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APPELLATE DIVISION.

FEBRUARY 1ST, 1915.

*WOOD v. ANDERSON.

Sale of Animal—Warranty—Sale for Particular Purpose—Express Warranty—Breach—Evidence—Return of Horse—Damages—Price Paid for Horse—Expenses of Keep—Deduction of Actual Value of Animal—Findings of Fact of Trial Judge—Appeal—Costs—Option of Return of Animal.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., ante 101.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and E. G. Porter, K.C., for the appellant.

W. N. Tilley and W. D. M. Shorey, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The action is brought to recover damages for the breach of an alleged warranty on the sale by the appellant to the respondent of a Percheron stallion, and the complaint of the respondent is, that one of the stallion's front feet is malformed, and that in consequence of this malformation he was entirely useless for breeding purposes, for which, to the knowledge of the appellant, he was purchased and intended to be used; and complaint is also made of the formation of the hind

*To be reported in the Ontario Law Reports.

legs of the stallion; but that complaint was not, in the view of the Chief Justice, sustainable.

Apart from the question as to whether or not there was any warranty, and, if there was, the nature of it, which depends upon documentary evidence—the correspondence between the parties, by which the contract was constituted—the questions for decision were questions of fact, as to which there was a direct conflict of testimony; and upon this conflicting testimony the learned Chief Justice found that the defect in the stallion's front foot existed from the stallion's birth, and was not, as the appellant contended, the result of any improper treatment or want of proper treatment of the respondent, and that this defect rendered the stallion unfit for breeding purposes. In coming to his conclusion the learned Chief Justice accepted the testimony of the respondent and his witnesses, although it was opposed to a large body of evidence adduced by the appellant, as well as to the testimony of the appellant himself. It is impossible for us to reverse these findings. There was evidence which, if believed, warranted them, and we cannot say that the findings were clearly wrong. The letters written on the 25th April and the 20th May, 1913, by the respondent, the first of them four days after the stallion reached Coulee, in the Province of Saskatchewan, to which point he had been shipped from the neighbourhood of Belleville, strongly support the contention of the respondent. It is true that the first of these letters is open to the observation made as to it by counsel for the appellant, which was that the complaint was not clearly directed to the defect of which the respondent complains and which has been found to have existed, but any force that there might have been in the observation is done away with by the second letter, which refers plainly to that defect.

That the respondent knew that the stallion was for breeding purposes is clear from the correspondence, and the law applicable is also clear, and is that: "If a contract be made to supply an article for a particular purpose, that purpose being the essential matter of the contract, so that it appears that the buyer relies on the seller's skill or judgment, then if the goods are of a description which it is in the course of the seller's business to supply, the seller is bound (whether he be the manufacturer or not) to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. A sale for a particular purpose may be inferred from the nature and circumstances of the transaction:" Leake on Contracts, 6th ed., p. 267.

If it had been necessary for the respondent to establish an express warranty, he has, in our opinion, done so, for the statement of the appellant in the leter of December, 1912, that the horse was a fine young Percheron stallion, and that "he could get all the mares that he should have, never leave the stable," was in substance and effect a warranty that he was fit for breeding purposes.

The appellant also complains that no deduction was made from the purchase-price for the actual value of the horse. It was stated during the argument that the evidence shewed that the horse was of no value for any purpose; but it appears from an examination of the evidence that the statement was incorrect. The only evidence as to the value of the horse was the testimony of the respondent, who said that he was of no value to him (p. 8), and that he did not sell him because he could get nothing for him (p. 22), and the testimony of Gardhouse, a witness called for the respondent, who said that he would make a work-horse, but not a very good one. This evidence does not establish that the horse was worth nothing, but the contrary. What the respondent evidently meant by stating that the horse was of no value to him was, that he was of no value for breeding purposes, for which the respondent bought him, and his statement as to the reason for his not having sold the horse is not sufficient, in the absence of any statement that any effort was made to sell him; that no effort to sell was made is, I think, apparent from the correspondence, which shews that the respondent had it in mind to return the horse to the appellant unless some other arrangement should be come to with him.

The respondent is entitled as damages to the price paid for the horse and the expense of transporting him to Saskatchewan and interest on the purchase-price, all of which the learned Chief Justice allowed; and, having offered to return the horse, he is also entitled to recover all expenses necessarily caused by the horse lying on his hand until the horse could be sold, this being limited to a reasonable time, and from these sums there should be deducted the actual value of the horse: Leake on Contracts, 6th ed., p. 782; Mayne on Damages, 6th ed., p. 231; Caswell v. Coare (1809), 1 Taunt. 566; Chesterman v. Lamb (1834), 2 A. & E. 129; Ellis v. Chinnock (1837), 7 C. & P. 169.

The proper course, in these circumstances, is to direct a reference to ascertain what the horse is worth and the amount that should be allowed to the respondent for keeping him for a reasonable time until he could have been sold, unless the appel-

lant elects to pay this amount and to take back the horse; and, if he so elects, the horse is to be given back to him upon request; and, if the parties are unable to agree as to the amount to be allowed for his keep, there will be a reference to ascertain it. In case of a reference, further directions and the costs of the reference will be reserved to be dealt with by a Judge of the High Court Division in Chambers. In Caswell v. Coare, where the purchase-price was recovered, it was directed that the horse should be redelivered to the defendant.

As success upon the appeal is divided, there will be no costs of it to either party.

FEBRUARY 1ST, 1915.

*CARTER v. HICKS.

Summary Judgment—Action for Money Demand — Specially Endorsed Writ of Summons—Affidavit of Defendant—Insufficiency—Rule 56—Appeal from Judgment of District Court—Time—County Courts Act, sec. 44—Extension—Indulgence.

Appeal by the defendant from an order for summary judgment made by the Judge of the District Court of the District of Temiskaming in an action in that Court for the price of pulpwood sold and delivered by the plaintiff to the defendant.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Sedgewick, for the appellant.

H. D. Gamble, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The appeal is supported upon the proposition that the appellant had filed the affidavit required by Rule 56, and that, he having done so, the order should not have been made.

The affidavit is not, in my opinion, a sufficient affidavit within the meaning of the Rule. In it the appellant deposes that he has "a good defence on its merits" to the action; that the quality of the pulpwood supplied to him for which the respondent claims

*To be reported in the Ontario Law Reports.

payment was not such as he agreed to deliver to him; and that the respondent did not deliver to him the amount of the pulpwood for which the respondent claims payment.

The object of the requirement of the Rule that a defendant shall, besides deposing that he has a good defence on the merits, also in his affidavit shew "the nature of his defence with the facts and circumstances which he deems entitle him to defend the action," is plainly that the Court may see whether the facts and circumstances on which he relies afford an answer to the plaintiff's claim; and, if they do not, the affidavit is not a bar to the making of an order for summary judgment.

It is plain from the appellant's affidavit that he owes some part of the respondent's claim, and it is quite consistent with the affidavit that he has no defence to the whole of the respondent's claim except $10.

It was, in my opinion, necessary, to make the affidavit a sufficient one, that the appellant should have shewn what reduction he claimed in respect of the objection to the quality of wood and the quantity of wood, payment for which was claimed, that was not delivered.

For these reasons, I would dismiss the appeal with costs.

Having come to that conclusion, it is unnecessary for us to determine the question raised by the respondent as to the competency of the appeal. The order appealed from was made on the 10th October, 1914, and the appeal was set down on the 29th November following, upon the fiat of my brother Hodgins, on the undertaking of the appellant "to file all papers within one week" from that date. The certificate of the Judge of the District Court bears date the 8th December, 1914, and the papers were, therefore, not completed within the week allowed for filing them; and it follows from this that the appeal was not set down within the time prescribed by sec. 44 of the County Courts Act. No indulgence should be granted to the appellant. The letters which he wrote to the respondent and to the respondent's solicitor, which may be looked at at all events for the purpose of determining whether any indulgence should be granted, contain clear admissions of the respondent's claim, and repeated promises to pay it. Besides this, the result of the delay that has taken place has been to prevent the respondent from taking the case to trial at the December sittings of the District Court, as he might have done if the appeal had been brought on promptly and the result of it had been adverse to him.

Appeal dismissed.

FEBRUARY 1ST, 1915.

LAIRD v. TAXICABS LIMITED.

Damages—Injury to Motor Car—Quantum of Damages—Evidence—Estimate of Cost of Repairs—Assessment by Jury—Appeal—Option Given to Defendant to Take Plaintiff's Injured Car—Payment of Increased Amount—Costs.

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injury to the plaintiff's motor car by a collision with a taxicab of the defendant company in High Park, Toronto, early in the morning of the 26th September, 1913. The jury found that the defendant company was liable for the injury to the plaintiff's car, and assessed the damages at $2,000. At a former trial, the plaintiff recovered a verdict of $1,750, which was set aside by the order of a Divisional Court of the Appellate Division: Laird v. Taxicabs Limited (1914), 6 O.W.N. 505.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. P. MacGregor, for the appellant company.

T. N. Phelan, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . We determined at the argument the question as to the liability of the appellant to answer in damages for the injury of which the respondent complains, adversely to the appellant; but we reserved judgment as to the question of damages, which the appellant alleges were excessive.

The only evidence of the value at the time of the accident of the motor car was that given by Arthur Visick, who testified that it was then worth to the owner between $2,500 and $2,600 (p. 158), and he was not cross-examined as to this. He also testified that his estimate of the cost of repairing it and putting it in the same condition as it was in before the accident was $1,500, and that the "salvage" was not worth more than $500. Harry Phillips testified that it would cost to put the car in as good condition as it was in before the accident "somewhere about $1,200 or $1,400," and he also testified that when that expenditure had been made he could not guarantee that he had

located or found all the defects in the car that resulted from the accident (p. 151).

These witnesses were well qualified to speak as to the matters as to which they testified; Phillips being the manager of the service department of the Russell Motor Company, and Visick, an automobile expert with an experience of 17 years and employed by the Provincial Government on all the important occasions when a death is caused by a motor car, and also as examiner in Toronto of persons desiring to be licensed as chauffeurs.

Opposed to this evidence was the testimony of two witnesses called on the part of the appellant: Arthur T. Knowles, the foreman of the City of Toronto garage, who testified that his estimate of the cost of the repairing of the car was $600, and that, when that sum had been expended in repairs, the car would be practically as good a car as it was before the accident as far as he could see by examination (p. 277); and Walter Sirett, the mechanical superintendent of the appellant, who testified that he "figured the cost of repairing the car and put it around about $600," and that "we would be glad to get work now—I would do it for $100 less" (p. 338).

It was urged by Mr. MacGregor that the testimony of Visick shewed that his estimate of the value of the car at the time of the accident was too high, and his estimate of the value of the "salvage" too low, because he said that an expenditure of $1,500 would put the car in the same condition as before the accident; but we think that it was quite open to the jury to conclude that what Visick meant was that the expenditure of $1,500 would put the car, for the purpose of being used, in as good a condition as it was in before the accident, but that was not the full measure of the damage, because the car, though as useful, would not be as saleable on account of the serious injury it had received.

We are of opinion that no case has been made for disturbing the jury's assessment of the damages, but that, in view of the wide differences between the estimates of the cost of the repairs, it would not be unreasonable that the appellant, if it elects to do so, should have the right to take the car, which is still in the same condition as it was in when injured, upon condition that the damages be increased to $2,500—the lowest estimate of its value by Visick—the election to be made within ten days.

If the appellant does not avail itself of the option to take the injured car on the terms mentioned, the appeal will be dismissed with costs. If the appellant elects to take the car, the

damages will be increased to $2,500, and the judgment will provide for the delivery of the injured car to the appellant upon its being demanded, and the costs of the appeal will be payable by the appellant.

FEBRUARY 1ST, 1915.

FRAME v. HAY.

Promissory Notes—Liability of Endorser—Intention—Transfer of Claim—Evidence.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial of the action without a jury at Stratford on the 1st December, 1914, dismissing it with costs.

The action was brought to recover $2,438.82 alleged to be due upon three promissory notes endorsed by the defendant and held by the plaintiff.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Robertson, for the appellant.

Glyn Osler, for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . We are of opinion that the judgment is right and should be affirmed, on the short ground that the appellant became the purchaser of the respondent's interest in the Frame & Hay Fence Company, which admittedly was intended to include the liability of the company to pay the indebtedness of the partnership of Frame & Hay to the respondent on the promissory notes sued on, and that the endorsement of the notes by the respondent was intended merely to transfer to the appellant the respondent's claim against the company in respect of them and the evidence of the liability of the partnership to the respondent, and not with the intention of the respondent becoming liable as endorser of the notes.

FEBRUARY 5TH, 1915.

CURRY v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Negligence—Collision between Street Car and Automobile—Derailment of Car—Res Ipsa Loquitur — Attempt to Prove Cause of Derailment—Evidence—Findings of Jury—New Trial.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 140, dismissing the action.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Rodd, for the appellant.

M. K. Cowan, K.C., and A. R. Bartlet, for the defendant company, respondent.

THE COURT ordered a new trial; costs of the former trial and of the appeal to be costs to the party ultimately succeeding.

HIGH COURT DIVISION.

LENNOX, J. FEBRUARY 1ST, 1915.

ROLPH & CLARK LIMITED v. GOLDMAN.

Contract—Goods Supplied to Company—Personal Liability of President—Undertaking to Pay — Substituted Contract—Evidence—Statute of Frauds—Guarantee—Pleading.

Action for the price of goods manufactured by the plaintiff company and supplied to the Diamond Cleanser Manufacturing Company Limited. The defendant was the president of that company, and the plaintiff company alleged that he personally undertook to pay for the goods.

E. G. Long, for the plaintiff company.

A. W. Holmested, for the defendant.

LENNOX, J., in a written opinion of considerable length, first outlined the facts, and then stated that the questions to be de-

termined were: (1) Did the defendant enter into a personal undertaking, as alleged by the plaintiff company? (2) Was it an undertaking or promise within or outside the provisions of sec. 4 of the Statute of Frauds? (3) If within the statute, is the statute sufficiently pleaded?

After examining and discussing the evidence, the learned Judge determines the first question in favour of the plaintiff company. He then proceeds:—

What then is the legal effect of the language actually used, construed in the light of then existing conditions, the subsequent conduct of both parties—particularly of the defendant—and the defendant's practical admission of the arrangements upon which the goods now in question were furnished?

I have come to the conclusion, after a great deal of careful consideration, but in the end without hesitation, that this is a transaction outside the Statute of Frauds, and that the defendant is liable; that it was not the intention or agreement of the parties that the defendant should be only conditionally or alternatively liable. James v. Balfour (1882), 7 A.R. 461, and cases of that class, do not touch the question to be decided here, upon the facts as I find them. The utmost that can be argued as to the connection of the Diamond company is, that there was a contemplated liability. The retention of this company's name increases the difficulty of rightly determining the facts; but how and why it happened, and to what intent, is still a question of fact to be determined by the evidence.

The existence of a guarantee is not necessarily predicated upon an antecedent liability or debt of another: Eastwood v. Kenyon (1840), 11 A. & E. 438. There may be a guarantee of a contemplated liability: Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, at p. 24. But where the contract is in its initial stages a matter of prospective liability only, there can be no inference or presumption of a guarantee, on the one hand, or of joint or independent liability of any of the negotiating parties, on the other; it is essentially a question of fact to be determined by the evidence; and the evidence, direct and circumstantial, here leaves no doubt upon my mind that, if there was a primary liability in this case after the interview, the party to be looked to, the person intended to be primarily liable, was the defendant: Buckmyr v. Darnall (1704), 2 Ld. Raym. 1085; Mountstephen v. Lakeman (1871), L.R. 7 Q.B. 196; and cases collected in Halsbury's Laws of England, vol. 15, p. 459, note (*k*).

I have indicated the difficulty I feel in determining whether the parties really intended that the Diamond company was to be a party to the new transaction at all. It is unimportant, unless the proper conclusion of fact is, that the original contemplated contract was consummated, and the defendant became a guarantor merely for its performance—the Diamond company the principal and the defendant its surety. On the contrary, I have come to the conclusion that the contemplated contract was abandoned, and a new contract substituted.

If this is a proper conclusion of fact, the defendant is liable, whether he contracted jointly with the Diamond company or separately to bind himself alone. A joint contract is not within the Statute of Frauds. There is no primary or secondary liability, no principal or surety, in such case: Halsbury, vol. 15, p. 461, para. 890, and cases referred to in notes (*g*) and (*h*). "A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person *in case of his default*:" Indian Contract Act, 1872, sec. 126. "A guarantee is an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriages of another person, *whose primary liability* to the promisee must exist or be contemplated:" Halsbury, vol. 15, p. 439, para. 864. The italics in both cases are mine.

Lord Selborne said in Lakeman v. Mountstephen, in referring to expressions of opinion by Judges of the Queen's Bench when the case was there (p. 24): "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto,* and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed."

The defendant was the representative of the company. It was for him to assert a completed and binding contract if he thought there was one. He did the opposite. He treated the whole matter as resting in negotiation, and, obtaining his own terms, and being personally interested and individually to be benefited—as he hoped—more than any other shareholder in his company, he should, as was said by Mr. Justice Anglin in the very similar case of Harrison v. Cooper and Turville (1908), 11 O.W.R. 817, be now estopped from disputing liability.

A perusal of this judgment and the cases there referred to brings up very pointedly the important qualification of the law

governing alleged contracts of guarantee, namely, that the statute does not apply where the guarantor has a personal interest distinct from the person whose credit he guarantees; and, although I cannot come to the conclusion that the defendant's interest as a shareholder is legally distinct from the Diamond company, yet his actual interest and activity in the affairs of the company affords substantial assistance in determining the meaning and effect of the contract which in the end secured the delivery of the goods sued for.

In view of the conclusions I have reached, it is not necessary to consider any question as to the form of the pleadings, or the record as it now is under the new Rules, made up of the writ and the defendant's affidavit. There is no claim made for interest for the plaintiff company.

There will be judgment for $1,495.02 and interest from the date of the writ with costs.

LENNOX, J. FEBRUARY 2ND, 1915.

RE CHALLONER.

Will — Construction — "Interest of Stock" Used as Meaning Shares in Company — "Any Male Heirs" — "Equally Divided between"—Person in Existence and Unascertained Class of Persons—Vested Interest—Costs.

Motion by the executor of the will of Agnes Audley Challoner, deceased, for an order determining certain questions arising in the administration of the estate as to the meaning and construction of the will.

J. J. Coughlin, for the applicant.
C. G. Jarvis, for George Challoner Benson.
F. W. Harcourt, K.C., for an unascertained class of persons.

LENNOX, J.:—The testatrix drew her own will. It is dated the 9th June, 1903, and she died on the 26th March, 1904.

The clause of her will requiring construction is: "The interest of stock in 'The Mooney Biscuit factory' to be equally divided between George Challoner Benson and any male heirs of Albert Benson and Thomas Challoner Benson."

Albert Benson and Thomas Challoner Benson are nephews of the testatrix; neither of these nephews has a son; Albert has three daughters, and Thomas Challoner has one daughter. It is not shewn whether any of these daughters were born at the time of the making of the will or in the lifetime of the testatrix. It was stated in Court and not questioned that George Challoner Benson has a sister. He is a son of George Oren Benson, another nephew of the testatrix.

By "interest of stock," I have no doubt, the stock itself was meant, as the stock was only of the par value of $500, the will purports to be a disposition of all the testatrix possessed, and otherwise this stock and some other stock, similarly referred to, would not be disposed of by the will. I am satisfied, too, that the testatrix meant by "any male heirs" "any male children" —a view entertained by all the counsel—as there is evidence in the will that she preferred males to females, and probably would not have in contemplation anything so remote as a gift to the grandsons of her nephews, children of the daughters. Also if, in the absence of something in the will or surrounding circumstances, she is to be presumed to know the law, and as she intended to make a division, she could hardly have intended that the whole of the stock should go to George Challoner as the male heir of his uncles—which he might become, of course, in certain eventualities.

I have not reached a conclusion as to how the testatrix intended to divide this stock without very great hesitation and difficulty. The weight of authority, in England at all events, in the absence of something to point to a different intention, is in favour of a per capita division. Counsel for George Challoner Benson attached a great deal of significance to the use of the word "between" instead of the word "among," and contended for a division as between two classes, giving his client one half, and the other half to go to the male children of Albert and Thomas Challoner Benson, if there are any, to be again divided among them in a way not now possible to determine. It seemed to be conceded that, if not entitled to a half, he would certainly be entitled to a one-third share. I cannot read the will in that way. If not entitled to one-half then the fund is to be divided per capita among all who are to take, and his share cannot be determined and would not vest—not absolutely at all events—until the death of whichever of his uncles should survive the other. This would tie up the whole of the fund for an indefinite and possibly for a very long period, and is a construc-

tion to be avoided if it can be avoided without doing violence to the presumed intention of the testatrix and the language she employed. In other words where two constructions are possible, the Courts lean in favour of that which will make for an early vesting of the fund.

In the Encyclopædic Dictionary it is said that "in strict accuracy *between* is used only of two. When there are more than two the proper term to use is *among*." The Standard and other dictionaries may be referred to for statements to the same effect. But it was pointed out to me that the testatrix was not a person to be expected to select her words with nice discrimination, and a perusal of her will would confirm this view; although it is not to be overlooked that, when she is giving her jewellery to her nieces, of whom she appears to have had a good many, she says: "My jewellery to be divided *among* my nieces;" and as to her furniture, after her sister's death, it is to be divided "equally *among* her children." I do not know how many children there were. On the other hand, I have found no intrinsic evidence in the will that the testatrix uses the word *between* where the word *among* would be more apt to express what she *manifestly* intends.

In the construction of wills, authorities as a rule afford very little help. The word "between" was under consideration in In re Harper, Plowman v. Harper, [1914] 1 Ch. 70, but I have not been able to get any assistance from it. The case most like the one I am considering is Hutchinson v. La Fortune (1897), 28 O.R. 329, in which the testator directed that, after the death of his mother, his real estate should be sold, "and the proceeds equally divided between my wife and my brother and sister." It is not stated that any circumstance was shewn or that there was any statement elsewhere in the will assisting the construction of the language above-quoted. It was held that the wife took one-half and the brother and sister one-half between them. The language quoted is almost identically upon the lines of the paragraph I am asked to construe.

The assistance of this decision would not alone be enough. But I cannot think that the testatrix intended to benefit George Challoner Benson only after the death of both his uncles; and, upon the wording of the will, no part of the fund can vest until both these events happen, unless this beneficiary is to take one-half of it. I think it is not unreasonable to infer that George Challoner Benson, as regards this fund, was the chief object of her bounty. At the time she made her will he was about eleven

years of age, and she would probably be more solicitous to benefit him than the possible issue of her two nephews. It is hardly conceivable that she intended to postpone this benefit indefinitely —until he became a middle-aged or possibly an old man. I would feel that it was unfortunate if I were compelled to adopt this interpretation. I do not think I am.

I am of opinion that George Challoner Benson is entitled to one-half the stock in the "Mooney Biscuit factory," that it vested at the death of the testatrix, and he is entitled to the interest or dividend of this from the death until the time of payment—to be paid to him as soon as practicable. As to the other one-half share, it must await contingencies and accumulate.

The costs of the executor and Official Guardian will be paid out of these accumulations on the moneys reserved—George Challoner Benson will bear his own costs.

BRITTON, J., IN CHAMBERS. FEBRUARY 2ND, 1915.

McCONNELL v. TOWNSHIP OF TORONTO.

County Courts—Transfer of Action to Supreme Court of Ontario—Grounds for—Practice—County Courts Act, R.S.O. 1914 ch. 59, secs. 29, 30.

Application by the defendants to transfer this action from the County Court of the County of Peel to the Supreme Court of Ontario.

W. D. McPherson, K.C., and W. S. Morphy, for the defendants.
R. U. McPherson, for the plaintiff.
R. C. H. Cassels, for the Toronto Golf Club, third parties.

BRITTON, J.:—The County Courts Act, R.S.O. 1914 ch. 59, authorises transfer in certain cases. Section 29 of that Act is the only one that need be specially considered. This transfer is not asked upon facts or under conditions excepted from sec. 29, viz., the cases mentioned in sub-secs. 2, 5, and 6 of sec. 22, or sec. 23; and sec. 29 authorises the making of an order transferring, if the case appears to the Judge to be a case fit to be tried in the Supreme Court of Ontario, and then only upon such terms

as to costs, security for costs and debt or damages, as the Judge may deem just.

Section 30 is very express and emphatic in providing for the trial of actions for claims under clauses (*c*) and (*d*) of sec. 22. The plaintiff's claim is under clause (*c*) of sec. 22.

The claim does not suggest any difficult question of law or fact; but the matter of bringing foreign water so that it flows over the plaintiff's land has been before the Judge of the County Court of the County of Peel, before whom this action will be tried, unless otherwise ordered. There was an award made by the township engineer under the Ditches and Watercourses Act, and this award, upon appeal to the County Court Judge, was set aside by him. For this reason and the further reason that a third party notice has been served, the case seems to me one fit to be tried—that is, one that ought to be tried—in the Supreme Court of Ontario.

There will be an order transferring the case, upon the following terms as to costs. If the plaintiff succeeds, he will be entitled to full costs on the High Court scale against the defendants, unless otherwise ordered by the trial Judge; and if the defendants succeed, and become entitled to costs of defence, the costs for the plaintiff to pay will be only upon the County Court scale. The defendants consent to this part of the order.

Costs of this application and order will be costs in the cause.

LATCHFORD, J. FEBRUARY 3RD, 1915.

CONSTABLE v. RUSSELL.

Stated Case—Preliminary Question of Law—Contract—Statute of Frauds—Refusal to Entertain Case—Determination of Case not Decisive of Action—Rule 126—*Judicature Act, sec.* 32 (2).

Stated case heard in the Weekly Court.

W. Proudfoot, K.C., for the plaintiff.
M. H. Ludwig, K.C., for the defendant.

LATCHFORD, J.:—Stated case under Rule 126 submitted for the opinion of the Court as to whether certain documents,

coupled with such oral evidence as may legally be given to identify the lands mentioned in the documents, do or do not make out a contract complying with sec. 5 of the Statute of Frauds, 3 & 4 Geo. V. ch. 27.

An answer in the affirmative will not dispose of the action, in which several defences—including fraud and misrepresentation by the plaintiff—are pleaded, in addition to the statute.

In Bulkeley v. Hope (1856), 8 DeG. M. & G. 36, Lord Justice Turner said: "I have considered this case, and have formed my opinion upon both the questions which are raised by it. I find, however, that the opinion which I have formed would not finally settle the questions between these parties, and in this state of circumstances I think that it would not be right for me to state the conclusions at which I have arrived, as an opinion now given upon questions which would not determine the rights of the parties might prejudice the discussion of those rights when properly before the Court for its determination."

Under sec. 32, sub-sec. (2), of the Judicature Act, R.S.O. 1914 ch. 56, my decision upon the question of law raised here could not be departed from by the trial Judge without my concurrence. This is an additional ground for allowing the action to proceed to trial untrammelled by a judgment upon the stated case.

I, therefore, do not see fit to make any order except that the costs of the application be in the discretion of the Judge who tries the action.

LENNOX, J. FEBRUARY 5TH, 1915.

RE MAJOR HILL TAXICAB AND TRANSFER CO. LIMITED AND CITY OF OTTAWA.

Company—Dominion Incorporation—Provincial License—Company Doing Business as Carriers in City—Board of Police Commissioners—Powers of—By-law—Imposition of License Fee—Municipal Act, secs. 354, 422*—Motion to Quash By-law—Discretion—Costs.*

Motion by the company to quash a by-law (or part thereof) of the Board of Commissioners of Police of the City of Ottawa.

The motion was heard in the Weekly Court at Ottawa.

W. C. McCarthy, for the company.

F. B. Proctor, for the city corporation.

LENNOX, J.:—By Dominion letters patent of incorporation, the company, amongst many other things, is authorised to carry on the business, in any part of Canada, of "letters to hire . . . of automobiles, motor cars . . . and carriages and vehicles of all kinds," however propelled, "and to carry on a general garage, livery, and taxicab business, including the business of transferring from place to place goods, wares, merchandise, and persons, by means of vehicles of any kind, drawn or propelled by any kind of power or by any means whatever."

By these letters patent the company became a body corporate in the several Provinces of the Dominion, and the company's rights and liabilities as a corporate body within the Province of Ontario were recognised by a license of the Provincial Government dated the 30th July, 1912.

This company shews that it has been and is, amongst other things, carrying on the business of letters to hire of motor and other vehicles and a general garage, livery, and taxicab business, including the transfer of goods, wares, merchandise, and persons for hire from place to place in the city of Ottawa.

Section 354 of the Municipal Act, R.S.O. 1914 ch. 192, provides that "there shall be for every city . . . a Board of Commissioners of Police;" and sec. 422 enacts that by-laws may be passed by Boards of Commissioners of Police of Cities: (1) for licensing drivers of cabs; (5) for licensing and regulating the owners of livery stables and of horses, cabs, carriages, carts, trucks, sleighs, omnibuses, and other vehicles regularly used for hire within the city, whether such owners reside within or without the city.

A duly constituted Board of Commissioners of Police for the City of Ottawa passed a by-law, No. 35, on the 12th June, 1914, requiring persons and companies carrying on business of the character in which the company is engaged, and their drivers, to take out a license, and imposing a fee of $5 and $1 respectively for such licenses.

The motion is to have this by-law—so far as it relates to the matters hereinbefore recited—quashed, upon the grounds: (1) that the passing of such a by-law is beyond the powers and jurisdiction of the said Board of Commissioners of Police and is ultra vires; (2) that the company cannot be compelled to take out an *additional* license.

I am not called upon to consider whether all or any of the provisions of the Extra-Provincial Corporations Act of Ontario are *intra* or *ultra vires*.

And no question is submitted to me, or arises, as to whether the by-law—assuming jurisdiction—is sufficient in terms to effect the objects and purposes of the Commissioners; and I express no opinion upon that point.

The company refused to take out a municipal license, and proceedings were taken which resulted in the imposition of a fine. Although the question of requiring drivers to pay a municipal license fee is covered by the notice of motion, the substantial question for decision now is, whether the company, having a Dominion charter and Provincial license, both involving outlay—taxation of a sort—and conferring rights, is, in common with other companies, firms, and persons engaged in similar callings, liable to an additional tax of the character now sought to be imposed. I think it clearly is. I think the language of sub-sec. 5 of sec. 422 is sufficient to authorise municipalities to exact license fees.

I do not read the decision of their Lordships of the Privy Council in the recent cases John Deere Plow Co. Limited v. Wharton, John Deere Plow Co. Limited v. Duck (1914), 29 W.L.R. 917, as conflicting with the proper exercise of such a right. Indeed their Lordships are careful to guard against the inference that their decision is to have so broad an interpretation, and say: "They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a Province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. . . . It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by Provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96; Colonial Building and Investment Association v. Attorney-General of Quebec (1883), 9 App. Cas. 157; and Bank of Toronto v. Lambe (1887), 12 App. Cas. 575. . . . It is true that, even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to

Provincial laws of general application, enacted under the powers conferred by sec. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to mortmain (Colonial Building and Investment Association v. Attorney-General of Quebec, 9 App. Cas. 157, at p. 164) ; or escape payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (Bank of Toronto v. Lambe, 12 App. Cas. 575). Again, such a company is subject to the powers of the Province relating to property and civil rights under sec. 92 for the regulation of contracts generally (Citizens Insurance Co. v. Parsons, 7 App. Cas. 96)."

The Board of Commissioners of Police exercised a power delegated by the Legislature not only affecting Dominion and Provincial incorporations but all syndicates, partnerships, and individuals alike, engaged in this class of business.

The language of sub-sec. 1, relating to drivers, is not so broad or general as sub-sec. 5 of sec. 422 and sub-sec. 4, and the Provincial licenses required to be obtained individually by drivers of motor cars may afford an indication that the Legislature did not intend to confer the right to exact a license fee from drivers other than those specifically mentioned. The question only incidentally arises upon the motion here; no practical question has yet arisen under this part of the by-law, and such a question may never arise. The city corporation may not seek to enforce it. But the quashing of a by-law—particularly as to a matter for the time being collateral—is to some extent discretionary, and I have concluded that it is better in this case to leave the parties as if this question had not been included in the application.

The motion will be dismissed, but as, in view of my decision to leave the question as to drivers an open question, and as it has not been shewn that the main question has been the subject of direct judicial consideration before, there will be no costs. This may suggest to the Commissioners the propriety of repealing this part of the by-law, if, after consideration, they should be advised that it is broader in its terms than the Municipal Act warrants. The company will have the right to take the deposit out of Court.

RE JOHNSTON V. CAYUGA—BRITTON, J., IN CHAMBERS—FEB. 2.

Division Court—Jurisdiction — Amount in Controversy — Amendment—Prohibition—Costs.]—Motion by the defendant for prohibition to the 4th Division Court in the County of Haldimand, on the ground that the amount claimed was beyond the jurisdiction. The learned Judge said that, notwithstanding all that was urged in favour of the motion, he was of opinion that, upon the facts stated in the affidavit of Mr. Arrell, his omitting to ask for such amendment as was warranted by the evidence, and as the County Court Judge had power to make, did not deprive the Court of jurisdiction. Mr. Arrell, acting for the plaintiff, and having seen the counterclaim or set-off, thought the whole matter amicably settled between the parties; and probably, if not already settled, it can be at much less cost than by further litigation. Motion dismissed without costs. J. B. Mackenzie, for the defendant. S. C. Arrell, for the plaintiff.

RE JARVIS LOCAL OPTION BY-LAW—SUTHERLAND, J., IN CHAMBERS—FEB. 2.

Municipal Corporation—Local Option By-law—Voting on—Inspection and Preservation of Ballots—Applicant for Order—Status—Municipal Act, R.S.O. 1914 *ch.* 192, *secs.* 146, 147, 279.]—Application, at the instance of the holder of a tavern license in the village of Jarvis, in the county of Haldimand, under sec. 146 or 147 of the Municipal Act, R.S.O. 1914 ch. 192, for an order allowing the inspection of the ballot papers relating to the voting upon a local option by-law alleged to have been approved by the necessary majority of the electors. The motion was made *ex parte*. SUTHERLAND, J., said that the only material filed was an affidavit of the solicitor for the applicant, very meagre in its terms, which failed to disclose the fact that the applicant was a person entitled to vote upon the by-law; and the learned Judge was unable to find that any other person was entitled to an order such as was asked: sec. 279 of the Municipal Act. Motion refused. J. B. Mackenzie, for the applicant.

RE MAHLER—SUTHERLAND, J., IN CHAMBERS—FEB. 2.

Devolution of Estates Act—Caution — Application by Administrator for Leave to Register after Expiry of Statutory Period—Infants—Official Guardian—R.S.O. 1914 *ch.* 119, *sec.* 15.]—An application in Chambers at London, by the administrator of the estate of Edwin Frank Mahler, deceased, for an order permitting a caution to be registered after the statutory period had expired. The material filed did not shew whether infants were or were not concerned in the real estate proposed to be dealt with. It was said by counsel that infants were interested in the property. The learned Judge said that the Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 15, provides what is necessary to be shewn on an application of this sort. Where infants are concerned, the usual and least expensive course is to submit the matter in the first instance to the Official Guardian, who in a simple case is authorised to give a certificate enabling the caution to be registered. In the circumstances of the case, the learned Judge declines to make the order asked at the present stage. W. R. Meredith, for the applicant.

HAWKINS V. MILLER—SUTHERLAND, J.—FEB. 4.

Interim Injunction—Company—Purchase of Property—Action by Shareholder to Restrain—Evidence—Refusal to Continue Injunction—Speedy Trial.]—Motion by the plaintiff, a shareholder in the defendant company, suing on behalf of himself and the other shareholders, to continue until the trial an injunction restraining the defendants and their representatives, officers, and agents, from committing or doing or permitting any act, matter, or thing whereby the defendant company might be made responsible for the purchase of certain real estate and from responsibility for the payment of the purchase-money, and from committing or permitting any act of ratification or confirmation by the company of such contract and the assignment thereof. The plaintiff complained that the defendant Harry Miller, a shareholder of the defendant company, the Miller Manufacturing Company, bought a large building for the price of $80,000, and, finding himself unable to carry out the purchase, was seeking to unload the property on the company. On

behalf of the company it was said that it was necessary to procure larger premises, and that from the outset the purchase was intended for the company, and was determined upon with the knowledge and consent of all the directors. SUTHERLAND, J., said that as a rule matters of this kind were questions which were determined solely by the directors and shareholders without the interference of the Courts. While, on the material filed when the interim injunction was obtained, and without any explanation on behalf of the defendants, it appeared proper that the restraining order asked should be temporarily made, it could not now be said, in view of the material before the Court, and particularly having regard to the facts set out in the affidavit of the solicitor for the company and in the affidavit of the defendant Harry Miller, that there was justification for continuing the order until the trial. However, in the circumstances, the defendants should be put upon terms to speed the trial. Motion to continue the injunction refused; costs to be costs in the cause. Grayson Smith, for the plaintiff. M. K. Cowan, K.C., for the defendants.

PEPPIATT V. REEDER—SUTHERLAND, J.—FEB. 6.

Injunction—Action to Set aside Sale of Property—Fraud and Misrepresentation — Interim Injunction — Continuance — Terms—Payment into Court—Speedy Trial.]—This action arose out of a sale by the defendant to the plaintiff of a moving picture theatre, in July, 1914, carried out by a bill of sale from the defendant to the plaintiff, a chattel mortgage for $2,600 from the plaintiff to the defendant, and a lease from the defendant to the plaintiff. In connection with the lease, the lessee paid to the lessor the sum of $1,000, in consideration of the making of the lease or as security for the carrying out of its terms. In this action the plaintiff alleged that the defendant was guilty of fraudulent misrepresentations in connection with the sale, and sought to have it rescinded. In the meantime he had been acting under the sale and making payments upon the chattel mortgage and for rent. He stated in an affidavit that it was only within the two weeks previous to the commencement of the action that he learned of the alleged deception, fraud, and misrepresentation of the defendant, and thereupon immediately consulted a solicitor and instructed proceedings to be taken to set aside the contract and recover the moneys paid by him. The

writ was issued on the 29th January, 1915, and the plaintiff on the following day obtained an interim injunction restraining the defendant from seizing or distraining the goods and chattels mentioned in the chattel mortgage under the powers contained therein or in the lease of the premises and from taking possession of the theatre. The plaintiff now moved to continue the injunction. The defendant filed an affidavit denying all allegations of fraud and misrepresentation. SUTHERLAND, J., said that, in the circumstances, he thought that the injunction might well be continued until the trial, but only on the payment of rent and instalments due under the chattel mortgage, in the meantime, into Court. It was a case in which it was desirable that an early trial should be had; and, unless the parties agreed upon terms as to this, counsel would be heard. Costs of the application to continue the injunction to be costs in the cause. E. Meek, K.C., for the plaintiff. J. Gray, for the defendant.

SURROGATE COURT OF THE COUNTY OF YORK.

WINCHESTER, SURR. CT.J. FEBRUARY 1ST, 1915.

RE FISHER.

Succession Duty—Mortgages on Land out of Province—Specialty Debts—Domicile of Testator—Succession Duty Act, R.S.O. 1914 *ch.* 24.

Application by the Solicitor to the Treasury for Ontario, under sec. 12 of the Succession Duty Act, R.S.O. 1914 ch. 24, for an inquiry into the correctness of the inventory of the estate of Donald F. Fisher, deceased, alleging that the Province was entitled to duty upon two mortgages held by the testator at the time of his death on real estate situated in British Columbia.

N. F. Davidson, K.C., for the Solicitor to the Treasury.
C. J. Holman, K.C., for the executor.

WINCHESTER, SURR. CT.J.:—The mortgages are dated respectively the 24th October, 1910, and the 2nd February, 1911, payable in three years after date thereof, securing the sum of $2,000 each, on property situated in South Vancouver, B.C. The testa-

tor died on the 13th October, 1912, at the city of Toronto, and among his papers were found the mortgages in question. Upon applying to this Court for letters probate, the executor entered into a bond whereby he covenanted to pay to the Treasurer of the Province of Ontario $1,000, the condition being that he would pay or cause to be paid to the Treasurer of Ontario for the time being, representing his Majesty the King, all duties to which the property, estate, and effects of the deceased may be found liable under the provisions of the Succession Duty Act; and in the schedule accompanying the papers these two mortgages are set forth as part of the estate, amounting with interest to $4,108.32. Before paying the duty in Ontario, the executor applied for and obtained ancillary letters probate in British Columbia, in January, 1914, for the purpose of discharging one of the mortgages and assigning the other as set forth in the affidavit of the executor on this application; and upon such application for ancillary probate the executor paid to the Province of British Columbia succession duty on the amount of the mortgages, being the sum of $203.35. In the month of April, 1914, the executor paid the Treasurer of this Province the amount of succession duty claimed, less the sum of $203.35 which he had paid to the Province of British Columbia.

The executor now contends that the estate is not liable to pay this duty to the Province of Ontario, because the sum was properly paid in the Province of British Columbia, and credit should be given him on the Ontario claim in respect of the said amount.

Counsel for the Province relied upon Lambe v. Manuel, [1903] A.C. 68; Treasurer of the Province of Ontario v. Pattin (1910), 22 O.L.R. 184; British Columbia statutes and interpretations. Counsel for the executor cited Lovitt v. The King (1910), 43 S.C.R. 106, 131, and The King v. Lovitt, [1912] A.C. 212, at p. 223; Harding v. Commissioners of Stamps for Queensland, [1898] A.C. 769; Commissioner of Stamps v. Hope, [1891] A.C. 476; Cotton v. The King, [1914] A.C. 176; and also British Columbia and Ontario statutes on the question.

The case of Treasurer of the Province of Ontario v. Pattin, 22 O.L.R. 184, referred to by the Supreme Court in The King v. Cotton (1912), 45 S.C.R. 469, shews conclusively that these mortgages were properly taxable for succession duty in this Province, the case of Commissioner of Stamps v. Hope, [1891] A.C. 476, being followed. The case of Harding v. Commissioners

of Stamps for Queensland, [1898] A.C. 769, was referred to on the argument in that case.

The cases in the Privy Council distinguish simple contract debts from specialty debts, and the greater number of those cited before me referred to collection of duty on simple contract debts. The debts in question are specialty debts, and the law is well settled now that they are taxable in the countries where they are found at the time of the death of the testator, he being domiciled in that country at the time. The land is not taxable, but the beneficial sum secured is what is taxable, and that is distributable in the domicile of the testator.

I am bound by the decision of the Court in Treasurer of the Province of Ontario v. Pattin; see also Lawson v. Commissioners of Inland Revenue, [1896] 2 I.R. 418.

As to the right of the Province of British Columbia to collect duties on the amount of these mortgages, in my opinion Woodruff v. Attorney-General for Ontario, [1908] A.C. 508, decides that a Province has no right to tax property situate outside of the Province. Cotton v. The King, [1914] A.C. 176, is to the same effect.

I find, therefore, that the executor is liable to the Treasurer of Ontario for the amount of succession duty on the sum of $4,-108.32 as claimed.

As to the costs of this application, I think that, owing to the decisions of the Privy Council, which do not agree, the question was a fair one to have considered, and that each party should pay his own costs.