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HON. MR. JUSTICE RIDDELL. JUNE 20TH, 1912.

RE GORDON.

3 O. W. N. 1458.

Will—Construction — Application for Advice by Executor—Under Trustee Act and Con. Rule 1269 (938) — Determination of Validity of Lease made by Life Tenant.

Motion by executor of the late Isaac Gordon, Sr., for advice of Court under Trustee Act and C. R. 1269 (938). Isaac Gordon, Sr., by his will, had devised certain lands to a certain son for life, and in case of his death without issue, to others. The tenant for life had leased the lands for a term of years and had died prior to the expiration of the lease.

The opinion of the Court was asked as to (1) the course to be pursued by the executor with respect to the lease, and, (2) as to the validity of the lease.

RIDDELL, J., *held*, that the questions asked were not such as were authorised by the Trustee Act nor the Rules, and refused to entertain the application.

Suffolk v. *Lawrence*, 32 W. R. 899, referred to.

Motion by the executors of the will of the late Issac Gordon, Sr., for the opinion, advice, or direction of the Court, under sec. 65 of the Trustee Act and Con. Rule 1269 (938).

A. A. Craig, for the executors' motion.

C. W. Plaxton, for tenants under a lease by Henry Gordon, contra.

HON. MR. JUSTICE RIDDELL:—Isaac Gordon, Sr., devised certain lands to his son Henry "for himself during his natural life, subject to the payment of" certain legacies, "but in case of my son Henry Gordon's death without issue or without leaving any child or children then it is my wish that the real estate be sold and the proceeds divided equally between my surviving sons and daughters share and share alike . . ." Henry in 1909, made a lease of the land to C. and A. for a term of five years; and died without issue

in June, 1911. The executor of Isaac Gordon, Sr., demanded possession of the land and the tenants refused claiming that the lease was good for the term mentioned in it. The executor was advised by his solicitor and believes that the lease was voided by the death of Henry and that it is his duty to sell the farm as executor.

Instead of taking proceedings to obtain possession of the land, he served upon the tenants a notice of motion "for the opinion, advice or direction of the Judge, pursuant to sec. 65 of the Trustee Act and Rule 1269 of the Consolidated Rules of Practice." The notice is somewhat ambiguous, but I accept the interpretation which counsel for the motion says was intended, viz. that opinion, advice or direction is sought in two matters: 1. the course to be pursued by the executor with respect to the lease; 2. the validity of the lease. Objection being taken to the practice by counsel for the tenants, I gave effect to his objection and as he refused to consent to the motion being turned into any other form of motion, I dismissed the second branch of the application with costs fixed at $5, following *Re Rally* (1912), 25 O. L. R. 112, and also *Re Anne E. Hunter,* a judgment delivered by myself yesterday.

The portion of C. R. 1269, which it is claimed covers the former branch of the application is (e), by which an application may be made for an order "directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or trustees." But this means any act in or about the estate of which they are executors or trustees—as it is put in *Suffolk* v. *Lawrence* (1884), 32 W. R. 899: "this only relates to the doing or abstaining from doing by trustees of some act within the scope of their trusts." The section was not intended to cover the case of an executor who was in doubt as to whether he should follow his solicitors' opinion so far as to claim as part of his estate, land claimed adversely to the estate. Executors must use their business sense and not ask the Court to exonerate them in advance; the general duties of executors are too well known that the Court should be called upon to lay them down on every occasion of apparent difficulty.

This part of the application is also refused.

HON. MR. JUSTICE BRITTON. JUNE 21ST, 1912.

McFARLANE v. COLLIER.

3 O. W. N. 1510.

Company — Contract — Oral Agreement — Superintendent of Company—Failure of Plaintiff to Satisfy Burden of Proof.

Action by plaintiff upon an alleged oral contract with the defendant, a large shareholder in a company, that plaintiff should be paid by defendant the sum of $4,300 for remaining on as superintendent of the company for one year after its reorganization.

Defendant denied the making of any such agreement.

BRITTON, J., *held*, that plaintiff had not satisfied the onus upon him of establishing the fact of the making of the agreement beyond a reasonable doubt.

Action dismissed without costs.

Action brought to recover $4,300, upon an alleged oral contract made between defendant and plaintiff, at the Oriental Hotel, in Peterboro, on or about 15th January, 1910, that plaintiff would remain as superintendent with The Wm. Hamilton Co., Ltd., until the end of the current year, and on the basis of a yearly hiring, and in consideration therefor, defendant would pay to plaintiff $4,300. The whole question was one of fact. No person other than the parties to this action was present and heard what plaintiff said was the bargain.

Plaintiff gave this account of what occurred. After some conversation as to selling preferred stock of the Wm. Hamilton Co., Ltd., and as to the applications therefor, and as to the necessity of getting these applications in, defendant promised to pay plaintiff $4,300, for agreeing that he, the plaintiff, would remain with the company for one year, from the first November, 1909. Plaintiff did not pretend to remember all the conversation. He did, however, so he said, remember this, that defendant stood to make a lot of money —but in order to make it it was necessary that all the stock applied for, should be sold, and that he the plaintiff should remain in his position with the company at least for the full year. The case was that the plaintiff promised to remain the year and defendant promised to pay plaintiff the $4,300.

Defendant emphatically denied that there was any meeting or conversation in any room in the Oriental Hotel on or about 15th January, 1910—and he denied, positively, that there was ever at any time or in any place such an agreement as alleged by plaintiff.

The defendant admitted meeting plaintiff at the Oriental Hotel—but fixed the time of that meeting as prior to 15th November, 1909, and the subject of conversation was, in attempting to come to an agreement, which afterwards was arrived at, reduced to writing and signed by parties including plaintiff and defendant.

The action was tried at Peterboro, without a jury.

F. D. Kerr and A. D. Meldrum, for the plaintiff.

R. R. Hall, K.C., and S. T. Medd, for the defendant.

HON. MR. JUSTICE BRITTON:—Both of these parties are respected persons of good repute in Peterboro. The reputation of neither one, for truth and veracity was questioned by witnesses in Court—I cannot think that the difference is a mere matter of recollection of one or the other. Either the bargain was made and the defendant knows it was made—or it was not made and the plaintiff for the sake of getting a part of defendant's profit in dealing with the stock of this company, has fabricated the story told by him. The plaintiff was pressed by opposing counsel as to the exact words used by defendant in making the agreement, and I asked plaintiff to give, if he could, defendant's words. The plaintiff's reply was, 'the words used were, that when he was relieved of the responsibility of selling this $38,000, that then he would pay me this $4,300—."

"Q. He said, when I am relieved of selling? A. When I get it all sold.

Q. Do you change it? A. When he had the stock all sold he would not have any drains on him then.

Q. Now start again—He said what? A. He said when 238 shares were sold, and he was relieved of paying commissions, then he would settle with me and give me this $4,300."

The undisputed facts, are that the plaintiff for 30 years or more had been in the employ of the Wm. Hamilton Manufacturing Company, Limited, and upon that company going into liquidation, a new company was formed called The Wm. Hamilton Company, Limited, and the plaintiff accepted the position of superintendent in the new company on a yearly hiring and yearly salary. This was generally known by the public in Peterboro—and the plaintiff had to a considerable extent the confidence of that public. In October, 1909, the

plaintiff declined to remain longer with the new company on a yearly hiring—but consented to remain with the right to leave at any time. To this the company agreed. It would be quite reasonable that the defendant as holder of shares in the company to a considerable amount, should desire the continuance of the plaintiff—as superintendent—and that he would be willing to pay something out of his own pocket to keep plaintiff on. The defendant as part of his evidence said: "As far as any agreement with him was concerned paying him $4,300 or asking him to remain, that is not so—I never asked him to remain—I did not care a snap of my finger whether he remained or not."

"Q. Did you tell him so? A. Yes, I told him at many a meeting of the directors."

In endeavouring to ascertain the real truth of this matter, I have carefully considered all the circumstances of their business, their relationship to the company and to each other, I was not assisted by the demeanour of either on the witness stand.

On the 12th October, 1908, the defendant was the holder of 1193 shares fully paid up common stock in the Wm. Hamilton Company, Limited, and the plaintiff and J. C. Smith and the defendant had each subscribed for 50 shares of preferred stock. On that day these three entered into an agreement in writing in reference to the sale and payment for shares. They were manipulating shares of the company for their own advantage and they were properly careful to have the agreement in writing down to the most minute detail.

On the 31st October, 1908, the defendant having been connected with A. R. Williams Co., and having a large amount of property, sold this property to the Wm. Hamilton Company for a large amount of money and a very full and complicated agreement was made. The defendant was to receive $65,000 in cash payable as therein stated. He was also to get 350 shares preferred stock and 1000 shares of common stock in the Hamilton Company. The defendant agreed to sell additional preferred stock to the amount of $95,000 upon which 10% should be paid to the company; of this $20,000 should be subscribed for on or before 1st March, 1909, $20,000 1st July, 1909, $40,000 1st July, 1910, and $15,000 1st July, 1910—provisions as to default and other provisions to which it is not necessary now to refer. The plaintiff, defendant and Smith were directors and prac-

tically had the management and control of the affairs of the Wm. Hamilton Company, Limited, during the years 1908-9.

On the 15th November, 1909, after considerable negotiation these three entered into an agreement, in writing, that they would procure a new agreement between the defendant and the company. This agreement recited the liability of defendant under the agreement of 31st October, 1908, to secure subscriptions of the amount of $95,000 of preferred stock in the Hamilton Company, and that it was then in the interest of that company that only $20,000 more of the preferred stock of the company should be issued and not the $95,000. This new agreement between defendant and the company, which the three agreed to procure was that (a) Collier, the defendant, should subscribe or procure subscriptions for 200 shares of preferred stock; (b) that Collier should pay to the company $1,500 in cash, and transfer to a trustee for the company 20 shares of preferred stock; (c) Collier should transfer to the company or to a trustee for the company 200 shares of common stock, and the company should release Collier from all obligations created by that agreement of 31st October, 1908, and from an offer which Collier had made to the company in a letter of 5th January, 1909. Then the agreement of 15th November, 1909, provides for what is to be done by the parties to it, and it contains this clause: "This memorandum of agreement cancels all previous understandings and agreements made between the party of the first part (the defendant and either or both the parties of the second part (Smith and the plaintiff). Then followed the proposal to the company to make the new agreement and settlement with defendant.

On December 6th, 1909, Mr. Gladman wrote to the defendant—what the committee recommended as to the cancellation of the agreement of 31st October, 1908. This letter is exhibit 15. Gladman's letter contains this clause—after dealing with the matter as between defendant and the company—"We do not take into consideration any private differences that may exist as between yourself and Messrs. Smith and McFarlane, with which we consider the company has nothing to do, and that you must arrange among yourselves."

The defendant says these differences had been arranged by the agreement of 15th November, 1909, and which was substantially carried out by defendant's offer to the company and the acceptance *sub modo* by the company; see

minutes of board of directors of company of meetings when plaintiff was present, 6th December, 1909, and 20th January, 1910. Then apart from the disputed agreement, matters continued until 14th November, 1910, when the defendant sold out to the plaintiff, Smith and Gladman. The defendant then owned 180 shares fully paid preferred stock, and 249 shares fully paid common stock in the Wm. Hamilton Company which he sold to the three named for $14,400, payable as follows: $2,400 1st February, 1911; $2,400 1st April, 1911; $2,400 1st June, 1911; $2,400 1st July, 1911; $2,400 1st August, 1911, and $2,400 1st September, 1911.

The special provisions in this last-mentioned agreement do not seem to me to be material in the present case.

It is material that in this negotiation, completion and fulfilment of this last agreement the plaintiff did not assert and insist upon the payment of the $4,300 to which he now claims to be entitled. It was not until toward the latter part of 1911, that the plaintiff put forward his claim. It was placed in solicitors hands in December, 1911, and the writ issued herein on the 4th January, 1912.. There is corroboration of plaintiff by the evidence of Gladman that plaintiff and defendant had differences in January, 1910, that they were in a room at the Oriental together for the purpose of settling some matter in difference—and that one said to Gladman, in the presence of the other that an agreement had been come to. That may have referred to the agreement of 15th November, but Gladman thinks not. It is most unfortunate that Gladman who was friendly with plaintiff and defendant did not hear what and all that took place —Gladman was interested in plaintiff's remaining on as superintendent—and in his being friendly with defendant—but not as to the terms of any agreement. Then there is corroboration of defendant's version. The plaintiff knew the value of writings, and of carefully prepared written agreements. The plaintiff was one of the directors and present at the meetings when defendant's offers first to purchase 400 shares, and afterwards to purchase 60 shares were turned down. The reasons for not then selling more stock may have been good, but underlying these reasons was the fact that the other directors did not want the defendant to get more stock. In the face of this it is a little singular that the plaintiff did not ask defendant for a letter or to sign a memorandum of agreement, or that Gladman who was friendly to plaintiff was not asked to be a witness. The plaintiff

although the result is the same gave a different account on a former occasion, from the one given at the trial of how the sum of $4,300, was arrived at. The plaintiff estimated defendant's profit at $18,000. If he got half of that, and Smith and the plaintiff each quarter, plaintiff thought that would be fair. Plaintiff asked $4,500—but consented to take $4,300—Smith stated that plaintiff claimed that he should get 15% on Gladman's $5,000 ..... $ 750 00
15% on Smith's $5,000 ..... 750 00
and 7% on $40,000 ..... 2,800 00

$4,300 00

Mr. Smith's position was apparently about the same as plaintiff's—and was entitled to something, if plaintiff was, but Smith has not so far as appears insisted upon any payment by defendant. In dealing with the alleged agreement of 15th January, 1910, it is a strong point in defendant's favour that there had in fact been the agreement of 15th November, 1909, which purported to cover everything between plaintiff and defendant—although Gladman thought there was something unsettled which he Gladman wished cleared up. Lastly there was the long silence of plaintiff in regard to this money although the plaintiff was paying money to defendant—and was losing dividends on stocks to which he according to his contention, was entitled. Against the defendant is the fact—not denied by defendant, of his conduct when plaintiff made the demand for payment of the $4,300. Defendant did not then as vigorously deny the agreement as he did in Court. He said he did not remember. He did not see how it could be so large—he would look into his books, etc. I would suppose that such a demand, if no agreement made, would have been met by a prompt denial. All the conduct of each may be consistent with contract or no contract—and contract or not is the question for determination.

The onus of establishing this contract is upon the plaintiff. If there is any reasonable doubt—that doubt must be resolved in favour of defendant. I am not free from doubt. No. doubt the defendant made a very large amount of money out of these transactions and the plaintiff assisted the defendant to make. It may be that the defendant promised to pay out of these profits something that would be fair. It might be that plaintiff was lulled into security and silence by something defendant said—in the way of promising to do

what would be fair between them—I cannot say—but all this would fall short of the contract which the plaintiff to succeed must establish.

In the view I take of the evidence the action must be dismissed, but under the circumstances it will be without costs.

Thirty days' stay.

HON. MR. JUSTICE RIDDELL. JUNE 22ND, 1912.

RE CANADIAN SHIPBUILDING CO.

3 O. W. N. 1476; O. L. R. .

Company—Winding-up—Liquidator—Claim of Ownership of Ship in Course of Building—Bill of Sale—R. S. O. (1897), c. 148.

In the course of liquidation of the Canadian Shipbuilding Co., Ltd., the Hamilton & Fort William Navigation Co., Ltd., claimed possession of a partly finished steamer being built for them by the Shipbuilding Co. under a contract and in respect of which two bills of sale had been given them as the work progressed. The liquidator disputed their claim, taking the position that the bills of sale were invalid as against him. Under the contract for the construction of the steamer, payment up to 80% of the cost of construction was to be made by the purchasers every two months, and after the first payment, ownership in the partially completed steamer and all materials, etc., used in the construction, was to pass, from time to time, to the purchasers, the Shipbuilding Co. covenanting to execute and deliver to the purchasers such bills of sale or other assurances as were necessary to vest title in them.

RIDDELL, J., *held*, that, under the contract, the ownership in the unfurnished steamer passed in equity to the purchasers after the making of the first payment.

Holroyd v. *Marshall*, 10 H. L. C. 191; 9 Jur. N. S. 213, followed.

That a liquidator, not being a creditor nor a purchaser for valuable consideration, cannot invoke the Bills of Sale Act, R. S. O. (1897), c. 148.

Dictum of STREET, J., in *In re Canadian Camera Co.*, 2 O. L. R. 677, disapproved.

Judgment of Referee confirmed, and appeal therefrom dismissed with costs.

An appeal by the liquidator of the Canadian Shipbuilding Co. from a certificate of an Official Referee.

J. A. Paterson, K.C., for the liquidator's appeal.

H. E. Rose, K.C., for the Navigation Co., contra.

HON. MR. JUSTICE RIDDELL:—The Canadian Shipbuilding Company made a contract, February 18th, 1907, to build a steamer for the Hamilton and Fort William Navigation Co. Limited, for $297,000—they were paid $30,000 on ac-

count of the work done, etc., etc., and November 4th, 1907, made a bill of sale of what had been done (I use popular language) to the navigation company—then November 27th, 1907, they made another bill of sale to the said company and went into liquidation, January, 1908. The steamer was not finished and the navigation company wished to get possession of it—so they applied to the Court, and March 3rd, 1909, the following order was made by the C. J. C. P.

1. It is ordered that the petitioners do give security in the sum of $40,000 by a bond of themselves and the Inland Navigation Company, to pay whatever amount (if any) it may be found that the liquidator of the Canadian Shipbuilding Company, Limited, now had a lien for, and for any damages which the liquidator may suffer by reason of the above-named petitioners taking possession of the said material, such amount to be promptly determined by the Referee in the winding-up proceedings.

2. It is further ordered that upon the completion and delivery of such security, the said petitioners shall be at liberty to take possession of the ship (if any) and the material purchased and intended to be used for constructing the same, covered by the said bill of sale as are now in the possession of the said liquidator.

3. And it is further ordered that the parties hereto keep a true account of everything received by the said petitioners as possession is taken.

4. And it is further ordered that save as herein expressly provided for, the rights and liabilities of the Hamilton & Fort William Navigation Company, and of the Canadian Shipbuilding Company and its liquidator to stand in the same position as they do now stand.

5. And it is further ordered that the costs of this application be disposed of by the said Referee in the winding-up proceedings.

The navigation company took possession of the unfinished ship, etc.—and the Referee proceeded with the reference as directed.

The liquidator claimed the ownership of the work basing this claim upon the proposition that the bills of sale were invalid as against him.

The Referee found against him and he now appeals.

The first matter to be considered is whether it was open to the Referee to consider this point at all—I think that his conclusion that he could is entirely justified. There is

no adjudication as to the ownership in the order of reference but the rights of the navigation company and the insolvent company (and its liquidator) are presumed the navigation company is allowed to take possession of the ship and materials, but that is all. The reference is to determine the amount of lien, if any, and any damages the liquidator may suffer by reason of the navigation company taking possession of the said material—in other words if there be a lien, how much is it? and if there be ownership, what damages for taking the property from the possession of the owner?

By the agreement the shipbuilding company was to build a freight steamer for the navigation company by October 1st, 1907, for $297,000, payments to be made every two months to the extent of 80 per cent. of the work done and material purchased by and delivered to the contractor for constructing the steamer—balance on completion—the shipbuilding company to provide all manner of labour, material and apparatus. As work goes on after the first payment "the property in the said steamer so far as constructed, and in all machinery belonging thereto and in all materials purchased and intended to be used for constructing the same or any part thereof, shall become vested in and be the absolute property of the owner (i.e.) the navigation company, and the contractor (i.e. the shipbuilding company), shall and will then or at any time thereafter at the request of the owner execute and deliver to the owner such bill of sale or other assurance as the owner may be advised to be necessary to so vest said steamer and machinery and material in the owner, subject to the lien of the contractor upon the said steamer and its machinery and equipment for any unpaid balance . . . and subject to the possession of the said steamer remaining in and with the contractor until the owner is entitled to delivery in accordance with the provisions of this contract."

This provision operated in equity as a transfer of ownership from the time of the first payment, of all the ship and materials, etc., without the execution of a bill of sale. There is I presume no difficulty as to that part of the ship and materials in hand *in esse* at the time of this payment, and I think there can be no doubt as to the rest.

In *Holyroyd* v. *Marshall* (1861), 10 H. L. C. 191; 9 Jur. N. S. 213, T. owned certain machinery in a mill sold it to H., remaining in possession. Desiring to repurchase it he executed a deed declaring that it was the property of H.,

conveying it to B. in trust that when he paid for it, it should be transferred to him, but if he failed, then to be held in trust for H.—T. also covenanted that all the machinery which should be placed in the mill during the continuance of the deed in addition or substitution for the original machinery should be subject to the same trusts. T. sold some of the machinery and bought other machinery instead, which he brought into the mill. H. did not take possession: T. got in low water and a creditor of his seized under a *fi. fa.* H. filed his bill. Stuart, V.-C., held the *fi. fa.* invalid as against the deed in respect of the added and substituted articles: the L. C. (Lord Campbell) reversed this decree: 2 DeG. F. & J. 596; and an appeal was had to the House of Lords. Judgment was reserved for more than a year, and a second argument heard.

The L. C. (Lord Westbury) said, p. 211: "If a vendor . . . agrees to sell . . . property, real or personal, of which he is not possessed at the time, and he receives consideration for the contract and afterwards becomes possessed of property answering the description, there is no doubt . . . that the contract would in equity transfer the beneficial interest to the purchaser immediately on the property being acquired . . . immediately in the new machinery . . . being . . . placed in the mill, they . . . passed in equity to the mortgagees and T was bound to make a legal conveyance and for whom he in the meantime was a trustee of the property in question." Lords Wensleydale and Chelmsford concurred in dismissing the appeal.

In that case there was not unlike this a covenant that T. should "do all necessary acts for assuring such added or substituted machinery, implements, and things so that the same may become vested accordingly." It was strongly argued that this express covenant must be taken as shewing that the property did not pass without a deed (see p. 225). On p. 224 Amphlett on the first argument is reported as saying *arguendo*: "Nothing whatever has been done, for so vesting the added machinery and, therefore, it has not vested," and on the second argument (on p. 207): "There must be a real (or if that was impossible) a constructive delivery of these new chattels in order to vest them in the appellants. There had not been any such delivery here. There ought to have been a new bill of sale of them, and a new registration of it." But the L. C. said, p. 209: "In equity it is not neces-

sary for the alienation of property—that there should be a formal deed of conveyance." Lord Chelmsford said p. 225: "It seems to be neither a convenient nor a reasonable view of the rights acquired under the deed to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of these parties."

This case has frequently been referred to and followed in our own Courts e.g.:—

Re Thurkill Perrin v. *Wood* (1874), 21 Gr. 492; *Mason* v. *McDonald* (1875), 25 U. C. C. P. 435, at p. 439; *Coyne* v. *Lee* (1887), 14 A. R. 503; *Horsfall* v. *Boisseau* (1894), 21 A. R. 663.

The statutes R. S. O. 1897, ch. 148, and the like are appealed to by the liquidator. I do not think that the liquidator can take advantage of the provisions of these Acts —he is not a creditor or a purchaser for valuable consideration.

It is said that he stands for the creditors, but the act does not speak of those who stand for the creditors, but of creditors; and sec. 38 of R. S. O. (1897), ch. 148, does not extend the meaning to liquidators, but only "to any assignee in insolvency of the mortgagor and to an assignee for the general benefit of creditors." Had it been intended to extend the meaning to cover liquidators that could easily have been done.

Before the Act of 1892, 55 Vict. ch. 26, it had been held that an assignee for the benefit of creditors could not claim in the capacity of creditor any benefit from want of registration.

Parkes v. *St. George* (1882), 2 O. R. 342, at p. 347, per Boyd, C.; *Kitching* v. *Hicks* (1884), 6 O. R. 738, per Proudfoot, J., at p. 745; per Osler, J., at p. 749, and cases stated.

And while an assignee in insolvency was held to be entitled to take advantage of the act that was "decided upon the peculiar language of our late Insolvent Act," per Osler, J., in *Kitching* v. *Hicks, ut supra,* at p. 749, citing *Re Barrett,* 5 A. R. 206: *Re Andrews,* 2 A. R. 24.

It has been considered in England in some cases, e.g., in cases of fraudulent conveyances under the statute of 13 Elizabeth, that if any fraud against creditors exists in a transaction to which the insolvent or bankrupt was a party the assigner or trustee may take advantage of it, and that a

deed which is void as against creditors is also void as against those who represent creditors. But it must be borne in mind that such deeds were contrary to the common law, and that the statute was merely an affirmance of the pre-existing common law.

In our case we have a statute which makes void perfectly legitimate and proper transactions and this statute must be read strictly. I think that one who is not a creditor cannot claim as though he were a creditor unless he can bring himself within the words of the Act.

I do not read the cases as excluding this view.

In *Re S. E. E. & R. Co.* (1869), L. R. 4 Ch. App. 215, at p. 27, Lord Hatherley, L.C., says: "The official liquidator had, therefore, now to act for the benefit of creditors as well as of the shareholders . . ." and in *Re Duckworth* (1867), L. R. 2 Ch. App. 578 (and other cases including some in our own Courts), it is said "the liquidator represents the creditors;" but as Lord Cairns, L.C., says, L. R. 2 Ch. App. 580: "the liquidator represents the creditors . . ., but only because he represents the company." This is approved in the H. L. by Lord Westbury in *Waterhouse* v. *Jameson* (1870), L. R. 2 H. L. Sc. 29, at p. 38.

In *Re Canadian Camera Co.* (1901), 2 O. L. R. 677, it is indeed said that in considering the statute now under examination that "it is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz.: that while in no sense an assignee for value of the company, yet he stands for the creditors of the company and is entitled to enforce their rights . . ." The learned Judge cites *In re S. E. E. & R. Co ut supra*—nothing, however, in that case, I venture to think, justifies the statement of law in the case in 2 O. L. R. just cited. What was held and all that was held, was that the solicitors for an insolvent company may be compelled to produce documents relating to the company upon application of the liquidator, but without prejudice to their lien for costs—and even this was found on sec. 115 of the Companies Act of 1862—which may be read on pp. 1297, 1298, of the second volume of Lindley on Companies, 6th ed.—and which it will be seen gives the Court power to dispose of the papers, etc., of the company.

The *dictum* of Mr. Justice Street, was not necessary for the determination of the case as it was held that the creditors never had the right to treat the insolvent company as owner.

I do not think that the provisions of a statute so severe as that respecting Bills of Sale, etc., are to be extended beyond the cases to which they are clearly applicable—and I think the liquidator is not a creditor within the meaning of the Act. But even if he were the decision in the case just mentioned would seem to be adverse to him in respect of some of the goods at least. There W. delivered a lathe to the company under condition that the property should not pass until the lathe was paid for in full—the company was wound up; the liquidator become possessed of the lathe and sold it. W. claimed his "lien," the Master in Ordinary allowed part only, but the Divisional Court held that the provisions of the Conditional Sales Act, did not "help the liquidator in his capacity of representative of the creditors of the insolvent company, because the creditors never had a right to treat the bailee as owner." In our case "the materials purchased and intended to be used" after the execution of the agreement and after the payment of the first bi-monthly instalment, never became the property of the shipbuilding company as against the navigation company, but in equity became at once upon purchase the property of the navigation company.

It is unnecessary, however, to pursue this matter.

I have not said anything as to the validity of the bills of sale, but I am not to be considered as dissenting from the view of the learned Referee in that regard.

I think the appeal should be dismissed with costs.

HON. SIR JOHN BOYD, C. JUNE 22ND, 1912.

RICHARDS v. COLLINS.

3 O. W. N. 1479.

Assessment and Taxes — Tax Sale—Indian Lands—Indian Act, R. S. O. (1897), c. 51, ss. 58-60—Intervention of Superintendent-General.

Action to set aside a tax sale of certain lands to defendant made in 1901. Defendant counterclaimed for improvements. The lands purporting to have been sold for taxes had not been properly assessed, statutory warning of the sale had not been given, and the sale took place within 3 years of the notice of the tax given the owner of the lands.

BOYD, C., set aside tax sale with costs; defendant given a lien on the lands in respect of matters set up in his counterclaim with costs.

Sections 58-60 of the Indian Act, R. S. C., c. 51, only apply to the case of an active intervention of the Superintendent-General between the tax purchaser and the original purchaser, where he has remained quiescent; the general law applicable to tax sales governs.

Action to recover possession of land and to set aside a tax sale.

F. E. Titus, for the plaintiffs.

R. R. McKessock, K.C., for the defendant.

HON. SIR JOHN BOYD, C.:—An objection not on the pleadings was raised *ore tenus* that by reason of some provisions of the Dominion Indian Act this action was not well founded.

The Indian Act as found in the Revised Statutes of Canada 1886, ch. 43, sec. 43, was amended in 1888 by 51 Vict. ch. 22, sec. 2, now found in the Revision of 1906 as ch. 51, secs. 58, 50, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be that when a conveyance has been made by the proper municipal officer of the province purporting to be based upon a sale for taxes the Superintendent General may "approve of such conveyance and act upon it and treat it as a valid transfer" of the interest of the original purchaser (sec. 58 (1)).

When the Superintendent General has "signified his approval of such conveyance by endorsement thereon," the grantee shall be substituted (in all respects in relation to the land) for the original purchaser; sec. 58 (2).

The Superintendent General may cause a patent to be issued to the grantee named in such conveyance on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction in a suit by some person interested in such land within two years after the date of the sale for taxes, and unless within such delay notice of such contestation has been given to the Superintendent General (sec. 59).

These provisions are, I think, to be read as applicable to a case where the Superintendent General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent General has taken under consideration the tax deed and has approved of it as a valid transfer by endorsement thereon. This *prima facie* ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent General. If the Superintendent General remains silent and inactive there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts so far as the Indian Act is concerned. He may otherwise lose his legal status by delay and adverse possession, but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that where lands are sold for arrears of taxes and the treasurer has given a deed for the same that deed shall be to all intents and purposes valid and binding if the same has not been questioned before some Court of competent jurisdiction by some person interested within two years from the time of sale; sec. 209, R. S. O. 1897, ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes and if these though legally imposed have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district

of Manitoulin, part of an Indian Reserve, and as such subject to the control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thos. F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres in 1879 to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that was duly registered in the Indian Department, and that part still stands in the name of David Richards and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that at her death what remains was to be equally divided between his sons Thomas and Luther. These two are the plaintiffs, and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer on the ground of infancy is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment had been recognized and acted on by the Indian Department, and I think any controversy as to his status will have to be decided by that department, if and when he applies for a patent. He has sufficient *locus standi*, with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant. That certificate sets out that a sale was had on the 4th September, 1901, of the right, title and interest of the owner in the patented lot being lot 21 in the 12th concession of Howland, containing 48 acres more or less, and that Collins became the purchaser for the sum of $8.65.

That sum was directed to be levied by warrant of the reeve, dated the 27th May, 1901, of which $7.85 was for arrears of taxes alleged to be due to the 31st December, 1900.

On this state of facts, the tax deed was executed by the proper officers of the township on the 17th September, 1902, which has been duly registered upon the land and in the Indian Department. By this deed the defendant claims that he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897, 1898, and 1899, and which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this, that the 100 acres patented and being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres as lot 21 in the 13th concession of Howland—as an entirely different lot in another concession, which concession has no existence. Among other mishaps the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898, as shewing taxes of $2.47 on 48 acres, concession 12, lot 21, owned by Thos. Richards; yet it does not seem to be clear that this is not the roll of 1899. But, even if the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than 3 years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the years 1897 or 1899, and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands containing these as liable to be sold for taxes was prepared by the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale was not in this case given (sec. 152).

What was substituted is frankly told by the treasurer; "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes; I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way."

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the lands, and against this should be any profit derived from the land or which could reasonably have been derived from it by the purchaser.

The plaintiffs should get the costs of action and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master if the parties cannot agree, and he will say how the costs should go in his office of the reference.

HON. MR. JUSTICE KELLY. JUNE 17TH, 1912.

REX v. HARRAN.

3 O. W. N. 1450.

Appeal—Leave to Appeal—To Court of Appeal—From Single Judge—Order Refusing to Quash Conviction.

Motion by the defendant for leave to appeal to the Court of Appeal from an order of HON. MR. JUSTICE MIDDLETON, 22 O. W. R. ; 3 O. W. N. 1107.

G. P. Deacon, for the defendant's motion.

D. L. McCarthy, K.C., for the prosecution, contra.

HON. MR. JUSTICE KELLY dismissed the motion with costs.

DIVISIONAL COURT.

JUNE 22ND, 1912.

SCOTT v. ALLEN.

3 O. W. N. 1484.

Husband and Wife—Authority of Wife to Pledge Husband's Credit —For Necessaries—Action to Recover on Current Account— Statute of Limitations.

Action by executrix of R. S., a grocer, against defendant, for goods supplied to his late wife in her lifetime. The account sued on had been running as far back as 1901, defendant's wife making monthly payments thereon, sometimes more and sometimes less than the monthly purchases, and the amounts so paid were applied by R. S. on the general account. In 1907, an account was rendered to that date; defendant's wife was surprised at its magnitude, but agreed to pay it if given time. She made several payments on account, as did her daughter, who managed defendant's household after her mother's death, but defendant stopped the payments. Defendant set up as a defence lack of authority and Statute of Limitation.

DIVISIONAL COURT *held*, that defendant's wife had implied authority to pledge his credit for necessaries.

Jolly v. *Rees*, 15 C. B. N. S. 628, and *Debenham* v. *Mellon*, 5 Q. B. D. 394; 6 A. C. 24, referred to.

That the payments on account were acts from which the inference could be drawn that the debtor intended to pay the balance, though no special reference was made thereto at the time of such payments.

Boultbee v. *Burke*, 9 O. R. 80, followed.

Per RIDDELL, J., "Grumbling and remonstrance at a wife's extravagance is not a limitation of authority."

Morgan v. *Chetwynd*, 4 F. & F. 457, followed.

An appeal by the defendant from a judgment of County Court of the United Counties of Leeds and Grenville, giving judgment for plaintiff with costs, in an action tried without a jury.

I. Hilliard, K.C., for defendant, appellant.

J. A. Hutcheson, K.C., contra.

HON. MR. JUSTICE BRITTON:—There is evidence to fully warrant the findings of fact of the learned County Court Judge—and upon the hearing of this appeal we were satisfied of the original liability of the defendant for the purchases by his wife—now deceased—but decision was reserved upon the question of whether the plaintiff's claim is barred by the Statute of Limitations. I am of opinion that the payments from time to time by the wife of the defendant were upon the whole running account so as to keep the claim alive. When the wife over paid the current account for purchases during the month—she intended such over payment to apply

generally on the indebtedness. Even if she made no specific application of such sum as overpaid the month's purchases, the creditor, Scott, could apply it generally, so long as the account upon which the payment was applied—was not statute barred.

There was and in time such application of the payment. It is rather hard on the defendant that, now after the death of his wife and after the death of the creditor, Scott, the defendant should be called upon to pay this large account—when at least $100 of it was owed as long ago as December 20th, 1901, but such is the law, and defendant must submit. As the wife, living with her husband, had the right to pledge her husband's credit for necessaries, then she had the right to make payment from time to time, so as to prevent the claim being barred by the Statute of Limitations—and the defendant is bound by what his wife did, in acknowledging the correctness of the account as finally rendered and by the payments thereon subsequently made by her.

Appeal should be dismissed with costs.

HON. MR. JUSTICE RIDDELL:—The plaintiff is the executrix of the late R. A. Scott, who in his lifetime carried on business as a grocer; and she sues the defendant for the balance of an account for goods supplied by her testator. The defendant defends mainly on two grounds, viz., (1) want of authority in his wife (now deceased) to order the goods and (2) the statute.

We disposed of the first at the hearing of the appeal holding that the law is correctly laid down in Eversley on Domestic Relations, 3rd ed., pp. 312, 313, "During co-habitation, there is a presumption arising from the very circumstances of the co-habitation of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate: that is to say a wife has an implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and are necessary and suitable to the style in which her husband chooses to live . . . In other words where a wife is living with her husband, the presumption is that she has his authority to bind him by contracts for articles suitable to that station which he permits her to assume: but that presumption may be rebutted by showing that she had not such authority. This doctrine was laid down in the two important cases of *Jolly* v. *Rees*, 15 C. B. N. S. 628, 33 L. J.

C. P. 177, and *Debenham* v. *Mellon*, 5 Q. B. D. 394, 6 A. C. 24, and is now settled law.

There was no doubt that the goods supplied were necessaries suitable to the station of the defendant and the style in which he lived. We also held that in this action at the suit of an executrix, corroboration of the alleged instruction to his wife not to run a bill must be adduced—and that no such corroboration was furnished.

Speaking for myself I would say that the alleged limitation of authority was by no means made out even if the defendant's evidence should have full credence and effect—all that took place was a warning not to get into debt, not an unprecedented occurrence. It has been held that grumbling and remonstrance at a wife's extravagance is not a limitation of authority. *Morgan* v. *Chetwynd*, 4 F. & F. 457. We reserved judgment to look into the question of the application of the statute.

On the other branch of the case also I think the defendant fails. The present account began as far back as February 23rd, 1882, at which time the parties had a settlement and the account was paid in full. During the lifetime of Scott the practice was for the wife of the defendant to buy groceries and make monthly payments, generally precisely the amount of the month's purchases, but sometimes a little more or a little less; if less the running balance—for it was all one running account—was increased if more diminished. But after the death of Scott, June, 1907, and in August, 1907, the account was sent to her in full, *i.e.*, a statement of the whole balance. Mrs. Scott the plaintiff was under the impression that this was done in June, 1907, but it is clear that she has made a mistake in the date—and indeed she acknowledges it on cross-examination. That the account was sent is abundantly proved not only by the plaintiff but also by the bookkeeper, by Mrs. Birks, and by the daughter of the defendant. It is actually produced at the trial by the defendant (Ex. 8), see also Ex. 4. This witness says that her mother received the account, that it came as a great shock and surprise to her "this large account," "she did not know where it ever arose from."

Mrs. Allen then went to the plaintiff and asked her not to crowd them for the account, that she would pay it all. This is established by the evidence of the plaintiff and of Mrs. Birks—and the promise seems to have been repeated different times.

Payments were made from time to time by Mrs. Allen upon this account; the plaintiff ceased to keep a shop and the payments were not in whole or in part on goods bought at or about the time. Even after the death in 1909 her daughter who then was put in charge of the defendant's household affairs made a few payments and doubtless would have continued doing so had not the defendant put a stop to it.

I have not thought it necessary to go through the account from the beginning; we were told by counsel for the plaintiff that the whole account from beginning to end was kept alive by payments and that there never was a time when any part of it—or any item of it—was barred by the statute. While this was denied by counsel for the defendant, we were not pointed to any person as supporting his contention; and the course of dealing in the periods I have examined make it most probable that the plaintiff is right. Since *Boultbee* v. *Burke* (1885), 9 O. R. 80, it cannot be successfully argued that the payment of a part is not an act from which the inference may be drawn that the debtor intended to pay the balance though no special reference is made thereto at the time of such part payment; or that a payment on account of a debt is not such part payment.

Ball v. *Parker*, 39 U. C. R. 488, and cases cited there and in 9 O. R. 80. Here the case is stronger—the debt was known and acknowledged, time was asked and accorded and the payments were at least in some instances made specifically and explicitly with reference to it—and there was no other debt.

The appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — I agree.

HON. MR. JUSTICE RIDDELL. JUNE 22ND, 1912.

CHAMBERS.

REX v. LAPOINTE.

3 O. W. N. 1469.

Intoxicating Liquors — Conviction — Selling without License — Three Informations Filed Together—Each Criminal Case Must Stand on its Own Merits.

Motion to quash conviction of defendant for selling liquor without a license. Defendant had been convicted by a magistrate under three informations which had been tried together, but fined only upon one charge. Part of the evidence taken, however, clearly did not relate to this latter charge.

RIDDELL, J., *held*, that "It is a well-established and well-known principle of the criminal law that each case ought to stand on its own merits and should be decided on the evidence given in relation to that particular charge."

Hamilton v. *Walker*, [1892] 2 Q. B. 25, at p. 28; *Reg* v. *Fry*, 67 L. J. Q. B. 67; 19 Cox 135; *Reg* v. *McBerney* (1897), 3 Can. Cr. Cas. 339; 29 N. S. R. 327; *Rex* v. *Burke* (No. 2) (1904), 8 Can. Cr. Cas. 14, referred to.

Conviction quashed, protection extended to magistrate only on payment of costs by him.

On 9th Nov., 1910, one Grigg laid three informations against Louis Lapointe for selling liquor without a license on October 29th, then ultimo, to (1) B. Guertin, (2) Jos. Dubie, and (3) Edward Dubie, respectively.

Defendant appeared before the Police Magistrate at Thessalon; the Police Magistrate read to him the informations one by one and defendant pleaded "not guilty" to each. Thereupon the Police Magistrate took the evidence of witnesses, B. Guertin, Jos. Dubie, Edward Dubie, for the prosecution, and others for the defence, the evidence being taken down on paper, headed

Deposition of a Witness.

Canada
Province of Ontario,
District of Algoma.
To wit:

The deposition of taken before the undersigned Police Magistrate for the said District of Algoma this 18th day of November in the year 1910, at Cutler, in said District of Algoma, in the presence and hearing of Louis Lapointe, who stands charged that he did at or near the village of Cutler, in said district, on or about the 29th day of October, 1910, sell liquor without a license as required by law."

There was ample evidence of the sale to Joseph Dubie and Edward Dubie—with some hesitation I think there was sufficient to justify a conviction in the Guertin case also.

The Police Magistrate recorded a conviction in the Joseph Dubie case and imposed a fine of $100 and $32 costs, in default of payment 3 months imprisonment.

It was sworn and not denied that at the same time he announced that he found the defendant guilty on the other two charges but adjourned these two convictions for the purpose of fixing the fine thereon until a future day—and this must have been the case as we find the magistrate writing the defendant December 1st, 1910. Having adjourned the two other cases against you for selling liquor "without a license until to-day I have this day come to the conclusion to simply allow the one fine to go which has been paid on payment of the costs in the other two cases." He then stated the amount of costs and asks this to be sent him by return mail "otherwise I will have to send the constable down."

The Police Magistrate told the solicitor for defendant that all the evidence in the three charges was set out in the depositions forwarded and that "the said evidence was utilized by him on each and all of the said charges."

A motion was then made to quash the conviction for selling to Joseph Dubie—the grounds taken in the notice of motion being (1) that there was no evidence to support the conviction, (2) that having three informations before him the Police Magistrate proceeded to hear evidence in all three cases and did then find him guilty in all three cases.

H. S. White, for the defendant's motion.

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

HON. MR. JUSTICE RIDDELL:—It is a well established and well known principle of the criminal law "that each case ought to stand on its own merits and should be decided on the evidence given with relation to that particular charge" per Pollock, B., in *Hamilton* v. *Walker* (1892), 2 Q. B. 25, at p. 28. And where the justices had two informations before them and after hearing evidence as the one charge determined to proceed with and hear the second; and having so proceeded with and heard the same thereupon convicted of the offence charged in the first, the conviction was quashed. So in *Reg.* v. *Fry* (1898), 67 L. J. Q. B. 67; 19 Cox 135; 62 J. P. 457, it was held that it is contrary to the rules and

principles of the criminal law that justices should mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. In that case one of the justices had been the Rt.-Hon. Sir Edward Fry "a great lawyer of long judicial experience," and the justices satisfied the Court that they applied to the case the evidence that was given in reference to it and to none other: and the conviction was sustained.

In our Canadian Courts the point has come up more than once. *Reg.* v. *McBerny* (1897), 3 Can. Cr. Ca. 339, S. C. 29 N. S. R. 327; *Rex* v. *Burke,* (No. 2) (1904), 8 Can. Cr. Ca. 14. The two cases in Ontario to which I have referred are not in reality against the view I have indicated. In *R.* v. *Dunkley* (1910), 16 O. W. R. 263, there were in fact two informations and both were before the magistrates, but the Court (Middleton, J.), held that one charge and one charge only was tried. In *R.* v. *Sutherland,* before the same learned Judge there was also only one charge tried—it being considered that the Crown might prove any number of sales on one day as constituting a selling on that day.

In the present case the conviction is for selling to Joseph Dubie, and it is evident that all the evidence taken was heard on that charge and considered in determining the question of guilt upon that charge. I am not prepared to say that if all the evidence given were applicable to that charge, the conviction must be quashed simply because the other informations were before the Police Magistrate, and evidence applicable to the three charges was heard; but if any of the evidence could not be applicable to the Joseph Dubie charge, it is to my mind plain that the conviction cannot stand. This I think applies to all the evidence on direct, cross or redirect examination and whether for prosecution or defence.

Looking at the defence evidence it would seem that the real defence is an alibi; there is nothing in that part of the evidence which is not applicable and admissible in the Jos. Dubie case.

In the Crown case Joseph Dubie swears that it was the defendant who sold him the whiskey; Edward Dubie swears he was with him at the time and that he, Edward Dubie, bought a bottle at the same time. He would not swear that it was not Louis Lapointe as it was dark and he did not know who it was. Remembering the defence is apparently based upon the identity of the seller, I cannot say that this last statement was inadmissible: Guertin does not seem to

have been with the Dubies and he says the man who sold him the whiskey was one of the Lapointes, he did not know which one, but he knew by the voice that it was one of the Lapointes —this was at 9.15. Jos. Dubie bought his liquor at about 8.30; the places were close together—or not far apart. Can it be said that this is not cogent evidence against the alibi set up? The defence and the only defence actually set up being that the accused was at Spanish at 8.50 (Modviski) 9.20, (John Foltz) 8.45, (John Smith) 8.30, (Louis McGregor), 6.30, 7.30, 9 and 10, (Simon Lapointe) 9.00, (Peter Lapointe) 6.30, 7.30, and 9, (Joseph Lapointe), is it not competent to show by witnesses that he was at Cutler that evening?

Notwithstanding all this, it may have been that the magistrate would not have accepted the statement of Joseph Dubie that he had bought whiskey at all had it not been sworn that two others had bought whiskey the same evening—we are left in the dark as to this, the magistrate has not vouchsafed any explanation. In that view, as the sale to the two others is clearly not evidence of the sale to Jos. Dubie, I think the doubt should be resolved in favour of the defendant and the conviction quashed.

As to costs and protection, it is the rule of the Court to go as far as possible for the protection of non-professional magistrates, but the present Police Magistrate is a lawyer and a K.C., he has left us in the dark, and not like that other lawyer Sir Edward Fry, explained his conduct (and it certainly needed explanation); the proceedings were very irregular; and I think the conviction should be quashed with costs to be paid by the magistrate, and that on these being paid an order for protection will go but not otherwise.

HON. MR. JUSTICE RIDDELL. JUNE 22ND, 1912.

CHAMBERS AND WEEKLY COURT.

RE RICHARDSON.

3 O. W. N. 1473.

Will—Construction — Revocation of Clause in Will by Codicil—Division of Residue among Infant Grandchildren.

Petition by mother of certain contingent beneficiaries under will of one Margaret Richardson, turned by consent into motion by executors under C. R. 938 (*a*) and (*e*), for the advice of the Court. Testatrix gave residue of her estate to be divided amongst her four grandchildren, all still infants, their shares to be paid them when the youngest should come of age, subject to certain contingencies in case any should die before that date. If all the grandchildren were to die before the period of distribution, the property was to go to the next of kin, also infants. Pending distribution the moneys were to be placed by the executors in a chartered bank. The questions submitted to the Court were: (1) Can the executors pay some part of the residue or the interest thereon to the mother of the infants for their support and maintenance? (2) Can the executors disregard the express instructions of the will and invest the residue instead of paying it into a chartered bank?

RIDDELL, J., *held*, (1) That as it was not at all certain that the infants named in the will would ultimately take, and as the next of kin, being infants, could not consent, no payment could be made to the mother of the infants out of the funds in the hands of the executors; (2) That the executors could only disregard the instructions of the will and invest the residue at their own risk.

Costs of motion to all parties out of fund.

This purported to be a petition on behalf of Lottie M. Richardson, widow of the late Dr. Richardson askiug (1) that she be appointed guardian of the estate of her infant children; (2) that the income of the estate of Margaret S. W. Richardson be paid to her for the maintenance of her said children, and (3) for costs.

W. T. Evans, for the petitioner.

W. C. Chisholm, K.C., for the executor.

T. J. Bain, for the next of kin.

F. W. Harcourt, K.C., for the infants.

HON. MR. JUSTICE RIDDELL:—As all parties interested appeared before me and are acting harmoniously consenting to a change of this proceeding into the proper form, I deal with the real matters presented.

By the will of Margaret S. W. Richardson she, in clause 9, directed her executor to sell the residue of her estate, real and personal (after certain specific bequests) giving one-third

to her grandchild Harry R., and the other two-thirds to her grandchildren Stewart R., Gerald R., and Margaret R., in equal parts—none of these to "receive his or her share until . . . Margaret R. shall have attained the full age of twenty-one years, and in case . . . Margaret R. shall not have attained the age of 21 years at the time of my decease, I hereby direct my executor hereinafter named to deposit the proceeds of such sale at interest in some chartered bank and to keep the said proceeds so deposited until . . Margaret R. shall have attained the age of 21 years, and then to hand over their respective shares with accrued interest to each of my said grandchildren. I further direct that the share or shares of any of my said grandchildren who may die before . . Margaret R. shall have attained the age of 21 years, shall be divided equally amongst the survivors. In case all of my said grandchildren shall die before . . Margaret R. shall have attained the age of 21 years then in such case, I give and bequeath the said proceeds of such sale to my next of kin." This provision was modified by the third codicil of the will, dated July 27th, 1911, which directed "the residue of my property to be divided equally amongst . . Harry, Stewart, Gerald, and Margaret the shares of the said Harry, Stewart and Gerald, to be paid to them when the youngest of them shall have attained the age of 21 years, and the share of the said Margaret to be paid to her when she shall have attained the age of 21 years." The ages of these grandchildren are Harry, 18; Stewart, 15; Gerald, 12, and Margaret, 11.

Dr. Richardson, son of the testatrix and father of these infants, the petitioner being their mother, died sometime ago and the petitioner has no means to support her children with. The executors of Margaret S. W. Richardson have about $14,000 from the sale of the property directed by the will.

The present proceeding has two objects in view: (1) to have the petitioner paid some part of the money or of the interest to apply to the support of her younger children; (2) to permit the executors to disregard the express provisions of the will and to invest the money instead of paying it into the bank.

The former could only be done if it were clear (a) that the money was the money of the infants, and (b) the express provision as to payment contained in the will could be disregarded.

To determine these points, I shall treat the present application as though it were a proceeding under C. R. 938 (a) (e).

It is necessary to examine with care the provisions both of clause 9 of the will and of the third codicil.

Clause 9 not only (1) directs the sale (2) the division one-third to Harry and two-thirds to the other grandchildren, (3) the payment when Margaret R. is 21, (4) the direction to pay into a bank until Margaret is 21, and (5) then to pay their respective shares with accrued interest to the grandchildren, but it also directs (6) that the share of any grandchild who dies before Margaret R. becomes 21, shall go to the survivors, and (7) if all die before Margaret becomes 21, the fund goes to the next of kin.

In the third codicil clause 3 reads: "Whereas by clause 9 of my said will I directed that one-third of the residue of my estate be paid to my grandchild Harry R., and the remaining two-thirds to my grandchildren Stewart, Gerald and Margaret in equal shares. Now I revoke that part of said clause of my said will and I direct the residue of my property be divided equally amongst my four grandchildren, the shares of the said Harry, Stewart and Gerald to be paid to them when the youngest of them shall have attained the age of 21 years, and the share of the said Margaret to be paid to her when she shall have attained the age of 21 years."

Here in addition to the express revocation of clause 9 (No. 2) above, there is also a revocation of so much of Nos. 3 and 5 as applies to the young men. There is no revocation of No. 4 so far as it relates to the payment of the money into a bank and while No. 6 is by implication revoked so far as it relates to the death of any of the young men at any time between the majority of Gerald and Margaret, it is not revoked as regards Margaret. But what is of most importance here is that No. 7 is not revoked—it may be that all will die before Margaret becomes 21, and the three young men before Gerald is 21 and then it would seem that the next of kin will take. Without the consent of the next of kin which cannot be given, same being infants, the infants cannot receive any of this money at present as they may turn out not to be entitled to any.

2. May the executors disregard the express direction to pay into Court? I deal with this as an application under C. R 938 (e) and (g).

Where executors or trustees disregard the express direction of the instrument under which they act, they cannot make

money thereby for themselves and make themselves personally responsible for any loss.

R. S. O. ch. 130, sec. 2 does not apply to the present case —there is no discretion given to the executors.

I do not consider it necessary to answer further.

Costs as of a motion (not of a petition, see *Re Rally*, 25 O. L. R.; *Re Anne E. Turner; Re Gordon Estate*, etc.), of all parties out of the fund.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 22ND, 1912.

YATES v. WINDSOR.

3 O. W. N. 1513.

Negligence — Highway — Snow and Ice — Injury to Pedestrian — Damages.

Action by plaintiff for damages for injuries sustained by falling on ice that had been allowed to accumulate on a public street of Windsor, Ont.

FALCONBRIDGE, C.J.K.B., found defendants guilty of the gross negligence required by the statute, in that the condition complained or had been allowed to continue for a long time after defendants' officials had knowledge thereof.

Judgment for plaintiff for $1,250 and costs.

O. E. Fleming, K.C., for the plaintiff.

A. St. George Ellis, for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Without suggesting desire on the part of any witness deliberately to say what is not true, I prefer the testimony of independent witnesses to that of city officials and others having an indirect interest in the matter.

And I find accordingly that the defendants were guilty of that gross negligence—causing the accident which the statute requires to render defendants liable therefor.

The plumbing inspector admits that pedestrians would have to be careful or it would be dangerous.

The long duration of the dangerous condition is an answer to the plea of want of notice.

Plaintiff fell on 25th January. Tonko says water running across sidewalk to the street—about first week in January. He says it was in worse condition than any other part of the city.

Richards says it was in bad condition a week or ten days. He saw a lady fall 4 or 5 days before this accident.

W. J. Turner says it was very bad—in bad condition fully two weeks before plaintiff fell. Turner saw a young lady fall then.

Scarr was sent up to the Water Works Board to stop the leak on 12th January—fixing the date of the water running over the sidewalk. It had been running for some days before that.

Welch thinks it was a week in that bad condition.

Burrows fell near corner of Chatham and Goyeau Sts. about the second week in January. He says it was bad all over.

Jas. H. Green fell about 4 or 5 days before plaintiff did.

Hilman, Superintendent of Public Works (although it is true he was confined to his house from about 22nd to 29th January), knew or should have known the state of the sidewalk, before he became ill.

Plaintiff is plainly entitled to succeed. I assess his damages at $250. Judgment for that amount and costs.

Thirty days' stay.

DIVISIONAL COURT.

JUNE 17TH, 1912.

O'HEARN v. RICHARDSON.

3 O. W. N. 1450.

Vendor and Purchaser—Contract for Sale of Land—Time of Essence—Note Given in Part Payment.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE SUTHERLAND, 21 O. W. R. 553; 3 O. W. N. 945.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

J. E. Day, for the plaintiff, appellant.

J. W. Mitchell, for the defendant, respondent.

THEIR LORDSHIPS held that the case was governed by *Labelle* v. *O'Connor*, 15 O. L. R. 528, and dismissed the appeal with costs. Plaintiff given leave to appeal to the Court of Appeal.

DIVISIONAL COURT.

JUNE 18TH, 1912.

JEWER v. THOMPSON.

3 O. W. N. 1122, 1450.

Vendor and Purchaser—Contract for Sale of Land—Objections to Title — Right of Way — Admission by Vendor of Validity of Objections—Termination of Contract—Registration—Discharge.

An appeal by the defendant from the following judgment of HON. MR. JUSTICE BRITTON, in favour of the plaintiffs, in an action to vacate the registration of an agreement for the sale of a house and land, after the plaintiffs had cancelled the contract, as they alleged, and for a mandatory injunction to the defendant to execute a release or discharge of the agreement, and for damages.

F. E. Hodgins, K.C., for the plaintiffs.

J. J. MacLennan, for the defendant.

HON. MR. JUSTICE BRITTON (19th April, 1912):—The plaintiffs were the owners of house No. 761 on the east side of Gladstone avenue in the city of Toronto. The defendant desiring to purchase this made an offer in writing to A. Jewer, one of the plaintiffs, which offer is in part, and so far as seems to me, material, as follows:—

"I, W. Thompson of the city of Toronto (as purchaser) hereby agree to purchase all and singular the premises situate on the east side of Gladstone avenue in the city of Toronto, known as house No. 761, plan No. , as registered in the registry office for the said city of Toronto, having a frontage

of about 19 feet, by a depth of about 62 feet more or less, at the price of $3,000, as follows . . . "

"The vendor shall not be required to furnish abstracts of title or to produce any deeds or copies of deeds not in his possession or control. The purchaser to be allowed ten days to examine title at his own expense. All objections to title to be made in writing within that time. Any valid objection which the vendor is unable or unwilling to remove, the agreement to be null and void, and deposit, if any, returned . . ."

The offer or agreement on the part of defendant was dated 24th November, 1911. On the same day the plaintiff, A. Jewer, signed an acceptance and agreed to and with the defendant to carry out the same on the terms and conditions above mentioned, and he accepted $50 as a deposit.

The plaintiffs gave the names of Morine and Morine as their solicitors. The defendant employed Mr. Robert Wherry as his solicitor. On the 1st December, the defendant's solicitor made requisitions on title of considerable length and of great minuteness and particularity. These were answered in part, but the answers were deemed by the defendant's solicitor unsatisfactory. The property is in fact subject to two rights of way, one over a small part of the north end, and another over a small part of the south end. Both were put forward as serious objections by defendant, but more stress seems to have been laid upon the right of way over the southerly one foot and some inches. Upon the land immediately adjacent to the south, which land was formerly owned by the plaintiffs, is erected a building used and occupied as a store. The distance between the southerly wall of 761 and the northerly wall of the store is about 3 feet. In selling the store lot, the plaintiffs' conveyance reserved a right of way over the northerly 1 foot 6 inches of the store lot and granted a right of way over the southerly 1 foot, 6 inches of 761. Apart from this right of way, it was established that the defendant would have got the full 19 feet frontage, but the defendant insisted upon getting title to all of what was called 761, freed and discharged from these rights of way—and particularly the right of way over the southerly part of about 18 inches. The plaintiffs not being able to satisfy the defendant, treated his objection as a valid objection, which the plaintiffs were unable or unwilling to remove, treated the agreement as null and void—declared it to be so, and tendered to the defendant his deposit of $50.

The plaintiffs then again offered the property for sale, and subsequently they received an offer from Robert Garbutt which offer the plaintiffs accepted. After the plaintiffs had cancelled the agreement, the defendant caused the agreement to be registered, and refused to release or discharge it. Garbutt insisted upon having the defendants' alleged agreement removed from the registry, hence this action which was commenced on the 15th February last. The plaintiffs ask for judgment vacating and discharging the registration of the agreement referred to, made between Alfred Jewer and the defendant, and a mandatory injunction, compelling the defendant to execute a release or discharge of it. The defendant denies the plaintiffs' right to cancel the agreement, and he sets up as objections to plaintiffs' title the right of way mentioned, and asks for specific performance of the agreement or performance of it subject to these rights of way with an abatement in the purchase price. The determination of this action depends upon the plaintiffs' right to rescind under the words in the contract itself.

I find, as it seems to me clear upon the evidence, that the plaintiffs did not have in mind the existence of any right of way over the southerly end of this lot until after defendant's offer and plaintiffs' acceptance of it. The plaintiffs did not personally give instructions as to the survey and they really thought that the land belonging to 761 extended to the northerly wall of the store mentioned.

The defendant could see for himself the position at the northerly end—if he was innocently misled as to the southerly end, he was not, as to the northerly end. I find that the plaintiffs had the right to treat the defendant's objection as a valid objection to the title—and being unable and unwilling to remove this objection, the plaintiffs could as they did annul the agreement and declare it void and of no effect.

The plaintiffs in doing this did not act unreasonably or capriciously—but acted in good faith and acted promptly under the circumstances.

The right of way over the southern part was not actually used by the occupant of the store and by reason of this the plaintiffs might well not bear in mind the fact that such right of way existed. There was no pretence at the trial that the plaintiffs wilfully concealed or intended to conceal anything from the defendant.

In entering into this contract I do not think that the plaintiffs or either of them "omitted anything which the ordinary prudent man having regard to his contractual relations with other parties is bound to do."

Re Jackson and Heden's Contract, [1906] 1 Ch. 412. There was no waiver of plaintiffs' right to rescind.

The case *Re Cains & Wood,* 29 C. D. 626, seems to me authority for plaintiffs' contention.

The purchase price was a bulk sum sale, not by the foot. The number of feet frontage was "more or less," and the defendant would get at least all the agreement called for in measurement exclusive of the right of way. See *Wilson Lumber Co.* v. *Simpson,* 22 O. L. R. 452. Apart from the correspondence between the solicitors, I find that the plaintiff, Alfred Jewer, saw the defendant on the 19th December, 1911, and told him in substance that he would not comply with the requisition as to those rights of way and that the defendant could "take the property or leave it," and that the defendant then said he would not take the property subject to the right of way. Nothing was then said about abatement of price. The defendant by his solicitor registered the agreement on the 21st December, 1911. The plaintiffs did not know of this, and again offered the property for sale—and on the 3rd January, 1912, the plaintiffs accepted the offer of Robert Garbutt and are bound to convey to him. Garbutt and plaintiffs both acted in good faith—Garbutt had no notice of defendant's offer. Garbutt is not a party to this action. It is clear from the conduct of the defendant that had not the plaintiffs cancelled the offer and acceptance as they did, the plaintiffs would have been involved in expensive and protracted litigation. The plaintiffs are entitled to judgment, vacating and discharging the agreement mentioned in the statement of claim registered in the registry office of the western division of the city of Toronto as No. 19076 D., on the 21st December, 1911, and a declaration that on that date the defendant had no right, title or interest under said agreement in said property.

A mandatory order will go, compelling the defendant to execute a release or discharge of said agreement so far as it affects the land in question, and forms a cloud upon the title thereto.

Judgment will be with costs, payable by defendant to plaintiffs. The $50 deposit may be applied by the plaintiffs upon the costs payable by defendant.

Defendant's counterclaim will be dismissed with costs.

Fifteen days' stay.

Defendant's appeal from above judgment to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE KELLY, on the 18th June, 1912.

J. J. Maclennan, for the defendant, appellant.

F. E. Hodgins, K.C., for the plaintiffs, respondent.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

DIVISIONAL COURT.

MARCH 19TH, 1912.

FARMERS BANK OF CANADA v. HEATH.

3 O. W. N. 879.

Process—Service of—Writ of Summons—Out of Jurisdiction—Leave to Enter Conditional Appearance — Question as to Where Causes of Action Arose—Place of Payment.

An appeal by the defendants from the following order of HON. MR. JUSTICE CLUTE in Chambers, dismissing an appeal from an order of the Master in Chambers, 21 O. W. R. 283; 3 O. W. N. 682, in one of the actions only, that upon the 1909 policy.

Shirley Denison, K.C., for the defendants, appellants.

M. L. Gordon, for the plaintiffs, respondents.

HON. MR. JUSTICE CLUTE (V.V.), (1st March, 1912):—I think the proper disposition of this matter is that which was made by the Master, following *Kemerer* v. *Watterson*, 20 O. L. R. 451. I think there is sufficient doubt in regard to the question as to where the contract was made, and as to where

the breach occurred, to justify the plaintiffs in bringing the action to have that question tested and to have a conditional appearance entered by the defendants, if they so desire; and I repeat what I said during the argument, that, if the facts are as suggested by counsel upon both sides, they might well have been spread out in form so that the Court could have acted upon them. I do not feel bound to act upon the documents above as they appear here; and, taking the insurance policy, issued apparently in London, to my mind it is obviously issued upon a form which shews that there was some person to whom the defendants were issuing it, and upon which they recognise that person as doing business in Toronto. Apparently, after it had been issued on the 20th January, 1909, in London, it passed to this person on the 8th February, 1909, in Toronto. Was that person the agent of the company of Lloyds? Or was he an agent of the bank? I do not know; but, upon the document issued by them, they recognised such a person. The natural inference was, that he was an agent of the defendants. That, of course, might be rebutted by the fact; and counsel for the defendants suggests that the fact is contrary to the inference I draw from the document itself; but that denial is not in such form that I can act upon it.

As I entertain a doubt as to where the contract was made or where the breach occurred, I think the proper order to make is that made in this case by the Master.

The appeal will be dismissed with costs to the plaintiffs in any event.

(This result is noted, 21 O. W. R. 403; 3 O. W. N. 805.)

On the 12th March, 1912, an order was made by HON. MR. JUSTICE MIDDLETON, in Chambers, allowing the defendants to appeal to a Divisional Court from the order.

The appeal was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE SUTHERLAND.

Shirley Denison, K.C., for the defendants, appellants.

J. Bicknell, K.C., and M. Lockhart Gordon, for the plaintiffs, respondents.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B. (V.V.), (19th March, 1912):—We are all agreed that Mr. Denison has presented this appeal with great skill and ingenuity. We

are further agreed that it is neither necessary nor desirable that we should reserve the case merely for the purpose of adding to the literature on the subject.

The decision which we arrive at is not at all founded on the apparent hardship of the plaintiffs having to pursue individual underwriters into all the financial centres of Europe. It is based on what we consider the clear view of the law and practice.

There are two policies here, as to one of which the defendants admit that they have to submit to the jurisdiction of the Ontario Courts. As to the other one it is for £5,145, which, by a written marginal note is declared to be equivalent to $25,000, the £1 sterling being taken at $4.86, the marginal note reading as follows, "£5,145 at ex. 4.86 = $25,000"—counsel for the defendants has endeavoured to persuade us that there is no contract to pay this one in this country.

Two judicial officers have exercised their discretion on this motion, and, in our opinion, rightly. It seems to us that the cases of *Canadian Radiator Co.* v. *Cuthbertson,* 9 O. L. R. 126; *Blackley Limited* v. *Elite Costume Co.,* 9 O. L. R. 382, and *Kemerer* v. *Watterson,* 20 O. L. R. 451, govern.

Not only is it a matter of doubt as to whether this contract is to be performed in Ontario, but I should think, without saying anything to prejudge the issue, it is quite arguable that the order appealed from is right: (1) by reason of the marginal note in the policy, which I have already referred to: and (2) from the fact that it is stamped with an agent's name, as referred to by Mr. Justice Clute. It is also suggested that the defendants have property in this country. However this may be, there is so much doubt in the case that the matters should be tried out in the cause, and not simply on affidavits. The practice is in substitution of the old common law practice requiring the plaintiff to undertake to submit to a nonsuit unless he proved a cause of action arising within the jurisdiction.

Appeal dismissed with costs to the plaintiffs in any event.

MASTER IN CHAMBERS. JUNE 10TH, 1912.

EDGEWORTH v. ALLEN.

3 O. W. N. 1375.

Process—Service of Writ of Summons—Out of Jurisdiction—Motion to Set Aside—Irregularities.

Motion by the defendants to set aside the service of the copy of the writ of summons herein.

F. Aylesworth, for the defendants' motion.

W. H. Bourdon, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—The defendants reside in Alberta and an order was made for service under Con. Rule 162. The writ, however, was issued as if for service in this province, and the copy served only gave 10 days for appearance instead of 20 as directed by the order. The copy served was also unsigned and undated though the original was correctly made out as to this. These very serious irregularities cannot be now cured by amendment. There is no explanation of how they came to be made. The first error seems fatal.

The motion will be granted with costs fixed at $25, unless either party desires a taxation.

MASTER IN CHAMBERS. JUNE 11TH, 1912.

McLAREN v. TEW.

3 O. W. N. 1376.

Evidence—Examination of Party as Witness on "Pending" Motion—No Notice of Motion Served—Appointment for Examination Set Aside.

An action to set aside as fraudulent a sale of assets by defendant Wilson to defendant Graham and for an injunction and a receiver. Tew was made a party as assignee of Wilson for benefit of creditors.

Before being served with the writ, Tew was served with an appointment for his examination as a witness on a pending motion under Con. Rule 491. On this he attended on 5th inst. with counsel, but refused to be sworn on his advice on the

ground that there was no motion pending. The examination was thereupon enlarged *sine die* to enable a motion to be made to set aside the appointment.

H. S. White, for the defendant Tew.

A. C. McMaster, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The cases under C. R. 491 are all collected in H. & L., 3rd ed., p. 713. None of these is exactly in point. The nearest and the one on which the plaintiffs rely is *Dunlop* v. *Dunlop*, 9 O. L. R. 372. It was there decided that an *ex parte* motion was within the rule, and the argument of plaintiffs' counsel is that it was not necessary that a notice of motion should be served here unless there is a distinction between a party to an action and a stranger.

In answer it was pointed out that such a proceeding was hitherto unknown, that it would enable a plaintiff to do indirectly what cannot be done directly, and there was a clear and vital distinction between the facts of the *Dunlop Case* and the present. It was conceded that as soon as a motion for injunction and receiver was served the defendants could be examined in support if the plaintiff thought it advantageous. Indeed that is, I believe, a very usual practice. The difference in the facts of this case and those in the case in 9 O. L. R. are plain. There there was no one on whom a notice of motion could have been served as the whole object was to find out some way of serving the defendant. Here if the examination is to be of any use a notice must be served later and upon the person sought to be examined. To apply the decision in the *Dunlop Case* as decisive here would seem to violate the well known dictum in *Quinn* v. *Leatham* (1901), A. C. 510. In the same way it was lately pointed out that unforeseen and unlooked for consequences arise from case B being decided because it is like case A. Then C follows because it is like B, and thereafter D from its likeness to C, though if D. had come up instead of B it would not have been thought to be within the same principle. (I cannot locate the case at present.) I do not think the present course would have been followed by plaintiff if it had not been for the *Dunlop* judgment.

To that case it does not seem related for the reasons given above, and the motion will be granted with costs to defendant in the cause, leaving the plaintiff to carry the matter further if deemed of sufficient importance.

HON. MR. JUSTICE MIDDLETON. JUNE 11TH, 1912.

RE THORNTON.

3 O. W. N. 1371.

Will — Construction — Devise — General Residuary Gift — Description of Land Owned by Testator—Sale of that Land and Acquisition of Other Land—After-acquired Land Passing Under Residuary Devise.

Motion by Letitia Robbins, one of the next of kin of the late W. H. Thornton, for an order determining a question arising upon the construction of his will.

J. C. Payne, for the applicant.

N. B. Gash, K.C., for the executors and residuary devisees.

HON. MR. JUSTICE MIDDLETON:—This appears to me to be a particularly plain case. The testator gives his nephew and niece all his residuary estate and then adds "my real estate is," etc. This parcel of land was sold and other land purchased.

The description given of the land owned at the date of the will does not in any way cut down the wide operation given to the general words used in the residuary devise, and clearly the after-acquired land passed. So declare. The applicant will have no costs. The executors and residuary devisees may have theirs out of the estate.

MASTER IN CHAMBERS. JUNE 6TH, 1911.

LLOYD v. STRONACH.

3 O. W. N. 1349.

Venue — Change — Motion for—County Court Action — Witnesses —Convenience.

Motion by the defendants to transfer the action from the County Court of the county of Huron to the County Court of the county of York. The action was for an account of sales of apples by the defendants for the plaintiff. The defendants swore to ten witnesses in Toronto, besides themselves, giving names and what the witnesses would be called to prove. The plaintiff swore to six witnesses in the county of Huron, but

did not give names nor indicate what the witnesses would testify. All the transactions between the parties took place at Toronto.

D. D. Grierson, for the defendants.

C. M. Garvey, for the plaintiffs.

CARTWRIGHT, K.C., MASTER, said that, having regard to all the facts appearing, it seemed right to grant the motion and transfer the action. Order made as asked. Costs in the cause.

DIVISIONAL COURT.

MAY 9TH, 1912.

HON. MR. JUSTICE MIDDLETON. JUNE 12TH, 1912.

RE PIPER ESTATE.

3 O. W. N. 912, 1243, 1377.

Will — Construction — Part of Estate not Disposed of — Distribution of such Part as in Case of Intestacy — Residuary Clause — Intention of Testator — Evidence of Conveyance Rejected — Payment of Debts — Resort to Undisposed of Personalty.

An appeal by Rebecca Piper, widow of the testator, from the following judgment of HON. MR. JUSTICE MIDDLETON on an originating notice to determine questions upon the construction of the will of the late John Mill Piper, who died on the 7th February, 1910.

I. F. Hellmuth, K.C., for David H. Piper.

W. E. Raney, K.C., for Rebecca Piper, the widow personally and also for the executors.

E. C. Cattanach, for the Official Guardian.

HON. MR. JUSTICE MIDDLETON (27th March, 1912):— The will was made upon a printed form, admirable in itself, but which is filled up with so little skill that it gives rise to considerable difficulty.

After making provision for the payment of debts, the printed form provides that all the testator's real and personal estate is devised and bequeathed "in the manner following." The conveyancer then inserted these words: "all to my wife Rebecca Piper, excepting only $25,000 which I give as follows." Then follow five specific pecuniary legacies, amounting in the whole to twenty thousand dollars, leaving five thousand of the excepted twenty-five thousand undealt with. Then follows another printed clause: "All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto"; to which the conveyancer has added "my executrix and executor for the purposes of this my will." The wife and another are then appointed executors. Endorsed upon the will is a codicil: "I direct the legacy of $5,000 to my sister Mrs. E. Sutton to be reduced to $2,500." The effect of this is to increase the undisposed of amount from $5,000 to $7,500.

The widow claims that the exception from the general devise to her of the $25,000 was for the purpose of providing for the specific legacies, and, these legacies amounting to less than the sum named, that the difference passes to her.

The applicant, on the other hand, claims that the gift to the wife is of all the testator's property except the sum of $25,000, and, the testator having failed to dispose of the whole of this $25,000, that there is an intestacy—or, more, accurately, that it would fall into the residual bequest to the executrix and executor, and, it being plain that this was not intended as a gift of a beneficial interest, and no purpose being declared, the executors hold in trust for the next of kin.

Before me the original will is produced, and the widow fortifies her position by pointing out that in the original draft of the will there were five legacies of $5,000 each, that two of the legacies were changed from $5,000 to $2,500 by the testator, before the execution of the will, as he has initialled the change; and that the inference ought to be that it was by an oversight only that the $25,000 was not changed to $20,000.

Upon the argument an affidavit by the conveyancer was tendered for the purpose of shewing the intention of the testator. I rejected this evidence, as I do not think I can look beyond the document itself. See *Re Davis,* 40 N. B. 23. Nor do I think it is open to me to speculate as to the testator's intention. He may have intended to increase the benefit to

the widow by reducing the amount of the legacies to be deducted, or it may well be that he intended to make some other disposition. More probably he had no intention whatever. This view is emphasized by the fact that when he made the codicil he expressed no intention. In the absence of intention there is of course intestacy. This is the result, as I understand the authorities, notwithstanding some vague expression in the earlier cases. See *Re Edwards,* 1906, 1 Ch. 750.

Assuming, in favour of the widow, that the devise to her can be treated as a residuary devise, I think that upon the authorities her contention fails. The case of *Blight* v. *Hartnoll,* 23 C. D. 218, is relied upon. There the testatrix gave to the defendant all her property except a certain parcel which she gave to other persons. This bequest failed, and it was held that it fell into the residue and belonged to the defendant; the principle being that the residuary gift carried every lapsed legacy and every legacy which for any reason failed to take effect.

The distinction between that case and the present is well pointed out in *Re Fraser,* 1904, 1 Ch. 726. There the testator excepted from a general residuary gift real estate and chattels real, which he otherwise disposed of by his will. By his will he gave these chattels real to his brother. His brother predeceased him. Several codicils were made to the will, one of which indicated a knowledge of the brother's death; but no disposition was made by any of the codicils of the excepted chattels real. It was held that it could not be taken that the testator had excepted these chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and consequently there was an intestacy and they did not fall into the general bequest. There Stirling, L.J., after stating the principle established by *Blight* v. *Hartnoll,* adds: "If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted property passes as on an intestacy. . . . The result in the present case is that the testator has on the face of the testamentary disposition existing at his death excepted the chattels real from the general bequest and has not really made any bequest of them."

This decision is in accord with the earlier cases. In *Green* v. *Pertwee,* 5 Hare 249, Sir James Wigram had before him a will where the testator excepted from a general bequest

£10,000 which he divided into ten shares of £1,000 each. One of these shares lapsed. The Vice-Chancellor held that this lapsed share of £1,000 did not pass as residue to the nephews and nieces, but was undisposed of. The decision is based upon the construction of the words of gift. "The question is whether the word 'residue,' as used in the second clause, must be understood to describe the general residue of the testator's estate or only the excess of the estate over the sum of £10,000. The word 'residue' in its large and general sense comprehends whatever in the events which happen turns out to be undisposed of; but if it appears that the word 'residue' is used in a more restricted sense, in that restricted sense the Court is bound to construe it."

Applying that reasoning here, the widow has a gift of all the property excepting $25,000. Her claim must fail, because nowhere has the testator given her any part of this $25,000.

The contention against the widow is made stronger when we find that after this general gift, which I have so far assumed to be a residuary gift, there follows what is in terms a residuary gift to the executrix and executor, under which the $7,500 may well pass.

It was admitted before me in argument that the executrix and executor could not take beneficially, but would take as trustees for, the next of kin. See *Yeap Cheah Neo* v. *Ong Cheng Neo,* L. R. 6 P. C. 381.

There will therefore be a declaration that the $7,500 is to be distributed as upon an intestacy. The costs of all parties should be paid out of this fund.

The appeal to Divisional Court was heard by Hon. Sir Wm. Mulock, C.J.Ex.D., Hon. Mr. Justice Clute and Hon. Mr. Justice Riddell, on the 9th May, 1912.

I. F. Hellmuth, K.C., for David H. Piper and others.

E. C. Cattanach, for the Official Guardian.

Their Lordships (V.V.) (9th May, 1912), dismissed the appeal with costs.

After above judgment was delivered a question was asked which was not raised on the former motion. Should the executors first resort to the residual estate, as to which no disposition is made, for payment of debts, before touching the property given the widow?

W. E. Raney, K.C., for the executors.

I. F. Hellmuth, K.C., for David H. Piper.

HON. MR. JUSTICE MIDDLETON (12th June, 1912):—The asset to be first resorted to is undisposed of personalty, and the question can be so answered.

No costs, as the question might have been raised on the former motion and there does not seem to be any contest over this question.