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SUPREME COURT OF CANADA.

NOVEMBER 29TH, 1920.

RE CLEGHORN.

CHOQUETTE v. CLEGHORN.

Will—Construction—Right of Occupancy by Wife and Daughters of Testator—Provision for Conveyance to Daughters at End of Occupancy—"Upon Payment" of Sum to Widow in Lieu of Dower—Condition—Charge upon Property—Interpretation by Court of Ambiguous Words.

Appeal by Ella A. Choquette from the judgment of the First Divisional Court of the Appellate Division, Re Cleghorn (1919), 45 O.L.R. 540.

The appeal was heard by DAVIES, C.J.C., IDINGTON, DUFF, ANGLIN, BRODEUR, and MIGNAULT, JJ.

J. J. Maclennan, for the appellant.

H. J. Scott, K.C., for Clara Gardner Cleghorn, the widow of the testator, respondent.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs.

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 29TH, 1920.

*RE SOLICITOR.

Solicitor—Taxation of Bill of Costs Rendered to Client—Tariff—Rule 676—Allowances over and above Party and Party Costs—Discretion of Taxing Officer—Appeal—Assessment as upon Quantum Meruit—Examinations in Cause—Fees of Examiner—Disbursements—Postponed Payment—Liability of Solicitor—Absence of Dishonesty—Mistake in Item of Bill—Correction.

Appeal by the client from the order of MIDDLETON, J., 18 O.W.N. 225, 47 O.L.R. 522.

The appeal was heard by MULOCK, C.J. EX., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

T. Hislop, for the appellant.

G. T. Walsh, for the solicitor, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. DECEMBER 2ND, 1920.

CITY OF CHATHAM v. CHATHAM GAS CO. LIMITED.

Ontario Railway and Municipal Board—Exclusive Jurisdiction—Increase in Price of Supply of Natural Gas—Agreement between Gas Company and City Corporation—Ontario Railway and Municipal Board Act, secs. 21 (1), 22—Public Utility—Action to Restrain Company from Increasing Price—Motion for Interim Injunction Adjourned until the Trial.

Appeal by the plaintiffs from the order of LOGIE, J., ante 166, dismissing the plaintiffs' motion for an interim injunction.

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

H. S. White, for the appellants.

W. N. Tilley, K.C., and J. G. Kerr, for the defendants, respondents.

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

THE COURT varied the order by directing that the motion for the interim injunction should be adjourned until the trial of the action; costs of the motion and appeal to be costs in the cause, unless otherwise ordered by the trial Judge; both parties to expedite the trial.

HIGH COURT DIVISION.

ORDE, J., IN CHAMBERS. NOVEMBER 29TH, 1920.

*RE CROTEAU & CLARK CO. LIMITED.

Bankruptcy and Insolvency—Petition in Bankruptcy Followed by Receiving Order—Voluntary Authorised Assignment Made between Date of Service of Petition and Date of Receiving Order—Ineffectiveness—Bankruptcy Act, 1919, sec. 3(a), 4(1), (6), 9.

Motion by the Canadian Credit Men's Association, as receivers, for an order directing the London and Western Trusts Company to deliver possession of the estate of the debtors, the Croteau & Clark Company Limited, to the applicants.

A. W. Ballantyne, for the applicants.
H. S. White, for the London and Western Trusts Company.

ORDE, J., in a written judgment, said that on the 1st November, 1920, Nisbet and Auld Limited filed a petition in bankruptcy against the Croteau Company, an incorporated company, carrying on business as general merchants at Essex, Ontario. Notice of hearing of the petition was given for the 11th November, 1920, and the petition and notice were served on the debtors on the 2nd November, 1920. On the 11th November, no one appeared for the debtors, and a receiving order was made, adjudging the debtors bankrupt, and appointing the present applicants receivers of the estate. When the receivers proceeded to take possession of the assets of the debtors, they found the London and Western Trusts Company in possession, under what purported to be an authorised assignment under the Bankruptcy Act, which the debtors had made to them, as authorised trustees, on the 8th November, 1920. The trusts company had taken charge and called a meeting of creditors for the afternoon of the 17th November, 1920. This motion was then launched.

The trusts company urged that, as sec. 9 of the Bankruptcy Act, 1919, provides that "an insolvent debtor may, at any time

prior to the making of a receiving order against him, make to an authorised trustee . . . an assignment of all his property for the general benefit of his creditors," the voluntary assignment of the 8th November had priority over the receiving order of the 11th November and rendered the latter ineffective. But an authorised assignment is itself an act of bankruptcy, upon which the Court may, if it see fit, upon the petition of a creditor, declare the debtor bankrupt and make a receiving order: secs. 3 (*a*) and 4 (1); and the Court may, upon such application, if satisfied that the estate can be best administered under the assignment, dismiss the petition: sec. 4 (6).

Upon the presentation of the petition to the Court, the Court's power is absolute to determine whether or not a receiving order shall be made, notwithstanding any prior authorised assignment. Section 4 (6) cannot apply to a case where the debtor, with the palpable intention of choosing his own trustee, makes an assignment after he has been served with the petition and before the return of the notice of hearing.

It should be understood that insolvent debtors will not be permitted to make a practice of choosing their own trustees after a bankruptcy petition has been served.

The learned Judge made an order declaring that the receiving order of the 11th November had rendered the assignment of the 8th November ineffective, and directing the trusts company forthwith to deliver the debtors' property to the receiver appointed by the receiving order.

This order was subsequently (by agreement) varied by setting aside the receiving order and allowing the estate to be administered under the assignment (sec. 4 (6)); but the only reason for permitting this was that the creditors, including the creditor who presented the petition in bankruptcy, so desired it, and the trusts company had acted in good faith and in the belief that, in claiming to hold possession in spite of the receiving order, they were acting within their legal rights.

HOLMESTED, REGISTRAR IN BANKRUPTCY. NOVEMBER 29TH, 1920.

RE HODNETT.

Bankruptcy and Insolvency—Procedure under Bankruptcy Act, 1919—Filing of Authorised Assignment with Registrar—Necessity for—Sec. 11 and Rule 7—Time for Filing—Certified Copy—Affidavits—Filing Fees.

Question submitted to the Registrar, on behalf of the Canadian Credit Men's Association, official trustees, whether or not an authorised assignment under the Bankruptcy Act, 1919, should be filed with the Registrar.

J. M. Bullen, for the applicants.

THE REGISTRAR, in a written memorandum, said that the Act and Rules were not explicit on the point, and the question seemed to depend on what was the proper inference to be drawn from the Act and Rules as they stood. It is a necessary inference from what is stated in the Act and Rules that all assignments shall be filed with the Registrar without delay after the making thereof; and this may be demonstrated by a careful consideration of sec. 11 and Rule 7.

The learned Registrar, however, was unwilling to make any ruling, because the question of payment of fees to the officers (of whom he was one) was involved; and he respectfully referred the question to the Judge in Bankruptcy, suggesting that not only the main question as to the necessity for filing assignments should be considered, but also: (1) the time for filing; (2) whether an original should be filed or whether a copy certified by the trustee would suffice (see sec. 11 (3), (8)); (3) whether the copies of the affidavits required by sec. 11 (11) and form 19 should also be filed; and (4) whether, if the affidavits and assignment should all be filed, a separate filing fee should be charged for each affidavit (see tariff item 13).

ROSE, J. NOVEMBER 29TH, 1920.

RE RYALL.

Will—Construction—Devise to Son—Ineffective Attempt to Divest Estate upon Death "without Leaving Lawful Heirs"—Estate in Fee Simple or Fee Tail—Originating Motion—Costs—Executors not Made Parties.

A motion on behalf of John A. Ryall for a declaration as to the effect of a clause contained in the will of Charles Ryall, deceased.

The motion was heard in the Weekly Court, Toronto.

J. B. Clarke, K.C., for the applicant.

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

ROSE, J., in a written judgment, said that by the will certain land was left to the applicant, his heirs and assigns forever, subject to the performance of certain conditions, which, it was said, had been performed; and by a later clause it was provided that, in the event of the decease of any of the children of the testator—the applicant being one of such children—without leaving lawful heirs, the lands devised to them should belong to the next child in point of age.

The testator left, besides the applicant, six children. Five of these were living and were served with notice of the hearing of the motion. The sixth, a son, had died, leaving children, one of whom was an infant, represented on the motion by the Official Guardian; the learned Judge thought it a proper case for an order declaring that all those interested in the estate of the deceased son of the testator were represented by the Official Guardian for the purposes of this motion.

The first question asked was, whether the provision in clause 14 of the will, that, in the event of the decease of any of the children of the testator without leaving lawful heirs, the lands "devised to them or either of them shall belong to the next child in point of age," was effective to pass to another child of the testator the lands devised to the applicant, in case the applicant should die "without leaving lawful heirs" him surviving. The Official Guardian did not contend that the clause could be so effective; and, for several reasons, it should be so declared.

There was also mooted on the argument, although it was not expressly raised by the originating notice, the question whether the applicant's estate was an estate in fee simple or an estate in fee tail. There did not seem to be any present necessity for deciding this question, and it would be inexpedient to pass upon it in the absence of any one particularly interested in contending that the applicant's estate was an estate tail.

The executors were not before the Court, and no order could be made for the payment of costs by the estate of Charles Ryall. The only order as to costs would be, that the applicant pay the costs of the Official Guardian.

ROSE, J. NOVEMBER 29TH, 1920.

HURLEY v. ROY.

Vendor and Purchaser—Agreement for Sale of Land—Purchaser's Action for Specific Performance—Attempted Rescission by Vendor—Inability to Convey whole Interest in Land—Unwillingness to Remove Objection to Title—Provision of Agreement—Inapplicability—Willingness of Third Person Entitled to Half Interest to Convey—Abatement in Purchase-price.

A purchaser's action for specific performance of an agreement for the sale and purchase of land.

The action was tried without a jury at Sandwich.

E. A. Cleary, for the plaintiff.

F. D. Davis, for the defendant.

ROSE, J., in a written judgment, said that the question was, whether the defendant was entitled to rescind the contract pursuant to a clause which provided that, if the purchaser should furnish the vendor with a valid objection to the title which the vendor should be unable or unwilling to remove, the agreement should be null and void.

The defendant acquired the land in 1915, and conveyed it, in 1916, to himself and his wife as joint tenants. Later on, he and his wife separated, and at the time when the contract sued upon was entered into they were living apart.

The plaintiff made an effort to purchase in 1919. After some discussion of the price, the defendant said he would sell, but he said it would be necessary that his wife should sign the agreement. He said that he told the plaintiff more than this, but the learned Judge did not think that he did, and did not believe that the plaintiff knew, or had reason to know, that there was any necessity for the wife's signature other than the necessity of barring her dower. After the plaintiff and the defendant had agreed upon a price, and the statement had been made as to the necessity of procuring the wife's signature, the plaintiff and the defendant went to see her at her house, where she expressed a willingness to have the land sold. The defendant and she then consulted apart from the plaintiff, and had some discussion as to whether, in case the sale went through, they should divide the purchase-money, or whether the defendant should keep the purchase-money and allow her a monthly sum for the support of herself and her child. They agreed upon the latter course, and it was because the wife

subsequently changed her mind, and insisted upon having one-half of the purchase-money, less some taxes which she agreed might be charged against her share, that the defendant decided to rescind the contract.

After the wife had expressed her willingness to join in the sale, the parties went to a solicitor to have an agreement prepared. This was the solicitor who acted for the defendant when the defendant bought the land in 1915; but, notwithstanding some statements made by the defendant in the witness-box, there was no reason to think that the solicitor knew that the defendant's wife had acquired an interest in the property, or that there was any reason for her signing the contract other than to agree to bar her dower. The agreement that was drawn and executed was an agreement by which the defendant agreed to sell, and his wife agreed to bar her dower, and the plaintiff agreed to buy. After the title had been searched, it was found that the defendant's wife was jointly interested with him, and the plaintiff had a requisition drawn in which it was said: "We find that Mrs. Roy is a joint owner with you, so we will require conveyance by her instead of a bar of dower." The defendant waited for the 10 days which the plaintiff had for searching the title, and then purported to rescind the agreement. Mrs. Roy, however, executed a conveyance of her interest in the land, and left it with the plaintiff's solicitor in escrow, to be delivered upon payment of one-half of the proceeds of the sale.

In the circumstances stated, the defendant was not entitled to rescind. To hold that he could so so would be, to quote the language of Rigby, L.J., in In re Deighton and Harris's Contract, [1898] 1 Ch. 458, to enable him to "ride off upon a condition to rescind which was not framed with reference to any such case."

The case seemed to be covered by the decisions in Nelthorpe v. Holgate (1844), 1 Coll. 204, and In re Jackson and Haden's Contract, [1906] 1 Ch. 412.

There should be judgment in the usual terms for specific performance, with an abatement of one-half of the contract-price. Reference if necessary to the Local Master at Sandwich. The defendant must pay the plaintiff's costs.

LATCHFORD, J. NOVEMBER 30TH, 1920.

WILKINSON v. WILKINSON.

Will—Construction—Devise of Lands to Son, Subject to Charges in Favour of Wife and Daughter of Testator—Daughter to Have "Home on Lands"—Life-estate not Created—Arrears of Annuity —Legacy—Interest—Limitations Act, secs. 5, 18—Lien on Lands—Injunction.

Action by the widow and the daughter of Charles Wilkinson, deceased, against Thomas Wilkinson, the son and brother of the plaintiffs, for a declaration that the plaintiffs were entitled to a charge upon land devised by the deceased to the defendant, in respect of arrears of an annuity to the widow and a legacy to the daughter and for support and maintenance of the daughter, and for payment of the sums due and in default of payment for realisation of the charge.

The action was tried without a jury at Chatham.

J. S. Fraser, K.C., for the plaintiffs.

R. L. Brackin, for the defendant.

LATCHFORD, J., in a written judgment, said that Charles Wilkinson died in 1905. By his will, after giving certain small specific legacies, he bequeathed to his widow an annuity of $100 for life, which he charged upon his lands, and gave her the use for her life of part of his dwelling and such of his furniture as she might require—the bequests to be in lieu of dower. She was also to be entitled "to necessary support from said land" during her lifetime, "such support to consist of household provisions."

Subject to the charges in favour of his widow, he next devised his lands to his son Bryan for life, with remainder to his son Thomas, the defendant.

A further charge of $500 in favour of his daughter (a plaintiff) was imposed on the devise in remainder, to be paid within one year after the death of Bryan. This devise was further subject to the right of the daughter to "a home on the lands" and to necessary support and maintenance during her lifetime if she should not marry.

The residue of his estate he bequeathed to his son Bryan for life, with remainder to his wife and daughter.

Bryan and the plaintiffs lived together on the farm from the death of Charles until the death of Bryan on the 23rd September, 1918, and were there supported and maintained largely by their

own labours. They had since resided and maintained themselves on the property, which had never been in the possession or occupation of the defendant.

Nothing had ever been paid to the widow on account of the annuity. The daughter was unmarried, and had not been paid the $500.

In July, 1920, the defendant, without offering to pay any of the charges, attempted to remove certain produce of the farm, but was restrained by an interlocutory injunction order made in this action.

The widow claimed 15 yearly payments of $100 each, with interest from the time the several payments accrued, and a lien for the full amount. The daughter claimed the legacy of $500, which became payable on the 24th September, 1919, and $1,000 for arrears of support and maintenance, and a lien.

It was also urged that the daughter had, under the terms of the will, a life-estate in the lands; but the learned Judge determined against this contention, distinguishing Bartels v. Bartels (1877), 42 U.C.R. 22, and Fulton v. Cummings (1874), 34 U.C.R. 331.

The widow was not entitled to more than 10 years' arrears: sec. 5 of the Limitations Act, R.S.O. 1914 ch. 75.

As this action was not brought within 10 years of the time when the several payments for 1906, 1907, 1908, and 1909, first accrued, the widow's right of action was barred as to such payments. The action having been brought within 10 years of the time when the payments from 1910 to 1919 first accrued, she was entitled to $900, and now—the 20th September, 1920, having passed—to $1,000.

Arrears of interest are, however, governed by sec. 18 of the Limitations Act, and interest was recoverable only on the payments falling due in the 6 years after the interest first became due, that is, on and after the 20th September, 1914.

The daughter was entitled to $500, with interest from the 24th September, 1919. She was not entitled to any sum for support and maintenance, as she had always been supported and maintained on the lands.

The plaintiffs were entitled to a lien upon the lands for the amounts stated, with interest pending payment. The injunction should be continued until payment of these sums.

The right of the widow to part of the dwelling and of the daughter to a home on the lands was not questioned.

The defendant should pay the plaintiffs' costs of the action, including the costs of the interlocutory injunction.

KELLY, J. DECEMBER 1ST, 1920.

WUYCHIK v. MAJEWSKI.

Partition—Tenants in Common—Unequal Contributions to Purchase-money of Property—Evidence—Finding of Master—Appeal—Actual Occupation by one Tenant alone—Occupation Rent—Exclusion of Co-tenant—Payment for Improvements and Repairs—Contribution for Rates and Taxes—Commission in Lieu of Costs—Apportionment of—Costs of Appeal.

An appeal by the plaintiff from the report of a Local Master in a partition proceeding.

The appeal was heard in the Weekly Court, Toronto.

N. S. Macdonnell, for the plaintiff, appellant.

A. W. Marquis, for the defendant, respondent.

KELLY, J., in a written judgment, said that the material before him was not in a satisfactory condition; and it was suggested at the close of the argument that he should deal merely with certain matters of law involved in the appeal, and that counsel and the parties would themselves endeavour to agree upon the facts, on a further consideration of the evidence, as they and the Local Master heard it, and as the Master had recorded it in his notes.

As to the first ground of the appeal, there was evidence to support the Master's finding that the defendant had paid on account of the purchase-money of the property certain sums in excess of his half share thereof; and the Master, especially for the reasons indicated, was in a much better position to judge of the credibility of the evidence. The learned Judge was not prepared to disturb the Master's finding on that item.

A question of law was raised as to the right of one tenant in common of land to claim occupation rent against his co-tenant in common, who had been in actual occupation. Much depended on whether the one making such a claim had been excluded from possession by the other; and it was for the claimant to shew such exclusion. Mere want of occupation by one, while the other had been in actual occupation, was not sufficient to establish the claim. It would be otherwise, however, if the one in possession, against whom the claim was made, had been in actual receipt of rent from third persons. Cases also had arisen in which such a claim was allowed where the tenant in common in possession had done acts amounting to an exclusion of the other from possession.

A further question was raised as to the right of one tenant in common making improvements and repairs to be paid therefor.

Reference to Teasdale v. Sanderson (1864), 33 Beav. 534; Rice v. George (1873), 20 Gr. 221; and Halsbury's Laws of England, vol. 24, p. 204.

One of several tenants in common or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor unless he consents to be charged with occupation rent.

It would seem also that, if charged with occupation rent, he would be entitled to contribution for taxes and water rates paid by him.

The appellant also took exception to the apportionment of the commission allowed the parties in lieu of costs, urging that two-thirds thereof should have gone to his solicitors. In partition suits commission in lieu of costs should be divided into fractional parts, and allowance be made to the parties in proportion to the amount of work done by and the responsibility imposed upon them respectively. The learned Judge had no means of determining the relative amount of work and responsibility of the solicitors in these proceedings, and so was not in a position to interfere. The appellant set up that his solicitors had done the greater part of the work of the proceedings. If the Local Master had not determined the matter on a consideration of the above statement of the practice, he should do so; but the learned Judge was not in a position to say that the apportionment had not been reached on this basis.

The learned Judge was not disposed to award any costs of the appeal; but if, after reconsideration of the evidence by counsel so as to arrive at the facts, it should become necessary to raise the question of costs, counsel will be heard.

MIDDLETON, J. DECEMBER 1ST, 1920.

LUCAS v. HOOPER AND PRIEST.

Way—Easement—Right of Way—Construction of Deed—"Premises"—Evidence—Failure to Establish Right—Nuisance—Injunction—Trespass—Nominal Damages—Costs.

Action (1) for a declaration that the plaintiff and his grantees are entitled to a right of way over the rear 8 feet of land owned by the defendant Hooper and occupied by the defendant Priest, as appurtenant to the house and premises known as No. 110 Bathgate avenue, and for an injunction restraining the defendants from using this 8 feet as a place for storage, testing, or repairing of motor-cycles; (2) for an injunction restraining the defendant Priest from

carrying on his business in such a manner as to cause a nuisance or injury to the plaintiff; and (3) for an injunction and damages in respect of a shed erected across the lane which trespassed 2 feet upon the plaintiff's land.

The action was tried without a jury at a Toronto sittings.

E. F. Raney, for the plaintiff.

J. C. McRuer and S. E. Buck, for the defendants.

MIDDLETON, J., in a written judgment, said, after stating the facts, that the plaintiff claimed a right of way over the rear 8 feet of Hooper's land. Hooper denied the plaintiff's right to a way, and refused to sell a right of way for any reasonable price, and this action was the result. The plaintiff asked that the conveyance to one Barnard, under which Hooper claimed, might be construed as shewing that the plaintiff had a right of way appurtenant to the house and premises No. 110 Monarch Park avenue. This was based upon the contention that certain words in the deed from Barnard rendered Hooper's premises subject to this right of way—upon the theory that the plaintiff, as the owner in fee simple of the 8 feet in the rear of Nos. 833 and 835, was the person designated as "the owner of the premises to the east" of the premises granted. But the learned Judge did not regard the clause in the deed relied on as a reservation in favour of the grantor, but as referring to a previous grant to one Russell; and he also thought that the premises to the east of the land granted meant the Russell store, and not the fee in the 8 feet.

The plaintiff failed upon the first branch of the action.

The claim for a nuisance created by Priest also failed. The repair business in motor-cycles done upon the premises by Priest was a very small matter. Any use of the lane would be some annoyance to the occupant of No. 110, but the plaintiff built these premises for use as stores; and, when a dwelling house is crowded upon the very rear of mercantile premises and garages built for use in connection with those premises, the occupants must be prepared to suffer some discomfort.

In the erection of the shed, there was an unintentional trespass upon the plaintiff's land. No complaint was made until this action was begun, and the structure was then at once removed. In respect of this trespass, the plaintiff should recover nominal damages, $1.

Save as to this, the action should be dismissed, and costs should follow the real event and be awarded to the defendants. The defendants, however, should have no costs in respect to the trespass, and the plaintiff should have a set-off of $15 as costs of the claim in respect of that trespass.

LATCHFORD, J. DECEMBER 2ND, 1920.

*BELL v. MATTHEWMAN.

Will—Action to Establish—Proof in Solemn Form—Attempt by Testator to Revoke—Ineffectiveness—Wills Act, secs. 22, 23—"Destroying."

Action by one of the daughters of Arthur Houghton Matthewman, deceased, to establish as his last will and testament a testamentary writing, dated the 20th June, 1902 or 1903.

The action was tried without a jury at an Ottawa sittings.

George McLaurin, for the plaintiff.

R. G. Code, K.C., for the defendants the Royal Trust Company and Ernest H. Matthewman.

C. J. Holman, K.C., for the defendants Alice M. Knowles, Anna A. Sihler, and Ethel Chamberlain.

M. J. Gorman, K.C., for the defendant George P. Matthewman.

J. F. Smellie, for the Official Guardian, representing the infant defendants.

LATCHFORD, J., in a written judgment, said that the plaintiff's father died on the 6th November, 1919. On the 17th December, 1919, the defendant the Royal Trust Company was appointed administrator of the estate of the deceased, all the children of the deceased, including the plaintiff, renouncing their right to administration in favour of the trust company. After the grant of letters of administration, the plaintiff offered the document in question for probate; her application was opposed; and proof in solemn form was ordered by the Surrogate Court. By order, the cause was transferred to the Supreme Court of Ontario.

By the alleged will, the plaintiff and the defendants Alice M. Knowles and Ernest H. Matthewman, three of the children of the deceased, were appointed executors.

The plaintiff stated that the will propounded came into her possession on the 31st October, 1919—a few days before the death. Her father gave it to her, and, as she testified, told her there was a later will, in her favour, but no later will had been found.

Written across the face of the last three paragraphs of the document, in the handwriting of the testator, in ink, were the words and figures: "Cancelled July 22, 1910. A. H. Matthewman." Two lines were drawn in ink through the signature to the will and a cross in ink was traced over the signatures of the three witnesses, but all were left legible.

The will discriminated against two of the testator's children—Ethel and George—and gave to his other children, during their lives only, or to their issue in certain events, merely the income from the estate, while it tied up the corpus until all the children whom it purported to benefit should be dead, when, and only when, the corpus was to be divided per stirpes among their children, if any living.

The purpose of the deceased in delivering to the plaintiff the will which both considered cancelled was, the learned Judge thought, that, when the new will was produced, she would be able to exhibit the cancelled will as evidence that, before he went to live with her, and, as might be suggested, became subject to her influence, he had benefited her and some of his children, to the exclusion of others.

The learned Judge found that the execution of the will of 1902 or 1903—the date at the end of the document had plainly been altered from 1902 to 1903—in conformity with the Wills Act, had been established.

The subsequent will spoken of by the testator had not been found and its execution had not been proved.

The question remaining was, whether the attempted cancellation was effective.

The learned Judge referred to the provisions of secs. 22 and 23 of the Wills Act, R.S.O. 1914 ch. 120, and to a large number of decided cases.

He was of opinion that what the testator did, in writing "cancelled" and striking out the signatures, was done with the intention of revoking the will; but, notwithstanding that, he was constrained by authority to hold that the intended cancellation was ineffective. There was no "destroying" of the will, within the meaning of the statute, as interpreted since 1838.

The will had been proved in solemn form, and letters probate of it should be granted.

The costs of all parties should be paid out of the estate, those of the trust company as between solicitor and client.

MIDDLETON, J. DECEMBER 3RD, 1920.

CECIL v. WETTLAUFER.

Principal and Agent—Agent's Commission on Sale of Company-shares—Commission not Payable until Payment Made for Shares—Payment not Made—Insolvency of Purchaser—Agreement of Vendor to Purchase Assets—Contract—Breach of Implied Obligation not to Do Anything to Prevent Payment.

Action to recover $46,320.40 commission, alleged to be payable by virtue of an agreement in writing dated the 5th September, 1918.

The action was tried without a jury at a Toronto sittings.
A. G. Slaght, for the plaintiff.
Glyn Osler and G. R. Munnoch, for the defendant.

MIDDLETON, J., in a written judgment, said that the defendant was the owner, or potential owner under an option agreement, of certain stock in the Orr Gold Mines Limited, and, by agreement dated the 5th September, 1918, agreed to sell this stock to the Kirkland Porphyry Gold Mines Limited for $513,200.40: $100,000 upon the transfer of the shares; $100,000 on the 1st September, 1919; and $313,200.40 on the 1st September, 1920, the deferred payments being secured by the deposit of bonds charged upon all the assets of the Kirkland company.

The plaintiff had been instrumental in bringing about this transaction, and the agreement sued upon was entered into to define his rights as to commission. The intial $100,000 was paid, and upon that Cecil received a commission of $5,000. The balance of his commission—10 per cent. upon the whole purchase-price—was to be paid as follows: "$10,000 out of the second payment to be made on the 1st September, 1919, when such payment shall have been made; $36,320.04 out of the third payment of $313,000.40, when such payment shall have been made. Should said payments not be made by the Kirkland company Wettlaufer shall be under no liablity to Cecil for the payment of any commission by reason of said sale."

The Kirkland company made no such further payments, but went into liquidation absolutely insolvent; and this alone constituted a complete answer to the claim as put forward.

It was urged that, notwithstanding this, the plaintiff was entitled to recover, either upon the contract or upon the theory put forward in Smith v. Upper Canada College (1920), 48 O.L.R. 120, by reason of a supposed breach by the defendant of an implied obligation on his part not to do anything to prevent payment by the purchaser of the purchase-money out of which the plaintiff was to receive his commission.

The facts relied upon were that, upon the Kirkland company going into liquidation, negotiations took place between the defendant and one Wills, who had put into the company practically all the money it ever had, including most of the $100,000 paid to the defendant, which resulted in an agreement for the purchase by them of the equity in the assets of the company, including the

stock of the Orr company held under the agreement of September, for $10,000, the amount which would pay off the creditors of the Kirkland company and the expenses of liquidation.

This arrangement was undoubtedly made in good faith and as an endeavour on the part of the defendant and Wills, who had most at stake, to try and save something from the wreck. The learned Judge did not think that what was done amounted in any sense to a breach of any implied contract or undertaking on the part of the defendant; and, even if it did, the plaintiff was in no way damnified thereby.

By his bargain the plaintiff was to be entitled to receive commission only as and when the Kirkland company paid the balance of the purchase-money. That company never paid and never was in a position to pay. Had the defendant rescinded the contract by reason of default or by proceedings in the nature of foreclosure, the plaintiff would be entitled to no commission. The defendant was ready to pay the commission if the property was taken off his hands by the purchaser at the price stipulated, but he was not to be liable to pay commission unless the sale was carried out. The sale was not carried out in any sense of the term, and the defendant was now in possession of the property unsold, and again seeking a purchaser. This was not technically what had taken place, but any distinction between this statement and the actual transaction as between the defendant and Wills told against the plaintiff's contention.

Action dismissed with costs.

MIDDLETON, J. DECEMBER 3RD, 1920.

*FERRIS v. ELLIS.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Milling Property—Preservation of Dam—Maintenance of Fishing Privileges—Bond—Obligation Personal to Covenantor and not Running with Land—"Assigns," Omission of, after "Heirs, Executors, and Administrators"—Grant of Fishing Privileges to Third Person—Compensation—Specific Performance with Abatement in Price—Judgement not Binding on Third Person—Rule 602—Judgment Stayed to Allow Motion to be Made upon Originating Notice for Order Binding on Third Person—Costs.

Action by a vendor of land for specific performance of the purchaser's agreement to take and pay for the land.

The action was tried without a jury at Orangeville.
C. R. McKeown, K.C., and J. R. Layton, for the plaintiff.
W. D. Henry, for the defendant.

MIDDLETON, J., in a written judgment, said that by an agreement in writing of the 28th July, 1919, Ferris agreed to sell to Ellis certain land described as "the lands only described" in a deed of the 7th February, 1905, from Gadke to Pound, for the price of $3,000, payable as follows: $200 on the 1st October, 1919; $200 on the 1st January, 1920; $200 on the 1st March, 1920; and the balance, $2,400, to be secured by a mortgage, upon terms set out; interest to be computed from the 1st September, 1919; the title to be free from dower and all other incumbrances. The purchaser was to be allowed to occupy the property from the 1st August, 1919, until in default in respect of the purchase-money; the purchaser was to search the title at his own expense; and, if the vendor, without any default on his part, was unable to make a good title within 10 days from the date of the agreement, and the purchaser declined to take such title as the vendor was able to make, the vendor might withdraw from the contract, on payment to the purchaser of all his expenses reasonably incurred in investigating the title and upon repayment to the purchaser of any money paid on account of the purchase-money; and time was to be of the essence of the agreement.

The first three instalments of $200 were duly paid; and the parties met on the 1st March, 1920, for the purpose of closing the transaction. Objection was then taken to the vendor's title—hence this action.

The property was a grist-mill, situated at the eastern end of a river expansion. When the property was conveyed to Gadke, it was described as a parcel of land which contained 6 $\frac{96}{100}$ acres, upon which a mill and dam were situated; and the conveyance also gave Gadke certain fishing rights. In 1904, however, Gadke transferred all the fishing privileges to a syndicate formed by one Morgan; and, contemporaneously with this, gave a bond to Morgan, in the penal sum of $10,000, conditioned for the preservation of the dam in a good state of repair. By the words of the bond, Gadke bound himself, his heirs, executors, and administrators—assigns were not mentioned.

The learned Judge said that he had come to the conclusion that the obligation which the bond created was purely personal to the covenantor, not because of the absence of the word "assigns," but because the covenant was not one which would run with the land so as to bind the grantee.

Reference to the notes to Spencer's Case (1583), 1 Sm. L.C. (13th ed.) 55, 62, et seq.; Tulk v. Moxhay (1848), 2 Ph. 774;

Haywood v. Brunswick Permanent Building Society (1881), 8 Q.B.D. 403; London and South Western R.W. Co. v. Gomm (1882), 20 Ch.D. 562; Austerberry v. Corporation of Oldham (1885), 29 Ch.D. 750.

The obligation of the bond could not be distorted into a covenant as to the mode of user of the land at all.

The main objection to the title was based upon the bond; but the question of the effect of the grant of the right to use the bank of the stream and the pond for fishing purposes remained. The plaintiff asserted that it was thoroughly understood between the purchaser and himself that the fishing privileges existed and were excepted from the grant. This was in contradiction of the exact terms of the written document; and, while credit should be given to the plaintiff in this respect, he must be held bound by the terms of his written contract; and, therefore, there ought to be compensation in respect of this defect. The compensation should be fixed at $200, and the plaintiff should have judgment for specific performance of the agreement with this abatement of the price.

The opinion expressed in reference to the effect of the bond would not, of course, bind Morgan and his associates; and there might be some hardship in forcing title upon the purchaser where he might in the result find himself saddled with a law-suit. See Smith v. Colbourne, [1914] 2 Ch. 533, 541.

The learned Judge was inclined to think that a somewhat different practice ought to prevail in this Province. By Rule 602 the Court is empowered to determine a question not only as between vendor and purchaser, but so as to bind a third person interested. If the defendant should desire to have Morgan and his associates bound, this judgment should be allowed to remain in abeyance until the defendant should serve notice under that Rule. Such a proceeding would give him an indubitable title, but he would be at the risk of costs.

As the plaintiff thus substantially succeeded, his costs of the action should be added to the price to be paid by the defendant; and the defendant should, within 10 days, make his election as to the giving of notice.

ROSE, J. DECEMBER 4TH, 1920.

BOURQUE v. GREGOIRE.

GREGOIRE v. BOURQUE.

Vendor and Purchaser—Agreement for Sale of Unpatented Land—Public Lands Act—Purchase-money Payable by Instalments—Undertaking by Purchaser to Make Improvements and Do all Things Requisite to Obtain Patent—Time Made of Essence of Agreement by Clause Applicable only to Payment of Instalments—Alleged Breaches by Purchaser—Validity of Agreement—Enforcement—Cutting of Timber by Vendor—Damages—Reference—Costs.

In the first action Bourque asked for a declaration that an agreement, dated the 11th July, 1918, by which the defendant S. Gregoire agreed to sell and Bourque agreed to buy an unpatented lot, for which S. Gregoire had made application under the Public Lands Act, was still in force, and for incidental relief. He also claimed damages in respect of some cutting of timber.

In the second action J. B. Gregoire claimed a declaration that, as against Bourque, he was the owner of the land, and he also asked for incidental relief.

The actions were tried together without a jury at Haileybury.

J. M. Ferguson, for Bourque.

H. L. Slaght, for the Gregoires.

ROSE, J., in a written judgment, said that in June, 1919, S. Gregoire made a conveyance of all his interest in the land to J. B. Gregoire, but it was admitted that, as against Bourque, J. B. Gregoire stood in no better position than S. Gregoire would have stood in if the transfer had not been made; and the evidence indicated that J. B. Gregoire was in reality a trustee for S. Gregoire.

Bourque agreed to pay $1,000 and the amount due the Government by way of mortgage and unpaid purchase-money, and to pay to S. Gregoire $100 down, $200 on the 1st January, 1920, and $200 on each 1st day of January thereafter until the $1,000 was paid, and to pay to the Government all sums due by the vendor. And it was expressly understood that time was to be of the essence of the agreement and that unless the payments were punctually made at the time and in the manner mentioned the agreement should be of no effect and the vendor should be at liberty to resell. The purchaser also agreed "to build a house to the Government requirement and to put under cultivation 5 acres within one year from this date and to do all that is necessary for the vendor to obtain his patent."

The defence to the first action was that S. Gregoire rescinded the agreement because of failure by Bourque to perform his part. Several breaches of the agreement were alleged by the defendants.

The learned Judge was of opinion that the clause which made time of the essence of the agreement was applicable only to the payment of the instalments of the purchase-money; that there was nothing in the evidence to justify the defendants in their contention that Bourque's rights under the agreement had come to an end; and that there should be a declaration that the agreement, as against both defendants, was valid and subsisting.

This did not, of course, touch any right of the Government to cancel its sale for any default upon which there might be the right to insist; but the attitude of the Department of Lands seemed to be that it would recognise whichever party should be held by the Court to be—as between the parties—entitled.

Some timber was cut, but the evidence given at the trial did not enable the learned Judge to fix the value. Both defendants were responsible for the cutting; and, if Bourque thought it worth while, he might have a reference to the Local Master to ascertain the damages, which ought to be set off against the purchase-price. If the parties should agree upon the amount it might be stated in the judgment.

The defendants should pay the plaintiff's costs of the first action. If a reference is taken, the costs of it will be reserved until after the report.

The first action succeeding, the second necessarily failed, and should be dismissed with costs.

MIDDLETON, J. DECEMBER 4TH, 1920.

DIAMOND v. WESTERN REALTY CO.

Vendor and Purchaser—Agreement for Sale of Land—Declaration of Court that Agreement Valid and Subsisting—Subdivision of Land by Purchaser and Sales of Lots—Moneys Received by Vendor-company — Winding-up of Company — Receiver — Account—Reference—Findings of Referee—Appeal—Jurisdiction—Interest—Taxes—Local Improvement Rates—Discount—Credit—Scope of Reference—Bill of Costs—Commission on Collections—Damages—Inducing Servant to Leave Employment.

Appeal by the liquidator of the defendant company and cross-appeal by the plaintiff from the report of an Official Referee upon

a reference directed by the judgment of the Supreme Court of Canada, of the 17th February, 1919: Diamond v. Western Realty Co. (1919), 58 Can. S.C.R. 620.

The appeals were heard in the Weekly Court, Toronto.

A. C. McMaster, for the liquidator.

G. E. Newman, for the receiver.

A. Cohen, for the plaintiff.

MIDDLETON, J., in a written judgment, after stating the facts and the history of the case, proceeded to consider the questions argued upon the appeal:—

1. By para. 12 of the report, the Referee found that the date from which interest is payable by the plaintiff should be postponed for a period of 15 months and 18 days after the date on which the final report is confirmed. The Supreme Court of Canada having declared that this agreement in question in the action is, in its entirety, a valid and subsisting agreement, the Referee had no jurisdiction to make such a direction as he had made.

2. By para. 13 of the report, the Referee found that the date from which taxes are payable, as provided by the agreement, is to be postponed for a period of 17 months and 12 days after the date of confirmation of the final report. There was, for the same reason, no jurisdiction to make this direction.

3. By para. 8 of the report, the Referee found that the plaintiff is entitled to $200 as a discount of 5 per cent. off principal payments, under clause 8 of the agreement. It had not been shewn that there was any right to discount under the agreement, properly interpreted.

4. By para. 9 of the report, it was found that the plaintiff was entitled to $250, or, in the alternative, to a declaration that this sum should be credited to the plaintiff when final adjustment made. This finding was entirely beyond the scope of the inquiry.

5. By para. 10 of the report, the plaintiff was found entitled, as against the company, to $550 damages in connection with the cancellation of the agreements. This finding could not be supported.

6. There was an appeal against the report on the ground that a sum of $400 awarded by the trial Judge upon a counterclaim, which was not interfered with by the Supreme Court of Canada, should have been allowed upon this reference. The learned Judge agreed with the Referee that this was entirely outside the scope of the reference.

7. A question was raised as to the rights of the parties with respect to local improvement rates in connection with waterworks. The intention of the parties was that the local improvement rates

should be regarded as taxes, and that with regard to everything falling due after the 1st December, 1919, they should be borne by the purchaser.

8. There was nothing in the evidence justifying a charge of $408 for culverts put in by the company in connection with the opening of the street.

9. There was no evidence to justify the allowance of $245.30 in respect of a bill of costs.

10. Neither the receiver Davidson nor the defendant company was entitled to any allowance whatever for commission or expenses of collection. Davidson undertook to collect the moneys payable by sub-purchasers without remuneration, and the company undertook to be responsible for his acts. With respect to sales made under new agreements, of which the plaintiff is taking the advantage, he should pay the commission.

11. The company was ready to convey the Rothwell lots, and the question whether it was bound to convey without the consent of Rothwell was dealt with in para. 7 of the report. This was outside of the scope of the reference.

12. By para. 6 of the report, it was found that the Bratley lots formed part of the subject-matter of the contract. In this the learned Judge agreed with the Referee. The sale to Bratley was after the date of the agreement, and must have been predicated upon a forfeiture of pre-existing agreements.

13. The receiver had no right to any commission.

14. The Referee's award of $500 damages against the defendant Davidson for inducing one Bettel to leave the service of the plaintiff could not be interfered with.

Some errors in the account should be corrected by referring to a statement made by one Clarkson, an expert accountant.

If the parties can readjust accounts in the light of the views expressed, the result may be embodied in an order. If not, the case must go back to the Master.

The costs of this appeal should be dealt with upon further directions.

RE STANDARD RELIANCE MORTGAGE CORPORATION—HALL'S CASE —KELLY, J.—DEC. 1.

Appeal—Order of Referee in Winding-up Proceeding—Insufficient Material—Reference back.]—An appeal by the liquidator of the corporation from an order of an Official Referee upon a reference for the winding-up of the affairs of the corporation. The appeal was heard in the Weekly Court, Toronto. KELLY, J.,

in a written judgment, said that, outside of some documents, there was not before him any evidence from which one could ascertain upon what the Referee proceeded in a matter evidently of a contentious nature as to the facts; and the learned Judge was, therefore, unable to pass upon the merits. There had, however, been filed an affidavit of the liquidator, made since the order, setting forth particulars of a claim of the company against Ella Hall, the respondent, upon a bond, and an affidavit of a brother of the respondent, also made since the order, setting up, among other things, that the claims of the parties, the one against the other, had been compromised. It was also urged by counsel for the liquidator that the Referee dealt with and his order disposed of a matter which was not before him on the application. In such circumstances, it was impossible for any Court to adjudicate in appeal so as to do justice between the contending parties. And the affidavits mentioned suggested other conditions which made it undesirable to deal on this appeal with the matters referred to in the order. There should be a reference back to the Referee, and materials should be brought before him upon which an appeal, if it is so desired, may proceed. J. S. Beatty, for the liquidator. W. C. MacKay, for the respondent.

CORRECTION.

In PATON v. FILLION, ante 177, it is stated at p. 179 that RIDDELL, J., agreed in the result stated by MULOCK, C.J. Ex. That is incorrect. RIDDELL, J., in fact, agreed with MASTEN, J.; and, the Court being divided, the judgment of ROSE, J., stands.