sense of cancelled or annulled by the codicil. It is hardly argued that such could have been the intention of the

testatrix, and at most it is urged that it may have been by oversight that she omitted to preserve that fifth clause. But in my view the bequest to Bertha in the codicil does not in that sense supersede the bequests in the will; it only takes priority of them.

The concluding clause of the codicil emphasises desire to give the husband and daughter the first place: "Following the bequest to Bertha I solemnly charge my executor or executors with a provision for Vernon's education or profession until he attains the age of 25 years." Vernon was then about 20 or 21 years of age. The word "following" evidently means giving priority to, and the clause there did not affect Bertha's right except in so far perhaps as to raise a question whether Vernon might not have been entitled possibly to look to her share as well as his brothers' or to his brothers' share alone, or to his own share only, for this education. But no question now arises under this clause.

In effect, then, in my opinion, the crucial point of the codicil is the reference in it to division under the will; and I construe the whole codicil as keeping the estate in the hands of the executors and thereby postponing the division so long as Bertha's one-fourth share would not alone yield sufficient income to pay her yearly the sum of $600 or $400, as the case might be, but expressly authorizing, that is to say no longer postponing, that division, if her assured income were only $400, so soon as her share would realize sufficient for that purpose; and until such division giving Bertha during her life the specified yearly sum out of the net income of the whole four shares, after the yearly payment to the father, and any residue of such income would go to the sons. In other words, Bertha would be paid only the deficit of income out of her brothers' shares.

Bertha married the respondent King in 1911. She was then 31 years of age. She died in 1912, leaving, it is said, a child, but having by her will appointed her husband her executor. In the events which have happened, therefore, she was entitled to an income of $600 till at least her marriage, and thereafter to either that sum or the income of her share, which in the year of her marriage is shewn to have exceeded that sum.

In my opinion the appeal should be allowed and the order appealed from varied in the way I have indicated. The costs of all parties, including the costs of the appeal, should be paid out of the estate.

APPELLATE DIVISION. DECEMBER 16TH, 1913.

## LLOYDS PLATE GLASS INSURANCE CO. v. EASTMURE.

5 O. W. N. 498.

*Principal and Agent—Accounting—General Insurance Agency—Substitution of Individual for Company — Liability of Individual Thereafter — Assumption of Outstanding Liability — Evidence—Statute of Frauds—Appeal.*

SUP. CT. ONT. (1st App. Div.), *held*, that upon the evidence the appellant had been substituted as general agent for the respondent insurance company in 1907, in place of a company in which he was the largest stockholder, and as such was liable to account for the agency business transacted thereafter, but that the evidence did not establish that he assumed any prior liabilities of the company in connection with such agency and the requirements of the Statute of Frauds with regard to the proof of such assumption had in any case not been met.

Judgment of LATCHFORD, J., at trial, varied; no costs of appeal.

Appeal by the defendant Eastmure, from a judgment of HON. MR. JUSTICE LATCHFORD pronounced September 30th, 1913, after the trial of the action without a jury, at Toronto on that day.

J. E. Jones, for appellant.

R. McKay, K.C., for respondent.

G. L. Smith, for Lightbourn.

H. A. Newman, for defendants Eastmure & Lightbourn, Ltd.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

HON. SIR WM. MEREDITH, C.J.O.:—The respondent is an insurance company having its head office at New York, and that action is brought to recover money alleged to be due to it from its general agent for Canada, in respect of premiums collected and not accounted for and other money alleged to be owing by the agent.

The action was brought against the appellant and the defendant Lightbourn trading under the firm name and style of Eastmure and Lightbourn, and in the statement of claim it was alleged that that firm was the general agent for Can-

ada of the respondent and accountable for the money that the respondent claims. Eastmure and Lightbourn, Ltd., was subsequently added as a defendant, and the statement of claim was amended by introducing an allegation that Eastmure and Lightbourn, Ltd., is an incorporated company carrying on business at Toronto as insurance agents and an allegation that in the event of its being held that if the agents Arthur L. Eastmure and Frank J. Lightbourn were not the agents of the respondent after the incorporation of the company or at any subsequent time that company acted as agent of the respondent throughout Canada and is responsible for its claim. The appellant in his individual capacity was subsequently added as a defendant.

The finding of the trial Judge was that after the 1st May, 1907, the appellant was the agent of the respondent and was liable for whatever balance may be found to be due to the respondent upon a proper taking of the account of moneys received for, or on behalf, or on account of, the respondent, or which it was the duty of the appellant to collect and remit to the respondent, including any balance which may have been owing on that day by the defendants Eastmure and Lightbourn, Ltd., to the respondent, which has not been liquidated or paid off by payments made by the appellant, and that the defendants Eastmure and Lightbourn, Ltd., were liable to the respondent for such balance, if any, as was due and owing by the defendants Eastmure and Lightbourn, Ltd., to the respondent in respect of the agency business of the respondent conducted by that agent down to the first day of May, 1907, which has not been paid or liquidated by payments made by the appellant subsequently, and the judgment was directed to be entered accordingly, with a reference to the Master-in-Ordinary to take the accounts, and dismissing the action as against Lightbourn and the firm of Eastmure and Lightbourn, with costs, and reserving further directions and costs as between the respondent and the appellant and the defendants Eastmure and Lightbourn, Ltd., until after the report, and from that judgment this appeal is brought.

It was argued on behalf of the appellant that the finding of the trial Judge that the appellant became the sole agent of the respondent on the 1st of May, 1907, was not supported by the evidence and that the action as against the appellant should have been dismissed.

We are of opinion that there was evidence which supports the finding that is attacked by the appellant.

The firm of Eastmure and Lightbourn was appointed general agent for the respondent for Canada in 1898. In 1904 or 1905 a company was incorporated bearing the name of Eastmure and Lightbourn, Ltd., which took over the business of the firm and subsequently acted as general agent for Canada of the respondent. The only shareholders in the company were the appellant and Lightbourn and three other persons each holding 5 shares. These three persons were nominees of the appellant and Lightbourn, and the shares were allotted to them in order to comply with the requirement of the Ontario Companies Act, that there shall be five applicants for letters patent of incorporation.

Owing to difficulties between the appellant and Lightbourn, and losses which the company met with owing, as was alleged, to the actions of Lightbourn, he withdrew from the company in the year 1907, and after that time the appellant was practically the company, though it was of course a separate entity.

Owing to these difficulties and losses having occurred, and probably fearing that if knowledge of them came to the respondent the general agency which the company had would be put an end to, the appellant went to New York and had there an interview with Mr. Woods, the president of the respondent, and it is upon what took place at this interview that the determination of the matter in issue mainly depends. The account of what took place given by Mr. Woods differs from the account given by the appellant. The testimony of Mr. Woods was corroborated by that of Mr. Chambers, the secretary of the respondent, and the trial Judge gave credit to them, preferring their testimony to that of the appellant, and found that the arrangement then made was that thereafter the appellant should be the sole general agent for Canada, of the respondent, and with that finding we agree. It is reasonably clear, we think, that although it may not have been expressed in so many words, the intention of the parties was that this change should take place. There was no reason why the appellant should have been unwilling that it should be made, but every reason in the circumstances why he should have been willing, and all the probabilities of the case are in favour of the view that it was agreed that the change should be made.

Much was sought to be made by counsel for the appellant of the fact that no change was made in the "literature" and printed documents of the agency, upon which the name of Eastmure and Lightbourn, Ltd., describing the company as general agents for the Dominion of Canada of the respondent was printed, and that some of the correspondence from the head office continued to be addressed to the company. This, however, was not inconsistent with the change in the agency having been made. It may have been and probably was thought by the appellant that for his own reasons it would be better not to make any change in the name that had been used, and, as Mr. Woods testified, it did not matter to the respondent in what name the appellant might carry on the business, so long as it was to him that the respondent was to look as the agent in Canada.

Much of the subsequent correspondence respecting the business, and practically all of it except the formal correspondence, was carried on with the appellant personally, and the letters which were written from the agency were written by him personally and not in the name of the company. This fact lends supports to the contention of the respondent, and the further fact that a power of attorney which was executed by the respondent on the 14th March, 1910, appointing the appellant as the attorney to establish and maintain at the city of Toronto, an agency of the respondent to be called the chief agency and that in it the appellant is designated chief agent of the respondent in Canada, is a very important piece of evidence in support of the respondent's case.

While I agree with the conclusions of the learned trial Judge as to the matters with which I have dealt, I am unable to understand upon what ground the appellant is made personally liable for anything that may have been owing by Eastmure and Lightbourn, Ltd., in respect of the transactions of the agency prior to 1st May, 1907. No case is made on the pleadings for such relief, and there is no evidence to support a finding that it was part of the arrangement made in New York that the appellant should assume any such liability, and even if it was so agreed the agreement could not be enforced, as it would have been an undertaking to answer for the debt of another and not enforceable because not evidenced as required by the Statute of Frauds.

The judgment should therefore be varied by striking out so much of it as declares that the appellant is liable to the respondent for what, if anything, is owing by Eastmure and Lightbourn, Ltd., and with that variation the judgment should be affirmed.

This variation of the judgment is of no importance practically, because as Mr. McKay stated upon the argument, the respondent does not claim anything in respect of the transactions of the agency prior to 1910.

There should, I think, be no costs of the appeal to either party.

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HON. MR. JUSTICE MIDDLETON. DECEMBER 16TH, 1913.

## RUDDY v. TOWN OF MILTON.

5 O. W. N. 525.

*Municipal Corporations—Action for Damages by Flooding—Inadequate Culvert — Act of Third Party — Obstruction of Natural Watercourse — Negligence — Continuing Damage — Mandatory Order to Defendants to Repair—Damages—Costs.*

MIDDLETON, J., gave plaintiff $100 damages against a municipal corporation for the flooding of her house by reason of the construction by the municipality of an inadequate culvert, and refused to award any damages on the basis of a continuing damage, but ordered the municipality to repair the culvert in question.

Action for damages for flooding of lands, tried at Milton on the 5th of November, 1913.

George Bell, K.C., for the plaintiff.

W. I. Dick, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The premises in question are situate at the corner of King and Bowes street, in the town of Milton. Lots 8 and 9, upon which the house in question is erected, were conveyed to the plaintiff Fanny Ruddy, on the 17th November, 1908. The rear lot, No. 10, was conveyed to the plaintiff Anna C. Ruddy, on the 29th December, 1911. This property was bought many years ago, but conveyances were only recently obtained.

The whole land is flat and low lying. Originally a watercourse, having its origin in the block bounded by King, Bronte, Mary and Bowes streets, north-west of the block in question, crossed King street, flowed across the block in question, crossed Robert street, and thence flowing

in a south-easterly direction joined a much larger stream which receives most of the town drainage. King street has a slight grade from both directions toward the place where this watercourse crosses it. The road has been turnpiked, and a ditch has been constructed on each side. Where the watercourse crosses the road a twelve-inch wooden box has been placed; and, to facilitate the continued flow of water in the old channel, a twelve-inch tile has been placed between the southern ditch and the boundary of the road. This brought the water on the land on the corner of lot seven, owned by Mr. Core; and a few lengths of ten-inch tile were placed on his land, facilitating the discharge of the water still in the old watercourse where it entered the western boundary of lot eight.

Where the watercourse crosses Robert street, the municipality placed tiles, at the north end six inches diameter and at the south end eight inches diameter, for the purpose of conveying the water across the street, so that it could continue in its old course. The municipality constructed a ditch on the south side of Robert street, running from the old watercourse to the large creek. This would have taken care of all the water that this little watercourse would have discharged, but, objection being taken by the owners of property on Robert street, to water which originally flowed in some other direction being brought down that street, the municipality filled up the new course at the foot of Bowes street, so that the water of this creek could not flow through this newly constructed drain. South of Robert street the old watercourse flowed through the lands of a man named White; and he plowed up the land and filled in the channel. The result is that there is now no free outlet for such water as would flow down the channel in question.

The municipality was no party to the action of White; instructions have been given to the town solicitor to take any proceedings necessary to secure the opening up of the old channel through his property.

The watercourse drains only a small area; the only water that reached it before passing the plaintiff's house is that gathered from the Mary street block and King street. Bronte street is well drained, and takes care of its own water and of all water to the west of it, also north of Mary street, save in so far as that territory is drained by the main stream. Bowes street and the land east of it drain into this main

drain. The only time there is any appreciable water in the ditch in question is during the spring thaw and occasionally after an exceptionally heavy rain. In the spring a good deal of water collects, and slowly makes its way off the land in question through this watercourse.

In the spring of 1913 the plaintiff's cellar was flooded, and some injury was done to the hot-air furnace. This flooding was not occasioned by the filling in by White on his land, as that did not take place till afterwards. Robert street had been raised, and the small tiles placed across it were insufficient, and they afforded some obstruction to the flow of water there. Further obstruction was caused from the fact that the old watercourse across White's land had become obstructed by the growth of grass and weeds, and otherwise.

I think the municipality was guilty of negligence in providing an inadequate culvert where the stream crossed Robert street, and that this inadequate culvert was the cause of the plaintiff's cellar being flooded.

According to the plan put in by the defendants the elevation at the entrance to the culvert is 89.36, and its discharge point 89.46. The elevation of the cellar floor is 90.43. From this, it is argued that the inadequacy of the outlet at Robert street could not occasion flooding upon the floor of the cellar.

I do not think that this follows, because the crown of Robert street is considerably higher than the culvert entrance, and when the water came down the watercourse and found an inadequate outlet at Robert street it would rise above the crown of the road. This would, I think, be sufficient to cause a flooding of the cellar.

It is inconceivable that a competent engineer would place a six-inch tile at a culvert lower down the stream when he had placed a twelve-inch culvert much higher up and the six-inch tile is quite inadequate to take care of the water. The area of the six-inch tile was further diminished by the fact that it was laid at the down-stream and at a higher elevation than at the up-stream end. At the present time this tile was found to be partially filled with earth, and it is impossible to say what its condition was when the flood was on.

The plaintiffs have brought their action upon the theory that they are now entitled to recover a comparatively large sum by reason of the depreciation of the house owing to its

liability to be flooded at any time. I think this is a mistaken theory, and that all they are entitled to is judgment for the damage already sustained and an order directing the placing of a proper culvert across Robert street, the present culvert being an unauthorized obstruction of the watercourse.

In view of the partial success, and of the possibility of the plaintiff being able to obtain this relief in the County Court, in which case a set-off would follow, I think justice would best be done by assessing the damages already sustained at $100, and by making the mandatory order indicated, and fixing the plaintiff's costs at the lump sum of $100. It is to be hoped that some arrangement may be made by which the water may be taken care of before next spring, or that Mr. White may see the wisdom of re-opening the watercourse over his property where he has obstructed it.

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HON. SIR JOHN BOYD, C. DECEMBER 17TH, 1913.

## RE TRACY.

5 O. W. N. 530.

*Will—Devise to Trustees on Trusts—Death of Object of Trusts in Lifetime of Testatrix—Sale of Lands by Testatrix—Conversion into Cash and Mortgage—Ademption—No Earmarking—Proceeds of Sale Falling into Residue—Intestacy.*

BOYD, C., *held*, that a devise of lands to executors upon certain trusts was adeemed or revoked by the action of the testatrix, after the object of the trusts died, in selling such lands, and that the proceeds of such sale, although partially represented by a mortgage, were not earmarked but went into the residuary estate.

*Re Dods*, 1 O. L. R. 7, followed.

Motion by the executors of Rachel Tracy for an order under Con. Rule 600 determining a question arising in regard to the estate of the testatrix.

D. Inglis Grant, for the executors.

H. Cassels, K.C., for certain legatees.

J. J. Maclennan, for the next of kin.

HON. SIR JOHN BOYD, C.:—The testatrix made her will in 1904, and she died in December, 1912. By the will she left the land in question to her husband for life, and after his death it was to be sold by her executors and the proceeds paid to various persons and objects named. The residue of her estate was given to her husband. He died before the

testatrix, in April, 1912. She sold the land in June, 1912, and received part of the price in two payments of $500 each; and the balance is on mortgage for $2,000. After the death of the husband she had the power, and elected to sell the land in question and convert it into money and mortgage. The property devised to the executors she thus by her own act destroyed, and to that extent revoked the devise; technically there was an ademption, according to the definition given in all modern authorities. I am bound by *Re Dods*, 1 O. L. R. 7, which has been followed, to hold that the devise of the land and proceeds to the executors is inoperative. The cases cited to the contrary are cases where the manifest intention of the testator was to give the subject of the gift, whatever was its condition, so long as it could be identified; and usually this obtains where the will deals with property coming to the testator from another estate than his own. The distinction is marked in *Lee* v. *Lee*, 27 L. J. Ch. 824, and *Toole* v. *Hamilton*, [1901] 1 I. R. 383, cited by Mr. Cassels.

Ademption means simply the taking away of the benefit by the act of the testator. The matter is neatly put in a note to the last edition of Jarman, 6th ed., vol. II., p. 1157: "A specific devise of land may be adeemed by the property being sold or conveyed after the date of the will. Mr. Jarman treats this as an instance of 'revocation by alteration of estate.'" This discussion will be found in vol. I., at pp. 161, 162, and *Re Clowes*, [1893] 1 Ch. 214, is cited, shewing that, even if the testator, on sale of the devised land, takes back a mortgage to secure the purchase-money, the benefit of the mortgage does not pass to the devisee. Here the testatrix gave the property specifically to her executors so that her husband might have it for life, and at his death the executors were to sell and divide the proceeds as directed. But, on the death of her husband, the widow proceeded to sell the property and to turn part of it into personal estate outstanding at her death. This the executors would take as part of the residue; but, the residuary legatee being the husband, it follows that there is an intestacy as to this. I see nothing in the will to indicate that the persons named, who are relatives of the husband, were intended to take under the will—all that was ended when the land was sold by the widow.

There is intestacy as to the moneys and mortgage in question; costs out of the estate

HON. MR. JUSTICE RIDDELL. DECEMBER 17TH, 1913.

## SARNIA GAS & ELECTRIC LIGHT CO. v. TOWN OF SARNIA.

5 O. W. N. 532.

*Trial—Stated Case—Municipal Corporations—Gas and Electric Company—Powers of—Street Lighting—Facts Inadequately Stated—Refusal of Court to Express an Opinion.*

RIDDELL, J., refused to give an opinion upon a stated case where the facts upon which the case was based were inadequately stated, and it would have been necessary for the Court to draw inferences which were little short of guesswork.

*Bulkeley* v. *Hope*, 8 D. M. & G. 36, followed.

Stated case argued in part before HON. MR. JUSTICE RIDDELL, June 19th, 1912; judgment was given June 20th, 1912: 22 O. W. R. 558.

I. F. Hellmuth, K.C., W. J. Hanna, K.C., and R. V. Le Sueur, for plaintiffs.

E. F. B. Johnston, K.C., and J. Cowan, K.C., contra.

HON. MR. JUSTICE RIDDELL:—Most of the facts are set out in the above judgment. The point decided there, it was said, would be sufficient and the decision render unnecessary the consideration of other matter submitted and argued. The parties are now, however, desirous of a decision upon the other points as well.

I set out the questions:—

"The questions for the opinion of the Court are as follows:

1. Are the provisions of the Consolidated Municipal Act, 3 Edw. VII., ch. 19, sec. 566, sub-sec. 4 (a) applicable to the plaintiff company, either as to its electric plant or its gas plant, or to both?

2. If so, do the provisions contained in sec. 566, sub-sec. 4 (b) and 4 (g) make the provisions of sec. 566, sub-sec. 4 (a), under the circumstances inapplicable, inoperative and non-effective in respect to the plaintiff company?

3. If the provisions of the said section of the said Act, namely, 3 Edw. VII., ch. 19, sec. 566, sub-sec. 4 (a) are applicable to the plaintiff company and the proceedings had and taken by the defendants, purporting to be under and

by virtue of said section are regular, was the appointment of the third arbitrator in such proceedings *intra vires?*

4. If the proceedings had and taken by way of arbitration are under the circumstances *intra vires,* can the plaintiff company refuse to proceed or to be bound by the same?

5. If an award is made in such proceedings, is there any provision for enforcing the same or of compulsory expropriation based on such award, and if not, then in the event of the company refusing to accept the sum fixed by the award to be paid to the company and to transfer its property to the defendants, can the defendants then construct and operate similar works to those being carried on by the company without the leave of the company?

6. If the defendants have a right to proceed under subsec. 4 (a) of said sec. 566, then must they take over and pay for the said company's works and property situate in the village of Point Edward and Sarnia township as well as for that in the town of Sarnia?"

In the case it is agreed that the plaintiff supplies "gas for heating purposes and electricity for lighting to the municipal corporations of the town of Sarnia and the village of Point Edward, but is not now supplying and never has supplied either the town of Sarnia or the village of Point Edward with both gas and electricity for street lighting purposes."

Nowhere does it appear whether the plaintiff supplies or has supplied "gas or electric light for street lighting in the municipality." For all that appears, it may be that the electricity supplied may be to light the municipal buildings and not to light the streets.

While I have the power to draw inference of fact as at a trial (former C. R. 372 (3) ), I decline to do so when the inference would not be far removed from a mere guess, and the real fact might have been clearly stated. Section 566 4 (a) is expressly only to apply "to a gas or electric light company that has supplied or shall supply gas or electric light for street lighting in the municipality"—but the fact is not stated. The Court will not make an order "when the facts . . . stated on a special case were such as did not enable the Court to determine the rights of the parties," and "it is not a proper use the Act of Parliament of come to the Court for its opinion on a partial . . . statement of facts:" *Bulkeley* v. *Hope* (1865), 8 D. M. & G. 36. I shall

follow the Lords Justices and make no order upon this case, without prejudice to any question and without prejudice to another special case being stated containing all the material facts.

No costs.

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HON. MR. JUSTICE LENNOX, IN CHRS. DEC. 16TH, 1913.

## GILPIN v. HAZEL JULES COBALT SILVER MINING CO.

5 O. W. N. 518.

*Process—Writ of Summons—Service out of Jurisdiction on Officers of Company—Company Incorporated in Ontario—Not British Subject—Con. Rules 26, 29—Insufficient Affidavit—Leave to File Sufficient Material Nunc Pro Tunc—Costs.*

LENNOX, J., *held*, that a company incorporated within Ontario is not "a British subject" within the meaning of Con. Rule 29, and where it must be served with process outside the jurisdiction notice of the writ of summons and not the writ must be served.

Motion by the defendant company to set aside an order made by the acting Master-in-Chambers allowing the issue of a concurrent writ of summons for service out of the jurisdiction, and to set aside the writ and the service of the notice thereof upon officers of the defendant company not British subjects resident in the State of New York.

A. C. Craig, in support of motion.

C. W. Plaxton, opposing.

HON. MR. JUSTICE LENNOX:—There is no outstanding merits in this application. Mr. Lee's book shews that the affidavit upon which he made the order was produced and read over before the order was made. That the order did not recite the material, is a mere clerical error or slip of the class directed to be corrected under Rule 521. The same may be said of the direction as to costs; and the proof of the claim was made in the affidavit filed on obtaining the order. There is a good deal more room for argument, but no more merit, upon the objection taken that the writ itself and not notice of the writ should have been served. Upon the merits it must be said that whatever purpose it might serve in a case where the defendant had by some means failed to take

measures to defend until after judgment entered, it has no merit here, for the notice gives the company, if anything, more information and warning than a writ, and the defendant company might quite as well have entered its defence, if any it has, as come into Court and wrangle about it. The defendant, however, has a right to have this question judicially dealt with. The plaintiff has shewn that the company's office is in Buffalo, and that the persons representing the company for service, namely, the president and secretary, are resident there and are not British subjects. The defendant contends that, by analogy, the company being incorporated in Ontario is to be read: "A British subject." I don't think I should seek out analogies, except in the last resort. A company chartered in Ontario, although subject to Ontario laws, is not, in my opinion, a British subject, and if not, the question raised is distinctly dealt with by Rule 29, which provides that where the defendant is to be served out of Ontario, as here, and is neither a British subject nor a resident in British dominions, as here, notice of the writ and not the writ itself is to be served. A point not taken is that Rule 26 was not fully complied with. The plaintiff will be at liberty to do so now by filing an affidavit *nunc pro tunc*, stating that, in his opinion, he has a right to the relief claimed, and that the case is a proper one for service out of Ontario under these Rules, and how this is, as for instance that the money was loaned and repayable in Ontario. Notice of the filing of this affidavit will be served upon the defendant's solicitors, and the defendant will have ten days after such service to enter an appearance—of course in conformity with the present rules. The order appealed from will be treated as amended by striking out the provision as to costs and referring to the affidavit filed, and I now order that, in case the defendant does not appear, the plaintiff, before entering judgment, shall file an affidavit swearing to the cause of action—that the money to be recovered is payable in Ontario and that the defendant company is justly and truly indebted to him in the amount he claims.

I also order that the costs of the order appealed from and the costs of this application shall be costs in the cause to the successful party.

HON. SIR JOHN BOYD, C. DECEMBER 16TH, 1913.

## RE BLAND AND MOHUN.

5 O. W. N. 522.

*Mortgage—Assignment of as Collateral Security for Loan of Lesser Amount — Provision for Re-assignment — Form of Assignment Otherwise Absolute — Discharge of Mortgage by Assignee — Validity—Judicature Act—Assignments of Choses in Action—Vendor and Purchaser Application.*

BOYD, C., *held*, that where a mortgage was assigned as collateral security for a loan of a lesser amount, the assignment containing a provision for re-assignment upon repayment of such loan that the assignee was the person entitled by law to receive the mortgage moneys from the mortgagor and to give a full discharge therefor.

*Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, 617, referred to.

Motion under the Vendor and Purchasers Act by a vendor for a declaration that he was able to make a good title despite purchaser's objections.

A. C. McMaster, for the vendor.

H. H. Shaver, for the purchaser.

HON. SIR JOHN BOYD, C.:—The assignment of the 17th August, 1904, by Vandervoort to Ibbotson, purports to be an assignment of a mortgage for $1,150, made by Amy Lee to Vandervoort, dated the 15th August, 1904. It recites that the assignee, Ibbotson, has lent to the assignor, Vandervoort, $1,000 for one year, on the promissory note of the assignor, and that the assignor has agreed to execute the assignment as collateral security for the said note. Then the witnessing part declares that the assignor doth assign and set over to the assignee all that the recited mortgage and also the sum of $1,150 and the full benefit of all powers, covenants, and provisions contained therein, and full power and authority to use the name of the assignor for enforcing the performance of the covenants, etc.

There is a special covenant written in, that the assignee binds himself, upon payment of the $1,000, he will re-assign and set over the said mortgage and will convey the lands to the said assignor.

Under the provisions of the Judicature Act as to assignments of choses in action, the question arises whether the assignment of the debt is absolute, *i.e.*, does it purport to pass

the entire interest of the assignor to the assignee, or is it an assignment purporting to be by way of charge only? If on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it is not material to consider what was the consideration for the assignment. see *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, 197.

The cases point to this, I think, under the Judicature Act, that an absolute assignment of a mortgage, even if it appears on the face of the assignment that it was only for the purpose of securing a debt lesser in amount, would be sufficient to come under the Act, so long as it did not purport to be by way of charge only: *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, 617.

On this assignment I think that, as between the mortgagor and the assignee, there was the right to receive the whole amount of the mortgage, and that such payment would be a good discharge—leaving it still to be discussed between the assignor and assignee how that sum total should be applied and distributed. As I read the assignment, it is sufficient under the Registry Act, 10 Edw. VII., ch. 60, sec. 62, to put the assignee, Ibbotson, in the position of an assignee to whom the mortgage has been assigned, and also a person entitled by law to receive the money and to discharge the mortgage. The whole mortgage and the whole of the debt is in fact assigned, and not merely a part of the debt and the instrument. See form 10 of the statute 10 Edw. VII., p. 539, and the effect of registration as declared by 1 Geo. V., ch. 17, sec. 66a (1911).

Had default been made by the mortgagor in paying, the action for recovery of the whole must have been by the assignee, in whose hands was the security, and who had the express right to use the name of the mortgagee to enforce performance of the covenant to pay. Suing in the name of the mortgagee, payment to the assignee would be a good discharge for the whole, and he would hold the surplus over the $1,000 for the use of his assignor. But under the Judicature Act he could also sue in his own name, though as to part of the money he would hold it in trust for the mortgagee, his assignor: *Comfort* v. *Betts*, [1891] 1 Q. B. 737.

The title is good as against this objection. I suppose the parties have arranged as to costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 16TH, 1913.

## BUCHANAN v. BARNES.

5 O. W. N. 524.

*Will—Devise—Restraint on Alienation—General in Terms—No Gift Over—In Form of Condition—Limited Period—Invalidity—Vendor and Purchaser Application.*

MIDDLETON, J., *held*, that a general restraint on alienation, even though it be in the guise of a condition as long as there is no gift over, is invalid even though it is subject to a time limitation. *Blackburn* v. *McCallum*, 33 S. C. R. 65, followed.

Motion by vendor under the Vendors and Purchasers Act for a declaration that he was able to make a good title as against purchaser's objections, heard at London, December 13th, 1913.

J. P. Shaw, for vendor.

C. St. C. Leitch, for purchaser.

HON. MR. JUSTICE MIDDLETON:—The sole question is whether the condition attached to the devise to Isaac Buchanan is repugnant and void. The will reads: "To my son, Isaac Buchanan, I give, devise, and bequeath the east half, etc., for his own absolute use and benefit forever, but subject to this further condition, that he, the said Isaac B., shall not have the power to sell or cause to be sold or mortgaged or encumbered the said east half, etc., for a period of twenty years from my decease." There is no gift over: *Blackburn* v. *McCallum*, 33 S. C. R. 65, is a repudiation of the doctrine of *Earls* v. *McAlpine*, 6 A. R. 145, and accepts *Re Rosher*, 21 Ch. D. 838, as the governing authority, and must be taken to determine that a general restraint on alienation is not given validity by a time limitation.

When there is a gift over it may amount to an executory devise and terminate the estate given, but a mere prohibition of alienation, though called a "condition," does not constitute a good common law condition so as to work a forfeiture.

Here the fee is given, and there is nothing to take it away.

The parties have no doubt some arrangement as to costs. If not, I may be notified.

MASTER IN CHAMBERS. DECEMBER 19TH, 1913.

## MEXICAN NORTHERN POWER CO. v. PEARSON.

5 O. W. N. 552.

*Particulars—Statement of Claim—Former Order not Complied with—Ability to Furnish—Discovery not Substitute—Penalty for Non-compliance with Order—Costs.*

HOLMESTED, K.C., ordered particulars of certain paragraphs of the statement of claim as asked, stating that discovery is not a substitute for particulars.

Motion for particulars of certain paragraphs of the statement of claim.

Glyn Osler, for defendants.

A. J. Thomson, for plaintiffs.

HOLMESTED, K.C.:—This is an action claiming damages for breach of a contract to design and construct a hydro-electric power plant on the Conchos River in Mexico.

In the statement of claim it is described as a contract for the "designing and construction of the plaintiffs' water power development." In its original statement of claim the plaintiff company set forth in par. 6 in various clauses, a to v inclusive, particulars of the defendant's alleged failure and neglect. On 29th July, 1913, the defendants demanded particulars of the matters referred to in 6c, d, e, i, j, k, l, n, o, p and s and also of paragraph 9 whereby the plaintiffs alleged they had sustained loss and damage amounting to $100,000. On the 10th October, 1913, an order was made by the learned Chief Justice of the King's Bench requiring the plaintiffs to furnish better particulars of parapraphs 6 and 9. The order does not specify any particular items of par. 6 of which particulars are to be furnished, and therefore, I presume that the order there made must necessarily cover each of the items in par. 6.

The plaintiffs thereupon delivered an amended statement of claim, in which they claim to have complied with the order of the 10th October.

The defendants have moved for better particulars of some of the matters included in par. 6 of the amended statement of claim.

When the motion was opened before me on the 15th day of December inst. it was urged on behalf of the plaintiff company, that it was unable to furnish the particulars of several of the matters as to which further particulars were claimed, because it was said that the plaintiffs had not in their possession data for furnishing the particulars, and that until the plaintiff company had obtained discovery from the defendants, better particulars than those contained in the statement of claim could not be furnished.

On the other hand, it was claimed by the defendants' solicitor that the plaintiff company had taken possession of all the plans and documents relating to the work which had been in the defendants' possession. I therefore adjourned the motion to enable both parties to furnish affidavits on this point. On the argument to-day, 18th December, the solicitor for the defendant has produced an affidavit verifying a letter written in the name and on behalf of the plaintiff company in August, 1912, in which the agent of the defendants is informed that the agent of the plaintiff company "has this day taken possession of the offices which up to the present have been occupied" by the defendants "as well as of the records, books, files and plans" contained therein. No affidavit has been filed on behalf of the plaintiffs.

I think in these circumstances I ought not to conclude that the plaintiffs are unable to furnish the required additional particulars from want of access to plans and other data in connection with the work done or required by the contract to be done in reference to the works therein mentioned.

Turning now to the particulars furnished by the amended statement of claim:—

I find par. 6(a) really gives no better or fuller particulars than did par. 6a of the original statement of claim. It is a mere reiteration of the former paragraph with the added statement that the defendants "did not make new surveys" —and as the learned Chief Justice found the original paragraph 6a insufficient, it is my duty to find that the new paragraph is equally insufficient. It was argued that this paragraph is a categorical denial of clause 1 of the contract, but on reading that clause of the contract which was produced on the argument, it does not appear to be so—that clause only requires the defendants to "make all new surveys required,"

and it does not appear that any were required. I think the defendants are entitled to know what particular surveys they claim were required which they allege the defendants did not make; and they are entitled to be informed what investigations as to water supply and storage they claim should have been made and which they allege were not made.

Paragraph 6c and d of the original statement of claim are now represented by paragraph 6a. This amended paragraph, it appears to me, is a sufficient statement, and satisfactorily answers the order of the 10th October.

Paragraph 6i of the original statement of claim is now represented by par. 6h of the amended statement of claim, and as the learned Chief Justice found the original statement of claim insufficient, and as the amended statement of claim is in identical terms, I must also hold this to be insufficient.

Paragraph 6j of the original statement of claim is now paragraph 6i of the amended statement of claim. The latter does indeed give better particulars than the original, but it is objected to as being still insufficient in that it alleges the cofferdam and flume "were not properly designed," but fails to state any particulars of the alleged defect in design. The plans, for aught that appears to the contrary, being in the plaintiffs' possession, they have the means of pointing out the imperfections in design on which they intend to rely, and I think that they should do so.

Paragraph 6k of the original statement of claim is now paragraph 6j of the amended statement of claim, and as they are in identical terms, I hold, as I did in regard to paragraph 6h of the amended statement of claim, that the order of the learned Chief Justice has not been complied with.

The same remarks apply to paragraph 6j, k, l, m, n, o, p, q, r.

Paragraph 6s relates to matters not mentioned in the original statement of claim and of this paragraph the defendants claim better particulars in regard to defects in the design of the culverts therein mentioned, which the plaintiffs intend to rely on—and I think they are entitled to them.

With regard to paragraph 9, the learned Chief Justice directed particulars to be furnished. The amended paragraph enumerates various matters in respect of which loss has arisen, but there is no attempt to particularize the amount

of loss under the different heads. The first item is loss of revenue from the plaintiffs' capital investment owing to delay in completion. This, it appears to me, is in the nature of "special damage," and the amount claimed under that head ought to be specified as well as the circumstances on which the plaintiffs rely as connected such loss with the breach of the contract complained of.

The other matters mentioned may be regarded as general damages naturally flowing from the alleged breach of contract, and, as to them, I do not think particulars need be given.

I may add that if I were free to dispose of this matter untrammelled by the order of the 10th October, I do not think I could come to any other conclusion. I have looked at the cases which have been referred to, but do not find in them anything conflicting with the view I have taken. It has been said before, and perhaps it is needless to say it again, that discovery is not a substitute for particulars. An examination for discovery might elicit information on all the points on which particulars are now sought, but that would not in any way tie or limit the plaintiffs at the trial to the facts deposed to on the examination for discovery, and the plaintiffs being a corporation the examination could not be read against them. "The function of particulars is to limit the generality of pleadings and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case to be made against him at the trial and to have such particulars of his opponent's case as will prevent him from being taken by surprise." Halsbury, vol. 22, p. 453, and if ever there were a case in which that course is essentially necessary it surely must be this, where so large an undertaking is in question, and so great an amount is at stake.

I may observe that the order of the 10th October does not in terms state what is to be the penalty for disobedience; usually a default in obeying an order for particulars is that the pleading, or part of the pleading as to which particulars are ordered, is to be struck out, and possibly the defendants in this case might have asked for that relief, as it is obvious that a suitor ought not to be put to the expense of repeated applications in respect of the same matter. The learned Chief Justice has ordered particulars of paragraph 6, and the answer in many cases is a mere reiteration of what was

contained in paragraph 6 when it was before him, such a contempt of his order could only be fittingly punished by striking out the offending paragraph, but the defendants have not asked for that relief on the present application, and I therefore forbear making such an order.

The notice of this motion has not been left with me, and I am not able, therefore, to see whether it asks for particulars as to all the matters as to which I have held the defendants entitled to particulars. If it does, the order will go as to all such matters, and if not, then as to such of them as are covered by the notice of motion. In default of the particulars being delivered within a time to be limited, the paragraphs as to which they are not delivered will be struck out.

The costs of the motion must be paid by the plaintiffs in any event.

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HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 8TH, 1913.

## PHILLIPS v. CANADA CEMENT CO. LTD.

5 O. W. N. 549.

*Negligence—Injury to Workmen—Air-drill Falling on Him—Alleged Negligence of Fellow-workmen—Findings of Jury—Contributory Negligence—Dismissal of Action.*

FALCONBRIDGE, C.J.K.B., dismissed an action brought by a workman for injuries sustained in defendants' employ caused by an air-drill falling on him, holding that the accident was caused by the contributory negligence of plaintiff.

Action by a workman employed by defendants in their works to recover damages for injuries sustained by him by reason of an air-drill which was being moved, by toppling over and falling on him, tried with a jury at Belleville.

E. G. Porter, K.C., and W. Carnew, for plaintiff.

W. B. Northrup, K.C., and R. D. Ponton, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—There is no indication by the jury as to wherein the negligence of the foreman consisted, and I think it would be difficult to point it out.

The plaintiff sat down by the fire with his back to the air-drill, when he says defendants' servants were either moving the air-drill or had just stopped, and his own witness, Schriver, says they had finished moving it when the plaintiff

sat down. He paid no attention to what was going on behind him, and the machine fell over on him. I think it is a clear case of contributory negligence, and that I might properly have withdrawn it from the jury.

Action dismissed with costs, if exacted.

Thirty days' stay.

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HON. MR. JUSTICE MIDDLETON. DECEMBER 18TH, 1913.

## CITY OF WOODSTOCK v. WOODSTOCK AUTOMOBILE MANUFACTURING CO. ET AL.

5 O. W. N. 540.

*Municipal Corporations—Bonus By-law—Action to Enforce Mortgage Given as Security for an Advance — Insolvency of Company—Assignment of Assets to Another Company—Right of Municipality to Refuse to Recognize Latter Company as Subrogated to Former—Construction of Mortgage Deed—No Express Covenant—Obligation Implied—Costs.*

MIDDLETON, J., *held*, that a municipality is not bound to accept as consideration for a bonus given by it the performances of an assignee of the bonused industry.

*Tolhurst* v. *Associated Portland Cement Mfrs.*, [1903] A. C. 414, followed.

That even where a mortgage does not contain an express covenant to repay the mortgage loan, yet nevertheless there is an implied covenant enforceable in a personal action.

Action by plaintiffs to enforce a mortgage security, tried at Woodstock, on the 16th December, 1913.

S. G. McKay, K.C., for the plaintiff.

W. T. McMullen, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—By by-law 583 the city of Woodstock agreed to lend to the Woodstock Automobile Manufacturing Co. Limited—a company incorporated under the Ontario Companies Act—the sum of $3,500 upon the terms set forth in an agreement dated the 24th February, 1912, to be secured by a mortgage calling for compliance with the terms and conditions upon which the aid was given. The agreement set forth that the company was to employ during the seven succeeding years upon an average twenty men for a period of eleven months (of ten-hour days) in each year, and that on the first of April in each year credit should be given upon the mortgage for the amount that

should have been earned during the preceding year. If more men than stipulated for had been employed the credit was to be proportionately greater; if fewer the credit would be less.

In the event of the company going into liquidation or assigning for the benefit of its creditors or discontinuing business before becoming entitled to a discharge of the mortgage, the property was to revert to the city. Upon the earning of any credit the mortgage should nevertheless remain as security for the full amount until the total credits would entitle the mortgagors to a complete discharge.

A mortgage was drawn and executed, bearing date the 6th of May, 1912, reciting the by-law and the agreement, containing a proviso that it is to be void "if the said the mortgagor shall in each and every year for the next succeeding seven years employ twenty men for a period of eleven months, ten-hour days each," and "provided also that if the said the mortgagor shall go into liquidation, assign for the benefit of creditors, or shall discontinue business before the time within which it should have earned the right to the discharge of this mortgage by the performance of labour as aforesaid or by payment of cash as aforesaid, the property hereby mortgaged shall revert to the said the mortgagee, without any reduction in said mortgage or any other reservation whatsoever."

There is a further proviso, not material, relating to increased credit or decreased credit where a greater or lesser number of men is employed, and providing that no partial discharge of the mortgage shall be given, but it "shall remain as security for the full amount until the said the mortgagor is entitled to credit for the whole amount of labour as aforesaid or has paid to the mortgagee the unearned portion thereof."

The company commenced business, and carried it on in substantial compliance with the requirements of the by-law and mortgage for somewhat less than a year, when, becoming financially embarrassed, on the 9th November, 1912, it assigned for the benefit of its creditors to the defendant Ross. The assignee continued the business for some little time thereafter, working up material and completing existing contracts.

On April 12th, 1913, about a year after the company commenced business, Ross conveyed the property to the Canada

Furniture Manufacturers, Ltd., subject to this mortgage and to another mortgage in favour of one W. J. Taylor. The company was hopelessly insolvent, has paid nothing to its unsecured creditors, and little to those holding security.

This action was brought on the 19th July, for the purpose of enforcing the mortgage security.

The Canada Furniture Manufacturers, Ltd., has a factory already in operation in Woodstock, and it is ready to employ men in the factory in question; but the municipality is not content to accept this as a compliance with the terms of the mortgage.

Several questions of importance arise. In the first place, I do not regard the proviso in the mortgage relating to the assignment as constituting any clog upon a redemption. Its true meaning is, I think, that if the mortgagor assigns before the mortgage debt is worked out by the continuance of the factory and the due employment of the requisite number of men, the mortgagee shall be entitled to assert against the property the full amount of the mortgage debt. Substantially the factory had been carried on for one year; and I am relieved from considering the question of the power of the Court to relieve against the forfeiture of the $500 credit upon the mortgage, by the assent of the counsel for the town to credit being given for this $500, leaving the mortgage debt at $3,000 instead of $3,500.

I do not think the municipality is bound to accept the employment of men by the furniture company as a compliance with the proviso in the mortgage. The bonus was a bonus to a specific industry. This is what is authorized by the Municipal Act, and it was not contemplated by the parties that the advantage of the bonus should be capable of being transferred. What was sought was the establishment of a new industry in the city. This cannot against the will of the municipality be converted into a bonus to an industry already existing. The furniture company is already established; and even if the enlargement of its premises involves the employment of the additional number of men it does not follow that the municipality would receive the kind of benefit contemplated by the by-law.

It is also obvious that the employment of the number of men contemplated, in this building, may simply mean the transfer of these men from some other factory building already in operation in the town.

Apart from the obvious intention of the Municipal Act and the by-law passed under it authorizing a bonus, the considerations suggested in *Tolhurst* v. *Associated Portland Cement Mfgrs.*, [1903] A. C. 414, indicate that in this case, regarded as a contract, the contract was one not intended to be capable of assignment.

It was then argued that the mortgage did not provide for redemption upon payment of a money sum, but upon the employment of the stipulated number of men.

I do not think this is so. Practically the mortgage is a mortgage to secure $3,500, the amount loaned, the mortgagee agreeing to accept as equivalent to the payment of $500 per annum the employment by the mortgagors of the stipulated number of men; and upon the assignment for the benefit of creditors by the mortgagor the property "hereby mortgaged shall revert to the mortgagee, without any reduction in the mortgage." This, though absolute in form, does not deprive the mortgagor or the mortgagor's assignees of the right to redeem within a time to be fixed by the Court. I therefore think the proper judgment is to direct that a time be fixed, six months from the date of this judgment, for redemption upon payment of three thousand dollars, with interest from the date of default, say 12th April, 1912.

The defendants argued in the alternative that this mortgage should be regarded merely as security for any damages which the defendants might be able to prove as resulting from the default of the mortgagor. I do not think that this is the way in which te mortgage in question should be construed. Bald and ineffective as the document is, it is a security for the money advanced, not to be enforceable if the mortgagor lived up to the covenant as to employment; and the conveyancer has avoided the difficulties found in some of the cases cited.

It is true there is no express covenant to repay this loan; but the cases collected in Fisher, shew that there is an implied obligation enforceable in a personal action.

The mortgagees are entitled to add the costs of the action; and possibly some other items ought to be taken into account. If this cannot be agreed upon, I may be spoken to.

HON. SIR JOHN BOYD, C. DECEMBER 18TH, 1913.

## RE LAIDLAW AND CAMPBELLFORD O. & W. RW. CO.

5 O. W. N. 534.

*Railway—Expropriation of Land—Agreement to Submit Compensation to "Valuers"—Appeal Prohibited—Motion to Set Aside Finding—Alleged Misconduct—View of Property in Presence of Claimant Only—Valuers not as Circumscribed as Arbitrators—No Injustice Done—Failure of Company to Give Item of Evidence—Examination of Valuer—Dismissal of Motion.*

BOYD, C., *held* that where certain lands were being taken and injuriously affected by a railway and the parties had agreed that the sum to be paid should be left to three valuers and that there should be no appeal from their finding, the action of the valuers in proceeding to view the lands in question, the claimant but no representative of the railway being present, was not misconduct and was no ground for setting aside their finding.

That greater latitude is to be allowed valuers than arbitrators.

Motion by railway company to set aside an award or decision of valuers appointed under an agreement between Laidlaw and the railway company to ascertain the amount to be paid as compensation to Laidlaw for land taken and damages for injury to lands not taken by the railway company.

A. McMurchy, K.C., for the railway company.

M. K. Cowan, K. C., and E. G. Long, for Laidlaw.

HON. SIR JOHN BOYD, C.:—Laidlaw's land having been intersected by the Campbellford O. & W. Railway, and certain portions being required, notice of expropriation was given and $1,200 offered by the railway company as for compensation and damages. This was not accepted, and the parties agreed on the 12th July, 1913, that these questions be referred to the determination of Joseph Hickson, as valuer appointed by the company, Nicholas Garland, appointed on behalf of the owner, with his Honour Judge Morgan as third valuer. The decision of any two valuers was to be conclusive and binding without appeal and without costs. Each party was to pay the fees of his own valuer and half fees of the third. The parties covenant that the decision of the valuers shall be kept and observed and shall be binding and conclusive upon both and shall not be subject to appeal. Then follows this clause: "Either party shall have the right to have one representative present, if desired, at any meeting

of the valuers; but failure of such representative to attend, whether through lack of notice or otherwise, shall not affect the validity of the decision."

The award of two of the valuers, dated the 22nd August, 1913, sets forth: "Having called the parties before us, at all times sitting together, and having, at the request of the parties, viewed the land and premises, and having heard the arguments of counsel for both parties," and then proceeds to declare that $6,800 is fixed as compensation for both items.

On the 9th October, the motion is made in a summary way to "set aside the award," on the grounds (1) that it was not made on the basis of evidence and statements presented and facts disclosed upon the view and inspection made. That ground was not argued, nor was it arguable, for no evidence was taken, and the parties were content and intended that the valuers should act on their own knowledge and experience and have the most ample discretionary powers —as no restrictions were placed upon their actions.

The second ground was because the amount was unreasonable and exorbitant. That ground is equally untenable, and was not discussed.

The third ground is that the arbitrators did not act judicially, but conferred with one of the parties in the absence of the other, and in that and other respects were guilty of misconduct sufficient to invalidate the award.

The sole ground of alleged misconduct is that the view was taken on the premises and in the presence of Mr. Laidlaw, the owner.

The point was not specifically taken that the Court had no jurisdiction to deal summarily with the motion to set aside. But it seems to be a formidable objection, as the parties were free to make their own agreement as to how the amount of compensation was to be attained, and had the right to agree that there should be no appeal. This motion is in substance an appeal, and at present it would seem to me that there are excluding words which oust the jurisdiction of the Court (see per Hannen, J., in *Jones* v. *St. John's College* (1870), L. R. 6 Q. B. 115, at p. 126.

But dealing with the last ground it may be that in ordinary arbitrations where evidence is to be taken under oath in the usual way, and the matters of fact in dispute are to be dealt with judicially, this action of viewing the premises with only one of the parties present might amount to

misconduct so that the award would have to be remitted to the same arbitrators for further consideration. That would be the utmost relief, for actual misconduct there is none in the present case—nothing more than mere inadvertence.

The motion assumes that this is an arbitration and calls the referees arbitrators; but, I think, the better view is that there were no judicial proceedings properly speaking contemplated; the matter was left to the sound judgment and good sense and well-known experience of the three who are called "valuers" by the parties themselves in the document, which is drawn by a legal hand. As briefly put by Lindley, J., in *Re Carus-Wilson & Greene* (1886), 18 Q. B. D. 7: "It is a mere matter of fixing the price, not of settling a dispute."

Having regard to the decisions in *Eads* v. *Williams* (1855), 24 L. J. Ch. 531, 533; *Bottomley* v. *Ambler* (1877), 38 L. T. N. S. 545, *Re Hammond & Waterton Arbitration* (1890), 62 L. T. N. S. 808, and *Re Langman & Martin* (1882), 46 U. C. R. 569, I prefer to treat the agreement as one for valuation rather than as one for arbitration.

There is greater latitude contemplated on the part of valuers than in the case of arbitrators. In this very case there appears to be a provision made against such an objection as the one in hand. The three valuers went "on the request of the parties" in the most natural way to the place of inspection, and there met and had intercourse with Mr. Laidlaw. In truth the railway company were there represented by the valuer Mr. Hickson, who was to be paid by them, and it was not thought needful to have their interests better protected. If other representative did not attend or was not notified, that, as the last clause quoted of the agreement provides, was not to "affect the validity of the decision."

Another matter was urged which is not in the notice of motion, but it ought not to prevail. It is said that the valuation might have been different had the valuers been aware of the fact that an interlocking switch had been ordered by the Railway Board to be established by the railway company at this point. That, if material, was a matter known to the railway company, and should have been by them brought before the valuers. Failing to do so, they merely failed to adduce a piece of evidence which might or might not have effected the final result: *Lemay* v. *McRae* (1888-9), 16 O.

R. 307, affirmed 16 A. R. 348. The only foundation for urging this ground is obtained by the examination of one of the valuers, and his evidence fails to shew any such mistake or miscarriage as would be a violation of general principles. See per Lord Eldon in *Walker* v. *Frobisher* (1801), 6 Ves. 70, 71, 72. The line of examination pursued seems to offend against the rule laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, that questions are not to be put as to what passed in the referee's mind when exercising his discretionary powers on the matters committed to him.

The motion is dismissed with costs.

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HON. MR. JUSTICE MIDDLETON. DECEMBER 18TH, 1913.

## McBAIN v. MUNICIPAL CORPORATION OF THE TOWNSHIP OF CAVAN.

5 O. W. N. 544.

*Municipal Corporations — Contract by—Drainage of Landowner's Lands—Lack of Seal or By-law — Executed Contract — Benefit Received by Corporation—Damages—Costs.*

MIDDLETON, J., *held*, that the absence of a seal or by-law was no defence to a municipality where a contract entered into it had been executed by the other party thereto, and he had changed his position as a consequence thereof.

Action tried at Peterboro on the 25th November, 1913.

Action for damages for breach of an agreement between the plaintiff, a land-owner, and defendant corporation, to keep open a certain watercourse so as to prevent injury to plaintiff's lands.

I. F. Hellmuth, K.C., and J. E. L. Goodwill, for plaintiff.

R. Ruddy, K.C., for defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff is the owner of the east half of lot No. 19 in the thirteenth concession of the township of Cavan. A small stream ran across the north end of this lot. This stream is sinuous in its course, and opposite the plaintiff's land crossed the road four times, two loops entering upon the plaintiff's land.

This was a matter of importance to the plaintiff, because the living stream flowing through his land afforded him water for his cattle.

In the year 1907 the municipality constructed a drainage ditch along the north side of the concession line, intercepting the stream wherever it crossed the highway; the idea being apparently to divert the whole flow of the stream to the ditch, so that it would cross the highway at one point only. McBain had only a small amount of low lying land, which would be in no way benefited by the drainage that the ditch would provide, and he claimed that he would suffer substantial injury by the loss of the flowing stream at which his cattle watered. He appealed from the assessment, and when before the Court of Revision, the municipality took the position that it was not intended to obstruct the flow of water in the stream and that the water would still be permitted to flow through the plaintiff's lands; the ditch being constructed on the same level would afford better outlet in the time of flood but would not prevent water reaching his land.

Relying upon this, the assessment was confirmed. When the ditch was constructed it was found that a quantity of material was brought by the stream down the ditch and that it lodged in the loops of the original stream entering the plaintiff's land and completely filled them up. The plaintiff drew the attention of the township officials to the unexpected development, and they at once recognized that the situation thus inadvertently created was contrary to the understanding upon which the assessment had been confirmed; and the municipality opened up the water course through the plaintiff's land.

In the year 1910 the water course was again obstructed in the same way, and an action against the municipality was threatened; the grievance alleged being the diversion of the running water from the plaintiff's property through the operation of the Cavan drain. The Reeve promised to take the matter up with the municipal council, after conference with the plaintiff; and on January 11th, 1911, the council passed a resolution instructing its committee "to deal with Mr. McBain on the following terms, namely, the council to open channel and protect it by gates on culvert, Mr. McBain to close the said gates in proper time to protect the channel from filling up by spring freshets; council

to keep the channel open; said offer to be without prejudice." This was communicated by the council to Mr. McBain, who on the 13th January acknowledged receipt, saying: "In reply I would like to express my pleasure at the way in which you have tried to overcome the difficulty, and I accept and agree to your resolution."

In pursuance of this agreement, in the early summer of 1911 the municipality opened up the channel, but before the gates were erected the channel was again filled, as the result of an unusual heavy rain storm. In the autumn the channel was again opened by the municipality and the gates were erected. In the spring freshets of 1912 the gates were promptly closed by the plaintiff, but the freshet was of such violence as to break through and undermine the whole structure, so that the water course was again filled up.

The municipality refused to do anything further, and the plaintiff ultimately brought this action, claiming damages for the inconvenience he had suffered. He could have cleaned out the ditch himself in 1912 for the sum of ten dollars, and in 1913, if it had again filled up, for a like sum. This I think fixes his damages at twenty dollars. He is not justified in claiming that he has suffered greater loss from the inconvenience which he could have remedied for this trifling sum.

The municipality now seeks to evade liability upon the ground that the contract is not under seal and that there was no by-law. It then pleads that any right which the plaintiff had to claim damages in respect of his grievances is lost by reason of the lapse of time and of the limitations contained in the Drainage Act. The dishonesty of this defence is such as to cause some surprise, and goes far to justify the statement of Lord Coke that corporations have neither soul nor conscience.

I am glad to say that I do not think this defence has any more foundation in law than in morals. Our Courts have always refused to allow a municipality to set up the absence of a seal or by-law when the transaction is an executed one and the municipality has received the benefits coming to it under the contract. Whether the plaintiff had a valid claim at the time of making the bargain is not the point. Whatever claim he had, he abandoned. He cannot be put in the same position, for the municipality now relies upon the Statute of Limitations, after having lulled the

plaintiff to sleep by his unsuspecting confidence in the validity of the unsealed contract.

The plaintiff could have recovered his twenty dollars in the Division Court. He seeks a mandatory order directing the municipality to comply with its contract and keep the watercourse clear in the future. I do not think he is entitled to this mandatory order. I think his remedy is to himself perform the work contracted for, and to sue for its cost as damages sustained upon each succeeding breach.

In all the circumstances I think the proper disposition is to give judgment for the sum named, twenty dollars, with costs fixed at one hundred dollars, as this litigation has in effect determined the wider question raised by the defendants, the validity of the contract.

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HON. MR. JUSTICE MIDDLETON. DECEMBER 18TH, 1913.

## EDWARDS v. PUBLIC SCHOOL BOARD S. S. OXFORD.

5 O. W. N. 537.

*Contract—Building Contract — School Building — Penalty Clause—Primary Default of Trustees and Architect — Acquiescence in Delay—Damages—Teacher's Salary—Change in Doors—Default of Contractor—Architect's Certificate—Interest—Costs.*

MIDDLETON, J., *held*, that a penalty clause in a contract for the erection of a school building could not be enforced where, owing to the dilatoriness of the officials of the School Board and their architect, the contractor was precluded from completing his contract within the time stipulated; nor owing to the above circumstances could damages for the delay be recovered.

*Brown* v. *Banantyne*, 21 W. L. R. 827, referred to.

Action to recover $1,089.80, balance upon a contract for the erection of a school building; tried at Woodstock 16th December, 1913.

S. G. McKay, K.C., for the plaintiff.

R. N. Ball, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—Originally the defence set up was denial of liability with respect to $28.50 claimed with respect to a change in the size of the doors in the building, and a claim for $560 penalty for seventy days at $8 per day, the rate stipulated in the contract. At the hearing an amendment was asked to permit the setting up

of failure to complete the building in accordance with the contract. Leave was granted. No particulars had been furnished before the trial, and a good deal of difficulty in satisfactorily dealing with this branch of the case became apparent, from the plaintiff's inability to satisfactorily deal with matters of detail as to which he had had no adequate notice. Finally it was agreed between the parties that an abatement should be allowed of $130 to compensate for all matters where there had been a departure from the strict terms of the contract. This sensible agreement relieved me from considering the difficult question which would have arisen owing to the peculiar form of the architect's certificate, and the consideration of the difficulties which arise with relation to an entire contract.

Upon the evidence I do not think the plaintiff has established his claim to the $28.50. It may be that in truth it was the fault of the architect; but the trouble giving rise to the supply of doors of an improper size ought to have been guarded against by the plaintiff, or he should have seen that he had very definite orders from the architect for his protection.

The remaining question relates to the peualty. Under the contract the trustees were bound to make the excavation and to supply bricks, sand and gravel. The architect was bound to supply necessary plans and details. The trustees were also bound to do the roofing.

I think there was such default on the part of the trustees in the performance of their part of the undertaking as to make it impossible for the contract to be complied with and for the building to be completed by the first of August, the day stipulated. It may be that this delay was unavoidable; nevertheless it was substantial, and left the matter at large. In the same way, the architect was dilatory. For example, he did not supply the details for the interior work until the 18th of July. He frankly says, what is quite obvious, that it was then entirely impossible for the building to be completed by the 1st of August. The fact was, as is usual in cases of this kind, that both parties acquiesced in a good deal of dilatoriness; and it was practically conceded by counsel upon the argument that it is impossible to enforce a penalty under these circumstances.

In the alternative the trustees ask for damages for the delay. I do not think they are entitled under the circum-

stances, nor do I think the damages which they claim, namely, the teacher's salary, can be recovered. See *Brown* v. *Banantyne*, 21 W. L. R. 827.

The school was completed, so far as the plaintiff was concerned, on the 11th of October. The delay from that time to the 11th November, when the school was opened was occasioned by the failure of the trustees to have made any provision for the instalment of heating apparatus, and, as Mr. Towns explained, the seats could not be placed in the building until after the heating apparatus was installed.

The result is that the plaintiff is entitled to recover the amount sued for, $1,089.80, less $28.50 and $130, being $931.30, and interest from the 30th April, 1913, the date of the architect's certificate. The money paid into Court, $513.30, and an accrued interest, to be paid out to him on account thereof. The plaintiff is also entitled to the costs of suit.

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HON. MR. JUSTICE LENNOX. DECEMBER 18TH, 1913.

## KENNER v. PROCTOR.

5 O. W. N. 552.

*Fraud and Misrepresentation—Sale of Lands—Action against Agent—Evidence—Dismissal of Action—Costs.*

LENNOX, J., dismissed an action brought for damages for fraud and misrepresentation upon the sale of certain lands, holding that it had not been proven that the representations were false to defendant's knowledge or that plaintiff had been induced to purchase by such representations.

Action for damages for fraud and misrepresentation in the sale to the plaintiff of a one-tenth interest in land by the defendant as agent for the vendor.

R. McKay, K.C., and R. T. Harding, for plaintiff.

R. S. Robertson, for defendant.

HON. MR. JUSTICE LENNOX:—The remedy the plaintiff is really seeking is an abatement in price owing to a very serious shortage in the quantity of land, there being a number of lakes upon the property bargained for—said to aggregate 800 to 1000 acres. If he were claiming against the vendor—this being as yet an executory contract—he would be entitled to have conveyed to him such portion of the land as the vendor could convey, with a proportionate abatement in the price for the deficiency in quantity. The action,

however, is against an agent, and is framed, and can only be maintained, as an action for deceit. And the plaintiff is bound to make out a clear case. It must appear that he was induced to enter into the contract by false and fraudulent representations of the defendant, knowingly made by the defendant, or made with a reckless disregard as to whether they were true or false. I am not satisfied that the evidence shews conclusively that the defendant did not honestly believe that the statements he made to the plaintiff were true. One of the most important statements he made is distinctly true, namely, that "it is good agricultural land." It is true, too, that he made a *bona fide* attempt to verify Stevens' report—which by the way estimates more than 1,100 acres of water—and I am very far from being able to find as a fact, in the sense in which such a statement is to be understood, that the defendant did not believe that "he had been over the land." The important question in the mind of both men at that time was the quality of the land—the defendant said he knew it to be good land, and it is. As to the relationship of Miller and Ferguson to McPherson in reference to this land, it was dishonest for the defendant to refer the plaintiff to these men if he knew their position, and I would not be surprised if he did, but I can find no evidence to shew that he did know of it as a matter of fact.

The other point. Did the plaintiff act upon or was the contract brought about by the representations complained of? This is to be inferred, of course, in many cases. But even where the plaintiff directly swears to being thereby induced, the facts may lead the Court to the opposite conclusion. Here the question is open, or rather it should be said that such evidence as plaintiff gives, points the other way. As well then from the circumstances, as from what the plaintiff says, I am inclined to believe that he was more influenced by his communications with Miller and Ferguson, particularly the latter, and the reputation of McPherson as a money-maker, than by anything said by the defendant. The litigation, however, was invited by the discovery of lakes and the suspicion engendered by the defendant's mistake—if a mistake it was—in saying that he had practically explored the whole area, and is therefore, perhaps, not a case for costs to the defendant.

The action will be dismissed without costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 18TH, 1913.

## RICHARDSON v. GEORGIAN BAY MILLING AND POWER CO.

5 O. W. N. 539.

*Sale of Goods—Wheat Stored in Elevator—Loss by Fire—Draft with Delivery Note Attached Unpaid—Specific Goods not Separated—Storage Charges Paid by Purchaser—Delivery at his Convenience—Insurance—Property Held not to Pass.*

MIDDLETON, J., *held*, that where certain wheat was sold to defendants but remained unseparated in an elevator in Meaford awaiting defendants' delivery orders, they paying storage charges, and a draft with delivery note attached had been sent to defendants but remained unpaid for their convenience that plaintiffs must bear the loss by reason of the destruction of such wheat in its elevator.

*Graham* v. *Laird*, 20 O. L. R. 11, followed.

*Inglis* v. *Richardson*, 29 O. R. 292, distinguished.

Action for the price of wheat sold. Tried at Toronto 12th December, 1913. Argued 17th December, 1913.

J. J. Maclennan, for plaintiff.

G. W. Mason and F. C. Carter, for defendant.

HON. MR. JUSTICE MIDDLETON:—It is common ground that, as the result of the correspondence filed, the plaintiffs bargained and sold to the defendants ten thousand bushels number two northern wheat at the price of 94½, cents per bushel. The defendants were to give instructions for the shipping of the wheat, and it was contemplated that delivery should be at the option of the purchaser, but within a reasonable time. The plaintiffs drew upon the defendants for the price, but the draft was allowed to stand unaccepted and unpaid, for the convenience of the purchaser; it being understood between the parties that the purchaser should pay the carrying charges upon the wheat in question, these charges consisting of the elevator charge, interest and insurance.

The wheat at this time was in an elevator at Meaford. It had in no way been separated from a larger quantity owned by the plaintiffs which was stored there. The order for delivery was attached to the draft, and the defendants could not obtain delivery without first paying the draft. While matters were in this situation a fire occurred, and the

wheat was destroyed. The question is, which party is called upon to bear the loss.

The case in some respects is very like *Inglis* v. *Richardson*, 29 O. R. 292; but I think it is clearly distinguishable. Here the wheat was not paid for, the order upon the elevator had not been handed over, and nothing whatever had been done from which it could be inferred that the property had actually passed. The intention of the parties, to be inferred from all the circumstances, was that the property in the grain should remain in the vendor until the draft was paid.

Both parties carried insurance on grain which they held in the warehouse, so that little light is thrown on the situation by this. If it be important, I think the vendor continued specific insurance for the purpose of covering the grain in question.

There is nothing here to take the case out of the general rule laid down in *Graham* v. *Laird*, 20 O. L. R. 11. See also Benjamin on Sales, 5th ed., p. 417.

The action therefore fails, and must be dismissed.

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HON. MR. JUSTICE LENNOX, IN CHRS. DEC. 16TH, 1913.

## RE BELLEVILLE DRIVING AND ATHLETIC ASSOCIATION, LIMITED.

5 O. W. N. 520.

*Company—Transfer of Paid-up Shares—Refusal to Register—Resolution of Directors—Ultra Vires—Ontario Companies Act, sec. 54 (2)—By-law or Resolution—Regulation—Prohibition—Mandatory Order.*

LENNOX, J., *held*, that an Ontario company with the ordinary powers could not pass a by-law or resolution forbidding the alienation of paid-up shares by its members except with the approval of its directors, and that a mandatory order would be granted compelling the registration of any transfer of paid-up shares by a shareholder.

*Re Good & Shantz*, 23 O. L. R. 544, and *Re Imperial Starch Co.*, 10 O. L. R. 22, followed.

Motion by one Ashley for a mandatory order compelling the association to transfer to the applicant upon the books of the association one share of the capital stock thereof purchased by him from one Wheeler.

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

M. Lockhart Gordon, for the association.

HON. MR. JUSTICE LENNOX:—Although it would be decidedly undesirable as a law applicable to companies generally it is very much to be regretted, I think, that steps were not taken before or immediately upon the incorporation of this association to enable the directors to effectively exercise the right of control now set up. That a share should not be assignable at the mere will of the shareholder was, I am convinced, the view and intention of a large majority of those who embarked in the scheme even before the charter was obtained. There was a discussion about it again shortly after the incorporation, I believe, that nothing definite was done until the 3rd of January, 1908, when a resolution was passed declaring "that no stock held in the association shall be validly transferred or assigned or binding upon the association until the same has been approved by the directors and duly entered upon the minutes of the association." I am compelled to hold that this resolution was not and is not binding upon J. A. Wheeler, a non-assenting shareholder, and is not valid against his assignee Hartford Ashley, the applicant for registration. *Re Good and Shantz, Son & Co., Ltd.*, 23 O. L. R. 544. This is not even a by-law and is not as effective as a general by-law duly passed after proper notice would be, but I do not regret my judgment at all on this ground. The very farthest the association can go is to pass a by-law "regulating" the transfer of shares, and "regulation" only means how, in what manner and with what formalities, the transfer is to be made; *Re Imperial Starch Co.*, 10 O. L. R. 22.

The power to regulate does not include the power to prohibit... *City of Toronto* v. *Virgo*, [1896] A. C. 88. The statute expressly provides that the shares are personal estate, and subject to any restrictions clearly authorized by the statute, possess all the essential qualities of such property, including alienability. There is no power that gives any majority of shareholders or the directors the right to prevent a sale of paid up shares or refuse to enter the transfer upon the books of the company. On the contrary sub-sec. 2 of sec. 54 of the Companies Act (Ontario), provides that "subject to sec. 56 (a share not paid for) no by-law shall be passed which in any way restricts the right of the holder of paid up shares to transfer the same, but nothing in this section shall prevent the regulation of the mode of transfer thereof." I have nothing to consider as to mere regulation

upon this motion; the right set up against Wheeler and Ashley is prohibition. I regret that the conclusion is forced upon me that the interests and purposes of the majority cannot be safeguarded in the way the association desires.

As a matter of expediency I am entirely in sympathy with the proposal that the majority should say who is to be in a company of this character. The law, however, as I understand it, is distinctly the other way.

There will be a mandatory order issued directing, ordering and compelling the Belleville Driving and Athletic Association, Limited, to forthwith cause to be transferred on the books of the association one share of the capital stock of the association, at present standing upon the books of the association in the name of James A. Wheeler to the applicant herein, Hartford Ashley, and to duly register the transfer of the said share from the said James A. Wheeler to the said Hartford Ashley; and the association will pay the costs of this application.

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HON. MR. JUSTICE BRITTON. DECEMBER 12TH, 1913.

## MENARY v. WHITE.

5 O. W. N. 472.

*Contract — Sale of Alberta Lands — Alleged Misrepresentations of Agent — Opportunity of Inspection by Purchaser — Value and Quality of Land—Evidence — Failure of Action—Foreign Commission—Costs of.*

BRITTON, J., dismissed an action brought for damages for alleged untrue representations made by defendant to plaintiffs on a sale by the former to the latter of certain Alberta lands.

*Scobie* v. *Wallace*, 24 O. W. R. 641, distinguished.

*Wilson* v. *Suburban Estates Co.*, 24 O. W. R. 825, referred to.

Action for damages for alleged false and fraudulent statements by defendant by which plaintiffs were induced to purchase land in the province of Alberta; tried at Orangeville without a jury.

J. Grayson Smith, and A. A. Hughson, for plaintiffs.

C. R. McKeown, K.C., and Geo. Robb, for defendants.

HON. MR. JUSTICE BRITTON:—The defendant, to the knowledge of the plaintiffs, was the agent of the Stewart and Matthews Co., in the buying and selling of western lands.

He also employed other agents in doing so. These sub-agents, in some cases—perhaps in all cases—in the vicinity where defendant operated, were appointed by him. These agents were allowed a commission of fifty cents an acre on land sold.

The defendant got his commission on all sales by himself or made by these sub-agents. This commission varied according to price and perhaps locality. Particulars were not given.

The plaintiffs owned a half section of land which was called on this trial "the Milk Creek Land."

The defendant in June, 1909, purchased this half section from the plaintiffs. That transaction was completed and has nothing to do with what is in controversy in the present suit, unless it may be thought that defendant bought this, with the object, or in the view of—at least in part—inducing the plaintiff to buy land which defendant had to sell.

The company owned sec. 13 T. 11, R. 17, west of 4th meridian province of Alberta.

The first thing that took place after the sale by plaintiffs of the Milk River land, was the appointment, by defendant, of the plaintiff Menary as agent, and the calling the price of sec. 13 $9.50 an acre with the allowance off of fifty cents an acre as agents' commission. Neither one of the plaintiffs seems now to know anything about the fifty cents as commission, and I am satisfied that the defendant Campbell did not know anything about the appointment of Menary as agent.

The price of sec. 13 was $9 an acre, neither more nor less.

But Menary did sign an agreement (Ex. 1) with the Stewart Matthews Company, dated 9th June, 1909, by which Menary agreed to become their agent.

Then, and dated 10th June, 1909, the plaintiffs signed an agreement to purchase sec. 13 at $9 an acre. This was with Stewart Matthews Co.

The plaintiffs appear to treat that agreement of the 10th of June as the concluded agreement, and they say that it was obtained by fraudulent and untrue representations; and to cover up these, and to shew actual fraud on the part of the defendant, they put forward what, as they say, amounted to misrepresentation when Menary went to look over the land.

This action is founded upon fraud.

Rescission is not asked. The plaintiffs have paid a considerable portion of the purchase-money; but the plaintiffs ask damages because of the misrepresentation as to value and character and condition of the land.

If the representations made by defendant were not untrue to the knowledge of the defendant, or if not recklessly made by the defendant, desiring these to be acted upon, and not caring whether true or false, the plaintiffs cannot recover.

If the inspection of premises was not complete it was not the fault of the defendant. The plaintiff Menary certainly had every opportunity to make such examination as he desired.

Unless satisfied that there was a conspiracy between the man Tainter and defendant, I cannot find that anything was said or done by either, of which the plaintiffs can complain. Menary knew that Tainter had acted as agent for defendant or defendant's company.

Upon the defendant being informed of Menary's intention to go West, he gave to Menary a letter addressed to Tainter introducing Menary as an applicant to purchase the land in question. This letter Menary had when he met Tainter at Taber, the latter part of June. Menary complains that Tainter was told that he, Menary, was only an applicant, when, in fact, this land had been reported to Tainter as land sold, and so Tainter was not diligent to shew Menary the land.

There was haste, and Menary joined in the hurry. I do not think there was fraud. I am not able, upon the evidence, to find that all the representations alleged by the plaintiffs to have been made by the defendant, were in fact made, and I cannot find that the representations actually made by the defendant were either false to the knowledge of the defendan or recklessly made by him not knowing or caring whether these were true or false.

The facts here are quite different from those in *Scobie* v. *Wallace*, 24 O. W. N. 641, but are more like those in *Wilson* v. *Suburban Estates Co.*, 24 O. W. N. 825.

The defendant was only agent, but as such he would be liable for any fraud perpetrated by him. It would, in my opinion, have been open to the plaintiffs to have withdrawn their offer after inspection, if the land was not in fact according to representation.

The document signed by plaintiffs, although, in form, an agreement, was in fact an offer, and could have been withdrawn before acceptance. The defendant's statement was that although the land was reported as sold, the offer was being held by his principals pending the inspection by plaintiffs.

The trial occupied a long time owing to the great amount of evidence taken. The evidence as to the kind and quality of this land was very conflicting. It was, however, clearly established that the location was good, and that the section as a whole is admirably adapted for mixed farming.

The weight of evidence was that one-half of the section is excellent wheat land, only the quality of one-quarter section could be designated poor, and that quarter is good pasture-land, and has water very valuable to the farm as a whole. The other quarter is fair land. Prices in that part of Alberta have dropped, but at the time of plaintiffs' purchase, the price they agreed to pay could not be called excessive.

The action will be dismissed and with costs, save and except costs of commission, and evidence taken thereunder. These costs should not be allowed to defendant.

Thirty days' stay.

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MASTER IN CHAMBERS. DECEMBER 2ND, 1913.

## MUNN v. YOUNG.

5 O. W. N. 426.

*Pleading—Statement of Defence—Motion to Strike Out as Irregular—Specially Endorsed Writ — Appearance Entered and Affidavit Filed—No Notice of Trial by Plaintiff—Defence Delivered After Lapse of Ten Days from Appearance—Not Irregular—Costs—Con. Rules 56, 112, 121.*

HOLMESTED, K.C., *held*, that a statement of defence filed after the time limited by Con. Rule 112 is not only not a nullity but is not irregular.

*Smith* v. *Walker*, 5 O. W. N. 410, considered.

Action was commenced by writ specially endorsed. The defendant entered an appearance and filed an affidavit disclosing his defence as required by Rule 56.

The plaintiff did not elect to proceed to trial as provided by Rule 56 (2).

After the lapse of ten days from appearance the defendant filed a statement of defence. The plaintiff moved to set this aside as being irregular in not having been filed within the ten days limited by Rule 112.

M. Wilkins, for plaintiff.

M. L. Gordon, for defendant.

HOLMESTED, K.C.:—According to the case of *Smith* v. *Walker*, decided by Kelly, J., last week, notwithstanding that the defendant had filed an affidavit stating and swearing to a good defence, the plaintiff might properly have entered judgment for default of a defence at the expiration of ten days from appearance because the defendant had omitted to go through the form of filing another defence not under oath, but the plaintiff did not do this; neither does it appear that he took any other proceeding consequent on the defendant's default. In the meantime, while the plaintiff was deliberating how he was to get on with his action a statement of defence is filed. In ordinary actions a defendant can no more file two defences than a plaintiff can file two statements of claim; but an action on a specially endorsed, is under the new Rules an exception to that rule. In such actions a defendant is first required to file an affidavit shewing his defence and swearing to its truth. This, for the purposes of Rule 56, is to all intents and purposes his statement of defence, and he cannot file any further statement of defence, except to set up any matter of defence not disclosed in his affidavit, and even such a statement of defence can only be filed by leave: Rule 56 (5). If, however, the plaintiff does not give notice of trial within 5 days then the defendant's affidavit (according to the decision in *Smith* v. *Walker*) ceases to be a defence, and the plaintiff can no longer treat it as a defence, and if he does so, his proceedings would be irregular and would be set aside. And the defendant may no longer treat the affidavit as his defence, but must file an unsworn "statement of defence" which, it is true, may merely reiterate (as does the defence now in question) the matters set out in his affidavit, or may set up any other matters to which he is unable to pledge his oath—otherwise the plaintiff's proper course is to sign judgment for default of defence. Rule 112 provides that the defendant may file a statement of defence or counterclaim within ten days after his appearance, and the question is whether

the defence is irregular because it was not filed within that time: Rules limiting time for pleading have been interpreted to mean that the pleading may be regularly filed without leave after the time limit has expired, if in the meantime the opposite party has not taken any step in the action consequent on the default. Where such a step has been taken then it would seem that the pleading cannot be filed so as to intercept that proceeding, except by leave and on such terms as may seem proper: *Snider* v. *Snider,* 11 P. R. 34; but where no such proceeding has been taken by the opposite party, then notwithstanding the time allowed by the Rules for filing the pleading has expired it may still be regularly filed without leave: *O'Connell* v. *O'Connell,* and *Sampson* v. *O'Donnell,* 6 L. R. Ir. 470, 471, and in *Wright* v. *Wright,* 13 P. R. 268 it was held that it might be so filed notwithstanding that it had the effect of re-opening the pleadings. It seems perfectly clear that a belated pleading can not be treated as a nullity: *Graves* v. *Terry,* 9 Q. B. D. 170; *Gill* v. *Woodfin* (1884), 25 Ch. D. 707; *Gibbings* v. *Strong* (1884), 23 Ch. D. 66; except perhaps where proceedings have been commenced consequent on the default: see *Snider* v. *Snider, supra,* though even that is doubtful because in *Gibbings* v. *Strong, supra,* the defendant applied after the time had expired to deliver a statement of defence, which application was refused and no appeal was taken, and the plaintiff set down the action to be heard *pro confesso,* and on the hearing the defendant again presented his defence which Fry, J., refused to consider, but the Court of Appeal (Selborne, L.C., and Coleridge, C.J., and Cotton, L.J.) varied his judgment, Lord Selborne saying, "Where no defence has been put in then by Order XXIX., R. 10 of the Rules of 1875 the plaintiff may set down the action," and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff entitled to. "This means that the Court is to exercise some judgment in the case; it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegations in his statement of claim, he appears to be entitled, and if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. . . . If . . . it contains a substantial ground of defence the Court will not take the circuitous course of giving judgment without regard to it, and obliging the defendant to apply under Rule 14 to

have that judgment set aside on terms, but will take steps to have the case properly tried on the merits."

Under our Rules the case is quite different, and notwithstanding a sworn defence is on the files a plaintiff is compelled in certain events to ignore it and sign judgment by default, and the defendant is put to the circuitous process of applying to set it aside as it is very hard to suppose that such a judgment could with any regard to justice be allowed to stand.

The defence in question having regard to the cases above referred to, is clearly not a nullity, though filed after the time limited by Rule 112, and in the circumstances in which it was filed, I am of the opinion that it cannot be said to be irregular. The motion therefore fails, but in consideration of the difficulty attending the introduction of a new procedure, I think the costs of the motion should be in the cause to the defendant.

Rule 121 allows a defence to be filed at any time before a defendant is noted in default, but that Rule applies where a defendant can be noted in default; in the present case according to the decision in *Smith* v. *Walker* he could not be noted in default. Rule 121 applies apparently only to actions where judgments cannot be signed, and here judgment could have been signed.

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HON. MR. JUSTICE MIDDLETON. DECEMBER 5TH, 1913.

## WHELAN v. KNIGHTS OF COLUMBUS.

5 O. W. N. 432.

*Fraternal Society — Amendment to Constitution — Institution of Superior Degree — Jurisdiction of Court — No Property Rights Involved—Stated Case—Dismissal of Action—Costs.*

MIDDLETON, J., *held*, that the Court had no jurisdiction to enquire into the organization or management of a fraternal society as long as no property rights were affected.

*Rigby* v. *Connoll*, 14 Ch. D. 428, followed.

Action for a declaration that the establishment by the defendant society of a "fourth degree" as a branch or offshoot of the society and the provisions made for the government of such degree were illegal and *ultra vires* the powers of the defendant society.

The action was originally entered for trial at Ottawa, but by consent of counsel argued upon a stated case at Toronto on the 28th November, 1913.

J. J. O'Meara, for plaintiff.

D. O'Connell, for defendants.

HON. MR. JUSTICE MIDDLETON:—The defendant society is a fraternal organization incorporated by an Act of the General Assembly of the State of Connecticut, passed March 29th, 1882, and since then several times amended. This Act in its final form appears in the pamphlet filed at p. 18, as embodied in the joint resolution of June 27th, 1907. The object for which the body is created is partly insurance and partly purely social and fraternal. The corporation is given power to adopt a constitution, by-laws, rules and regulations, and from time to time to alter, amend and repeal the same, provided that it shall continue to be governed by the constitution then already in force under a similar authority conferred by earlier Act, until such constitution, by-laws and regulations shall have been altered or changed in manner provided by such constitution, etc. Power is given to the corporation to establish subordinate councils, or rather branches and divisions, thereof, in any town or city of its state of origin or any other state of the Union or any foreign country.

The constitution provides that the order shall be governed by a supreme council and state council; and each local body is created a subordinate council having certain limited powers.

Membership is limited to "practical Roman Catholics," who are initiated, and, according to the original constitution, receive three degrees on passing certain ceremonial rites, the nature of which has not been stated, but which no doubt import certain moral obligations.

The order has a large membership in Canada, but it has never been authorized to transact and does not transact insurance business in this Province, its sole function in Ontario being fraternal, or, as defined by the constitution "of promoting such social and intellectual intercourse among its members as shall be desirable and proper, and by such lawful means as to them shall seem best."

The plaintiff has been a member of the organization since the year 1900. He duly paid his initiation fee, $10, and was

admitted to the first, second and third degrees of the order, and has ever since been a member in good standing.

It was deemed desirable by some of those interested in the association to institute what is known as "the fourth degree." This degree was intended to be a select body within the parent association. Rules and regulations relating to this degree were in effect from July, 1902; but new and revised rules were passed relating to it in 1910. Constitutional amendments were made relating to this degree. Under these and under the constitution of the fourth degree, the supreme power and control over the degree is vested in the Board of Directors of the body, and a Board of government for the fourth degree was established, known as the National Assembly, with subordinate district and local assemblies, each having its own sphere of government and its own officers.

I was told upon the argument that the fourth degree was established for the purpose of inculcating a spirit of patriotism, and that for that reason the membership is, as appears by the constitution relating to the fourth degree, confined to citizens of the respective countries where membership is sought. There are certain other requirements which make the fourth degree more or less an eclectic body. Upon initiation into this degree a further special fee is required.

The plaintiff attacks all this, mainly upon two grounds. In the first place he says that this is an attempt to confine some of the privileges which ought to belong to every member of the order, to certain members only; secondly, that the amendments by which this fourth degree is organized are fundamentally wrong, inasmuch as they hand over to the board of directors and to the different fourth degree legislative bodies certain portions of the legislative and administrative powers which by the constitution are, and ought to remain, vested in the governing bodies of the order itself.

The defendants in the first place deny the right of the Court to enter into this controversy at all; relying upon the line of authority of which *Rigby* v. *Connoll*, 14 C. D. 428, is the leading case.

This contention of the defendants must, I think, prevail. It is not shewn that any property right is affected; and, in the absence of this, the Courts have no jurisdiction.

I listened to the arguments on the other question with much interest; and, if it is any satisfaction to those concerned, I may say that I am rather strongly of the view that

in what was done there was nothing unconstitutional or improper. I can see nothing to prevent the formation in a fraternal and social organization such as this of a subordinate body or organization which confines its membership to those qualified by membership in the parent society and which is practically a self-governing body, subject to some supervision and oversight remaining vested in the parent society.

This matter has come before me as a stated case. The questions submitted in this case do not touch the point upon which the case must be determined, that is, the absence of any jurisdiction in the Court; and I do not think the Court ought to deal with a matter over which it has no jurisdiction to entertain an action, when that matter is submitted to it in the form of a stated case. The parties thus fail to obtain any answers to the questions submitted, and I think this affords sufficient reason to refuse to award costs.

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HON. R. M. MEREDITH, C.J.C.P. DECEMBER 5TH, 1913.

## STEVENS v. MORITZ.

5 O. W. N. 421.

*Vendor and Purchaser—Action for Specific Performance—Incomplete Agreement — Part Payment by Mortgage—No Provision as to Mode or Terms of Payment—No Demurrer Taken—Costs Limited Accordingly.*

MEREDITH, C.J.C.P., *held*, that where a memorandum of agreement for the purchase of certain lands provided that part of the payment only was to be in cash, "the balance to be arranged by mortgage bearing 6 per cent. interest," the agreement was unenforceable as no provision was made for the mode or time of payment of such mortgage. *Reynolds* v. *Foster*, 23 O. W. R. 933, followed.

That as this defence should have been raised as a question of law on the pleadings, the costs of such a proceeding only should be allowed to defendant.

Action by vendor for specific performance of an agreement to purchase certain lands.

C. L. Dunbar, for plaintiff.

H. Guthrie, K.C., for defendant.

HON. R. M. MEREDITH, C.J.C.P.:—The complete absence of the word demurrer from the legal vocabulary of the present day, is, doubtless, the result of giving a dog a bad name;

a demurrer was a commendable time-saving and cost-saving proceeding; but it was also put to highly technical time-losing and cost-increasing uses, and thus came into such bad repute that even the name seems to have become unbearable and was obliterated; and yet its better part still remains under a new name and ought always to remain, by whatever name it may be called, though "demurrer" still holds the mind whatever the tongue may say. And that this case ought to have been heard upon demurrer, speedily and inexpensively, instead of being, in the first instance, brought down to trial involving much delay, much greater cost, and an unfortunate conflict of testimony between equally highly reputable fellow-citizens, I consider obvious; so obvious that I would not have mentioned it except that it may be necessary to do so in dealing with the question of costs.

At the close of a hard-fought trial upon a question of fact involving such a conflict of testimony as I have mentioned, it turns out that there is a vital preliminary question to be considered; a question which might, and ought early in the action, to have been raised and determined under that practice which is now the equivalent of a general demurrer. If the demurrer were held to be good the action was ended; otherwise the parties would be obliged to go to trial; so that, plainly, it was not the better course to bring all questions down to a trial, where, after all, the demurrer must be considered, and, if given effect, to render all the proceedings upon the other question worse than useless.

The question raised upon the demurrer is whether, admitting all that the plaintiff alleges as to the extent of the agreement entered into respecting the sale and purchase of the land in question, there is an enforceable contract for the purchase of it.

There is no dispute as to the facts on this branch of the case; the whole agreement, it is said on both sides, is contained in the writing in question, and so no question under the statute of frauds can be raised; there is nothing that is not in writing; and the single question is whether that writing contains all the essentials of an enforceable agreement for the sale of land.

This question is further simplified, too, by the fact that the only point in it is whether the want of any definite agreement as to the terms of payment of that part of the price of the land to be secured by a mortgage upon it renders the agreement unenforceable because incomplete.

That the omission is an omission of an essential part of a contract I can have no doubt; and if so how can there be specific performance? Specific performance of what? Of what in respect of the mortgage? It must be of something the parties had never agreed upon. It must, in that respect, be a Court made contract not the contract of the parties.

It does not follow that if the plaintiff cannot have specific performance in this case, no one can have specific performance in any case in which the parties have not expressly agreed upon all the details of the sale; that is far from being so; much may be tacitly agreed upon; and the law sometimes covers terms which need not be expressed. But where essential things are not provided for expressly or tacitly or otherwise there is not a completed agreement; there is not an enforceable contract.

The fact that delivery and payment are generally concurrent acts cannot apply, because, expressly, in this case, payment is to be of only about one quarter of the price, the "balance to be arranged by mortgage bearing 6% interest."

It is plain, from that which is expressed, that neither party was to be at liberty to fix the mode and time of payment under the mortgage. That was to be "arranged" by the parties; and was a thing of substance, of very considerable importance, about which there might be wide differences of opinion; even eventually an inability to agree upon them.

The subject was discussed recently in the case of *Reynolds* v. *Foster*, 23 O. W. R. 933; and so I shall not now say anything more upon the subject which would be but a repetition of that which was in that case said.

On this ground the action will be dismissed, and the defendant may have his costs of it, limited however to such only as relate to this branch of the case and which would have been incurred if the speediest mode of bringing this question alone up for consideration had been taken.

The other branch of the case involves several questions of considerable difficulty such as the relationship of the witness Oates to the parties in the transaction; whether any misrepresentation respecting the land was made by him; and if so what would be the effect of it; questions which need not now, and so, as I think, ought not now, to be considered; nor anything further said upon the subject except this: that there was nothing in the demeanour of any of the witnesses which in itself would incline me to discredit him or her.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 12TH. 1913.

## ARKLES v. GRAND TRUNK RW. CO.

5 O. W. N. 462.

*Release—Action for Negligence—Personal Injuries—Release Executed in Hospital—Alleged Fraud or Undue Influence—Mental Condition of Plaintiff—Evidence—Dismissal of Action.*

FALCONBRIDGE, C.J.K.B., dismissed an action brought against defendant railway company for damages for alleged negligence upon the ground that plaintiff had released defendants from liability by instrument in writing, and there was no evidence to justify a finding that such release had been procured by fraud or undue influence.

*Gissing* v. *Eaton*, 25 O. L. R. 50, referred to.

Action tried at Owen Sound, to recover damages for injuries said to have been sustained by the plaintiff owing to the negligence of the defendants. The defendants filed the usual pleadings denying negligence and alleging contributory negligence, and further setting up a release under seal. The plaintiff replied that the release had been obtained by fraud and undue influence on the part of the defendants and their agents, and therefore was not binding upon him.

W. M. Wright, and J. A. MacDonald, for plaintiff.

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

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I proceeded to try the issue on the release first and reserved judgment thereon meaning to go on and try the remaining issues with the aid of the jury, so that the case would be finally disposed of as far as the trial was concerned. Then counsel for defendants made an application to put off the trial until the next jury sittings for the purpose of having an X-ray examination of the plaintiff. This application I granted on certain terms as to costs to be paid by the defendants.

As I have stated above, I was extremely anxious to dispose of the case once for all, but now, inasmuch as I have a strong view regarding the portion of the case which I tried myself I conceive it to be my duty to decide that issue before the parties incur any more expense.

The defendants filed a release under seal, the consideration being $40 and payment of hospital fees, and of the physician's services in connection with the plaintiff's injuries. Plaintiff is not a marksman but signs his own name and

he also endorsed two cheques for $20 each and his wife got them cashed. The cheques themselves say on their face "this amount being in final settlement of claim known as number 2731 on the records of the claim's agent of this company."

The evidence may be summarized as follows: The plaintiff swears, "I don't mind putting my signature there, I don't remember seeing Heyd (the Grant Trunk agent at Owen Sound) at the hospital. I had not consulted a lawyer or made any claim on the Grand Trunk in the hospital. I don't remember getting the money on the cheque." His wife swears that "his memory is not of much account. He would talk with me one day and argue with me the next day that I had not been there the day before." Oscar Arkles, son of the plaintiff, says that "when he was in the hospital, some times he would know me and some times not; he does not remember things. I did know what was in them when I took the cheques to mother. Father told me to take them home to mother." Arthur Little said that he knew plaintiff and saw him three or four times in the hospital and that the plaintiff did not recognize him. Samuel Graham knew him a week or two and saw him about two weeks after the accident and thinks that plaintiff knew him.

For the defence was called Brown, foreman for Wright and Company. Plaintiff told Brown he had made a settlement. Brown had warned him not to make any settlement until he went out. Dr. Dow was sent for by Wright and Company. "I never knew there was anything the matter with the man mentally. He recognized me from day to day." (He was 50 days in the hospital). J. G. Heyd, Grand Trunk agent at Owen Sound, says plaintiff was certainly sensible enough when he and Shepherd, the claims agent, were there. Shepherd handed the release to the plaintiff to read, and also read it over to him and asked him "Do you understand it?" The answer was "Yes, I guess it is all up with me now."

Shepherd, the claims agent, "I read it to him and he read it over and signed it. He recognised me. I told him we would not recognize any liability, but were willing to help him out financially. He said 'Is that the best you can do for me,' and I said 'Yes.' He read the release and handed

it back to me and I read it over to him and asked him if he fully understood it. He answered 'Yes, I understand, it is all up with me' (meaning that that was all he expected to get)." Miss Stella Benton, a remarkably alert and intelligent witness, was the nurse in charge of the plaintiff; during the last two or three weeks "the condition of his mind was all right."

It is not possible for me upon this evidence to find that the lease was obtained by fraud and undue influence. I find, on the contrary, that plaintiff fully understood what he was doing and did accept the sum of $40 in full settlement of the cause of action. I have consulted the following cases: *Doyle* v. *Diamond Flint Glass Co.* (1904), 8 O. L. R. 499; same case in appeal (1905), 10 O. L. R. 567; *Clough* v. *London and North Western Rw. Co.* (1871), L. R. 7 Ex. 27; *Johnson* v. *Grand Trunk Rw. Co.* (1894), 21 A. R. 408; *Disher* v. *Clarris* (1894), 25 O. R. 493; and finally *Gissing* v. *Eaton*, 25 O. L. R. 50, which is the last word on the subject.

The action will be dismissed with costs if exacted.

Thirty days' stay.

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HON. MR. JUSTICE LATCHFORD. DECEMBER 15TH, 1913.

## RE CLOONEY.

5 O. W. N. 513.

*Will—Construction—Payment to Beneficiary on Attaining Age of 23—Divesting Clause—Direction for Investment of Corpus in Interval—Costs.*

LATCHFORD, J., *held*, that where a testatrix made a gift to a beneficiary when he should attain the age of 23, and directed the corpus to be invested for him in the meantime, the executors should, not later than one year from the death of the testatrix, set aside and invest such sum.

M. H. Ludwig, K.C., for executors.

N. B. Gash, K.C., for children of Michael Ryan.

A. E. Knox, for children of Mary Ann and Josephine Flanagan, and for Daniel Flanagan.

J. R. Meredith, for John C. Flanagan.

Application for the opinion and advice of the Court upon questions arising, or said to arise, under the will of Kate Clooney, late of the city of Toronto, married woman, deceased.

HON. MR. JUSTICE LATCHFORD:—The paragraph in question directs the trustees and executors to pay "to John Clooney Flanagan $5,000, when he shall attain the age of 23 years."

The legatee is not yet twenty-one years of age.

The testatrix directed that the "vested or expectant share of any infant" under her will shall be invested by her trustees during the minority of any child, who, if of the age of 23 years" would be entitled to a share under the will, and empowers the trustees to apply the whole or any part of the income of the expectant share of such minor for or towards his or her support, maintenance and education, with liberty to pay the same at their discretion to the guardian or guardians of such minor . . . and shall accumulate the residue (if any) of the said income by investing the same, and the resulting income thereof to the intent that such accumulation shall be added to the principal share . . . and follow the destination thereof."

The trustees are also given power to resort to the accumulations of any preceding year, or years, and to apply the same towards the support, education or maintenance of any person for the time being presumptively entitled thereto, and may further at their discretion raise the whole or any part of the expectant share of any minor, and apply the same for his advancement or benefit as the trustees shall think fit.

In case of a deficiency of assets there is to be a proportionate abatement of the pecuniary legacies other than that to John Clooney Flanagan. Should this legatee die without leaving issue there is a gift over of the bequest made to him by the will.

It is quite clear that John Clooney Flanagan, if he attains the age of twenty-three, will be entitled to the $5,000. The trustees have, in the meantime, the duty cast upon them of investing the $5,000, and the discretion of applying for his maintenance and education the whole or any part of the income of his expectant share. There is nothing in the will fixing the time in which the conversion of the estate of the deceased is to be made. The trustees accordingly have the

usual term of one year from the death of the testatrix. Not later than one year after her death it is their duty to set aside and invest the sum of $5,000 to provide for the legacy to John Clooney Flanagan. They may pay the income, or any part of it, for his benefit until he attains twenty-one and to him from that time until he attains the age of twenty-three, when he will be entitled to the $5,000, and any part of the income not expended as directed. Payment of the principal even should not be made to him when he attains twenty-one. His interest in all but the income becomes divested if he should die without leaving issue before he is twenty-three, and passes to others by express terms in the will.

There will be judgment accordingly. In matters so plain as this, the advice of the Court should not in my opinion be sought. I cannot, however, say that the application is improperly made. But the costs should not come out of the legacy to John Clooney Flanagan; they should be paid out of the general estate of the testatrix.

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HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 13TH, 1913.

## HUDSON v. NAPANEE RIVER IMPROVEMENT CO.

5 O. W. N. 467.

*Negligence—Death by Drowning—Breaking of Dam—Action against River Company—Findings of Jury—Negligence—Evidence—Contributory Negligence—Voluntary Assumption of Risk—Dismissal of Action.*

FALCONBRIDGE, C.J.K.B., dismissed an action brought against a river company for their alleged negligence causing the death of one George Hudson by drowning in a flood of water caused by the breaking of one of defendant's dams, holding that no negligence on the part of defendants had been established, and that in any case the primary cause of the accident was the contributory negligence of deceased in persisting after warning in endeavoring to cross the swollen stream.

Action by the mother and administratrix of the estate of George Hudson, deceased, to recover damages for his death said to have been caused by the negligence of defendants, tried at Napanee.

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

W. S. Herrington, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The defendants were authorized by the statute, 29-30 Vict. (1866) ch. 84, and Amending Acts, to construct and maintain dams and reservoirs for the purpose of improving and increasing the supply of water in the Napanee River, and they erected, amongst others, a dam at Fifth Deep Eau Lake in the County of Frontenac which dam penned back water on said lake for some feet.

It was proved at the trial, and it was manifest from the demeanor of some of the witnesses that there was a good deal of ill-feeling in the neighborhood against the company arising, one witness said, from unsanitary conditions said to have been produced by flooding land which would have been naturally dry. Their original dam went out in 1908, and three years ago the south end of a new structure went out under circumstances which made it reasonably clear that dynamite or some other high explosive had been maliciously used for the purpose. The defendants offered $500 reward, but no one was apprehended and the hole was repaired. On the 16th April last it gave way again, as the evidence shews and as the jury have found, as the result of an explosive. On this last occasion a large quantity of water was released and the stream below the said dam became much swollen. About a quarter of a mile down the river there is a bridge known as McCumber's forming part of a travelled public highway in the township of Hinchinbrocke. The water overflowed part of the highway, and approaches to the said bridge. The plaintiff's son, George Hudson, attempted to cross the bridge and approach and was carried away by the force of the water and was drowned. The plaintiff now brings her action as mother and administratrix of said George Hudson, claiming that his death was caused by the neglect and carelessness of the said defendants: (1) in erecting and maintaining an improperly constructed and insecure dam; (2) in not taking proper precautions to prevent the said dam from breaking; (3) and the said dam having broken, in not taking precautions to repair and make safe the highway at places where the stream crossed it.

The evidence completely failed to establish any of these allegations. The dam was properly constructed, and the jury by finding that the negligence of the defendants consisted "by not having watchmen" negatived any other suggestion of negligence.

At one time a watchman had lived in a house at the dam, and after his death, on the 14th of July, 1912, his widow lived there until the autumn and the house was burnt by someone unknown about a month after she left, since which time there has been no watchman on the premises. It will be observed that the finding of the jury is "by not having watchmen." The "a" before "watchmen" has been struck out, therefore their finding must mean that one watchman must be there day and night. This is not put forward in the statement of claim as an item of negligence unless it is covered by (2).

I think, also, that the evidence shews that George Hudson, who knew of the break in the dam, was guilty of negligence causing the accident in voluntarily attempting, with knowledge of the risk he ran, to pass the place of danger. The evidence of Mrs. McCumber on this point is as follows: "I met Hudson a little way south-west of the bridge. He stopped to ask me if that was the right road to Wagarville, and I said 'Yes.' I had seen him driving through some backwater on the highway already. I asked him if he had heard of the dam, and he said 'Yes,' and I said it had gone out by some means last night, and I told him water was running round each end of the bridge and there were some rails and floodwood at the other side, and I did not know whether he could get through or not. He said he did not mind the rails if the bottom was all right, and I told him it was always hard bottom there where the water was running round. We waited to see how he would get there. He went through the first approach and on the bridge, and going off the bridge to the approach on the far side the horse seemed to go right down deep and the buggy swerved around and he went out of the buggy and cried out for help."

In this state of facts I am of opinion that the plaintiff cannot recover and I dismiss the action—under all the circumstances without costs.

Thirty days' stay.

HON. MR. JUSTICE LENNOX. DECEMBER 15TH, 1913.

## SMITH v. WILSON.

5 O. W. N. 550.

*Master—Appeal from Report of—Vendor and Purchaser—Parnership—Execution Creditors—Value of Property—Profits—Registration of Deed—Costs—Reference Remitted.*

LENNOX, J., in an appeal from the report of the Local Master at Ottawa in a vendor and purchaser matter, made certain findings of fact and remitted the matter to the Local Master for further report.

Appeal by purchaser in a Vendors and Purchasers matter from the report of the local Master at Ottawa.

J. E. Caldwell, for purchaser.

W. C. McCarthy (by order of the Master), for execution creditors.

Magee, also appeared for certain creditors.

HON. MR. JUSTICE LENNOX:—The matter comes before me by way of appeal from the report or judgment of the local Master.

I find and declare that the property in question is partnership property, that the vendor and purchaser each holds his share subject to the mortgage, that subject to the mortgage each party is entitled to a lien upon the property and to be repaid whatever sum he put into it for building, improvements, upkeep, betterments, taxes or other outlays with interest, and that the difference between the aggregate of these sums and the value of the property is the net profits made by the vendor and vendee by the purchase and handling of the property. I find, too, and declare, that neither party is entitled to any allowance for his labour, management or care upon or in connection with the property, that the proposed deed from the vendor to the purchaser has not been delivered, that the four execution creditors have a lien upon, and are entitled to participate in the vendor's share of the net profits and in the moneys, if any, which he contributed from his own means as aforesaid; but that the sheriff cannot realize upon the vendor's interest, and it cannot be made available without the assistance of the Court; and with the consent and approval of all parties, I declare the total value of the property to be the sum of $5,000.

In order, therefore, to avoid unnecessary expense and with the consent of counsel aforesaid, I order and direct that the

four creditors, who have executions in the sheriff's hands, be and they are hereby added as party claimants in this matter, and that this matter be referred back to the local Master to take an account of the amount of mortgage money charged upon the property, including the interest thereon to the date of taking the account, the amount which each of the parties hereto has put into the property with interest to the date of taking the account and after deducting these several sums from the sum of $5,000 to ascertain and declare the total net profits, and to declare that each of the parties hereto is entitled to and has a share in the property to the extent of one-half of these net profits, and the sum with interest thereon which he has put into the property ascertained as aforesaid; and that the Master shall certify all these matters to the Court.

And I declare and adjudge that the costs of the counsel appointed to represent the execution creditors shall be paid out of the moneys representing the share and interest of the vendor and the balance shall be paid to the sheriff to be distributed by him according to law among the several creditors of the vendor, who have executions in his hands at the time of the registration of the deed as hereinafter provided; that there will be no costs to the other counsel appearing for creditors; and that the other costs of the proceedings herein shall be borne by the vendor and purchaser in the proportion of their shares as ascertained.

And I also declare and adjudge that upon payment by the purchase of the several sums directed to be paid by him, that he shall be at liberty to register the deed referred to in these proceedings and upon registration thereof at the time of payment to the sheriff the property in question will become and be absolutely freed and discharged of the claims of all execution creditors then having executions in the sheriff's hands against the lands of the vendor.

And I order and direct that if it should happen that executions against the lands of the vendor, other than the four referred to, are placed in the hands of the sheriff pending the final winding up of this matter, these creditors shall be added as party claimants and they shall have a right to be heard before such final winding-up.

The purchaser will be entitled to a certificate of this judgment for registration and to an order staying the said several executions as against the lands in question upon complying on his part with the terms of this judgment.