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CARTWRIGHT, MASTER. DECEMBER 5TH, 1904.

CHAMBERS.

GOODWIN v. GRAVES.

Libel—Pleading — Privilege — Justification — Denial of Innuendo—Motion to Strike out Defences.

Motion by plaintiff to strike out paragraphs 2, 3, 4, 5, and 6 of the statement of defence.

The action was for libel. The alleged libel was a petition to a municipal council for the removal of plaintiff from the office of poundkeeper for alleged misconduct.

Paragraph 2 of the defence denied the innuendo; paragraph 3 was in justification; paragraph 4 alleged that plaintiff improperly impounded the animals of one Reid from malicious motives, and impounded no animals other than those of Reid; paragraph 5 stated that the matters set forth in the preceding paragraphs became and were matters of public notoriety and discussion and interest before and at the dates referred to; paragraph 6, that defendant acted in good faith and without malice and in the public interest, and that the publication was privileged.

I. F. Hellmuth, K.C., for plaintiff.

S. B. Woods, for defendant.

THE MASTER.—From the statement of claim itself it appears that the present is a case of qualified privilege: see Willcocks v. Howell, 5 O. R. 360.

Having regard to Dryden v. Smith, 17 P. R. 505 . . . I see nothing in the statement of defence with which I can properly interfere.

Paragraph 2 denies the innuendo, which defendant is surely entitled to do; whether he can succeed is another matter.

Paragraphs 4, 5, and 6 set up privilege and the grounds on which that claim is based.

The concluding sentence of the 4th paragraph—"From the date of his appointment until the said dates, plaintiff impounded no animals other than those of the said William Reid"—does not go far enough if intended to support the plea of justification . . . but it may be used in support of the plea of privilege. If the alleged fact is not true, then plaintiff has notice that it will be asserted at the trial, and he cannot complain of being forewarned, so that he can either dispute the statement or shew that no other cattle were at large, and let defendant disprove this if he can: see Milling v. Loring, 6 Q. B. D. 190.

Motion dismissed with costs to defendant in the cause.

BOYD, C. DECEMBER 5TH, 1904.

TRIAL.

GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

Railway—Liability of Municipal Corporation to Contribute to Maintenance of Gates at Crossings—Dominion Railway —Constitutional Law.

Action to recover proportion of cost of maintenance of gates, etc., at railway crossings in the city of Toronto. Three questions of law were raised: (1) Whether secs. 187 and 188 of the Railway Act of 1888 were ultra vires. (2) Whether the defendants were parties interested if the Act were not ultra vires. (3) Whether there was jurisdiction on the part of the Railway Committee of the Privy Council to direct the apportionment of cost as to the different crossings, because of defendants making application for different relief.

H. S. Osler, K.C., and D. L. McCarthy, for plaintiffs.

J. S. Fullerton, K.C., and W. Johnston, for defendants.

G. F. Shepley, K.C., for the Attorney-General for Canada.

No one appeared for the Attorney-General for Ontario.

BOYD, C., held that the questions were all expressly or by fair implication involved in the decision of the majority of the Court of Appeal in Re Canadian Pacific R. W. Co. and County of York, 25 A. R. 65, recognized in Re Grand Trunk R. W. Co., 8 Ex. C. R. 349.

Judgment for payment of what is due by defendants with costs.

BOYD, C. DECEMBER 5TH, 1904.

TRIAL.

NASMITH CO. v. ALEXANDER BROWN MILLING AND ELEVATOR CO.

Contract—Sale of Goods—Statute of Frauds—Memorandum —Signature—Conflicting Evidence.

Action for damages for breach of a contract for the delivery of flour.

G. F. Shepley, K.C., for plaintiffs.

E. E. A. DuVernet and A. A. Miller, for defendants.

BOYD, C.—The contract sued on by plaintiffs is not proved as against defendants according to the requirements of the Statute of Frauds. The writings relied on are: (1) the paper of 30th December, 1903, signed by plaintiffs and addressed to defendants, to enter order for 2,000 barrels of flour and to have option for 3,000 barrels more, with delivery as required; and (2) the entry made in the contract book of defendants in these words: "1904, Dec. 30. By 2,000, P. Rose, $4.10—cash discount of one per cent." This appears as one of a series of orders under heading on the page of Nasmith Co., and forms an item of an account which begins in the book in 1899. On the fly sheet of the book is stamped the name of defendants, with words in red ink above it, "New account 1st June, 1902"—the whole surrounded with a circular flourish. The meaning of this is that the company changed its organization at the date mentioned. The book began in 1899, and was carried on as the book of the new concern, and that is why the name and date of the new company appears on the fly sheet. . . .

The statement of the facts carries its own refutation of the name being stamped as a signature. Besides being placed there years before this transaction, it was not put there as in any sense a signature—but as a mark of time when the new proprietorship began. . . .The latest case I have found is Hucklesby v. Hook, [1900] W. N. 45. . . . In brief, the printed name at the beginning of the book cannot be, in Lord Ellenborough's phrase, appropriated to the particular contract as a signature, and it was not placed there in recognition of the contract sued upon: Schneider v. Norris, 2 M. & S. 286, 289. See also Evans v. Hoare, [1892] 1 Q. B. 593; Bluck v. Gompertz, 7 Ex. 862, 866; Torret v. Cripps, 27 W. R. 706.

There are other formidable difficulties discussed in argument, such as this: Supposing sufficient connection between the documents, and that the stamped name were to be treated as a signature, what is authenticated thereby? A contract other than that sued upon, viz., one for no more than the sale of 2,000 barrels at $4.10—cash with certain discount. The written evidence in this case, if all admissible as parts of one contract, shews non-agreement on one essential point, i.e., as to whether it was to be a time contract or one of delivery as required—upon which there is no satisfactorily proved consensus. The very object of the statute is to get rid of the conflicting evidence which arises upon the recollection of parties and their bias towards themselves, in the absence of contemporaneous writing when the contract is made.

Action dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 6TH, 1904.

CHAMBERS.

MOLSONS BANK v. HALL.

Summary Judgment—Rule 603—Action on Foreign Judgment—Defence—Defective Service of Process—Leave to Defend—Terms.

Motion by plaintiffs for summary judgment under Rule 603 in an action upon a judgment recovered by plaintiffs in the County Court of Vancouver, British Columbia.

C. S. MacInnes, for plaintiffs.

E. F. B. Johnston, K.C., for defendant.

THE MASTER.—Defendant's affidavit denies that he was shewn the original of the writ, but admits service of a copy, and that he gave himself no further concern about the matter. He states that he has also a good defence on the merits to the original cause of action, and also a large counterclaim against plaintiffs. Defendant was not cross-examined.

I thought at first that, under the case of Anderson Produce Co. v. Nesbitt, 1 O. W. R. 818, defendant was entitled to defend as of right. But, on sending for the papers, I found that on 9th January, 1903, this judgment was reversed by the Chancellor. . . . The fate of the action is to be seen in 2 O. W. R. 430, and the nature of the attempted defence.

I think, having regard to all the facts of the present case, that the best order to make is to dismiss the motion for speedy

judgment; costs in the cause. But, as a term, defendant must forthwith put in his defence and facilitate the progress of the action in every way. Plaintiffs are to be at liberty to move against the defence to be delivered as they may be advised, notwithstanding the dismissal of the present motion. It may be that under the British Columbia procedure it is not necessary to shew an original writ, even if demanded by a defendant. No other defence is suggested in defendant's affidavit affecting the validity of the judgment.

ANGLIN, J. DECEMBER 6TH, 1904.

TRIAL.

JOHNSTON v. BARKLEY.

Res Judicata—Action to Set aside Assignment of Chose in Action—Previous Garnishee Proceeding in Division Court —Establishment of Validity of Assignment — Parties — —False Evidence—Fraud—Costs.

Action by a creditor of defendant Nora Barkley to set aside an assignment (dated 16th February, 1904) of her salary as a school teacher for 1904 to defendant Zenas Barkley, her father, as fraudulent and void.

J. Leitch, K.C., and J. A. C. Cameron, Cornwall, for plaintiff.

G. I. Gogo, Cornwall, for defendants.

ANGLIN, J.—. . . The only substantial defence is . . . res judicata, founded upon a judgment of the 3rd Division Court in Stormont, Dundas, and Glengarry, in a garnishee proceeding to which the present plaintiff and defendants were parties, plaintiff as primary creditor, defendant Nora Barkley as primary debtor, defendant Zenas Barkley as claimant under the . . assignment. Upon the hearing of the garnishee summons in the Division Court the validity of this assignment was the question for determination. By suppressing material facts and by giving evidence that was wilfully false, the claimant succeeded in securing from the learned junior Judge an adjudication that the garnishees (the board of school trustees) were not indebted to the primary debtor. The primary creditor moved for a new trial. In dismissing this application the learned Judge expresses his opinion that defendant Zenas Barkley is thoroughly honest and that the assignment to him was made in perfect good faith. How such a conclusion was reached, even upon the partial statement of facts before the Division Court Judge,

I find it difficult to understand. A more glaring and palpable case of a fictitious assignment for a fraudulent purpose can scarcely be imagined than that disclosed before me at the trial of this action.

But I am not sitting in appeal from the judgment pronounced in the Division Court, and, since that judgment has "the same force and effect as a judgment of a court of record," with regret I am obliged to give effect to defendants' plea of res judicata.

Though not obtained in a direct proceeding between plaintiff and defendant as such, this Division Court judgment, disposing of proceedings taken under sec. 202 of the Division Courts Act, is, I think, clearly within the purview of sec. 7 of that statute, and therefore equivalent to a judgment of a court of record: see Re Perras v. Keefer, 22 O. R. 672; Radford v. Merchants Bank, 3 O. R. 529; Dingwall v. McBean, 30 S. C. R. 441.

Mr. Leitch strongly urged the fraudulent means taken by the present defendants to procure the judgment in the Division Court, as an answer to their plea of res judicata, the fraud consisting in perjury. I am not able to agree with his contention. . . [Reference to Kerr on Fraud and Mistake, 3rd ed., p. 301; Earl of Bandon v. Beecher, 3 Cl. & F. 497; Cole v. Langford, [1898] 2 Q. B. 361; Baker v. Wadsworth, 67 L. J. Q. B. 300; Flower v. Lloyd, 6 Ch. D. 297, 10 Ch. D. 327; Black on Judgments, 2nd ed., p. 296.]

While constrained, therefore, giving effect to defendants' plea of res judicata, to dismiss this action, I mark my sense of their dishonesty by refusing to allow them costs.

TEETZEL, J. DECEMBER 6TH, 1904.

TRIAL.

SCOTT v. SPRAGUE'S MERCANTILE AGENCY OF ONTARIO, LIMITED.

Fraud and Misrepresentation — Action for Damages for Fraudulent Representations Inducing Contract—Failure to Prove Actual Fraud.

Action for damages for alleged fraudulent representations by defendants' agent by which plaintiff was induced to enter into a contract with defendants for collection of debts and to give his note for $250 as a retainer fee, which, being transferred before maturity, plaintiff was compelled to pay.

J. H. Rodd, Windsor, for plaintiff.

M. K. Cowan, K.C., for defendants.

TEETZEL, J.—Defendants did not at the trial dispute the representations proved by plaintiff, but contended that they were true, and that if in fact they were untrue they were not fraudulently made.

The evidence to prove falsity of the representations was not satisfactory to me, and, while I am in doubt as to the representations made by defendants' agent being literally true, I am clearly of opinion that plaintiff has failed to shew any fraud or deceit on the part of defendants or their agent, and therefore cannot in any event recover in this action.

In this form of action it is necessary for plaintiff to prove actual fraud, which may be done either by shewing that a false representation has been made knowingly or without belief in its truth, or recklessly, without caring whether it be true or false. See Derry v. Peek, 14 App. Cas. 337; Angus v. Clifford, [1891] 2 Ch. 449; Lowe v. Bouverie, [1891] 3 Ch. 82; White v. Sage, 19 A. R. 136.

The evidence in this case falls entirely short of any proof of actual fraud, and the action must be dismissed with costs.

ANGLIN, J. DECEMBER 7TH, 1904.

WEEKLY COURT.

RE BAINSVILLE SCHOOL SECTION.

Public Schools—Formation of New School Section—Award of Arbitrators—Statutory Requirements—Area of Section—Number of Children of School Age—Determination of Arbitrators—Jurisdiction—Power of Court to Review.

Motion by the municipal corporation of the township of Lancaster and others to quash an award of arbitrators appointed by the county council of the united counties of Stormont, Dundas, and Glengarry, under sec. 42, sub-sec. 2, of the Public Schools Act, 1901. The arbitrators, upon the appeal of the present respondents, residents of the unincorporated village of Bainsville and its immediate vicinity, whose petition for the erection of a new school section the township council had refused, decided in favour of the formation of such new section, to be composed of parts of existing sections numbers 1, 2, 4, and 5 of the township of Lancaster.

D. B. Maclennan, K.C., for applicants.

J. A. Chisholm, Cornwall, for respondents.

ANGLIN, J.—Upon the argument of the motion I intimated that, in my opinion, I should not consider the grounds of alleged inconvenience, financial difficulties, etc., urged

in support of the motion. The only other grounds (and upon these I reserved judgment) are that the new school section, contrary to the requirements of sec. 12, sub-sec. 3, of the Act of 1901, is not more than four square miles in area and contains fewer than 50 children between the ages of five and twenty-one years, whose parents or guardians are residents of the section, and that one of the existing school sections will, as a result of the proposed change, be in a like predicament. Upon this ground Liddell, Co.J., one of the five arbitrators, dissents from the impeached award, in which his four colleagues concur. Though there is no express statement by the majority of the arbitrators to that effect, I must assume that, having the statutory requirement in mind, they did actually find either that the new school section contains the specified number of children of school age, or that it comprises an area of more than four square miles, and that school section No. 1, as altered, would still fulfil the statutory requirements, if these should be held to apply to existing sections thus altered.

Mr. Maclennan ingeniously argued that the arbitrators have no jurisdiction to make an award not in conformity with sec. 12, sub-sec. 3, and that for this reason their determinations in regard to areas and school population, as a foundation of jurisdiction, are open to review upon the present motion. Whatever might be the position if there were no evidence upon which the finding I have assumed the arbitrators to have made could be founded, there being some such evidence, I cannot substitute any conclusion I might reach upon a consideration of its value or of its comparative weight for that at which they have arrived. The arbitrators clearly had jurisdiction to enter upon the inquiry which they made into these very matters. No mistake of law or fact is apparent upon the face of the award; neither is any such mistake admitted by the respondents, or by the arbitrators: Re Grant and Eastwood, 22 Gr. 563; Lalla v. Wallbridge, 3 P. R. 157. Assuming that the question is one of jurisdiction, as contended by Mr. Maclennan, I cannot on that account entertain this motion.

The analogy between the position of arbitrators and that of an inferior court in an inquiry into and a finding upon facts essential to jurisdiction, seems very close. The conclusion reached—if based upon any evidence—will not be reviewed in the case of the inferior court upon motion for prohibition: Wilkes v. Home Life Association, 8 O. L. R. 91, 3 O. W. R. 589, 675, 744; nor in the case of arbitrators upon motion to quash or set aside their award. In attempting

such a review, the Court would, in either case, constitute itself an appellate tribunal.

The motion, therefore, fails and must be dismissed with costs.

BOYD, C. DECEMBER 7TH, 1904.

TRIAL.

MACKENZIE v. CITY OF TORONTO.

Municipal Corporation—Waterworks—Right of Outsider to Water Supply—Contract—Easement—Discrimination.

Action for an injunction and a declaration of plaintiff's right to the continuation of a supply of water from defendant's waterworks for the house and grounds of plaintiff outside the limits of the city.

W. Laidlaw, K.C., and J. Bicknell, K.C., for plaintiff.

J. S. Fullerton, K.C., and W. Johnston, for defendants.

BOYD, C.—. . . The rights of plaintiff . . . are supposed to arise under the prosecution of the waterworks system belonging originally to the Yorkville waterworks and passed on by way of transfer to the municipality of Yorkville in 1875. Thereafter the by-law 316 (14th August, 1876), was passed, whereby it was enacted that the village should purchase land in the township of York wherein to establish or construct a reservoir and pay for land whereon the retaining basin was constructed . . . and to lay main pipes from the intersection of Cottingham street and Avenue road to the proposed reservoir. This work was carried through part of the McMaster property, which was procured or acquired in some way (not in evidence) for that purpose, and thereafter water for Yorkville was drawn from this new reservoir in the county of York, through an extension of the pipes from the limits of Yorkville to the new-acquired property. Mr. McMaster's house was supplied with water from the new extension main pipe, but in what way or under what arrangement (if any) is not disclosed. This work was done in the exercise of powers conferred upon the Yorkville Waterworks Co. by its incorporating statute.

The right to get water as claimed in this case depends upon the status of plaintiff deriving under his purchase of the McMaster land. It may be assumed that if the owner of the McMaster land at the time of the construction of the extension of the original waterworks in Yorkville (temp.

1875) had a right to be served from these village waterworks, it would be a long step towards the attainment of plaintiff's suit. I find no trace of the existence of any such right as a legal claim vested in any one who was not an inhabitant of the local municipality of Yorkville. . . .

The property of Mr. McMaster was in the state of intermediate grounds and lands lying between the reservoir and the village, through which the line of pipes conveyed the water from the high land to the lower levels of the village. But, being outside of the municipal limits, there was no beneficial or actual usufruct of the water itself attributable to this mere vicinage to the main service pipe proceeding from the reservoir to the village. Whatever permission, easement, or privilege in the use of the water was conceded to Mr. McMaster, it was a revocable and voluntary concession or contract—not binding upon the original corporation (the Yorkville Waterworks Co.), and indeed not within the purview of its corporate powers.

Now, as the stream cannot rise higher than its source, no more can the claims of a part purchaser of the McMaster estate transcend those of its first proprietor in regard to the water service of the village, now vested in the city of Toronto. . . .

The Toronto authorities had power to discriminate as to non-residents of the city, and to supply water on special terms as to them, in a manner which might not obtain as to resident consumers: Attorney-General v. City of Toronto, 23 S. C. R. 519. . . .

It is not till 1891 that water is supplied through the city to Mr. Janes, the predecessor of the present plaintiff. . . . It does not follow, because the city may have agreed to supply McMaster for some undisclosed consideration, that the like privilege is to be extended to the owners of the various subdivisions of his property. Domestic service of water was, however, supplied, and, it is to be assumed, in the ordinary way as to outside consumers, to Mr. Janes in 1891, and that has been continued to the present plaintiff, on payment of the rates fixed by the city.

But I see no reason for holding that the city could not at any time end the arrangement and refuse to supply water on any terms to those who could not assert the rights of citizenship. The city had power to pass the by-law to cut off the supply on six months' notice to these outsiders, and power to amend that so as to provide for giving no more than 48 hours' notice or no notice, so far as municipal and statutory power is concerned. . . .

In brief, plaintiff is not an inhabitant of the city, his premises are in the county of York, and he can only deal as a stranger with the city for water supply under the section already referred to. Defendants are not bound to deal with him, are not under obligation to supply water to him, and the Courts in such cases do not interfere: Weale v. Weale, 1 J. & W. 358, followed in Wren's Case by Jessel, M.R., of which a note is made in Michael & Will's Law Relating to Gas and Water, 5th ed., p. 313. See also Cooke v. Newton, 38 Ch. D. 56, 14 App. Cas. 698.

Action dismissed with costs.

TEETZEL, J. DECEMBER 8TH, 1904.

CHAMBERS.

SAUNDERSON v. JOHNSTON.

Trial—Setting down—Close of Pleadings—Rights of Defendant—Injunction Motion—Terms of Order.

Appeal by defendant from order of Master in Chambers setting aside defendant's setting down of the action for trial at the Toronto non-jury sittings, and the notice of setting down.

The action was for an injunction, and on 31st October MAGEE, J., heard a motion by plaintiff for an interim injunction and adjourned it till the trial, directing plaintiff to deliver his statement of claim on 14th November and set the action down for trial at the Toronto sittings within two weeks after the close of the pleadings, and that, in default of plaintiff so pleading and setting down, the motion should be dismissed.

The statement of claim was filed within the time limited, and on 16th November defendant joined issue thereon, and, treating the pleadings as closed, under the authority of Malcolm v. Race, 16 P. R. 330, and Hare v. Cawthrope, 11 P. R. 353, set the case down and gave notice thereof, under Rule 542, which provides for either party setting the action down for trial immediately after the close of the pleadings.

W. N. Tilley, for defendant.

H. M. Mowat, K.C., for plaintiff.

TEETZEL, J.—With great deference to the learned Master, I cannot read the order of Magee, J., as imposing any qualification upon or limiting defendant's right under Rule 542. I think, therefore, defendant was entitled to set the case down, and that the appeal should be allowed with costs to defendant in any event.

BRITTON, J. DECEMBER 8TH, 1904.

TRIAL.

GILBERT v. IRELAND.

Costs—Action to Establish Will—Failure of Charges of Fraud and Undue Influence—Costs out of Estate.

An action to establish a will, tried with a jury at Milton. Judgment was given establishing the will and directing probate. The question of costs was reserved.

BRITTON, J.—Should persons who, in opposing probate of a will, set up fraud and undue influence and fail, ever get costs out of the estate, and if so in what cases? . . .

[Reference to Goodacre v. Smith, L. R. 1 P. & D. 359; Orton v. Smith, L. R. 3 P. & D. 23; Tippett v. Tippett, L. R. 1 P. & D. 54; Smith v. Smith, ib. 239; McAuley v. Kemp, 27 Gr. 442; Aylwin v. Aylwin, [1902] P. 203; McFadyen v. McFadyen, 27 O. R. 598; Wilson v. Grant, 22 Gr. 39.]

Upon the peculiar facts and circumstances which came out upon the trial, and considering fairly the conduct of the beneficiary, I think the case is well within the rule by which the Court allows costs out of the estate, and I so order as to all the parties.

BOYD, C. DECEMBER 8TH, 1904.

TRIAL.

AMES v. CONMEE.

Broker — Purchase of Shares for Customer on Margin — Moneys Advanced to Keep up Margins — Recovery — Instructions—Usual Course of Dealing—Practice of Brokers —Discharge of Customer—Obligation of Broker to Sell— Several Orders Included in One Contract—Interest.

Action by brokers against a customer to recover moneys paid to keep up margins on shares bought by plaintiffs for defendant, and interest thereon.

D. E. Thompson, K.C., and W. N. Tilley, for plaintiffs.

C. Millar, for defendant.

BOYD, C.—A person who employs a broker to act for him in the purchase of stock is taken to be aware of the usual course of dealing in such cases and to authorize his agent to act in accordance therewith: Sutton v. Tatham, 10 A. & E.

27, 29; Grissell v. Bristowe, L. R. 3 C. P. 112. The rule of law further appears to be that if the instructions are of such uncertain terms as to be capable of different meanings, and the agent bona fide adopts one which is in accordance with the ordinary course of business, the principal cannot afterwards disavow the act and authority of his agent, because some other outcome was in his mind: Ireland v. Livingston, L. R. 5 H. L. 395, 416.

Having acted under instructions, the broker is entitled to be indemnified by the principal against loss or liability properly incurred by him as agent in the course of the particular transaction, and that even though it be of a merely speculative character, so long as it does not trench on illegality: Thacker v. Hardy, 4 Q. B. D. 685; Forget v. Ostigny, [1895] A. C. 318.

Plaintiffs in this case were instructed to buy stock (of named company) for defendant. He was told that it could be purchased at 30½, and he said he was prepared to risk $3,000 and take that in stock. He was told that would be margin for 300 shares of the stock—a ten point margin. This much defendant recollects. Fraser, acting for plaintiffs, says that defendant wanted the stock to be carried, on putting up a deposit, and Fraser then said that he would have to put up ten per cent. margin and maintain it. It is, however, doubtful whether the maintaining the margin was discussed between them. Defendant says he understood he was giving $3,000 to buy the stock and that he would have no further liability. . . . But, as he was informed that these 300 shares were being dealt with on a 10 per cent. margin, each share being for $100 and purchasable at 30½, he must be taken to have knowledge that his payment would not cover the price of the shares.

Now, the order was in effect to acquire 300 shares, and the duty of the broker was to do what would be required to perfect that order, and this was done by his advancing other part of the price and obtaining the rest by repledging with the Philadelphia broker through whom the purchase of the stock was concluded. This advance of money on account of defendant, though not, in terms, discussed, was justified by the law and practice of brokers: Bailey v. Williams, 7 C. B. 885.

The brokers thus came under obligation to carry the stock for defendant, and were liable for and had expended the balance of the price over and above the $3,000 payment made by defendant.

I find no sufficient evidence of any discharge of defendant from the obligation to save harmless the agents from the balance due on this account. . . .

The parties were at arm's length in December, 1902, and if the shares then sold by plaintiffs could be regarded as earmarked for defendant, his liability would cease at that point; but the law appears to be recognized in this country, as it is in the United States, that so long as the broker retains and has in hand shares sufficient in number and kind to answer what have been bought for the principal, no sale of like shares bought for the principal ends the contract: Horton v. Morgan, 17 N. Y. 170; Janissy v. Hart, 58 N. Y. 475; Clarkson v. Snider, 10 O. R. 568.

The brokers were not obliged to sell the stock, though default was made in keeping up the margin, until they received direction from the principal to sell, and none such was given here. They might have sold to protect themselves at an earlier stage, but no legal liability can be imputed to them because they abstained as they did, in the absence of evidence to shew want of good faith and ordinary caution: Kerr v. Murton, 7 O. L. R. 751, 3 O. W. R. 801.

The objection as to several orders being included in one contract at the start does not appear to be material as the transaction has worked out. Beckhausen v. Hamblett, [1900] 2 Q. B. 18, is answered by Scott v. Godfrey, [1901] 2 K. B. 726.

In the absence of any promise to pay a greater rate of interest than the statutory on money advanced for defendant, I do not think that a greater rate should be allowed than the statutory 5 per cent., and that not compounded. To this extent the account should be modified by the Registrar, and judgment should go for the principal due and interest so computed, with costs of action.

BRITTON, J. DECEMBER 9TH, 1904.

WEEKLY COURT.

RE HUGHES.

Will — Construction — Distribution of Estate — Period for — Event — Acceleration — Income — Accumulation — Infant.

Petition by the executors of the will of Maria Agnes Hughes for the advice and opinion of the Court upon certain questions in reference to the administration of the estate.

The testatrix died on 15th April, 1902. By her will, apart from certain specific bequests, she left her estate to the

petitioners in trust for the purposes set out in the will. The following clauses of the will were material: "The income . . . shall, during the 5 years next after my decease, be paid by my executors to such of my unmarried daughters as shall not at the time of my death have entered the conventual life, in equal shares, and so that from the time any one of my daughters shall marry or shall enter conventual life her share of such income during the said period of 5 years or any part thereof, as the case may be, shall cease and shall be equally divided amongst my other daughters. . . . And at the end of the said period of 5 years, I direct that my said son Vincent James shall receive one-sixth of my estate to hold for himself absolutely, and that the income of the remaining five-sixths be paid to all my daughters in equal shares during their natural lives, the shares of any daughters dying without issue to be equally divided between my surviving children—the daughters receiving the income and my son the principal as the case may be, and the share of any daughter dying and leaving lawful issue to be divided amongst such issue when they attain the full age of 21 years, and to be expended for their benefit during their minority."

On 3rd September, 1904, upon the marriage of Annie C. Hughes, all the daughters of the testatrix were married or in conventual life. One daughter, Madeline Coffee, died on 21st February, 1904, leaving one child.

W. N. Ferguson, for petitioners.

C. A. Moss, for Vincent J. Hughes.

F. W. Harcourt, for the infant.

BRITTON, J.—1. Did Vincent James Hughes become entitled on 3rd September, 1904, to be paid one-sixth of the estate? . . .

The general rule is that acceleration results in every event which removes the prior estate out of the way. This, however, is outside of that rule, as it is not the case of a "prior estate" within the meaning of it. There is no gift to Vincent James Hughes of a reversion or a remainder. It is merely the postponement for a definite short term of the time when Vincent shall come into possession in his own right of a portion of the property of testatrix, which she thought proper for such short term to place under the management of trustees. There is no failure of an estate to be managed or of persons to manage, but simply failure on the part of the testatrix to say expressly what, in the event of the contingency which has arisen, shall be done with the income during the unexpired portion of the term of five years.

No doubt one of the objects, and possibly the only object, the testatrix aimed at in fixing the term of 5 years was to provide for such of the unmarried daughters as had not taken vows. It may, however, well be that for other reasons the testatrix desired to have her estate as a whole administered for five years, and that Vincent should not get his share until the expiration of that period. But, whether there were other reasons or not, this is a case in which the statement of limitation is so clear that it must prevail, and cannot be shortened. The answer to the question must be in the negative.

2. Should the income of the estate since 3rd September, 1904, be divided or allowed to accumulate?

I am of opinion that as to the income of the estate since 3rd September, 1904, and until the expiration of the 5 years, there is an intestacy, and that it should be paid out to the children, who are entitled, in equal portions, and that one-sixth, the share of Madeline, shall be applied for the support and maintenance of her infant child.

3. It was, I think, the clear intention of the testatrix that under no circumstances should there be any division of the whole estate or the setting aside of any portion of the corpus within the term of 5 years. The trusts created by the will should be executed, and the one-sixth belonging to the infant should not be separated until Vincent becomes entitled to his share.

4. The trustees should keep the estate invested until the time arrives for ascertaining and setting apart one share, and then all the shares should be ascertained, separated, and set apart.

5. The trustees are entitled to retain possession of the share of the infant until the separation of her share.

The present opinion and order upon the case presented will be without prejudice to any application, when the shares are separated, or upon new facts or conditions, that may be necessary on behalf of the infant or her guardian, or by the official guardian, or by the trustees, for handing over or payment into Court of the infant's share or for any order, advice, or direction in reference thereto.

Costs of all parties out of income.