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CARTWRIGHT, MASTER. MAY 31ST, 1907.

CHAMBERS.

CONSUMERS GAS CO. v. TORONTO R. W. CO.

Particulars—Statement of Claim—Injury to Plaintiffs' Pipes by Escape of Electricity from Defendants' Works—Defences —Damages.

Motion by defendants for particulars of statement of claim before delivery of defence.

D. L. McCarthy, for defendants.

E. D. Armour, K.C., for plaintiffs.

THE MASTER:—The statement of claim covers 5 typewritten pages. In view of the terms of Rule 268, it would not be thought that it was too "concise," at least until shewn to be so. It alleges in substance that the pipes of plaintiffs have been injured by electricity escaping from the railway system of defendants, because the latter have "failed to adopt and use necessary, reasonable, and proper precautions to safely confine the same to their own wires and apparatus," but have negligently allowed the same to escape through the ground, and, "in consequence, enter into, pass through, and leave at different points the mains and pipes of the plaintiffs, to the serious injury and detriment of the pipes, mains, and property of the plaintiffs." The plaintiffs further charge that defendants have increased the amount of electricity passing through the pipes of the plaintiffs, by connecting them with the rails by means of bonding wires,

against the wish of the plaintiffs; that defendants have at various times deposited salt upon or near the rails, whereby greater currents of electricity escape, and aggravate the damages complained of; and that, as the result of the preceding alleged wrongful acts of defendants, the plaintiffs' pipes have been injured, causing the loss of large quantities of gas and the expenditure of large sums for repairs. The particulars asked for cover nearly two typewritten pages and are divided into 16 different heads. A specimen of one of the shortest demands is as follows: it shews the character of what is demanded as to the others even more extensively. Under par. 10 of the statement of claim, which charges the deposit of salt, these particulars are asked: (a) At what times and the exact places where the defendants deposited salt upon and in the neighbourhood of their rails. (b) At what places the mains and pipes of plaintiffs have been damaged in consequence of the deposit of salt by defendants. If the plaintiffs know of any places where salt has been so sprinkled, or of any places where the bonding complained of has taken place, they may not object so say so, but I cannot order this to be done. The only particulars that should be given are of the "neighbouring municipalities" mentioned in par. 8, and of the amount already expended for repairs as mentioned in par. 12.

The only defences, as it seems to me, that can be raised, or that are necessary to defeat the plaintiffs' claims, are these: (1) denial of any wrongful escape of electricity; (2) denial of any damage to plaintiffs' pipes having been caused by such escape, if any there was; (3) denial of bonding of defendants' rails to plaintiffs' pipes; (4) leave and license to do so, if it was done; (5) denial of injury resulting therefrom in any event; (6) denial of sprinkling of salt; (7) denial of any resulting injury; and (8) denial of any liability for such injury, if proved to have been caused thereby.

After consideration, I am unable to see how any other of the particulars asked for can be necessary to enable defendants to plead. It surely is plain enough what plaintiffs are asking, and on what grounds the claim is based. The case cited on the argument of East and South African Telegraph Co. v. Cape Town Tramway Co., [1902] A. C. 381, is very similar in its facts, assuming that the plaintiffs' allegations can be proved. In the judgment, at p. 392, it was

said: "Electricity (in the quantity which we are now dealing with) is capable, when uncontrolled, of producing injury to life and limb, and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in Rylands v. Fletcher, L. R. 3 H. L. 330, and the principle would apply."

Here plaintiffs allege serious and continuing damage to their property. This must be proved, to entitle them to recover from defendants, and this is the material fact on which plaintiffs must rely. The other allegations of wrongful bonding of the rails to the gas pipes, and of the sprinkling of salt, are in one respect no more than evidence of plaintiffs' right to recover, though in another they may be part of the cause of action. Even if they are viewed as evidence, they could not be objected to as improperly pleaded under the decision in Millington v. Loring, 6 Q. B. D. 190. In neither view is there any necessity for particulars as to these.

Except as already stated, the motion cannot be granted, at this stage of the action at least. The only issues that are likely to be dealt with at the trial will be: (1) whether the pipes of the plaintiffs have been damaged by electrolysis as alleged; and (2), if so, whether defendants are for any reason liable to plaintiffs therefor.

If these questions are both answered affirmatively, then the quantum of damages payable must be determined by a referee. This, I understood, was conceded on the argument.

No doubt, when that stage is reached, it will be necessary for plaintiffs to give some evidence, such as is asked for in the demand for particulars, e.g., as to the escape of gas owing to the weakening of the pipes, and as to the ascertained and probable damage to plaintiffs' property resulting from electrolysis.

At present, however, such details are not, in my opinion, necessary, nor can they be usefully considered until the primary question of liability has been finally determined. This may not be reached until a somewhat remote period in this novel case; especially when a similar claim is being made by the corporation of the city of Toronto for damage to their water pipes.

Defendants should plead in 8 days (or such further time as may be agreed on).

The costs of the motion will be in the cause, as the action is of an unusual character.

TEETZEL, J. JUNE 3RD, 1907.

WEEKLY COURT.

RE CHILDS.

Trusts and Trustees—Sale of Unproductive Land—Purchase Money—Apportionment—Tenant for Life—Income—Capital—Interest—Costs.

Motion by the tenant for life under the trusts of a will for an order and direction as to whether or not any portion, and, if any, what portion, of the purchase price of certain lands included in the trusts, was payable to the applicant.

W. T. Evans, Hamilton, for the applicant.

W. Bell, Hamilton, for the executor.

G. C. Thomson, Hamilton, for the Boys' Home.

W. W. Osborne, Hamilton, for the Aged Women's Home.

J. L. Counsell, Hamilton, for the Girls' Home.

TEETZEL, J.:—I think this matter is governed by Re Clarke, 6 O. L. R. 551, 2 O. W. R. 980, following In re Cameron, 2 O. L. R. 756, and Walters v. Solicitor for the Treasury, [1900] 2 Ch. 107; and therefore the life tenant, Mrs. Carry, is entitled to an apportionment of the $2,500.

The registrar will ascertain what sum invested at the testator's death (30th April, 1894), would have produced $2,500 when the land was sold, interest being calculated at 4½ per cent. per annum with half-yearly rests. The sum so ascertained will represent capital, and will be deducted from the $2,500, and the balance will represent deferred income, and will be payable to the applicant.

I make no order respecting other sales of unproductive real estate heretofore made, as there is not sufficient material filed to enable me to do so satisfactorily. Nor shall I make directions as to future sales.

Costs of all parties to be deducted in equal portions from the respective sums ascertained to represent capital and deferred income.

BOYD, C. JUNE 3RD, 1907.

TRIAL.

PETERBOROUGH HYDRAULIC CO. v. McALLISTER.

Landlord and Tenant—Action for Rent—Claim for Indemnity —Agreement between Tenant and Bank—Disposal of Business—Authority of Agent of Bank—Assumption of Liabilities—Implied Obligation to Pay Rent—Transferees of Lease—Power of Bank to Carry on Business—Covenant of Tenant not to Assign without Leave—Tacit Leave.

Action for rent, and claim over by defendants against the Ontario Bank, third parties, for indemnity against the payment of the rent.

BOYD, C.:—The McAllisters, partners under the name of the McAllister Milling Co,, are lessees from plaintiffs for 10 years from January, 1903, of a milling property, at the rent of $3,000 yearly, payable quarterly. . . . The action is to recover three months' rent, $750, which is payable in advance on 1st January, 1907. The McAllisters are liable on this by reason of their covenant to pay, but they claim to be indemnified against such payment by the Ontario Bank, brought in as third parties. The lease provides that the McAllisters will not assign without leave except to a limited liability company in which the lessees shall be interrested—an exception not now material.

The McAllisters became heavily indebted to the bank, and, not being able to pay, an arrangement was made by which, in brief, upon payment of $10,000 cash and the transfer of all the partnership assets to the bank, the partners should be discharged from all liabilities. In detail the matter was carried out by a series of documents prepared by the solicitor for the bank, pursuant to the agreement arrived at between the general manager of the bank at Toronto (McGill) and Mr. McAllister.

The first document is an agreement of 19th September, 1905, between the McAllister Co. and the bank, in which, after appropriate recitals, it is agreed: (1) that the company thereby surrender to the bank all their right, title, and interest in the assets of the company and agree to asign to the bank their lease of the milling property: (2) that the company shall pay to the bank forthwith $10,000—the bank assuming payment of certain of the company's liabilities, as particularly set out in attached memorandum, and will honour the company's cheques when issued in payment of such liabilities: (3) the company agree to execute such further assignments and assurances as may be necessary to vest in the bank all of the said assets: (4) in consideration whereof the bank shall forthwith release the McAllisters from all further liability, and in the event of the business being hereafter carried on in the name of the said company (as provided in contemporaneous agreement) or in any similar way, the bank agrees to indemnify the company . . . against any and all liabilities then or thereby incurred.

This document is executed by the McAllisters and by Mr. Crane, the local manager at Peterborough of the bank, and the solicitor of the bank is the witness. The memorandum annexed contains only the book debts of the company amounting to $4,217 and any outstanding grain tickets.

The agreement of the same date as to the bargain is between Charles McAllister and the bank, and recites that it is made for the more convenient liquidation of the partnership assets and with a view of disposing of the company's business as a going concern. It provides that McAllister shall continue to carry on the business under the name of the McAllister Co. and to manage the same as a going concern and collect book debts and reduce the amount due to the bank . . . having in view the intention to dispose of the business as a going concern at the earliest date possible; he is to get a salary of $1,000 out of the business, which business is to be under the supervision of the local manager, who shall have access to the books, and to whom McAllister shall be accountable. The bank agree to indemnify the company against any liability incurred while the business is being continued in the company's name.

This document is signed by Charles McAllister and the local manager of the bank before the same witness.

The last of the series is a general release of all demands —a mutual release down to the date of it, which is 19th September, 1905, and is made between the McAllisters and the bank, and contains this recital: "Whereas the McAllisters are indebted to the bank in the sum of $62,900, and, being unable to pay in full, have by instrument of even date herewith surrendered to the bank all their firm assets, and have also paid the sum of $10,000 in consideration that the bank would release the firm and the individuals from all liabilities. This is signed by the McAllisters, and also by the general manager of the bank, and the corporate seal is duly attached.

This concluding document, incorporating the provisions of both the others, duly executed by the bank, displaces the argument addressed to me that the agreement relied on was not binding upon the bank. Apart from this, I think the whole course of the proceedings prior and subsequent to the signing of the papers shews that the agent who signed was acting not without authority, and his action was, besides, adopted and ratified by the bank.

I think it may also be properly concluded that the subsequent liability which might arise as to accruing rent was not provided for expressly in any of the papers. It was not intended to be included in the schedule of current or existing claims which were to be paid forthwith by the cheque of the company, and it is not contemplated in the liabilities incurred in the course of the prosecution of the business, after the bank had become transferees of the property, and against which the bank indemnifies. The claim for subsequent rent, which may arise though no subsequent business is prosecuted, appears to me to lie outside of these expressed provisions.

There is evidence, not contradicted, that McAllister mentioned the matter of future rent during the negotiations as a thing he was not to pay, and there is also the emphatic testimony of the solicitor for the bank that McAllister was to be indemnified against all liabilities connected with the business. This evidence goes to establish that there is no obstacle interfering with any implied obligation which may arise out of the nature of the transaction.

The only other facts which need be referred to are that the business was carried on by McAllister under the supervision and for the benefit of the bank for 6 months—that he was succeeded by another appointee of the bank, who

appears to have been in charge till the business was closed at the end of 1906.

In July, 1906, at the instance of the bank, the McAllisters gave a power of attorney to the local manager empowering him to execute any deed of assignment or surrender of the lease. McAllister also on behalf of the bank arranged with the lessors that they should consent to an assignment of the lease to a third party, to whom the property should be disposed of by the bank. But no purchaser or third party could be found up to the time in September, 1906, when the bank, becoming involved in financial embarrassment, suspended payment and became subject to the supervisory powers of a curator (see R. S. C. 1906 ch. 29, sec. 2), or of some functionary directed by the Bank of Montreal, for the evidence is not clear as to what exactly happened. There is no proof, however, that there has been any change in the legal or equitable control of the Ontario Bank over the property and leasehold term now under discussion. The business was ended apparently by this officer under the Bank of Montreal, who paid the last gale of rent up to the end of 1906, and sent back the keys to the lessors in the name of the McAllister Co.

This, I think, clears the way to consider the results and the legal situation. Upon the facts, I think the proper conclusion is, that the bank became the lawful transferees of the lease, and thereafter managed and controlled the leasehold premises for their own advantage. Though active possession of the mill premises ceased at the end of 1906, the right to possession and to resume active operations or to dispose of the property rests with the bank. The McAllisters certainly have no right to enter thereon, as against the bank.

The objection raised as to the agreement not being binding on the bank, I have already considered and dealt with. The next objection strongly urged was that the action of the bank in carrying on the business was ultra vires, having regard to sec. 76 (2 a) of the Bank Act, R. S. C. 1906 ch. 29: "Except as authorized by this Act, the bank shall not either directly or indirectly engage or be engaged in any trade or business whatsoever."

There is no express provision in the statute authorizing the bank to do what was done in this case, that is, to take

a transfer of property in satisfaction of an existing debt which the customer is unable to pay otherwise. The Act relates to the taking of securities, etc., but looking at sec. 81 particularly, as well as other sections, it appears that the bank can purchase the property of its debtor under execution or insolvency just as any individual might do, and may take, hold, and dispose of the same at pleasure. It has also been held that the bank have power to compound a claim when the exigencies of business require that to be done: Bank of Commerce v. Jenkins, 16 O. R. 215, 221. And when the bank have taken over the security for a debt already incurred, they may carry out such arrangement for its sale and disposition as the bank may think proper: In re Rainy Lake Lumber Co., 15 A. R. 749; see also Exchange Bank of Canada v. Fletcher, 19 S. C. R. 278. It was competent, I think, for the bank to acquire these assets and to take the transfer absolutely of the leasehold, and as subsidiary to a favourable or profitable disposal or sale of the mill to keep it as a going concern for a reasonable time: see First National Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, and Roebling v. First National Bank of Richmond, 30 Fed. R. 744. Possibly, but for the bank's suspension of business, such a disposition would before this have been made of this concern. But, whether my view as to a going concern be correct or not, it does not seem to me that the bank can escape from the obligation of their position as transferees of the leasehold by invoking the doctrine of ultra vires or by objecting that this conduct of the business is not authorized or is forbidden by the statute. The bank have by the agreement to transfer become equitable owners of the leasehold, and can deal with it as owners by occupation or subletting or otherwise getting the benefit of it, and the McAllisters have no further right to its enjoyment. It is evident that the bank did not seek to have executed a formal deed of assignment, but were content to hold and control the right to have a transfer made to their nominee. It is objected that the bank were never entitled to the possession because no consent to any assignment to the bank has been given by the lessors. But the lessors have not refused such consent; on the contrary, knowing that the bank were handling the property after the McAllister settlement, the lessors accepted rent and are willing to accept the rent from the bank as it accrues from

time to time. The evidence indicates this, and it also appears that, on application being made to the lessors after McAllister had ceased to be manager for the bank, they signified their readiness to assign the lease to a third party. The local manager says he was aware that the lessors would assign to a third party as assignee or purchaser, but the trouble was to find the person.

Here the element which distinguishes the case relied on by the bank of Crouch v. Tregonning, L. R. 7 Ex. 88, is wanting. . . . The ground of Baron Bramwell's judgment is that the bargain was that a regular assignment of the term should be executed, and this was never done because the landlord's license which was required could not be obtained, and therein arose failure of consideration in respect of indemnifying the lessee.

The liability of the bank rests on the agreement to have the leasehold transferred, which can be carried out, and on the control which the bank exercise over the leasehold premises. It is not necessary that there should be actual and beneficial usufruct of the premises to render the bank liable. If they have the potential power to control the possession, that creates the implied obligation which arises out of the contract, though not expressed therein, so long as there is no evidence to negative that implication. If the agreement in question was carried out into details, the deed of assignment would be drawn so as to be subject to the payment of rent by the transferees. Even without these words "subject to payment," etc., there is the implied promise of the assignee of a lease to indemnify the original lessee. The effect of the assignment is that the lessee becomes a surety to the lessor for the assignee, who as between himself and the lessor is the principal, bound while he is assignee to pay the rent, and the surety after paying the rent has his remedy over against the principal. I have been just quoting from language approved of and given effect to by the Court of Exchequer in Moule v. Garrett, L. R. 5 Ex. 132, and affirmed in L. R. 7 Ex. 101. If a formal deed of transfer had to be executed, it would contain a covenant by the purchasers, the bank, to indemnify the vendor against the payment of the rent: see Bridgman v. Daw, 40 W. R. 253, and Dodson v. Downey, [1901] 2 Ch. 620, 623.

The conclusion I have reached is that the claim of the McAllisters to be indemnified by the bank against this payment of rent is established, and judgment should be so framed with costs to be paid by the bank.

FALCONBRIDGE, C.J. JUNE 4TH, 1907.

CHAMBERS.

COLLINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

PERKINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Parties — Joinder of Defendants — Cause of Action — Joint Liability—Tort.

Appeals by defendants the Dominion Natural Gas Co. from orders of Master in Chambers, ante 84, dismissing appellants' motion for orders requiring plaintiffs to elect against which defendant they would proceed.

G. M. Clark, for appellants.

D. L. McCarthy, for the other defendants.

J. G. Farmer, Hamilton, for plaintiff Collins.

D'Arcy Martin, Hamilton, for plaintiff Perkins.

FALCONBRIDGE, C.J., dismissed the appeal with costs to be paid by appellants in any event.

RIDDELL, J. JUNE 4TH, 1907.

TRIAL.

LUMSDEN v. TEMISKAMING AND NORTHERN ONTARIO R. W. COMMISSION.

Railway—Damages "Sustained by Reason of the Railway"—Timber Cut for Construction of Railway — Limitation Clause in Railway Act—Action not Brought within Six Months.

Action for damages for the cutting and taking of timber from certain lands under license to plaintiff.

G. F. Henderson, Ottawa, for plaintiff.

D. E. Thomson, K.C., for the defendants the railway commission.

J. H. Moss, for defendant A. R. McDonell.

RIDDELL, J.:—Alexander Lumsden, the plaintiff, was the licensee of certain timber limits under the usual form of timber license issued by the department. The defendants the railway commission were incorporated by 2 Edw. VII. ch. 9 for the purpose of building a railway through the northern part of this province; defendant McDonell is a contractor under them. Before the filing of the plans and about June, 1903, the defendants entered upon the timber limits of Lumsden and cut certain timber—admittedly this was done in the course of contructing the projected railway. These acts continued down to a later period, but ceased much more than 6 months before the issue of the writ herein. Several defences were urged before me at tho trial, but I need consider only one of these.

The Act of incorporation, 2 Edw. VII. ch. 9, provides, sec. 8, that the commission shall have in respect to the railway all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario. This Act, R. S. O. 1897 ch. 207, sec. 42, provides that "an action for damages or injury sustained by reason of the railway shall be instituted within 6 months next after the time of the supposed damage sustained." The corresponding section of the Dominion Railway Act, R. S. C. 1886 ch. 109, sec. 27, has been interpreted by the late Mr. Justice Street (venerabile nomen!) and by the Court of Appeal in McArthur v. Northern and Pacific Junction R. W. Co., 15 O. R. 733, 17 A. R. 86. Mr. Justice Street held that such damages as indemnity is sought for in this action were "sustained by reason of the railway," and this decision was affirmed by the Court of Appeal. It is true that the Court of Appeal was equally divided, but that is immaterial as regards an inferior Court. An inferior Court must follow the decision unless and until it should be overruled either by the Court of Appeal or some higher Court. . . . The "Vera Cruz," 9 P. D. 86, 91.

I do not think that Mr. Henderson succeeded in at all distinguishing the facts of this case from those in the Mc-

Arthur case; and therefore, without expressing any independent opinion of my own, I shall direct judgment to be entered dismissing this action with costs. . . .

CARTWRIGHT, MASTER. JUNE 4TH, 1907.
FALCONBRIDGE, C.J. JUNE 5TH, 1907.

CHAMBERS.

BRIGHAM v. McALLISTER.

Venue—Motion to Change—Residence of Parties—Nominal Plaintiff — Real Plaintiff — "Party" — Preponderance of Convenience—Witnesses—Expense—Costs.

Motion by defendants to change the venue from Owen Sound to Gore Bay.

J. E. Jones, for defendants.

R. C. H. Cassels, for plaintiff.

THE MASTER:—The plaintiff is suing as assignee of one Detwiller, who is a resident of Saskatchewan, where he has just been examined on commission. He there says that he will get all the benefit of this action if successful, as it is to be applied on another account between plaintiff and himself. He also says that the assignment was without consideration and was given to save him from a trip to Ontario. Incidentally it obviates the necessity of security for costs.

It is admitted that the cause of action, if any there be, arose in the district of Manitoulin Island.

On these facts it was argued that Detwiller is the real plaintiff, and that this case is within the principle of Saskatchewan Land and Homestead Co. v. Leadley, 9 O. L. R. 556, 5 O. W. R. 149, which I followed in Appleyard v. Mulligan, 6 O. W. R. 929.

It was contended in answer that Mr. Brigham and not Mr. Detwiller is "the party" to the action; that, if Detwiller had brought suit in his own name and laid the venue at Owen Sound, or wherever else he might happen to be in the province at the time, this could not be interfered

with, as was decided in Campbell v. Doherty, 18 P. R. 243, in the Court of Appeal.

It was submitted that in effect this was being done here, and that, therefore, the motion could not succeed under Rule 529 (b). Though examinable for discovery without order under Rule 441, Detwiller does not seem to be a "party" within the definition given in cl. 8 of sec. 2 of the Judicature Act.

I am not satisfied that the present comes within the principle of the Saskatchewan case, which I understand it was said by Sir W. R. Meredith, C.J., in dismissing the appeal in Geedy v. Wabash R. R. Co., 9 O. W. R. 507, was not to be extended. . . .

The real question seems to be whether Detwiller continued in defendants' service after 25th June, 1904. He says no salary was fixed, but that he was to get whatever he thought was right.

It is not apparent how there can be 5 or 6 witnesses on this, on either side, unless they heard admissions of the plaintiff or of the defendants to that effect, or to the contrary. But I cannot safely disregard plaintiff's affidavit, who swears to a balance of expense in favour of Owen Sound.

In view of this, and considering that the assizes at Gore Bay begin on 11th instant, while those at Owen Sound are a week later, I do not think the motion can succeed. The time for getting ready for a trial at Gore Bay is very short, and a change of venue might result in the case going over, though the defendants are willing to take short notice of trial. But the plaintiff would not be in default if he did not proceed at these sittings.

The costs of the motion will be in the cause; the extra costs (if any) of a trial at Owen Sound as against Gore Bay can be disposed of by the trial Judge.

An appeal from this decision, argued by the same counsel, was dismissed by FALCONBRIDGE, C.J.

RIDDELL, J. JUNE 5TH, 1907.

TRIAL.

BULLEN v. NESBITT.

Will—Construction—Life Estate—Estate in Fee or Tail—Devise of Remainder to Children after Express Devise for Life—Rule in Shelley's Case—Purchaser from Mortgagee of Life Tenant—Title by Possession—Limitation of Actions — Ejectment — Defence — Mesne Profits—Improvements under Mistake of Title—Reference—Costs.

Action to recover possession of land and for mesne profits.

A. H. Clarke, K.C., for plaintiff.

Taylor McVeity, Ottawa, for defendant.

RIDDELL, J.:—Mary Bullen was the owner of a certain lot No. 7 on the south side of Gloucester street in the city of Ottawa, and in September, 1868, she was living upon this lot with her son, William Bullen, and the present plaintiff, his wife. At that time they had one child living. Mary Bullen made her last will and testament in that month, of which the material parts are as follows:—

"I give and devise town lot No. 7 on the south side of Gloucester street, in the said city of Ottawa. . . together with all the improvements thereon and appurtenances thereof to the use of my son William Bullen for and during his life. . . and from and after the death of my said son William Bullen, I give and devise the said lot. . . to the use of the children of the said William Bullen lawfully begotten or to be begotten, and the heirs of the bodies of the said children of the said William Bullen respectively, and in default of issue of the said William Bullen lawfully begotten or to be begotten"—a devise over.

Mary Bullen died 12th September, 1868, the will having been made on 7th September. William Bullen continued to live upon the said lot until 9th March, 1878, when he removed to Toronto. In the meantime he seems to have made a mortgage of his life interest to one McGillivray. McGillivray, at all events, after the removal of Bullen, leased the premises from time to time, and finally about

23 years ago sold to defendant for $700. Defendant had already been in possession of the property as tenant of McGillivray, and after the sale she continued in possession, now claiming as owner, and so continues to the present time. She paid $600 of the purchase money, and, McGillivray dying, she has not been required to pay the remainder.

William Bullen died 21st November, 1906. On 14th February, 1907, four, being all the surviving, children of William Bullen, granted all their interest in the lot to their mother, the plaintiff. It appears that another daughter of the deceased William Bullen predeceased him, leaving issue. These will require to be made parties plaintiffs to this action.

Defendant claims by possession, setting up that the effect of the will is to vest a fee simple in either William Bullen alone or in William Bullen and his children, that is to say, that either the rule in Shelley's case or the rule in Wild's case applies: and counsel, waiving all technical objections to the frame of the action, rests his case upon that proposition.

If the mortgage said to have been given to McGillivray was in reality, as it is asserted, a mortgage by William Bullen of a life interest, it is apparent that defendant was in possession and claiming under a mortgage for the life of William — rightfully in possession — and therefore the time would not begin to run until the death of William as against any one claiming as heir in fee or in tail of William. If, then, I came to the conclusion that William took an estate in fee or in tail, it would become necessary to consider how far the mortgage had been proved. But, in the view I take of the case, such an inquiry is unnecessary.

The will contains an express devise to the son "for and during his life," and then continues "and from and after the death of my said son. . . I give and devise . . . to the use of the children of the said W. B. lawfully begotten or to be begotten, and the heirs of the bodies of the said children of the said W. B. respectively."

No doubt, the rule in Shelley's case has sometimes been applied when the word "children" has been used instead of "heirs" or "heirs of the body," but never, I think, where there is an express life estate devised to the ancestor. And the rule in Wild's case does not apply—the gift to the children not being immediate: Grant v. Fuller, 33 S. C. R.

34; Chandler v. Gibson, 2 O. L. R. 442; Re Sharon and Stuart, 12 O. L. R. 605, 8 O. W. R. 625. The two last cases are also authority against the applicability of the rule in Shelley's case. No estate was taken by W. B. except an estate for life—no estate was taken by any of his children except in remainder after this life estate; the statutory period did not begin to run till the death of W. B.; and the defence fails.

Defendant seems to have made certain improvements upon the property under the belief that it was her own; she would, consequently, be entitled to a lien upon the same, to the extent to which the value of the land is enhanced by such improvements: R. S. O. 1897 ch. 119, sec. 30. She is liable for mesne profits. It seems to me that the one may well be set off against the other, and I so direct, unless either party within 20 days . . . elects take a reference, in which case it will be referred to the Master at Ottawa to inquire and report: (1) the amount by which the value of the land is enhanced by lasting improvements thereon made by the defendant under the belief that such land was her own; and (2) the amount of mesne profits to which defendant is liable.

As to costs, defendant was notified of the claim of plaintiff, and held in defiance thereof. She should pay the costs up to and including judgment. If a reference is taken, it will, of course, be at the peril of the party electing to take it. Costs of the reference and all further costs and further directions I reserve to be disposed of by myself . . .

MABEE, J. JUNE 5TH, 1907.

TRIAL.

FALLIS v. WILSON.

Fraudulent Conveyance—Ante-Nuptial Marriage Settlement—Action by Execution Creditor to Set aside—Fraudulent Intent of Settlor—Knowledge of Intended Wife of Claim of Execution Creditor—Bona Fides—Absence of Knowledge of Fraudulent Purpose—Marriage a Valuable Consideration.

Action to set aside a marriage settlement made by defendant George H. Wilson upon his wife, defendant Alice Emily Wilson, as being fraudulent against plaintiff.

B. N. Davis, for plaintiff.

J. M. Godfrey, for defendants.

MABEE, J.:— . . . The plaintiff, Lizzie Fallis, on 31st October, 1906, obtained a verdict against defendant George H. Wilson for $1,000 damages for breach of promise of marriage. A notice of motion by way of appeal to a Divisional Court was given, but by consent on 25th January, 1907, the motion was dismissed. Judgment was signed on 26th January, and the costs taxed at $238.30 on 4th February, and on 6th February execution placed in the sheriff's hands against the goods and lands of the debtor.

During the first week in October, 1906, defendant George H. Wilson proposed marriage to defendant Alice Emily Wilson, then Alice Emily Caton. She took time to consider, and on 16th January, 1907, wrote him the following letter: "68 Elliott St. Dear George: On account of the trouble you are in, I have considered your proposal of October, 1906, on certain conditions, that you settle on me for my own benefit and the benefit of my offspring, if any, $2,500 either in money or property to that value. I do wish it was spring. I am sure you must feel dreadfully cold on night duty. I hope your mother will soon be better again. I suppose your brother and his wife are still here. I am sure they will be enjoying their visit, although their home out there must be so nice. . . . By-by for the present. With love, Alice."

She had not seen him between the date of the proposal and the date of the letter. On 25th January George H. Wilson called at Miss Caton's house, at about tea time, and asked her when she would get married; she said she was ready at any time, nothing being said about the property or marriage settlement. On 28th January he wrote her a note to meet him the next morning at Mr. Phelan's office (this was burned at the time); she went there as requested and met George H. Wilson, his brother David Wilson, and Lavinia, David's wife; a marriage settlement was prepared, drawn up by Mr. Phelan upon instructions from George H. Wilson, given on the 28th, David and Lavinia Wilson being the trustees; it was read over by Miss Caton, and from it she saw that a 50-acre farm and $1,000 in money were being settled upon her; the document was executed; the $1,000 paid over to the trustees; and the marriage was properly solemnized the same afternoon. Miss Caton had no one

acting for her, and was entirely trusting to George H. Wilson making the settlement. The date of the proposed marriage was not fixed until after the execution of the document, but the parties went direct from the law office and obtained the license, and from there to the clergyman. Miss Caton knew that the action for breach of promise was pending against Wilson; he told her of it when he proposed marriage to her, and she saw afterwards in a newspaper that a verdict for $1,000 had been recovered, and I think a fair inference to be drawn from the letter of 16th January, by its reference to the trouble Wilson was in, is that she then knew the verdict was still unpaid. Whether she knew of the then pending appeal there is no evidence. Defendant George H. Wilson's property consisted of some $1,200 in cash and the equity of redemption in 50 acres in the township of Vaughan, worth about $800. So the value of the property settled was about $1,800, instead of $2,500. Miss Caton had no knowledge of what the value of the property was, nor as to whether the settlement covered all the property Wilson had. She had not met the trustees before the day the marriage settlement was executed; they are the persons referred to in her letter of 16th January.

It was not contended at the trial that Wilson's object in making the settlement was not to place the property beyond the reach of plaintiff's judgment and execution. The question for consideration is whether the settlement so operates. In determining this, regard must be had to whether the marriage settlement was the consideration that induced Miss Caton to enter into the contract of marriage. She stated both in her examination for discovery and at the trial that she would not have entered into the marriage had the settlement not been made, and I know of no reason why her statement as to this should not be accepted; she was not cross-examined upon it; and I am unable to find the contrary to be the fact.

It was argued that she would have willingly married Wilson without the settlement being made; that she was giving up no prospects at her mother's house; and the proper inference was that the settlement was not the consideration. She had a comfortable home; her delay in accepting the proposal, the knowledge of the actual execution of the settlement in accordance with the request in the letter, that its preparation had been attended to in the office of

reputable solicitors, all goes to strengthen her statement that without the settlement she would not have entered into the marriage. Mrs. Wilson (Miss Caton) appeared in the witness box as a respectable lady; she said she was 35; her husband appears to be some years older; they had been on friendly terms for several years; and there was nothing to shew that she was lending herself to any fraudulent scheme to defeat plaintiff's execution. . . .

[Thompson v. Gore, 12 O. R. 651, distinguished.]

An honest marriage has been entered into by the principal defendant here, who of course is the wife; the marriage settlement has the effect, if it stands, of defeating plaintiff in recovering upon her judgment; if it is set aside, then the wife has been deprived of the consideration moving to her as the inducement for entering into the marriage. Of course, if the wife lent herself to her husband's fraudulent scheme, or entered into the contract for the purpose of defrauding plaintiff, there is no doubt about what the result should be; but I am unable to find such to be the case.

Marriage has always been regarded as the highest consideration, but plenty of cases may be found where such consideration has been of no avail, where found to have been a mere pretence, or, although solemnly entered into, been intended as the cloak for fraud: see Colombine v. Penhall, 1 Sm. & Giff. 228; Fraser v. Thompson, 1 Giff. 65; Bulmer v. Hunter, L. R. 8 Eq. 46.

Although the marriage was honestly entered into on the part of the wife, and the settlement formed the consideration, or at least part of the consideration, for it, is she to be deprived of it because she knew of the indebtedness to plaintiff, and, according to the letter of 16th January, that the trouble was still existing?

In my view, this does not necessarily deprive her of the benefit of the settlement. It might be, and doubtless is, some evidence of fraud, and without more might be regarded as cogent proof of the intention to join in the fraud of the husband. . . .

[Reference to May, 2nd ed., p. 79.]

The 6th section of the Statute of Elizabeth expressly provides that it shall not extend to any estate upon good consideration and bona fide conveyed to any person not having at the time of the conveyance any manner of notice or knowledge of covin, fraud, or collusion. Assuming only

knowledge in the wife of the existence of the judgment and its non-payment on 16th January, does that necessarily make her a party to the fraud? It of course creates a suspicion, and necessarily causes the closest scrutiny to be made into all the surrounding facts. These I have most carefully considered, and the only evidence pointing to any complicity of the wife consists of her knowledge of this debt, and the inference to be drawn from the letter. . . .

[Reference to May, 2nd ed., p. 332; Fraser v. Thompson, 1 Giff. 49, 4 DeG. & J. 659; Hickerson v. Parrington, 18 A. R. 635; Re Johnson, Goeden v. Gillam, 20 Ch. D. 389.]

The Court must find that Miss Caton contracted this marriage, not only with notice of the unpaid claim of plaintiff, but also with the knowledge that Wilson was marrying her merely to defraud his creditors. It is reasonable to suppose a woman would contract marriage in such circumstances? I do not think so, nor do I think she contracted the marriage with the view of defrauding the creditors. I think she desired to marry Wilson; she knew of the outstanding claim; she had no knowledge of the extent or value of Wilson's property, and took the precaution of requiring a settlement to the extent of $2,500 to be made upon her; and it is not shewn that she took this step upon any suggestion of Wilson or with the knowledge that he desired her to take that position. She stands then as a bona fide purchaser for value without notice of any fraudulent intent in the settlor, and herself free from fraud. In these circumstances, the cases shew that she is entitled to more consideration than the creditors.

I think also, notwithstanding scattered statements to the contrary, that the old doctrine that marriage is the highest consideration known to the law should still be adhered to, and that it should continue to be the policy of the law to hesitate long before undoing contracts founded upon that consideration, in the absence of clear and convincing evidence of fraud participated in by the party seeking to uphold the transaction. . . . .

[Bulmer v. Hunter, L. R. S. Eq. 46, and Thompson v. Gore, 12 O. R. 651, distinguished.]

Objection was taken to the form of the marriage settlement, and it was argued that the property was still under

the control of the husband. I do not think so. The deed gives the wife and trustees entire control of the money and lands, and she acquires valuable rights that, without her consent, her husband can in no way interfere with.

I have not overlooked the various facts referred to by plaintiff's counsel upon the argument that in his view pointed to fraud. He contended that the letter of the 16th January was not written at that time, but was ante-dated, written after the marriage, to shew a demand made prior to the execution of the settlement. There is no evidence of this, and it seems to me that the reference in the letter to the trouble Wilson was in is strong evidence of the letter being genuine, both as to origin and date. Without the letter and the admissions of the wife, plaintiff would have been unable to shew that the wife had any knowledge of the existence of plaintiff's judgment. Complaint was made about the business-like manner of the proposal of marriage, and the delay from October to January before the conditional acceptance. The latter was accounted for by illness in the lady's family, and the death of her father. The engagement and marriage certainly were of a rather formal character, but the fire of youth was absent, and the romantic days of each had passed. I listened to the case and approached its consideration with suspicion. I have gone over most of the transactions several times, and, in the words of Mr. Justice Osler in Hickerson v. Parrington, ante), "on the whole I have arrived at a firm opinion that the existence of a valuable consideration dominates every circumstance which might be regarded as suspicious."

The action will be dismissed with costs."

It may be proper to say that I have no regrets at having been able to reach the foregoing conclusions, for the following reasons. On 25th January the solicitor for defendant George H. Wilson offered the solicitor for plaintiff $900 and all costs in settlement of plaintiff's claim, which offer was refused. Since I heard the case and before giving judgment the plaintiff called me by telephone and endeavoured to discuss her case and force her views upon me, and this morning I have received the anonymous letter, written in the interest of plaintiff, which I have attached to the record.

JUNE 5TH, 1906.

DIVISIONAL COURT.

MAYCOCK v. WABASH R. R. CO. AND GRAND TRUNK R. W. CO.

Railway—Collision—Death of Engine-driver — Negligence — Rules of Company—Disobedience of Deceased—Cause of Death—Action by Widow—Findings of Jury.

Appeal by plaintiff from judgment of MABEE, J., 9 O. W. R. 546.

J. H. Rodd, Windsor, for plaintiff.

H. E. Rose, for defendants the Wabash Railroad Co.

W. E. Foster, Montreal, for defendants the Grand Trunk Railway Co.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

JUNE 5TH, 1907.

DIVISIONAL COURT.

HOWARD STOVE MANUFACTURING CO. v. DINGMAN.

Sale of Goods — Proposed Organization of Joint Stock Company—Liability of Promoters for Price of Goods Purchased for Proposed Company — Partnership — Agency — Agreement — Novation — Evidence — Joint Liability —Contribution—Parties—Costs.

Appeals by defendants Dingman and Coulter, respectively, from judgment of MABEE, J., in favour of plaintiffs, an incorporated company doing business in Savannah, Missouri, for the recovery of $611.57, the full amount claimed in an action for the price of certain stoves, against both defendants, who were described as promoters.

S. H. Bradford, for defendant Dingman.

J. L. Ross, for defendant Coulter.

G. M. Clark and J. A. McEvoy, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., CLUTE, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—By reason of a somewhat unusual course taken at the trial, it becomes necessary to distinguish between the facts as proved against defendants, respectively. As between plaintiffs and defendant Dingman the following appear to be proved. Lincoln Howard, of Savannah, Mo., was the inventor of certain improvements to stoves, which he patented. The plaintiffs, a company of Savannah, manufactured stoves, according to this patent, but had no interest in the Canadian patent. In September, 1902, one Williams, an attorney and agent for Howard, met Dingman in Toronto, and an agreement was made between Howard and Dingman whereby Dingman had an option of dealing with the patent rights for Canada in any one of the 3 specified ways, one of these being the formation of a joint stock company, the transfer to such company of the Canadian patent, and the payment for such patent in stock of the company. On 5th October, 1902, Dingman writes to Williams, who was also an officer of plaintiffs, in reference to the option, and adds: "What I wish to learn at once is, will the Novelty people furnish us with the castings and sheet steel bodies for 100 stoves and at the cost price as given in the estimates furnished? . . . (2) Will Mr. Howard waive royalty . . . . ?" It is important to observe that thus soon Dingman was quite aware that plaintiffs—the Novelty people, as he calls them—and Howard were not at all the same, but must be dealt with separately.

On 2nd November, 1902, the defendants Dingman and Coulter entered into an agreement. . . .

About a fortnight after this, Dingman went to Savannah, saw Howard (who was also the president of the plaintiffs), and made with Howard an agreement selecting that one of the three options mentioned above, contracting that he would organize a company, and that a certain amount of the stock of the company would be delivered to Howard for the patent rights for Canada.

At the same time he bought from the plaintiffs the stoves, the price of which is in question in this action, for the purpose of putting them up right away while the company was organizing and getting ready for manufacturing,

and this with the formation of the company in view. Some of these he directed to be sent to the address of Coulter and some to his own address. Whether he at that time told the officers of the plaintiffs that he was acting for Coulter is disputed, and is not material to the present inquiry.

In December Coulter had found that he could not go on with the promotion of the company, and so Dingman informed the plaintiffs. Coulter refused to take the goods from the station, and finally it was arranged that, as the goods had been shipped to Coulter, and his concurrence was necessary to get the goods, the shipment should be delivered to Coulter, "and by accepting same, we (the plaintiffs) understand that he assumes no obligation for the payment."

Considerable negotiations were carried on by Dingman as to the disposal of the stoves, and in the long run plaintiffs demanded payment. Upon his attempting to connect the transactions with the plaintiffs and those with Howard, he was reminded that Howard and the plaintiffs were quite distinct. I do not think this reminder was necessary, as it is quite clear that, whenever he thought about the matter at all, he quite appreciated this fact.

It is said that there was a novation, a new contract, express or implied, as to the payment for or disposition of these goods, but neither oral nor written evidence shews anything of the kind.

I think that the appeal of Dingman should be dismissed, and with costs.

The position of Coulter is different. At the trial, by arrangement between counsel for the plaintiffs and for Dingman, Dingman's evidence for discovery was read as evidence for Dingman. This was against the objections of counsel for Coulter; and of course it cannot be read against Coulter.

What is proved against him is the agreement between him and Dingman, and the fact that certain stoves were shipped to his address. All the letters and oral statements of Dingman must be excluded, unless they become admissible from the relationship created by the agreement of 2nd November, 1902. The terms of this become material. It will be seen that the agreement provides that their interests shall be equal in the agreement which Dingman had, giving him the right to negotiate a sale of the patent and to organize a company to manufacture the heaters, and that

their interests shall be equal in the promotion and organizing of such company. No doubt, the association of the two was simply to promote and organize the company, and it is therefore argued for Coulter that his position of joint promoter with Dingman does not render Dingman his agent to buy goods. If this contention be sound, the appeal of Coulter should be allowed. But is that the state of the law?

The rules as to the liability of promoters for the acts of each other are accurately laid down in Lindley on Companies, 6th ed., p. 193 . . . ; see also Sandusky Coal Co. v. Walker, 27 O. R. 677, 681, 687; and were Dingman and Coulter simply subscribers for stock and promoters, only in that way, or in the ways mentioned in the cases in Lindley at pp. 193, 194, and 195, there could be no pretence but that Coulter was liable. But they are much more intimately connected than that. They have agreed to "become associated" (to use the language of the contract), and are engaged in a commercial enterprise, viz., that of operating a company and with an agreement that they shall share the profits derived from it. Such an association is a partnership, unless the contrary is shewn: Pooley v. Driver, 5 Ch. D. 458; Adam v. Newbigging, 13 App. Cas. 308, 316; In re Foot, [1897] 2 Q. B. 495.

I do not think there is anything in the circumstances of this case leading to a contrary conclusion. Dingman was then the agent—or partner—of Coulter in making the purchase of the stoves.

Moreover, the contract itself shews that before the organization of the company Dingman was to have control of the "advertising department." This can only mean that in the pursuit of the common undertaking, and until the organization of the company, Dingman was to use his judgment as to what was proper for the purpose of advertising the company and its intended manufacture; and it is clear that Dingman bona fide thought that the best way of advertising was to have these stoves sent on and exposed to the public. I think Coulter was liable for the amount sued for. The fact that he refused to take the goods from the railway station without any assurance that this act should not render him personally liable does not affect his liability. The only assurance that he received—even if it be considered that the letter of 23rd March, 1903, was within the authority of the writer—was that that act should not

render him personally liable. I have considered his case, therefore, without regard to that circumstance.

Coulter being thus originally liable, no new contract has been shewn; and his appeal should be dismissed.

The evidence which fixes him with liability was produced for the first time upon the argument of the appeal. Plaintiffs then should have no costs of the appeal, and, as Coulter is liable for the amount found by the trial Judge. he should have no costs of the appeal.

Complaint was made that the trial Judge should have added Howard as a party defendant. This is admittedly a matter of discretion, and we do not interfere with that discretion. The refusal to add Howard as a party will be without prejudice to any action which either defendant may be advised to bring against Howard. And, of course, the judgment will not interfere with any action or other proceeding by either defendant against the other for contribution. . . . .

JUNE 5TH, 1907.

C.A.

EMBREE v. McCURDY.

Receiver—Motion for, after Judgment, when Appeal Pending —Jurisdiction of Court of Appeal—Partnership—Dissolution—Receiver not Asked for in Statement of Claim or at Trial—Grounds for Motion—Danger of Loss of Partnership Assets—Costs.

Motion by plaintiff for an injunction or receiver, in the circumstances mentioned in the judgment.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

B. N. Davis, for plaintiff.

F. E. Hodgins, K.C., for defendant.

MOSS, C.J.O.:—The action is for a declaration that a partnership existed between the plaintiff and defendant in

the business of contractors, etc., and for dissolution and the taking of the accounts and winding-up of the partnership affairs. The defendant denied the existence of a partnership. There have been two trials, each resulting in a judgment in favour of plaintiff. The last judgment declares that there was a partnership between the plaintiff and defendant, orders that it be dissolved on the day of the judgment, and directs a reference to take the partnership accounts.

The defendant obtained special leave to appeal directly to this Court, and has given security for the costs of the appeal in accordance with Rule 826, but the case is not yet in a position to be brought on for argument. The plaintiff applied to the Judge of the High Court for an injunction to prevent the defendant from dealing with the partnership moneys, pending the appeal, or for a receiver. The defendant objected that the effect of giving the security in appeal was to stay all proceedings in the action, unless otherwise ordered by the Court of Appeal or a Judge thereof—Rules 827 and 829—and therefore there was no power in the Judge to make the order. The Judge directed the motion to stand for 10 days to enable the plaintiff to make an application to this Court. The plaintiff now moves for an injunction or receiver or for such other order as may be just.

This relief was not asked for in the statement of claim or at the trial, though, in view of the issues and the findings in favour of plaintiff, it would seem that the appointment of a receiver, if asked for, would have been granted without any difficulty.

The fact of partnership being denied, the Court would not have appointed an interim receiver pending the determination of the question of partnership or no partnership, unless under very special circumstances: Peacock v. Peacock, 16 Ves. 49; Fairburn v. Pearson, 2 Macn. & G. 144; Chapman v. Beach, 1 J. & W. 594.

But, it having been found that a partnership did exist, and a dissolution having been ordered, the appointment of a receiver would follow almost as a matter of course: Lindley on Partnership, 6th ed., p. 534. In Pini v. Boncoroni, [1892] 1 Ch. 633, Stirling, J., said: "The plaintiff, however, insists that he is entitled as of right to the appointment of a receiver, and contends that the mere fact of the dissolution gives him that right. That is putting it rather

higher than it is put in Lindley on Partnership, where it is said, and I adopt the statement, that where one partner seeks to have a receiver appointed against his co-partners, if the partnership is already dissolved, as it has been, the Court usually appoints a receiver almost as a matter of course."

At the trial of the present case everything concurred to entitle the plaintiff to a receiver almost as a matter of course, if it had been asked for when judgment was pronounced, for the fact that it was not claimed by the writ or pleading was not an insuperable obstacle: Norton v. Gover, W. N. 1877, p. 206.

But the defendant now takes the position that, as the case now stands, there is no jurisdiction or power in this Court to make an order such as is sought for. It would be a singular state of things if it should be found that nowhere is there jurisdiction in a case situate as this is to prevent an appellant pending an appeal from actually making away with the property in question, or from acting or dealing with it in a manner which manifestly must result in loss or in jeopardizing its safety, so that at the conclusion of the appeal the respondent, if successful, is left with a barren victory.

Under the Ontario Judicature Act the Court of Appeal possesses as full powers and jurisdiction as a Court of Appeal as the English Judicature Act, 1873, vested in the Court of Appeal in England. Each is a Court of Appeal only, but, as said by Lord Justice James in Flower v. Lloyd, 6 Ch. D. 297, at p. 301, "a Court of Appeal only with incidental original jurisdiction for the purpose of exercising that appellate jurisdiction." Section 54 of the O. J. A. provides, amongst other things, that "a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit, but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof." And it seems reasonable to conclude that what may be done by a single Judge during vacation can be done by the Court at any other time. In Johnstone v. Royal Courts of Justice Chambers Co., W. N. 1883, p. 5, Sir George Jessel, M.R., expressed the opinion that under the corresponding section (52) of the English Judicature Act, 1873,

an application could have been made in the vacation to a Judge of the Court of Appeal to prevent the appellant from being prejudiced by the proceeding by the respondent company with the erection of a building pending the appeal. Sections 57 (12) and 58 (9) confer large powers on the Courts, and sec. 55 provides that "for all the purposes of and incidental to the appeal . . . and for the purposes of every other authority given to the Court of Appeal by this Act the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court."

Having regard to these and other provisions of the Act, it does not seem to be putting any undue strain upon these powers, authorities, and jurisdiction, to hold that they enable the Court of Appeal to make an order such as is asked for on this application if a proper case is shewn: Salt v. Cooper, 16 Ch. D. 544.

For the time being a case in the position of this case is withdrawn from the High Court pending the appeal and until judgment has been given therein: Hargrave v. Royal Templars of Temperance, 2 O. L. R. 126. All proceedings in the High Court, except the issue of the judgment and the taxation of the costs thereunder, are stayed: Rule 829. But the stay is subject to the provisions of the Judicature Act and the Rules, by which the Court of Appeal is enabled to prevent prejudice to the claims of the parties pending the appeal. These powers should, no doubt, be exercised sparingly and with caution, having regard to the rights of all parties and the interests of justice, but they ought not to be withheld in a proper case.

For the purposes of this application it must be taken as established that the defendant has in his hands partnership funds to a considerable amount. They appear to be mixed with and to form part of an account which the defendant keeps at a bank in his own name, and which he uses for the purposes of his business. They are exposed to all the risks attendant upon such a mode of dealing with them. This state of affairs, of itself, furnishes strong reason for the appointment of a receiver: Harding v. Glover, 18 Ves. 281; Doupe v. Stewart, 13 Gr. 637. The defendant does not shew himself to be possessed of property and means beyond what he has embarked in business. He makes a general statement as to his ability to meet all claims against

him. On the other hand, it is shewn that since the judgment was pronounced he has conveyed a parcel of land to his wife. The explanation offered is the somewhat familiar one of a purchase of the property with the wife's money, but the conveyance made to the husband. Whatever may be the fact, the circumstance affords some additional ground for the plaintiff's application.

An order should go for the appointment of a receiver in the usual way, with liberty to the defendant to propose himself, giving security, or, if the defendant now consents, an order will go appointing him on his giving security to the satisfaction of the registrar if the parties cannot agree. If the defendant does not consent to become receiver, or if the parties disagree as to the appointment, the reference will be to the registrar.

As to the costs, the plaintiff, by his neglect to ask for or obtain a receiver at the trial, rendered this motion necessary, and the costs should be costs to the defendant in any event of the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented.

JUNE 5TH, 1907.

C.A.

CARMAN v. WIGHTMAN.

Mortgage—Assignment—Agreement—Executors of Purchaser from Mortgagor—Liability for Mortgage Moneys—Statute of Limitations—Indemnity—Cause of Action—Payments on Mortgage.

Appeal by defendants W. J. McNaughton and Margaret Wightman, executors of John Wightman, from judgment of MACMAHON, J., 8 O. W. R. 572, holding the testator's estate liable to pay to plaintiff $2,288.20 with costs.

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

C. H. Cline, Cornwall, for appellants.

R. Smith, Cornwall, for plaintiff and defendants by counterclaim.

Moss, C.J.O.:— . . . The evidence establishes that in January, 1898, the executors of Patrick Purcell, the mortgagee, were taking proceedings to enforce payment of the mortgage money either by sale under the power or by action. There were at the same time moneys and securities belonging to the testator's estate, in the hands of Leitch & Pringle, applicable under the testator's will to the payment of the mortgage, but they were not immediately available for that purpose, or at least not to an extent sufficient to pay the amount of principal and interest demanded. Out of moneys in Leitch & Pringle's hands belonging to the estate the sum of $419.45 was paid to Purcell's executors on account of arrears of interest, leaving $200 arrears of interest and $2,000 principal money still payable. This amount was lent by plaintiff to the executors of Wightman, the defendants who now appeal, it being arranged that the mortgage should be assigned to plaintiff, and that the $2,200 should be repaid to him by defendants, one-half on 15th January, 1899, and the other half on 15th January, 1900.

There is no doubt that the money was advanced to defendants in order to enable them to put an end to the proceedings which had been taken against the mortgaged premises, and it was paid to and received by the executors of Purcell, who executed an assignment of the mortgage to plaintiff, and the proceedings thereunder dropped. Subsequently payments were made on account of interest to plaintiff out of the moneys or proceeds of securities belonging to the testator Wightman's estate in Leitch & Pringle's hands. The defendants now resist payment, and contend that the estate of Wightman is not liable.

The mortgage to Purcell had been made by one McCrimmon, who afterwards sold and conveyed the lands comprised therein to the testator Wightman for $5,300, subject to the mortgage for $2,000, which was deducted from the consideration of $5,300.

The transaction was therefore not a sale to Wightman of the equity of redemption, but a sale of the lands, the amount of the mortgage being treated as part of the price and retained by the purchaser for payment to the mortgagee. In In re Cozier, Parker v. Glover, 24 Gr. 537, it was decided by Proudfoot, J., that in such a state of circumstances the mortgagee might maintain an action directly against the purchaser for the amount of the mortgage, and was entitled

after the death of the purchaser to prove against his estate in the hands of his executor for the mortgage moneys. See this case referred to by Hagarty, C.J., in Canavan v. Meek, 2 O. R. 636, at pp. 645-6. And there is force in the argument that the purchaser, by agreeing to retain so much of the purchase price as represents the mortgage, renders himself subject to liability to be called on for payment by the mortgagee. In this case the estate of Wightman was directly liable to pay the Purcell mortgage.

But it is not necessary to rest on this ground, for on other grounds the estate was subject to be rendered liable for payment of the mortgage.

It is undeniable that upon becoming the purchaser of the lands from McCrimmon, Wightman rendered himself liable to indemnify his vendor and save him harmless on the covenant for payment therein contained, and it was the executor's duty, as soon as payment of the mortgage money was demanded of them, to pay it off in order that the testator's obligations might be performed. It was suggested that McCrimmon's right to demand indemnity was barred by the Statute of Limitations. The mortgage was made before 1st July, 1894, and the covenants would not be barred under 20 years from the time when the cause of action arose: R. S. O. 1897 ch. 72, sec. 1 (b). There is no proof of any default in payment prior to the date when the principal sum of $2,000 became due on 27th February, 1894, and in any case there is no proof that before that date there had been any demand on McCrimmon so as to entitle him to call upon the testator to make good his obligation to indemnify. No point of time is shewn at which his cause of action (if any) arose: Angrove v. Tippitt, 11 L. T. N. S. 707. Nor were the mortgagee's remedies against McCrimmon upon the covenants lost by reason of any supposed dealings between Purcell's executors and the testator Wightman: Forster v. Ivey, 2 O. L. R. 480. The estate being thus liable to pay the amount of the mortgage debt, the executors, not having funds in their hands immediately available, had authority to borrow such an amount as was needed, and, if need be, to pledge the assets of the estate. And one executor, especially if the acting or managing executor, may bind his co-executor. All the executors are not bound to concur in an act in order to render it binding on the estate:

McLeod v. Drummond, 17 Ves. 152; Ewart v. Gordon, 13 Gr. 40.

Again, defendants had in the hands of Leitch & Pringle securities and property of the estate which under their testator's will they were bound to devote to the payment of the Purcell mortgage. When they were called upon to pay, they were unable to apply these assets. They had, as they contend and admit, more than sufficient for the purpose, but they were not available. In order to tide over the difficulty and to save the estate, they obtained a loan which enabled them to accomplish what they desired. They ought not to be allowed now to allege as against plaintiff that it should not be repaid out of the estate which received the benefit of it.

They say they left the payment of the debt to be made by Messrs. Leitch & Pringle out of the moneys in their hands, or to come to their hands out of the securities belonging to their testator's estate, and payments were made by these gentlemen on account out of such moneys, the last being in September, 1904. It must be taken that up to that date they acknowledged the debt as a valid and subsisting liability of the estate.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 5TH, 1907.

C.A.

OTTAWA ELECTRIC R. W. CO. v. CITY OF OTTAWA.

Assessment and Taxes—Street Railway—Exemptions—Land Leased from Crown—Agreement with Municipality—Construction—Storage Battery—Real or Personal Property—Ejusdem Generis Rule—Fixtures—Constitutional Law—Assessment Act—Property of Dominion.

Appeal by plaintiffs from judgment of TEETZEL, J., 7 O. W. R. 481, dismissing the action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

F. H. Chrysler, K.C., for plaintiffs.

T. McVeity, for defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

MOSS, C. J. O.:—The real question between the parties is in regard to an assessment imposed by the defendants upon the plaintiffs in respect of an electrical machine of large proportions, technically known as a storage battery. In respect of this storage battery the defendants have assessed the plaintiffs for $40,000. The plaintiffs contend that they are not liable to the assessment, on the grounds, first, that under an agreement between the plaintiffs and defendants dated 28th June, 1893, and validated by Acts of the Parliament of the Dominion and of the legislature of Ontario, the storage battery is exempt from taxation; and secondly, that, being situate on lands the property of the Dominion, it is, with other property belonging to the plaintiffs situate on the lands, not liable to taxation. In connection with this latter ground a question was raised as to whether the provisions of the Assessment Act, R. S. O. 1897 ch. 225, in so far as they deal with property of Canada, are within the legislative authority of the legislature.

The respective Attorneys-General for Canada and Ontario were notified, and counsel appeared for the province. But the facts of the case do not appear to furnish any occasion for discussion of these questions.

The plaintiffs hold the lands under a lease put in evidence at the trial, the effect of which, as stated by counsel for the plaintiffs, is that they are virtually owners of the property; their title is as good as a title in fee.

The Assessment Act does not profess to render liable to taxation lands or property belonging to Canada. On the contrary, it declares that they shall not be liable. So far, therefore, no constitutional question arises.

It does not appear that the defendants have endeavoured or are now endeavouring to impose taxation on anything that is the land or property of the Crown. If they should seek to do so, there are provisions in the Assessment Act that would render nugatory any such attempt, and suffici-

ently protect the property of the Crown. And we ought not to attribute to the defendants an intention to enlarge their powers beyond those conferred by the Act.

The case, therefore, resolves itself into the question whether the storage battery is exempt under the agreement.

The plaintiffs are operating their cars upon and along the defendants' streets, by means of electricity, under and in accordance with the terms of the agreement. For this purpose it is, of course, essential that electric power should be generated and constantly supplied and distributed throughout the entire system. Regularity and constancy of supply are material factors in the proper and satisfactory working of the motive power applied to the cars.

From the description of the storage battery in question, its chief office seems to be to control and regulate the supply of electric power as it passes from the generating dynamos to the street and rail wires. A secondary purpose is the collection and storage of surplus power capable of being used in case of temporary failure of transmission from the dynamos. It takes no part in the generation of power. It is merely a link in the chain of transmission from the generators to the wires. It is put in use by connecting it with the power by means of a simple contrivance, and in the same way it can be taken out of service, and the power connected directly, so that it is transmitted to the cars without using the storage battery. It can only be spoken of, if at all, as fixed machinery, in the sense that it is stationary, made up of segments which rest of their own weight upon, but not attached to, the floor of the building in which it is situate. This being a general description of its nature and uses, does it come within the property exempt from taxation under the terms of the agreement? The material sections of the agreement are the 18th and 52nd, which are set out at length in the judgment delivered by the trial Judge. The 18th section exempts from taxation the franchises, tracks, and rolling stock and other personal property used in and about the working of the railway. There is no context to exclude the more comprehensive meaning given to the expression "tracks" by the 52nd section. Therefore, the word "tracks" as used in the 18th section is to be read as meaning the rails, ties, wires, and other works of the company used in connection therewith.

The trial Judge was of the opinion that the storage

battery did not come within these expressions, but was to be treated as real estate. This conclusion was reached by the application of the law of fixtures and by treating the battery as constructively annexed to the realty. But the question is whether, in the circumstances, the law of fixtures has any application.

As already stated, the battery is not part of the machinery engaged in producing the power. It is part of the apparatus used for applying the generated power to the working of the railway.

No doubt, the plaintiffs' witness Murphy assented more than once to the suggestion of the defendants' counsel that it formed part of the power plant, but it is quite apparent from his testimony that he did not intend to give to it the character or quality of a producer, and all that he meant to convey was that it was a medium in the transmission of power in its application to the working of the railway. There can be no manner of doubt that before it was brought to the premises, power was being conveyed to the railway, and that it was put in as an addition to the apparatus previously in use. When it was brought here, it was undoubtedly personal property. And beyond question it was brought there and placed where it is for the purpose of being used in connection with the working of the railway. There is nothing in the nature of the use to which it was put to necessarily change its original character. What reason then is there for removing it from the category of personal property? There is nothing in the evidence to lead to the conclusion that it was within the contemplation of the defendants that its employment for the purpose to which it is put would change its character.

It cannot be that the application of a wire to a slot and the turn of a thumb screw converts this collection of boxes or "cells" and plates, which, standing by itself, is a personal chattel, into something else when a reverse turn of the same screw immediately restores it to its former condition. This is not the case of vendor and vendee or mortgagor and mortgagee, or even landlord and tenant, and in any of which questions under the law of fixtures might possibly arise. It is not to be tested by the application of rules applicable to such cases. When the agreement was entered into, and when the assessment now in question was imposed, personal property was liable to taxation equally with real property,

and except that the agreement provided for the exemption from taxation of certain kinds of property specified therein, it could make no difference to the defendants for the purposes of assessment whether the battery was personal property or real property. The practical question was, not so much whether it was real property or whether it was personal property, as whether it came within the words "other personal property used in and about the working of the railway."

It is personal property of which it may fairly be predicated that it is used in and about the working of the railway. It is argued, however, that the general words "other personal property used in and about the working of the railway" are made to follow particular and specific words, and, therefore, must be confined to things of the same kind, by the application of the well known ejusdem generis doctrine. Of that doctrine, Rigby, L.J., remarked in Smelting Co. of Australia v. Commissioners of Inland Revenue, [1897] 1 Q. B. at p. 180, "The rule of construction which is called the ejusdem generis doctrine, or sometimes the doctrine 'noscitur a sociis,' is one which I think ought to be applied with great caution, because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the legislature." These remarks were made with reference to the words of a statute, but they apply with equal force to the words of an instrument. To apply the doctrine in every case where there is a collocation of words apparently used with the intention of covering matters or things that might otherwise be thought to be omitted, would frequently result in frustrating what was actually intended. Given their natural meaning, the words include the storage battery. Is there anything in the earlier words to exclude it? They must all be read in relation to the subject matter with which clause 18 of the agreement is dealing, viz., the exemption of property used in and about the working of the railway. There is no good reason why the concluding words "used in and about the working of the railway" should not apply to and govern all that goes before—the word "franchises" as well as the other words which follow. The franchises here meant are evidently those derived from the defendants in the form of liberty to use the streets for the working of the railway thereon, and such franchises are as

much a genus for the concluding words as tracks (as interpreted by sec. 52) and rolling stock. They are all words to be interpreted in a large and liberal sense as relating to the greater agencies for working the railway rather than trifling articles.

In comparison, however, with the things enumerated, the storage battery is of comparatively slight importance in the working of the railway.

The result is that it should be exempt from taxation, and the judgment should so declare.

The appeal is allowed to that extent with costs here and below, except any costs, if there be any, incurred by reason of the other issues.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 5TH, 1907.

C.A.

BOHAN v. GALBRAITH.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Correspondence — Offer — Quasi-acceptance —Agent.

Appeal by plaintiff from order of a Divisional Court, 9 O. W. R. 95, 13 O. L. R. 301, reversing judgment of TEETZEL, J., in a purchaser's action for specific performance, and dismissing the action without costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A., RIDDELL, J.

J. A. Paterson, K.C., for plaintiff.

W. E. Middleton, for defendant.

OSLER, J.A.:—The facts are peculiar, and the decided cases do not afford us much assistance, but I think that the judgment must be affirmed, for the reason I will state.

If we had nothing but defendant's letter of 15th December, 1905, and the letter from plaintiff's agents of 20th

December in reply, it might perhaps be said that a completed contract between the parties was thereby constituted, unlikely as it may seem that defendant intended his letter as an offer to sell, and thereby to expose himself to the difficulties in which a vendor sometimes finds himself who enters into an open contract. But defendant's subsequent conduct in requiring an offer to be made by plaintiff, in the form and in the terms sent forward by the latter's agents, shews that he did not consider his letter of 15th December as anything but the quotation of a price, and, though it is possible that this might have been of no avail to him if plaintiff had refused to make the offer and had rested upon his letter of 20th December as an acceptance of an offer made by plaintiff, yet, when the latter acceded to his opponent's position and signed and transmitted an offer in the terms required, he cannot, in my opinion, now be heard to say that this offer went for nothing, and that a contract already existed notwithstanding it. I think it is true to say that he thereby yielded to defendant's view that the offer was to come from himself and upon the terms defendant required, and that this offer not having been accepted by defendant, the earlier correspondence cannot be resorted to, and that therefore no contract ever arose between the parties.

The appeal must be dismissed with costs.

MEREDITH, J.A., and RIDDELL, J., each gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., concurred.

JUNE 5TH, 1907.

C.A.

EMPEY v. FICK.

Parent and Child—Conveyance of Farm by Father to Daughters — Agreement for Maintenance — Action to Set aside Transaction—Understanding and Capacity of Grantor—Lack of Independent Advice—Absence of Undue Influence—Parties to Action—Status of Heir-at-law of Grantor as Plaintiff.

Appeal by plaintiff from order of a Divisional Court, 13 O. L. R. 178, 9 O. W. R. 73, reversing judgment of

CLUTE, J., and dismissing the action, which was brought by a son of David Empey, deceased, to set aside a conveyance made by the deceased in 1901 to defendants, two of his daughters, of a farm of 100 acres in the county of Oxford, in consideration of an agreement by defendants for the maintenance of the grantor and his wife and the payment of $200 to another daughter, and in consideration of past services.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A., RIDDELL, J.

J. M. McEvoy, London, and J. S. MacKay, Woodstock, for plaintiff.

W. M. Douglas, K.C., and W. C. Brown, Tilsonburg, for defendants, supported the order for the reasons upon which it was based, and also contended that the action was not maintainable by the plaintiff alone, and that the proper parties were not before the Court.

MOSS, C.J.O.:—As I am of the opinion that upon the facts of this case the appeal should be dismissed, I do not consider it necessary to enter upon or deal with the question of the constitution of the action nor as to parties. The point was not alluded to in the judgments of the Courts below, nor taken in the reasons against the appeal.

On the other grounds I concur in the conclusion that the appeal fails and must be dismissed with costs.

OSLER, J.A.:—The judgment of the Divisional Court deals with the case both on the facts and on the law to be applied to them in a manner which is, to my mind, entirely satisfactory. I can add nothing beyond a reference to Armstrong v. Armstrong, 14 Gr. 528, which supports the transaction complained of. I think that the appeal should be dismissed with costs.

MEREDITH, J.A.:—If the transaction in question had been attacked by David Empey in his lifetime, I can have no manner of doubt that it ought to have been, and would have been, set aside. . . . But it was not attacked by the grantor, or by his wife, in his lifetime; on the contrary, it was throughout treated by them as satisfactory and binding, and is now earnestly supported by the widow. There can be no sort of doubt that had it been attacked in his or her name or in

the names of both of them, the action would have been repudiated, and at their instance would have failed. How then can any one representing or claiming under David Empey succeed in a like action? The mental condition of the grantor cannot be said to have been such that he could not have prevented such an action, or such as to make him wholly unable to ratify or confirm the transaction in any manner.

The agreement was not inofficious, even if looked at as a testamentary disposition; provision is made for the one daughter who may be considered as dependent upon her father's bounty, as ample perhaps as a share of the estate in case of an intestacy would be; whilst the one son who might be considered as so dependent incurred—rightly or wrongly—his parents' displeasure to such an extent that he could have no good reason for expectations in regard to their bounty.

For these latter reasons only, I would dismiss the appeal.

RIDDELL, J., gave elaborate written reasons for dismissing the appeal. He expressed the opinion that the action was not properly constituted, and upon the merits agreed with the judgment below.

GARROW, J.A., also concurred.

JUNE 5TH, 1907.

TRIAL.

CHALK v. WIGLE.

Master and Servant—Contract to Pay Wages—Adopted Son—Method of Payment—Quantum Meruit—Period of Services—Limitation of Actions.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of the plaintiff William Chalk, in an action by him and his wife to recover wages. At the trial the action as to the wife was dismissed, and she did not appeal.

The defendant was a farmer. When the plaintiff William Chalk was an infant of the age of 5 years, he came to reside with the defendant, under an agreement of adoption, and continued so to reside until about May, 1904. The plaintiff's claim was for wages after he had attained the age of 21 years, or for a period of about 15 years, but the Statute of Limitations was set up as a defence, with the

result that the claim was confined to a period of 6 years before action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. S. Wigle, Windsor, for defendant.

F. E. Hodgins, K.C., for plaintiff.

GARROW, J.A.:—The Chief Justice held that, under the circumstances, an agreement to pay wages had been established, and with that conclusion I agree. There is no dispute about the rendering of the services, and their nature. They were such as are usually rendered by a farm servant, and of course were valuable to defendant. And there is also practically no dispute upon the evidence that the services were not intended to be gratuitous: see Murdock v. West, 24 S. C. R. 303; McGugan v. Smith, 21 S. C. R. 263.

The real dispute is as to how they were to be paid for, the defendant's contention being that the plaintiff's position was like that of a son, and that he, the defendant, had promised and intended to recompense the plaintiff by providing for him in his will. But, unfortunately for the defence, the evidence falls short of proving that the plaintiff ever agreed to accept that mode of payment; and the matter was in consequence left open. The plaintiff and the defendant both apparently have violent tempers, and repeatedly quarrelled. And the question of wages or payment seems seldom to have been mentioned, except during an altercation of some kind, with the result that there is nothing in the evidence which can be relied on as proving a specific bargain of any kind, or as fixing by agreement the rate or amount of the wages. The defendant, however, had at one time, in the course of one of these periodical quarrels, offered to give to plaintiff a parcel of land (referred to in the judgment), and plaintiff under examination stated that, had he been offered a clear deed, he would have accepted the land in settlement. And the Chief Justice, taking the value of that land as a basis, arrived at the sum of $1,000, for which he gave judgment. Counsel for the defendant objected before us to that mode of reaching the result, as well as to the result itself, as being in effect in the nature of compelling a performance by defendant of his offer to convey the land. Reading the whole judgment, the criti-

cism is not, I think, well founded. But in any event it is not decisive, unless the result itself can be successfully attacked. For myself, and with deference, I prefer what seems to me to be a simpler and more direct method.

My view is this: there was no express contract, but the services were to be paid for. In the absence of an express contract, plaintiff is entitled to recover as upon a quantum meruit. But, in view of the defence of the statute, he can only recover for 4½ years' services, which goes back to 6 years next before the commencement of the action. Upon the evidence, a fair wage for the year round would be $17.50 a month, which for 4½ years would amount to $945. And from that should be deducted $40 a year, which plaintiff admitted (the exact admission was $35 or $40 a year, which was, I think, an admission of the larger sum) he had been paid, leaving as the balance $765, for which, in my opinion, he should have judgment.

And with this variation the appeal should be otherwise dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that the action should be dismissed.

JUNE 5TH, 1907.

C. A.

WILSON v. LOCKHART.

(AND TEN OTHER ACTIONS.)

Promissory Notes—Procurement of, by False Representations—Conspiracy—Transfer of Notes to Plaintiff for Value—Bona Fides—Absence of Notice—Circumstances of Suspicion—Copy of Promissory Note—Actual Signature of Maker—Destruction of Part of Document Shewing it to be a Copy—Uttering of Copy as Note—Forgery—Defence to Action by Holder for Value—Negligence—Estoppel.

Appeals by plaintiff from judgments of CLUTE, J., dismissing 11 actions brought by Albert J. Wilson against the

first-named defendant in each action, one Eber B. Tree being also a defendant in each action, but judgment having been signed against him. The actions were brought to recover the amounts of promissory notes signed by defendants. They set up that their signatures to the notes were obtained by fraud, of which plaintiff had notice.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. F. B. Johnston, K.C., and Peter McDonald, Woodstock, for plaintiff.

G. T. Blackstock, K.C., and W. T. McMullen, Woodstock, for defendants.

GARROW, J.A.:—. . . The action is upon a promissory note for $1,000 made by defendant Lockhart in favour of defendant Tree or order, and by the latter indorsed to plaintiff.

There are 10 other actions brought by the plaintiff upon similar promissory notes made by other parties under similar circumstances. All were tried together, the appeals were heard together, and all abide the result in this except the case against Sydney Pearson, in which the facts differ, and which must, therefore, be dealt with separately.

The statement of defence admits the making of the note, the indorsement to plaintiff, and that plaintiff is entitled to recover, but for the facts and circumstances set forth therein as follows.

The various defendants and others had some years ago invested considerable sums of money in the attempted perfecting of a rotary engine invented by defendant Tree, and a company was incorporated under the name of the Tree Rotary Engine Co., which acquired the patents held by defendant Tree. The perfecting of the engine not having been accomplished, and all the money so invested having been spent, a second company, called the Imperial Engine Co., Limited, was incorporated and acquired the patents, one W. O. Taylor being president of this company, and he and defendant Tree being active in the promotion thereof. In the autumn of 1905 Taylor and Tree (as alleged) formed the fraudulent design of inducing the defendants to sign promissory notes for $1,000 each, payable to Tree or order,

upon the false and fraudulent representation that the notes would be deposited in the Western Bank at Tavistock as collateral to an undertaking or liability of the Imperial Engine Co., to be incurred at the office of the bank for the purpose of raising money to be used for the purpose of the erection of a plant for the manufacture and sale of the engines at the village of Tavistock, which factory Taylor and Tree falsely and fraudulently represented it was the intention of the Imperial Engine Co. to erect, and that defendant would be protected against the note, Taylor and Tree falsely and fraudulently representing that the sum obtained from the bank would be repaid out of funds of the company to be raised by the sale of stock, and that defendant would not be called upon to pay the same, whereas, as the fact is, neither Taylor nor Tree nor the Imperial Engine Co. even intended to erect any such factory, nor did they intend to obtain from the bank any sum of money upon the undertaking or liability of the Imperial Engine Co., as to which the notes were to be deposited as collateral, but, on the contrary, the above representations and engagements made by Taylor and Tree were made without any bona fide intention of carrying out the same, and their object and intention was the falsely, fraudulently, and corruptly inducing defendant to sign the note. Tree, in pursuance of the fraudulent scheme, transferred the note to plaintiff, and plaintiff took it with full knowledge of all the facts and circumstances connected therewith, and with knowledge of the fact that Tree was defrauding defendant, and plaintiff was privy to and aware of the fraudulent scheme, both before and after the making of the note, and defendant was induced to sign by the false and fraudulent representations of Taylor and Tree, and relying thereon to the knowledge of plaintiff. Plaintiff gave no value for the note, and is not the bona fide holder thereof for value without notice, or the holder in due course. (These were the allegations of the defence.)

There is substantial agreement that when the notes were obtained Tree represented that he intended to use them at the agency of the Western Bank at Tavistock as a basis for credit, or, in other words, to raise money to build a factory there, and that he promised to indemnify defendants against the notes, which he said would be taken up out of the proceeds to be derived from the sale of stock in the Im-

perial Engine Co. And also a like agreement that in the case of each note he obtained from the maker a written application for stock in that company for the same amount as the note, the defendants stating that they did not buy the stock, but were told by Tree that he was making them a present of it, and that the signing of the application was mere matter of form. And it is also substantially agreed that in every case there was a subsequent transfer by Tree to defendants of paid up stock till then held and apparently owned by him to satisfy the applications.

There is no direct evidence of any arranged prior scheme between Taylor and Tree to obtain the notes such as is alleged in the pleading. There are even some incidents which, to my mind, suggest that it is possible that Taylor, and even Tree, carried away by the enthusiasm of the inventor, may have made the representations in good faith. But, as these conclusions do not necessarily affect the result so far as plaintiff is concerned, I do not dwell upon them, but will assume that the notes were negotiated in fraud of the agreement upon which defendants made and delivered them to Tree, which is sufficient for defendants' purposes, if—the really difficult point in the case—notice or bad faith is brought home to plaintiff.

The summing up upon this point by the trial Judge is as follows: "The whole circumstances of the case, the large indebtedness to him (plaintiff), the financial condition of Tree and of Taylor, known to him, the fact, as I believe it to be the fact, that he was in touch with Tree, that Tree visited his house, that he knew from Parsons, according to his own admission, that a note which Tree had agreed to take care of and which was obtained on that representation, had not been taken care of, the circumstances all lead my mind to the conclusion, and I entertain no doubt whatever, that at the time that the plaintiff went into this transaction he did not do so bona fide, but that he did it for the express purpose of getting rid of these old claims, and having them cleared out, taking his chances upon the result. I think I am justified in inferring that he knew what Tree was doing, and that Tree was acting in touch with him, and that the meaning of it all was that the plaintiff was to get his share of the transaction by having these old claims paid, and relying upon the fact that he was dealing with promissory notes."

There were two modes of attack open to the defendants, one by proving that the plaintiff was in fact a party or privy to the original fraud, the other that, assuming his original innocence, he nevertheless purchased either with direct notice of the imperfection in Tree's title, or under such circumstances of suspicion, with the means of knowledge in his power which he wilfully disregarded, as would, if pursued, have led him to the truth: see per Lord Blackburn in Jones v. Gordon, 2 App. Cas. 616, 629. The judgment of the trial Judge evidently proceeds upon the first rather than the second of these modes, although there are expressions in it applicable to both.

The plaintiff could scarcely be truly described as "in touch with Tree," "knowing what Tree was doing" in his efforts to obtain the notes in question, and "expecting to share in the proceeds" with the object of wiping out the old liabilities, without implying that he was simply an original party to the fraud, and in fact a co-conspirator with Tree and Taylor. This is to impute to him a very gross personal fraud, and should be supported by clear and satisfactory proof.

The evidence need not, of course, be direct, but, if inferential, it must lead the judicial mind inevitably to the conclusion that the transaction is inconsistent with honesty.

And I am, with deference, wholly unable to find such evidence in this case. There is, to begin with, a total absence of direct evidence to connect the plaintiff with the origination of the fraud. That is not disputed. And the disconnected, and upon the whole trivial, circumstances relied on, such as the Clark incident, the cab drivers' stories, Moisey's evidence, and the evidence of Parsons, are wholly insufficient, in my opinion, to justify any such inference.

Upon the other branch there is no evidence that the plaintiff had, when he purchased, actual notice of the original agreement between Tree and the several makers, nor is it seriously denied that he paid in cash the sum of $5,000, and gave up or credited upon the other securities held by him the balance, less the discount of $600. His position is, therefore, that of a purchaser for value. Is he also a purchaser in good faith, and without notice? Some statement of the surrounding circumstances seems to be necessary.

The plaintiff is a retired farmer (and an old neighbour of some if not all of the defendants), now residing in Woodstock, where he lends his own money and occasionally buys notes. Tree was the inventor of an engine, in which at one time or another he had contrived to interest many people. Taylor was a reputable physician practising at Princeton, and president of the Imperial Engine Co. The defendant Lockhart has been warden of the county of Oxford, and is evidently a man of intelligence and of considerable business experience. He has been interested in several companies, and knew much more than the ordinary farmer about stocks and their transfer. He had been Tree's teacher in Sunday School, and must therefore have known him for many years. The plaintiff, too, had known Tree for 20 years, and in that time had had many dealings with him. The plaintiff had been a shareholder in the first company but not in the second. He apparently held on 1st December about $6,000 worth of securities obtained for discounts and advances to Tree and Taylor, and otherwise in connection with the business of the engine. And in addition he also held a note of one Stahbler for $4,000, which grew out of the same business. And, so far as appears, he held nothing but personal security for these large sums.

On 1st December the engine had not been condemned, and Taylor and Tree apparently then stood as high as ever in the confidence of those interested. They experienced no difficulty or set back in their canvass for the notes in question. That the defendants trusted them is proved by the readiness with which they gave the notes for such considerable sums; that plaintiff had also trusted them is proved by the large amount of unsecured paper which he was then holding, much of which he knew would be worthless unless the engine proved to be successful. Under these circumstances and on that date Tree and Taylor came to the plaintiff with the first lot of notes, amounting to $5,000, and the negotiations began.

The plaintiff was examined at the trial and gave his version. Taylor was examined by the defendants under commission executed at New York, and his evidence was used at the trial.

There are, of course, as was to be expected, some discrepancies between the two accounts, none, however, of serious

importance, in my opinion. The defendants at least cannot complain if Taylor's story is adopted, for he is their witness.

[Transcript of portions of evidence of Taylor.]

There are of course, as was to be expected, discrepancies between the story as told by the plaintiff and as told by Taylor. The plaintiff said he was not shewn the application, but was merely told they had been selling stock; that they had come to an agreement on the night of 1st December, and that the changing of the applications was not done at his suggestion. What Taylor said as to these matters, I have set out. The discrepancies are of no importance. Probably neither is absolutely accurate, and yet both may be perfectly truthful. Taking all the evidence together, I think it probable that the plaintiff was shewn the applications, and improbable that he pointed out the defect or difference between the applications and the stock with which it was proposed to satisfy them. That, I have no doubt, was pointed out by Mr. McDonald, the solicitor, next day. No doubt the matter was discussed next day in the presence of both the plaintiff and Taylor, and in the result Mr. McDonald, instructed and paid by Tree, suggested and carried out the mode for making the necessary corrections.

But the chief importance, to my mind, of Taylor's evidence is that it so effectually corroborates the main story of the plaintiff, a circumstance which I cannot help thinking was not present to the Judge's mind when stating his conclusion that the plaintiff was not to be believed. For so concluding he gave as the reason the fact that the plaintiff had sworn that he believed the old securities to be good. Some of them probably were, upon the evidence, but certainly not all, nor even the bulk, but after all he was merely expressing his opinion, and that opinion is found, on reading his whole statement, which, of course, should be done, to largely rest upon the final success of the engine.

Why deny to him a little of the faith, and even the unwisdom, so abundantly shewn by the defendants, who, upon request and on Tree's mere verbal promise that all would be well, gave him these very considerable promissory notes?

The plaintiff has not shewn in the transactions with Tree that he is a much keener or wiser man than the defendants. He, too, had trusted him, to a much greater

extent even than the defendants, as witness the large amount of unsecured paper held by him prior to the first of the transactions in question.

And if the plaintiff can be and ought to be accepted as a truthful witness, the defence must fail.

The story he told is not improbable. It is supported by and in line with the documentary evidence, and in addition has, as I have pointed out, Taylor's corroboration.

Taylor's statement only of course extends to the first transaction, although, as the plaintiff has sworn, he was present at all three. He was not asked as to the second and third. But before his examination at New York, he had been seen by the defendants' solicitor, who knew from the plaintiff's examination for discovery what the plaintiff's story was, and had given him a statement. He was apparently not an unwilling witness for the defendants, and it may, I think, under all the circumstances, be now assumed that if he could have substantially contradicted the plaintiff as to the other transactions, he would have been questioned as to them. And Taylor's evidence, if believed, disposes of practically all the circumstances of suspicion so much relied upon by the defendants and to which I have before referred. These circumstances all point to the assumption that the plaintiff was in the fraud practically from the beginning.

But, as Taylor details the interview of 1st December, that assumption is shewn to be false, unless the conspirators were, when no one but themselves was present, busy with keeping up vain and meaningless appearances. If that meeting was the mere culmination of a pre-arranged scheme, why should the plaintiff have appeared so coy, and so unprepared with the requisite money? Why should it have been necessary for Tree to coax as he did, and to finally offer to permit a portion of the proceeds to be applied on the old indebtedness? And if the theory of prior knowledge and participation must, in the light of Taylor's evidence, be abandoned, what is left to which to apply Clark's improbable story, or the evidence of the cabmen or of Moisey?

It may be, and doubtless is, the fact, that the plaintiff saw in the proposition an advantage to himself in exchanging new and better securities for the old. But he had a legal right to do that, and he has not yet by any means reached the end. The new notes have to be collected, and

he must first get back his $5,000 in cash, the venturing of which is in itself very good evidence of good faith, before he begins to reap the expected benefit. $1,000 of it has already disappeared, if our judgment in the Sydney Pearson case stands. And it would, I think, be a bold prophecy to make, that in the end his whole loss will be confined to that.

The appeal should, in my opinion, be allowed in all the actions except that against Sydney Pearson, with costs, and judgment granted in favour of the plaintiff for the amount of the notes and interest, and for his costs in the Court below.

The promissory note in question in WILSON v. SYDNEY PEARSON is one of the series in question. . . . but there is the additional defence that the note of defendant is not a note at all, that it is merely a copy of a note, and was so modified upon its face at the time of its delivery to Tree. The only evidence upon the subject is that of defendant, which must be accepted. He says that he had given a note for $1,000 on the same understanding as the others had with Tree, but that, repenting, he had some days later demanded it back, that Tree subsequently gave it back, but asked for a copy of it. The body of the copy was written by Tree, but the signature at the end is that of the defendant Pearson. The blank form upon which the copy was made is one used by the Canadian Bank of Commerce. At the left is a considerable margin, with a scroll containing the name of the bank, and upon this margin was written the word "copy." The greater part of the margin, including the scroll and the word "copy" has apparently been smoothly cut off and entirely removed, but leaving the remainder of the document intact and apparently regular enough, and in form a promissory note.

The removal of the word "copy" and the subsequent uttering to plaintiff was, in legal effect, a forgery; and forgery is, at least prima facie, a good defence, although where the signature is, as here, genuine, it may not be, if defendant has been guilty of such negligence as to create an estoppel. The nature and character of what is in law such negligence has received recent and authoritative consideration in more than one case. And the approved definition appears to be that the negligence creating the estoppel must be directly connected with the actual negotiation of the

instrument to an innocent holder, prior negligence in the making or custody of the instrument not being sufficient. See Colonial Bank of Australasia v. Marshall, [1906] A. C. 559; Baxendale v. Bennett, 3 Q. B. D. 525; Schopheed v. Earl of Londesborough, [1896] A. C. 514; Arnold v. Cheque Bank, 1 C. P. D. 578; Lewes Sanitary, etc., Co. v. Barclay, 22 Times L. R. 737.

There is, I think, no evidence of any such negligence. It was, of course, an unusual and even an extraordinary thing for Tree to ask or for defendant Pearson to give a copy of a note which had been wholly recalled. But defendant is a farmer, not perhaps much accustomed to such matters, and may have been for that reason the more easily persuaded to do what was certainly a very foolish thing. But the instrument he gave was in its then form a perfectly innocent affair, and could only be made effective as a note by the commission of a crime, and he was in no way bound to anticipate that.

The instrument sued on is not and never was a promissory note, and defendant has done nothing, in my opinion, to prevent him from proving that fact.

The appeal should, therefore, as to this defendant, be dismissed with costs.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissenting (except in the Pearson case), was of opinion that the actions were properly dismissed, for reasons given in writing.

TEETZEL, J. JUNE 6TH, 1907.

CHAMBERS.

OSTERHOUT v. FOX.

Costs—Scale of—Amount Recovered — Ascertainment — Covenant—Amount Due under — Deduction — Division Court Jurisdiction.

Appeal by defendants from the ruling of the taxing officer at Belleville that plaintiff's costs of an action in the

High Court should be taxed on the County Court scale, instead of on the Division Court scale, plaintiff having recovered judgment at the trial for $193.50, and the trial Judge having refused to certify as to costs.

T. L. Monahan, for defendants.

J. H. Spence, for plaintiff.

TEETZEL, J.:—The action was to recover $433 for alleged arrears of fixed annual sums secured to the plaintiff during his life under a covenant contained in a deed signed by the defendants, and also for damages for the defendants' failure to supply the plaintiff with certain articles, as provided in another covenant signed by them.

The trial Judge decided that the plaintiff had no cause of action in respect of the latter claim, but awarded him judgment for $193.50 as balance due in respect of the money covenant, deducting payments made by the defendants.

Viewing the action in the light of the findings of the trial Judge, it seems to me impossible to say that this case was not of the proper competence of a Division Court, under sec. 72 of the Division Courts Act, as amended by 4 Edw. VII. ch. 12, and therefore under Rule 1132 Division Court costs only should be allowed.

The covenant signed by the defendants clearly fixes the annual payments, and therefore the original amount of plaintiff's claim is ascertained in the manner required by the Act, and no evidence is required beyond the production and proof of the document to prove such original amount.

The ruling of the taxing officer appears to have been influenced by an erroneous view of the pleadings and of the manner in which the trial Judge treated the payment of $69. In his report he says: "In this action the amount actually found due by the trial Judge under the written agreement was over $200, but the amount was reduced by the equitable allowance by the Judge in the way of set-off of the sum of $69, reducing the amount to less than $200, which is not set up in the pleadings."

What the trial Judge says is: "That for the annuity for 7 years in all the plaintiff is entitled to recover $37.50 for each year, making a total of $262.50, but against that must be offset the sum of $69, which I find was paid by the defendants the Foxes to one Dunnett, a creditor of the

plaintiff, whom they had not in any way undertaken to pay as part of the bargain when they took the farm over, but whom they subsequently paid at the plaintiff's request. Deducting this sum leaves a balance of $193.50, for which judgment must be awarded for the plaintiff with costs."

Among other defences the defendants plead payment, and, upon the facts as above found, the plaintiff should have given credit for the $69, thus reducing his claim to Division Court jurisdiction.

The appeal must be allowed, but I think it should be without costs.

RIDDELL, J. JUNE 6TH, 1907.

TRIAL.

MARRIOTT v. BRENNAN.

Principal and Agent — Agent's Commission on Sale of Land—Finding Purchaser—Sale by Principal to Another —Terms of Contract—Breach of Implied Contract to Accept Purchaser—Damages — Quantum Meruit — Amendment.

Action by estate agents to recover a commission of $225 for finding a purchaser for land offered for sale by defendant.

R. G. Code, Ottawa, for plaintiffs.

E. J. Daly, Ottawa, for defendant.

RIDDELL, J.:—Defendant employed plaintiffs, who are a firm of real estate agents, to sell certain property of his in Ottawa, at $9,000, for which they were to be paid by him at the rate of 2½ per cent. i.e., $225, commission. They procured a purchaser able and willing to pay the price, and submitted a written offer from him to defendant. Defendant had in January given a written option to L. to sell him the property at $9,000, which option expired 15th February. About the time at which the option expired it was renewed till 1st March. This was a mere offer to sell, without consideration, and in no way preventing defendant from selling to any one else if he felt so inclined. On Wednesday 27th February McC., the proposed purchaser, signed an offer to

purchase the property, and this was taken by Acres, one of the plaintiffs, to defendant on Thursday 28th February. Defendant made no objection to the terms of the offer to purchase, but said that he wanted to look into the matter. Beyond any question, he desired to make use of the offer of McC. as a lever to move L. to purchase, and thereby, if possible, avoid the payment of any commission. He went to L., told him that he had an offer for the property, and if L. wanted it he would have to act at once. L. bought, and thereupon defendant telephoned plaintiffs that he had sold to another.

I find the above as facts, and would add that I consider the evidence of all of the witnesses except defendant worthy of belief. I do not accept the evidence of defendant where it is contradicted.

Many cases have been decided, under not dissimilar circumstances, as to the rights of an agent for sale where the land is not sold to the purchaser whom he secures. These rights will, of course, depend upon the exact words of the contract. For example, if, as in Adamson v. Yeager, 10 A. R. 477, the contract is that the agent is entitled to commission only when the property is disposed of, he cannot sue for commission at all, but only for a quantum meruit. So, as in Topping v. Henley, 3 F. & F. 325, if the contract is for the principal to pay a commission if he procures a loan; or, as in Packett v. Badger, 1 C. B. 296, where the agent was to look out for a purchaser, stipulating for a commission of 1½ per cent. of the purchase money; or, as in Bull v. Price, 7 Bing. 237, where the contract was to give the agent 2 per cent. on the sum obtained. In all such cases the agent is driven to a quantum meruit. But if the contract were that he is to find a purchaser able and willing to purchase at the stipulated price, then if he find such purchaser he has done all that he is called upon to do to earn his commission: MacKenzie v. Champion, 12 S. C. R. 649, 655.

I think that plaintiffs had done all that they were called upon to do when they on 28th February produced a purchaser ready and willing to purchase; and the conduct of defendant was inconsistent with fair dealing. . . .

[Reference to Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.]

Whether in the present case, as I think, plaintiffs were only to find the purchaser, and have therefore done every-

thing they were bound to do to earn their commission as commission, or whether they were entitled only to a quantum meruit or to damages, I think immaterial. A proper amount to award as damages for breach of the implied agreement to accept a purchaser found by plaintiffs is $225. A proper amount to allow for the work done by them is equally $225. And, however the case be put, plaintiffs are entitled to receive $225 from defendant.

It is, however, contended that the offer to purchase is not such as was contemplated. Defendant made no objections to the terms of the offer; no evidence is given that this is not the usual form of offer; and there is no foundation for the agreement that the offer is for a small part of the purchase money to be paid in cash and the balance in 10 days.

. . .

Judgment for plaintiffs for $225 and costs on the proper scale. Any amendments may be made to the record which plaintiffs may be advised to make.

RIDDELL, J. JUNE 6TH, 1907.

TRIAL.

SOVEREIGN BANK v. INTERNATIONAL PORTLAND CEMENT CO.

Equitable Assignment—Order for Payment of Moneys Payable under Contract to Creditors of Contractor — Validity as against Judgment Creditors of Contractor — Judicature Act, sec. 58 (5)—Assignment of Whole Debt—Security for Advances—Notice—Money in Custodia Legis—Interpleader Issue—Costs.

An interpleader issue, tried without a jury at Ottawa.

RIDDELL, J.:—A firm of Clement & Leal had a contract for paving with the corporation of the town of Perth. Desiring an advance from the Sovereign Bank, they went to the agency of the bank at Perth and arranged to give an assignment of all moneys due or to become due from the town under the contract as security for the repayment of advances to be made them.

A document was executed by Clement & Leal as follows: "From the Sovereign Bank of Canada, Perth, Ont., July 21, 1906. To Corp. Town of Perth. We hereby assign, transfer, and make over to the Sovereign Bank of Canada any money or moneys due or which may become due from the corp. of the town of Perth."

Notice was given as follows: "From the Sovereign Bank of Canada, Perth, Ont., July 23, 1906. To the Town Clerk, Perth, Ont. Dear Sir: Please note that we have taken an order from Messrs. Clement & Leal for any moneys which may become due them from the corp. town of Perth. If you hand us the cheques, we will see that they are properly indorsed by them. Yours truly, C. A. MacMahon, manager."

The following day the clerk of the town came into the bank and asked to see the order. This was shewn to and examined by him, and thereafter the moneys to which the contractors became entitled were paid by cheque drawn to their order but handed to the bank. The contractors were entitled only on account of this one contract to receive anything from the town, of which the bank manager was fully aware.

The contractors lived in Marmora, and on 12th November they made an assignment in Marmora, in the following words: "Marmora, Nov. (?) 1906. To the Corporation of the Town of Perth and to the Sovereign Bank of Canada, Perth. We hereby, for and in consideration of advances heretofore made to the undersigned, assign, transfer, and make over to the Sovereign Bank of Canada, Marmora branch, as a general and continuing collateral security, balance of the account against the corporation of the town of Perth now assigned to the Sovereign Bank of Canada, Perth branch." (Signed by Clement & Leal.)

This document was sent to the manager of the Sovereign Bank at Perth with a request that it should be shewn to the officials of the town, but this was not done. The bank manager at Marmora also knew that there was but one contract from which Clement & Leal would become entitled to receive money from the town.

Moneys were advanced from time to time by the Perth branch after the execution of the above assignment to them, but none by the Marmora branch after the execution of the assignment last set out above. To the Perth branch some

$2,000 is still owing, and to the Marmora branch about $1,060, with interest added in each case.

The International Portland Cement Company obtained judgment against Clement & Leal on 28th November, 1906, for $1,195.22 and costs taxed at $56.88, and procured a garnishing order on 18th December, whereby the town corporation were ordered to pay $2,290.50, part of the moneys now in their hands, and by them owing to Clement & Leal, into the hands of the sheriff of the county of Lanark, under sec. 37 of the Creditors' Relief Act—as also any further sum that might become due to the contractors.

A number of creditors of Clement & Leal also obtained judgments against them in the Division Court, and on 6th May, 1907, an order was made by the local Judge at Perth for an interpleader issue, wherein the International Portland Cement Co. should represent all the judgment creditors, and the issue to be tried should be whether the moneys paid in or to be paid in to the sheriff were the property of the Sovereign Bank of Canada as against these judgment creditors.

This issue came down for trial before me at the Ottawa non-jury sittings, 3rd June, where the foregoing facts appeared.

The first matter which at the trial received attention is the question whether the said assignments are within sec. 58, sub-sec. 5, of the Judicature Act. This sub-section was introduced by 60 Vict. ch. 15, sec. 5, and is, totidem verbis, the English sec. 25 (6) of the Judicature Act of 1873 (36 & 37 Vict. ch. 66.) There have been many decisions upon the sub-section in the English Act, by which decisions I am, of course, bound: Trimble v. Hill, 5 App. Cas. 342, 344. I have not found it easy to reconcile all the cases. It is to be noted that the assignment must be an absolute one, not purporting to be by way of charge only, and to be of a debt or other legal chose in action.

At the trial it was admitted by both bank managers that the assignments they took were simply security for the repayment of the advances they made or should make. At first glance this would seem to bring them within Mercantile Bank of London v. Evans, [1899] 2 Q. B. 613. . . .

[Reference to that case and to Comfort v. Betts, [1891] 1 Q. B. 737; Tancred v. Delagoa Bay R. W. Co., 23 Q. B. D. 239; Durham v. Robertson, [1898] 1 Q. B. 765; Hughes v.

Pump House Hotel Co., [1902] 2 K. B. 190, 197; Jones v. Humphreys, [1902] 1 K. B. 10.]

The test would seem to be, does the document purport to assign all the debt, though that may be simply securits for a possibly smaller sum, or does it purport to assign only sufficient of the debt to secure the amount of the advance? . . . Cozens Hardy, L.J., considers that the Evans case was decided as it was because the Court held that there was not an assignment of the whole debt.

It is not, however, in the view I take of the present case, necessary to decide whether the assignments to the bank fall within the sub-section, if they can be considered good equitable assignments. If they are, since the creditors can take no higher rights than the debtor, the assignments must prevail here: Thomson v. Macdonnell, 13 O. L. R. 653, 8 O. W. R. 721; Neale v. Molineux, 2 C. & K. 672. And the fact that the money is in custodia legis does not injure, but, if anything, assists, the bank.

That the statute has not affected the principles of equitable assignment is clear: Durham v. Robertson, [1898] 1 Q. B. 765, 769, 770; Hughes v. Pump House Hotel Co., [1902] 2 K. B. 190, 196; Alexander v. Steinhardt, [1903] 2 K. B. 208; Lane v. Dungannon Driving Park Association, 22 O. R. 264; Quick v. Township of Colchester South, 30 O. R. 614; Elgie v. Edgar, 9 O. W. R. 614; Re McRae, 6 O. L. R. 238. . . .

Notice is not required to perfect the transfer as between assignor, assignee, and debtor; the effect and object of notice being to protect the assignee against further assignments or any other right of set-off and secure the debtor against other claims: Rennie v. Quebec Bank, 1 O. L. R. 303, and cases cited at p. 308.

The want of notice in the case of the Marmora assignment becomes immaterial if that be a good equitable assignment.

In view of the decisions in Lane v. Dungannon Driving Park Association and Edgar v. Elgie, in our own Courts, and of such cases as Tailby v. Official Receiver, 13 App. Cas. 523, in England, I think it impossible to say that either of the documents held by the bank is not a perfectly good equitable assignment.

Without deciding whether the bank could in either case have sued the town without adding the assignors as plain-

tiffs, I must hold that the money paid in or to be paid in to the sheriff is the money of the bank.

Under Rule 1114 I am to dispose of the whole interpleader proceedings. The defendants will pay the costs of the sheriff and of the plaintiffs of the application for interpleader and all proceedings leading up to the order, also the costs of the issue, trial, and judgment. The sheriff will pay to plaintiffs out of the moneys in his hands sufficient to pay the amount of their claims with interest, but not any part of the costs (which should in no event come out of the moneys in the sheriff's hands.) The remainder will be applied according to the Creditors' Relief Act. The fees of the sheriff, poundage, etc., so far as they are applicable to any moneys to which the bank is declared entitled, are not to be paid out of the fund, but by defendants—the intention being that all costs and expenses of the sheriff and others occasioned by the unfounded claim to the fund in the hands of the town corporation shall be paid by those making the claim and so far as it was unfounded. . . .

MABEE, J. JUNE 6TH, 1907.

TRIAL.

McCARTER v. YORK COUNTY LOAN CO.

Company — Winding-up — Effect of Order — Continuance of Rights and Obligations of Company — Lease of Lands — Option of Purchase — Covenant in Lease — Breach after Winding-up Order—Defence of Liquidators—Sale of Property without Knowledge of Plaintiff—Damages for Breach.

Action against the York County Loan Co., a company in liquidation, and the National Trust Co., the liquidators, for damages for breach of a covenant or provision contained in a lease.

J. Shilton, for plaintiff.

E. F. B. Johnston, K.C., for defendants.

MABEE, J.:—On 1st December, 1904, the York County Loan Co. leased to plaintiff the property since known as No.

5 High Park Boulevard for the term of 3 years and 5 months, the lease containing the following clause: "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as in said offer."

On 16th December, 1905, an order was made declaring the York County Loan Co. insolvent within the meaning of the Winding-up Act, directing it to be wound up, and appointing the National Trust Co. provisional liquidators. . . . The trust company were afterwards appointed permanent liquidators.

On 31st January, 1906, the property, with a large number of others, was advertised for sale by the liquidators, and on 19th February S. C. Halligan made a written offer to buy at $9,000. This was not carried out. On 7th May Halligan made another offer in writing to purchase the property in question with a few additional feet of land at $9,450. This was on the same day approved by the official referee, and on 16th June the liquidators wrote to plaintiff that the premises had been sold to Halligan, and that plaintiff should in future pay rent to him. This was followed on 25th June by a letter from plaintiff's solicitors to the liquidators saying that the offer should have been submitted to plaintiff and he given an opportunity of purchasing before the sale was closed. The liquidators on 27th June answered that the property had been sold at the repeated requests of plaintiff's wife, and that "ample opportunity was given him to make an offer for the house if he so desired."

Plaintiff commenced and has since continued to pay rent under protest to Halligan. It was admitted that the property had been conveyed to Halligan, and that before the acceptance of his offer there had been no formal submission of the same to plaintiff and opportunity given him of purchasing on the terms of Halligan's offer.

The defence is based upon the contention that the clause in question in the lease is not binding upon the liquidators, and that the property was sold with plaintiff's knowledge and consent and upon the request of his wife.

Before bringing action plaintiff applied to the referee for leave for such purpose, which was refused, but upon appeal Meredith, C.J., reversed the order of the referee and gave plaintiff leave to institute and prosecute such action or

actions against the York County Loan Co. and the liquidators as he might be advised, and the material for that application included an affidavit of plaintiff and examinations of plaintiff and R. Home Smith and Frank B. Poucher, the assistant manager and inspector of the trust company; so practically all the facts were before the Chief Justice.

Upon the first point raised by the defence, I am of opinion that the winding-up order in no way cut down the rights of plaintiff or changed his position as lessee of the property, or any benefit he was entitled to by virtue of the provision giving him leave to purchase. The only effect of the winding-up order is to prevent the company from carrying on its business, except in so far as is, in the opinion of the liquidators, required for the beneficial winding-up thereof; the corporate state and all the corporate powers of the company continue until the affairs of the company are wound up: R. S. C. 1906 ch. 144, sec. 20.

The liquidator may, with the approval of the Court, carry on the business of the company for the purposes of winding-up; he may execute "in the name and on behalf of the company" all deeds, etc., and for such purpose use the seal of the company: sec. 34.

When the business of the company is being wound up, all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, shall be admissible to proof against the company: sec. 69.

The liquidator seems to be somewhat in the position of a receiver or agent appointed by the Court to represent the company for the purposes of the Act, not as an assignee, but as the statutory representative of the company for the purposes of the winding-up. The liquidator has power, with the approval of the Court, to sell the real estate of the company; in this case the liquidators were authorized to sell the property in question; they could sell only subject to the terms and conditions of plaintiff's lease; possession could be given only upon expiry of plaintiff's term, and the provision regarding plaintiff's right to purchase was, I think, equally binding upon the liquidator. When the liquidator obtained the offer from Halligan, it was in effect the company, which was still in existence, obtaining the offer, and having obtained such offer, the liquidators, I think, were bound to submit it to plaintiff in accordance with the terms of the proviso in the lease.

Plaintiff knew the liquidator was making efforts to sell the property; his wife led Mr. Smith and Mr. Poucher to think she wished it sold, so that she might leave and the lease be terminated, and these gentlemen supposed they were doing her a kindness by effecting a speedy sale, and taking for granted that plaintiff was taking the same position, they omitted to comply with the proviso in the lease. Mr. Smith, at an earlier stage of the liquidation, knew of the proviso in question, and doubtless, had it not been for the wishes of Mrs. McCarter, as he understood them, would have followed the conditions. . . . Plaintiff, however, says he was not aware of these requests. . . . ; that he had no opportunity to purchase upon the terms of the Halligan offer; and it is not suggested that he had. The letters shew that the position taken by the liquidators was that ample opportunity was given to plaintiff to make an offer if he desired. This is quite true, but plaintiff's right, I think, was more than that, and the liquidators were bound to give him the opportunity before accepting the Halligan offer to purchase upon the terms of that offer. This was not done. Plaintiff, I find, did not waive his right; his knowledge of the attempt to sell, of the advertising, etc., does not deprive him of his right under the contract, as I think. He says he would have purchased on the terms of Halligan's offer. I have no reason to suppose that is not the fact.

I think defendants the York Loan Co. are liable for breach of contract.

The damages are difficult to fix. Plaintiff values the property at $11,000; Holmes, $13,725; Polley, $12,800. For defendants Poucher says $10,000 now, and that the value has increased about 10 per cent. since the sale. Smith and Armstrong say it was well sold. Suydam says $8,500 to $9,000, and Pearson from $8,000 to $9,000. I am unable upon the evidence to fix the value with any accuracy. I feel that, as defendants were acting as they thought according to the wishes of Mrs. McCarter, the visitation of damages for breach of the contract should be upon the lowest reasonable scale, and these I fix at $500.

Judgment for plaintiff against defendants the York County Loan Co. for $500 and costs.

BOYD, C. JUNE 6TH, 1907.

TRIAL.

WALKER v. CLARKE.

Equitable Assignment—Gift of Moneys Arising from Contract —Voluntary Assignment—Death of Donor — Solvency— Mental Competence—Issue—Costs.

Issue between the administrator of the estate of an intestate and two persons claiming a fund, which was part of the property of the intestate, under a voluntary assignment by the intestate in his lifetime.

BOYD, C.:—It is well settled in modern law that to operate as an equitable assignment by writing, no particular form of document is needed. An engagement or direction to pay a defined part of a debt or fund of money constitutes an equitable assignment of so much as is dealt with. When the document, though merely of a voluntary character, is handed over to the donee, the transaction between donor and donee is complete, and the right to obtain the money vests in the donee. If the matter is further prosecuted, and the document is handed to the custodian of the fund or the debtor and accepted, the assignee is the only person who can receive the money and give an effectual discharge. These positions are, I think, established by Harding v. Harding, 17 Q. B. D. 442; Re Patrick, [1891] 1 Ch. 87; and Re Griffin, [1899] 1 Ch. 462.

It is not necessary to enter into an examination of the relationship between the parties in order to see if any consideration existed. I think there was a valid and completed equitable transfer signed by the deceased in favour of the two claimants, the Clarkes, which was handed over to the bank as direction and authority for the payment to the beneficiaries of the balance to be derived from the moneys payable in respect of the Penetanguishene contract, which the intestate had previously assigned to the bank. The effect of the voluntary assignment was not disturbed by the donor's death before the moneys came to the hands of the bank. Indeed the cases shew that had the moneys been re-

ceived by the donor in derogation of the assignment during his life, recovery of the amount might be had from his representatives.

The only question of difficulty is one arising on the facts, which required the examination of witnesses, viz., whether or not the document was signed by the donor when he was in a competent condition, both as to his mind and his financial condition. Upon the evidence, I think the proper conclusion is, that he was not insolvent on 30th July, 1906, and that he understood what he was doing when he put his mark to the paper. Through physical weakness he was probably not able to undergo the fatigue of signing his name to the papers then executed.

The costs have been chiefly, if not altogether, incurred by the condition of the deceased, which justified the administrator in claiming the fund in question now in Court. But it should be paid out ratably to mother and child after deducting their costs. No costs to the administrator, though he should get them from the estate. The amount to be divided is $466, and half should go to each claimant. The infant's share to remain in Court subject to any claim the mother may have for maintenance.

JUNE 6TH, 1907.

DIVISIONAL COURT.

WATKINS v. TORONTO R. W. CO.

Street Railways—Injury to Person Attempting to Get on Car and Consequent Death—Negligence—Findings of Jury—Contributory Negligence—Ultimate Negligence—Dismissal of Action.

Appeal by plaintiff from judgment of RIDDELL, J., 9 O. W. R. 702, dismissing action.

John MacGregor and E. A. Forster, for plaintiff.

D. L. McCarthy, for defendants.

THE COURT (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), dismissed the appeal with costs.

RIDDELL, J. JUNE 7TH, 1907.

TRIAL.

BIRKETT v. BISSONETTE.

Limitation of Actions—Simple Contract Debt—Payments on Account Made by Assignee for Benefit of Creditors under Voluntary Assignment.

Action for balance of price of goods sold. Defence, Statute of Limitations.

W. D. Hogg, K.C., for plaintiff.

G McLaurin, Ottawa, for defendant.

RIDDELL, J.:—Plaintiff sold defendant goods at various times from 21st August, 1900, to 28th February, 1901; defendant made a payment on account on 31st October, 1900. On 12th March, 1901, defendant made an assignment for the benefit of creditors, in the usual form; and his assignee made two payments on account of dividend applicable to the account, the payments being made on 27th June, 1901, and 2nd November, 1901. Plaintiff brought this action for the balance of his account on 15th February, 1907; the only defence is the Statute of Limitations.

Notwithstanding a dictum of Bracton to the contrary, it seems clear that there was at the common law no limitation to the time within which an action ex contractu could be brought: Banning on Limitations, 2nd ed., p. 11. The statutes must, therefore, be read with some approach to strictness. The original Act of 21 Jac. I. ch. 16 still remains in force; it will be seen that the statute itself contains no clause in respect of simple contract debt in terms saving cases of part payment. Such a saving has, however, as in cases of acknowledgment, been held by the Judges to be implied. In the case of money charged upon land, etc., as provided by the various Real Property Limitation Acts, e.g., 3 & 4 Wm. IV. ch. 27 (Imp.), 37 & 38 Vict. ch. 57, sec. 8 (Imp.), and R. S. O. 1897 ch. 133, secs. 22, 23, there is a provision for the payment of some part of the purchase money or some interest therein tolling the statute.

A number of cases may be found in which a person in the position of a receiver or the like has made payments on

account of such debts—and these payments have been held to be effective to take the case out of the statute. For example, Chinnery v. Evans, 11 H. L. C. 115, and a number of Irish cases. It may well be that the express provision that payment of any part shall give a new statutory point in the case of debts of this kind, may have had much to do with the decision of these cases—and this may be a true ground of distinction.

I do not pursue that line of inquiry, as I think both on principle and authority this case may be decided without reference to cases of that kind.

Confining the inquiry to the case of a simple contract debt, in which case, as has been said, there is no express tolling of the statute by a payment on account, it will be found that the Courts early introduced a saving clause to the exception made by them of part payment; and that was as laid down by Hannen, J., in Morgan v. Rowland, L. R. 7 Q. B. 493, at p. 498, where he says: "I think it is clear that a part payment is not sufficient to take the debt out of the Statute of Limitations, unless it be such that a jury might fairly infer a promise to pay the remainder." The cases are uniform in that sense: In re Somerset, [1894] 1 Ch. 231, 264.

Here defendant made an assignment for the benefit of his creditors. I cannot understand how he could be held to have authorized his assignee to do anything more than pay the amount of his estate to his creditors; and I think it is clear that, had the assignee made an express promise to pay the remainder of the debt, such promise would have been beyond his authority, and would not have been binding upon his assignor. If an express promise would have been beyond his powers, how could it be said "that a jury might fairly infer a promise to pay the remainder?"

This was the view I expressed at the trial; but I reserved judgment that I might look into the authorities. So far from shaking my impression, the cases are conclusive that the view I formed at the trial is correct. . . .

[Reference to and quotations from Davies v. Edwards, 1 Ex. 22, 15 Jur. 1015; Read v. Johnson, 1 R. I. 81; Christy v. Flumington, 10 Barr. 129; Woodbridge v. Allen, 12 Metcalf 470; Ex p. Topping, 4 DeG. J. & S. 551; Ex p. Bateson, 1 Mont. D. & DeG. 289; Taylor v. Halland, [1902] 1 K. B. 676, 680; Burrill on Assignments, p. 674, sec. 446; Pick-

ett v. King, 34 Barb. 193; Burger v. Dawson, 22 Barb. 68; Jackson v. Fairbanks, 2 H. Bl. 340; Bramham v. Wharton, 1 B. & Ald. 468; Ex p. Dewdney, 15 Ves. 499; Pickett v. Leonard, 34 N. Y. 175; Marienthal v. Mosher, 16 Ohio St. 566; Stoddard v. Doane, 7 Gray (73 Mass.) 387; Roosevelt v. Mark, 6 Johns. Ch. 266.]

I agree . . . that there is no substantial difference in the position of an assignee under a voluntary and an assignee under a compulsory assignment, and for the reasons given. I agree also in all else that I have quoted . . . and therefore think that the defence is made out.

The action must be dismissed with costs.

BRITTON, J. JUNE 7TH, 1907.

TRIAL.

THOMPSON v. JOSE.

Will—Construction—Devise of Farm and House with "Curtilage and Outbuildings thereof"—Extrinsic Evidence to Shew Meaning—Intention of Testator—Barn and Barnyard—Whether Included—Action—Costs.

Action for a declaration in regard to the will of the late Asa Forbes Wallbridge.

F. E. Hodgins, K.C., and E. H. McLean, Newcastle, for plaintiff.

D. B. Simpson, K.C., for defendant Jose.

H. F. Holland, Cobourg, for the official guardian, representing the infant defendant.

BRITTON, J.:—The contest is as to whether the words "curtilage and outbuildings" include a barn and strip of land in rear of house in which testator resided when his will was made. The clause of the will in which these words appear is in full as follows: "I give and devise unto my nephew Asa Leonard Thompson the east half of the north half of lot number 26 in the 1st concession of the township of Clarke aforesaid, and also those parts of portions of lot number 25 in the 1st concession of said township of Clarke

now owned by me, and also the house wherein I live and the curtilage and outbuildings thereof." The devisee A. L. Thompson is the plaintiff.

The land and barn in dispute, if they do not belong to plaintiff, go to defendant Eleanor Jose in trust for her son William W. Jose, under another clause of the same will, which is: "I give and devise all those portions of the north halves of lots 26 and 27 in the 1st concession of the township of Clarke, now in the village of Newcastle, as yet undevised, unto Eleanor Jose, wife of Stephen Jose, in trust for her son William W. Jose."

If there can be found what exactly fits the devise, then that passes by the will, and parol evidence is not admissible to shew that the testator intended something else: Lawrence v. Ketcheson, 4 A. R. 406.

I allowed parol evidence only to shew the occupation of the devised property by the testator and those under him, to get his environment, to put myself, as far as possible, in his place or in the position in which he stood, and so get his mind when making his will. This is warranted: see Weber v. Stanley, 16 C. B. N. S. 698; Stanley v. Stanley, 2 J. & H. 491.

The will was made on 12th April, 1899, and the testator died on 9th May, 1905. The testator owned, with other lands, the east half of the north half of 27, the north half of 26, and the northerly 58 acres of 25, all in the 1st concession of Clarke. His residence was at the north-east corner of the west half of the north half of lot 26. Attached to his residence was a lawn, to the south of the lawn was a garden, and to the south of the residence were kitchen, shed, and outhouse. . . . The residence and all just described are and were wholly enclosed. Farther to the south and adjoining the residence property is a triangular piece of property, enclosed, narrowing to the south, and terminating at a point where the crossing was usually made to enter upon the east half of the north half of lot 26. On this triangular piece of land is a barn. Between the barn and the land enclosed with the residence is what is called the barn-yard. Plaintiff claims this triangular piece of land with the barn upon it, and the right of way, as passing to him under the will. Plaintiff claims under the word "curtilage" and also that the barn is an outbuilding mentioned in the will and intended by the testator.

On 2nd December, 1889, the testator leased to the Colwills, with other lands, the north half of 26 in the 1st concession of Clarke, "except the dwelling-house, out-buildings, shed, and yard on the part of said lot then occupied by Mrs. Baker," and also reserving to the lessor a right of way over or upon the lane lying immediately upon the east side of the dwelling-house. This lease was for 15 years from 1st April, 1890, and it expired on 1st April, 1905. Before its expiration and on 1st April, 1904, a new lease was made by testator to A. A. Colwill of the same property and subject to the same exceptions as to property for 5 years. This will not expire till 1st April, 1909. At the time of making the last lease the testator was residing in the homestead house formerly occupied by Mrs. Baker. As a fact, the tenant occupied and now occupies the barn. No dispute has arisen in regard to the use of the barn-yard. Testator had wood and property more or less upon it from the time of his return after Mrs. Baker left down to his death. It is argued that, as apparently the testator did not as an outbuilding reserve the barn or expressly reserve the barn-yard out of the lease, he did not intend to devise these to the plaintiff. In the lease he used the word "outbuildings" as meaning those directly connected with and attached to the house.

The will was drawn by a professional man. Technical terms are used, apparently understandingly used, by the testator. Unless the word "curtilage" was intended to cover the triangular piece of land so separated from the farm as to apparently belong to the residence, it is difficult to get at the meaning of testator. He did not mean barn or land in front of residence. He could hardly have intended the garden or small enclosed yard to the south of the lawn. The barn is an "outbuilding" within the fair meaning of the word as ordinarily used. It was in an enclosure separate from land given to defendant, and connected more immediately with the residence given to plaintiff. I am of opinion that the barn-yard and triangular piece of ground extending to the south of the barn is what the testator intended by the word "curtilage," and that he intended to include the barn in the word "out buildings." . . .

Is there any authority binding upon me that would exclude this land and the barn from coming within the meaning of these words?

The word "curtilage" is distinct from and means more than "dwelling" or "residence" or "house." It is distinct from "garden" and from "lawn." The property in question would not pass under any of these words. . . .

[Reference to Steele v. Midland R. W. Co., L. R. 1 Ch. 275; Wright v. Wallesy, 18 Q. B. D. 783.]

If the testator had stopped with the devise of "the house wherein I live," it would have been a cogent, perhaps complete, answer to say that the barn and yard were not intended, as not necessary to the complete enjoyment of the house, but here the word "curtilage" is added with the word "outbuildings," and I think that word applicable only to the land enclosed extending southerly from the northerly limit of the enclosure in which the barn stands. . . .

[Reference to Bl. Com., vol. 4, p. 224; Jacob's Law Dict., "Curtilage;" Regina v. Gilbert, 1 C. & K. 84; People v. Taylor, 2 Mich. 250.]

Nothing in the cases cited or that I have found precludes me from holding that the words "curtilage" and "outbuildings" in the will under consideration include the enclosure and barn in dispute.

The action was not premature. Any decision as respecting the rights of the parties to this action in regard to what they respectively take under the will, cannot affect the rights of creditors, if any.

This judgment does not affect the lessee. He will hold under his lease until the term expires or other termination of it.

This is simply a contest between the parties to the action. No other devisee is interested. It is a case in which I cannot say that plaintiff was wrong in bringing the action or that defendant should not have resisted. The point for decision is an interesting and important one.

I think there should be no costs to the plaintiff or to the defendants, except the costs of the official guardian, and I think plaintiff should pay his costs. Plaintiff gets a valuable property, and the infant defendant does not get a farm building which he naturally thought might be regarded as belonging to his part of the farm rather than to the farm devised to plaintiff.

JUNE 7TH, 1907.

DIVISIONAL COURT.

BISHOP v. BISHOP.

Trusts and Trustees—Land Conveyed to Son of Tenant—Agreement to Purchase—Declaration of Trusteeship—Improvements—Conflicting Evidence—Appeal—Duty of Appellate Court—Findings of Trial Judge.

Appeal by defendant from judgment of MAGEE, J., 8 O. W. R. 877.

C. E. Hewson, K.C., for defendant.

W. A. Boys, Barrie, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—The case is a puzzling one, and the learned trial Judge had some difficulty in arriving at a conclusion. In the appeal before us, it was urged that he had not given sufficient weight to the evidence on behalf of the defendant, and had consequently been led into error in his findings of fact. The duty of an appellate Court in an appeal from a trial Judge upon questions of fact has been discussed in more than one case—I know of none in which that is better expressed than Coghlan v. Cumberland, [1898] 1 Ch. 704-705: "The appeal from the Judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering: and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he had had

in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses."

The evidence in this case is hopelessly contradictory; and the conclusions to be arrived at must depend upon the credibility of the witnesses; and I can find no reason for disagreeing with the findings of the trial Judge. It is, if one were to judge by the words of the witnesses as they appear in cold black and white, and by these alone, more than likely that another tribunal would give more effect to certain parts of the evidence of the defendant—for example, the declaration made by the plaintiff in presence of Mr. Creswicke—but the effect of this declaration and the plaintiff's knowledge of its contents must depend upon the intelligence and honesty of the plaintiff, which the trial Judge alone could rightly gauge. And there is no rule which binds a trial Judge to wholly believe or wholly disbelieve a witness. The witness may be absolutely discredited and disbelieved in one part of his evidence, and wholly believed in another—that is for the trial Judge to decide. In Kew v. City of London, 9 O. W. R. 224, I considered the great advantage the trial Judge has in that respect.

Had the learned trial Judge found the facts diametrically opposite from those as found, I do not think the Court could interfere, and equally I cannot see how the Court can interfere with the judgment actually made.

The appeal should be dismissed. The litigation is most discreditable to both parties—there should be no costs of the appeal.

BRITTON, J. JUNE 7TH, 1907.

TRIAL.

WOOD v. BROWN.

Costs—Third Party Proceedings—Dismissal of Action against Defendant at Trial—Discretion—No Costs.

Question of costs of third party proceedings where action dismissed against defendant at the trial.

BRITTON, J.:—At the close of the trial I gave judgment dismissing the action with costs, but reserved the question of costs of third party proceedings. There was a third party notice served upon W. H. Mahon, who, it is said, sold the horse in question to defendant. Mahon appeared and did not admit his liability. Thereupon defendant obtained an order from the local Judge at London for the trial of the question of liability of the third party for indemnity, contribution, and relief over, to defendant, at the time of and at the trial of this action. . . .

There was no trial of any question of liability as between plaintiffs and third party or as between defendant and third party. Plaintiffs should not, in my opinion, be liable for third party costs. Plaintiffs' claim to the horse was not dependent upon or affected by the dealings between defendant and third party, except as to the question of credibility of third party, which had to be dealt with in determining the question between plaintiffs and defendant.

It appeared in evidence that there were, in regard to the horse in question and otherwise, very intimate and confidential relations between defendant and third party. Upon the whole case, and in the exercise of my discretion, I think the third party should not get costs, and that defendant should not get any costs of bringing third party in. See Re Salmon, Prest v. Appleby, 42 Ch. D. 358.

RIDDELL, J. JUNE 8TH, 1907.

TRIAL.

BURROWS v. ALLEN.

Will—Construction — Devise — Life Estate to Widow with Power of Appointment by Will—Power of Sale given to Executors with Consent of Widow—Quit Claim by Executors to Widow—Conveyance by Widow to Child—Will of Widow —Consent Shewn by Acceptance of Quit Claim—Conveyance of Widow's Estate in Another Parcel—Exercise of Power of Appointment—Partition.

Action for partition or sale of lands in the city of Ottawa.

R. J. McLaughlin, K.C., for plaintiff.

A. F. May, Ottawa, for defendant.

RIDDELL, J.:—John Burrows, of Bytown (now Ottawa), on 16th January, 1848, made his last will and testament, still of record in the Court of Probate, Toronto. The clauses of importance are as follows: "Also the parts shewn in the accompanying sketch . . . numbered 5, 6, 7, 8, 9, 10, 11, and 12, on which the Chaudiere Cottage and other buildings were erected, shall be in charge of my beloved wife. Should it hereafter be found advisable to dispose of the same, it may be done by my executors with the consent of my wife, but should such disposal be found unnecessary, then shall my beloved wife enjoy any benefit that may arise therefrom by building or other improvements erected thereon during her lifetime, and that she may dispose of the same to her surviving present minor children, her daughter Armanilla Andrews to be considered one of them, by will."

Then a codicil made 29th January, 1848, provides: "I do desire that the lot commonly called the Cottage lot and other parts adjoining or marked in the aforesaid sketch accompanying this will, and being Nos. 5, 6, 7, 8, 9, 10, 11, and 12, as already noticed in my will, cannot be sold in any wise without the consent of my beloved wife, or shall it be advisable to sell any part or parts of the said Cottage lot or lots adjoining as above mentioned, the proceeds of such sale shall be lodged in a bank in the name of my beloved wife, to be drawn out by her when required for the benefit of the estate or her children or at her disposal, as already stated."

Letters of probate were granted by the old Court of Probate (Lord Elgin being Judge thereof), and the will and codicil "proved, approved, and registered" 14th September, 1848, the executors proving being William Peters, the Rev. J. C. Davidson, the Rev. William Andrews, and Henry Burrows.

A memorial of an indenture of quit claim is produced from the registry office shewing that on 25th February, 1861, the executor and executrix of William Peters and the other 3 executors of John Burrows "did bargain, sell, and quit claim" to the widow certain of this land for the alleged consideration of $100.

In April, 1889, the widow grants in fee all that remains of this property to her daughter Armanilla Andrews; and she in August, 1889, sells to defendant. This may be called land "A."

Another portion of the land, which may be called land "B.," not conveyed by the quit claim to the widow, also comes into the possession of defendant through mesne conveyances: Mrs. Burrows to Mrs. Andrews, 13th April, 1889; Mrs. Andrews to John J. Nichols, 13th May, 1889; and John J. Nichols to defendant, 8th February, 1890.

Defendant has been in possession since the conveyances to him.

Mrs. Burrows died on 11th September, 1896. This action was brought 6th March, 1906, by one of those (as is admitted) who are called "minor children" in the will of John Burrows.

All technical difficulties, if there are any, as to parties, are expressly waived, and the whole question for determination is the power of the widow to convey as she did.

No oral evidence was given, nor any evidence other than the documents already spoken of, the patent from the Crown to John Burrows, and the probate of the will of the widow, which will simply give "all my freehold property, my leasehold property, my personal property, and all claims of every kind thereto or therein to my dear children named—" the plaintiff, Mrs. Andrews, and another.

Confining my attention for the present to land "A.," I assume in favour of plaintiff that if the conveyance by his mother could not carry the fee, he is entitled to some interest in the land in question. If the will operates as an appointment or disposition by her, authorized by the will of John Burrows, he takes as an appointee; as to which see Deedes v. Graham, 16 Gr. 167; Rogerson v. Campbell, 10 O. L. R. 748, 6 O. W. R. 617. And, if not, the general interest may be effective, in the absence of appointment; as to which see Burrough v. Philcox, 5 My. & Cr. 72, 92; McPhail v. McIntosh, 14 O. R. 312, and cases cited. If there be an intestacy, he may claim as being of the heirs-at-law of John Burrows. Quacunque via, the plaintiff would have rights in the land. Indeed Mr. May candidly admitted this, and agreed that everything depends upon the interpretation of the will of John Burrows.

The will and codicil, as it seems to me, contain in effect a devise to the wife for life with power to the executors to sell with the consent of the wife, paying in case of a sale the proceeds into the bank to the credit of the wife for her to draw upon—but if such sale be not deemed advisable, the

wife to have the full advantage of her life estate and power by will to dispose of the property to her "minor children."

No evidence is given, no fraud or collusion is even charged. The executors seem to have thought it necessary —or at least advisable—to dispose of the property and to dispose of it to the widow. For all that appears, she was willing to pay more than any one else, and the sale to her was a most advantageous one for the estate. She was not an executor or a trustee, even if that could be urged in an action constituted as this is. Her acceptance of the quit claim, followed by her acts in requiring the memorial thereof to be registered and in dealing with the property as her own, sufficiently shews that she consented to the conveyance. So far as appears, the purchase money may have been paid into the bank, and the estate received the advantage of it. Unless I must hold that the power given to the executors to dispose of the land carried with it a prohibition against disposing of it to her, I cannot hold the quit claim to her ineffectual. Independently of authority, I should have arrived at the conclusion that such is the case; but authority is not wanting. . . .

[Reference to Lewin on Trusts, 10th ed., pp. 551, 552; Howard v. Ducane, 1 T. & R. 81, 85, 86; Bevan v. Habgood, 1 J. & H. 222; Boyce v. Edbrooke, [1903] 1 Ch. 836; Dickinson v. Talbot, L. R. 6 Ch. 32.]

Instead of the position of a tenant for life in this regard being altered for the worse, the tendency seems the other way, e.g., it is now held that trustees having a power with the consent of the tenant for life to lend trust funds on personal security, may lend them on personal security to the tenant for life: In re Lang's Settlement, [1899] 1 Ch. 593. The proposition to the contrary in Lewin on Trusts, 10th ed., p. 335, purporting to be founded on Keays v. Lane, L. R. 3 Eq. 1, is not followed.

I am not insensible to the fact that the widow in this case was not precisely a tenant for life by a certain tenure, and that her tenancy for life must cease with the exercise of the power of sale; but I am quite unable to see how her position is thereby altered for the worse so as to incapacitate her from taking a conveyance of the land.

The action should be dismissed in respect of this parcel.

The parcel which we have called "B." is on a different footing. Without any deed or conveyance to herself, the widow purports to convey the land in fee by her deed of

13th April, 1889; she had the right to convey her life estate, held as it was on such insecure tenure, and consequently the deed was not wholly ineffective. Beyond her life estate she had no power to convey; and it cannot be successfully contended that this deed was an exercise of the power of appointment given by the will of her husband. "A power to be executed by will cannot be executed by deed, and equity will not relieve if the attempt is made:" Farwell on Powers, 2nd ed., p. 332.

Upon the death of his mother the plaintiff took some interest in the parcel "B." sufficient to entitle him to a partition or sale of this land.

I do not determine what that interest is—it may be threshed out in the Master's office on the reference I shall order.

As to parcel "B." there will be a declaration that plaintiff is a person entitled to compel partition of land "B." within the meaning of Rule 956 (1) and under the Partition Act, R. S. O. 1897 ch. 123, referring it to the Master at Ottawa for partition or sale under the usual form of judgment.

As each party has succeeded in part, there will be no costs up to judgment. The Master will report specially as to the costs in his office; and further directions and further costs will be reserved to be disposed of by me.

JUNE 8TH, 1907.

DIVISIONAL COURT.

FOSTER v. TORONTO ELECTRIC LIGHT CO.

Nuisance—Clanging of Heavy Gate—Jarring House Adjoining — Disturbance of Inmates—Damages—Obstruction of Highway—Erection of Fence—Disputed Boundary—Plan —Evidence—Possession — Counterclaim—House Leaning over upon Adjoining Land—Injury to Fence and Gate—Projecting Eaves—Easement — Prescription — Conflicting Evidence—Findings of Judge—Appeal.

Appeal by defendants from judgment of MACMAHON, J., 9 O. W. R. 590.

J. S. Lundy, for defendants.

F. J. Roche, for plaintiff.

The judgment of the Court (BOYD, C., ANGLIN, J., MAGEE, J.), was delivered by

BOYD, C.:—This appeal turns entirely on matters of evidence. The witnesses give contradictory accounts of the state of the house, and the trial Judge, to appreciate the situation to better advantage, viewed the premises in person. The chief dispute is, whether the east wall of plaintiff's house has gradually settled in a slanting direction over on the premises and buildings of defendants—or was originally constructed out of the plumb line. Two witnesses who are provincial land surveyors, one called for the plaintiff (Sewell) and one for the defendants (Speight), agree in the opinion that the slant to the east was in the wall 18 years ago, when the building of defendants was first erected. And two of the witnesses, one called for the plaintiff (Sewell) and the other for the defendants (Froude), a bricklayer, agree in the opinion that plaintiff's house, when originally built over 40 years ago, was put up carelessly with a slant to the east in the east wall of the house, as it stands very much in the same condition to-day. There is other evidence of old witnesses who say that the house and the wall to the east are in about the same condition as they always have been, and that there are no perceptible indications of any recent subsidence.

Three witnesses called for defendants think that the wall has settled to the east on account of decayed sills on that side—but the obvious evidence on the ground that the slant must have existed 18 years ago, as pointed out by defendants' witness Speight, and that defendants' building was put up so as to conform to that slant, rejects the theory of recent decay of the sills.

It is a case of conflicting evidence; the Judge has seen and heard the witnesses and has examined the place, and I am not able to say that the weight of evidence is not in favour of the conclusion that he has reached, viz., that the east wall has slanted over the land now held by defendants from the original erection of the building, and that defendants are wrongdoers in attaching their gate to that wall and so using the gate as to shake the house and otherwise annoy the inmates.

I would, therefore, affirm with costs.