The
Ontario Weekly Notes

VOL. XI. TORONTO, DECEMBER 15, 1916. No. 14

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 4TH, 1916.

*RE WEST NISSOURI CONTINUATION SCHOOL.

Schools—Continuation School—Vacancies in Board—Duty of Township Council to Fill — Mandamus — Necessity for Demand and Refusal — Ineffective Technical Objection — Continuation Schools Act, R.S.O. 1914 ch. 267—Municipal Act, R.S.O. 1914 ch. 192, secs. 193, 215, 242—Costs.

Appeal by the Council of the Township of West Nissouri from the order of SUTHERLAND, J., in Chambers, ante 33, directing the appellants to fill the vacancies in the West Nissouri School Board by the election of new trustees, and, in default, for the issue of a mandamus.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

Sir George C. Gibbons, K.C., for the appellants.

W. R. Meredith, for Bryan and others, the applicants for the mandamus.

MEREDITH, C.J.C.P., read a judgment in which he said that the real appellants were the members of the township council; and the appeal was based upon the sole ground that no demand, such as the practice of the Court required, had been made upon the appellants before the application for the order in appeal was made.

Under the Continuation Schools Act, R.S.O. 1914 ch. 267, it was, the plain statute-imposed duty of the appellants to appoint three trustees of the school.

*This case and all others so marked to be reported in the Ontario Law Reports.

There was also imposed upon the head of the council, who was one of the appellants, the statutory duty to "be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed" and "to oversee the conduct of all subordinate officers in the government of it, and, as far as practicable, cause all negligence, carelessness, and violation of duty to be prosecuted and punished;" and he and each of his fellow-members of the council, his co-appellants, had made the statute-imposed declaration that he would truly, faithfully, and impartially, and to the best of his knowledge and ability, perform the duties of his office: Municipal Act, R.S.O. 1914 ch. 192, secs. 215, 242, and 193.

In the face of these duties and obligations, the appellants had endeavoured to thwart the law and evade their plain duty.

To the technical objection of want of demand and refusal, there were three plain answers: (1) that the course and conduct of the appellants shewed a settled purpose not to perform their duty—in such a case, a demand and refusal would be useless and need not be proved; (2) that an effective demand was duly made in August last, a demand that was still effective, because never effectually complied with or intended to be so complied with, the pretended compliance being in truth but further resistance of the duty, and prevention of the effect which an honest and impartial performance of it would have had—the result being still no board of trustees; and (3) that, upon the motion before Sutherland, J., that learned Judge considerately and properly gave to the appellants another opportunity to perform their duty, and at the same time test their good faith—they accepted the offered opportunity, but, instead of filling the offices of trustees honestly and impartially, they made another abortive appointment, though they might have made an effective one of ratepayers quite as competent as they and impartial.

The appeal must be dismissed; the appellants must pay all costs—those of the "township council," if it can have and has any, to be taxed as between solicitor and client.

RIDDELL, KELLY, and MASTEN, JJ., agreed in the result, each giving reasons in writing.

Appeal dismissed.

SECOND DIVISIONAL COURT. DECEMBER 4TH, 1916.

*DOAN v. NEFF.

Trial—Action by two Plaintiffs — Damages for Negligence—Verdict of Jury—New Trial Confined to Assessment of Damages —Judicature Act, sec. 27—Costs of Appeal.

Appeal by the plaintiffs from the judgment of BRITTON, J., upon the findings of a jury, in so far as it dismissed the action as against the plaintiff Violet B. Doan.

The action was brought by E. F. Doan and Violet B. Doan, his wife, to recover damages arising from a collision upon a highway of a buggy belonging to the plaintiff E. F. Doan with the defendant's automobile. The buggy was smashed, and it was alleged that the plaintiff Violet was injured. The plaintiffs charged negligence on the part of the defendant. The jury found a verdict as follows: "On account of slight evidence of Mr. Neff we give a verdict of $125 to Mr. Doan, and nothing to Mrs. Doan." Judgment was given for the plaintiff E. F. Doan for $125 with costs on the County Court scale and without set-off; and dismissing without costs the claim of the plaintiff Violet B. Doan.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

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

Frank Denton, K.C., for the defendant, respondent.

RIDDELL, J., in a written judgment, said that the injuries suffered by the wife were substantial, and it would be impossible to allow the finding against her to stand. The question arose whether the Court should exercise the power given by sec. 27 (2) of the Judicature Act, R.S.O. 1914 ch. 56, and assess the damages. It was urged that the jury thought that the amount given the husband was enough for both. That might be. On the hearing, the learned Judge said, he inclined to the opinion that there were "before the Court all the materials necessary for finally determining the matters in controversy;" but he was now quite clear that all the necessary material was not before the Court; so that, even if the power would otherwise exist in such a case to assess the damages, it should not be exercised here.

There should be a new trial, but limited to an assessment of damages. In view of the damages assessed to the husband,

these damages should be re-assessed if the defendant desired it. The power so to order is given by sec. 27 (1) and (3).

The defendant should pay the costs of the appeal in any event.

KELLY, J., was of the same opinion, for reasons briefly stated in writing.

MASTEN, J., concurred.

MEREDITH, C.J.C.P., read a judgment in which he expressed the view that the verdict of the jury was the result of a compromise; that the plaintiffs should have a new trial upon the whole case, if they desired it; and in that case there should be no costs of this appeal; if the plaintiffs did not elect to take a new trial, the appeal should be dismissed with costs; but he did not dissent from the conclusion of his brethren, to which effect must be given.

New assessment of damages ordered.

SECOND DIVISIONAL COURT. DECEMBER 4TH, 1916.

LONDON SHOE CO. v. LEVIN.

Assignments and Preferences—Chattel Mortgage Made by Insolvent Debtor—Action by Creditor to Set aside—Evidence—Suspicion —Findings of Trial Judge—Appeal—Costs.

Appeal by the plaintiffs from the judgment of BOYD., C., at the trial, in an action to set aside a chattel mortgage, dismissing the action with costs to the female defendant, but without costs to the male defendant.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Sir George C. Gibbons, K.C., for the appellants.

O. L. Lewis, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., read the judgment of the Court. He said that the male defendant came to this Province in January, 1916, and commenced business in one of its lesser towns; after

being in business there as a clothier and general storekeeper for about seven months, he absconded, leaving his business in a hopelessly insolvent state, and having in that short time "done" too-confiding manufacturers and merchants of Ontario out of about $5,000. His co-defendant, his sister-in-law, was employed in his store and lived with him and his family for several months before and up to the time that he absconded.

Almost immediately before he absconded, the impeached transaction took place. It was a chattel mortgage upon all his property for $1,500. The formal part of the transaction was conducted through solicitors for mortgagor and mortgagee—solicitors whose capability and shrewdness no one could question; and a striking feature of the transaction was, that, though the mortgagee, if her testimony was true, had, when this mortgage was taken, another claim against the mortgagor for a just debt of $1,000, that was not added to the amount of the mortgage, which was taken for the amount then advanced only—why, unless for fear of such an action as this?

Then, the money said to have been received by the insolvent debtor from his sister-in-law, employee, and boarder, was admittedly sent at once to another sister-in-law in New York.

But there were two important circumstances in the woman's favour. First, that $1,500 was drawn by her from her own bank-account when the mortgage was made, actually paid over to the insolvent debtor, and sent to New York; and the woman really had a considerable amount of money of her own.

Though one might have a strong suspicion that the man came to this Province for the purpose of "doing" those who would trust him, and of making away with all the money he could lay hold of, and that the several members of the family were in league with him, the evidence was hardly sufficient to warrant so far-reaching a finding.

Then, second, the learned Chancellor, who tried the case, after time for reflection, upheld the transaction, and was favourably impressed by the demeanour of the female defendant and of the witnesses whose testimony corroborated, or tended to corroborate, her.

The trial Judge's findings could not, in these circumstances, be reversed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

LATCHFORD, J. DECEMBER 4TH, 1916.

RE ALEXANDRA REALTY CO. AND MITCHELL.

Mortgage—Sale by First Mortgagee under Power of Sale—Purchase by Second Mortgagee—Surplus after Payment of First Mortgagee's Claim — Disposition of — Execution Creditor — Priority over Second Mortgagee—Execution Act, R.S.O. 1914 ch. 80, secs. 31, 34.

Motion under the Vendors and Purchasers Act, by the company, vendors, for an order declaring that they could make a good title to lands which they had agreed to sell to Mitchell.

The motion was heard at the Ottawa Weekly Court.
W. D. Hogg, K.C., for the vendors.
W. C. McCarthy, for Mitchell.
A. C. Hill, for Mrs. Shenkman.

LATCHFORD, J., in a written judgment, said that upon the hearing of the motion he had expressed the opinion that a good title to the lands in question could be made by the vendors to the purchaser.

The only matter reserved was, whether Mitchell, as second mortgagee, was entitled to the whole of the surplus, amounting to about $1,200, as against Mrs. Shenkman, who had issued and placed in the hands of the Sheriff of Carleton on the 29th December, 1914, a writ of *fieri facias* against one of the three persons who owned the equity of redemption in the lands. Subsequently, on the 1st February, 1915, the three owners conveyed the lands, subject to the mortgage to the Alexandra Realty Company, to one Donald Fraser, who, on the 23rd April, 1915, mortgaged them to Mr. Mitchell. At a sale of the lands by the company, under the power contained in their mortgage, Mr. Mitchell became the purchaser, at a price exceeding what was due on the mortgage by the sum stated. He now claims that as second mortgagee he is entitled to the whole surplus.

A reference to the Execution Act, R.S.O. 1914 ch. 80, secs. 31 and 34, and to such recent high authority as Clarkson and Forgie v. Wishart and Myers, [1913] A.C. 828, confirms the view stated at the hearing, that the interest of one of the owners was liable to seizure and sale under the writ, and that, therefore, one-

third of the surplus is payable to the execution creditor by a purchaser whose interest in the fund arose under a conveyance subsequent in date to the placing of the writ in this sheriff's hands. Mrs. Shenkman is also entitled to be paid by Mr. Mitchell her costs of the motion. No costs as between vendors and purchaser.

THE ASSISTANT MASTER IN ORDINARY. DECEMBER 4TH, 1916.

ELLIOTT v. ROWELL.

Mechanics' Liens—Practice under Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 37 (2)—Notice of Trial—Necessity for Service upon Defendants who do not Defend—"Appear"—Rules 121, 354.

An action to enforce a mechanics' lien, tried before Mr. R. S. Neville, K.C., the Assistant Master in Ordinary.

W. H. Ford, for the plaintiffs.

THE ASSISTANT MASTER IN ORDINARY, in a written judgment, said that a defendant who does not deliver a statement of defence, after being duly served with a statement of claim, in a mechanics' lien action, need not be served with a notice of trial.

Section 37 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, requires service of notice of trial upon the solicitors of defendants who "appear" by solicitors, and upon defendants who "appear" in person, but not upon defendants who do not "appear." To "appear" must mean to deliver a statement of defence, for that is the first step of a defendant coming into a mechanic's lien proceeding.

But the Clerk of Records and Writs does not note default of pleading in a mechanic's lien action under Rule 121; and Rule 354, which provides that, when pleadings have been noted as closed against a defendant, he "shall be deemed to admit all the statements of fact set forth in the statement of claim," does not come into operation. The proceedings which follow such noting in ordinary actions do not apply therefore to mechanics' liens. The case must be brought to trial in the usual way. Notice of trial must be served upon other lien-holders and upon subsequent incumbrancers, including execution creditors, as provided by the Act. The plaintiff must prove his claim in open court and submit

it to full investigation and to any contest which the lien-holders and subsequent incumbrancers may choose to make against it. But this may be done in the absence of and without notice to a defendant who, after the service upon him of the statement of claim, does not choose to "appear," or, in other words, to file any statement of defence.

THE ASSISTANT MASTER IN ORDINARY. DECEMBER 5TH, 1916.

BATTS v. POYNTZ.

Mechanics' Liens — Accounts between Owner and Contractor—Default of Contractor—Work Completed by Owner—Cost of Completion—Liquidated Damages for Delay—Penalty—Deduction of Actual Damages—Progressive Payments—Statutory Drawback—Mechanics and Wage-Earners Lien Act, sec. 12—"Calculated on the Basis of the Contract Price"—Architect's Final Estimate of Value of Work Done by Contractors—Sums for which Sub-contractors Entitled to Lien—Method of Finding Value of Work Done and Materials Furnished—Percentage Based on Value, not on Payments.

An action to enforce a mechanic's lien, tried before Mr. R.S. Neville, K.C., the Assistant Master in Ordinary. Two other actions against the same owner and contractors were tried at the same time.

H. H. Shaver, for the plaintiffs.
W. R. Wadsworth, for the defendants.

THE ASSISTANT MASTER IN ORDINARY, in a written judgment, dealt first with the accounts between the owner and the contractors. The contract price for the work was $3,233; the owner paid the contractors $1,850; and, after their default, it cost the owner $1,279.75 to complete; leaving $103.25 in the owner's hands. The contract provided for payment to the owner by the contractors of $35 per week by way of liquidated damages for such time as the work should remain incomplete after the date named for completion. This, however, should be looked upon as in the nature of a penalty; actual damages only should be allowed; and the owner was sufficiently compensated for the delay by the balance of the contract price in his hands.

As to the 20 per cent. of the value of the work which, by sec. 12 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, the owner is required to deduct from the payments which fall due during the progress of the work, the words applicable are, "20 per cent. of the value of the work, service, and materials actually done, placed, or furnished as mentioned in section 6," and such value shall be calculated on the basis of the contract price. Under the contract, 80 per cent. of the value of the work and materials, calculated on the basis of the contract price, was to be paid on account as the work proceeded; and the architect was to issue progress certificates for these payments, certifying that he considered the payments properly due.

As the work proceeded, the architect issued various certificates, amounting in all to $1,850. This shewed that at the time the last certificate was issued the architect estimated the value of the work done and material furnished to be not less than $2,312.50, calculated on the basis of the contract price. The owner paid the sums certified in full without making the deductions required by the statute. But, by the contract, the certificates were not to lessen the total and final responsibility of the contractors, nor exempt them from liability to replace work afterwards discovered to have been badly done or not in accordance with the drawings and specifications. The architect was thus entitled to re-inspect the work and to require defects to be made good before issuing his final certificate. The contractors not having completed their work, the architect had the same right to re-inspect the work actually done; he had done so and revised his estimate of the value, placing it at $2,240.03, instead of $2,312.50. The finding should, therefore, be that $2,240.03 was the value of the work done and materials furnished by the contractors, calculated on the basis of the contract price, and 20 per cent. of that, or $448, was the sum for which the claimants were entitled to liens—the amount which (based upon the final revision of the architect) the owner should have deducted from the payments that became due, and retained to meet possible claims for liens.

The proper method of finding the value of work done prior to default by a defaulting contractor, is not to deduct the cost of completion from the contract price and take the difference as the work done prior to default. Evidence of the cost of completion is relevant, and may help in arriving at a proportionate valuation of the previous work. But the cost of completion is generally, and often materially, out of proportion to its value compared with the value of the previous work, or calculated on the basis of the original contract price. To be a true guide, the value of the

subsequent work must be calculated on the same basis as the previous work; that is, on the basis of the original contract price, not on a higher basis of cost, whether done by day-labour or by reletting the work to a new contractor. It is all a question of proportion.

To arrive at the 20 per cent. due to the lien-holders, it must be calculated on the value of the work in proportion to the contract price without any deduction for damages or extra cost of completion. We must get down to the basis of the original contract as far as we can, even when the cost of completion is the only evidence we have to go by.

The 20 per cent. to be deducted, under sec. 12, from the payments to be made, is not 20 per cent. of the payments, but 20 per cent. of the value of the work done and materials furnished, calculated on the basis of the contract price. In Rice Lewis & Son Limited v. George Rathbone Limited (1913), 27 O.L.R. 630, the percentage is, by an apparent slip, spoken of in one of the judgments as 20 per cent. of the payments. It is correctly stated in the other judgment reported, as it had been before in Russell v. French (1897), 28 O.R. 215, and as it has been since in Deldo v. Gough Sellers Investments Limited (1915), 34 O.L.R. 274, 278.

On careful examination of the judgments in McManus v. Rothschild (1911), 25 O.L.R. 138, and Farrell v. Gallagher (1911), 23 O.L.R. 130, it will be found that what has been said does not conflict with those decisions.

Under the contract now being dealt with, the work was to have been completed by the 21st December. But, on account of the unjustifiable delays of the contractors and their ultimate default, the building operations were thrown over into the winter, when such work is usually more expensive. Temporary heating appliances became necessary and fuel bills had to be paid; the architect charged extra fees, etc. All this and more was chargeable to the contractors as damages for breach of contract. But these items did not affect the proportionate value of the work done by the first contractors, calculated on the basis of the original contract price. The evidence on these points was considered; but it was found safer to rely upon the architect's estimate of the value of the work of the first contractors, calculated on the statutory basis, and that estimate was adopted.

MIDDLETON, J., IN CHAMBERS. DECEMBER 5TH, 1916.

*REX v. RIDDELL.

Ontario Temperance Act—Keeping Intoxicating Liquor for Sale—6 Geo. V. ch. 50, sec. 42—Owner of Liquor Leaving it on Premises of Another—"Kept" by Owner—Search-warrant—Discovery of Liquor on Search—Sec. 67 of Act—Presumption against Occupant of Premises—Magistrate's Conviction Quashed.

Motion to quash a magistrate's conviction for keeping intoxicating liquor for sale, in contravention of sec. 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

James Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the liquor, in a barrel, was found upon the premises of one Smith, where it had been concealed behind some baskets in a small room to the rear of the fruit-store kept by Smith. The accused owned the liquor, and placed it upon Smith's premises with his privity. There was no evidence of any sale or that the liquor was kept for sale. Riddell, who gave evidence on his own behalf, stated that he purchased the liquor for use in the manufacture of beverages containing less than two and a half per cent. proof spirit, but, finding it unsuitable, he intended to return it to the vendors. As he kept an hotel, he stored it, in the meantine, on Smith's premises. The magistrate apparently did not accept this evidence.

The motion was based upon two grounds. It was said that the liquor was "kept" by Smith, and not by the accused. But the liquor was kept by the accused, even though he kept it upon the premises of another.

Then it was said that there was no evidence that the liquor was kept for sale. The Crown relied upon sec. 67. The liquor being found under a search-warrant, it was said that there was a statutory presumption that it was kept for sale. The presumption under this section is not against the owner of the liquor, but against the occupant of the premises—that is, against Smith, and not against Riddell.

On this ground the conviction must be quashed.

No costs, and usual protection order.

MIDDLETON, J. DECEMBER 5TH, 1916.

RE KINNEHAN.

Will—Construction—Trust—Bequest of Income of Estate to Widow for Life—Estate to be Divided between Daughters at Death of Widow—Provision in Case of Death of Daughter Leaving Issue—Issue to Take Parent's Share—Executory Gift—Absolute Title not in Daughter Surviving.

Motion by Annie Kinnehan for an order declaring her to be the only person interested in the estate of a deceased testator, and vesting the estate in her beneficially, and discharging her co-trustee under the testator's will.

The motion was heard in the Weekly Court at Toronto.
G. H. Kilmer, K.C., for the applicant.
F. W. Harcourt, K.C., for an infant.

MIDDLETON, J., in a written judgment, said that under the will the income was given the widow for life, and upon her death the estate was to be divided between the daughters Margaret and Minnie. Margaret was dead. She had a child, also dead, whose husband had released his claim in favour of the widow, the applicant. Minnie was 27 years old, and had also released in favour of the widow.

The only trouble was caused by a clause in the will, immediately following the gift to the daughters, providing: "Should either of my daughters be dead at the time of distribution and should such deceased daughter leave lawful issue her surviving then in such event such lawful issue shall inherit the deceased parent's share." This applied to the daughter now living, and was an executory gift operating in the event specified, and prevented that daughter's title being absolute.

The widow, therefore, had an absolute title to one-half of the estate, and could demand it, but had not an absolute title to the remaining one-half, which must continue subject to the trust.

Costs out of the estate.

MIDDLETON, J. DECEMBER 5TH, 1916.

LINCK v. GAINSBECK.

Gift—Voluntary Assignments of Mortgages by Deed to Daughter—Intention of Grantor that Deeds should not Operate until Death—Testamentary Writings—Evidence—Escrow—Absence of Delivery—Administration Action—Costs—Commission—Disbursements—Rule 653.

An appeal by the plaintiff from a report of the Local Master at Sarnia in an administration action; and motion for judgment on further directions.

The appeal and motion were heard in the Weekly Court at Toronto.

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

J. B. Davidson, for the defendant.

MIDDLETON, J., in a written judgment, said that the sole question was as to the title to certain mortgages, which, it was alleged, were validly and effectually assigned by the testator during his life. The Master had found that the assignments were not intended to operate until the testator's death; were in their nature attempted testamentary dispositions, which, not being in accordance with the Wills Act, were void.

The law is well settled. Foundling Hospital Governors and Guardians v. Crane, [1911] 2 K.B. 367, leaves nothing to be said. A deed may be delivered absolutely so as to be immediately operative, or it may be delivered as an escrow so as to become operative upon the happening of a stipulated event, but a deed signed by the grantor and held to be delivered on his death is not validly delivered as an escrow. As said by Lord Justice Farwell: "This is not a good condition for an escrow: a deed of grant of the grantor's own property to take effect only on the death of the grantor is necessarily testamentary, and cannot be turned into a deed."

"An instrument, in any form, whether a deed poll, or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will:" Buller, J., in Habergham v. Vincent (1793), 2 Ves. Jr. 204, 231.

The intention to be ascertained is that of the grantor; and, when the deed is, as here, voluntary, that is the only intention that is material.

The evidence was conflicting. The plaintiff gave evidence, which indicated that it was not to be relied on, and which lacked corroboration, seeking to shew a delivery of the assignments to her by the deceased. From the circumstances and from the evidence of one Black, it seemed clear that there was no delivery by the deceased save that which in law was no delivery at all—the abortive testamentary disposition.

Black held the deed under the deceased's instructions; the testator collected the interest as his own, not under any leave and license from his daughter.

The appeal must be dismissed with costs.

A motion was made for further directions and on the question of costs of the proceedings. All parties should be allowed commission and disbursements out of the estate, under Rule 653; the commission to be equally divided between the solicitor for the plaintiff and the solicitor for the defendant; otherwise no costs.

The money should be distributed in accordance with the report—the costs allowed out of the fund being deducted and the costs of the appeal being taken from the plaintiff's share.

MIDDLETON, J., IN CHAMBERS. DECEMBER 6TH, 1916.

*REX v. TOYNE.

Ontario Temperance Act—Magistrate's Conviction for Receiving Order for Intoxicating Liquor for Beverage Purposes—6 Geo. V. ch. 50, secs. 42, 139—"Purchasers' Agent"—Transmission of Order to Seller out of Ontario—Delivery in Ontario—Sham Transaction—Question for Magistrate.

Motion to quash a magistrate's conviction of the defendant for the offence of receiving an order for intoxicating liquor for beverage purposes, contrary to sec. 42 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

G. Lynch-Staunton, K.C., and W. M. German, K.C., for the defendant.

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

MIDDLETON, J., in a written judgment, said that the accused, who before the 16th September, 1916, ran a liquor store at Welland,

after that date ceased to sell liquor, but commenced to carry on business as a "purchasers' agent," placing such orders as he might (as agent) receive for goods with dealers outside of the Province.

The theory was, that the defendant, by force of a document signed by the purchaser, became the purchaser's agent, and, as the purchaser's agent, placed the order for goods in Montreal. The man in Montreal had bought goods from a manufacturer in Ontario; and the defendant sent instructions to the man in Montreal to deliver on his account in Ontario; and delivery was made accordingly.

The power of the Province to enact temperance legislation is not unlimited, and in the Act care has been taken to keep within constitutional limitations. Section 49 dominates and overrides the whole Act, and sec. 42 must be read as subject to it.

It was argued for the defendant that, reading the two sections together, it was not an offence to canvass for, receive, or solicit orders for liquor as long as the orders were to be filled by some one beyond the Province—that, the sale being protected by sec. 139, all its incidents fell within the same protection.

The learned Judge said that he could not accept this reasoning. The transaction in liquor is protected because the Province has no power over a person out of the Province; but the canvassing is not "a transaction in liquor" at all; it is a separate act from which a transaction may be expected to result.

The true meaning of the sections, read together, is this: "We cannot and do not intend to prohibit dealing with merchants abroad, but we can and do prohibit all canvassing and soliciting of orders for liquor within this Province, no matter whence the liquor is to come.

It was said, however, that what was done was not in any aspect within sec. 42. There was no canvassing, no receiving, no soliciting of orders.

If one could shut one's eyes and accept the printed memorandum signed by the purchaser as the truth, the whole truth, and nothing but the truth, there would be much in the contention. But whether the transaction was a real one or a mere sham was a question for the magistrate. He convicted the defendant—and there was evidence on which he could convict.

Motion dismissed with costs.

MIDDLETON, J. DECEMBER 6TH, 1916.

RE STOCKS.

Will—Construction — Irreconcilable Residuary Clauses—Later of two to Prevail — Rule of Thumb — "Money" — Proceeds of Sale of Land — Distribution of Estate.

Motion by the executors of the will of Jean Chalmers Stocks, deceased, for an order declaring the true construction in regard to questions arising in the distribution of the estate.

The motion was heard in the Weekly Court at Toronto.

T. Hobson, K.C., for the executors.

A. C. Kingstone, for beneficiaries not related to the testatrix.

E. C. Cattanach, for the adult relatives.

F. W. Harcourt, K.C., for the infant relatives.

MIDDLETON, J., in a written judgment, said that the testatrix prepared her own will, and confusion arose from two clauses, each in its nature residuary, and numbered for convenience 36 and 42.

Clause 36, which followed a long catalogue of specific and pecuniary legacies to members of the family and others, read: "If there should be more money I wish it divided among the relatives mentioned."

Clause 42, which followed the appointment of executors and certain provisions for their remuneration and gifts, read: "If any surplus to be divided evenly between the executors and all mentioned in the will."

The learned Judge said that he had sought in vain for any way in which these clauses could both stand so that a conflict might be avoided. If the earlier clause could be confined to money or personal property, then the later clause might be regarded as general and operating upon all not included in the earlier; but this was not what was meant by the testatrix.

The will was very inartificial. There was no direction to sell the land, but the testatrix mentioned it and said that it should be worth $8,000 or $10,000 at least. It sold for $13,000. There was little money outside of this, and the personal property was mostly given specifically; so it must be that the "money" from which the pecuniary legacies are to be paid is the proceeds of the land, and the "money" mentioned in clause 36 is the surplus

arising from the sale. Lands cannot pass under a gift of money, but the proceeds of land may.

This is one of those rare cases in which the last clause has been written without the earlier being in mind; and, as there is nothing to guide the judicial mind, according to the cases the last written clause governs.

Failing all clues in the will itself, effect must be given to the rule of thumb, which seems illogical but well-established.

Neither clause had any value until the due execution of the will, and both received vitality at the same moment from the same act.

The distribution should therefore be among the executors and those "mentioned," i.e., "mentioned as beneficiaries," in the will.

Costs out of the estate.

MIDDLETON, J. DECEMBER 6TH, 1916.

BURDICK v. STATHAN.

Deed—Conveyance of Land—Agreement of Grantee to Maintain Grantor—Covenant — Breach — Condition — Forfeiture — Relief against—Evidence—Waiver.

Action to set aside a conveyance of a house and land made by one Rebecca Burdick Matheson, since deceased, to the defendant, for delivery of it up for cancellation, for possession, and for an account of rents and profits.

The action was tried without a jury at Sandwich.
G. Lynch-Staunton, K.C., for the plaintiff.
A. St. G. Ellis, for the defendant.

MIDDLETON, J., in a written judgment, said that in July, 1912, the deceased, an old lady, agreed to convey her house and land to the plaintiff, subject to a life estate in herself. The plaintiff and his wife were to live with her in the house and maintain her for her life. The land was conveyed in fee subject to the life estate; and by a concurrent agreement under seal the plaintiff covenanted for maintenance, and also that, should any default be made by him in any of the covenants thereinbefore contained, the conveyance of land should become null and void and the land should revert to the grantor.

What was proposed was carried out, and all went well for some time. But events happened which caused the discontinuance of the household arrangement; the plaintiff went away; his wife was ill, and went to live with her mother; and the deceased went into a Home. After a time, she returned to her house, but again went back to the Home, where she died in October, 1913. When she went to the Home the second time, the house was rented, and the rents received by her.

On the 5th February, 1913, she made a conveyance of the land and house to the defendant; this was not registered until just before the death in October, 1913.

No intimation was made by the deceased that she intended to exercise the right of forfeiture given by the agreement; and there was evidence that she had stated that she did not intend to interfere with the deed to the plaintiff.

If the deed alone were looked at, there was failure to comply with its terms; and it was argued for the defendant that the title of the plaintiff was conditional, and—the condition being broken—the title was at an end. The learned Judge did not agree with this. He cited Challis's Law of Real Property, 3rd ed., p. 261, to the effect that the breach of such a condition does not ipso facto avoid the estate, but only makes it liable to be avoided by the entry of the person entitled to the possibility of reverter. "No estate of freehold can be made to cease without entry upon the breach of a condition."

There was no entry during the lifetime of the deceased, for her possession was by virtue of her life estate—but, on her death, the defendant, by virtue of her deed, took possession. The defendant's deed operated upon the possibility of reverter and the right of entry; and the question of the plaintiff's right depended upon the effect to be given to the evidence.

Upon the evidence, the learned Judge's conclusion was, that the deceased waived performance of the provisions of the covenant as to maintenance, and that there was no forfeiture during her life.

The covenant in the deed was not strictly a condition; and, if a condition, was dependent upon a breach of covenant. The covenant, being one covering many things, some small and some great, was not in its nature penal; and, if there had been a technical breach, the Court could relieve against forfeiture.

In the result, the plaintiff's title should prevail, and the plaintiff should have possession and the rents received by the defendant since the death, less all due outgoings.

The plaintiff must then take care to discharge his obligations under the covenant, or he might find his title again in jeopardy.

No costs.

CLUTE, J., IN CHAMBERS. DECEMBER 7TH, 1916.

*REX v. MELVIN.

Ontario Temperance Act—Magistrate's Conviction for Keeping Intoxicating Liquor in Shop—6 Geo. V. ch. 50, sec. 41 (1)—Evidence — Liquor Found on Premises — Explanation of Accused — Evidence in Reply — Drunken Men Seen Coming from Shop—Inadmissibility—Effect on Mind of Magistrate of Admission of Irrelevant Evidence—Possible Prejudice—Order Quashing Conviction—Costs—Protection of Magistrate and Constable.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Stratford, on the 10th November, 1916, for that the said defendant, on the 17th October, 1916, at the said city of Stratford, "in his premises unlawfully did have or keep liquor at his barber-shop and cigar-store at 85 Downie street, the same not being a private dwelling-house at which he resided, and for which place he did not have a license under the Ontario Temperance Act authorising him so to do."

By sec. 41 (1) of the Act (6 Geo. V. ch. 50), "Except as provided by this Act, no person, by himself, his clerk, servant, or agent, shall have or keep or give liquor in any place wheresoever other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license."

The grounds of the motion were: (1) that there was no evidence to support the conviction; and (2) that the evidence of one Broadley, called in reply, was improperly admitted.

F. R. Blewett, K.C., for the defendant.
R. S. Robertson, for the Crown.

CLUTE, J., read a judgment in which he set out the facts and the evidence, and said that the finding of intoxicating liquor upon the defendant's premises, not his dwelling-house, raised a prima facie case against him, which was not, to the satisfaction of the magistrate, answered (sec. 88 of the Act); and, therefore, the motion failed upon the first ground.

The evidence for the prosecution was that a bottle containing intoxicating liquor was found by a constable in a cupboard in the defendant's shop. The defendant in his defence swore (and was corroborated by another witness) that the bottle and its con-

tents were mere rubbish put away two years before and forgotten. Broadley, in reply, testified that the defendant and other men had been seen by him coming out of the defendant's shop under the influence of liquor on more than one occasion. This evidence was objected to, but admitted by the magistrate. It was argued for the Crown that it was admissible as tending to shew the character of the place and raising a probability that liquor was being kept upon the premises for use.

The learned Judge said that the principle applied in Rex v. Lapointe (1912), 20 Can. Crim. Cas. 98, 3 O.W.N. 1469, was applicable here. The evidence in question had nothing to with the charge. It may have been true that the defendant and others were drunk on several occasions, but it did not follow that they became so from liquor drunk on the premises; and, if it did, it was no evidence that liquor was found upon the premises on the day in question; nor was the evidence in reply relevant to the question of guilty knowledge. There was evidence, exclusive of the evidence in reply, upon which the magistrate might have found that the defendant had liquor upon his premises contrary to the Act, if he disbelieved the defendant's story, as he evidently did, but that disbelief might have arisen partly from the evidence given in reply, which was inadmissible. If that evidence had any effect upon the mind of the magistrate in reaching a conclusion, the defendant was prejudiced in his trial. The magistrate had not stated whether it had or had not. It was sufficient that the defendant might have been prejudicially affected in the result by the admission of irrelevant evidence.

Reference to Rex v. Bullock and Stevens (1903), 6 O.L.R. 663; Regina v. Hazen (1893), 23 O.R. 387, 20 A.R. 633; Rex v. Haslam (1916), 12 Cr. App. R. 10; Rex v. Banks, [1916] 2 K.B. 621; Perkins v. Jeffery, [1915] 2 K.B. 702; Makin v. Attorney-General for New South Wales, [1894] A.C. 57, 65; Rex v. Bond, [1906] 2 K.B. 389, 409; Regina v. Ollis, [1900] 2 Q.B. 758; Rex v. Kurasch, [1915] 2 K.B. 749; Rex v. Rodley, [1913] 3 K.B. 468, 472.

Order made quashing the conviction without costs and with protection to the magistrate and constable so far as the Judge has power to protect them.

MULOCK, C.J.Ex. DECEMBER 7TH, 1916.

RE DAVIS AND VILLAGE OF CREEMORE.

Municipal Corporations—Money By-law Passed by Village Council for Erection of School-house—Motion to Quash—Municipal Act, R.S.O. 1914 ch. 192, sec. 258—By-law not Signed by Reeve—Remedy by Mandamus—Cost of School-house—Apportionment—Objections to By-law — Unreasonableness — Powers of Council—Power of Court to Interfere.

Motion by one Davis to quash a by-law of the Municipal Corporation of the Village of Creemore authorising the borrowing of $16,000, by the issue and sale of debentures, for the purpose of erecting a school-house, on the following grounds: (1) that it was not signed by the head of the municipality or presiding officer at the meeting of the council at which it was passed; (2) that no one except the Reeve had authority to sign the by-law, and that he did not sign it; (3) that, as the proposed school was intended to serve a section of the township of Nottawasaga, the cost should be levied against the ratepayers of such section together with those of Creemore, whereas the by-law charged the whole cost against the ratepayers of Creemore; (4) that the by-law was unreasonable.

The motion was heard in the Weekly Court at Toronto.
W. A. Boys, K.C., for the applicant.
W. A. J. Bell, K.C., for the village corporation.

MULOCK, C.J.Ex., in a written judgment, dealing with objections (1) and (2), said that, where a by-law has been passed by a municipal council and has not been signed or sealed as the Municipal Act requires, it is for the time being of no validity, but when so signed and sealed becomes effective. The head of the municipality or presiding officer, as the case may be, whose duty it is, under R.S.O. 1914 ch. 192, sec. 258, to sign and seal the by-law, may be compelled by mandamus to perform his duty. To such a motion the Reeve or other presiding officer would be a necessary party, and would have an opportunity of shewing cause, which he had not on this motion. It would not be proper now to defeat a possible motion for mandamus by quashing the by-law on either the first or second ground.

As to objection (3), whilst it might seem fair that the ratepayers of a section of the township of Nottawasaga should con-

tribute towards the cost of the erection of the school, and whilst they may be compellable to do so, still the Municipal Council of the Village of Creemore had statutory authority in the first instance to levy the whole debt against its own ratepayers; and, the council having so legislated, this Court had not the right to interfere.

As to objection (4), counsel for the applicant contended that the cost of the proposed school was excessive, having regard to the population and resources of the village. The council had full authority from the Legislature to pass the by-law in question. Doing so was a legislative act, and the Court had no more power to sit in judgment upon the reasonableness of the act of the council than in the case of an act of the Legislature. Where the council is acting entirely within its statutory powers, the Court has no right to interfere.

For these reasons, the motion should be dismissed with costs.

MIDDLETON, J. DECEMBER 7TH, 1916.

MARANTETTE v. L'UNION ST. JOSEPH DU CANADA.

Insurance — Life Insurance — Beneficiary Certificate — Default in Payment of Member's Dues — Rules of Society — Evidence —Waiver — Dismissal of Action to Recover Amount of Insurance—Costs—Forfeited Premium.

Action upon a beneficiary certificate insuring the life of one Marantette, deceased.

The action was tried without a jury at Sandwich.
J. H. Rodd, and J. D. Grandpré, for the plaintiff.
C. A. Seguin, for the defendants.

MIDDLETON, J., in a written judgment, said that under the rules of the defendant society a member in default in payment of his dues for 30 days is suspended, and upon a further default for 60 days he is *ipso facto* struck off the membership. A suspended member may be restored during the 60 days, upon his written application, and upon payment of all arrears. If the request is made within 30 days after suspension, he must furnish a declaration of good health. If after 30 days, there must be a medical examination.

There are local councils and local officers, but these local bodies have no power over the assurance branch of the organisation. The local treasurer receives and transmits fees to the head office—a monthly sheet being sent in.

In the case of the local council at Windsor, there had been much laxity in the matter of payment of fees, but this had not been in any way approved by the head office, and there was nothing upon which to base a finding that there had been in any way a waiver of the provisions of the rules.

Marantette paid his dues most irregularly, and, when they were in arrear, the head office communicated with the local officer, drawing attention to the need of an application and medical examination; but, unfortunately, Marantette was not then in a condition to make the declaration or undergo examination with any satisfactory result. He was then away from home and suffering from tuberculosis, from which he died. The local officer forged his name to a declaration of good health, but this was returned for a medical examination; no examination ever took place.

The case was governed by Wells v. Independent Order of Foresters (1889), 17 O.R. 317, and could not be brought within Horton v. Provincial Provident Institution (1889), 17 O.R. 361.

There never was any intention, by any one in authority, to waive the requirements of the rules which bound the member, and the plaintiff must suffer the consequences of the default.

To an outsider it seemed a pity that there should not have been some communication with the member, but the policy of the body seems to be to have all correspondence between the local council and members rather than for head office officials to communicate direct. No notice of suspension or striking off seemed necessary.

The plaintiff failed—but the premium received, and under the rules forfeited to the society, must stand in lieu of any award of costs.

MULOCK, C.J.Ex. DECEMBER 8TH, 1916.

NESTOR v. NESTOR.

Will—Construction—Devise of Homestead to Son, Subject to Right of other Children to Use it as a Home—Limitation to Lifetime of Son—Will of Son—Devisee of Homestead Freed from Use by other Children—Household Furniture—Conversion — Damages—Reference—Costs.

Action by Catherine Nestor, on behalf of herself and "the heirs-at-law of John Nestor," against James M. Nestor and Hamilton K. Woodruff, for a declaration that under the will of John Nestor, the plaintiff's father, she and his other children became entitled during their respective lives to occupy the testator's homestead as a home, and that his household furniture and effects were to become the property of all his children equally, but to remain in the homestead whilst so used as a home for them all.

The plaintiff also complained that the furniture was sold to satisfy taxes for 1914 against the homestead, which should have been paid by the defendant James M. Nestor, and she claimed damages for wrongful conversion.

The plaintiff also sought to set aside a sale by the defendant James M. Nestor of a portion of the homestead lands to the defendant Woodruff.

John Nestor died on the 14th December, 1912, having first made his will, by which he devised his homestead property to his son William Nestor, adding: "And it is my will and I desire that my said homestead shall be maintained by my said son and that all or any of my children shall have the right to come to my homestead as they have always done during my lifetime in case any or either of them are in need of a home, but this provision shall not be taken to mean that my said son shall be bound to support and maintain any or all of my said children so coming home. All my household furniture and effects shall belong to my children equally but shall remain in the homestead so long as it is retained as a home for them all."

William Nestor died on the 19th May, 1914, having first made his will, whereby he devised and bequeathed to his brother, the defendant James M. Nestor, all his estate, both real and personal, and appointed him his sole executor; and James M. Nestor, by deed of the 8th July, 1915, conveyed to the defendant Woodruff a portion of the homestead property.

The action was tried without a jury at St. Catharines.
A. C. Kingstone, for the plaintiff.
G. B. Burson, for the defendants.

Mulock, C.J.Ex., set out the facts in a written judgment, and said that the right of the children to use the homestead as a home was, upon the true construction of the will, limited to the life of William; and the homestead passed by William's will to James free from any rights of the other children of John.

As to the household furniture: on the death of William, each child of John was entitled to have it sold and the proceeds divided equally among them all; but it was allowed to remain upon the place, and was sold for the taxes of 1914 and other debts and funeral expenses of William; and the children (other than James) of John were entitled to damages against the estate of William for wrongful conversion.

These damages are assessed tentatively at $300. If both parties are satisfied with this amount, the amount is to be paid into Court and distributed among those entitled. If any one is dissatisfied, there will be a reference—the costs thereof to be in the Master's discretion.

So much of the plaintiff's claim as refers to the homestead property is dismissed with costs to the defendant Woodruff.

No other costs down to the reference.

Muirhead v. Muirhead—Kelly, J.—Dec. 4.

Improvements—Lien on Land for—Lease of Farm by Father to Son—Request—Representations — Action against Executors of Father — Failure to Prove Definite Contract.]—Action by John Muirhead against the executors of his father's will on a claim for work done and material supplied upon a farm owned by the father, and for the establishment and enforcement of a lien upon the land to the extent of lasting improvements made by the plaintiff. James Muirhead, the father, died in July, 1914. From 1879 until 1915, with the exception of a period of about four years beginning in 1906, the plaintiff was the tenant of the farm. The plaintiff asserted that he began in 1880 and continued until 1913 to make lasting improvements on the land at the request of his father, or encouraged by representations and promises of the father, on which he relied, that on the father's death the farm would belong to him (the plaintiff). The action was tried without

a jury at Toronto. KELLY, J., in a written judgment, said that, if the plaintiff was to succeed, there should be the clearest evidence of a certain and definite contract deliberately made by the deceased: Walker v. Boughner (1889), 18 O.R. 448, at p. 454. The plaintiff's allegation that the improvements he now sought compensation for were made at the request of his father was negatived by evidence which the learned Judge was compelled to accept. Upon the whole claim, in respect of any obligation of the deceased, the plaintiff failed. The plaintiff sought to charge the defendants, the executors, with work done and material supplied since the decease of their testator, but there was nothing to shew that they were liable therefor. Action dismissed with costs. T. N. Phelan, for the plaintiff. M. K. Cowan, K.C., for the defendants.

LEES V. MORGAN—LENNOX, J.—DEC. 6.

Trustee — Account — Release — Sale of Properties of Trust Estate—Interest—Costs.]—An action against a trustee for an account, tried without a jury at Hamilton. LENNOX, J., in a written judgment, said that, without deciding that the release, or document referred to as a release, executed by the plaintiff and his mother on the 6th October, 1899, was binding to all intents and purposes, he was of opinion that there was not enough shewn to justify him or the Local Master at London, to whom certain questions were referred, in ignoring the amount ($18,106.41) acknowledged and stated by that instrument as being properly accounted for by the defendant. The Master reported that there were some small properties of the estate yet to be disposed of. Nothing was shewn to satisfy the learned Judge that the defendant was not legally compellable to execute completely the trusts he undertook; but this was not insisted upon; and the rights of the parties could be secured in another way. The plaintiff shall proceed, in a way involving no unnecessary expense, to procure offers for the purchase of these properties, at the prices already ascertained by the Master as reasonable, or at about these prices or at higher prices if they can be obtained; and the defendant and the plaintiff and other necessary parties, if any, if they can be procured to do so, shall join in the conveyances, with liberty reserved to the plaintiff or defendant to apply to the Court for a further order if any difficulty should arise. Exclusive of these properties, the total amount to be accounted for by the defendant to the plaintiff is $21,543.02, and he has acoounted for $20,606.41.

leaving a balance of $936.21. The defendant should not be compelled to pay interest, but he should pay costs. Judgment providing for the sales mentioned and for payment of $936.61 by the defendant to the plaintiff with costs. H. D. Petrie, for the plaintiff. R. N. Ball, for the defendant.

RICHARDSON v. LONDON GUARANTEE AND ACCIDENT CO.—LATCHFORD, J.—DEC. 7.

Guaranty — Action on Suretyship Bond — Assurance of Due Performance of Contract — Material Alterations in Proposed Contract — Absence of Assent of Guarantors.]—Action upon a bond issued by the defendants, purporting to assure the due performance for the plaintiffs, by the Pneumatic Conveyor Company of Chicago, of written contracts dated the 14th March, 1914. The action was tried without a jury. LATCHFORD, J., in a written judgment, said that there were no written contracts nor any contract bearing the date mentioned. The defendants did not guarantee the performance of the contract afterwards made. At most, their guaranty was for the carrying out, if accepted, of a certain proposal as it existed prior to certain changes made in it, and no contract was made on the basis of the proposal in that state. There was no assent by the defendants to the changes. The contract of suretyship is strictissimi juris. To allow the claim of the plaintiffs would be to hold the defendants liable for what they did not undertake. See Halsbury's Laws of England, vol. 15, p. 480. Action dismissed without costs. J. L. Whiting, K.C., for the plaintiffs. M. K. Cowan, K.C., and C. Swabey, for the defendants.

FOX v. BELLEPERCHE—MIDDLETON, J.—DEC. 7.

Fraud and Misrepresentation—Sale of Land—Statements of Vendors—Failure of Proof—Statement of what was Expected in Regard to Water-mains and Sewers—Misrepresentation of Fact.]—Action to rescind an agreement for the purchase of certain lands and to recover the money paid by the plaintiff. The action was tried without a jury at Sandwich. MIDDLETON, J., in a written judgment, said that the first misrepresentation alleged was, that Vine street, the main road to the lands, was 66 feet wide. This failed on the facts, for the street is of that width. The second was, that arrangements had been made and contracts let for the opening and grading of the street. This was shewn to be true, and the work was done. The third was, that arrangements had been made and contracts let for the laying of water-mains and the building of sewers on the streets. On the evidence, the making of this representation was not satisfactorily proved. Where a contract is executory, it may be avoided by any misrepresentation of fact. A mere statement as to what is expected to be done by the contracting party or by any one else, which does not amount to a contract, amounts to nothing. See In re Fickus, [1900] 1 Ch. 331, and cases there collected. Action dismissed with costs. T. Mercer Morton, for the plaintiff. J. H. Rodd, for the defendants.