The Ontario Weekly Notes

Vol. IX. TORONTO, FEBRUARY 11, 1916. No. 23

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 20TH, 1916.

*BEAMENT v. FOSTER.

Will—Action to Establish—Due Execution—Testamentary Capacity—Insane Delusions not Affecting Dispositions of Property—Finding of Fact of Trial Judge—Appeal—Parties—Beneficiaries.

Appeal by the defendant from the judgment of the Surrogate Court of the County of Carleton in favour of the plaintiff, the executor named in the will of Robert Foster, deceased, in an action to establish the will, arising out of a petition for letters probate.

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

Glyn Osler, for the appellant.

A. H. Armstrong, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering the judgment of the Court, said that the appellant was the testator's only child and heir at law, and the main ground of opposition to the will was alleged mental incapacity of the testator, it being said that he was subject to insane delusions.

The onus of proof that the document propounded is in truth the last will of a capable testator is, in the first place, upon him who propounds that will, but that onus is sufficiently satisfied by proof of the execution of the will in the manner required by law, by an apparently competent testator; and the onus then shifts to him who opposes the will, and that onus is in turn

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

satisfied, in such a case as this, by proof of an insane delusion such as was proved in this case—a delusion that his own wife and his son's wife desired and attempted to poison him—and then the onus shifts back to the propounder of the will—the onus of proof sufficient to satisfy the conscience of the Court that the dispositions of his property made by the testator in the will were not affected by the insane delusions.

It was not suggested that the learned Surrogate Court Judge erred in any matter of law throughout the trial; the appeal was entirely upon a question of fact, a question determined by a Judge of much experience and care, who had the benefit of hearing and seeing the witnesses. The Court could not rightly reverse his finding unless well convinced of error in it; and the Court was not convinced that the learned Judge erred in his finding in favour of the will.

It was said that the findings were based entirely upon the judgment of the Supreme Court of Canada in Skinner v. Farquharson (1902), 32 S.C.R. 58. What the learned Judge meant was that, acting upon the principle applied in that case, he was bound to find in favour of the will in this case—and the principle is, that when the provisions of the will itself prove that it was not affected by insane delusions, it must be found that it was not so affected.

The appeal should be dismissed.

Only one of the beneficiaries under the will being a party to the cause, no judgment should be pronounced that could prejudicially affect any of the absent beneficiaries; the judgment binds only the parties before the Court, others concerned being at liberty, if they choose, which is unlikely, to litigate the matter over again.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 2ND, 1916.

MAZZARENO v. PASTINO.

Contract—Sale of Goods—Substituted Contract—Evidence to Establish—Conflict of Testimony—Finding of Fact of Trial Judge—Credibility of Witnesses—Breach of Contract—Damages—Appeal.

Appeal by the defendants from the judgment of the Judge of the District Court of the District of Sudbury, in favour of the

plaintiff, in an action for damages for breach of a contract to deliver 600 cases of macaroni.

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

R. W. Hart, for the appellants.

No one appeared for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering the judgment of the Court, said that the one question involved was purely a question of fact, the finding of which depended mainly upon the question which of two witnesses should be believed. A binding contract in writing was entered into between the parties, by which the defendants sold and were to deliver to the plaintiff 1,200 cases of macaroni. War broke out, and the defendants thought they should be excused. The plaintiff accepted this view, and the parties entered into negotiations for another contract—a substituted one. The plaintiff testified that the original contract was reduced to one for 600 cases; the defendants' agent, who was said to have made this new contract, positively denied having done so. In this conflict of testimony, the trial Judge apparently credited the plaintiff and discredited the agent of the defendants. The defendants having failed to deliver the 600 cases, the learned Judge gave the plaintiff reasonable damages for the breach of that contract. The probabilities were in favour of the plaintiff's view; and in one of their letters the defendants referred to the delivery of the 600 cases as having been "contracted with our agent."

Counsel for the appellants had said all that could be said in support of the appeal, but had an uphill and impossible task.

Appeal dismissed without costs.

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

HYATT v. ALLEN.

Company—Directors—Trustees—Account—Reference — Report —Salaries and Disbursements of Directors—Value of Preferred Shares Received by Directors—Evidence—Interest—Estoppel—Remuneration of Trustees—Costs of Reference—Costs of Appeal.

Appeal by the defendants from the order of SUTHELAND, J., ante 173, upon appeal and cross-appeal from the report of a

Local Master, confirming the report, and from the judgment on further directions.

See Hyatt v. Allen (1911-12), 2 O.W.N. 927, 3 O.W.N. 370, 1401, affirmed by the Judicial Committee of the Privy Council: Hyatt v. Allen (1914), 26 O.W.R. 215.

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

J. W. Bain, K.C., and M. L. Gordon, for the appellants.

E. G. Porter, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.C.P., delivering judgment, said that the action was not brought to recover damages for deceit, but was brought and the plaintiffs' claim in it given effect to accordingly, to have it adjudged that the defendants were not personally entitled to the money and property in question in the action, but were, as directors, trustees of it for the benefit of all the shareholders of the Lakeside Canning Company; and the plaintiffs succeeded accordingly.

Upon the reference, the Local Master treated the defendants as if they were bound to account in money for the value of the property on the day when they received it, which was quite erroneous. The plaintiffs actually prevented the sale, and must bear the consequences. The appeal must be allowed as to this item.

So, too, the Master erred in charging the defendants with interest upon the money of which the defendants were held to be trustees for all the shareholders. This money was deposited in a chartered bank during part of the time of this lengthy litigation. Leaving it there was no breach of trust; it was a reasonable and proper thing to do; and all the interest to which the shareholders were entitled was that which it earned when so deposited. The appeal must be allowed as to this item also.

As to the application for a reference back upon the question of estoppel of some of the shareholders from claiming any benefit of the judgment in this action, the matter might well be opened again if there were any cogent evidence of any such estoppel; but, as it is, without any kind of evidence upon the subject, and without even an assertion of counsel that any such case exists, there could be no excuse for re-opening the reference as to this The appeal as to this should be dismissed.

The appeal as to further remuneration for the trustees should also be dismissed. In all the circumstances, the trustees were well recompensed in the additional pay allowed by the Master.

As to the costs of the reference, the general rule must prevail: the plaintiffs were entitled to the general costs of it; and, if there was any part of it upon which the plaintiffs failed, they must pay any separable costs of it, to be set off against the plaintiffs' costs.

The report and the judgment on further directions will be varied in accordance with these rulings.

The plaintiffs must pay the costs of this appeal and of the appeal to Sutherland, J., less the separable costs of the grounds of appeal on which the defendants failed, which the defendants must pay, fixed at one-fourth of the amount of the defendants' costs, so that in the result the defendants will get three-fourths of their costs of the appeals.

The other members of the Court concurred, RIDDELL and MASTEN, JJ., each giving written reasons.

Appeal allowed in part.

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

*STONEHOUSE v. WALTON.

Deed—Release of Interest in Land—Voluntary Deed—Action to Set aside—Lack of Independent Advice—Undue Influence —Laches and Acquiescence.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 35 O.L.R. 17, ante 222, dismissing without costs, on the ground of laches and acquiescence, an action to set aside a deed executed by the plaintiff releasing an interest in land devised to her by the will of the defendant's mother.

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

W. Laidlaw, K.C., for the appellant.

J. E. Jones, for the defendant, respondent.

MEREDITH, C.J.C.P., delivering judgment, said that the judgment of the trial Judge was sought to be supported upon the ground that the transaction was a valid one, and the Judge's finding in that respect erroneous, as well as upon the ground upon which he based his decision—the plaintiff's laches and acquiescence.

The learned Chief Justice, after setting out the facts and circumstances, said that it seemed to him impossible to contend, with any hope of success, that such a transaction as that between the parties—the release of the plaintiff's interest in a farm under the will of the defendant's mother—could stand if rightly attacked.

Reference to Turner v. Collins (1871), L.R. 7 Ch. 329; Hoghton v. Hoghton (1852), 15 Beav. 278.

The second question was, whether the plaintiff was precluded from having relief in this Court, by reason of her delay in bringing this action. Within a few hours after the deed was executed, she knew its meaning and effect; and was, quite naturally, much dissatisfied with it; yet this action was not commenced until about 12 years afterwards.

The main reasons for the delay were, that the plaintiff's foster-mother said that she would take up the matter with her brother and nephew in her (the plaintiff's) behalf, and that the plaintiff's position in life, and especially in the Forfar family, upon which she was so largely dependent, and which in turn was so largely dependent upon the Waltons, gave her no opportunity for entering into litigation with the latter. She was not at any time quite her own mistress—quite independent. There was never an abandonment of her dissatisfaction.

The plaintiff's right to the property under the will has not yet arisen, and it may never arise; and no substantial prejudice has been caused to the Waltons by the delay. The utmost that can be said against the plaintiff is that in the meantime Mrs. Forfar had died, and so any testimony she could have given is lost; and that all memories get more or less rusty in 12 years. However, if all the evidence, except the defendant's own testimony, were eliminated, the plaintiff's right to relief would be proved.

Stale claims are always—and rightly—in disfavour, but once they are clearly established, and when the delay has caused no substantial prejudice to any one, there is no reason why they should not be enforced.

If the plaintiff had only an equitable right, that right would not be counterbalanced by anything that would make it inequitable to give effect to it now; the defendant will not be obliged to give up anything but the mere piece of paper; he has enjoyed nothing under it, nor done anything on his faith in it; and the mere lapse of 12 years is not in itself enough; if equity were to

act upon this question in conformity to statues of limitation, there is none that would preclude the plaintiff.

Reference to Allcard v. Skinner (1887), 36 Ch. D. 145; Turner v. Collins, supra.

If there were actual fraud, as might well be found, the lapse of time would be no hindrance to the plaintiff: see Hatch v. Hatch (1804), 9 Ves. 292; McDonald v. McDonald (1892), 21 S.C.R. 201.

The appeal should be allowed with costs, and there should be judgment for the plaintiff setting aside the deed in question with costs.

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

LENNOX, J., also agreed in the result.

MASTEN, J., agreed in the result, for the reasons stated by the Chief Justice.

Appeal allowed.

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

DALES v. BYRNE.

Solicitor—Lien for Costs—Fund Recovered by Attachment in Garnishee Proceedings—Creditors Relief Act, secs. 5(1), 6(2)*—Priority of Claim for Costs of Garnishee Proceedings —Lien for Costs of Action in which Judgment Recovered by Attaching Creditor, Denied—Rule* 689.

Appeal by the plaintiff's solicitor from an order made by one of the Judges of the County Court of the County of York, upon an application by the appellants for payment out of Court to them of the amount of their costs of attachment proceedings and of this action; the appellants claiming a lien upon the fund in Court upon the ground that it was created or preserved by their exertions. The order made upon the application, and now the subject of appeal, while it allowed the appellants their costs of the attachment proceedings out of the fund, directed that the balance should be paid to the sheriff for distribution among creditors, under the Creditors Relief Act, R.S.O. 1914 ch. 81.

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

T. N. Phelan, for the appellants.

No one appeared to oppose the appeal.

MEREDITH, C.J.C.P., delivering judgment, said that the solicitors assumed that they had a lien upon the moneys in question, and then asked the Court to hold that the Creditors Relief Act did not deprive them of it; and it was obvious that they never had any such right, never having had possession of or any control over the moneys. Having recovered the judgment for their client, and attached the moneys, only they had the right to seek the equitable interference of the Court in aid of any equitable right they might have to payment of their costs out of these moneys: see Hough v. Edwards (1856), 1 H. & N. 171, and Mercer v. Graves (1872), L.R. 7 Q.B. 499: a right now expressly given in Rule 689.

Under the Creditors Relief Act, sec. 5(1), moneys attached in garnishee proceedings are deemed to be so attached for the benefit of all creditors.

Any right the solicitors can have cannot be greater than the right of their client. Anything that may have been preserved or recovered has been recovered for the client's benefit; there is no conflict of interest between solicitors and client: see Francis v. Francis (1854), 5 D. M. & G. 108, and Re Harrald, Wilde v. Walford (1884), 51 L.T.R. 441.

The solicitors relied on Bell v. Wright (1895), 24 S.C.R. 656, but it is not in point, being a case of set-off of debts to the prejudice of a solicitor's claim.

The Creditors Relief Act, sec. 6(2), in unmistakable words, provides that the moneys in question shall go to the creditors, who come within its provisions, ratably, less the costs of the garnishee proceedings, which the attaching creditor—the client in this case—is to have. How then can client or solicitor have more than that?

The appeal should be dismissed.

LENNOX, J., was of opinion, for reasons stated in writing, that the appeal should be dismissed.

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

Appeal dismissed without costs.

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

*HUNT v. LONG.

Chattel Mortgage—Payment of Existing Debt and Future Indebtedness Secured in one Instrument—Affidavits of Bona Fides—Mortgage Invalid as to Future Indebtedness—Validity as to other Part—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 *ch.* 135, *secs.* 5, 6.

Appeal by the plaintiff from the judgment of the First Division Court in the County of Wentworth upon an interpleader issue as to the validity of a chattel mortgage under which the defendant claimed property seized under the plaintiff's execution against the goods of the mortgagor. It was found in the Division Court that the mortgage was a valid security in so far as it secured the payment of an existing debt.

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

G. H. Sedgewick, for the appellant.

H. S. White, for the defendant, respondent.

MEREDITH, C.J.C.P., delivering judgment, said that the one question involved in the appeal was, whether a chattel mortgage given for two quite separate and independent purposes, and so, really, two mortgages in the one instrument, was altogether invalidated by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, because, although it complied in all respects with the provisions of that enactment as to the one purpose, it did not comply with it as to the other, and was on all hands admitted to be bad as to that.

The two purposes of the mortgage were: (1) to secure the payment of an existing debt; and (2) to secure future indebtedness.

The enactment makes separate and different provisions as to the affidavit of bona fides which shall be registered with the mortgage in the case of an existing debt and in the case of future indebtedness. See secs. 5 and 6.

No reason had been given, nor could the learned Chief Justice imagine any, why the whole mortgage should be invalid because one part was; nor had any case been referred to, or found by the learned Chief Justice, which gave support to the appellant's contention.

Reference to Reid v. Creighton (1895), 24 S.C.R. 69; Hughes v. Little (1886), 17 Q.B.D. 204, 18 Q.B.D. 32; Ex p. Stanford (1886), 17 Q.B.D. 259; Kitching v. Hicks (1883), 6 O.R. 739.

The appeal should be dismissed.

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

MASTEN, J., agreed in the result and in the reasons of MEREDITH, C.J.C.P.

RIDDELL, J., agreed in the result, with some doubt.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

*GRAY v. WABASH R.R. CO.

Railway—Injury by Passing Train to Persons Crossing Track—Negligence—Failure to Ring Bell and Blow Whistle—Contributory Negligence of Persons Injured in Attempt to Cross without Looking—Findings of Jury—Explanation by Foreman — Effect of — Judgment of Trial Judge Dismissing Action — Usurping Functions of Jury — Reversal of Judgment—Refusal to Direct New Trial—Entry of Judgment for Plaintiffs.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 102, after trial of the action with a jury at Sandwich, dismissing it, with costs if demanded.

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

J. H. Rodd, for the appellants.

H. E. Rose, K.C., for the defendants the Wabash Railroad Company, respondents.

MEREDITH, C.J.C.P., delivering judgment, said that the jury had found that the plaintiffs' injuries were caused by the negligence of the respondents, and that the plaintiffs were not guilty of contributory negligence. The finding of negligence was, "that the Wabash Railroad Company were negligent in so far as the

evidence shews that the engine-bell was not sounding immediately prior to the arrival of the train at Tecumseh road crossing and in so far as a danger whistle was not blown between the 550 foot range of vision immediately west of the place on the crossing at which the accident in question occurred." After the verdict had been so rendered, a discussion took place between the trial Judge and the foreman of the jury as to the meaning of it, and the foreman, interrogated by the Judge, finally said that he could not go further than saying that if the bell or the alarm had been sounded within the last 550 feet, that "*might* have prevented the accident."

The trial Judge directed that judgment be entered for the defendants, notwithstanding the verdict—basing that direction upon (1) the statement of the foreman of the jury above given, and (2) the conclusion that the action failed upon the whole evidence because the plaintiffs were guilty of contributory negligence.

There was error in both respects.

The statement of the foreman, especially when given in the course of a conversation, in which there was no time to weigh his words, ought not to be taken as overriding the deliberate written verdict of the whole jury. The verdict, once duly rendered, ought to stand. The onus of shewing clearly that it was rightly reversed rested upon the defendants; and all that they had shewn fell far short of any warrant for a reversal.

Because the railway enactments do not make it a duty to sound the whistle within the 550 feet is no reason why failure to do so may not be negligence; if it were a thing which, in the proper performance of their duties, competent drivers—it would be negligent to employ incompetent drivers—ordinarily would not omit, the omission of it was actionable negligence; and the jury were quite within their rights in finding that the appellants' injuries were caused by the neglect of the respondents *to sound the whistle, in the peculiar circumstances of the case.*

The learned Judge then discussed the question whether, the judgment for the respondents being set aside, there should be a new trial, and said that, in his view, the respondents had wholly failed to shew any legal right to a new trial; that injustice would be done if a new trial were ordered.

Reference to the decision of the Judicial Committee in Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331.

The learned trial Judge thought he was justified in directing judgment to be entered for the respondents, notwithstanding

the verdict for the plaintiffs, because the appellants were, in his view, plainly guilty of contributory negligence—that they should have looked both ways for trains before crossing; and, if they had so looked, must have seen the train which caused their injuries, and should have avoided it. Both the plaintiffs—husband and wife—swore positively that they did look and kept looking till the accident happened, but saw no train. So the Judge must have discredited their testimony in this respect. The subject was within the province of the jury, and that province was invaded when the Judge determined that there was contributory negligence and determined the question as to the veracity of the plaintiffs. No one could reasonably say that the jury, in finding distinctly and clearly that the plaintiffs were not guilty of contributory negligence, did that which reasonable men could not conscientiously do.

The appeal should be allowed with costs, and there should be judgment for the plaintiffs for $1,000 damages with costs of the action.

LENNOX and MASTEN, JJ., concurred.

RIDDELL, J., dissenting, was of opinion, for reasons stated in writing, that the appeal should be dismissed.

Appeal allowed; RIDDELL, J., *dissenting.*

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

*PEARSON v. CALDER.

Promissory Note—Consideration—Debt of Infant—Guaranty—Suretyship—Contract.

Appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Wentworth, in favour of the plaintiff, in an action upon a promissory note, for the recovery of $300 and costs.

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

W. S. MacBrayne, for the appellants.

C. W. Bell, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering judgment, said that the defendant's sister, who was about 18 years of age, had worked for the plaintiff in her business of a milliner, carried on at Hamilton and Brantford. This girl of 18 made an arrangement with the plaintiff for the acquisition of the Brantford business and the stock in trade there for a little over $300; the girl was let into possession, and the plaintiff gave her a bill of sale of the goods and an informal written assignment of the lease of the shop. The purchase-money was to be paid by the girl's brother, out of her own money, which he held in trust for her, except as to the excess over $300, which she was herself to pay. There was no expressed obligation on the part of the girl to pay the $300 or any part of it—it was to be paid in cash by the brother. After some delay and negotiation, the brother refused to pay, and the plaintiff proceeded to take back her property; but, before that was done, the defendant, who was the purchaser's elder sister, and of age, stepped into the breach, to do that which the brother refused to do; she gave the note in question, payable 3 months after its date, for the $300; the plaintiff accepted it, abandoning her intention and the steps taken by her to get back her property; and the purchaser remained in possession and carried on the business. The purchaser was not a party to the note.

The learned County Court Judge found that the debt evidenced by the promissory note in question was the debt of the defendant, and that her obligation arising out of the transaction in question was not merely that of a surety for the payment only of a legal debt of her infant sister upon the sister's default in payment of it.

With that finding the learned Chief Justice agreed. He referred to Harris v. Huntbach (1757), 1 Burr. 373; Baker v. Kennett (1873), 54 Mo. 82; Conn v. Coburn (1834), 7 N.H. 368; Kun's Executor v. Young (1859), 34 Pa. St. 60; Wauthier v. Wilson (1912), 28 Times L.R. 239.

The appeal should be dismissed.

MASTEN, J., was also of opinion that the appeal should be dismissed. Without assenting to or dissenting from the County Court Judge's finding of fact, he thought that in any case the defendant was liable.

(1) If the young sister was the real purchaser and primarily liable, and if both parties to the action contracted on the basis of knowing that she was an infant and not legally liable to

pay, the obligation undertaken by the defendant was to pay in any event if the purchaser failed to do so, irrespective of whether such failure arose from infantile non-responsibility or from financial incapacity. Such a contract differs fundamentally from an ordinary guaranty ensuring payment to the creditor of whatever sum the principal debtor is legally liable to pay, and the rule invoked by the defendant has no application.

(2) In the alternative, if the defendant knew the purchaser's age, and the plaintiff did not, then the situation is, that the defendant, by giving a security now asserted to be valueless in law, induced the plaintiff to abandon the right, which she was bonâ fide asserting, to retake possession. To permit the defendant to do so would be inequitable: Mutual Loan Fund Association v. Sudlow (1858), 5 C.B.N.S. 449; Wauthier v. Wilson, 28 Times L.R. 239.

Riddell and Lennox, JJ., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

Second Divisional Court. February 4th, 1916.

*McILWAIN v. McILWAIN.

Husband and Wife—Alimony—Cruelty—Findings of Trial Judge—Absence of Finding of Danger to Life or Health—Evidence—Appeal.

Appeal by the defendant from the judgment of Boyd, C., in an action for alimony, declaring the plaintiff entitled to alimony and directing a reference to fix the amount, with costs to the plaintiff.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ.

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

J. C. Elliott, for the plaintiff, respondent.

Meredith, C.J.C.P., delivering judgment, said that the findings of the Chancellor were that the husband was guilty of cruelty—assault and battery—on the 24th June, 1914; and that

there was "some proof" of former acts of cruelty "several years" before.

The power to award alimony in this Province is conferred upon the Court by sec. 34 of the Judicature Act, R.S.O. 1897 ch. 51.

The findings of fact are not sufficient to support the judgment. There is no finding that the cruelty proved was such as to cause reasonable apprehension of danger to the life, limb, or health of the wife.

If the Court could, upon the evidence adduced at the trial, add to the findings at the trial, or if, upon the whole evidence, the Court could find facts sufficient to support the judgment, it would be the wife's right to have it supported in that way; but, the learned Chief Justice said, he was quite convinced that the Chancellor in his findings of fact put the case as strongly as he fairly could in the plaintiff's favour; and the Chief Justice agreed with and adopted the Chancellor's remark that there was no reason why the parties could not live together in the future.

The appeal should be allowed and the action dismissed; the defendant to pay "the amount of the cash disbursements actually and properly made by the plaintiff's solicitor" (Rule 388); otherwise no costs.

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

Appeal allowed.

SECOND DIVISIONAL COURT. FEBRUARY 4TH, 1916.

*MARSHALL BRICK CO. v. IRVING.

Mechanics' Liens—Mortgagee—"Owner"—Privity and Consent—Direct Benefit—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 2(*c*), 8, 14—*Increased Value —Prior Mortgagee—Abandonment of Position—Reference back.*

Appeal by the defendants the York Farmers Colonisation Company from the judgment of an Official Referee, in a mechanic's lien proceeding, finding the plaintiffs entitled to enforce a lien for bricks furnished to the contractor for the erection of houses upon the appellants' land, to the extent of $573.52 and costs.

The appellants sold the land sought to be made subject to the lien to the defendant Irving, and advanced money to him to enable him to build. The position of the appellants in respect of mechanics' liens was fixed by the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 14(2), as that of mortgagees; but the Referee determined their status as owners by an application of sec. 2(*c*) of the Act—because, as he said, the plaintiffs' materials were supplied at their request and with their privity and consent.

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

B. N. Davis and W. Cook, for the appellants.

C. L. Fraser, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., delivering judgment, said that the appellants could not be deemed "owners." Nothing was done or supplied by contractor, sub-contractors, or workmen at their request or on their credit; Irving was in no sense their agent in making his contract—the work was done at his request and upon his credit solely; so too on his behalf; the appellants were strangers to the building contracts of Irving with the builders; there was no privity and consent; and plainly it was not for their direct benefit—it was for Irving's direct benefit; all that the appellants could get would be an indirect benefit in the additional security they would have if the value of the lands were increased by the buildings more in amount than the sums they paid to Irving, under their agreement with him, towards the erection of the buildings; and so they were without sec. 8 of the Act, and within secs. 14 and 8(3).

The appeal should be allowed with costs, and the action be dismissed without costs, as the case stood at present; but, notwithstanding the abandonment of all claims against the appellants as prior mortgagees only, the respondents should have leave to apply to the Court, within a week, for a reference of the case again, so that the claims of the respondents might be renewed on the basis of the appellants being only prior mortgagees, or for leave to redeem as subsequent incumbrancers.

RIDDELL, J., was also of opinion, for reasons stated in writing, that mere knowledge and non-interference will not render a mortgagee liable as an owner. He referred to and explained the decision in Orr v. Robertson (1915), 34 O.L.R. 147; and referred

also to Graham v. Williams (1884-5), 8 O.R. 478, 9 O.R. 458; Blight v. Ray (1893), 23 O.R. 415; Gearing v. Robinson (1900), 27 A.R. 364; Cut-Rate Plate Glass Co. v. Solodinski (1915), 34 O.L.R. 604. He was of opinion that the decision of the Referee should be reversed with costs here and below.

LENNOX, J., was also of opinion, for reasons stated in writing, that the appellants had not made themselves liable as owners. He agreed with MEREDITH, C.J.C.P., that there should be a reference back, if desired.

MASTEN, J., also agreed with MEREDITH, C.J.C.P.

Judgment as stated by MEREDITH, C.J.C.P.

HIGH COURT DIVISION.

RE GREEN—KELLY, J.—JAN. 31.

Will—Construction—Originating Notice—Parties—Service.] —Application, by originating notice, by the Capital Trusts Corporation, stated to be the administrators of the estate of Philip Green, deceased, "in the place and stead of Lucy Green, executrix of the last will and testament of the said deceased," for an order declaring the construction of the will of the deceased. The motion was heard in the Weekly Court. On the return of the motion it was stated by counsel, but not otherwise proved, that Lucy Green had become of unsound mind. The letters of administration to the applicants were not produced. There was no proof of service of the notice of motion on John James Green, a son of the testator, to whom the will directed a share of the estate to be paid on the death of the testator's widow; the argument proceeded subject to its being determined whether it was necessary that he should be represented. The only service effected upon the widow of the testator and a daughter Margaret, both interested under the will, but whose interests in the issue raised by the application were in conflict with each other, was upon a solicitor who accepted service for them; but it was not shewn what instructions he had in the matter, and he gave no undertaking to appear for them. He was not present on the argument, but the applicants' counsel submitted authorities, he

said, at this solicitor's request—he being desirous of not incurring unnecessary costs. KELLY, J., said that, commendable as was this desire, he did not think a motion of such importance to the parties concerned should, in the circumstances, proceed on such service as was effected. He accordingly enlarged the motion until the 14th February, to enable proper service to be made. J. J. O'Meara, for the applicants. K. W. Wright, for the Inspector of Prisons and Public Charities.

McMILLAN v. McMILLAN—LENNOX, J.—FEB. 1.

Injunction—Payment of Insurance Moneys—Injunction Dissolved upon Terms—Undertaking.]—Motion by the plaintiff to continue till the trial an injunction granted by a Local Judge restraining the defendants from paying over and receiving insurance moneys. The learned Judge said that, since he had heard the motion on the 12th January, counsel for the defendants had sent particulars of a proposed compromise, which was a fair one in the circumstances. The order of the Court is that, upon counsel for the defendants filing an undertaking to account for $100 of the insurance moneys to the plaintiff's solicitor, the injunction will be dissolved without costs. L. R. Knight, for the plaintiff. G. H. Hopkins, K.C., for the defendants.

McGUIRE v. MURTHA—BRITTON, J.—FEB. 3.

Gift—Validity—Mental Capacity of Aged Person — Completed Gift of Money—Incomplete Gift of Promissory Note—Sale of Live Stock—Action by Executors—Evidence—Corroboration.]—Action by the executors of Peter Murtha, deceased, to recover from the defendant, Henry Murtha, a nephew of the deceased, the sum of $3,800, a promissory note for $200, and a horse and two cows, which were part of the property of Peter, deceased, but came into the possession of the defendant shortly before the death of Peter. The defendant asserted that $3,600 of the money and the promissory note were handed by Peter to him, the defendant, as a gift to him, for his own use absolutely to the extent of $3,000 of the money, and as to the remaining $600 as a gift to the defendant's brother James (to whom it had

been paid), and that the note, as a part of the contents of a desk of the deceased, was given to him (the defendant). He claimed the house and cows by purchase from the deceased—the purchase-money to be paid, after the death of Peter, to his nephew Richard. Peter died at the age of 95. The alleged gift was made on the 9th or 10th March, 1915, and Peter died on the 2nd May, 1915. The action was tried without a jury at Lindsay. The learned Judge set out the facts and reviewed the evidence in a written opinion. He said that he accepted the evidence of the defendant as establishing the gift. It was corroborated by other material evidence, particularly that of Mary Murtha. Mary, as the sister of the defendant, was an interested witness, but she gave her evidence in a truthful manner, and she stood well the test of a very vigorous cross-examination. The story of the defendant and Mary was not a fabrication, but a true account of what happened. There was other material evidence in corroboration. The evidence also established the sale of the horse and cows to the defendant. The gift of the $200 note could not be sustained. The note was payable to the order of the deceased, and was not endorsed by him. The gift was incomplete. The note was not produced and handed over to the defendant, as was the money. There was no doubt that at the time of the alleged gift the deceased was of disposing mind and memory. Judgment declaring that the defendant is entitled to the money in Court, $2,960, and interest thereon, and is the owner of the horse and cows, subject to the payment of $100 to Richard Murtha; that the plaintiffs are entitled to the delivery up of the promissory note; and that, in default of its being handed over within 10 days from the date of the final judgment in this action, the plaintiffs will be entitled to a personal judgment against the defendant for $200, with interest at 10 per cent. from the 15th August, 1913. No costs. G. H. Watson, K.C., and T. Stewart, for the plaintiffs. R. R. Hall, for the defendant.

Brant v. Canadian Pacific R.W. Co.—Falconbridge, C.J.K.B. —Feb. 4.

Railway—Damage to Neighbouring Land from Closing of Street in City—Remedy—Right of Action—Forum—Assessment of Damages—Evidence—Operation of Railway—Vibration.]—Action to recover damages for injury sustained by the plaintiff by reason of the closing of Albany avenue, in the City of Toronto, just north of the plaintiff's house and lot, and by reason of the operation of the railway. The action was tried without a jury at Toronto. The learned Chief Justice said that this was at most a comparatively trivial matter, and he would not, if he could help it, after the parties had come down to issue and trial, send the plaintiff to another forum. He thought that he was properly seized of the case, and ruled against the defendants' contentions on that point. The defendants were admittedly liable in some tribunal for some amount—the question was for how much? Two of the plaintiff's experts put his damages at $1,000 and $1,025 respectively. The defendants' two experts (and they were among the best-known in the community) said that he suffered practically no damage whatever. The property was residential, not of a very high class, say the 4th or 5th. Sitting as a juryman, the learned Chief Justice said, he was probably giving the plaintiff at least all that he was entitled to, if not more, when he struck a rough average and awarded him $525. He was not much impressed with the vibration theory as an element of damage—he could not see how there could be more vibration from a train running over a well-built embankment, 7 or 8 feet high, than from one running over a level crossing. However, to prevent all question hereafter, he awarded the plaintiff $25 on this head. Judgment for the plaintiff for $550 and costs. The defendants the Canadian Pacific Railway Company undertaking to hold the defendants the Canadian Northern Railway Company indemnified, judgment would go against both defendants. G. H. Watson, K.C., for the plaintiff. W. N. Tilley, K.C., for the defendants.