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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

MITCHELL v. TORONTO AND YORK RADIAL R.W. CO.

Negligence—Street Railway—Horse being Driven across Track on Highway Struck by Electric Car—Evidence—Findings of Jury—Excessive Speed—Neglect to Give Warning of Approach of Car—Failure to Avoid Running into Horse after Danger of Collision Manifest—Contributory Negligence—Ultimate Negligence.

Appeal by the plaintiff from the judgment of DENTON, Jun Co. C.J., dismissing an action brought in the County Court of the County of York and tried with a jury.

The action was for damages caused to the plaintiff by his horse being killed and his sleigh and harness injured when struck by a car of the defendants upon the highway. The jury found negligence, but the trial Judge, having reserved judgment on a motion for a nonsuit, before leaving questions to the jury, afterwards held that there was no evidence of negligence for the jury, and dismissed the action.

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

W. Shapley, for the appellant.

J. H. Moss, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the Court had to consider whether there was or was not any evidence upon which reasonable men could find for the appellant. The facts were simple, and there was no conflict of testimony.

The appellant's witnesses were: his servant who was driving the horse at the time; another servant who was there too at the time; and a third person who happened to be upon the highway in front of the appellant's place of business at the time, and who saw all that occurred, and who seemed to be an entirely disinterested person. The respondents did not call any witnesses or give any evidence at the trial. The appellant's two servants and the horse and sleigh were employed, at 8 o'clock in the morning, in removing a heavy load of crockery from his stable to his store, a short distance from the stable, but it could be reached only by going through a lane to the highway, and then along the highway to the store. For about 50 feet before reaching the highway, the lane runs uphill, the worst part of the incline being at the top upon the highway where the respondents' track is; and the difficulty of thus getting out of the stable-yard into the highway had been, at the time in question, increased by the respondents having swept the snow from their track so that it was piled up on each side of it to such an extent that the horse and sleigh coming out of the lane could not turn either to the right or left upon the highway until they had crossed the track. The horse was stopped about 50 feet from the highway, so that the driver might look and listen for cars on the respondents' track. From this point on to the road there was a bridge obstructing the view of the track. There being neither sight nor sound of a car, the driver went on, starting "the horse up with as much force" as he could "in order to make the hill." The driver's story was, that, when he came through the gate of the lane into the highway, he saw the car coming, and that it was then about 300 feet away. The distance from the gate to the track is 15 feet. The driver said he knew he had a tight pull there, that it would be all he could do to make the track, and that he put up his hand as a signal to the driver of the car to stop; but the car came right down, apparently no effort to stop being made; when he saw what was likely to happen he commenced to whip his horse to get her across the track; he could not turn on account of the snow which the respondents had put on both sides of the track, and he could not get any speed—the horse was going "an inch at a time." The car came on and struck the horse about her shoulder, carrying her 115 feet before stopping, and soon after stopping the horse dropped down dead. The other servant and the bystander corroborated the driver of the horse.

There was evidence of excessive speed of the car, and the more so as the knowledge was with the respondents, and they gave no evidence.

As to failure to give warning of the approach of the car, the trial Judge thought there was no duty to give warning; but that was a question of fact, and, in the circumstances of this case, one for the jury.

As to failure to avoid running into the horse, the trial Judge said that there was no evidence that the driver of the car had time or space in which to stop the car before the collision. But such a conclusion could be reached only by discarding the evidence of each of the three witnesses, and that was a thing quite beyond the Judge's province.

The question of contributory negligence was likewise one for the jury. If they believed the story of the driver of the sleigh, he was not guilty of any negligence. Whether he should be believed or not was a question for the jury; and even if they had not believed him and had found him guilty of negligence, they might yet have very well found, upon the evidence of the bystander, that, notwithstanding the driver's negligence, the defendants might, by the exercise of ordinary care, have avoided the injury done.

The appeal should be allowed with costs, and judgment should be entered for the plaintiff for $100, the sum at which his damages were assessed by the jury, with costs of action.

The other members of the Court agreed in the result; written reasons were given by RIDDELL, J., and also by ROSE, J.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

TORONTO SUBURBAN R.W. CO. v. BEARDMORE.

Contract—Electric Railway—Agreement to Build through Yard of Tanning Company—Consideration—Right to Maintain Railway Constructed without Objection—Validity of Agreement—Authority of Managing Director of Company—Evidence—Corroboration—Evidence Act, R.S.O. 1914 ch. 76, sec. 12.

Appeal by the defendants from the judgment of BRITTON, J., ante 214.

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

H. M. Mowat, K.C., for the appellants.

Wallace Nesbitt, K.C., and Christopher C. Robinson, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

POLAK v. SWARTZ.

Covenant—Assignment of Covenant Contained in Deed—Covenantors not Executing Deed—Exchange of Properties Subject to Mortgages—Action by Assignee to Enforce Covenant.

Appeal by the plaintiff from the judgment of CLUTE, J., ante 46.

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

W. J. McLarty, for the appellant.

J. A. Macintosh, for the defendants, respondents.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the action was brought to recover the amount alleged to be due and payable under a mortgage made by one Sonshine to the plaintiff. Sonshine sold his equity of redemption in accordance, it was said, with an agreement between him and the defendants that they should "assume and pay off" this mortgage; but it was also said that Sonshine at the same time, and as part of the same transaction, agreed with them to pay off mortgages upon certain lands, the equity of redemption in which they conveyed to him. The deed from Sonshine to the defendants contained a form of covenant—a clumsy form—on the part of the defendants to pay off the mortgage upon the land conveyed by Sonshine to them—the mortgage in question in this action. But the deed in which this form of covenant was contained was never executed by either of the defendants. It was signed, sealed, and delivered by Sonshine and his wife only.

Treating the form of covenant as if really a covenant, Sonshine subsequently assigned all benefit of it to the plaintiff; and this

action was brought upon that assignment of that covenant, and upon that only.

There was, however, no covenant, and so there was no foundation for this claim—whatever right there might be, if any, between any of the parties, by reason of the defendants having acquired the land on the terms and in the manner mentioned: see Witham v. Vane (1881), 44 L.T.R. 718; Challis on Real Property, p. 341; Boultbee v. Gzowski (1896), 28 O.R. 285; Am. & Eng. Encyc. of Law, 2nd ed., vol. 8, p. 65.

The point was not a purely technical one: the plaintiff could have no right against the defendants, personally, except under an assignment from Sonshine, and there was nothing to shew that the plaintiff had any right to compel Sonshine to assign any right against the defendants to him; and in regard to any implied obligation on the part of the defendants to pay off the mortgage, or otherwise protect Sonshine against it, it might be that there were mutual obligations which should prevent Sonshine enforcing this obligation without fulfilling his like obligation to pay off the mortgage upon the lands conveyed to him by the defendants.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

*C. v. C.

Husband and Wife—Alimony—Validity of Marriage—Previous Foreign Divorce of Wife—Validity in Ontario—Domicile—Jurisdiction of Foreign Court—Status of Husband to Attack Divorce.

Appeal by the defendant from the judgment of MIDDLETON, J., 11 O.W.N. 342, 38 O.L.R. 481.

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

H. H. Dewart, K.C., and R. T. Harding, for the appellant.

J. W. Bain, K.C., and Peter White, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs; MEREDITH, C.J.C.P., dissenting.

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

SECOND DIVISIONAL COURT. JUNE 8TH, 1917

*STRUTHERS v. BURROW.

Negligence—Unsafe Premises—Injury to Person Going there on Lawful Business—Invitation—Leave—Findings of Jury—Evidence.

Appeal by the defendants from the judgment of KELLY, J., ante 19.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., RIDDELL, LENNOX, and ROSE, JJ.

George Lynch-Staunton, K.C., and E. F. Lazier, for the appellants.

S. F. Washington, K.C., and J. G. Gauld, K.C., for the plaintiff, respondent.

RIDDELL, J., read a judgment, in which he said that the plaintiff bought from the defendants a pair of scales; receiving notice that these were ready for him, he went with his waggon to the defendants' factory for them. He went into the defendants' office, and was referred to an employee upstairs, who told him to go to a certain platform outside the building, and that the scales would be brought to him there. He drove around and saw a delivery or "loading" platform, stopped his waggon some 20 feet away, got out on the ground and waited for his scales to be brought out; it was cold, and he got tired of waiting; he made up his mind to get up on the platform, go into the factory by the open door, and see what caused the delay. The platform was only about 4 feet wide; it had no steps leading up to it, although a neighbouring platform had. There were, however, a few blocks of wood, 3 feet long, lying loose at one end of the platform, which apparently had been used by some one to mount the platform. The plaintiff tried to get on the platform by these blocks, toppled over, and was injured.

In this action, to recover damages for the plaintiff's injury, the jury, in answer to questions, found: (1) negligence on the part of the defendants "for not having proper steps or no steps at all;" (2) that the negligence caused the injury; (3) that the cause of injury was in the fall which the plaintiff received on the defendant's property; (4) that the plaintiff could not, by the exercise of reasonable care, have avoided the injury; (5) that he

was justified in doing as he did; (6) that, as there was no other means to get on the platform, there was an invitation by the defendants to the plaintiff to use the steps or blocks; (7) that the purpose for which the invitation was given was "to receive goods which was ordered." And the jury assessed the plaintiff's damages at $600.

If there was an invitation to the plaintiff to use the blocks, the defendants were liable. The jury could not reasonably find that there was an invitation for any purpose, but the judgment should not be placed on that ground.

The jury found that the invitation was to use the blocks "to receive goods which was ordered." The plaintiff was not using the blocks for any such purpose, but to mount the platform to trespass upon the defendants' factory. He was invited to mount the platform (according to the jury) if and when he was "to receive goods;" and that time had not come. By the instructions he received, he was to wait, and the goods would be brought out on the platform. Even if the jury were right, then and then only was the invitation effective.

The appeal should be allowed and the action dismissed, both with costs.

ROSE, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., was also of opinion, for reasons stated in writing, that the appeal should be allowed and the action dismissed. He stated that the plaintiff's right to recover did not depend upon an invitation; the mere leave of the defendants would, in certain circumstances, be quite enough. The plaintiff could retain his judgment only: (1) if the defendants owed to him some legal duty; (2) which they neglected; (3) thereby causing him the injury in respect of which he had been awarded damages. The main question was, whether the plaintiff had leave from the defendants to mount the platform in the way he was attempting to mount it when injured. There was no evidence upon which reasonable men could find that the plaintiff had the leave of the defendants to mount the platform; and there was much evidence to the contrary.

MAGEE, J.A., and LENNOX, J., dissented, for reasons given in writing by the latter.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

*BALDWIN v. O'BRIEN.

Way—Public or Private Lane—Establishment of, as Highway—Evidence—Dedication—Right of Way—Access to Land—Devise—Appurtenance—Proof of Occupancy—Lost Grant—Prescriptive Right—Limitations Act, sec. 35.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 10 O.W.N. 304.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., LENNOX and ROSE, JJ.

E. D. Armour, K.C., for the appellants.

W. N. Tilley, K.C., and Strachan Johnston, K.C., for the defendants O'Brien, McLean, and Verral, respondents.

J. A. Paterson, K.C., for the defendants the North American Life Assurance Company, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that substantially the action was for trespass to land; and the defences set up at the trial were: a denial of the plaintiffs' title in an assertion that the place in question is a highway; and that, if not, the defendants had a right to do the things complained of under a devise, or a lost grant, or by reason of the provisions of the Statute of Limitations.

The first defence rested upon an alleged dedication of the land in question, by an early owner of it, as a public highway, and an acceptance in law and fact of that dedication. The Chief Justice said that he was unable to find any kind of evidence of such dedication, or of any thought of dedication, on that owner's part.

The next defence was, that the land was not a highway, but a private lane over which the defendants have a right of way, with access to their land—that at the time of the first owner's death the way existed, and that a tenant of that part of lot 8 which they now own had, under the owner, the use and benefit of such a way and means of access, and that, though no such right was expressly devised with lot 8, that right of way and right of access went with it as something appurtenant to it. But there was no proof of any such occupancy at the time of the first owner's death or in her lifetime; and, if it were proved, it could

not help the defence, for the only right of way and access that could have been had was one lasting only for the term of years which the tenant had, and which came to an end with its determination, however brought about; and, again, the right was of passage over the way and into this part of lot 8 as given to and enjoyed by the tenant—a passage which passed away with the tenancy and had been entirely obliterated, so that no one could tell where or what it actually was.

Then the defendants urged that, not only was there no highway, but there was no expressed grant, and that they held under a lost grant, although there was no room in reason for any such contention. The whole history of and devolution of estates in the land were known; and, if this were not so, it could not be said that the defendants had enjoyed the rights they claimed as of right, nec vi, nec clam, nec precario. A lost grant may be presumed when the way as of right has no other reasonable explanation; here it was fully explained as a public right which, it turned out, did not exist.

The contention that the plaintiffs' right of action was barred by sec. 35 of the Limitations Act was also made. Ever since the building now occupied by the defendants was erected, they and those through whom they claimed had had the full enjoyment of all the light that this lane enabled them to obtain through the existing windows on that side of the building; and they had had a door in the building giving access to it from the lane, as well as some means of access from the lane to their yard, and seemed to have made use of these means of access to and from public streets, by way of this lane, whenever they chose to do so, except when the iron gates at the south end of it were locked. But the actual extent and character of that use of the lane was very indefinitely shewn. The statute requires that the right shall be actually enjoyed by a person claiming right thereto; and claiming right thereto means claiming a private right—not a right as one of the public; and the enjoyment must have been for 20 years next before the time of the commencement of this action. It was quite plain that no such enjoyment of any definite or indefinite right of way or access had been had. For that length of time, and ever since the trial of a former action called "the tenants' case," at the least, any and all such rights had been exercised as by one of the public having land fronting on a highway; and, the highway defence failing, the lost grant and prescriptive right defence must fail also.

The appeal should be allowed, and judgment should be given

for the plaintiffs, with nominal damages and costs on the Supreme Court scale without set-off.

MAGEE, J.A., concurred.

LENNOX, J., agreed in the result.

ROSE, J., read a judgment, his conclusion being the same.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

*RE FAULKNERS LIMITED.

Company—Winding-up—Creditor's Claim for Price of Goods—Preference or Priority over Ordinary Creditors—Sale from Samples, but not according to Sample—Goods Shipped from Abroad—Freight Paid by Purchaser—Act of Insolvency before Acceptance of Goods—Time when Property in Goods Passed—Right of Inspection—Fraud—Possession—Stoppage in Transitu.

Appeal by Arthur & Co., creditors, from the order of CLUTE, J., ante 50.

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

A. C. Heighington, for the appellants.

G. D. Kelley, for the liquidator, respondent.

MEREDITH, C.J.C.P., read a judgment in which he first set out the facts. In October, 1914, Faulkners Limited, the company in liquidation, who were retail dry goods merchants in Ottawa, Ontario, gave to a travelling salesman of the appellants, who were wholesale dealers in Glasgow, Scotland, an order for goods, after the salesman had displayed samples, from which the company selected the goods they required. The goods were shipped from Scotland, and arrived in Ottawa on the 19th February, 1915. The company on the 3rd March took the goods from the carriers (paying the freight)and placed them in a bonded warehouse. The duty was paid upon nearly all the goods, and they were taken by the representatives of the company into stock

on the 4th, 6th, 9th, 11th, and 25th March, 1915. On the 20th March, 1915, an order was made for the winding-up of the company under the Dominion Act. In July, 1915, an affidavit, proving the appellants' claim against the insolvent estate, was made by their registered attorney in Canada, in which it was said that the company were justly and truly indebted to the appellants in the sum of $2,739.25 for goods supplied, giving particulars, and that the appellants held no security for their claim.

The appellants had changed their position, and now contended: (1) that the contract made in October, 1915, was procured by the fraud of the company, and therefore no property in or right to the goods ever passed to the company; and (2) that, in any case, no property in the goods ever passed, under the transaction in question to the company, but they wrongly converted the goods to their own use; and that the liquidator could stand in no better position than they, and so he was guilty of a wrongful conversion of the appellants' goods in selling them, as he did, as part of the insolvents' estate.

The Referee in the winding-up and Clute, J., upon the appeal from the Referee's certificate, were both of opinion that the appellants' real rights in the matter were those referred to in the affidavit of their attorney in July, 1915, and that there was no substantial ground for the changed claim.

The learned Chief Justice was unable to find any fact proved upon which any charge of fraud could even plausibly be made. There was no assertion made, nor any assurance asked for, at the time of the sale in October, 1914, or at any time, that the company were in solvent circumstances; and, if there had been, there was no evidence that they were not.

The other ground of the appeal seemed to be that the property in the goods had not passed to the purchasers (the company) on the 3rd March, 1915, when a letter was written by one Martin intimating that they were unable to meet their liabilities as they fell due and proposing an extension of time for payment of their debts—that the property had not passed, because the goods were sold according to sample and had not been inspected and accepted by the purchasers when that letter was written; that, therefore, the property in the goods always remained in the seller; that the subsequent taking possession of them by the buyers was a wrongful act which gave no right in them to the buyers; and that the liquidator, therefore, never had any right to them, and, having sold them, was answerable to the appellants for the price or value of the goods.

There cannot be a rescission of the contract without the con-

sent of the seller; but there may be a tacit concurrence in putting an end to the contract, and actions may speak as well as words: Morgan v. Bain (1874), L.R. 10 C.P. 15; In re Phœnix Bessemer Steel Co. (1876), 4 Ch. D. 108; Ex p. Stapleton (1879), 10 Ch. D. 586; 35 Cyc. 134, 135, 253. This case, however, did not come within that rule. The Martin letter was not a letter of the buyers, but of an accountant representing creditors of the buyers. And, not only had the property in the goods passed to the buyers before the 2nd March, 1915, but the possession also had passed to them. The sale of the goods was not a sale according to sample, but a sale from samples; the goods when delivered were not to be compared with the samples, and there was no necessity for inspection. The property in the goods passed to the buyer when the goods, having been selected and packed in accordance with the intention of the parties, were delivered to the carriers for and in the name of the buyers; and the possession then also passed to the buyers—bills of lading in their favour being sent to them. When property passes, the right to stop in transitu is an effective safeguard.

The appeal should be dismissed.

RIDDELL, LENNOX, and ROSE, JJ., agreed that the appeal should be dismissed.

Appeal dismissed.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

ROELOFSON v. GRAND.

Contract—Repairs to Elevators in Building—Ascertainment of Terms of Oral Contract—Evidence—Agreement—Conditions on which Work Undertaken—Work Done of no Benefit—Findings of Trial Judge—Appeal—Counterclaim—Costs.

Appeal by the defendant from the judgment of BOYD, C., 10 O.W.N. 213.

The appeal was heard by MACLAREN and MAGEE, JJ.A., RIDDELL, LENNOX, and MASTEN, JJ.

Strachan Johnston, K.C., for the appellant.

M. A. Secord, K.C., for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he set out the facts. The defendant, who lived in England, was the owner of a building

in London, Ontario, which was occupied by Grays Limited. In the building were two hydraulic elevators, which did not work to the satisfaction of the tenants, and it was desirable that a change should be made. Persons acting for the defendant had negotiations with the plaintiff, an elevator-builder at Galt, which resulted in the plaintiff doing considerable work on the building, for the price or value of which he brought this action. The defendant not only defended, but counterclaimed for damages. The late Chancellor dismissed the counterclaim with costs, found the plaintiff entitled to judgment, and directed a reference to fix the amount on the principle laid down by him in his reasons for judgment.

The plaintiff, after reading a report on the condition of the elevators, and after an examination of the "basement end" of the elevators, gave an assurance to the defendant's agents that he could remedy the trouble, assuming the report to be right. The plaintiff was an expert, had been sent for as such, and was exercising his judgment as such; the defendant's agents were not experts, and desired an assurance from the plaintiff for their future guidance. The plaintiff said he gave the defendant's agents an approximate price, $2,000—but must make a thorough examination before he could say definitely what the cost would be. All parties understood that the elevators could be repaired for about $2,000 if the report was correct. The defendant's representatives were willing to pay $100 more, that the plaintiff might assure himself of the accuracy of the report. He was to notify them if he found the report wrong in such a way that he could not repair the elevators for about $2,000.

The contract was as though the defendant's representatives had said—and the plaintiff had assented—"Go on and repair the elevators if it will not cost more than about $2,000; we are willing that you shall put us to $100 expense in determining if you can do the job for that money; but, if you find that you cannot do it, let us know before proceeding further."

Instead of doing this, the plaintiff went on with the work; and now, for work which has been wholly useless, desires to charge the defendant with over $5,000.

The plaintiff failed; and the defendant's appeal should be allowed with costs, and the action dismissed with costs.

On the evidence adduced, the counterclaim was properly dismissed; and no case appeared to be made out for allowing the matter to be opened up in this action or another. The appeal as to the counterclaim should be dismissed, but without costs.

MAGEE, J.A., agreed.

LENNOX, J., agreed in the result, for reasons stated in writing.

MACLAREN, J.A., and MASTEN, J., dissented.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 8TH, 1917.

PENDER v. HAMILTON STREET R.W. CO.

Trial—Improper Language Addressed by Counsel to Jury—Inflammatory Tendency—Possible Prejudice—Objection Made at Trial—Course Open to Trial Judge—Verdict of Jury Set aside and New Trial Ordered.

Appeal by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff for the recovery of $1,500 damages and costs in an action by an employee of the defendants for injury sustained while being carried to his work on a car of the defendants, by reason (as alleged) of the negligence of the servants of the defendants, in charge of the car.

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

D. L. McCarthy, K.C., and A. Hope Gibson, for the appellants.

J. L. Counsell, for the plaintiff, respondent.

LENNOX, J., in a written judgment, said that the defendants asked for a new trial upon the ground that counsel for the plaintiff in addressing the jury said: "If the corporation are going to get out of this, there is only one remedy, and we are here to ask you to give it to us. They can force you to go to the Court of Appeal or the Supreme Court. They will do nothing for you. You have got to bring them into court. They think they can kill a man for $1,000. I think you are entitled to take into account the way the street railway operate these cars, and put one car on to save a little money when there should be five or six cars on, and herd the people in like cattle. I want you to startle the company by your verdict in this case." The defendants contended that these statements were unjustifiable, inflam-

matory, extravagant, misleading, and calculated to prejudice the jury against the defendants, and prevent, as they in fact did, a fair trial of the action. Counsel for the defendants objected to the language quoted at the time it was used. It was not denied that it was used.

The language was improper, and was likely to prejudice the jury—that was enough. It would have been competent and quite proper for the trial Judge to have discharged the jury and have forthwith determined the issues himself or have called another jury: Dale v. Toronto R.W. Co. (1915), 34 O.L.R. 104; Sornberger v. Canadian Pacific R.W. Co. (1897), 24 A.R. 263; Combs v. The State (1881), 75 Ind. 215.

It was to be regretted that the verdict of the jury must be set aside and a new trial ordered, but in this case it was necessary in the interest of justice.

Costs of the former trial and of the appeal should be costs to the defendants in any event.

MEREDITH, C.J.C.P., in a brief judgment, said that all the members of the Court agreed with the conclusions of Lennox, J.; and he (the Chief Justice) wished only to add an expression of his regret that there must be another trial of this case—or a second trial of any case—and to say that the plaintiff had made it unavoidable in this case; he had, through over-zeal, prevented a fair trial, in the first instance, and he was now unwilling that this Court should determine all matters in question in the action upon this appeal. The ruling now made was quite in accord with that in Loughead v. Collingwood Shipbuilding Co. (1908), 12 O.W.R. 697, affirming the judgment in 16 O.L.R. 64, and that in Gage v. Reid (1917), 38 O.L.R. 514; and it was to be hoped that the effect of such rulings would be, that restraint upon extravagance of expression, in the conduct of cases, which, whilst aiding in the due administration of justice, does not in any way tend to the weakening of a party's cause, in the long run.

New trial ordered.

HIGH COURT DIVISION.

CLUTE, J. JUNE 2ND, 1917

CONWAY v. ST. LOUIS.

Husband and Wife—Household Goods Purchased by Wife out of Savings from Moneys Paid to her by Husband as Housekeeping Allowance—Married Women's Property Act, R.S.O. 1914 ch. 149—Separate Property of Wife—Chattel Mortgage Made by Husband.

Action for trespass to land and goods and for an injunction and other relief.

The action was tried without a jury at Sandwich.
F. D. Davis, for the plaintiff.
J. L. Murphy, for the defendants.

CLUTE, J., in a written judgment, said that the alleged trespass was at the instance of the defendant Margaret McLaughlin, by her bailiff, the defendant St. Louis, seizing goods alleged to be the property of the plaintiff in a house in Windsor, in which the plaintiff lived with her husband; the seizure purporting to be under a chattel mortgage made by the plaintiff's husband and assigned to the defendant Margaret McLaughlin. The plaintiff was not a party to this mortgage. She did not claim any of the chattels which were the household goods of her husband at the time the mortgage was made, but claimed only goods purchased by her out of savings from an allowance for housekeeping made to her by her husband and moneys given to her by her son and her father.

At the trial, the plaintiff's claim for trespass to land was dismissed, it being held that, as the husband paid the rent of the house, although the bargain for the renting was made by the plaintiff, she should be regarded as living with him in his house; and, therefore, she had no legal right to claim damages for the defendants' entry upon the premises to seize goods there belonging to the husband.

The defendants, however, seized the goods purchased by the plaintiff with the moneys above mentioned; and the learned Judge found that these goods were her property under the Married Women's Property Act, R.S.O. 1914 ch. 149, and that

the defendants had no right to seize these goods under the chattel mortgage: Shuttleworth v. McGillivray (1903), 5 O.L.R. 536.

Judgment for the plaintiff with costs, declaring her entitled to the goods claimed by her, not including any goods purchased by her husband, and to an injunction restraining the defendants from selling or otherwise interfering with the goods of the plaintiff.

KELLY, J. JUNE 6TH, 1917.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Contempt of Court—Judgment Restraining School Board from Paying Salaries to Unqualified Teachers—Disobedience by Chairman—Motion to Commit—Objections to Motion—Practice—Motion Made in Action in which Judgment Obtained—Right to Proceed against Officer of Corporation—Judgment not Served on Officer—Knowledge of Judgment—Evidence.

Motion by one Genest, the Chairman of the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa, for an order quashing and dismissing a motion launched by the plaintiffs to commit the applicant for breach of an injunction granted by the judgment of LENNOX, J., in this action, dated the 17th December, 1914 (see 23 O.L.R. 245, 261), restraining the defendant Board from continuing in its employment or paying salaries to teachers who do not possess the proper legal qualifications or who are not authorised to teach pursuant to the provisions of the Separate Schools Act or the regulations of the Department of Education of Ontario.

The motion was heard in the Weekly Court at Toronto.

J. H. Fraser, for the applicant.

W. N. Tilley, K.C., for the plaintiffs.

KELLY, J., in a written judgment, said that the applicant urged that the motion to commit was irregular and a nullity; that the contempt, if any, was not in the presence of the Court; that the only mode of bringing the applicant before the Court was by summons; and that it had not been shewn that a copy of the judgment said to have been disobeyed had been served upon him.

The motion to commit was, as a matter of practice, properly launched in the action in which the judgment was obtained. The

right to proceed against an officer of a corporation for a breach of an injunction by the corporation was established by Re Bolton and County of Wentworth (1911), 23 O.L.R. 390, 393. See also Rule 553; City of Toronto v. Toronto R.W. Co. (1917), ante 111.

It is sufficient if the person whose committal is sought has knowledge of the judgment: United Telephone Co. v. Dale (1884), 25 Ch. D. 778.

It could not be said that the applicant had no knowledge of the judgment. It was stated in the argument, and not contradicted, that the evidence to be submitted by the plaintiffs on their motion to commit indicated that he had that knowledge; and there were other reasons why, on that ground, the motion to quash should not be entertained at this stage of the proceedings.

It would be an interference with the plaintiff's right to have the motion disposed of on its merits if the present application—launched on technical grounds only—were to be granted on the evidence now before the Court.

Motion dismissed with costs.

CLUTE, J. JUNE 7TH, 1917.

NEWCOMBE v. EVANS.

Will—Testamentary Capacity—Undue Influence—Conspiracy—Evidence—Appointment of "Conservator" by Foreign Court—Admissibility—Execution of Will—Hand of Testator Guided by Witness—Witness not Told Nature of Document—Findings of Trial Judge.

Action by the widow of John A. Newcombe, deceased, to establish as his last will and testament a testamentary writing executed on the 27th October, 1915, in which the plaintiff was named as sole legatee and executrix.

The action was removed from the Surrogate Court of the County of Essex into the Supreme Court of Ontario: see Re Newcombe v. Evans (1916), 37 O.L.R. 354.

The property of the deceased was chiefly in the State of Massachusetts, and was estimated at from $25,000 to $30,000.

The defendant, the sister of the deceased, set up that the will was not duly executed; that the deceased was not, at the time of the execution of the document, of sound and disposing mind, memory, and understanding; that the execution of the document was obtained by undue influence and was the result of a con-

spiracy between the plaintiff and members of her family to secure the property of the deceased.

The action was tried without a jury at Sandwich.

J. H. Rodd, for the plaintiff.

O. E. Fleming, K.C., and A. H. Foster, for the defendant.

CLUTE, J., in a written judgment, examined the evidence with care. He said that the deceased at times drank to excess, and in 1910, under the laws of Massachusetts, where he then lived, a "conservator" was appointed to take charge of his property. This control continued until his death. He took up his abode in Ontario in May, 1914, and married the plaintiff on the 14th February; he died on the 28th November, 1915, being then 65 years of age.

Evidence in regard to the appointment of the conservator was admitted as proper for the consideration of the Court in determining the question of soundness of mind. It would be admissible for that purpose in Massachusetts also: Clifford v. Taylor (1910), 204 Mass. 358.

The evidence was, that the deceased did not drink after his marriage.

On the 3rd October, 1915, he had an apoplectic stroke, from which he recovered, and was able to go out alone; his mental condition was clear. He gave instructions for the will and executed it himself, but his hand was held by the plaintiff's brother, who was one of the witnesses, to steady it when he was signing.

The learned Judge said that he was satisfied that the deceased had his will prepared and signed it in the manner described by the plaintiff's witnesses, and that the execution was not obtained by undue influence. There was not a tittle of evidence to justify the charge of conspiracy. At the time the will was executed, the deceased was of sound mind and memory; the execution of the will was his own act, without influence or fraud of any kind in regard to the execution or otherwise.

Reference to Halsbury's Laws of England, vol. 28, p. 548, paras. 1085, 1087.

A valid execution of a will may be had where the testator's hand is guided by an attesting witness: Wilson v. Beddard (1841), 12 Sim. 28; Jarman on Wills, 6th ed., p. 107.

It is immaterial that the witness is not told that it is a will: ib. 114; In Bonis Moore, [1901] P. 44.

Judgment for the plaintiff declaring that the will should be admitted to probate, with costs.

MASTEN, J. JUNE 8TH, 1917.

RE CUNNINGHAM.

Will—Construction—Life-tenant of Lands Devised—Executors and Trustees—Control and Management of Lands—Legal Estate—Equitable Estate—Discreation—Municipal Taxes—Repairs—Dilapidations—Insurance Premiums—Remaindermen.

Motion by the executors of the will of John Cunningham, deceased, for an order determining questions arising upon the will.

The testator died in 1890. He left all his property to his executors "in trust for the use of my grandson William John Newall his wife and children as hereinafter provided after payment of my debts and funeral and testamentary expenses and on my said grandson's death the property is to be for the use of his widow and children during her life so long as she remains unmarried and the executors are to see that the children are properly supported and educated in their discretion and after her death or marriage for the use of my grandson's said issue . . . And my said grandson or his children shall not have the liberty to sell mortgage or otherwise incumber said estate or in any way to mortgage or anticipate the income thereof. . . . But at the death of the last of his children it may be sold and divided equally among their heirs and my grandson's widow is to have the use of said property for life or during widowhood even if he has no issue and in case my said grandson dies without issue and his wife being dead or married then the property is to be sold and the proceeds divided equally among the Orphans Home Boys Home and Girls Home of Toronto."

The grandson survived the testator, and subsequently died, leaving him surviving his widow, Mary Newall, and no children.

The executors sought the advice and direction of the Court as to the right to control and manage the property.

The motion was heard in the Weekly Court at Toronto.

W. Proudfoot, K.C., for the executors.

K. F. Mackenzie, for Mary Newall.

J. H. Fraser, for the residuary devisees entitled in remainder.

MASTEN, J., in a written judgment, said that the legal estate in the lands devised passed to and remained in the trustees, the executors: In re Tanqueray-Willaume and Landau (1882), 20

Ch. D. 465; Van Grutten v. Foxwell, [1897] A.C. 658, 683. The real and personal property went first to the executors charged with the payment of debts; they then had further duties to perform, in case of the grandson's death with widow and children living, viz., to see (in their discretion) that the children were properly supported and educated. For this purpose it would manifestly be necessary that they should have not only the legal estate but the control and management of the property so as to apply the proceeds of it to the purposes indicated by the will. If the grandson died leaving no children, the property was, after the death of the widow, to be sold, and the proceeds divided equally among the residuary devisees in remainder, in which case the executors again have active duties to perform.

Where equitable estates are concerned, the right to give possession to the life-tenant is discretionary with the Court: Taylor v. Taylor (1875), L.R. 20 Eq. 297; In re Bagot's Settlement, [1894] 1 Ch. 177; In re Richardson, [1900] 2 Ch. 778; In re Newen, [1894] 2 Ch. 297, 302.

In the circumstances here existing, it is not the personal occupation, but the management and control of the property which is sought by the life-tenant, and the will manifests the wish of the testator that the management and control of the property should rest with the executors. Hefferman v. Taylor (1888), 15 O.R. 670, and Whiteside v. Miller (1868), 14 Gr. 393, distinguished. In re Wythes, [1893] 2 Ch. 369, and Orford v. Orford (1884), 6 O.R. 6, referred to.

The life-tenant is liable for all taxes imposed on the land: Biscoe v. Van Bearle (1858), 6 Gr. 438; Gray v. Hatch (1871), 18 Gr. 72; but not for repairs necessary to overcome dilapidations: Patterson v. Central Canada Loan and Savings Co. (1898), 29 O.R. 134; Currie v. Currie (1910), 20 O.L.R. 375; nor for insurance premiums: In re Betty, [1899] 1 Ch. 821, at p. 829.

The executors are therefore entitled to exercise the control and management of the property, as against the life-tenant.

The annual municipal taxes are to be borne by the life-tenant; insurance and repairs by those entitled in remainder.

Order declaring accordingly; costs out of the corpus of the estate, those of the executors as between solicitor and client.

WONDER ROPE MACHINE CO. v. SCOTT—CLUTE, J.—JUNE 2.

Fraud and Misrepresentation—Procurement of Trade Agreement—Finding of Trial Judge—Counterclaim.]—Action by Robert Sterling Carter, trading under the name "Wonder Rope Machine Company," to recover $882.50 from the defendants Scott and Harrington and $300 deposited by them with the defendant the Standard Bank of Canada, and to restrain the defendant bank from paying the $300 to any person other than the plaintiff. The moneys were claimed under an agreement by which the defendants Scott and Harrington were to have the exclusive right to sell the plaintiff's machines in the Provinces of Manitoba, Saskatchewan, Alberta, and British Columbia. The defendants charged that the agreement was obtained by the plaintiff by fraud and misrepresentation. The defendants Scott and Harrington counterclaimed the return of $200 paid by them to the plaintiff and $300 paid to the Standard Bank of Canada under the agreement. The action and counterclaim were tried without a jury at Brantford. CLUTE, J., in a written judgment, after setting out the facts, stated his conclusion that the agreement was induced by fraudulent representations made by the plaintiff, and therefore dismissed the action and allowed the counterclaim, both with costs. W. S. Brewster, K.C., for the plaintiff. J. Harley, K.C., and W. A. Lewis, for the defendants.

PINKERTON v. BANKS—BRITTON, J.—JUNE 5.

Contract—Exchange of Lands—Material Misrepresentation—Refusal to Adjudge Specific Performance.]—Action for specific performance by the defendant of an agreement for the exchange of the plaintiff's farm for the defendant's house and land in the city of Toronto. The agreement was dated the 27th September, 1916. The farm was subject to a mortgage for $2,600, bearing interest at 6 per cent. per annum; $100 of the principal was to be paid on the 1st day of October in each year. The defendant was to assume this mortgage. He asserted that it was distinctly a part of the agreement—though it did not appear in the written memorandum thereof—that the $100 payment due on the 1st October, 1916, should be postponed for one year—that is, the plaintiff was to pay it and charge it to the defendant, or was to arrange with the mortgagee to postpone the payment. The plaintiff did not

so pay or arrange, and the mortgagee threatened to take possession. The action was tried without a jury at Toronto. The learned Judge set out the facts in a written judgment and found that the plaintiff had made the representation charged with regard to the $100; that it was material; and, therefore, that the action failed. The defendant gave a promissory note to the plaintiff for $130, but, in the circumstances, was not liable thereupon. Judgment dismissing the action without costs, and declaring the defendant not liable to the plaintiff upon the promissory note. F. D. Rielly, for the plaintiff. Joseph Montgomery, for the defendant.

MARTENS v. ASLING—KELLY, J., IN CHAMBERS—JUNE 6.

Parties—Order Adding Defendant—Discharge of Added Defendant upon Payment into Court of Moneys in Question in Action.]—Appeal by the defendants Asling and Doherty from an order of the Master in Chambers refusing to set aside a former order adding the Toronto Stock Exchange as a defendant. The following order was made by KELLY, J.:—Order that the defendant the Toronto Stock Exchange may, within four days after service of this order upon it, pay into Court the proceeds of the sale of the seat (on the exchange) in question, less its costs of the action (including its costs of this appeal and paying in), and on such payment the action shall be dismissed as against it, and the appeal by the other defendants be dismissed with costs to the plaintiffs against such other defendants. Should the defendant the Toronto Stock Exchange not pay in as above mentioned, this appeal is to be dismissed with costs against the defendants Asling and Doherty. P. White, K.C., for the defendants Asling and Doherty. R. C. H. Cassels, for the defendant the Toronto Stock Exchange. F. Arnoldi, K.C., for the plaintiffs.

COLERIDGE v. DAVIS—SUTHERLAND, J.—JUNE 7.

Mortgage—Action on—Defence—Failure to Prove—Counterclaim.]—Action by the administrator of the estate of Selina Ann Coleridge, deceased, upon a mortgage of land made by the defendant to the deceased to secure the sum of $600. The plaintiff sought a personal judgment for the amount due upon the mortgage and, in default of payment, sale of the land. The land was conveyed to the defendant by the deceased by a deed which stated the consideration to be $700, and the mortgage for $600 was made by him at the same time. The defendant pleaded that the deed to him was a mere trust deed for sale, that it was not intended that the mortgage should be paid, and he said that he was willing to turn over the property to the plaintiff as administrator. The defendant counterclaimed for some chattels alleged to have been left by him for safekeeping with the deceased. The action and counterclaim were tried without a jury at Walkerton. SUTHERLAND, J., in a written judgment, stated the facts and carefully considered the evidence. He found the facts against the defendant, gave judgment for the plaintiff as prayed with costs, and dismissed the counterclaim with costs. Sir George Gibbons, K.C., for the plaintiff. A. S. Clarke, for the defendant.