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RIDDELL, J. APRIL 19TH, 1909.

CHAMBERS.

REX v. GRAF.

Criminal Law—Selling Obscene Books and Pictures—Conviction by Magistrate—Summary Trial—Evidence of Sale Taking Place in Canada—Admission of Accused—Absence of Denial—Evidence of Confession—Reception—Police Officers—Threats or Inducements—Absence of Corroboration—Sufficiency of Confession—Charge not Reduced to Writing—Procedure—Criminal Code—Information—Prejudice of Magistrate—Looking at Pictures before Trial—Defect in Conviction — Absence of Scienter — Amendment—Same Defect in Warrant of Commitment—Habeas Corpus—Motion for Discharge—Enlargement for Purpose of Substituting Warrant in Proper Form.

Application by defendant, upon the return of a habeas corpus and certiorari in aid, for his discharge from custody under a commitment issued pursuant to a conviction made by one of the police magistrates for the city of Toronto, for selling obscene books and pictures, etc.

Eric N. Armour, for the defendant.

J. R. Cartwright, K.C., for the Crown.

RIDDELL, J.:—Martin T. Graf, alias M. Munroe, who describes himself as of Buffalo, New York, is in the central prison under sentence for selling books, pictures, and photographs which his counsel states are of so obscene, filthy, and disgusting a nature, that for a magistrate to look at them would necessarily prejudice him against the pris-

oner. I accept counsel's statement as to the character of his client's literature, etc., without comment.

Graf applies to be released from custody upon many grounds; and, of course, blackguard as he is, he is entitled to every advantage the law may give him. Men, under our system, are not to be punished for sin, or even for committing a crime, unless they have been proved guilty of crime in the proper way. Our Code provides, by sec. 1027, specifically for this.

The case was argued very fully and ably by Mr. Armour. I now proceed to dispose provisionally of the points raised, in their order—premising that this is an application for discharge from prison upon the return of a writ of habeas corpus with a certiorari in aid.

1. It is urged that there is no evidence that the sale complained of took place in Canada.

The information is that the "said Martin T. Graf, alias M. Munroe, in the month of March, 1909, at the city of Toronto, in the county of York, did sell a quantity of obscene books, printed matter, pictures, and photographs, tending to corrupt morals."

The charge is laid under the provisions of the Criminal Code, R. S. C. 1906 ch. 146, sec. 207 (a). The evidence is given by gentlemen who are said by counsel for the prisoner to be police detectives, who say that they found the articles produced, part of them upon the person of the prisoner, and the rest in a satchel and valise in his room—that the prisoner at first denied, but afterwards admitted, that the valise was his, and said he had sold all these things for $200. "He did not say he had sold them here, so far as I remember, but he said he was here and expected to get the money here that day; we were at the —— House in this city at the time of the conversation."

No evidence was offered for the defence.

This is not wholly unlike the cases of Rex v. Highmore, 2 Ld. Raym. 1220, and Rex v. Jeffries, 1 T. R. 241, in which the jurisdiction of the magistrate depended upon the locus of the offence. It was held that it must be affirmatively proved from the evidence that the offence was committed within the prescribed place.

In an application for discharge under a writ of habeas corpus, in the case of a conviction under the Liquor License Act, it is said: "The Court will examine the depositions

and proceedings before the magistrate to ascertain if a conviction was justified, although the formal conviction returned appears regular on its face:" Rex v. Simmons, 14 Can. Crim. Cas. 5, 17 O. L. R. 239, 12 O. W. R. 776, per Anglin, J. Assuming the accuracy of this, in cases of this kind, the case is not advanced; for the Court will not, if there be any evidence at all upon which a jury or a Judge might so find, interfere with a finding against evidence or the weight of evidence: Rex v. McArthur, 8 O. W. R. 694. I think, had it been a question in a civil proceeding in which it rested upon the plaintiff to prove that the defendant had made a sale in Toronto, that any jury or Judge would be well justified in finding such sale proved upon the admissions made, at least coupled with the fact that no evidence was offered by the defendant to the contrary. I cannot look at his affidavit now; the proper place to have the evidence adduced was before the police magistrate.

2. Then it is urged that the evidence of the confession was not rightly admitted. It is said that, before evidence of a confession can be admitted, the prosecution must prove affirmatively that the confession was free and voluntary; and such cases as Regina v. Thompson, 17 Cox C. C. 641, are cited. I do not think it necessary to go through the cases or to inquire what is the rule in its exactness. Much might be said in favour of the opinion of Erle, J., in Regina v. Baldry, 2 Den. C. C. 430: "Unless it be clear that there was either a threat or a promise to induce it, it ought not to be excluded." Granting the rule as claimed, and granting also that such an objection can be taken upon an application of this kind—it has been laid down that "a Court acting within the sphere of its jurisdiction is conclusively presumed, so far as all collateral inquiries are concerned, to have performed its duty, and the question whether other than legal evidence was admitted will not be considered by a higher Court:" Hurd on Habeas Corpus, 2nd ed., sec. 196, p. 281:—there is nothing to shew that all the facts necessary to be established in order to make such evidence admissible were not proved to the satisfaction of the police magistrate, in a manner which should have been satisfactory to him. Only the evidence in the case bearing upon the questions to be tried need be taken down, as I read the law. There is no more necessity for the written record to contain the allegations of a witness which will

render his evidence admissible than the examination upon the voir dire of a child, or that of some person who, it is contended, should not be allowed to be sworn on account of his infidel opinions. And the prisoner himself, in the affidavit he makes, does not assert that it was not proved, before the evidence was admitted, that the confessions were not brought about by threats or promises, etc.—nor does his solicitor.

If we cannot go outside of the written evidence in the police court, moreover, it nowhere appears that the witnesses were policemen or persons in authority such that, within the rule, their threats or persuasion would prevent the confessions being given in evidence: Roscoe's Crim. Ev., 11th ed., pp. 43, 44.

It is not without significance that all the evidence was given, without objection, in the presence of the prisoner and his counsel, and, had there been any objection to the admissibility of the evidence, no doubt objection would have been taken.

3. That a confession alone is sufficient to justify a conviction has been law since 1789: Wheeling's Case, 1 Leach 311n. Before that time, and indeed since, there had been considerable discussion whether an extra-judicial confession, uncorroborated in any way whatever, is sufficient to found a conviction: Taylor on Evidence, sec. 686; but the doubt has not received any judicial sanction for many years.

4. The charge should have been reduced to writing.

The trial was under sec. 777 of the Code, in Part XVI., respecting summary trial of indictable offences, the prisoner having consented to be tried by the police magistrate. Section 778 (3) provides that "if the person charged consents to the charge being summarily tried . . . the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge."

What appears upon the papers is as follows. On 16th March, 1909, an information was sworn to before the police magistrate; upon the same day, whether at the same time as, or before, or after, the laying of the information, the prisoner elected to be tried summarily, and pleaded "not guilty," and was remanded to the 23rd. It nowhere appears how the prisoner was brought before the police magistrate. I should think that he appeared before the police magis-

trate charged with the crime before the information was drawn up. It is then the duty of the magistrate, after ascertaining the nature and extent of the charge, to state to the prisoner the substance of the charge against him. There is no reason to doubt that this was properly done. Then the magistrate asks him whether he consents to be tried before him (the magistrate.) No doubt, this was done. Then, and not till then, according to the Act, comes the duty to reduce the charge to writing. (I do not mean in point of time, because I see no reason why the magistrate may not have the charge prepared in advance in anticipation of the prisoner's expected or possible choice.) The information seems then to have been prepared, as, instead of the complainant praying for the issue of a warrant or summons, the sentence reads, "Complainant prays that justice be done in the premises." After the charge has been reduced to writing, the magistrate is to "read the same to such person, and shall then ask him whether or not he is guilty of such charge." There is nothing to shew that this was not done—if so, the proceedings were wholly regular. I think the fact that the charge is contained in a document in the form of an information is wholly immaterial: Rex v. Sheppard, 6 Can. Crim. Cas. 463.

5. It is contended that the police magistrate must be considered as having prejudged the case. No imputation of wilful misfeasance is made against the police magistrate, but it is said that the simple fact that he looked at these utterly vile and disgusting pictures, etc., must of necessity prejudice him against the defendant. (All allegations in the affidavit of the prisoner are withdrawn in this connection; and the only fact now alleged is, that, before the actual trial, the magistrate looked at the productions.) If the prisoner was brought before the police magistrate upon summons or warrant issued by him, as to which we are left in the dark, it was the duty of the police magistrate, before issuing summons or warrant (sec. 655), "to hear and consider the allegations of the complainant," and, "if of the opinion that a case for so doing" was "made out," to "issue a summons or warrant." The magistrate must satisfy himself that a case has been made out before issuing a summons or warrant; to do that he may require to look at the pictures, etc., which it is alleged are obscene. It is perfectly notorious that many of the best people in the

world look upon that as obscene which others, equally good but of different training or temperament, consider not only harmless, but a thing of beauty: see Commonwealth v. Buckley, 86 N. E. Repr. 910, for an instance. It might not be safe for any magistrate to take the opinion of some persons —even some policemen—as to what was and what was not obscene. And what will "tend to corrupt morals" is very much a matter of individual opinion and judgment. Thousands of the best people would suffer persecution rather than look at a theatrical performance or a horse-race, while both are held harmless by many—some of whom assert that the former at least may be and often is edifying and of great moral value. The police magistrate might well, then, look at these productions—and, if he could do so before, he might after, the prisoner was in custody, or at any time.

There is nothing in what I have said at all opposed to Regina v. Petrie, 20 O. R. 317, or Rex v. Walsh, 8 Can. Crim. Cas. 101—this case may be looked at in respect to reading to the accused an information previously prepared as the charge reduced to writing—or Rex v. Legros, 17 O. L. R. 425, 12 O. W. R. 983. The British Columbia cases cited have no application: Rex v. McGregor, 11 B. C. R. 350; Rex v. Williams, ib. 351.

6. The information is that the prisoner did, "contrary to law, sell a quantity of obscene books . . ." The statutory offence is "knowingly, without lawful justification or excuse . . . sell . . . obscene books . . ." The gist of the offence consists in the scienter, and such scienter is not alleged. The charge as read to the prisoner contained no offence against the law.

Rex v. Hayes, 5 O. L. R. 198, 2 O. W. R. 123, is a case in which the defendant was convicted under 60 & 61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13 (D.), for unlawfully causing the importation of an alien from the United States into Canada under contract to perform labour in Canada. The statute contained the word "knowingly;" and the Court (Street and Britton, JJ.), held that the conviction was on its face bad, citing Carpenter v. Mason, 12 A. & E. 629; Regina v. Justices of Radnorshire, 9 Dowl. P. C. 90.

So also in Rex v. Beaver, 9 O. L. R. 418, 5 O. W. R. 102, the word "knowingly" was held by the Court of Appeal

to be of cardinal importance. Rex v. Tupper, 11 Can. Crim. Cas. 199, and Ex p. O'Shaughnessy, 8 Can. Crim. Cas. 136, may also be looked at.

The conviction followed the information, as did the warrant of commitment. Unless the conviction can be amended, the motion must succeed.

The conviction, before return to the certiorari, was amended by inserting the word "knowingly;" but the information and the warrant returned do not contain this word. It is quite clear that the police magistrate might amend the conviction at any time before the return: Regina v. McCarthy, 11 O. R. 657. And it is equally clear that the fact that the information is defective is immaterial: S. C., at p. 658; Regina v. Emily Munro, 24 U. C. R. 44.

7. But the warrant which has been returned by the gaoler has not been amended, nor has a new warrant been substituted therefor. Even if the case came within R. S. C. 1906 ch. 146, sec. 1124, the omission of the word "knowingly" is not an "irregularity, informality, or insufficiency," within the meaning of that section: Rex v. Hayes, 5 O. L. R. 198, especially at p. 201.

The warrant is clearly bad: Rex v. Kelson, 12 O. W. R. 1063, and cases cited at p. 1065.

In a case of this kind my brother MacMahon held that the proper course is to enlarge the motion so as to enable the magistrate to file a fresh warrant of commitment in conformity with the conviction returned: Regina v. Lavin, 12 P. R. 642. There may be some doubt as to the power to act thus without the authority of the statute. I think, however, sec. 1120 is broad enough to cover this case. It is argued that this section applies to cases before conviction only; but my brother Latchford recently acted upon it in the case of two persons under sentence; and Mr. Justice Ferguson does not seem to doubt that the power exists, though he declined to exercise it in Regina v. Randolph, 32 O. R. 212; see p. 215.

Without making any final determination, I direct the further detention of the prisoner Graf, alias Munroe, and direct the police magistrate to lodge with the warden of the central prison of the province of Ontario a warrant in accordance with the conviction.

The case will be adjourned for further hearing until Friday 23rd April at 10 a.m., at which time the delivery of the amended warrant is to be proved by affidavit; and I shall finally dispose of the matter.

TEETZEL, J. APRIL 19TH, 1909.

TRIAL.

KEOWN v. WINDSOR ESSEX AND LAKE SHORE RAPID R. W. CO.

Trial—Findings of Jury—Interpretation—Negligence—Contributory Negligence—Ultimate Negligence—Damages—Scale of Costs.

Action for damages for personal injuries sustained by plaintiff and for injury to property by reason of a collision between an electric car of the defendants and a corn-binder and team of horses driven by plaintiff along the Talbot road, in the town of Essex, owing, as alleged by the plaintiff, to the negligence of the defendants' servants in charge of the car.

The action was tried before TEETZEL, J., and a jury, at Sandwich.

The jury were asked certain questions, which, with their answers, were as follows:—

1. Was the defendant company guilty of any negligence which caused the plaintiff's injuries? A. Yes.

2. If your answer is "yes," in what did such negligence consist? A. By dragging the team, binder, and man the distance they did.

3. Could the plaintiff, by the exercise of reasonable care on his part, have avoided the collision? A. Yes.

4. Could the defendants' servants, after the position of the plaintiff became apparent, by the exercise of reasonable care on their part, have prevented the injuries to the plaintiff? A. To a considerable extent.

5. If the plaintiff is entitled to damages, at what sum do you assess the same? A. $152.

6. What portion of the plaintiff's damages, if any, occurred after the time you find the defendant's servants could have stopped the car? A. The whole amount.

A. H. Clarke, K.C., for plaintiff.

J. M. Pike, K.C., for defendants.

TEETZEL, J.:—I think the proper interpretation of the answers of the jury to the questions submitted is, that, while the plaintiff could, by the exercise of reasonable care, have avoided the collision, nevertheless after his position became apparent, the defendants' servants were guilty of negligence in not stopping the car sooner than they did, and that dragging the plaintiff with his team and binder the distance they did after the collision was the cause of all his injuries. In other words, it is a case of liability for ultimate negligence.

I think judgment must be entered for the plaintiff for $152 damages and costs on the County Court scale without set-off.

FALCONBRIDGE, C.J. APRIL 19TH, 1909.

TRIAL.

LANGLEY v. PALTER.

Bankruptcy and Insolvency—Goods Delivered to Creditors by Insolvent Company under Arrangement with Manager—Preference—Intent — Presumption—Rebuttal—Account —Reference—Costs.

Action by the assignee for the benefit of creditors of the Standard Cap Co. for the removal and conversion by the defendants of certain goods of the company; for an account of certain moneys collected by defendants; and, alternatively, to recover the goods removed by defendants as having been transferred to the defendants when the company were insolvent, with intent to prefer.

J. Baird, K.C., and K. F. Mackenzie, for plaintiff.

R. J. McLaughlin, K.C., for defendant.

FALCONBRIDGE, C.J.:—Plaintiff is the assignee (under assignment dated 7th January, 1909), for the benefit of creditors of the Standard Cap Co. Limited. Defendants are merchants and manufacturers of caps, carrying on business in Toronto. The statement of claim charges that on or about 31st December, 1908, defendants wrongfully entered into the warehouse of the Standard Cap Co., and, wrongfully and without leave or license, removed therefrom

certain goods. This count was not sustained by the evidence; the goods were removed by defendants under an arrangement entered into between them and Paul Levi, general manager and president of the Standard Cap Co.

The two concerns had had dealings, which were closed up in the end of 1907 by the purchase by defendants from the Standard Cap Co. of certain real estate, the accounts being then balanced. In the early part of 1908 an arrangement was made between them whereby the Standard Cap Co. agreed to hand over to the defendants orders taken by buyers on behalf of the Standard Cap Co. Defendants were to ship the manufactured goods direct to the persons giving the orders, and were to collect the accounts therefor, the usual course of procedure being for the defendants to place in their bank, for collection, drafts on customers drawn by the Standard Cap Co. Levi asserted that the defendants were to take the responsibility of these sales, that is, that they would account for the same to the Standard Cap Co., whether they succeeded in collecting or not. This is denied by defendants, and I find as to this issue in defendants' favour, both on the evidence and on the probabilities of the case. The Standard Cap Co. were getting the same discounts and allowances as they had been doing during the year 1907, with the small and reasonable deduction of 2½ per cent. for shipping direct to customers instead of to the Standard Cap Co., as was done in 1907; there was, therefore, no consideration for the alleged assumption by defendants of responsibility for the accounts. The goods sued for were purchased by the defendants from the Standard Cap Co. under an arrangement which is very little in dispute.

Plaintiff alleges alternatively that the goods were delivered to defendants by the Standard Cap Co. at a time when the company were in an insolvent condition, with intent to give the defendants, and intent on the part of the defendants to obtain, an unjust preference over the other creditors of the company. The transaction was within the 60 days, and therefore it is presumed prima facie to have been made with the intent aforesaid. But I think that this prima facie presumption has been rebutted in this case. To avoid the transaction there must be concurrence of intent on the one side to give, and on the other to accept, a preference over the other creditors: Benallack v. Bank of British North America, 36 S. C. R. 120, and cases cited.

Paul Levi (who was the principal witness for plaintiff, and who has the strongest interest in setting aside the transaction, inasmuch as he appears, on the statement of affairs of the company, as a creditor for $7,233 out of a total liability of $12,306) swears that he was not intending to give the defendants any preference over the other creditors. There was no direct notice to, or absolute knowledge on the part of, defendants of the desperate condition of the company's affairs. The transactions between them had not been more unsatisfactory in 1908 than they were in 1907, and, but for the enormous claim presented by Paul Levi (general manager, president, and principal stockholder), the company would appear to be perfectly solvent; a somewhat eccentric condition of affairs. I therefore hold that the transaction is not affected by the section of the statute, and it will stand.

The 4 pieces of cloth valued at $50, being the last item in plaintiff's account, were not purchased by defendants and are lying at defendants' place to plaintiff's order. The defendants have given satisfactory proof of their account—the $3.29 paid into Court balances this account—and the action must be dismissed.

But there was something said about a reference at the opening of the case, and the plaintiff's counsel stated that he was not quite prepared to meet that claim; so that, while I think that there does not seem to be a necessity for any reference or further contestation as to defendants' account, the plaintiff may have a reference as to this, if he should be so advised, at his own risk; otherwise action dismissed with costs.

If plaintiff takes a reference as to defendants' account, costs to date to be payable forthwith by him to defendants, and further directions and subsequent costs reserved until after report.

APRIL 19TH, 1909.

DIVISIONAL COURT.

RE BREWER AND CITY OF TORONTO.

RE ROBINSON AND CITY OF TORONTO.

Liquor License Act—By-law of City Council Reducing Number of Licenses—Powers of Council—Section 20 of Act—Next Ensuing License Year—Future Years—Continuance of By-law in Force until Altered or Repealed—Annexation of Town to City—By-law of Town—Repeal by Implication—Annexation of Territory to City after First Reading of By-law—By-law not Re-introduced—Procedure of Council — Objection to By-law — Discretion as to Quashing—Repeal of Former By-laws.

Appeals by John Brewer and William Robinson from an order of MEREDITH, C.J., refusing to quash a by-law of the municipal corporation of the city of Toronto limiting the number of tavern licenses. The two appeals were argued together.

A. M. Lewis, Hamilton, for Brewer.

J. B. Mackenzie, for Robinson.

W. C. Chisholm, K.C., and F. R. Mackelcan, for the city corporation.

The judgment of the Court (MULOCK, C.J., MACLAREN, J.A., CLUTE, J.), was delivered by

MULOCK, C.J.:—One ground of appeal was that the by-law purported to limit the number of licenses for a longer period than one license year, namely, "for each subsequent license year until this by-law is altered or repealed," and that it was in excess of the powers conferred upon councils by sec. 20 of the Liquor License Act to limit the number for a period longer than the then next ensuing license year.

Section 20 reads as follows: "The council of every city, town, village, or township, may, by by-law to be passed before the 1st day of March in any year, limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any

future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act."

In support of this ground of appeal it was contended that the section means that the council may, in its discretion, limit the number of licenses for the next ensuing license year, but no longer, or, passing over such next ensuing license year, may limit the number for any future year, and that, in such latter event only, would the by-law remain in force until altered or repealed.

I am unable to accede to this argument. If such interpretation were placed upon the section, it would follow that a by-law taking effect on the 1st day of May then next, would cease to exist at the end of one year from 1st May, whilst a by-law applicable to a future year would remain in force until action by the council by way of repealing or altering it. Much clearer language than is here used would be necessary in order to warrant the conclusion that the legislature intended that a by-law to take effect in some future year would continue thereafter in force until altered or repealed, whilst a by-law applicable to the then ensuing year would terminate at the end of such year. If such an interpretation were placed upon the section, then the council could pass no by-law applicable to the next ensuing license year which would continue in force for a longer period than one year. If the section were open to the construction placed upon it by the appellants, namely, that it is discretionary with the council to pass a by-law for the next ensuing license year, or for some future year, then the words "altered or repealed" apply to either class of by-law, and a by-law which, by its express language, was passed for "the then next ensuing license year," would be construed as having added thereto the words of the statute, and would continue in force thereafter in future years until altered or repealed. The section is not happily worded, but its meaning does not seem to me open to doubt. A by-law passed for the next ensuing license year continues in force throughout future years "till altered or repealed," and the words in the section, "or for any future year," may be regarded as surplusage.

It cannot be contended that the council may not pass a by-law for the next ensuing license year. If they should do so, such a by-law, without more, would continue in force for future years until altered or repealed. It would be a

by-law for the next ensuing license year "and" for future years, etc. It is thus clear that the word "or," in the fifth line of the section, was intended to be read as "and;" and, so construing it, the by-law was within the provisions of the section, and the first ground of appeal fails.

The next objection is that the town of East Toronto, which now forms part of the city of Toronto, passed a by-law on 9th February, 1908, limiting to 5 the number of licenses that might be issued in that town; that on 15th December, 1908, the town of East Toronto became annexed to and formed part of the municipality of the city of Toronto, their by-law being then in force, and that thereafter, namely, on 18th February, 1909, the municipal corporation of the city of Toronto passed the by-law in question limiting the number of tavern licenses that might be issued in the city of Toronto to 110, whereby it is argued there are now two by-laws in force dealing with the same matter, but unequal in their effect.

The answer to this objection seems very obvious. When the town of East Toronto became a portion of the municipality of Toronto, it became subject to the powers of the municipal corporation of the city of Toronto in respect of limiting the number of tavern licenses, and when the corporation of the city, in the exercise of its corporate powers, passed the by-law in question, limiting the number of tavern licenses to be issued, within what then constituted the limits of Toronto, to 110, that by-law applied to the whole territory embraced within the city's limits, in effect, and repealed any by-laws inconsistent with it. Thereupon the by-law of what was formerly the town of East Toronto ceased to exist; and this objection fails.

The last objection is that, after the first reading of the by-law now attacked, some other outlying territory became annexed to the city, and that the by-law should have been reintroduced before its final passage. Assuming that such would have been the more regular course, no one appears to have objected to the method which was pursued, and, doubtless, and by apparent inadvertence and not by design, it passed through its final reading without such reintroduction. It is reasonable to assume that if any person had suggested the reintroduction of the by-law, that course would have been adopted. Nevertheless, we are urged to quash the by-law on the mere technical ground that its first reading preceded the actual annexation of the added territory, al-

though such addition, for all that here appears, may then have been practically agreed to by the different communities interested in promoting the same, and although, after such annexation, the council, if it had deemed it advisable, might have reintroduced the by-law and given it its various readings, in strict compliance with the rules of procedure. The by-law on its face is legal, and, in such circumstances as the present, it is discretionary with the Court whether, upon extraneous evidence, it will find such illegality in connection with its passage that it would be unjust to permit it to remain in force. Nothing fraudulent or even improper in connection with the by-law being shewn, we should follow, I think, the principle adopted in Re Secord and County of Lincoln, referred to in Re Jones and City of London, 30 O. R. 587, and not undo the city's action in the passage of the by-law. I therefore think this objection must also be disallowed.

It was further urged that the annexation of East Toronto and other territory had the effect of repealing a former by-law passed by the municipal corporation of the city of Toronto whereby the number of tavern licenses was limited to 150. I fail to see how this objection can support the appellants' appeal. It is rather an argument in favour of the by-law now under review, which, as already observed, repealed all inconsistent by-laws, and, amongst them, the by-law formerly allowing 150 licenses.

For these reasons, I think the appeal should be dismissed with costs.

APRIL 19TH, 1909.

DIVISIONAL COURT.

CRAWFORD v. CANADIAN BANK OF COMMERCE.

Life Insurance—Policy Payable to Wife of Insured—Assignment of Policy by Insured to Creditor in Trust for Himself and Another—Consent of Wife by Letter to Assignee—Wife Domiciled in Province of Quebec—Absolute Nullity of Assignment—Quebec Law—Re-assignment of Policy by Original Assignee to Bank—Notice of Claim of Cestui que Trust—Bona Fide Purchaser for Value—Evidence.

Appeal by plaintiff from judgment of RIDDELL, J., 12 O. W. R. 401, dismissing the action.

N. Sommerville and F. S. S. Dunlevie, for plaintiff.

Glyn Osler, for defendants the Canadian Bank of Commerce.

C. A. Moss, for defendant McDougall.

The judgment of the Court (MULOCK, C.J., CLUTE, J., LATCHFORD, J.), was delivered by

CLUTE, J.:—The action is brought in respect of a policy of insurance made in 1894 on the life of John McDougall. In 1895 this policy was assigned, for an advance, to one Bailey, who held such assignment in trust for himself and the plaintiff Crawford. Subsequently Bailey assigned to the bank as security for his account.

It is alleged that the bank took with notice of Crawford's claim. If the bank took the assignment without notice, then it is clear that, whatever claim the plaintiff may have had in the policy while it remained in the hands of Bailey, the bank, holding as a bona fide purchaser for value, would be entitled to receive the proceeds free and clear of any equity which the plaintiff might claim.

There was a further question raised as to the domicile of McDougall and his wife at the time that the assignment was made, it being stated that if the domicile of McDougall and his wife was in the province of Quebec, and if the assignment was there executed by her, it was void so far as she was concerned.

The trial Judge held that the bank took with notice. He expressed his view as to the position of the bank, which was subsequently confirmed in his written judgment. I quote from the notes. He says: "Then coming to the position of the bank. Again, I have had some difficulty in making up my mind as to the facts. I will say, having seen Mr. Crawford in the witness box, that I am satisfied with his evidence. I accept Mr. Crawford's statement as being an accurate statement of the facts. I think that Mr. Aird (the bank manager) had full notice and full knowledge of the purpose for which the insurance policy was to be assigned. I dare say it may have passed out of his mind in the subsequent matters, in the subsequent dealings, although it ought not to have passed out of his mind, and I think Mr. Aird has perhaps himself laid his finger upon the crux in question 101, speaking about agreements. 'What

we were interested in was the security, and our rights were set forth on the face of the security.' I am of opinion that Mr. Aird considered the form of the transaction, the transfer in form to Bailey, as being sufficient to justify him, Mr. Aird, in taking the assignment directly from Bailey, and applying the proceeds, or what he did receive, to the debt alone of Bailey."

It is not pretended that, at the time the bank took the transfer from Bailey, there was any notice whatever given to the bank. It is alleged, however, that on a previous occasion, when Bailey was getting certain advances from the bank, it was mentioned to Aird that Crawford claimed an equity in the policy of insurance.

Assuming that Crawford, as has been found by the trial Judge, is a credible witness, and what he says is to be taken as the facts as found by the trial Judge, I am still of opinion that what took place did not amount to notice to the bank, within the meaning of the law. As the evidence is not lengthy, I will quote what was relied on by counsel, and what is, I think, the substance of the evidence of Crawford in this regard. Crawford, after stating that he and Bailey had agreed to make advances to McDougall, saw the manager, Aird, to whom he stated "that McDougall wanted Mr. Bailey and I, or some one else, to finance a scheme of water purification and sewage purification, which he was working in Chatham and Windsor. I might say I was introduced to Mr. McDougall previous to this, by Mr. Galt, an engineer who was doing some work for me. . . . I told Mr. Aird I could not put up my portion of the money unless I were able to finance it with the bank. 'Well,' he said, 'Crawford, I do not look very favourably on this scheme. It seems to me it is in the air until Mr. McDougall gets at work. But I would not mix it up with your account, because you have only started your account with the Bank of Commerce. If Mr. Bailey is going in and can finance, we can arrange a portion of what you need (at that time we spoke of $400) through Mr. Bailey's account.

"Q. And did you tell him anything about the nature of the agreement you were to make with McDougall? A. I did.

"Q. What did you say? A. I told him that we were making an arrangement with Mr. McDougall by which we were to get a fifth interest.

"Q. In what? A. In the water and sewage purification scheme, which Mr. McDougall claims he had a right for Canada.

"Q. Anything further—you told him at that time you were getting? A. A policy of insurance on Mr. McDougall's life, which was paid up.

"Q. Through whose account was this transaction to be financed? A. Well, Mr. Aird said through Mr. Bailey's account.

"Q. In pursuance of that, what did he say? A. I took —I met Mr. McDougall and Mr. Galt, and took Mr. Bailey over to Mr. Rowan's office."

McDougall and Bailey had an agreement prepared, dated 20th December, 1895—exhibit 1—which provides for an advance of $1,200 to be made by Bailey to McDougall, and for an assignment of the insurance policy in question from McDougall to Bailey, which, though absolute in form, gives the right to McDougall to redeem and to obtain a reassignment thereof upon payment of the $1,200. On 7th April, 1896, a further agreement was entered into between McDougall and Bailey, whereby it is declared that the former agreement should be held as security for the further sum of $1,000, as well as for the $1,200 there mentioned, and that the said policy of insurance should be held as security for the said $1,000, as well as the $1,200. The two agreements to be read as one agreement. In reference to these two agreements, Crawford states that they were taken over to Mr. Aird and shewn to him. Bailey then made a note, payable to Crawford's order, which the bank discounted, for $400. On cross-examination, in reference to this interview, when the $400 was obtained, Crawford stated that he submitted the whole matter to Aird, and asked him if he would advance $400. He states further that Aird asked him if he had any security, and he told Aird that "we were getting this policy."

"Q. And you explained to him accurately and carefully that that policy was assigned to both of you? A. I did not explain that at that time. I told him we were getting the policy of insurance.

"Q. You did not at that time say anything about it? A. I told him we were getting the policy of insurance.

"Q. But you did not say what was going to happen to it, to whom it was to be assigned? A. Oh no.

"Q. So that he did not get any definite opinion from you on the first occasion? A. No.

"Q. So that we can pass that by? A. Yes." . . .

On further cross-examination he says: "Q. The first occasion was merely general talk about borrowing money? A. That is all. . . .

"Q. At any rate, Mr. Aird did not ask to see Mr. Bailey? A. Not at that time, no.

"Q. How long did Mr. Aird take reading these documents over? A. I cannot say as to that.

"Q. Try to say? A. I cannot say; it is a long time ago.

"Q. A long time ago. I am almost surprised at the accuracy of some of your recollections, but try to help me there, some time, I suppose? A. Well, I cannot say as to that; I took them over to him; as to whether he read them over or not, I would not swear.

"Q. You would not swear he read them over? A. No.

"Q. Would you tell me how he would have a knowledge of their contents without reading them over? A. By my telling him.

"Q. By your telling him? A. Yes.

"Q. And how long was your interview? A. It was not very long.

"Q. How long? A. Perhaps 10 minutes. . . .

"Q. Now will you tell me what you told Mr. Aird at that time about the assignment? A. The second interview with Mr. Aird?

"Q. Yes, because you told him nothing on the first? A. Yes, I told him we were taking an assignment of the policy.

"Q. Who were you? A. Bailey and I.

"Q. Bailey and you were taking an assignment of this policy? A. Yes.

"Q. Did you name the amount? A. I did not at that time, not the exact amount, but I knew it was in the neighbourhood of $2,000.

"Q. You did not shew him the document? A. No, I do not think I had the assignment with me.

"Q. You do not think you ever shewed that to Mr. Aird, did you? A. I do not think I ever did."

It would thus seem, from Crawford's statement, that his interview with Aird had relation to an advance which at the time that these documents were referred to was for

$400. The assignment was not shewn to Aird at the time, and, although further advances from time to time were obtained from the bank by Bailey, and, as Crawford says, by him also through Bailey for McDougall, it does not appear that, when these various advances were made, further reference at any time was made to the policy. Long subsequent to this the bank took an absolute assignment of the policy, in the ordinary course of business, collateral to Bailey's account. It was not suggested that, at the time the assignment was made, anything whatever was said with reference to Crawford's interest with Bailey in the insurance policy. Is it reasonable to impute to Mr. Aird that he should recall, and have in mind at the time the assignment was made, that long prior thereto it had been incidentally mentioned by Crawford that he and Bailey were taking an assignment of the McDougall policy? It seems to me wholly unreasonable to so hold. Mr. Aird, acting for the bank, was not interested in the policy at the time it was first mentioned to him. So far as he was concerned, it formed no part of that transaction. It was not being dealt with at that time by the bank, nor suggested then as a security which the bank might take. There was nothing, so far as I can see, that would lead the bank manager to regard that policy as a matter that concerned the bank; and, if the evidence stood there alone, I am of opinion that what took place between Crawford and Aird does not amount to notice to the bank. But Mr. Aird denies all this. Whether his recollection be right or wrong, it is perfectly manifest that the casual reference to the policy of insurance had passed entirely out of his mind at the time the assignment was taken. The trial Judge seems to take this view, but thinks he ought to have remembered.

The authorities do not, in my opinion, warrant the conclusion that what is here shewn amounts to notice to the bank.

Bailey v. Jellett, 9 A. R. 187, is, in some respects, like the present case. In that case the plaintiff placed in the hands of his solicitor a mortgage for collection, and it was arranged between them, in the presence of the manager of the local bank, of which the plaintiff's solicitor was also solicitor, that the amount so received should be deposited in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. The money was received and de-

posited to the solicitor's private account. Ten days afterwards he drew out $3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff, and transmitted the same to him, telling him that the balance would be sent next week. He drew upon the fund for his own purposes, and died without rendering an account. It was held that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for the solicitor's misappropriation thereof. The judgment of Spragge, C.J.O., asks pointedly: "How and when would the bank necessarily see that there was a breach of trust? . . . As a matter of fact he did not see it, nor did he, so far as appears, think it strange."

It will be observed that Crawford never stated to Aird the exact facts in relation to the assignment, namely, that it was to be made to Bailey, who would hold it in trust for Bailey and himself, but his expression was, "I told him we were taking an assignment of the policy." At the time he used this expression, he did not have the assignment with him, and he never shewed Aird the agreement under which Bailey held the assignment in trust for Bailey and Crawford. Later, when the assignment under which the bank now claims was made, nothing whatever was said, and, if the bank manager recalled the conversation at all, it would not, in my judgment, put him upon inquiry. He would see before him an absolute assignment to Bailey, and would have no reason to suppose or suspect even that Bailey held in trust for himself and Crawford.

See, also, In re Castell and Brown Limited, [1898] 1 Ch. 315; In re Valletort, [1903] 2 Ch. 654; and In re Bourne, [1906] 1 Ch. 113, affirmed, [1906] 2 Ch. 427.

Even if at the earlier interval Crawford intimated to Aird that he and Bailey were taking an assignment of the policy, yet when, at a somewhat later period, Bailey exhibited to Aird an assignment of the policy, it is there made to Bailey absolutely, and if, and at this time, Aird recalled the former statement of Crawford, he would be entitled to assume that the contemplated arrangement in favour of Crawford and Bailey had been abandoned, and that the assignment to Bailey was what on its face it purported to be, namely, an absolute assignment for his sole benefit.

In Union Bank of Halifax v. Indian and General Investment Trust, 40 S. C. R. 510, the facts are quite different from the present case. The question there was as to the validity of a security created by a trading company in the ordinary course of business, as against a floating security created by a previous trust deed, to secure bonds issued by the company. This case is reported in the Court below in (1907) 3 E. L. R. 409. It is there stated by the trial Judge that the question was whether the bank, when it took the security and advanced the money, had actual notice of the restriction contained in the trust deed. It appears from the evidence (p. 411) that, at the time the loan was made, it was pointed out that there was a charge or mortgage on the property to secure bonds, and the manager was asked if he could make the declaration under the Bank Act, and the bank manager replied that it was quite usual, he understood that. After the manager of the company reached his office, he was called up by telephone and was asked by the bank manager to let him know how the mortgage read in regard to the lien on the property, and he was requested to send up for the mortgage. This he declined, but asked him to read it, and the whole of the clause was then read. The bank manager swore that he did not remember this. The appellate Court accepted the evidence of this witness, that actual notice was given the bank. Such notice was so given, and had reference to the loan then being made. Upon the facts, the case is, I think, quite distinguishable from the present.

I am of opinion that the bank was a bona fide purchaser for value without notice. This view renders it unnecessary to inquire into the second branch of the case, namely, as to the domicile of McDougall and his wife at the time the assignment was made. Upon the evidence, however, I agree with the finding of the trial Judge upon this point, namely, that, at the time of the assignment, the domicile of McDougall and his wife was in the province of Quebec, and that the law of Quebec applied to the assignment of the policy. This, being so, the evidence as to the law of Quebec clearly shews that the assignment in question was a nullity: See Lee v. Abdy, 17 Q. B. D. 309.

It was strongly urged on behalf of the plaintiff that, although the assignment was executed at Montreal, it was not in fact delivered there, but in Toronto, but I do not

think that this view can be supported. It was executed by the wife and mailed there. As was said in the Lee case, "I cannot see how, if there was no valid contract between them, there can be any valid assignment," nor can I see how there could be a delivery of a contract that was absolutely void, so as to validate the same. As between defendant McDougall and the bank, an agreement having been come to as to the insurance moneys, it is sufficient to dispose of the plaintiff's claim.

I think the appeal should be dismissed with costs.

APRIL 19TH, 1909.

DIVISIONAL COURT.

MARTIN v. HOPKINS.

Mortgage—Power of Sale—Exercise of by Reason of Interest Overdue—Payment of Interest—Application of Payment—Authority of Agent—Question of Fact—Action to Restrain Proceedings—Costs.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., ante 100, in favour of plaintiffs in an action to restrain the defendant from proceeding to exercise the power of sale contained in a mortgage deed.

W. E. Middleton, K.C., for defendant.

R. J. McLaughlin, K.C., for plaintiffs.

The judgment of the Court (MULOCK, C.J., MAGEE, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—The facts appear to be as follows. The defendant is a practising solicitor in the town of Lindsay, and is holder of a first mortgage on certain lands, made by one Corscadden. The plaintiff Martin is assignee for the benefit of creditors of the estate of the firm of Corscadden & Mullen, one of the partners being the mortgagor Corscadden. The sum of $67.50 became due for interest on the defendant's mortgage, and Corscadden applied to the plaintiff Begg for a loan of $300 to be secured by a second mortgage on the lands mortgaged to Hopkins. Begg

agreed to make the loan, and on 14th March, 1908, Corscadden executed a second mortgage to Begg to secure the $300. Begg placed the amount in the hands of his solicitors, Messrs. Weldon & Knight, who desired to pay out of the mortgage moneys the $67.50 arrears of interest due to the defendant, and, for that purpose, drew their cheque, bearing date 16th March, 1908, for this sum of $67.50, payable to the order of the defendant Hopkins. This cheque they intrusted to Corscadden for the purpose of his delivering it to Hopkins in payment of the interest then due. On the face of the cheque are written the words, "Re Corscadden and Mullen." Messrs. Weldon & Knight at the same time delivered to Corscadden their other cheque for $218.85, being the balance of Begg's advance, after deducting therefrom a small amount for costs, and on the face of this cheque are written the words, "re Begg." Corscadden, with the two cheques in his possession, proceeded, along with his partner Mullen, to defendant's office, and there saw defendant. The latter was solicitor for the Bank of Montreal, and at this time held for collection on behalf of the bank a note for $344 made by Corscadden & Mullen, and was anxious to collect the same. Corscadden handed the two cheques to Hopkins, who accepted them, and gave Corscadden a receipt for the total amount on account of the bank's claim; and the question is whether, as against Begg, Hopkins was not bound to have applied the $67.50 in payment of the interest due on his mortgage.

At the trial there was some conflict of evidence as to whether Hopkins knew the source from which the $67.50 was coming, and, also, as to whether the cheque was handed to him by Corscadden for payment of the interest.

The learned trial Judge has not dealt with this conflict of evidence, nor, in my opinion, was it necessary to do so. The money represented by the cheque for $67.50 was Begg's. The cheque was payable to the order of Hopkins, and Corscadden was Begg's agent simply to deliver the cheque to Hopkins. Corscadden had no control over the money; his agency was limited to delivering the cheque; and he had no right to divert it from the purpose for which it was being sent to Hopkins. He may have consented to its application on account of the bank's note, but he had no authority to do so, and, therefore, the mere circumstance that the defendant chose to treat it as a payment on account of the bank in no

way affects Begg's rights. Corscadden was simply the messenger to deliver the cheque to the payee, Hopkins, and it was the duty of the latter to apply the cheque to the purpose for which it was sent to him. If he did not know what that purpose was, it was his duty to have ascertained. In the circumstances, I think the amount of the cheque must be treated as a payment of the interest due to Hopkins, and this appeal should be dismissed with costs.

APRIL 19TH, 1909.

DIVISIONAL COURT.

O'REILLY v. O'REILLY.

Husband and Wife—Marriage Contract—Quebec Law—Sum of Money Payable to Wife after Death of Husband—Right of Wife to Rank as Creditor upon Insolvent Estate of Deceased Husband—Construction of Contract—Onerous or Gratuitous Contract—Consideration—Love and Affection—Renunciation of Dower—Insolvency of Husband at Date of Contract—Absence of Actual Fraudulent Intent.

Appeal by defendants Garland and others, creditors of the estate of Edward O'Reilly, deceased, from the judgment of BRITTON, J., 12 O. W. R. 688, finding in favour of plaintiff, the widow of Edward O'Reilly, upon the first of two issues directed by an order of the Court, viz., that a certain marriage contract made between Edward O'Reilly and the plaintiff entitled the plaintiff to rank as a creditor of his estate. The trial Judge found the other issue (as to an insurance policy) against the plaintiff, and there was a cross-appeal as to this, which was abandoned at the hearing.

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

F. H. Chrysler, K.C., for the plaintiff.

M. J. Gorman, K.C., for the executors of Edward O'Reilly.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—This appeal involves the determination of the right asserted by the widow of the late Edward O'Reilly

to rank as a creditor upon his estate in course of administration, in respect of a claim for a sum of $25,000, which, by marriage settlement, he agreed should be paid to her after his death. An issue directed to determine this, and another question as to an insurance policy, was tried before Britton, J., at Ottawa, and on 28th September last he gave judgment in favour of Mrs. O'Reilly, holding her to be entitled to rank as a creditor.

It has been found by the trial Judge to be a proper inference from the evidence that Edward O'Reilly was, at the date of the marriage contract, insolvent. The evidence appears to warrant this inference.

The claim of the contestant and the claims of all other creditors arose after the making of the marriage contract, and none of them have been subrogated to the rights of any creditor whose claim antedates that contract (Que. Civil Code, art. 1039). The estate of Edward O'Reilly is insolvent.

The right of the claimant to rank as a creditor depends upon the validity and the construction and effect of her marriage contract—questions which must be determined according to the law of the province of Quebec, where the parties were domiciled at the time of the making of the contract, and where the contract was in fact made. Advocates at the Bar of that province were called as witnesses at the trial to explain and give their opinions upon the provisions of the Quebec law bearing upon these questions.

I have read and re-read the testimony of these witnesses, and have critically examined every authority to which they refer. The conflict of opinion between them is hopeless upon several points. For the claimant it is mantained that the contract is onerous: for the contesting creditor, that it is gratuitous. For the claimant it is asserted that intent to defraud creditors at the time of making the contract on the part of Edward O'Reilly has not been established; that intent to defraud on the part of Mrs. O'Reilly has not been shewn; and that the contestant, in order to succeed, must prove such intent on the part of both: for the contestant it is argued that fraudulent intent on the part of Edward O'Reilly is a legitimate inference from the fact of his insolvency at the time of the making of the contract and the character of the contract itself, and that the facts in evidence warrant an inference of fraudulent intent on the part of Mrs. O'Reilly; but that it is unnecessary to prove fraudu-

lent intent on her part, and that, without proof of such actual intent, even on the part of the donor, the contract may be avoided. For the claimant it is argued that such a contract as that in question can be attacked only by a creditor whose claim existed when the contract was made; for the contestant it is contended that a subsequent creditor has a status to impugn its validity.

Mr. Aylen, the expert witness for the claimant, in interpreting the provisions of the Code, prefers to be guided by judicial construction and application of those provisions where available (p. 45); Mr. Forin, one of the expert witnesses for the contestant, states that "we rely more upon the writings of authors for the purpose of explaining the Code than we do on the decisions of the Courts. Case law was almost unknown to us until the establishment of the Supreme Court in Ottawa. . . . The Judges were not bound by decided cases unless they had been decided by a higher Court" (pp. 59, 61). Mr. Brooke, the other expert witness called for the contestant, expressed his concurrence in Mr. Forin's views, subject to two or three specific exceptions, none of which relate to this particular point.

Upon all these matters the expert witnesses differ, and it becomes necessary to determine which of the opinions put forward is the better supported by the authorities upon which the several counsel rely: Hunt v. Trusts and Guarantee Co., 10 O. L. R. 147, 148, 5 O. W. R. 405 (affirmed 6 O. W. R. 1024.)

It was rather conceded at bar by counsel for Mrs. O'Reilly that, if the contract under which she claims is gratuitous in character, creditors whose claims have arisen since the contract was made, can successfully oppose her claim. The learned trial Judge was of this opinion.

Having regard to art. 1039 of the Code—"No contract or payment can be avoided by reason of anything contained in this section at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor"—unless actual fraudulent intent is admitted or proved, the status of such subsequent creditors to contest the right of the beneficiary to rank as a creditor must depend upon the nature of the contract itself, and of the right which it confers.

It becomes necessary carefully to consider the terms of the contract in order to determine whether it should be regarded as onerous or gratuitous—a question which counsel

appeared to regard as vital—and to decide upon its true construction and effect.

The contract was drawn up by a notary public, and was executed by the parties in his presence on 22nd June, 1899. It recites that the parties have made the contract "in view of the marriage which it is intended shall be had and solemnised between them." It provides as follows:—

(1) That no community of property shall exist between the spouses; that each shall be separated from the other as to property; that each may purchase and acquire real or personal property without participation, authority or control of the other, and may hold the same clear, freed, and discharged from every debt, incumbrance, claim, and demand, of any kind, proceeding from the acts or promises of the other. "Provided, however, that all the property of the said Edward O'Reilly shall be subject to and liable for the payment to the said Miss Eliza Petrie of the sum of $25,000, as hereinafter stipulated."

(2) The personal property of each spouse shall belong to such spouse.

(3) Edward O'Reilly undertakes to pay all household expenses, and to provide wearing apparel, &c., for his wife and children.

The fourth and fifth clauses read as follows:—

(4) "And in the future view of the said intended marriage, he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm, unto the said Miss Eliza Petrie, accepting hereof: first, the household furniture now owned by the said Edward O'Reilly and that which may hereafter be acquired by him by any title whatsoever, to be the said household furniture held, used, and enjoyed by the said Miss Eliza Petrie as her own absolute property forever; second, the sum of $25,000, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators, or assigns of him, the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly; and in the event of the said Miss Eliza Petrie departing this life before the said Edward O'Reilly, but there being children, issue of the said intended marriage, at the death of the said Miss Eliza Petrie, the said sum of money

shall be held in trust by the said Edward O'Reilly, or his heirs, executors, administrators, or assigns, for the sole benefit of all the children issue of the said intended marriage, and shall be paid unto them, share and share alike, as they shall attain the age of majority; it being expressly understood that should she, the said Miss Eliza Petrie, depart this life before him, the said Edward O'Reilly, and should there be no children issue of the said intended marriage at the death of the said Miss Eliza Petrie, then the said gift shall become null and void as if it had not been made; and provided further that the said sum of money (said gift) or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie, nor in any way liable to seizure thereof. And for security of the payment of the above given $25,000, all the immovable properties of the said Edward O'Reilly shall remain specially mortgaged and hypothecated.

(5) "The said Miss Eliza Petrie hath renounced and by these presents she doth renounce to all dower, whether customary or prefix, and to all right of dower."

These clauses are immediately followed by a formal conclusion of the contract.

It is essential to bear in mind that marriage as a consideration is very differently regarded under the Civil Code of Quebec and under the common law of Ontario. The lawyer trained in the doctrines of English law finds it difficult to regard an ante-nuptial settlement, made in consideration of marriage, as aught else than a contract for valuable consideration. Under the Quebec law the cases appear to be uniform that a contract, made in contemplation or consideration of marriage merely, is gratuitous—a contract made for a consideration, valid but not valuable.

In Behan v. Erickson, 7 Q. L. R. 295, Chief Justice Meredith held that a settlement of household furniture by the prospective husband on the intended wife, by marriage contract, is not onerous, and is liable to be set aside, if the donor, at the time it was made, was and knew himself to be insolvent, without proof of knowledge of his insolvency on the part of the donee. The learned Judge says that all the authorities except Chardon regard such a contract as gratuitous. The Civil Code, art. 1034, declares that "a gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it." Article 1035 of the Civil Code provides that "an onerous contract

made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud."

In Turgeon v. Shannon, Q. R. 20 S. C. 135, it was held that the settlement in a marriage contract by the future husband on his intended wife of furniture and household effects is by gratuitous title, and is invalid as against a creditor of the husband, who was insolvent at the time of the marriage. MacIntosh v. Reiplinger, 20 Rev. Leg. 130, and many other authorities, might be cited for this, which seems to be with civil lawyers almost an elementary proposition.

But it is contended that where the contract is made, not merely in consideration of marriage, but in consideration of an abandonment of dower rights by the intended wife, such abandonment and the acceptance of the contractual provision in lieu of dower, renders the contract onerous and not gratuitous. For this proposition the claimant relies upon Turgeon v. Shannon, ubi sup. Archibald, J., there held that a further provision of the contract, above referred to, by which the husband undertook to provide for payment to his wife, after death, of an annuity of $600 a year, "to be taken by her in lieu of all dower," was onerous in its character, the ground of his decision being that this provision "is expressly stated to be in lieu of dower."

It may be noted in passing that in the present instance the provision for payment of $25,000 to the wife is not expressly made in lieu of dower, but is stated to be "for and in consideration of the love and affection and esteem which he (the settlor) hath for and beareth to the said Miss Eliza Petrie."

In Bussieres v. Proulx, 1 Rev. de Jur. 58, 507, the settlement of $1,500, notwithstanding that it was in the contract stated to be in lieu of dower, was held to be, by title of donation, gratuitous, and therefore susceptible of being set aside without proof of knowledge of the insolvency of the grantor or fraudulent intent on the part of the donee. A possible distinction between these two cases appears to be that in Bussieres v. Proulx, of which the head-note seems to be misleading, actual fraudulent intent on the part of the settlor was found by the Court, and the gift, which was payable during his life, rendered him insolvent; whereas in Turgeon v. Shannon insolvency at the time of the marriage was found, but not actual fraudulent intent on the part of the settlor.

The latter case was disposed of under arts. 1033-4-5 of the Civil Code.

As to the gift of furniture, a presumption of fraudulent intent under art. 1034 was made in favour of the plaintiff, a portion of whose claim as a creditor antedated the marriage contract. But fraudulent intent could not be presumed by virtue of art. 1034 so as to invalidate the provision for the annuity expressly made in consideration of the relinquishment of dower, because this was held to make the contract, as to this item, onerous, and within art. 1035. In Bussieres v. Proulx, actual fraudulent intent on the part of the settlor found by the Court was held sufficient to invalidate the provision for payment of $1,500, though expressly made in lieu of dower, and apparently because of non-registration as against subsequent as well as anterior creditors.

A release of dower rights must be a valuable consideration quite as much when given for the assumption of a liability to make payment presently, as when given in consideration of a promise of payment after death. If the contract is onerous in the one case, I would regard it as onerous in the other; if gratuitous in the one case, I should deem it gratuitous in the other. Bussieres v. Proulx (1895), the decision of a Court of Review (Loranger, Davidson, and Doherty, JJ.), affirming the decision of Ouimet, J., does not appear to have been cited in Turgeon v. Shannon (1901); nor does Dessaint v. Ladriere (1890) seem to have been referred to in Bussieres v. Proulx.

In Dessaint v. Ladriere, 16 Q. L. R. 277, it was held by Casault, J., that a stipulation in a marriage contract, whereby the future husband, to replace legal dower renounced by the future wife, gave her an undivided half-interest in some real estate, and " in addition the sum of $2,000 in money to be taken from his most available property in the event of his death and at once after his death," entitled the wife to rank with other creditors against his estate. This case does not appear to be distinguishable upon the ground indicated by Mr. Forin (p. 70), who said that it involved merely a question between the widow and the heirs-at law, and did not affect the rights of the creditors, because it is stated in the report, at the foot of p. 278, that the creditors who had received 50 cents on the dollar from the administrator had undertaken to repay whatever might be necessary (so sont obligés à rapporter), if the widow should succeed in her

claim. But the question actually dealt with in the judgment seems to be one of construction of the contract, viz., whether it meant that the sum of $2,000 should be paid to the widow out of the estate of the deceased, after payment of creditors, or whether it meant that she was entitled to claim upon all the property left by him concurrently with his creditors. The validity of the instrument as against creditors, upon the latter construction, does not appear to have been contested. Neither was there in this case any question as to the solvency of the settlor when the contract was made, or any suggestion of fraud.

Mr. Brooks does not commit himself to Mr. Forin's view of the decision in Dessaint v. Ladriere (p. 93).

In these 3 cases the settlement upon the wife was made expressly in consideration of her relinquishment of dower. It is contended for the claimant that, upon its true construction, the contract here under consideration should be deemed to be made in consideration of the renunciation of dower. Mr. Aylen appears to be strongly of this opinion (p. 36, foot). Messrs. Forin and Brooke are equally strongly of the view that, for several reasons, which they give, the contract, as to the $25,000, should not be deemed to be made in consideration of renunciation of dower, and their opinion further is that, even if made in consideration of such a release, it should be regarded as a gratuitous and not an onerous contract (pp. 57-8-9).

The rule is, no doubt, well established that the words of a contract should be interpreted with reference to each other, and that in construing each clause the provisions of the instrument as a whole must be taken into account. But there are a number of features of the particular clause of this contract, which contains the stipulation in regard to the payment of the sum of $25,000 to Mrs. O'Reilly, which, upon the evidence of Messrs. Forin and Brooke, not disputed on this point by Mr. Aylen, seem quite inconsistent with the view that the relinquishment of dower should, in this case, be regarded as the consideration for this undertaking of the settlor.

It is a well known maxim in our jurisprudence that that method of construction should prevail which will give effect to every provision of a contract, and that no provision should be rejected unless absolutely inconsistent with the general tenor of the instrument.

For the contestant it is pointed out that, when dealing with the undertaking that $25,000 shall be paid to the intended wife after the death of her future husband, the contract specifies the consideration for this undertaking in the words, "for and in consideration of the love and affection and esteem which he hath for and beareth to Miss Eliza Petrie." The consideration being so stated, not by an inexperienced person, but by the notary drawing the contract, why should other considerations be imported or presumed? In the clause of the contract dealing with this sum of money, it is spoken of as a "gift," and again as "said gift"—language made use of by a skilled person. Moreover, it is not necessary to look to this promise to find consideration for the renunciation of dower by the intended wife. By an earlier provision of the contract she is relieved from the provisions of the law relating to community of goods, and is given the right to hold separate estate freed from debts and claims of her husband, and it is stated by the Quebec advocates that it is quite customary, in marriage contracts where provisions such as these are made, to find renunciation of dower rights without other consideration (pp. 57, 94).

But, perhaps, the strongest argument in favour of the view that the undertaking for the payment of $25,000 must be deemed gratuitous, is found in the concluding provision, that "the said sum of money (said gift) or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie or in any way liable to seizure therefor." Attached to a gratuitous donation, this is a valid provision, and is effective under art. 599 of the Code of Procedure, which renders exempt from seizure "sums of money or objects given or bequeathed upon the condition of their being exempt from seizure." The words "given or bequeathed" in this provision indicate acquisition by gratuitous title. The uncontradicted testimony of Messrs. Forin and Brooke (pp. 56, 94) is that such a condition can be validly annexed only to gifts and donations, and not to property acquired by onerous title. In an onerous contract such a stipulation would be null and void. If, therefore, the contract in question should be regarded as onerous, it would be necessary to reject this provision as inconsistent with the character of the undertaking. As already pointed out, this would be contrary to one of the best known canons of construction in our own system of

jurisprudence, and would appear to be equally objectionable under the Quebec system.

Other reasons why this provision should be deemed gratuitous are suggested by Messrs. Forin and Brooke. They assert that during the lifetime of the husband all his property, including any money available to pay this $25,000, is subject to the claims of his creditors, and is alienable by him: Boissy v. Daignault, Q. R. 10 S. C. 33; Civil Code, arts. 757, 823. In the event of his insolvency, his wife could not prevent all his property being taken to satisfy his creditors' claims, and this was the position up to the moment of his death. The right of the wife herself to this sum of money is said by these gentlemen to be inalienable during the husband's lifetime. They say that is a mere expectancy. They further say that if her right to it was by onerous contract, she would be able to part with it, and they refer to art. 1570 of the Civil Code. They maintain that her inability to make title, should she desire to dispose of her right during the husband's lifetime, is another evidence that the contract is gratuitous.

After giving this question the best consideration of which I am capable, I have reached the conclusion that, upon the proper construction of this contract, the undertaking as to the sum of $25,000 should not be regarded as made or given in consideration of the wife's renunciation of dower, but that it should be taken as a gift or donation to the wife made in view of the projected marriage and in consideration of love, affection, and esteem, as stated in the contract, and therfore gratuitous upon the authorities above referred to.

The notary drawing the contract must be taken to have inserted deliberately the consideration which is actually stated, and his omission to refer to the relinquishment of dower or other benefits to the husband or detriments to the wife under the contract, as part of the consideration, cannot be assumed to have been accidental. Neither should it be presumed that he used the words "gift" and "said gift," without understanding that they imply a gratuitous donation. He must also be taken to have known that the condition as to non-seizability cannot be annexed to anything except a donation. His insertion of this provision in the contract renders it reasonably certain that his choice of the consideration which he had the parties express was deliberate and designed. The entire clause is framed as one would expect

to find it if the intention of the draftsman were to make it clearly and undoubtedly gratuitous, and I find it impossible, without doing violence to what I conceive to be an intention clearly expressed in the contract itself, to regard the provision as to the $25,000 as onerous. I find nothing in the contract, taken as a whole, inconsistent with this view of the character of the $25,000 stipulation.

What, then, is the effect of this gratuitous marriage contract by which the future husband assumed a present liability to his intended wife for $25,000—payable after his death by his heirs, executors, administrators, and assigns? The attempted hypothecation of his entire immovable property as security for the payment is admittedly ineffectual. It is only of importance as an indication, if such were necessary, of the settlor's intent that his assumption of liability should be present, and that his indebtedness to his wife should exist from the passing of the contract—that she should then have the status of a creditor, debitum in presenti solvendum in futuro. The Civil Code, in art. 777, not referred to by the witnesses, says, "The gift . . . of a sum of money . . . which the donor promises to pay . . . divests the donor, in the sense that he becomes the debtor of the donee." This is the view taken in all the cases cited in which the promise was to pay during the lifetime of the settlor: Denis v. Kent, Q. R. 18 S. C. 436; Morin v. Bedard, 17 Q. L. R. 30; Viger v. Kent, 16 Rev. Leg. 568; Fox v. Lamarche, 13 Rev. Leg. N. S. 67.

But counsel for the contestant and his witnesses maintain that where money settled by marriage contract is payable only after the death of the settlor, the settlement must be regarded as "a contractual institution of heirship," a donatio mortis causa in a marriage contract. The effect of such a contract, they assert, is to postpone the right of the donee to the claims of creditors, just as the rights of heirs and testamentary beneficiaries are postponed, and they refer to DeLorimier's Bibliotheque du Code Civil, vol. 6, p. 594, and to Mignault's Droit Civil Canadien, vol. 4, p. 203.

De Lorimier, from p. 587 to p. 610, collates authorities bearing upon art. 818 of the Civil Code. That article deals with donations in marriage contracts, (a) of present property, (b) of property which the donor may leave at his death, (c) of both together. When the gift is of property which the donor may leave at his death, it is deemed to be made in

contemplation of death, and is donatio mortis causa, vesting no present property in the donee, lapsing if the donee predeceases the donor, and irrevocable only because contained in a marriage contract. Such donations, whether by universal, general, or particular title, are subject to the rights and claims of persons who are creditors of the donor at his death. The gift is in fact construed and treated as a gift out of the succession or estate left after creditors have been satisfied. The authors and commentators regard "property left after death" as "biens à venir," future property, during the lifetime of the decedent. And Mignault, in speaking of a "donation de biens à venir," at p. 203, says, "If the donation is by particular title, as when the donor gives to the donee a sum of money to be taken from the property which he shall leave at his death, it cannot injure creditors, for the donee . . . is liable for the debts, in case the other property is insufficient."

But, where the contract is not that the donee may take from the property which the donor may have at his death—which does not create a debitum in presenti—but is a present gift of, or an unqualified undertaking to pay, a sum of money—payment merely being postponed until the settlor's death—the donee becomes a creditor at once, and the donation is not deemed to be made "de biens à venir," but "de biens présents,"—it "divests the donor in the sense that he becomes the debtor of the donee" (art. 777, C. C.), and in such a case, says Mignault at p. 203, "as to future debts the right of exemption (of the donee) is absolute, since it is only creditors anterior to the donation who can demand its annulment on account of fraud."

This last statement is, perhaps, too broad if meant to cover a case in which actual intent to defraud future creditors can be proved; but it is, no doubt, intended to be confined to the cases in which presumptions of fraud are raised by the Code: arts. 1034 and 1035. The importance of the passage quoted is that it shews that donations of this class, though payable at death, are not by the very nature of the gift postponed to the claims of subsequent creditors of the donor, unsatisfied at the time of his death. When there is a gift of a sum of money which the donor promises to pay, he becomes the debtor of the donee under art. 777 of the Civil Code, and he remains such until the debt is discharged, whether it be in his lifetime or after his decease. The

donee has the right to rank upon his estate as a creditor equally in the event of its distribution amongst creditors during his lifetime, or, in the event of its administration, after his death.

Therefore, apart from the question of fraud, the contract would appear to give Mrs. O'Reilly the right to rank for her claim with other creditors of her deceased husband.

As already pointed out, there being no creditors of the estate of Edward O'Reilly, deceased, whose claims are anterior to the making of the marriage contract, there can be no presumption of fraud under the provisions of arts. 1034, 1035, of the Civil Code (see art. 1039). To succeed, therefore, the contesting creditor must prove actual fraudulent intent.

Notwithstanding the insolvency of the settlor when he married, and the comparatively large amount of the gift to his wife, I cannot find in these circumstances enough to warrant an inference that there was actual fraudulent intent in the making of the contract—actual intent thereby to defeat or prejudice future creditors of the settlor.

The argument for the contestant may perhaps be most plausibly presented in this form:—

"If the legal effect of this gratuitous provision in favour of the wife were to give priority over the heirs-at-law and other gratuitous beneficiaries in the administration of her husband's estate, but not to enable her to rank with creditors of her husband, there could, of course, be no fraud upon his creditors. But, since the legal effect of the contract, notwithstanding its gratuitous character, is that, if valid, it gives the wife the right to rank with creditors, that fact is important in determining the intent of the parties. It could only be material to give the wife this right in the event of the husband's estate being insufficient to meet her claim and the claims of his creditors in full. If the estate should prove adequate to meet both, it would not matter whether she is paid pari passu with creditors or after their claims had been satisfied; but, if the estate should be insufficient to meet the claim of creditors, then every cent to be paid to the widow would diminish the fund which would be otherwise available to satisfy creditors. The only purpose of the contracting parties in attempting to give to the wife the status of a creditor would be to enable her to take a portion of the fund to which credi-

tors must resort, and this would almost necessarily involve the conclusion that the parties were providing for the case of the husband's estate being insolvent, and therefore contemplated defeating his creditors in part. Having regard to the insolvent condition of the settlor when the contract was made, and to the large amount of the post obit provision for the wife (Brooke's evidence, pp. 98, 118), the contract, if intended to give the wife the status of a creditor, was made with fraudulent intent by both parties. If fraudulent intent of both parties is the proper and legitimate inference from the evidence, then the contract would be voidable, not only as against anterior, but also as against subsequent, creditors. The decisions of the Quebec Courts are apparently uniform on this point: Murphy v. Stewart, 12 Rev. Leg. 501; Ivers v. Lemieux, 5 Q. L. R. 128; and Bussieres v. Proulx, ubi supra."

But, however logical this argument may appear, it is difficult to conceive that these contracting parties had in mind the idea that the prospective husband might die insolvent, or might leave an estate insufficient to satisfy his creditors and also this claim of his intended wife, and therefore schemed to defeat claims of such future creditors of the husband by this contract. Such an inference would not, in my view, be warranted by the facts in evidence. There is no evidence whatever that the intended wife knew of her future husband's insolvent condition.

I think the contestant fails because actual fraudulent intent has not been shewn, and because, upon its proper construction, the contract, though gratuitous, on the marriage being solemnised, constituted the wife a creditor of the husband, whose right to payment only was deferred until after the husband's death.

The appeal should, therefore, be dismissed with costs.

APRIL 19TH, 1909.

DIVISIONAL COURT.

SAWYER-MASSEY CO. v. HODGSON.

Husband and Wife—Joint Sureties for Debt of Third Person—Liability of Wife—Lack of Independent Advice—Fraud—Duress—Findings of Trial Judge—Demeanour of Witnesses—Appeal.

Appeal by defendants from judgment of RIDDELL, J., in an action upon promissory notes made by the defendants,

husband and wife, as guarantors for one Lawton of the price of a machine purchased by Lawton from plaintiffs.

Featherston Aylesworth, for defendants.

Kirwan Martin, Hamilton, for plaintiffs.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—The defendants, husband and wife, appeal from the judgment of Riddell J., holding them liable to the plaintiffs as guarantors of the indebtedness of one Lawton. Lawton is not a party to the action, and counsel for the appellants confined his argument to a plea for the relief of Mrs. Hodgson.

Upon the findings of the trial Judge, the defendant Jane Hodgson became co-surety with her husband, with full knowledge of the nature of the obligation which she undertook and without anything in the nature of fraud, misrepresentation, duress, or undue influence. The learned Judge has further found no circumstances proved which would relieve the principal debtor from liability.

From a perusal of the evidence, I am not at all certain that I would have reached the conclusion that the plaintiffs' agent, when demanding that Mrs. Hodgson, as registered owner of the farm occupied by herself and her husband, should guarantee Lawton's debt, did no more than hint at certain unpleasant consequences to her husband should she refuse. But the trial Judge has found that no such threats were made, expressly stating, at least twice, that he bases his finding upon "consideration of the witnesses whose conduct and demeanour I see in the witness-box." With our hands thus tied, we cannot, upon conflicting evidence, reverse this finding: Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury, [1908] A. C. 323, 326.

Counsel for the appellants relied upon Cox v. Adams, 35 S. C. R. 393, as authority establishing that Mrs. Hodgson should not be held liable because she had not the benefit of independent advice before entering into the obligation to the plaintiffs. The judgment of this Court was reserved pending the disposition in the Supreme Court of Canada of Stuart v. Bank of Montreal, 17 O. L. R. 436, 12 O. W. R. 958, in which it was anticipated that the principle of the decision in Cox v. Adams might be reconsidered. Judgment

has recently been rendered by the Supreme Court following Cox v. Adams, allowing Mrs. Stuart's appeal, and holding her not liable solely because she had not independent advice.

But in the Stuart case, as in Cox v. Adams, the feme covert had entered into the impeached transaction for the benefit of her husband. This fact was held to raise a presumption of undue influence which could only be rebutted by proof that she had in fact had independent advice.

In the present case, although it was suggested that Hodgson had some personal interest in the threshing machine bought by Lawton, the evidence establishes, and the trial Judge has declared (p. 169), that it is perfectly plain that Hodgson was merely a surety for Lawton, and had no proprietary or beneficial interest in the transaction.

In the absence of any such interest in the husband, the ground upon which the presumption of undue influence was based in Cox v. Adams and Stuart v. Bank of Montreal is non-existent in this case. Not only has a married woman, when contracting otherwise than for the benefit of her husband, all the capacity of a feme sole to bind her separate estate, but there can be no ground for presuming that the husband abused the confidence of his wife by exercising undue marital influence for the benefit of a stranger.

Upon the findings of the learned trial Judge, with which we are not in a position to interfere, the liability of Mrs. Hodgson is established. The appeal, therefore, fails, and must be dismissed with costs.

CLUTE, J. APRIL 20TH, 1909.

WEEKLY COURT.

RE MCGARRY.

Will—Construction — Bequest of "Goods and Chattels" — Book Debts Included.

Motion by the executors of James McGarry, deceased, under Con. Rule 938, for an order declaring the construction of the will of the deceased.

W. M. German, K.C., for the executors.

F. W. Hill, Niagara Falls, for J. H. McGarry.

CLUTE, J.:—The testator, having bequeathed to his wife the family residence and all furniture therein contained, with certain exceptions, and certain other real estate, proceeds as follows:—

"I also will, devise, and bequeath unto my beloved wife all moneys in bank, notes, mortgages, and all goods and chattels whatsoever and wheresoever, including my beneficiary certificate in the A. O. U. W."

He then leaves a legacy of $1,500 to his daughter, and gives to his son $500 insurance and his medical works and instruments.

The question for decision is, whether the words "all goods and chattels whatesoever and wheresoever" is a good bequest of the book accounts to the widow.

"The words 'bona et catalla,' jointly or separately, in our ancient statutes and law writers, denote personal property of every kind, as distinguished from real: Bullock v. Dodds, 2 B. & Ald. 276;" Stroud's Judicial Dictionary, 2nd ed., p. 823.

"A bequest of all testator's 'goods and chattels' doth pass all his estate, active and passive (except lands of inheritance and freehold estates and such things as depend thereon), as leases for years, gold, silver, plate, household stuff, cattle, corn, debts, and the like:" ib. Touch. 447.

In a bequest of "furniture, goods, and chattels," the latter words would pass only such things as are ejusdem generis with "furniture:" Manton v. Tabois, 30 Ch. D. 92.

I think book debts are ejusdem generis with moneys in bank, notes, mortgages, as representing obligations for debts owing. But, whether this be so or not, the words "goods and chattels" being broad enough to cover the book debts, I find nothing in the context to limit their meaning.

It is further to be observed that the presumption is that the testator intended to dispose of the whole of his personal estate, which presumption is only overcome where the intention of the testator to do otherwise is plain and ambiguous: Am. & Eng. Encyc. of Law, 2nd ed., vol. 30, p. 668. See also Re Way, 6 O. L. R. 614, 2 O. W. R. 1072; Re McMillan, 4 O. L. R. 415, 1 O. W. R. 471; Smith v. Davis, 14 W. R. 942; Re Hudson, 16 O. L. R. 165, 11 O. W. R. 912; Campbell v. McGrain, Ir. R. 9 Eq. 397 (1887).

I am of opinion that the clause above mentioned is sufficient to pass book debts of the deceased. Costs out of the estate.

RIDDELL, J. APRIL 20TH, 1909.

TRIAL.

KENNEDY v. KENNEDY.

Will — Construction — Devise of Life Estate in Lands not Owned by Testator—Mortgage Held by Testator on Lands —Sale by Testator of Part of Lands—Finding that Nothing Due on Mortgage—Illusory Devise—Claim against Estate for Compensation—Right of Devisee of Life Estate to Share in Residue—"Pecuniary Legatees"—Costs.

Action by Joseph Hilton Kennedy, a son of David Kennedy, deceased, against the executors and beneficiaries of the will of David Kennedy, to recover the value in money of a life estate in lands devised to the plaintiff by the will; and for other relief.

W. M. Douglas, K.C., for plaintiff.

E. D. Armour, K.C., W. Proudfoot, K.C., W. Davidson, K.C., A. J. Russell Snow, K.C., W. A. Proudfoot, and T. N. Phelan, for the several defendants.

RIDDELL, J.:—The late David Kennedy died in 1903, leaving a will whereby he appointed the defendants James Harold Kennedy (his son) and Gertrude Maude Foxwell and Annie Maude Hamilton (his granddaughters) his executor and executrices. He then made certain dispositions of his estate, those of importance at the present time being the following:—

"3. I give, devise, and bequeath to my son James Harold Kennedy the dwelling-house . . . and all the appurtenances thereto belonging . . . together with chattels therein and thereon at the time of my death . . .

"4. I give, devise, and bequeath all that real estate of mine . . . known as the Foxwell estate, together with the goods and chattels thereon at the time of my decease, to my said trustees, in trust for the benefit of my son Joseph Hilton Kennedy, to permit him to use, occupy, and enjoy the same for" life—remainder to the children of Joseph absolutely, and, in default of issue, to become part of the residue.

7. An annuity for life of $400 to David Kennedy.

8. A sum of $5,000 to Madeline Kennedy.

12. "I give, devise, and bequeath to my daughter Margaret M. Down the sum of $5,000 . . ."

13. "I give and bequeath to my granddaughter Gertrude Maude Foxwell the sum of $5,000 . . ." and certain chattels.

14. "I give, devise, and bequeath to Annie Maude Hamilton the sum of $5,000 . . ." and certain chattels.

15, 16, 17, 18. Gifts to various persons named of certain specific chattels.

"20. The rest, residue, and remainder of my estate, both real and personal, I give, devise, and bequeath to my executor, executrices, and trustees, aforesaid, to be used and employed by them, in their discretion or in the discretion of a majority of them, in so far as it may go, to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy, with full power and authority to make sales of my real estate, upon such terms and conditions and otherwise as may be expedient, and to execute all deeds, documents, and other papers necessary for the sale of same and to make title thereto to any purchaser thereof, and the proceeds of such sales to devote, as, in their discretion or in the discretion of a majority of them, may seem meet and necessary, to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained, and if for any reason it should be necessary that the said residence should be sold or disposed of, I direct, upon any such sale being completed, that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

James Harold Kennedy alone was granted probate, the granddaughters renouncing.

The Foxwell estate belonged to the grandchildren of David Kennedy and their mother, his daughter. They had mortgaged the property to one R. H.; they not being in a position to pay the mortgage money, R. H. assigned the mortgage to David Kennedy. He foreclosed the mortgage, as he thought, but left out one of the necessary parties; then, considering the land his own, he proceeded to sell some of it. After his death, in 1906, an action for redemption was begun by the representative of the omitted party,

the foreclosure opened up, and a reference directed to the Master. Upon the matter coming up in the Master's office, with the consent of all parties except Joseph Kennedy, who had been made a party in the Master's office, but in presence of his counsel, it was found that there was nothing due upon the mortgage. There is no pretence that there was any change in the state of the accounts between the time of the death of David Kennedy and the time the Master made his report. In an action, then, to which both the plaintiff and the defendant James Harold Kennedy were parties, it has been found that nothing was due upon the mortgage at the time of the report (2nd December, 1908), and by implication nothing at the time of the death of David Kennedy. He was probably a necessary and certainly a proper party to that action; and it was to his interest to prove that some amount was still due and unpaid upon the mortgage.

Joseph thus failed to obtain the Foxwell estate, the remaining part of which must needs be conveyed to the parties entitled to redeem.

He now brings this action, claiming that, as he has been deprived of his "life use" in the Foxwell estate, he is entitled to receive out of the said estate the value of the said life use in money. He goes on to allege that James H. Kennedy is guilty of gross misconduct in the management of the estate, and is not a proper person to have charge of it; that he has no right to exercise the sole management of any of the trusts, as the testator clearly intended that no less than two trustees should manage the trusts. He also asks an interpretation of the will. His prayer for relief is somewhat voluminous, claiming, as it does: (1) the value in money of the life estate in the Foxwell estate; (2) the removal of James as executor and trustee; (3) an injunction; (4) appointment of new trustees; (5) accounts; (6) an interpretation of the will; (7) costs; and (8) general relief.

The defendants file various defences, but have obtained no order for the trial of issues inter se, and I am informed that they will have no difficulty in arranging any difficulties there may be among themselves.

I thought it a case in which the purely legal matters might be disposed of first, and the rights of the plaintiff were argued at length.

It is contended for him that he has two rights: (1) to the amount of the Foxwell mortgage, without deduction for any amount which may have been properly chargeable by the mortgagors against such mortgage, from having been received by the mortgagee from sales of the land; and (2) a share in the residue under clause 20 of the will.

I consider these claims in the reverse order.

It would seem that the testator, in giving this residue for the purpose of keeping up the house, did not anticipate that it would from the income fulfil this purpose, but the income was to be applied "in so far as it would go" to that purpose. Then, if it were thought advisable, sales could be made and the proceeds be devoted, in the discretion of the trustees or the majority of them, as "may seem meet and necessary, to keep and maintain" the "residence in the manner in which it has been heretofore kept and maintained." There does not appear to be any doubt that the testator did not intend that the proceeds from the sale of the land should be applied to any other purpose than that of keeping up the house. Then, if the house should be sold, the residuary estate then remaining shall be equally divided among the pecuniary legatees. This residue so to be divided will, as I at present think, include such part of the proceeds of former sales, if any, as has not been already devoted to keeping up the house.

The plaintiff claims that he is one of the "pecuniary legatees" under this clause. Such a claim is wholly untenable. We must look at the meaning which was in the mind of the testator when he used the expression "pecuniary legatees." He had made certain bequests of money, by annuity or otherwise (Gaskin v. Rogers, L. R. 2 Ch. 284), certain bequests of specific chattels, and this specific devise of land which he believed himself to own. It cannot be successfully contended that a devise of land constitutes the devisee a legatee; and the bequest of certain chattels to the plaintiff does not advance his position: In re Elcom, [1893] 1 Ch. 303; Re Read, ante 508. In a case of this kind, as in the case of a legacy or devise being null and void by reason of a witness being interested, the will is to be read as it stands, and as though all were valid and effectual, and then the results determine which follow from the legacy or devise being invalid. See In re Maybee, 8 O. L. R. 601, at p. 602, 4 O. W. R. 421; Aplin v. Stone, [1904]

1 Ch. 543, and cases cited. So that, even though it should be held that by reason of the failure of the Foxwell estate devise, the plaintiff should be declared entitled to certain money, that would not make him a pecuniary legatee.

It is argued that before the sale of the house and after the sale of the residue, or some part of it, the plaintiff has or may have an interest. The argument is that it may well be that the sale of this residue will produce such a sum as that the income thereof will be more than any trustee could honestly consider was "meet and necessary to keep up and maintain" the "said residence in the manner in which it" had before the testator's death been "kept and maintained," and that as to the surplus—or the surplus income at the very least—the testator had made no disposition of this, and the plaintiff would be entitled to a share as on an intestacy.

Much might be said in favour of the plaintiff's contention, if such turned out to be the fact in the future, but the case has not yet arisen and may never arise, and therefore it does not call at present for actual decision.

In respect of the Foxwell estate, the position of the testator at the time of his death was that of a mortgagee in possession of some of the mortgaged premises, who claimed to own it and had sold the rest. He was not in fact the owner of this estate, and effect cannot be given to the devise of what he calls "that real estate of mine."

It is quite clear that in a case in which the testator thinks he has and has not the ownership of land but only a mortgage thereon, a devise of the land will be effective as a gift of the interest the testator actually has in the land, i.e., the mortgage.

"What, after all," says Lindley, L.J., in the well known case of In re Lowman, [1895] 2 Ch. 348, at p. 354, "is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and prima facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular land in his mind, and if there is nothing else to answer the description."

So also in In re Carter, [1900] 1 Ch. 801, Cozens-Hardy, J., in the case of a devise of "my two houses and stable in George street . . . to . . . J. D. . . . in fee simple," the testatrix not having the fee, but only a

mortgage upon the property, held that the mortgage passed. At p. 803: "The position of a mortgagee in possession is peculiar . . . He treats himself as owner, and, unless and until redeemed, he naturally regards himself as owner. I cannot doubt that Mrs. C. intended to give the plaintiff all her interest in this property, the rents and profits of which were being received by her."

Such cases have nothing in common with cases of ademption by the act of the testator subsequent to the making of the will; as, for example, In re Clowes, [1893] 1 Ch. 214, in which case the testator, after devising a particular property, sold it and took a mortgage back. In such cases the testator changes the ownership from himself, and thereby adeems the devise.

See also Re Dods, 1 O. L. R. 7, and cases cited. Burches v. Dixon, 6 W. R. 427, may also be looked at.

But no authority can be found, I think—none has been cited, and I know of none—for the proposition that in the case of a mortgagee in possession devising land, the devisee is entitled to say that he will take in money, from the testator's estate, the value of the land which he should have received under the will. But it is argued that the plaintiff here is entitled to say that the testator was the mortgagee of the land; that his interest in the land was the amount unpaid on the mortgage; and that the money which he had received from a sale of part of the land was a debt which he owed to the mortgagors. For this proposition Parkinson v. Hanbury, L. R. 2 H. L. 1, is cited; but nothing in that case supports such a contention. There a purchaser under the power of sale in a mortgage having been in possession of the rents and profits, and it being established that the power of sale had not been rightly exercised, it was attempted by the mortgagors to hold the purchaser liable as a mortgagee in possession on the footing of wilful default. It was held that this contention could not prevail, the history of the doctrine of accounting on the footing of wilful default was gone into, and it was held that this principle did not apply in the particular case. The case may be an authority for the proposition that the testator's estate could not in the redemption action be called upon to account for the rents and profits on the wilful default basis (and as to that I express no opinion), but it goes no further.

The real position of mortgagor and mortgagee is of course that the mortgagor owns the land, and the mortgagee has a charge upon it. If the mortgagee sells any of the land under power of sale in the mortgage—it seems the testator did not purport to act under such power of sale here—it is his clear duty to apply the net proceeds upon the mortgage: see R. S. O. 1897 ch. 126 (p. 1127), sched. B. (14). No reason can be successfully urged why a mortgagee in possession in fact should not apply the proceeds of sales of the land in this way, even though he supposes he is selling and can sell as the absolute owner. And it has been found, in an action to which the plaintiff and the defendant James H. Kennedy were both parties, that there is nothing due upon the mortgage. No appeal has been taken from this finding, nor, on the admissions made before me, could there be. It thus appears that, while in form the testator at the time of his death had a charge upon the Foxwell property for a large sum, in reality he had no charge at all. The devisee takes all the testator can give him, but unfortunately for him that is illusory. Nothing passed of value under the devise: still, the devisee cannot look to the estate for compensation.

Under these circumstances, at present, under the allegations in the statement of claim, he has no right to interfere in the estate.

Whether if, by the change of circumstances, he is able to make such allegations as will entitle him to some relief hereafter, I do not inquire.

The present action will be dismissed, but, as it is plain that the testator intended a considerable benefit to the plaintiff, and the plaintiff has been deprived of this benefit through no act of his own, I think I may dismiss the action without costs.

No declaration is made as to the relative rights of the defendants inter se, and this dismissal to be without prejudice to any action the plaintiff may see fit to bring under changed circumstances.

APRIL 20TH, 1909.

DIVISIONAL COURT.

BOYD v. SHAW-CASSILS CO.

Contract—Peeling, Piling, and Delivery of Bark—Failure of Plaintiff to Do Work—Damages for Breach of Contract—Remedy Provided by Contract—Right of Defendants to Do Work—Exercise of Right—No Right to Damages—Construction of Contract—Implication from Deletion of Clause—Trespass—Damages—Principle of Assessment—Crown Dues Paid by Defendants—Disallowance.

An appeal by defendants from the judgment of LATCHFORD, J., 12 O. W. R. 913, upon the grounds following:—

1. The defendants should have been found entitled to damages for breach of the agreement.

2. They should have been held to be entitled to cut and take the logs, and not held to be trespassers.

3. They should have been allowed $158.90 paid by them for dues, etc.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

W. E. Middleton, K.C., and A. E. Knox, for defendants.

N. Sommerville, for plaintiff.

RIDDELL, J.:—It may be necessary to set out certain terms of the agreement. The price to be paid to the plaintiff for the tan bark by the defendants was not "the" but "their then current tannery price." The clause for payment to the defendants by the plaintiff of money paid for dues, etc., reads: "All moneys paid by the parties of the second part for their protection hereunder, whether by reason of the default of the party of the first part or otherwise, shall be added to and form part of the indebtedness first hereinabove provided for, and shall bear the like interest and be repayable in like manner." And by a previous clause the following provision was made: "The party of the first part will forthwith pay the balance of $106.55,

part of the said sum now due to the Department of Crown Lands under said license, and will from time to time and at all times hereafter pay all dues, ground rent, and other charges and expenses in connection with the said license and all renewals thereof."

In respect of the first point in appeal, the argument to which my learned brother has acceded is that there is in the contract itself a provision as to what may be done by the defendants in case of a breach by the plaintiff of his agreement to deliver the bark, and consequently no other relief can be claimed by the defendants.

The doctrine in Apsdin v. Austin, 5 Q. B. at p. 684, cited by my learned brother, has been applied steadily and consistently by the Courts of England and Ontario: Hill v. Ingersoll and Port Burwell Gravel Road Co., 32 O. R. 194, and cases cited. But that doctrine has no application here. The right to bring an action for breach of contract is not a term implied in the contract, is not a term of the contract at all. It is a new right given by the law immediately to the person injured, by way of compensation for his loss, and a new corresponding duty is laid upon the other party: Holland, Elements of Jurisprudence, ch. 13, p. 315.

If in a lease there is a term that the landlord may re-enter upon non-payment of rent, it could not be contended that the tenant might successfully defend an action for rent due by setting up that the lease gave the landlord his remedy; nor could a mortgagee be met by a plea that his mortgage deed gave him a remedy by entry and lease or sale.

In like manner, "upon covenants and simple contracts with a penalty the plaintiff has an election as to the form of action. 'He may either bring an action of debt for the penalty . . . or, if he do not choose to go for the penalty, he may proceed upon the covenant and recover more or less than the penalty:'" Leake on Contracts, 5th ed., pp. 772, 773, and cases cited; Baker v. Trusts and Guarantee Co., 29 O. R. 456 (the head-note of this case is misleading).

Not wholly unlike the present is the case supposed by Lord Ellenborough in giving the judgment of the Court in Clarke v. Gray, 6 East 564, at p. 567—"the case of a covenant in a lease not to plough ancient meadow or the like, followed by a proviso that, in case the same should be

ploughed by the tenant thereof, he should pay a certain increased rent for the same." The Chief Justice says: "In such case, it would certainly be in the option of the lessor to declare as for a breach of a covenant not to plough, or the lessor may declare at once for a breach of a covenant in not paying the stipulated satisfaction for such ploughing."

So in the present case, I can see no necessity for the defendants availing themselves of the license given by the contract itself upon the failure of the plaintiff to fulfil his express contract.

Upon the argument it was practically conceded by counsel for the defendants that the first bark was actually to be delivered in 1902. Upon the reference the claim was first made that the delivery should begin in 1901, but this was abandoned. My learned brother considers that the first delivery should have been in 1902, and, considering the ambiguity of the contract itself and the interpretation placed upon it by the parties, I cannot say he was wrong.

Then the defendants, instead of relying upon the contract of the plaintiff to deliver, and bringing an action against him, as they might have done, took advantage of the term in the contract allowing them to take hold of the property themselves—they took off (Boyd, p. 22) 170 cords—he had previously said 293 cords, but that amount seems to have been taken from another limit.

Did this act upon the part of the defendants have the effect of destroying their right to damages, or had it simply the effect of reducing the damages?

Applying analogy to the case in 6 East, it would seem that the effect is wholly to bar the right. Suppose in that case, the agreement had been that the tenant would plough a certain field, but that, if he failed, the landlord might come and take a horse from him. The tenant omitting to plough, there would be no legal liability upon the landlord to take the horse; he might sue at once for damages. But, if he did take the horse, it could not be argued that he could also sue the tenant for damages for breach of his covenant to plough. And, if the agreement had been that, upon failure of the tenant to plough, the landlord might himself plough the field, or so much of it as he might consider desirable, the landlord need not plough at all, but, if he did, he must be considered as adopting the alternate agreement, and, so long as the tenant did nothing to pre-

vent him, from ploughing what he wished, he could have no cause of action. So in the present case, it seems to me that, at the time of the breach of the agreement by the plaintiff of his contract, the defendants might have simply declined to avail themselves of the alternate agreement giving them the right themselves to act; but, acting, they must be considered as adopting the alternate provision. Their election cannot be revoked, and I think they are not entitled now to damages.

In this respect, I cannot see that the judgment appealed from is wrong, though the result is arrived at in a different way.

2. I can see no reason for quarrelling with the judgment appealed from in respect of the amount with which the defendants are charged for the timber taken by them, the property of the plaintiff. The fair market value, as I think, has been intended to be and has been charged.

3. In respect of the claim for money paid by the defendants for dues, etc., I am unable to agree with my learned brother. There is an express agreement upon the part of the plaintiff to pay such dues, and an equally express agreement that, if the defendants should pay any money for their own protection, the amount should be added to the indebtedness. In view of these express provisions, the defendants are entitled to add the sum of $158.90 to their claim. The appeal upon this point should be allowed.

Success being divided, there should be no costs of the appeal.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., agreed in the result.

LATCHFORD, J. APRIL 21ST, 1909.

CHAMBERS.

HAZELTINE v. CONSOLIDATED MINES LIMITED.

Mortgage—Action for Foreclosure — Judgment — Principal Due by Virtue of Acceleration Clause—Default in Payment of Interest—Stay of Proceedings upon Payment of Interest—R. S. O. 1897 ch. 126, sched. B., cl. 16—Practice of High Court—Rules 387, 388, 389.

Appeal by plaintiff from order of Master in Chambers directing that the proceedings in this action be stayed, pur-

suant to Rule 389, which provides that in an action for foreclosure the defendant may move to stay the proceedings in the action after judgment, but before final foreclosure, or recovery of possession of the mortgaged property, upon paying into Court the amount then due for principal, interest, and costs.

W. R. Wadsworth, for plaintiff.

J. F. Hollis, for defendants.

LATCHFORD, J.:—The mortgage is dated 29th September, 1902, and is made pursuant to the Act respecting Short Forms of Mortgages, R. S. O. 1897 ch. 126. It secures upon certain mining locations near Port Arthur the payment of $50,000 principal money in 10 years from its date, with interest at 6 per cent., and contains the form of words in clause 16 of column 1 of schedule B. to the Act: "Provided that in default of the payment of the interest hereby secured the principal hereby secured shall become due and payable." Default was admittedly made by defendants, the assignees of the equity of redemption, in the payment of interest; and, under the acceleration clause quoted and the effect given to it by the statute, the whole principal sum "forthwith became due and payable, as if the time in the mortgage mentioned had fully come and expired."

In the foreclosure proceedings, by an order made 3rd December, 1908, the amount due to the plaintiff, as of 4th January, 1909, was found to be $52,039.45, which was directed to be paid into the Bank of Montreal at Port Arthur to the joint credit of the plaintiff and the Accountant of the Court. Of the sum mentioned, $50,000 was due only by virtue of the acceleration clause in the mortgage. The defendants paid $2,039.45, and applied for and obtained the order appealed from.

The question whether the Court can grant relief is to be determined, I think, by the contract of the parties. Clause 16, as extended by the statute, provides for acceleration, but it also gives, in that event, a remedy to the mortgagor or his assigns. At any time before judgment, or within such time as, according to the practice of the High Court, relief therein could be obtained, the mortgagor, or those claiming under him, shall, on payment of all arrears under the mortgage and costs, "be relieved from the consequences of non-payment of

so much of the money secured as may not then have become payable by reason of lapse of time."

The practice of the Court rests now on Rules 387, 388, and 389, as it rested on Rules 359, 360, and 361, when Wilson v. Campbell, 15 P. R. 254, was decided in 1893. In that case, while an order directing a stay was set aside, the action was upon a covenant, judgment had been recovered, and execution placed in the sheriff's hands. It was held, following the opinion of Moss, C.J.A., in Tylee v. Hinton, 3 A. R. at p. 60, upon the effect of General Chancery Orders 457-462, that the Rules cited did not avail for the relief of one sued in covenant upon an acceleration clause. But the learned Chancellor, in his judgment, at p. 257, observes: "In the usual mortgage action I can well understand why there should be the right to interfere before the judgment of the Court has been completely executed."

The present is the usual mortgage action for foreclosure, and Wilson v. Campbell, far from being an authority favouring the plaintiff, contains an expression of matured opinion directly opposed to his contention.

In Todd v. Linklater, 1 O. L. R. 103, Rose, J., says, referring to clause 16: "I think the effect of the clause is to give a right in every case to pay all arrears and lawful costs and charges, except where a judgment has been recovered, and that the subsequent words, 'or within such time as by the practice of the High Court relief therein could be obtained,' preserve to the mortgagor the benefit of Rules 388, 389, and 390.

In a recent case in Manitoba, National Trust Co. v. Campbell, 17 Man. L. R. 587, 7 W. L. R. 754, the effect of a Rule identical with Rule 389 and G. O. 462 was considered; and, while it was held that the words "then due" in the Rule prevented the Court from granting relief, yet the effect of sec. 117 of the Real Property Act, R. S. M. 1902 ch. 148, was to afford the relief desired. That section is substantially equivalent to the latter part of clause 16, as extended in our statute.

In the case under consideration, the parties to the mortgage by their contract provided that the mortgagee or his assigns should be entitled to relief according to the practice of our Courts. The learned Master granted only that relief, and the appeal from his order must be dismissed with costs, to be set off against the mortgage debt.

It is alleged on behalf of the plaintiff that the defendants are not paying taxes and insurance, and are shipping out large quantities of ore, thus exposing the property to loss and depreciating its value. These are matters which may be considered upon a proper application, but they have, I think, no bearing on this appeal.

CARTWRIGHT, MASTER. APRIL 22ND, 1909.

CHAMBERS.

STOWE v. CURRIE.

Security for Costs—Increase in Amount—Several Defendants —Limitation.

Motion by defendants the Otisse Mining Co. for an order requiring the plaintiff to give additional security for costs. The other defendants supported the motion.

F. Arnoldi, K.C., R. F. Segsworth, and Eric N. Armour, for defendants.

F. E. Hodgins, K.C., for plaintiff.

THE MASTER:—By my direction, bills of costs have been submitted. These have been perused and considered. They amount, as made out, to about $3,000 for the 4 different defences. These bills seem to be rather between solicitor and client than between party and party. It is, however, unnecessary to express any detailed opinion on this, having regard to the facts of the case. There is nothing very unusual or special in the action itself, though it may involve the title to a valuable mine. On 3rd November an order was made for security to the amount of $1,000. This was complied with by the plaintiff by giving a bond for $2,000 of one of the approved security companies. In my judgment, this bond is ample for defendants' party and party costs up to and inclusive of the trial. In view of the decision in Standard Trading Co. v. Seybold, 6 O. L. R. 376, 2 O. W. R. 878, 935, it would seem to be a reproach to the administration of justice if plaintiff were required to give over $2,000 security before his case could be tried.

The motion will be dismissed with costs to plaintiff in the cause.

MEREDITH, C.J. APRIL 22ND, 1909.

WEEKLY COURT.

RE STEPHENS.

Will—Construction—Residuary Clause—Division of Income of Residue among Children Nominatim with Substitution of Grandchildren—Death of one Child before Period for Distribution of Corpus — Share of Income of Deceased Child—Devolution upon Next of Kin.

Motion by way of originating notice by the executors, who were all the children of the testator, except the respondent Sarah Firman, for the determination of a question arising upon the will of Daniel Turner Stephens, dated 7th March, 1895.

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

H. S. Osler, K.C., for Sarah Firman.

MEREDITH, C.J.:—The testator by his will, after providing for the payment of his debts and funeral expenses, and making certain devises and bequests for the benefit of his children and their children, devised and bequeathed the residue of his estate by the 7th paragraph of his will, which is as follows:—

(7) "I give devise and bequeath the residue of my estate real personal and mixed of which I may be possessed at the time of my death after paying all my lawful debts legacies and expenses in connection with the settlement of my estate in trust to my executors hereinafter named to be by them held and sold and the proceeds thereof to be invested in first class securities at interest for the benefit of my three sons Byron Francis and Louis and my two daughters Eleanor Floretta and Emma Lisette Stephens the interest to be paid them annually share and share alike. In case of the death of any of my children and their leaving children then their share is to go to their children; in all cases the interest to be paid them annually. I order and direct my executors to pay all taxes annually and charge the same to the estate or individual that should pay them."

The 8th paragraph of the will is in these words:—

8. "I order and direct that after the death of all my children but two they are authorised to divide equally between themselves the whole of my estate then left."

The testator died on 18th March, 1896, and all his children survived him. One of the sons, Francis, died on 19th June, 1896, a bachelor; and the question which has arisen is as to the destination of the share of the income of the residuary estate to which he was entitled.

It is contended by the respondent, Sarah Firman, that, upon the death of Francis, his share of the income devolved upon his next of kin, and this is disputed by the other brothers and sisters.

I am of opinion that the contention of the respondent is well founded, and that, upon the death of Francis, his share of the income of the residuary estate passed to his next of kin.

Whatever may be the effect otherwise of paragraph 8, it is clear that the authority to make a division of the corpus of the residuary estate is not to be exercised until the number of the surviving children is reduced by death to two, and it follows, I think, that the scheme of the will is that until that event happens the income of the residuary estate is to be divided equally between the 5 children named in paragraph 7.

The gift is not a gift to a class, but to children nominatim, and therefore until the period when the division of the corpus may take place according to paragraph 8, the division of the income provided for by paragraph 7 is to continue. In other words, there is a bequest to each of the children named in paragraph 7, of one undivided one-fifth of the income of the residuary estate, to be paid annually until the period for the division of the corpus shall have arrived, and, subject to the provision as to the substitution of children in the event of a child dying leaving children, upon the death of a child, in the absence of any testamentary disposition of it, his share of the income devolved upon his next of kin.

I say nothing as to the proper construction in other respects of the provisions of paragraph 8, the time for determining that not having arrived.

There will be a declaration in accordance with the opinion I have expressed, and the costs of all parties will be payable out of the share of Francis.

APRIL 22ND, 1909.

DIVISIONAL COURT.

GLEDHILL v. TELEGRAM PRINTING CO.

Principal and Agent—Agent's Commission on Advertising Secured for Principal—Contract of Agency—Construction —Advertising "Originating in his Territory"—Defining Clause—Limitation of Agent's Sphere of Action.

Appeal by defendants from order of MULOCK, C.J., dated 23rd December, 1908, affirming with a variation the report of an official referee (Cartwright), dated 24th November, 1908, by which the latter found and reported that there was due by the defendants to the plaintiff $3,844.94.

E. E. A. DuVernet, K.C., and A. H. F. Lefroy, K.C., for defendants.

G. H. Kilmer, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The action is brought by the plaintiff to recover from the defendants commissions to which he claims to be entitled under the terms of an agreement made in September, 1892, between him and the defendants, by which he was appointed a special agent of the defendants to secure contracts for advertising for them for Toronto and the province of Ontario.

The only question argued before us was as to the right of the plaintiff to commission in respect of an advertising contract entered into by the T. Eaton Co. with the defendants.

The agreement between the parties is in writing, and bears date 1st January, 1903.

By this agreement the plaintiff is appointed special advertising representative of the defendants for the city of Toronto and "Ontario province" for one year.

The agreement provides that the compensation to be paid the plaintiff is 20 per cent. of the net amount paid to the defendants for advertising "originating in his territory," certain business being excepted.

The agreement further provides that "business originating in Toronto as above mentioned is to be further defined as business for which the final contract or insertion order is sent from a Toronto office, either direct from the advertiser or through a Toronto advertising agency," and that the plaintiff was "to diligently canvass all advertisers and advertising agents in his territory, and to use all possible efforts to secure advertising for" the defendants.

The advertising contract of the T. Eaton Co., in respect of which the plaintiff claims to be entitled to commission, is dated 1st September, 1904, and is in the form of an authority from the company to insert in the daily and evening edition of the defendants' newspaper display advertisements of the company to occupy space of one year (sic) agate lines to run every day for one year from the date when the company's Winnipeg store should be opened, and an agreement by the company to pay for the advertising at the rate of two cents per line, payments to be made monthly.

The arrangements which resulted in this contract were made at Winnipeg between a representative of the defendants and a representative of the T. Eaton Co., but the contract itself was signed by the company at Toronto, and when signed was there handed to one Sanderson, an advertising agent of the defendants, to whom I shall afterwards refer.

The T. Eaton Co. carried on business at Toronto and at Winnipeg, and their store at Winnipeg is, according to the testimony of John C. Eaton, a separate store. The head office of the company is at Toronto.

The material for the advertisement or copy is what is called in the agreement the insertion order, and it was all sent by the T. Eaton Co. from their store in Winnipeg to the defendants, and all of it related to their Winnipeg business.

The correspondence between the defendants and the plaintiff shews that the former were very anxious to secure advertising from the T. Eaton Co., and were urging the plaintiff to use his best endeavours to obtain it. This was, no doubt, advertising for the Toronto business of the company, and there is nothing in the correspondence to shew that the parties had in contemplation advertising their Winnipeg business.

According to the testimony of the plaintiff, which is not contradicted, Mr. Sanderson, the city advertising agent in Winnipeg of the defendants, called on him in Toronto, hav-

ing, as he said, special instructions to call on the T. Eaton Co., in reference, as I understand the evidence, to advertising for their Winnipeg business.

According to the same testimony, Sanderson and the plaintiff visited the establishment of the company twice, with the result that Sanderson obtained from the company the advertising contract to which I have referred, and shewed it to the plaintiff; other business houses were also visited by Sanderson and the plaintiff, and with some of them advertising contracts were closed.

The solution of the question between the parties depends on the meaning of the words "originating in his territory," as explained by the subsequent provisions of the agreement defining the meaning of that expression, to which I have referred.

It was argued by counsel for the defendants that, in order to entitle the plaintiff to commission, the business must have originated in his territory, and that the subsequent provision is only a further definition of the words "advertising originating in his territory"—in other words, that not only must the final contract or insertion order have been sent from a Toronto office, but the advertising must also have originated in the plaintiff's territory.

I am unable to agree with this contention; the purpose of the defining clause was, as it appears to me, intended to avoid difficulties which might without it arise as to where the advertising originated. Several persons might have had to do with the securing of advertising, and each of them might claim that the advertising was secured by him. The intention of the parties appears to me to have been to avoid these difficulties by providing that the place from which the final contract or the insertion order should be sent should determine the origin of the business, and that that place should, for the purposes of the agreement, be deemed to be the place where the business originated.

I see no reason why the plaintiff was not at liberty to canvass business establishments in his territory for advertising, although the advertising should be for a branch or department situate outside of it, and the language of the obligation which the plaintiff entered into, "to diligently canvass all advertisers and advertising agents in his territory and to use all possible efforts to secure advertising for the Winnipeg Telegram," indicates, I think, that there was to be no

such limitation of the sphere of action of the plaintiff as the defendants contend for.

Having reached this conclusion, the final contract by the T. Eaton Co. having been completed and delivered to the defendants at Toronto, the plaintiff is, in my opinion, entitled to the commission which he claims in respect of it.

The appeal should be dismissed with costs.

APRIL 22ND, 1909.

DIVISIONAL COURT.

RE SHANNON.

Will—Construction—Bequest in Trust for Maintenance of Lunatic Child—Trustee to Retain Unexpended Balance—Child Dying before Testator—Claim of Trustee to Whole Sum Bequeathed—Intestacy—Lapse.

Appeal by the Reverend Father Whibbs from an order of CLUTE, J., ante 378, on a motion by the executors of Thomas Shannon, under Con. Rule 938, for an order determining whether the appellant was entitled to any share of the estate bequeathed by the testator to Edith Shannon, and the rights and interests of the legatees under his will.

By the order appealed from it was declared that "the bequest to Edith Shannon contained in the 3rd and 4th paragraphs of the . . will lapsed by reason of her death in the lifetime of the testator without leaving issue."

E. F. B. Johnston, K.C., for the appellant.

W. F. Kerr, Cobourg, for the children and legatees.

Grayson Smith, for the executors.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., LATCHFORD, J.), was delivered by

MEREDITH, C.J.:—The will is dated 10th May, 1905. By the second paragraph the testator bequeathed to his executor and truestee the money at his credit in the Campbellford branch of the Bank of British North America, in trust to pay his debts, funeral and testamentary expenses, and to pay

the residue to the appellant, who is described as the priest of the parish of Campbellford, to be applied by him, one-half for masses for the repose of the soul of the testator, and the remainder "towards the liquidation of the church debt on the Roman Catholic church in the village of Campbellford."

By the 3rd paragraph, the residue of the estate is devised and bequeathed to the executor and trustee in trust for conversion and to divide the proceeds "in equal shares amongst my children, namely, Lena Marks . . Kate Shannon . . Amelia Hay . . Edith Shannon, of the city of Kingston, spinster, subject to the conditions and limitations hereinafter mentioned, Daisy Rutherford . . Robert Shannon . . Thomas Shannon . . and Hugh Shannon . ."

The fourth paragraph is as follows:—

"4th. I hereby direct my said executor and trustee, the said James Forestell, to pay the share of my estate hereinbefore bequeathed to my said daughter Edith Shannon, who is an inmate of the insane asylum at Kingston, to Rev. Father Whibbs, parish priest of Campbellford, upon the following trusts: firstly, to pay so much thereof as may be necessary for providing proper clothing for my said daughter Edith Shannon, while she is an inmate of the said asylum, provided, however, that, in case my said daughter Edith Shannon dies before her share of my said estate so bequeathed to her is exhausted by the payments hereinbefore mentioned, then I bequeath the remainder of her said share to the said Rev. Father Whibbs, to be applied by him towards the liquidation of the debt on the Roman Catholic church in the village of Campbellford, and I hereby direct that the receipt of the said Rev. Father Whibbs shall be a good and valid discharge to my said executor and trustee for the payment by my said executor of the share of my said estate so bequeathed as aforesaid to my said daughter Edith Shannon."

Edith Shannon died in the lifetime of the testator and without issue. She was insane, and at the date of the will was an inmate of the asylum for the insane at Kingston.

My learned brother has dealt with the case upon the view that a share of the residuary estate was bequeathed to Edith, and that what is dealt with by paragraph 4 is that share, and that as, owing to Edith's death in the lifetime of the testator, she took nothing under the will, there was no share upon which paragraph 4 can operate.

I am, with great respect, unable to adopt that view.

It was conceded upon the argument that the beneficiaries mentioned in paragraph 3 do not take as a class, and that, if the share of Edith Shannon lapsed, it was not disposed of by the will, and that as to it the testator died intestate.

It is manifest, I think, from the provisions of the will, that the testator intended that the Roman Catholic church at Campbellford should share in the residue of his estate to the extent of receiving so much of that which may be called, and, for want of better words, I have called, Edith's share, as should not be required to be used for providing proper clothing for her while she should be an inmate of the Kingston asylum.

According to the statement of counsel, an eighth share of the residuary estate amounts to upwards of $1,000, and the testator must, therefore, have had it in mind that the probabilities were that very little, if any, of the corpus of her share would be required to be expended for his daughter's clothing, and that the most of it would go the appellant for the benefit of the parish church; and it is highly improbable that, had he thought about it at all, he would have made the taking of the benefit by the church to depend upon whether or not Edith survived him—especially as, in the event of her dying in his lifetime, unless the church was to take, her share would be undisposed of.

I see no reason why the will may not be read so as to give effect to what, as I have said, appears to me to have been the manifest intention of the testator.

Has not the testator in effect said: My executor and trustee is to divide the residuary estate into eight equal parts, and to hold one of these parts for each of my children named in paragraph 3, except Edith, absolutely, but, as to my daughter Edith, the one-eighth which, but for her insanity, would have gone to her, is to be paid over to the appellant to be held by him on trust to provide clothing for her while she remains in the asylum and at her death to apply what remains towards the discharge of the church debt.

To construe the will in that way, in my opinion, violates no canon of construction, and is in accordance with the principle of decided cases, as far as it can be said that any principle is to be extracted from them.

It is true that the testator in paragraph 3 names his daughter Edith as one of the children amongst whom his residuary estate is to be equally divided; but the addition

after her name of the words "subject to the conditions and limitations hereinafter mentioned" appear to me to shew that the testator was only ear-marking a share of his residuary estate for the purpose of its identification in a subsequent part of the will, in which he intended to provide for the disposition of it.

Stewart v. Jones, 3 DeG. & J. 532, relied on by the respondents as supporting their contention, is, I think, clearly distinguishable. In that case the testator bequeathed his residuary estate in trust for his children, who, being a son, should attain twenty-one, or, being a daughter, should attain or marry under that age, in equal shares, as tenants in common, and declared that the share to which each of his daughters on attaining 21 or marrying under that age should become entitled should be held in trust for her for life and afterwards for her children; and it was held by the Lord Chancellor, affirming the decision of Vice-Chancellor Wood, that the children of a daughter who died in the lifetime of the testator took no interest. It was the case of a gift to a class, and a lapse did not occur by the death of one of the class in the testator's lifetime. In the case at bar the gift is not to a class. In that case the gift was in terms contingent, taking effect only in the event of the beneficiary attaining 21, or in the case of a daughter marrying under that age; and it was only the share to which a daughter should become entitled under the trusts that was to be held in trust for the daughter for life and afterwards for her children. In the case at bar it is not the share to which Edith becomes entitled that is to be dealt with as provided by paragraph 4, but the share bequeathed to her, and, as I have already said, bequeathed to her subject to the conditions and limitations mentioned in paragraph 4.

Stewart v. Jones was questioned by Vice-Chancellor Malins in In re Speakman, 4 Ch. D. 620, and the Vice-Chancellor there construed a will not very different in its provisions from the will in the former case as entitling the children of a deceased daughter to take notwithstanding that her death occurred in the lifetime of the testator. The Vice-Chancellor said that his view with regard to the construction of wills was that the first step was "to be satisfied what the intention of the testator really was, and then see how far the words of the will will carry that intention into effect" (pp. 623-4); and went on to say that "it

would be an extraordinary thing to say that the daughter was to be tenant for life with remainder to her children if she survived her father and not if she did not survive," and that he was quite satisfied that the testator simply intended his daughter to be tenant for life of her share. "It is true," he added, "that it was called her share, and it was her share for the purposes of division and of ascertaining into how many shares the property was to be divided. But the intention to give it to the children in all cases of her death is so clear to my mind as to be beyond all possibility of doubt" (p. 624); and he concluded by stating his entire agreement with the observations of Vice-Chancellor James in Habergham v. Ridehalgh, L. R. 9 Eq. 395, "as to the principles which ought to guide the Court in the construction of wills, that is to say, they ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal, and common-sense spirit, to give effect to his manifest intention" (p. 625.)

Substituting for the statement that the intention of the testator was that the daughter should take for life, and that whether her death should happen during his lifetime, or after his death, her children should at her death take her share, the statement that the testator Shannon's intention was that his daughter Edith should have the benefit of what was required for her clothing out of what he calls her share, and that, subject to this, upon her death, whether it should happen in his lifetime or after his death, the share should go for the benefit of the church at Campbellford, every word of the Vice-Chancellor's judgment is applicable to this case.

In re Speakman was in turn disapproved and Stewart v. Jones was followed by Pearson, J., in In re Roberts, 27 Ch. D. 346. In that case a residue was bequeathed to trustees in trust for a nephew and 3 nieces, by name, equally among them, with a provision that the share of each of the nieces should be retained by the trustees in trust to pay the income to her during her life for her separate use without power of anticipation and after her decease as to the capital upon trust as she should by will appoint, and in default of appointment upon trust for her children . . . One of the nieces died in the lifetime of the testator, leaving an infant daughter, and it was held that the share of the deceased niece had

lapsed and that there was an intestacy as to it. The view of the learned Judge was that that which the testator directed should be settled was the share of the niece; that, as the niece died before the testator, she could not take any share under the will; and that there was therefore no share to settle, and her child could take nothing under the will. The judgment of Pearson, J., was affirmed by the Court of Appeal, 30 Ch. D. 234; but Lindley, L.J., in delivering his judgment, said that counsel was justified in saying that the case was distinguishable from Stewart v. Jones; and it appears clearly from all the judgments in the Court of Appeal that the conclusion which was come to was reached because of various provisions of the will which were thought to shew that it was the intention of the testator that the niece whose share was to be settled was to be a niece who was to die after and not before him.

Stewart v. Jones and In re Roberts were considered and distinguished by Chitty, J., in In re Pinhorne, [1894] 2 Ch. 276; the trust there was for the testator's 4 sisters by name, in equal shares, and the trustees were directed to retain the share of each sister, upon trust to pay the income to the sister for life, with power to appoint a life interest to her husband, and after her death for her children, contingently on their attaining 21 or marrying, and in default of children for her next of kin. One of the sisters died in the testator's lifetime, leaving children, and it was held that the share of the deceased sister had not lapsed, and that her children were entitled to it, contingently on their attaining 21 or marrying. The reasoning of the learned Judge proceeded on the same lines as that of Vice-Chancellor Malins in the Speakman case, and, in distinguishing In re Roberts, he says that the key of the judgment was to be found in what Lord Justice Lindley said, "You cannot read it as a settlement of one-fourth, but as a settlement of the share which the niece takes" (p. 280); and every word of the judgment of Chitty, J., is, in my opinion, applicable to the will in question.

In re Pinhorne was followed by Cozens Hardy, J., in In re Powell, [1900] 2 Ch. 525.

In In re Whitmore, [1902] 2 Ch. 66, the question was as to the meaning of the words "the share" used by the testatrix to describe what she had given to her sister Char-

lotte in providing for the manner in which it was to be held and enjoyed and for its destination in certain events.

The testatrix directed her residuary estate to be held in trust for such of her brothers and sisters, excluding one sister, but including two other sisters if they should marry, as should be living at the decease or marriage of the surviving or last marrying sister, in equal shares, as tenants in common, with a proviso that if, at the period of distribution, her 3 brothers, or any of them, should be dead, or either of her sisters Sophia and Catharine should be dead, having previously married, and there should be living any child or children of any of them who should then have attained 21, or should then have married, or should afterwards marry, the children should take such part or share of the estate as their parents would have been entitled to if living. The testatrix further declared that with respect to the share of her sister Charlotte, it should be held in trust to pay the income to her for life, for her separate inalienable use, and that after her decease the capital "of the same share" should be held in trust for her children as she should appoint, and, in default of appointment, "in trust for and to vest in the child, if only one, or all the children, if more than one, of the said Charlotte Harrison, who, being a son or sons, shall have attained or shall attain the age of 21 years or die under that age leaving issue living at his death or at their respective deaths, and who, being a daughter or daughters, shall have attained or shall attain that age or shall have married or shall marry under that age, and, if more than one, in equal shares;" and, in default of any son or daughter becoming entitled, the testatrix directed that "the same share" should be held in trust for the persons entitled to the other shares of her estate and in the same proportions. Charlotte Harrison did not survive the period of distribution, and it was contended, and Byrne, J., held, [1901] W. N. 146, that she did not take any "share" in the trust fund, and that consequently her children and their representatives could take nothing, but that there was an intestacy. The Court of Appeal took a different view, and reversed the judgment of Byrne, J., holding that, upon the true construction of the will, by the expression "the share of Charlotte Harrison" was meant an aliquot part of the estate of the testatrix, and not merely the share which she would have taken if she had survived the period of distribu-

tion, and that, consequently, the representatives of the deceased children of Charlotte were entitled to the residue. In re Roberts, In re Pinhorne, and In re Powell, were referred to, the first as binding on the Court, and the other two with approval.

These cases, in my opinion, amply warrant the conclusion which I would have reached independent of authority as to the true construction of the will, viz., that the one-eighth share of the residuary estate to which Edith would have become entitled, subject to the conditions and limitations mentioned in paragraph 4, had she survived the testator, did not lapse owing to her death in the lifetime of the testator, and that, in the events that have happened, the appellant is entitled to receive the one-eighth share in trust to apply it towards the liquidation of the debt on the Roman Catholic church at Campbellford.

I would, therefore, reverse the judgment of my brother Clute, and substitute for it a declaration and judgment in accordance with the opinion I have expressed.

The costs of all parties should be paid out of the fund.

CARTWRIGHT, MASTER. APRIL 23RD, 1909.

CHAMBERS.

RE MCHUTCHION AND CANADIAN ORDER OF FORESTERS.

Life Insurance—Benefit Certificate Payable to Wife of Assured — Subsequent Designation by Will in Favour of Mother and Sisters — Predecease of Mother — Certificate Unaltered — Rival Claims to Insurance Moneys — Payment into Court.

Motion by the Canadian Order of Foresters, a benefit society, for an order allowing them to pay into Court the moneys payable by them under certificate No. 2280.

Lyman Lee, Hamilton, for the society.

Grayson Smith, for the widow of the assured.

W. L. Baird, Brantford, for legatees under his will.

THE MASTER:—The widow was the sole beneficiary named in the certificate, which was never altered since made in 1886. On 17th June, 1901, an agreement of separation was made between Mr. and Mrs. McHutchion, whereby they agreed to divide the property, and that the wife should release all claims against her husband. As it would seem, in consequence of this deed, Mr. McHutchion, on 4th July, 1901, made his will and bequeathed the certificate in question to his mother, and in case of her death in his lifetime to his two sisters equally. The mother died on 19th April, 1906, and the testator died on 4th October, 1908, without having made any other disposition of the certificate, so far as appears. The amount of this certificate is now claimed both by the widow and the sisters of the deceased.

By 4 Edw. VII. ch. 15, sec. 7, power is given to the assured to make an apportionment when the beneficiaries die in his lifetime, and, in default thereof, where there are no children of the assured, the insurance forms part of his estate. It is admitted that there are no children here. By 7 Edw. VII. ch. 30, sec. 5, the "instrument in writing" spoken of in 4 Edw. VII. ch. 15, sec. 5, includes a will, and provides that it "shall speak from the date of signing thereof."

The question in this case is: did the will operate as a bar to the claim of the widow, as it would admittedly have done if the mother had survived the testator? Or did it require a further declaration in writing by the assured, after his mother's death, to vest the fund in his sisters, and exclude the widow, who was the only person named in the certificate?

Had the original apportionment been to the mother, and, in case of her predeceasing the assured, to the sisters, that would enable the sisters to recover: see Re Travellers Insurance Co., Kelly v. McBride, 7 O. L. R. 30, 2 O. W. R. 1107. Nor does there seem any reason why the terms of the will should not have been indorsed on the certificate, or why the original certificate might not have been surrendered, and a new one issued, payable as in the Kelly case, and why the sisters should not have recovered in either of these events.

But the fact remains that none of these things was done, and, as the point is new and not free from doubt, the order may go for payment in (less costs fixed at $25), with liberty to the claimants to move for payment out and for such direction as may be given as to which of them is to be liable for the costs of payment in.

CARTWRIGHT, MASTER. APRIL 23RD, 1909.

CHAMBERS.

FOSTER v. MACDONALD.

Slander — Pleading — Statement of Defence — Justification—Particulars—Fair Comment—Mitigation of Damages—Provocatory Challenge—Irrevelant Matters — Embarrassment—Scope of Trial—Specific Charges.

After the Master's order of 12th March, 1908, the reasons for which are reported ante 671, the plaintiff amended so as to confine the statement of claim to the two acts of wrongdoing alleged against him and to which the innuendo was pointed. The statement of defence was not amended, and the plaintiff renewed his motion to strike out portions of it.

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

N. W. Rowell, K.C., for defendant.

THE MASTER:—The defendant admits speaking the words complained of, and that he was at that time managing editor of the "Globe" newspaper; but says that these words are incapable of the meaning given to them by the plaintiff or of any other defamatory meaning, and that special damage is not alleged. Then follows the plea which was formulated in Crow's Nest Pass Coal Co. v. Bell, 4 O. L. R. 660, 1 O. W. 679. To these there is no objection, nor to the last paragraph (14), which sets up that the words complained of were spoken and published bona fide and without malice and in such circumstances (previously set out) as make them privileged.

The 6th, 7th, 8th, 9th, 10th, and 13th paragraphs are those objected to as being irrelevant and embarrassing. (There is no paragraph 11.)

Paragraph 6 covers more than 11 type-written pages, and is divided into 21 clauses. It contains a long account of the way in which the Union Trust Co. came into existence with the plaintiff as manager, and states that that company were then intrusted with the investment of the funds of the Independent Order of Foresters, and alleges various dealings of plaintiff with those funds. The 5th clause alone of the

21 is not objected to. It sets out the agreements made between the Union Trust Co. and the Independent Order of Foresters as to the investment of the funds of the Order. The 6th and 7th treat of the plaintiff's influence with the Supreme Chief Ranger of the Order in the disposition of the funds. The 8th and following clauses give the details of certain alleged investments which, it is charged, were made improperly by plaintiff as such manager, and in which he obtained illegal commissions or other benefits for himself. Of these only the 11th relates to the matter complained of, known as "the Swan River land deal." The 13th clause sets out the history of the Great West Land Co., and plaintiff's connection with it. The remaining clauses deal chiefly with certain transfers made by plaintiff and his associates to the Independent Order of Foresters of lands which they had bought, as alleged, with the funds of the Order, through the Union Trust Co.

The 21st clause concludes as follows: "By reason of the matters aforesaid, among others, the defendant says that, so far as the said words set out in the 3rd paragraph of the plaintiff's statement of claim consist of allegations of fact, they are true in substance and in fact, and, so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon said facts, which, by reason of the matters hereinbefore and hereinafter set forth, were and are matters of public interest."

It was objected by defendant's counsel that he could not be required to amend because plaintiff had done so. He relied on Christy v. Ion Specialty Co., 18 C. L. T. Occ. N. 85. That case is only briefly reported, and was of a special character. Here, however, I do not think that anything that was a good defence before plaintiff's amendment would cease to be so now, as plaintiff has not limited his claim as was done in Bateman v. Mail Printing Co., 2 O. L. R. 416. Even there the statement of defence was amended correspondingly. The plaintiff does not move against clause 5, which would be insensible if left by itself and divorced from the preceding clauses.

Therefore, if the defendant thinks it of any advantage he can retain the first 7 and the 11th clauses in toto, and also the 12th and 18th, but limited so as to relate to the Swan River matter only. So limited, these clauses may then be

considered particulars of the plea of justification, and of what the defendant relies on to establish it.

The rest is, in my view, irrelevant, and therefore embarrassing, except clause 17 and the conclusion of clause 21, which may stand as particulars of the second allegation of which plaintiff complains.

Paragraph 7 is said to be "a further plea of justification and by way of mitigation of damages." It covers over 3 type-written pages, and sets out the proceedings before the Royal Commission on Insurance in regard to the Independent Order of Foresters and their dealings with the Union Trust Co., and gives verbatim a part of the report of the commission which deals with "the Swan River Land deal," and on which plaintiff gave evidence. Some of his letters were made exhibits, and extracts from them appear in the report.

So far as this is a plea of justification, it must be by way of particulars. After a good deal of hesitation and not without doubt, I think it may be allowed to stand in that view. In support of this Mr. Rowell relied on Zierenberg v. Labouchere, [1893] 2 Q. B. 183. There the defendant had published in his paper that the plaintiffs were "charity swindlers" and "impostors," and that the home which they conducted was "a monstrous swindle." The defendant pleaded generally that the statements complained of were true. Particulars were ordered to be given, and discovery for that purpose was refused. In the present case there is not the same necessity for particulars. The plaintiff has not demanded any. In allowing this paragraph to stand, I do so on two grounds: (1) because any possible ground of defence is not lightly to be excised; (2) because it cannot be embarrassing to plaintiff to be told what defendant intends to rely on at the trial: see Millington v. Loring, 6 Q. B. D. 190.

But, if I rightly apprehend what Odgers says, 4th ed., p. 369, anything said in that report, or by any one else, could not be pleaded in mitigation of damages. I do not find in the admitted statements of defendant any reference to this report as being his authority for his allegations about the "private rake-off in a deal with trust funds," made on his own authority only.

The allegation in paragraph 8, it was also said, should be struck out. It sets out merely that the plaintiff is a

prominent member of Parliament, and was seeking re-election for North Toronto in the House of Commons, and, if elected, and his party returned to power, would have been Finance Minister in the new administration, and would have had charge of insurance legislation, and been of great influence in all financial matters. This would appear to be a plea of fair comment, assuming that the plea of justification is proved, at least substantially. As is said in Odgers, p. 197, "the electors are entitled to investigate all matters in the past private life of a candidate which, if true, would prove him morally or intellectually unfit to represent them in Parliament; but not to state as facts what they only know as rumours:" see cases cited in loc.

Paragraph 9 sets out that the plaintiff, from his place in the House of Commons, in discussing the expenses of the Insurance Commission, justified his conduct in reference to the matters set out in paragraph 3 of the statement of claim herein, and challenged criticism on his conduct and his relations with the companies referred to.

Paragraph 10 sets out that, prior to 20th October, 1908, and prior to any address by defendant in reference to plaintiff's candidature for North Toronto, the plaintiff attacked the defendant in his capacity of editor of the "Globe," which, with other papers, had commented on plaintiff's relations with the Independent Order of Foresters and Union Trust Co.; and that on 1st October, 1908, and other public meetings in the city and throughout the province of Ontario, in the presence of reporters, and with the intention that the same should be published in the Dominion, the plaintiff made statements that the defendant was a liar, and made other similar defamatory statements, and challenged defendant to appear and discuss these matters

Paragraph 12, which is not objected to, sets out that these were and are matters of public interest, and that defendant in discussing them in public, during a general election, and after the plaintiff's challenge, was acting in the discharge of a public duty.

Paragraph 13 says that plaintiff, by reason of his conduct as set out in paragraphs 9 and 10 aforesaid, is not entitled to proceed against defendant for accepting his challenge to discuss the matter in question on the public platform.

These paragraphs, 9 and 10, may be sustained as setting out facts which caused, if they did not justify, the defend-

ant's attack. For the reasons given in O'Donoghue v. Hussey, Ir. R. 5 C. L. 124 (considered and distinguished in Murphy v. Halpin, Ir. R. 8 C. L. 127), Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 504, and Downey v. Stirton, 1 O. L. R. 86, it seems that where statements have been made by a plaintiff himself (such as are alleged in these paragraphs and in the circumstances therein stated) attacking a defendant, the latter may give these as evidence in reduction of damages. In that view, they must be allowed to stand.

It may be open to plaintiff to reply that, if he made any attack on the defendant, it was in consequence of what had previously appeared in the newspaper of which the defendant is the managing editor. But that does not come into consideration on this motion.

I have not overlooked the case cited by Mr. Hellmuth of Wernher Beit & Co. v. Markham, 18 Times L. R. 143, and in the House of Lords, ib. 763. Counsel suggested that the whole of the paragraphs now attacked should be stricken out under that decision. To this I accede, so far as to hold, as I did before, that the trial must be confined to those accusations of which plaintiff complains, and that his whole conduct for years past cannot be scrutinised and called in question. Otherwise all that would be necessary for any one who wished to attack another, whether in a public position or not, would be to make a general sweeping charge of wrong-doing, coupled with one or two specific instances, and then, when proceeded against for those one or two, to set out particulars of as many as he could discover or invent. It was said in answer that an article or a speech must be looked at as a whole. This is true. But what is meant thereby is that defendant can shew in this way that the plaintiff was not really hurt. It cannot mean that, if a man is accused of 20 acts of wrong-doing, he will not be allowed to proceed against the libeller for one or two of these accusations, unless he will defend himself against all. Still less can he be debarred from calling for proof of two alleged acts of wrong-doing, unless he is prepared to defend himself also against all the accusations in respect of his previous life which may be brought up by the alleged libeller to prove a general charge of neglect of duty and a breach of every moral obligation.

The defendant should now amend so as to conform to this judgment. Plaintiff to have the usual time to reply.

The costs of the motion will be in the cause.

APRIL 23RD, 1909.

DIVISIONAL COURT.

WESNER v. TREMBLAY.

Mechanics' Liens—Sale of Land Affected to Realise Liens—Judicial Sale—Interest under Oil and Gas Lease—Contract of Purchasers — Land Subject to Tax Imposed by Supplementary Revenue Act, 1907—Ignorance of Vendors and Purchasers of Existence of Tax—Purchasers not Entitled to have Amount of Tax Deducted from Purchase Money—Rescission of Sale—Direction for Re-sale—Costs —Appeals.

Appeal by plaintiffs from order of ANGLIN, J., ante 544, dismissing plaintiffs' appeal from a report of the local Master at Chatham, dated 1st February, 1909.

J. M. Ferguson, for plaintiffs.

W. E. Middleton, K.C., for the claimants MacEwen Brothers.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., LATCHFORD, J.), was delivered by

MEREDITH, C.J.:—The action is a mechanic's lien action, and by the judgment pronounced at the trial, which is dated 20th June, 1908, it was ordered and adjudged that, in default of payment by the defendants into Court of the amounts which upon the reference directed by the judgment should be found due to the lien-holders, the lands upon which the lien existed should be sold with the approbation of the local Master at Chatham, and the purchase money paid into Court.

Default was made in payment of the amounts found due to the lien-holders, and a sale thereupon took place under the authority of the judgment.

The sale took place on 19th December, 1908, and what was advertised to be sold and was offered for sale was "all the right, title, and interest of J. Tremblay and B. Ballard under and by virtue of an oil and gas lease" in the west half of lot No. 12 north of the middle road in the township of Tilbury East.

The respondents became the purchasers at the sale for the price of $3,080, and signed an agreement to purchase the property mentioned in the advertisement or particulars, a copy of which is annexed to the agreement, at that price and upon the terms set forth in the conditions of sale.

The lands were, at the time of the sale, subject to a tax imposed by the Supplementary Revenue Act, 1907, amounting to $144.46, but this was not known to the vendors or to the respondents.

By the report of the local Master at Chatham of 1st February, 1909, he deducted from the purchase money the amount of this tax, and treated the sum realised from the sale as $3,080, less the amount of the tax.

The plaintiffs appealed from this report as to various matters, including the deduction of the tax from the purchase money, and the appeal was heard by Anglin, J., who was of opinion that the proper course would have been to sell subject to the tax, and that it might be that "in strict law the purchaser would only acquire the estate or interest of the owner, and would therefore take subject to the payment of the tax," but, being satisfied that "the Court would not allow a purchaser from it to be put in any unfair position," and of opinion that the only effect which could be given to the appellants' objection would be to set aside the sale and to direct that the property be again offered for sale, and that "this would involve a great deal of expense and inconvenience, probably a loss to the lien-holders greater than the amount of the tax," my learned brother thought that the proper course was to affirm what the Master had done, and he therefore dismissed the appeal.

We are, with great respect, of opinion that, however reasonable the course taken by the Master and approved by my learned brother may appear to have been in the circumstances, it was not proper or in accordance with the practice of the Court against the will of the appellants to vary the terms of the sale, as has practically been done, by allowing

the purchaser to deduct the amount of the tax from the purchase money.

All that was liable to the lien, and all that was advertised for sale and purchased by the respondents, was the estate, right, title, and interest of Tremblay and Ballard under the lease in the lands, and all that the purchasers were therefore entitled to was that estate, right, title, and interest; and they took therefore subject to the tax.

Where a sale takes place in Court, the Court, as my brother Anglin said, "will not allow a purchaser from it to be put in any unfair position."

No doubt, in the case of a sale in Court, where a purchaser is entitled to have a good title to the land itself shewn, and that free from incumbrances, his completion of the purchase in ignorance of an incumbrance which he would have been entitled to have paid out of the purchase money would not disentitle him on discovery of the mistake to have it rectified.

Turrill v. Turrill, 7 P. R. 142, was a case of that kind, and in that case Vice-Chancellor Blake rested his judgment upon the ground that, "as the Court in the terms of sale represented the premises as being sold and not a mere interest in them, the Court, as it had the means of doing so by the money being in Court, should see that such a title as that which was represented by the advertisement be given to the purchaser."

That is a very different thing from giving such relief to a purchaser who is not entitled to have an incumbrance paid out of his purchase money, but, under the terms of his contract, takes what is sold with the burden of the incumbrance upon it, which is doing what practically amounts to making a new and better bargain for him.

The utmost relief to which, in our opinion, the respondents were entitled was to have their contract wholly rescinded: Daniel's Chancery Practice, 7th ed., pp. 887-8.

Mr. Middleton, for the respondents, intimated that if we should be of opinion that that was the full extent of the relief to which the respondents were entitled, they would elect to rescind their contract, and to their doing so no serious objection was urged by the appellants' counsel.

The order appealed from must, therefore, be discharged, and there be substituted for it an order rescinding the contact of sale and for payment out of Court to the respond-

ents of the purchase money, or so much of it as has been paid into Court, and directing a re-sale. So much also of the Master's report as relates to the sale must also be vacated.

We have had difficulty in determining how the costs of the appeals and of the sale which has proved abortive should be dealt with. There is much to be said for requiring the respondents to pay them, as the price of the indulgence which has been granted to them, but, upon the whole, we have reached the conclusion that there should be no costs of the appeals to either party, but that the respondents should be required to pay the costs of and incidental to the abortive sale.

APRIL 23RD, 1909.

DIVISIONAL COURT.

CANADIAN RUBBER CO. v. CONNOR.

Sale of Goods—Manufactured Article—Action for Price—Defence that Article not Suitable for Purpose for which Sold—Evidence—Tests—Good Faith.

Appeal by plaintiffs from judgment of Judge of County Court of Carleton dismissing an action for the price of rubber cement sold and delivered to defendants, and in favour of defendants upon their counterclaim.

A. Lemieux, Ottawa, for plaintiffs.

D. J. Macdougal, Ottawa, for defendants.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., LATCHFORD, J.), was delivered by

MAGEE, J.:—The plaintiffs sue for the price of rubber cement sold and delivered to the defendants. The defence is, that the cement was useless for the purposes of the defendants' business for which it was sold. The plaintiffs say that they did not sell it as suitable for the defendants' business, but only as being identical with a sample which they had submitted to the defendants and which the latter had tested and approved of.

The defendants are manufacturers of clothes-wringers, parts of which consist of rubber rollers, each on an iron rod or shaft. They required a cement which would so unite the rubber to the iron rod which formed its axis, that the two would revolve together, and would not separate under such pressure as the defendants' experience led them to put on to test the fitness of the roller for actual use. As a matter of prudence, and in order to give a margin of safety, that pressure was, as might be expected, considerably greater than would ordinarily be given by a person using the wringer, or, as the witness put it, by a washerwoman. The defendants were using a cement which they purchased ready-made from another concern. The plaintiffs manufactured various cements, and, desirous of doing business with the defendants, solicited an order, and their salesman procured from the defendants a sample of the cement which they were using, in order that the plaintiffs might make up one like it or equally effective.

Cements are made up of crude rubber and various chemicals. Neither plaintiffs nor defendants knew the exact composition of this particular cement. The plaintiffs' manager, Mr. Thornton, on receipt of the sample, analysed it, and arrived, as he concluded, at its ingredients, and compounded a small quantity of cement which he considered the same or equally effective, and sent it on as a sample to the defendants to be tested. He admits that he could not make a perfect analysis, and could not say that it was exactly the same, inasmuch as the chief constituent, rubber, varies greatly. The cement must not only cohere with the iron wringer, but must vulcanise or harden uniformly with the outer roll of rubber so as to unite with it. This vulcanising is also spoken of as "curing." There are many varieties of rubber, and a cement which will unite with one sort may not unite with another, the quantity of sulphur in the cement and the rubber being an important element, as that having the greater quantity of sulphur hardens first. It would be necessary, therefore, for the plaintiffs to know whether the cement they had prepared would "vulcanise" or "cure" with the particular rubber which the defendants were using.

When sending the sample which he had compounded to the defendants, the plaintiffs' manager sent with it a letter to them of 3rd January, 1907, as follows: "We are sending

you . . . a sample of cement stock for wringer-rolls. Will you kindly see if it cures with your stock, and oblige?"

The sample so forwarded to the defendants was a small one, only enough for 3 or 4 rollers. The defendants treated it as they did their other cement—dissolved it in gasoline, coated the iron rod or shaft with it, and wrapped the rubber around both, and placed the whole in a mould, which was then subjected to heat, so as to effect vulcanisation or hardening. The rollers, after heating, had to be pushed lengthwise out of the mould, and the pressure used in doing that seems to have been considered or made a sufficient test of the strength of the union effected. If not firmly cemented, the iron rod would be pushed out, leaving the cement and rubber, or perhaps the rubber alone, behind it. The rollers made with this sample cement stood that test. In addition, the defendants cut down through the rubber and cement to the shaft to see if the cement adhered to the iron, and it appeared to do so. They informed the plaintiffs' salesman that the sample had proved satisfactory, and gave him an order for a bale of about 200 lbs. of cement, "same as last sample submitted as per Mr. Thornton's letter of 3rd January, 1907."

The quantity ordered was duly forwarded to them. Before using or testing it, they gave a small additional order for goods, which also were duly sent them. When the defendants came to use the cement so sent them, they tried two batches of 30 or 40 rollers each, and found that in very few of them did the cement adhere to the iron, and in those few only imperfectly. In consequence, they were useless to them. They complained to the plaintiffs. The plaintiffs undertook to shew that it was not the fault of the cement. They got a couple of iron rods from the defendants, and made with the cement a roller which appeared to themselves to be satisfactory. They sent it to the defendants, who, in presence of the plaintiffs' salesman, tested it, and one of the defendants' ordinary rollers. In that made by the plaintiffs the cement at once separated almost completely from the shaft, while in the other one it did not. The plaintiffs' salesman admits being present at a test and the result, but says he could not gauge the force applied, nor be assured of the identity of the rollers.

The plaintiffs' manager says that the absence of the desired cohesion might be owing to several causes, such as a

difference in the grade of gasoline used in dissolving the cement before application to the iron; the smoothness of the iron itself, which should be first roughened; or variableness in the degree of heat applied.

The defendants say they purchase and use gasoline of uniform grade, which they have found no difficulty with, and it was used on both the sample and the bulk, and also on their other rollers. They also say they treated all alike as to heat, and that, as to the smoothness of the iron, they obviate that, not by mechanical roughening, but by the use of an acid, which is subsequently washed off, and the plaintiffs themselves actually failed, when using the iron furnished by the defendants, although the plaintiffs thought they had succeeded.

On the one hand, we have the plaintiffs' manager asserting that the cement sold was made exactly like, though not made at the same time as, the sample which the defendants, after testing, approved of. On the other hand, we have the defendants' manager asserting uniformity of treatment for each, and yet differing results.

The plaintiffs' position is, that they could not tell whether the cement, of which they forwarded a sample, was suitable for the defendants' purpose, and they expressly asked the defendants to test it and see if it was, and the defendants must have failed to test it properly, but cannot blame the plaintiffs for supplying cement in accordance with their order, which asked for cement the same as the sample.

Now, if the defendants did fail to test the samples as to cohesion with the iron, are the plaintiffs justified in saying that they throw that burden on the defendants? Mr. Thornton does indeed say (p. 28) that he mixed up a sample and sent it to Ottawa to see if it would cure or vulcanise with their rubber cover and the shaft. Nowhere else does he make the assertion. Reading his letter of 3rd January in the light of the evidence, I would consider that by the words "see if it cures with your stock" he referred only to vulcanisation with the rubber forming the outer part of the roller. That appears to be the meaning put upon it by Mr. Carroll, the plaintiffs' sales manager. He says: "Mr. Thornton wrote them (defendants) and asked them to test it and ascertain if it would cement with the outer cover." Mr. Thurnton himself (p. 26) says he asked the defendants to

see if the cement would vulcanise with their outer stock. At p. 27 he admits that two things are necessary, the vulcanisation to the outer rubber and the cohesion to the shaft. Elsewhere (p. 32) he says he distinguishes very much between vulcanisation and cohesion. It would seem as if he either paid no attention to the question of cohesion with the iron, or else was so well satisfied on that point that he did not ask the defendants to test it. At p. 25 he says it is not customary, before wringers go out, to subject them to a test as to pressure, only as to vulcanisation. At p. 24, when asked, "What is the degree of pressure that you would regard as reasonable?" he answered: "A washerwoman's hands. That is all that should be reasonably expected." At p. 31 he says he does not remember having ever expressed an opinion that this mixture (the cement) would or would not cement to iron. "Q. And you do not undertake now to say whether it would or would not cement to iron? A. I would not undertake to say one way or the other." He admits knowledge that the cement was required for wringer-rollers, and that cohesion to the shaft was a necessity. Again he is asked on cross-examination: "Q. The whole substance of your evidence is that you got a sample, you mixed up a substance which was, as nearly as you could make it, the same as that sample? A. Yes, sir. Q. You did that quite irrespective of whether or not it would be suitable for the purpose of wringers? A. Certainly. Q. And you conceived it was none of your business whether it answered the purposes of wringer-rollers or not? A. Yes. Q. And that is your position? A. Yes."

His evidence as to the roller which he subsequently had made on one of the defendants' iron rods to prove the sufficiency of the cement, goes to shew that he then had vulcanisation in mind rather than cohesion. His letter of 20th January only speaks of having completed vulcanising. At p. 32 he is asked: "Q. You consider that you had very satisfactorily demonstrated that the cement stock manufactured by you would do its work? A. Would vulcanise. Q. You distinguish between vulcanising and cohesion? A. Yes, very much." At p. 33: "Q.You did not test it as to cohesion with the shaft? A. No. Q. You carefully avoided that? A. It was not the point with me, and it never occurred to me."

It is, I think, the fair result of the evidence that, for some reason, the plaintiffs' manager had not the question of the cohesion with the shaft actively present to his mind, perhaps from a feeling that the chief difficulty would not lie there, and that he did not invite or expect the defendants to make that the subject of their attention. They were told to direct their experiments to the curing or vulcanisation with the particular variety of rubber, the stock they were using, and might, therefore, well rely upon the suitability in other respects of the sample offered to them for the purposes of their business. It was not suggested to them to test in all respects or any but the one. Considering the little attention the plaintiffs' manager himself seems to have paid to the fitness of the cement in the very quality in which it failed, they should not be entitled to throw upon the defendants the loss arising therefrom.

There is, of course, the fact that the 3 or 4 rollers made by defendants with the plaintiffs' sample of cement did stand the pressure which those made from the subsequent bulk would not. Assuming uniformity of conditions, that would go to shew a difference in the cement.

The manager of each company is unwilling to recognise any difference or short-comings in the work of his own factory, but, however close the supervision, each must work through others, and unknown mistakes may have been made on one side or the other. Even if made on the side of the defendants, it would be in relation to a matter in which they had no intimation that the plaintiffs were relying on them, that is, in a test of cohesion, and in which the plaintiffs seem to have been somewhat remiss, perhaps through over-confidence.

The burden of supplying an article suitable for the purpose for which it was sold is thrown upon the plaintiffs, except in so far as they are able to shew that they cast that burden upon the defendants. We find the plaintiffs not inviting a test of their original sample as to the particular quality in which it failed. When the defect is made known to them, and they attempt to shew that it did not exist, we find them paying little or no attention to the real point of weakness. We find the defendants inviting the plaintiffs' representative to be present at the subsequent test of the success of that attempt which the plaintiffs considered successful, and which failed under the test. We find the plain-

tiffs' representative not inquiring into or complaining of the conditions of that test, but only professing ignorance of their fairness. We find no reason to suspect that defendants are not acting in good faith.

In my opinion, the decision of the learned Judge appealed from should be affirmed with costs.

CORRECTIONS.

RE REID.

In the report of this case, ante 915, the judgment of RIDDELL, J., is not given in full, and the short report is inaccurate.

After setting out the facts, practically as on p. 915, the learned Judge says:—

The motion purports to be made under the provisions of Con. Rule 938. Assuming that the present is a case within that Rule, it could be under (a), (c), or (h) only. Applications under these clauses are to be made before a Judge of the High Court sitting in Weekly Court, and not before a Judge in Chambers. I have no jurisdiction in Chambers to dispose of this application. Nor should I remove it into Court—the insolvent not appearing. Had all parties been represented, I should probably have so removed the application, but, as things are, I shall not do so in his absence.

The motion will be refused.

In KINNEAR v. CLYNE, ante 777, 15th line from bottom, for "[1893] 2 Ch." read "[1903] 2 Ch.," and 16th line from bottom, for "[1897] 2 Ch." read "[1907] 2 Ch."

In RICHARDSON v. SHENK, ante 913, 4th line from bottom, insert "not" before "shewn."