The
Ontario Weekly Notes

Vol. III. TORONTO, APRIL 3, 1912. No. 29.

HIGH COURT OF JUSTICE.

SUTHERLAND, J. MARCH 22ND, 1912.

GILROY v. CONN.

Receiver—Equitable Execution—Legacy—Claim against Estate — Cross-claim of Estate against Legatee — Right of Receiver to Contest—Security for Costs—Executors Served with Notice of Motion—Costs of Executors.

Motion by the plaintiff to continue an injunction granted and a receiver appointed by an order made ex parte, on the 26th February, 1912.

W. D. McPherson, K.C., for the plaintiff.
H. D. Gamble, K.C., for the defendant.
F. E. Hodgins, K.C., for the executors of the defendant's father.

SUTHERLAND, J.:—The applicant is a judgment creditor; and the defendant (the judgment debtor) is said to be entitled to a legacy under the will of his father, Meredith Conn, deceased. The order restrains the defendant from dealing in any way with the legacy, and appoints the plaintiff receiver thereof. Upon the facts disclosed in the material filed in support of the application, I think the plaintiff is entitled to an order continuing him as receiver. I, therefore, order and direct that he be continued as receiver, without remuneration and without security, of any and all legacies to which the defendant is or may be entitled under the will of Meredith Conn, deceased, to the extent of the plaintiff's judgment and costs, including the costs of the application for the order and of this application, which costs when taxed the plaintiff shall be at liberty to add to his claim.

The plaintiff directed the notice of motion to the executors of the will of Meredith Conn, deceased, as well as to the defend-

ant. I do not think it was necessary for him to have done so for the purposes he had in view upon the application. Having been notified, I think the executors were warranted in being represented on the motion to state their position in the matter and protect the interests of the estate.

It appears from the affidavit of one of the executors that it is asserted by them that the defendant owes the estate $1,500 and interest, which, if set off against his claim with respect to the legacy, would more than exhaust it. Under these circumstances, and in the light of this claim on the part of the estate, of which the plaintiff had knowledge before serving his notice of motion, he asks therein that he be also appointed to contest for the defendant any right the executors may assert on behalf of the estate to set off any such alleged claim of the estate against the defendant's legacy. I think the plaintiff is entitled to be so appointed and do order and direct accordingly. Before so contesting the claim, he must first idemnify the defendant against costs.

It is said that the defendant is a non-resident, and that, upon this application, I should direct that, in case the plaintiff sees fit so to contest the claim of the estate against the defendant, he should be directed first to give security for costs. I do not think it necessary or appropriate to make such an order at this time. I am not at all disposing of the matter finally, or precluding the estate from or prejudicing it in making a future application for that purpose, in case the executors should be so advised and it becomes necessary.

The plaintiff will have his costs of the motion as aforesaid. The executors will have costs against the plaintiff, but limited to the costs of a formal attendance upon the application.

LATCHFORD, J. MARCH 22ND, 1912.

RE WOLFE AND HOLLAND.

Will—Construction—Devise—Life Estate with Power of Appointment—Title to Land—Description—Vendor and Purchaser.

Motion by the vendors, under the Vendors and Purchasers Act, for a declaration that the objections made by the purchaser to the title to certain lands in Ottawa were invalid.

The objections were: (1) that the description contained in the conveyance under which the vendors held title was not the proper or legal description of the said lands; (2) that the will of the late August Bauer did not transfer the absolute estate in fee simple to his widow Charlotte Bauer, one of the predecessors in title of the vendors.

W. C. Greig, for the vendors.
W. Greene, for the purchaser.
A. C. T. Lewis, for the Official Guardian.

LATCHFORD, J.:—The first objection I disposed of on the argument by holding the description sufficient.

I reserved for consideration the second objection, although I expressed at the time the opinion that the widow had but a life estate.

August Bauer, the owner in his lifetime of the lands in question, made his will shortly before his death in 1898, in the following words: "I leave my property to my wife too share with the childring at her death as she thinks fit."

The will was duly attested; and the widow in March, 1909, took out letters of administration with the will annexed; and, assuming that she was absolutely entitled to the lands in fee simple, executed a conveyance in fee to the vendors, who in turn have contracted to sell to the purchaser.

It is contended on the part of the vendors that under the will in question the children took no interest, and that the conveyance which they (the vendors) have received from Mrs. Bauer vests in them the fee.

I am quite unable to adopt this view. The gift to the testator's wife is, in effect, like that considered in Burrell v. Burrell (1778), 1 Ambl. 660. There the testator gave all his property to his wife, to the end that she might give her children such fortunes as she thought proper or as they best deserved. The case came before the Court upon a question as to whether the power had been properly exercised by the widow, who had given a merely nominal sum to one of the children; but nowhere was it suggested that the widow was absolutely entitled.

In the present case Bauer imposed an obligation upon his widow to share with or among his children at her death the same property which he gave to her. She took but a life estate, with power of appointment among the children. She could not convey to the vendors more than she received under the will; and the vendors are unable to convey in fee to the purchaser.

There will be an order accordingly. Costs to be paid by the vendors.

MIDDLETON, J. MARCH 23RD, 1912.

RE HEWITT.

Land Titles Act—Special Case for Determination by Court—Ex Parte Application—Practice—Possessory Title—Limitation of Actions—Character of Occupation—Fences.

A person applying for registration as the owner of land under the Land Titles Act, 1 Geo. V. ch. 28, moved, ex parte, under sec. 88 of the Act, for an order of the Court determining a doubtful question arising in the office of the Master of Titles.

R. L. Defries, for the applicant.

MIDDLETON, J.:—The applicant desires to have the case disposed of ex parte, because he does not know in whom the paper title is now vested.

I very much doubt whether there is authority to hear a special case ex parte, as the statute in question directs that the practice and procedure shall be the same as on a special case or on an issue directed in an action; and no actor in an action can obtain an adjudication without first finding a respondent and giving notice to him.

Apart from this difficulty, I do not think that a possessory title is made out. The land has been fenced since 1882; but that is not enough; there must be an "actual, constant, and visible occupation;" and this is not met by the statement that "for twenty years off and on I have stored lumber on the lot, also other building material," even when supplemented by the vague and unsatisfactory statement, "some material would remain there continuously."

I had occasion to consider this question, and to collect the authorities, in Campeau v. May, 2 O.W.N. 1420.

Upon both grounds, I refuse to interfere.

MIDDLETON, J. MARCH 23RD, 1912.

RE MATTHEW GUY CARRIAGE AND AUTOMOBILE CO. THOMAS'S CASE.

Company—Winding-up—Contributory—Absence of Allotment and Notice—Estoppel—Recall of Bonus Shares—Intra Vires—Appeal—Costs.

Appeal by the liquidator of the company from the certificate of the Master in Ordinary dismissing the application of the liquidator to place the name of R. W. Thomas upon the list of contributories in the winding-up of the company.

G. H. Kilmer, K.C., for the liquidator.
W. S. McBrayne, for R. W. Thomas.

MIDDLETON, J.:—Those in charge of this company seem to have formed the erroneous impression that they could issue stock at less than par; and some time before the 1st March, 1911, Mr. Thomas signed two applications for stock. By the first he subscribed for 125 shares of the par value of $100, and agreed to pay for the same $10,000 on or about the 1st March, 1911. This stock he intended to carry in his name. At the same time he subscribed for 40 other shares, for which he agreed to pay $3,200 on or about the 1st March; these shares to be made out in the name of F. R. Daniels. There does not appear to have been any stock allotted or any notice of allotment. The affairs of the company appear to have been conducted in the laxest manner possible; and, so far as the records and evidence shew, there was no corporate action whatever with respect to these subscriptions.

Early in March, Thomas paid to the company $10,000 in cash, and received from the company stock certificates in the name of Daniels for 40 fully paid-up shares, and in his own name certificates for 85 fully paid-up shares, which together would represent the stock he would be entitled to receive, including the bonus stock.

On the 30th March, he gave his note to the company for $3,200. This note was not at that time treated as a payment of the balance remaining upon his subscription, but was treated as an accommodation to the company. The note matured on the 3rd July, was paid, and was then treated as being a payment of the balance due for stock. By this time some question had been raised as to the legality of the issue of this bonus stock, and Thomas had taken the position that he would not receive the bonus stock; and he requested a certificate to be made out to him, not for the 40 shares that he would be entitled to receive upon the bonus basis, but for 7 shares only, which, with the 125 already issued, would be paid for in full by the $13,200 that he had paid to the company.

On the 3rd August, a resolution was passed, reciting that, whereas applications for stock had been taken upon the understanding that a portion of the shares to be issued should be given as a bonus, and certificates had been issued for this bonus stock, and whereas the directors and shareholders had been advised that this issue of bonus stock was illegal, and it had been mutually agreed to cancel the applications and recall any certificates, by which it was resolved that all applications for stock,

which included bonus stock, and all certificates issued for bonus stock, should be recalled, and that new applications should be received for the stock, without the bonus, and that new certificates should be issued.

It is not clear whether this resolution was passed at any meeting duly called, but apparently all the shareholders assented.

The original applications signed by Thomas were returned to him with a memorandum written across the face, "cancelled by resolution of the Board, July 17," signed by the secretary-treasurer. There is no record in the minute-book of any such resolution; but the applications were returned to Mr. Thomas with this memorandum, and for them were substituted, at some time after the resolution of the 3rd August, applications for 40 shares and 92 shares, antedated as of the 27th January, which was probably about the real date of the original subscriptions—these bearing no date upon their face.

Thomas attended meetings of the company as a shareholder, and undoubtedly would be estopped from denying that he was a shareholder; but I can see no reason why he should, by virtue of this estoppel, be held to be a shareholder in respect of any greater number of shares than were covered by the certificates issued to him.

It is true that the first 125 shares were issued as fully paid-up, when 25 of them were really bonus shares; but, when the note was paid in July, Thomas and the company mutually agreed that $2,500 then paid should be applied in discharge of the liability in respect of the bonus shares then issued, and that $700 should be applied in payment of 7 other shares covered by the certificate of the 3rd July.

I can find nothing which will preclude Thomas from denying any allotment or notice of allotment with respect to the shares over and above the 132.

Moreover, I think the transaction which took place in July and August, by which the subscriptions were returned because the parties were advised that what was contemplated was illegal, and new subscriptions substituted, was intra vires of the company and is binding upon the liquidator.

While, therefore, I cannot accept the reasons given by the learned Master, I arrive at the same conclusion, and hold that the liquidator is not entitled to place Thomas upon the list of contributories with respect to the 33 shares of stock in question.

I dismiss the appeal, but I do not give costs, because the laxity with which the affairs of this company have been con-

ducted has invited the litigation, and I do not think the creditors should suffer thereby.

I do not know that the question of the liquidator's costs is before me, but I may say that I think the appeal was justified, and that he may properly be allowed his costs out of the estate.

BOYD, C., IN CHAMBERS. MARCH 25TH, 1912.

*JARRETT v. CAMPBELL.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Order for Trial of Issues by Jury—Action to Establish Will—Practice.

Motion by the defendant Campbell for leave to appeal to a Divisional Court from the order of FALCONBRIDGE, C.J.K.B., ante 872, dismissing an application for an order for trial by jury of the issues raised in this cause.

G. Grant, for the applicant.
I. F. Hellmuth, K.C., for the plaintiffs.
J. R. Meredith, for the infants.

BOYD, C.:— . . . Even in England, the statute-law of which was, so far as applicable to the condition of this Province, adopted in 1791, the course of practice was not to regard the claim of the heir-at-law to have an issue tried before a jury as an absolute right, but one to be dealt with according to the circumstances. . . .

[Reference to Man v. Ricketts, 7 Beav. 93, 101; White v. Wilson, 13 Ves. 87, at p. 91; Re Lewis, 11 P.R. 107, at p. 108.]

In Ontario, all Courts alike have the fullest power and the most searching method of investigating facts.

The old course in England was to file a bill for the purpose of establishing the will as against the heir with regard to realty. Then there would be a hearing of such evidence as was admissible in equity practice, and if a sufficient prima facie case of proof was made out, then an issue would be directed (devisavit vel non) in order to establish conclusively as against the heir the fact of a valid will made by a competent testator. See the course pursued in Waters v. Waters, 2 De G. & Sm. 591, 599.

*To be reported in the Ontario Law Reports.

The English practice grew out of historical reasons. Until the Probate Court Act of 1857, 20 & 21 Vict. ch. 77, there was no jurisdiction to admit a will of land to probate. The only mode of testing the validity of such will was by an action of ejectment between the heir and the devisee. But in our practice the probate of a will includes realty and personalty: realty is becoming more and more assimilated to personalty: with us the unique distinction of heir-at-law never obtained, for all children shared equally. All the reasons which necessitated (almost) a jury trial as against the heir-at-law in England never existed here; and our practice is settled, whether the contest be in the lower Court or upon the removal of the contention to the High Court, that the trial of fact by jury is a matter for the sound discretion of the Court or a Judge; R.S.O. 1897 ch. 59, sec. 22 (now 10 Edw. VII. ch. 31, sec. 28) and sec. 35. These sections are conclusive as against any vested and absolute right of the heir to insist on a trial by jury.

The practice was well settled by a very careful Judge in 1885, Re Lewis, 11 P.R. 107, and I see no reason to doubt the correctness of the order of the Chief Justice of the King's Bench or to doubt that he wisely exercised his discretion, having regard to the issues raised and their magnitude and the complexity likely to arise in trying to sever the methods of trial in investigating the facts of this controversy.

I disallow leave to appeal; and costs of executors and other beneficiaries opposing should be paid out of the estate.

SUTHERLAND, J. MARCH 25TH, 1912.

RE CROWE.

Will—Construction—Devise—Life Estate—Intestacy as to Remainder—Time at which Heirs of Intestate to be Ascertained.

Motion by the executors of the will of Thomas Crowe, deceased, for an order, under Con. Rule 938, determining questions as to the construction of the will.

T. A. O'Rourke, for the executors.

A. Abbott, for the heirs at law and next of kin of Thomas Crowe, the testator.

D. C. Ross, for the heirs and next of kin of his widow.

SUTHERLAND, J.:—The will of Thomas Crowe is dated the 9th December, 1876. He died on the 6th February, 1877; and letters probate of his will issued on the 12th March, 1877.

At the testator's death, he left him surviving his widow and one child only, viz., a son, also named Thomas, then aged about seven years. The latter died on the 27th July, 1903, unmarried and intestate. The widow did not re-marry, and died intestate on the 18th October, 1911. At her death, there were living one brother of the testator, George Crowe, and two sisters, viz., Edna Arnott and Sarah Ray. Two other brothers had previously died, leaving children who were all of age. Another sister of the testator, Anna Sanson, is also dead, leaving children, all of whom are of age. Anna Sanson is a witness to the testator's will; and, in any event, she and those who might take an interest through her would probably, under the Wills Act, be cut out.

The widow, at her death, left her surviving one brother and three sisters all of age; also three half-sisters and three nephews, the children of a deceased brother, Charles.

The important portions of the will are as follows: "That the rest of property interest of mortgages and money invested together with the enjoyment of my homestead and all the furniture therein I leave to my dear wife in sole use for her support and for the support and education of my son Thomas my only child to have and to hold the use and enjoyment of the same *for the term of her natural life, save and except* that if my *widow should ever be married* again that the use and enjoyment of *all my property aforementioned* shall then be given to my son Thomas aforementioned to have and to hold absolutely and for ever on the day that he shall be of the full age of twenty-one years. I further will and direct that all or any moneys that may be invested at the time of my decease shall be then invested by my executors and the interest thereof applied as above to the sole use and enjoyment of my widow so long as she shall remain such and that she shall also bear the expense of keeping my house or any other property governed by these presents in proper repair. I further will and devise that in case my son Thomas should die a minor then my property as before mentioned shall on the decease of my wife or if she shall be married again be divided into three equal parts and be given one part each to my brother George and my sisters Anna and Edna or their heirs. Provided always that all my plate shall be included in the portion to be given to my brother George being desirous that it should always remain if possible in the possession of a male heir of the name of Crowe."

Executors were named in the will, and it is at their instance that this application is made. They suggest that there has been an intestacy, and ask the opinion of the Court as to the proper construction of the will.

The heirs of the testator as at the date of the death of the widow contend that they should take the property as on an intestacy at that time. The heirs of the widow also contend that there was an intestacy, but that it must be dealt with as at the time of the testator's death, in consequence of which the son Thomas, who was then the testator's heir, was entitled to the fee in remainder after the life interest of the widow. On his death during her lifetime, his mother became his heir, and her heirs are now entitled.

I think this latter view is the correct one. The widow was to have the income and enjoyment of the property for the term of her natural life, unless she re-married, "for her support and for the support and education" of the son Thomas. There was a further provision that if she re-married then the use and enjoyment of the property should be given to the son to be held "absolutely and for ever" on the day that he should be of the full age of twenty-one years. She did not re-marry, and there is no direct provision in the will devising the property to him at her death. There is a provision that if he should die a minor then at her death or re-marriage the property should be otherwise disposed of.

There will be a declaration that, apart from the provision in the will for the life estate of the widow, there was an intestacy. One has then to apply the rule that the "heirs and next of kin are to be ascertained as at the death of the ancestor," a rule which has application to "realty, personalty, and to a mixed fund." See Cusack v. Rood, 24 W.R. 391. The testator's heir at his death was his son Thomas; and, he having died unmarried and intestate during the lifetime of his mother, she became his heir. On her death, intestate, her heirs became and are entitled to the property in question.

It was also argued on behalf of her heirs that there was a residuary devise by implication to the son. There is perhaps much to be said in favour of this view. See Re Branton, 20 O.L.R. 642. The result would in the end be the same.

The cost of all parties to the application will be paid out of the fund, those of the executors as between solicitor and client.

BOYD, C. MARCH 25TH, 1912.

*ADAMS v. GOURLAY.

Will—Construction — Conditional Bequests — Revocation upon Non-fulfilment of Condition—Distribution among other Legatees Named in Will—Legatee Named in Codicil—Status of, to Question Fulfilment of Condition—Evidence as to Fulfilment—Condition contra Bonos Mores—Substantial Performance of Condition—Cy-près Doctrine.

Action for construction of the will of George Baker and for an accounting by the defendant, the executor; and to recover from the defendants the Misses Baker the moneys and property of the estate transferred to them by the executor, and for administration.

G. G. McPherson, K.C., for the plaintiff.
F. H. Thompson, K.C., for the defendants.

BOYD, C.:—The testator gives the bulk of his property to his two nieces, who are, with the executor, defendants, upon this condition:—

"Upon their remaining with me as my housekeepers at all times (unless I consent to one or both of them going out) during the remainder of my life and during that time rendering me faithful service and giving me all necessary and proper attention and all proper care and nursing in case of illness or in case I should become feeble and should they fail in those respects or any of them I hereby absolutely revoke the said devise and bequests to them and direct that in lieu thereof my executors shall pay to my said niece Sarah Elizabeth Baker the sum of two hundred dollars only and I direct that their shares be distributed equally among the other legatees named in this my will."

"And I hereby further declare notwithstanding anything hereinbefore contained that it is not my will or intention that it shall be compulsory for both of my said nieces to remain with me at all times but that it will be sufficient if one of them is with me when I am in my usual health and that both of them shall be present when I require the services of both and so notify them."

The will was made in February, 1907; a codicil was added giving the legacy of $100 to the plaintiff, under the name of Ellen Hamilton—she not being named or referred to in the will

*To be reported in the Ontario Law Reports.

—codicil dated in September, 1908. The testator died on the 27th September, 1910. His wife died in 1906, and he had no children. I am not clear as to his age, but I think it was about eighty. The nieces did not know of the terms of the condition or of anything that was in the will—nor did any one, according to the evidence, but the solicitor who drew it (who was not called as a witness.) The nieces, however, lived with and cared for him, as it turned out, according to the terms of the condition, however strictly construed, from before the date of the will and just upon the death of his wife until the 19th July, 1909, when a change in his health and habits became very apparent, which had begun about the date the physician was summoned during February, 1909; then at his instance more competent assistance was called in under the supervision of the nieces, and this state of domestic affairs continued until his death.

Then first became known the condition expressed in the will; and, on a review of and with knowledge of all that was detailed before me in evidence, the executor paid over or turned over to the two beneficiaries the property now claimed (in part) by the plaintiff. The plaintiff, as she testified, sues on her own behalf solely, and is not joined by and does not represent any other possible claimants under the will.

I expressed my opinion as to the effect of the evidence at the close of the argument, but reserved judgment generally. I now deal first with the right of the plaintiff to maintain this action.

. . .

[Reference to Henwood v. Overend (1815), 1 Mer. 23; Bonner v. Bonner (1807), 13 Ves. 380; Hall v. Severne (1839), 9 Sim. 515; Sherer v. Bishop (1792), 4 Bro. C.C. 55.]

Looking at this will per se, I would not think the testator's meaning to be doubtful. He directs that the property intended to be given to his two nieces, which upon their default in certain conditions is to be revoked, shall then be distributed "equally among the other legatees named in this my will." The codicil does not in terms say that that is made part of the will, as in the Severne case, but it confirms the will and gives other pecuniary legacies to persons not named in the will. The obvious meaning, to my mind, is, that the testator names in the will those who share equally in the revoked property, and does not intend that the legatees first named in the codicil shall come in to diminish what is given to those named in the will.

It was said in argument that Hall v. Severne has been discredited. On the contrary, I find that it has not been impeached but rather upheld. It was followed in Early v. Benbow (1846),

2 Coll. 342, and both cases were referred to as authorities by Farwell, J., in Re Sealy (1901), 85 L.T.R. 451; and Hall v. Severne was held to be rightly decided, by Sullivan, M.R., in Donnellan v. O'Neill (1871), Ir. R. 5 Eq. 532, on the ground that the shares of the residue were fixed by the will, and so were the persons to take them, and there was nothing in the codicil to alter this express gift. And, in addition to all this, it was followed as late as 1907, by a Divisional Court, in Re Miles, 14 O.L.R. 241—a decision binding upon me.

There is no doubt of the general principle that a codicil forms part of the will or testamentary instrument, but not necessarily to all intents or purposes. As said by Lord Hardwicke, C., in Fuller v. Hooper (1750), 2 Ves. Sr. 242, "the testament . . . may be made at different times and different circumstances, and therefore there may be a different intention at making one and the other."

I hold, therefore, that the present plaintiff, being a legatee only by virtue of the codicil signed and made on the 9th September, 1908, is not one of the legatees contemplated in the will made on the 7th February, 1907. This being so, and as the evidence is, that she sues only for herself and in her own behalf, she has no locus standi to question the conduct of the executor in paying over the property devised to the two nieces who take under the terms of the will.

This lessens the importance of the main question as to whether these nieces are entitled to take the property. My impression at the trial was, that, upon the facts, there had been a sufficient compliance with the conditions requisite to their success. . . . True it is, that ignorance by the beneficiary of a condition annexed to a gift by will does not protect the devisee from the consequences of not complying therewith; Astley v. Earl of Essex (1874), L.R. 18 Eq. 290.

There is a good deal to be said in favour of the view presented by the plaintiff's counsel, that the conduct of the testator, his words and acts in regard to his nieces and in their presence, were so fraught with sexual aberration as to render the requirement of residence with him one contra bonos mores, within the meaning of Brown v. Peck (1758), 1 Eden 140. This of course does not appear upon the face of the condition, and requires to be established (as it was established) by the evidence. This conduct would absolve them from continuous residence and would justify their having him cared for, as they did, by a married woman and her husband, who were able to control the testator; so that, in equity, the testator himself worked a discharge of the conditions.

I still think that there was a substantial performance of the condition by the nieces; and, if so, by the application of the cy-près doctrine, the condition has been practically satisfied. . .

[Reference to Williams on Executors, 10th ed., p. 1013, note (*e*).]

But, in view of my decision upon the status of the plaintiff, I do not further pursue the inquiry on this branch of the case.

The action should stand dismissed, but I would give no costs against the plaintiff, unless she appeals. Costs out of the estate to the defendants in any event.

MIDDLETON, J. MARCH 27TH, 1912.

RE PIPER.

Will—Construction—Part of Estate Undisposed of—Distribution of, as upon Intestacy—Residuary Clause—Intention—Evidence of Conveyancer—Rejection of.

An originating notice to determine questions upon the construction of the will of the late John Mill Piper, who died on the 7th February, 1910.

I. F. Hellmuth, K.C., for David H. Piper.

W. E. Raney, K.C., for Rebecca Piper, the widow personally, and also for the executors.

E. C. Cattanach, for the Official Guardian.

MIDDLETON, J.:—The will was made upon a printed form, admirable in itself, but which is filled up with so little skill that it gives rise to considerable difficulty.

After making provision for the payment of debts, the printed form provides, that all the testator's real and personal estate is devised and bequeathed "in the manner following." The conveyancer then inserted these words, "all to my wife Rebecca Piper excepting only $25,000 which I give as follows." Then follow five specific pecuniary legacies, amounting in the whole to $20,000, leaving $5,000 of the excepted $25,000 undealt with. Then follows another printed clause: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto"—to which the conveyancer has added "my executrix and executor for the purposes of this my will." The wife and another are then appointed executors. Indorsed upon the will

is a codicil: "I direct the legacy of $5,000 to my sister Mrs. E. Sutton to be reduced to $2,500." The effect of this is to increase the undisposed of amount from $5,000 to $7,500.

The widow contends that the exception from the general devise to her of the $25,000 was for the purpose of providing for the specific legacies; and, these legacies amounting to less than the sum named, that the difference passes to her.

The applicant, on the other hand, contends that the gift to the wife is of all the testator's property except the sum of $25,000; and, the testator having failed to dispose of the whole of this $25,000, that there is an intestacy—or, more accurately, that it would fall into the residual bequest to the executrix and executor; and, it being plain that this was not intended as a gift of a beneficial interest, and no purpose being declared, the executors hold in trust for the next of kin.

Before me the original will is produced, and the widow fortifies her position by pointing out that in the original draft of the will there were five legacies of $5,000 each, that two of the legacies were changed from $5,000 to $2,500 by the testator, before the execution of the will, as he has initialled the change; and that the inference ought to be that it was by an oversight only that the $25,000 was not changed to $20,000.

Upon the argument, an affidavit by the conveyancer was tendered for the purpose of shewing the intention of the testator. I rejected this evidence, as I do not think I can look beyond the document itself. See Re Davis, 40 N.B.R. 23. Nor do I think it is open to me to speculate as to the testator's intention. He may have intended to increase the benefit to the widow by reducing the amount of the legacies to be deducted, or it may well be that he intended to make some other disposition. More probably he had no intention whatever. This view is emphasised by the fact that, when he made the codicil, he expressed no intention. In the absence of intention, there is, of course, intestacy. This is the result, as I understand the authorities, notwithstanding some vague expression in the earlier cases. See In re Edwards, [1906] 1 Ch. 750.

Assuming, in favour of the widow, that the devise to her can be treated as a residuary devise, I think that, upon the authorities, her contention fails.

The case of Blight v. Hartnoll, 23 Ch.D. 218, is relied upon. There the testatrix gave to the defendant all her property, except a certain parcel, which she gave to other persons. This bequest failed, and it was held that it fell into the residue and belonged to the defendant; the principle being that the residuary

gift carried every lapsed legacy and every legacy which for any reason failed to take effect.

The distinction between that case and the present is well pointed out in In re Fraser [1904] 1 Ch. 726. There the testator excepted from a general residuary gift real estate and chattels real, which he otherwise disposed of by his will. By his will he gave these chattels real to his brother. His brother predeceased him. Several codicils were made to the will, one of which indicated a knowledge of the brother's death; but no disposition was made by any of the codicils of the excepted chattels real. It was held that it could not be taken that the testator had excepted these chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and consequently there was an intestacy and they did not fall into the general bequest. There Stirling, L.J., after stating the principle established by Blight v. Hartnoll, adds: "If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted property passes as on the intestacy . . . The result in the present case is, that the testator has, on the face of the testamentary disposition existing at his death, excepted the chattels real from the general bequest, and has not really made any bequest of them."

This decision is in accord with the earlier cases. In Green v. Pertwee, 5 Hare 249, Sir James Wigram had before him a will where the testator excepted from a general bequest £10,000, which he divided into ten shares of £1,000 each. One of these shares lapsed. The Vice-Chancellor held that this lapsed share of £1,000 did not pass as residue to the nephews and nieces, but was undisposed of. The decision is based upon the construction of the words of gift. "The question is, whether the word 'residue,' as used in the second clause, must be understood to describe the general residue of the testator's estate or only the excess of the estate over the sum of £10,000. The word 'residue' in its large and general sense comprehends whatever, in the events which happen, turns out to be undisposed of; but, if it appears that the word 'residue' is used in a more restricted sense, in that restricted sense the Court is bound to construe it."

Applying that reasoning here, the widow has a gift of all the property excepting $25,000. Her claim must fail, because nowhere has the testator given her any part of this $25,000.

The contention against the widow is made stronger when we find that, after this general gift, which I have so far assumed to be a residuary gift, there follows what is in terms a residuary

gift to the executrix and executor, under which the $7,500 may well pass.

It was admitted beforé me in argument that the executrix and executor could not take beneficially, but would take as trustees for the next of kin. See Yeap Cheah Neo v. Ong Cheng Neo, L.R. 6 P.C. 381.

There will, therefore, be a declaration that the $7,500 is to be distributed as upon an intestacy. The costs of all parties should be paid out of this fund.

BOYD, C. MARCH 27TH, 1912.

*HUEGLI v. PAULI.

Church — Property Rights — Religious Institutions Act — Construction—Right to Land and Meeting-house — Abandonment as Place of Public Worship—Purchase of New Site—Trust Deed—Construction—Breaches of Trust—Congregational Rights—Status of Minister.

Appeal for a mandatory injunction compelling the defendants, the trustees of an Evangelical Lutheran Church in the town of Stratford, to reopen their disused church-edifice for public worship and to allow the plaintiff Huegli to conduct services therein, for a declaration that the plaintiffs are entitled to have the trusts of the deed of the land upon which that building stands carried into execution, for an injunction restraining the defendants from leasing or selling the building or the land and from using or allowing it to be used for purposes other than declared in the trust deed, and for other relief.

F. H. Thompson, K.C., for the plaintiffs.
R. S. Robertson, for the defendants.

BOYD, C.:—This is a church case, not involving question of doctrine, but only those of property. All the litigants are of the Evangelical Lutheran denomination, holding the doctrines set forth in the unaltered Augsburg Confession, and both parties claim conflicting rights under one and the same deed of trust. . .

Three plaintiffs are on the record, but at the hearing they asked leave to sue "on behalf of others." An initial difficulty arises as to "who are the others?" That remains as yet unde-

*To be reported in the Ontario Law Reports.

fined. The defendants are alleged to be and are the trustees of the legal estate in the church property in question, and breaches of trust are complained of. No doubt, the rule is well settled that a member of the society may sue on behalf of himself and all the members of that society to prevent a breach of trust; or it may be that, if he stands alone, he may sue in his own name for an injunction; but it must appear that he has a legal interest to intervene. So I pass for the present from the question of parties and the locus standi of the plaintiffs.

The trust property was acquired in July, 1874, by conveyance in fee simple from Alexander Grant, of Stratford, for an expressed consideration of $200. The conveyance is made to three persons appointed to be trustees (under the statute then in force, 36 Vict. ch. 135, respecting the property of religious institutions) for the purposes therein set forth. The recitals shew that a then existing religious society or congregation of Evangelical Lutherans had occasion for the land purchased and conveyed as a site for a house of public worship, and had appointed three persons to hold in perpetual succession, under the name of "The Trustees of the Stratford Evangelical Lutheran Church," for the use of the said society and upon the trusts thereinafter set forth.

There are two "special trusts" (to use the phrase of the deed): first, that the premises shall be forever hereafter held for the use of the members of an Evangelical Lutheran Church, which shall be exclusively composed of persons holding the doctrines of the said Augsburg Confession; and, second, "that the trustees shall at all times hereafter permit any Minister, he being duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof, to officiate in the church existing or which may hereafter be built on the said lot according to the ritual, etc., of the said Church, and shall also apply the rents and profits derived from any portion of the said lot or the buildings erected thereon towards the maintenance of public worship in the said church or meeting-house, according to the rules, etc., or towards the repairs or improvements of the said property and to no other purpose whatsoever."

It is to be noted that the word "church" is used in two senses in different parts of the conveyance; at times referring to the religious society, and again to the particular meeting-house on the premises.

The recitals shew that the conveyance was obtained under the powers conferred upon religious societies by the provincial statute then in force, 36 Vict. ch. 135, sec. 19, which provides

that in every case the special trusts or powers of trustees contained in any deed, conveyance, or other instrument, shall not be affected or varied by any of the provisions of this Act. That clause is carried into the latest revision of the same Act (R.S.O. 1897 ch. 307, sec. 23). This Act gives power to sell the land when it becomes unnecessary to be held for the religious use of the congregation and it is deemed advantageous to sell, etc.: sec. 7 of 36 Vict. ch. 135.

This original society built and took possession of a meeting-house on the said land and occupied the place for religious uses down to the 13th December, 1908, when the premises were vacated under the following circumstances.

The congregation was growing from year to year, and it became a question whether the old building should be repaired and extended or another site should be procured and a new building erected.

By the record in the church minutes it was on the 17th December, 1906, resolved unanimously that a new church should be erected. There was some fluctuation of opinions and of resolutions as to the locus, but finally it was moved and carried at a meeting of the congregation held on the 24th January, 1908, that a new lot should be bought, and on the 28th August of the same year that the old lot should be sold. This vote also appears to be practically unanimous, only one person (who is one of the plaintiffs, Allstadt) voting "nay."

The new building being put up on the new lot, the congregation as a whole took possession of the new building in Erie street on the 13th December, 1908, when the new meeting-house was formally opened. There does not appear to have been what is called a "split" in the society. Some members may have been reluctant or inert, but only the one who voted "nay" upon the question of sale is in evidence as being actively dissident. The Pastor of the society that moved into the new building says, "Practically the whole congregation went with me." He names the plaintiff Allstadt as the only exception. Another plaintiff, Racey, was active in support of the new movement, and voted in favour of it at the meetings.

After vacating the old site, the trustees, acting on the direction of the congregation, rented the buildings thereon, and applied the surplus of rent after paying taxes and insurance for the benefit of that congregation and of the new site. The trustees also, in like manner, sold four feet of the land, and are now offering the rest for sale. The trustees of the Erie street lot

(now defendants) claim to be the legal owners of the old site, and this is not in effect questioned by the plaintiffs in the present case. The object of the suit is to restrain the sale and to get a right of entrance to the old building (which is in Cambria street) in order to make use of it for religious services in the interest of a body of people represented by the plaintiffs. This movement in regard to the new body began in February, 1911, by the forwarding of a petition with twelve signatures to the plaintiff Huegli, who is an Evangelical Lutheran Clergyman of the Synod of Missouri, and in good standing as a member of that Synod, inviting him to take up ministerial work in Stratford. He came, and a hall was rented in Downey street, and there he began to organise a congregation, and was joined by the plaintiffs Racey and Allstadt and two or three others who had been members of the congregation worshipping in Cambria street, and also by some outsiders, aggregating in all about twenty members—the whole number of present adherents in Downey street hall being about one hundred. . . .

The situation as it has been developed is not provided for in the four corners of the deed of trust. Only two conditions are there dealt with: (1) when all is going on in due course by the occupation and religious use of the trust property by the congregation of the Stratford Evangelical Lutheran Church; and (2) when the church for which the "trust was created shall lose its visibility and cease to exist"—then the control of the property is to pass over to and vest in the nearest Evangelical Lutheran Church of the same faith and order.

The action is framed on the theory that this second situation has arisen—by assuming that the vacating of the old site is equivalent to the cessor of existence of the beneficiary. This proposition cannot, it seems to me, be sustained. The church in possession under the deed of trust has, for sufficient reasons, decided no longer to remain on the trust property, and the question as to what is to be done with that property cannot be solved by reference to this latter provision in the deed of trust. . . .

This Act, no doubt, provides for the sale and leasing of church lands when it becomes unnecessary to retain them for religious use, upon the consent being obtained of a majority of the members present at a meeting duly called for that purpose; and, so far as all necessary preliminaries are concerned, this place may well be sold or leased if the Act applies. But the plaintiffs rely on sec. 19 of the Act, which provides that in every case the special trusts or powers of trustees contained in any

deed shall not be affected or varied by any of the provisions of the Act. In this deed we find expressed as "special trusts"; (1) that the land shall be forever hereafter held and enjoyed for the use of the members of an Evangelical Lutheran Church; and (2) that the rents and profit derived from any portion of the said parcel of ground or the building erected thereon shall be applied towards the maintenance of public worship in the said church or meeting-house, towards the repairs or improvement of the said property, and for no other purpose whatsoever. This last special trust is peculiarly emphatic in being impressed on the very place and the building (the meeting-house) thereon.

Unless I can nullify these special trusts, the land cannot be sold or the rents diverted to another place. And, as I read the statute, it forbids the nullification of these special trusts. . . .

But, apart from special restraining trusts, when the body outgrows its building and the majority so decide that it has become necessary and advantageous to dispose of the property with a view of removing to a more convenient situation, then the statute promotes the benefit of the body by sanctioning such a course; and a sale so had, which is a conversion of the present property, cannot be regarded as a diversion or a breach of trust. . . .

The trust inheres in the title, and so passes to the successive trustees indefinitely in future—not to be interrupted by a sale out and out. This is my reading of the statute and of this trust deed—but the result does not enure to the benefit of the plaintiffs.

Now the present trustees, the defendants, hold this land in trust for the particular church so long as it exists and can be traced and identified. The Stratford Evangelical Lutheran Church of the deed had power to change the place at which its services should be conducted and also to change its name to that of the "Erie Street Church." These changes of local habitation and name are matters of ecclesiastical concern and cognizance, with which the Courts have nothing to do. This body, the organisation of this church, is of the Independent or Congregational system, in which the view of the majority of the members prevails. The minority, however small or large, is outvoted by the action of the majority, and the resolutions to vacate the old place, to sell or rent it, and to move into a new building on a new site, are all metters of congregational competence and are conclusively settled as against the plaintiffs. The identity of the beneficiary church is established in favour of the body represented by the trustees, the defendants. The few who went out and banded

themselves together with others in a new organisation worshipping in the Downey street hall, are an offshoot from the old body, but thereby have ceased to be a part of it, and can have no right as once members of the original body to claim any part of the property vested in the trustees for that original body: see per Dickerson, C., in Newburgh Associate Reformed Church Trustees v. Princeton Theological Seminary Trustees (1837), 4 N.J. Eq. 77; and Pine Hill Lutheran Congregation Trustees v. St. Michael's Evangelical Church of Pine Hill (1864), 48 Pa. St. 20.

That appears to be the situation as regards the religious or ecclesiastical aspect of this controversy. None of the plaintiffs is a corporator or beneficiary, because not a member of the old church. But that leaves untouched the consequences of this congregational act of removal in a legal point of view as affected by the legal breaches of trust begun in part and in process of consummation by the sale of the land.

It may be well now to deal with the plaintiff Huegli. . . . Assuming the non-existence of the church, the plaintiffs invoke that part of the deed which provides that if the church loses its visibility the land forthwith vests in the trustees of the nearest Evangelical Lutheran Church, which in this case happens to be the Erie Street Church, and the defendants, the trustees. If so vested with the land in this character, the deed provides that the trustees shall be under obligation to open the church for regular or occasional services to any Minister or Missionary of the Evangelical Lutheran denomination holding the doctrinal views of the Augsburg Confession aforesaid. This requirement is fulfilled by Mr. Huegli. . . . The difference between this part of the trust and that which relates to the regular services held when the building is occupied by the original church, is, that in the latter case the clergyman who has the right of entrée is one "duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof." The context shews that the source of authority is to be sought not in the denomination at large, extending over the continent, but in the particular body or church representing the original congregation. There being no lack of existence or of visibility of this latter body, the plaintiff Huegli is a clergyman not competent to officiate, whose claim to conduct the services in the old building may well be vetoed by the trustees. So that, to put it shortly, the plaintiffs who complain of a breach of trust by the trustees propose to enforce against them an occupancy of the site, which would be a further breach of trust. . . .

No amendment enabling the plaintiffs to sue on behalf of others who sympathise with them—and this is essential in order that no incongruity in the class represented may arise—no such amendment would better the cause of action. The legal title is in the defendants, and no breach of trust has arisen in regard to which the plaintiffs had a right or an interest to complain. The breaches of trust must be investigated by another method, probably by the intervention of the Attorney-General and a competent relator; but on that I do not decide. The only possible way of reparation to cure the breaches would be for the Zion Church congregation to retrace their steps, resume possession, and re-establish worship on the old site, but I suppose it is now too late for the remedy. It may be that the real solution of the difficulty is to resort to the Legislature and procure special legislation, which may quiet if not satisfy all concerned.

The action must be dismissed, but costs will not be given, considering that the question discussed is new and bare of precedent, and that the conduct of the defendants has not been according to law, however honestly undertaken.

LATCHFORD, J. MARCH 28TH, 1912.

PLAUNT v. GILLIES BROTHERS LIMITED.

Arbitration and Award — Arbitrator — Disqualification — Bias — Costs of Application Dismissed for Want of Jurisdiction—Con. Rule 1130.

Motion by the plaintiff, in the Weekly Court at Ottawa, for an injunction restraining the defendant John Burwash from acting as arbitrator in certain arbitration proceedings between the plaintiff and the defendants Gillies Brothers Limited, instituted pursuant to the Saw-Logs Driving Act, R.S.O. 1897 ch. 143.

Upon the return of the motion the parties consented that it should be treated as a motion for judgment upon the whole case.

W. L. Scott, for the plaintiff.
R. V. Sinclair, K.C., for the defendants.

LATCHFORD, J.:—The plaintiff and the defendants Gillies Brothers Limited are lumbermen, who, during the season of

1911, operated upon the Madawaska river. The plaintiff was bringing down telegraph poles, and Gillies Brothers Limited were bringing down railway ties. The progress of the telegraph poles was, it appears, slower than that of the ties; and, the Gillies Brothers refusing to assist in a joint drive, the plaintiff was, as he alleges, obliged to drive the Gillies Brothers' ties with his telegraph poles, thus greatly delaying his drive and entailing upon him expense which he now desires to have settled by arbitration.

Gillies Brothers Limited first proposed as their arbitrator Mr. H. F. McLachlin, of Ottawa, lumber merchant; but objection was made by the plaintiff to Mr. McLachlin, on the ground that Mr. McLachlin was largely interested in McLachlin Brothers Limited, a company which had been concerned for many years in driving the Madawaska river in conjunction with Gillies Brothers. Mr. McLachlin, however, objected to serve, owing, as he stated, to his business engagements. Gillies Brothers then formally appointed Mr. John Burwash, of Arnprior, as their arbitrator.

It appears that Mr. Burwash is the woods manager for McLachlin Brothers. Objection is, therefore, taken to his appointment, on the ground that his employers are directly and pecuniarily interested in the result of the litigation, and that he will be biassed against the plaintiff's claim and incapable of fairly trying the matters in question in this arbitration and of making a fair award between the parties.

The contention that Burwash's employers have any direct or pecuniary interest in the result of the arbitration is, in my opinion, met and overcome by the evidence before me. It is also shewn that they and Gillies Brothers have not driven the Madawaska on joint account for three years, and that McLachlin Brothers Limited have not driven the river at all for two years. It is shewn beyond question that Mr. Burwash is a man of great experience in the lumbering business. He has been engaged in it for over forty years, and has during that period had charge of the driving of logs and timber on the Madawaska and other rivers, and is therefore familiar with the conditions which would have to be dealt with by the arbitrators. He deposes that he can be perfectly independent and that he is capable of trying the matter in question fairly and without bias or prejudice. He is well known to be a man of high character; and, as the matter was presented to me upon the argument, while he does not desire to take part in the arbitration, he considers that to abandon the position to which he was appointed would be an admission of his unfitness for it.

A number of authorities were cited to me regarding the duties of an arbitrator and umpire. It is manifest that he ought to be a person who stands indifferently between the parties. Beyond the fact that the employers of Burwash have had business relations in the past with the defendants, there is no suggestion here which would tend in the slightest degree to shew that Mr. Burwash has any bias unfitting him for the position of arbitrator.

It is urged that a distinction must be drawn between the freedom from bias required in an arbitrator chosen by the parties themselves—"an agreed arbitrator"—and that necessary in persons to whom the parties are obliged *ex necessitate* to have recourse.

In cases of decisions by judicial tribunals, any direct pecuniary interest, however small, disqualifies.

Blackburn, J., in Regina v. Rand (1866), L.R. 1 Q.B. 230, shews that there is another cause. He says (p. 233): "Wherever there is a real likelihood that the Judge would from kindred or other cause have bias in favour of one of the parties, it would be very wrong for him to act."

In Eckersley v. Mersey Docks Co., [1894] 2 Q.B. 667, Lord Esher is reported to have said (p. 671): "Persons ought not to act as judges in a matter in which the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed."

This is regarded as extending the rule far beyond the principles stated in Regina v. Rand; Regina v. Dean of Rochester (1851), 17 Q.B. 1; and Regina v. Meyers, 1 Q.B.D. 173.

Vaughan Williams, L.J., in Rex v. Justices of Sunderland, [1901] 2 K.B. 357, states that mere possibility or suspicion that a judge may be biassed is not sufficient to disqualify him.

Lord O'Brien, also, speaking for the King's Bench Division of Ireland, in Rex v. Justices of Tyrone, [1909] 2 I.R. 763, comments adversely on the supposed rule laid down by Lord Esher. He says: "That, in my opinion, goes too far. It makes the mere suspicion of unreasonable persons the test of bias. I think that the judgment was not a considered one, and that Lord Esher made use of some loose expressions. We decline, on a consideration of the cases, to go so far as that very eminent Judge. There must, in the words of Blackburn, J., be a 'real likelihood' of bias: Regina v. Rand. In Rex v. Justices of Queen's County, [1908] 2 I.R. 285, at p. 294, I expressed myself as follows: 'By "bias" I understand a real likelihood of an operative prejudice. There must, in my opinion, be reasonable evidence to satisfy us that there is a real likelihood of bias.'"

To disqualify a Judge or Justice, there must exist a reasonable likelihood of a bias which would affect his mind in deciding between the parties.

In Vineberg v. Guardian Assurance Co. (1890), 19 A.R. 293, an arbitrator who was a sub-agent of the agent of the defendant company was held disqualified.

Mr. Justice Rose, in Christie v. Town of Toronto Junction (1894), 24 O.R. 443, states that the Vineberg case probably goes the farthest of any that can be cited, and that it is difficult to distinguish it from the case then before him, in which one of the arbitrators had from time to time advised as counsel the standing solicitor for the defendant corporation. But that learned Judge did draw a distinction, and held (p. 445) that there was not such a relation between the arbitrator and the corporation as might give rise to bias or that should fairly lay the arbitrator open to observation.

The plaintiff's case fails, and I direct that judgment be entered for the defendants with costs.

As to the costs of the application, made before the issue of the writ, for the removal of the arbitrator—when no order could be made owing to want of jurisdiction—they also must be paid by the plaintiff. Notwithstanding that an application fails on the ground that the Court has no jurisdiction to give the relief sought, the unsuccessful party may nevertheless be ordered to pay the costs of the proceeding: Con. Rule 1130; Holmested and Langton's Judicature Act, p. 1339.

TEETZEL, J. MARCH 28TH, 1912.

*KENNEDY v. KENNEDY.

Will—Construction — Gift for Maintenance of Residence—Perpetuity—Void Gift—Sale of Land—Charge of Annuity—Deed Poll—Bona Fides—Costs.

The plaintiff, one of the next of kin of David Kennedy, deceased, brought this action to obtain a construction of the will of the deceased, and for a declaration that the gift to the trustees to keep up and maintain the residence of the testator was void as tending to create a perpetuity.

The testator gave his dwelling-house and premises in the city of Toronto, together with the chattels therein at the time

*To be reported in the Ontario Law Reports.

of his decease, except a number specifically bequeathed, to the defendant James Harold Kennedy, "but subject nevertheless to the provisions hereinafter made for Gertrude Maud Foxwell and Annie Maud Hamilton." The provisions referred to and the clause of the will directing the keeping up of the residence are set out in Kennedy v. Kennedy (1909), 13 O.W.R. 984; Kennedy v. Kennedy (1911), 24 O.L.R. 183; and Foxwell v. Kennedy, 24 O.L.R. 189.

J. Bicknell, K.C., and W. A. Baird, for the plaintiff and the defendants Robert Kennedy and Joseph H. Kennedy.

E. D. Armour, K.C., and A. D. Armour, for the defendant James Harold Kennedy.

W. M. Douglas, K.C., for the defendants the Suydam Realty Company and Henry Suydam.

T. P. Galt, K.C., A. J. Russell Snow, K.C., and W. A. Proudfoot, for the other defendants.

TEETZEL, J.:—The principal question for determination is, whether or not a provision contained in the will of David Kennedy, deceased, is good—or void as creating or tending to create a perpetuity. . . .

I think it is plain from all the provisions of the will with reference to the residence that the testator's scheme was to have the same maintained as a family residence for Gertrude Maud Foxwell and Annie Maud Hamilton, as long as they live, and for his son James Harold Kennedy and his family and descendants or whomsoever James Harold Kennedy might by will or otherwise give the residence to, and that such residence should, until sold or disposed of, be kept and maintained by the trustees and those succeeding them in the trust in the manner in which it had been kept and maintained by him. . . .

As the result of the best consideration I have been able to give to the numerous authorities cited by both sides and to others, I am of opinion that the gift in question is void as creating or tending to create a perpetuity. I am unable to distinguish it in principle from such cases as Thomson v. Shakespear (1860), 1 DeG. F. & J. 399; Carne v. Long (1860), 2 DeG. F. & J. 75; Yeap Cheah Neo v. Ong Chen Neo (1875), L.R. C.P.C. 381; and Rickard v. Robson (1862), 31 Beav. 244. . . .

[Review of these cases. Reference also to Hoar v. Osborne (1866), L.R. 1 Eq. 585; Fowler v. Fowler (1864), 33 Beav. 616; In re Gassiot (1901), 70 L.J.N.S. Ch. 242; In re Dutton (1878), L.R. 4 Ex. 54.]

I think the general proposition of law to be drawn from the above cases is, that any gift, not being charitable, the object of which is to tie up property for an indefinite time, is void.

It seems to me that there can be no question in this case as to the indefiniteness of the time during which the residuary estate was to be tied up, inasmuch as many generations of owners may continue to occupy the residence before the happening of the event upon which further expenditures are to cease, *i.e.*, when it shall "be necessary that the said residence should be sold and disposed of."

Nor do I think that, upon a fair interpretation of the testator's language, it can be held that the residue, except such as in the honest discretion of the trustees it is necessary to expend for up-keep and maintenance of the residence according to the standard fixed by the testator, is not tied up and taken from commerce, within the meaning of the authorities. Neither the owners of the residence nor the trustees have any right to dispose of the fund for any other purpose. The trustees are bound to hold the whole fund for the purpose of the up-keep and maintenance until the happening of the event upon which, according to the testator's wish, the residue was to be distributed among his pecuniary legatees; and I cannot conceive how the fact that, because it has been held that the testator's wish in that regard has been defeated by reason of his language contravening the law, any advantage therefrom is to accrue to the owner of the residence.

I am unable to yield to the argument by Mr. Armour, that, because the trust is in its nature imperative, and the amount to be expended is left to the discretion of the trustees, they can at once appropriate the whole fund regardless of the amount thereof or of the necessities for expenditures, for the benefit of the present owners, as by his deed poll (exhibit 4) the defendant James H. Kennedy, the owner and sole trustee, has attempted to do. Like any other trust, it must be executed in good faith, and the Court will exercise its control to prevent a dishonest exercise of discretion. Whether or not the defendant James H. Kennedy, in the exercise of his discretion as evidenced by the deed poll, has acted honestly, I am unable, upon the evidence, to say, because the actual amount of the fund in his hands or the necessities for up-keep and maintenance were not disclosed in evidence before me; so that, if it should be held that my judgment as to the total invalidity of the gift is not maintained, the plaintiff and other next of kin should be at

liberty, in another action, if so advised, to contest the good faith of James H. Kennedy in the exercise of the discretion as evidenced by the deed poll.

The whole estate was charged with the payment of an annuity of $400 to the plaintiff; and he contends that the lands embraced in the residuary gift cannot be sold except subject to that charge. In view of the wide power of sale vested in the trustees, it is, I think, perfectly plain that they may make title to the purchaser free from the charge, but the proceeds will be charged with the annuity.

At the trial, I dismissed the action as against the defendants Suydam and the Suydam Realty Company, but reserved the question of costs. I now think that there is no good reason why the plaintiff should not pay them.

The judgment will therefore be:—

(1) Declaring that the gift of the residue is void as creating a perpetuity, and that the lands embraced therein may be sold free from the plaintiff's annuity, declaring that the proceeds of the sale are charged therewith, and that as to the whole residuary gift there is an intestacy, reserving to the plaintiff and other next of kin, in the event of it being held that my judgment is wrong, the right to impeach in another action the good faith of the defendant James H. Kennedy in the exercise of his discretion as evidenced by the deed poll.

(2) That the action be dismissed with costs as against the defendants Suydam and the Suydam Realty Company.

(3) Except as to those costs, the costs of all parties shall be paid out of the residuary estate.

NEY V. NEY (NO. 2)—MASTER IN CHAMBERS—MARCH 22.

Parties—Joinder of Defendants—Separate Causes of Action—Alimony—Custody of Children—Husband and Another Joined as Defendants—Pleading—Statement of Claim—Amendment.]—This action was brought by the plaintiff against her husband and his father. She asked for alimony as against the husband and for the custody of the two children of the marriage as against both defendants. The defendants moved for an order requiring her to elect on which branch she would proceed in this action, and striking out some parts of the statement of claim. The Master said that the motion was entitled to prevail, with costs to the defendants only in the cause. Two separate causes of action,

in one of which one of the defendants has no concern, cannot be joined: Hinds v. Town of Barrie, 6 O.L.R. 656 (C.A.), and cases cited there. The plaintiff should amend. This could best be done by discontinuing as against the father, and continuing the action for alimony against the husband. In the present action she could claim the custody of the children, which would be given to her in a proper case, as in Cowie v. Cowie, 13 O.W.R. 599, 14 O.W.R. 226. Paragraph 5 would then be amended. Paragraph 6 might stand under the decision in Millington v. Loring, 6 Q.B.D. 190. It gave the defendant notice of what the plaintiff would prove at the trial. Paragraph 13 and clause 2 of paragraph 14 should also be amended. If these amendments were made promptly, the action would be tried at the non-jury sittings before vacation. If a mother seeks possession of her children from any one except her husband, should she not proceed to get out a writ of habeas corpus? Is not this the appropriate remedy? T. N. Phelan, for the defendants. W. J. McLarty, for the plaintiff.

RE GOLDFIELDS LIMITED—SUTHERLAND, J.—MARCH 23.

Company—Shares—Transfer—Refusal to Register—Application for Mandamus Enlarged upon Undertaking of Company to Bring Action for Cancellation of Certificate Issued to Transferor.]—Application by Homer Mason for an order compelling Goldfields Limited, an incorporated mining company, to register a transfer of 1,000 shares of their stock from the applicant to John Mason and to issue a certificate to John Mason therefor. In answer to the application, the company set up (by an affidavit of their secretary) that they had received no value for the shares issued to Homer Mason, and had given instructions for the bringing of an action against him for the return and cancellation of the certificates issued to him. The learned Judge, in a written opinion, set out the facts at length, and said that, while the company had been dilatory in commencing the action, and while, in ordinary circumstances, the applicant would be entitled to an order such as he asked, yet, in view of the position formerly taken by him and the statement now made in the affidavit of the company's secretary the order should not at present be made. The company offered, on the application, to commence the action at once and speed the trial. This should be done; and the present motion should be disposed of by the Judge at the trial of the action. W. A. McMaster, for the applicant. G. H. Kilmer, K.C., for the company.

WHITE v. WHITE—MASTER IN CHAMBERS—MARCH 27TH.

Husband and Wife—Interim Alimony—Refusal of Order for—Order for Payment of Disbursements.]—Motion by the plaintiff for an order for interim alimony and disbursements. She was left with the care of three children, said to have inherited the delicacy of their father, who was apparently dying of consumption, and was being taken care of by his parents. The Master said that all attempts at settlement had failed in spite of the efforts of the legal advisers of both litigants; and, upon the facts as developed on the material, it did not seem that any other order could be made than for payment of $40 for interim disbursements, so that the case could be tried. This could be paid out of the $300 still due on the sale of some property of the defendant. The plaintiff appeared to be in possession of more than a fifth of the husband's income—which seemed to prevent any further allowance at present. See Lush, Law of Husband and Wife, 3rd ed., p. 184. Capstick v. Capstick, 33 L.J.N.S. P. & M. 105, shewed that in some cases where the husband had neither property nor earning power the Court would not award interim alimony pendente lite. Here the husband was not only unable to work, but was being cared for by his parents; while the plaintiff occupied the defendant's store and had whatever income was derived from the business which he carried on. It was alleged by the defendant's father that the plaintiff also got $12.50 a month as rent of another adjoining store. The affidavit of the plaintiff in reply did not meet this directly (if at all). Order made for disbursements only. Edward Gillis, for the plaintiff. M. H. Ludwig, K.C., for the defendant.

IMRIE v. WILSON—MASTER IN CHAMBERS—MARCH 27.

Discovery—Production of Documents—Affidavit—Claim of Privilege—Confidential Documents—Preparation for Purpose of Obtaining Solicitor's Advice.]—In obedience to the order made in this action on the 20th March (ante 895), the plaintiffs filed a further and better affidavit on production. With this the defendant was not satisfied, and moved for production of the documents set out therein, for which privilege was claimed by the plaintiffs. In the new affidavit the plaintiffs stated that they objected to produce the documents set forth in the second part of the said first schedule, "on the ground that the said correspondence between the plaintiffs Imrie and Graham was had after

consultation with the solicitor acting for us in this action and on his instructions, and was for the purpose of obtaining further advice and information in relation to the litigation now proceeding in this action and in view of such litigation, and was had and obtained for the purpose of the facts and information being laid before our said solicitor, as our professional adviser, in view of this litigation, and to obtain his advice; and the said letters contain some of the evidence and names of witnesses; and the said letters, with the exception of the original of that dated the 15th February, 1912, were on receipt placed in the hands of our solicitor for his information and to obtain his advice thereon in relation to the now pending litigation in this action; and we believe he has still has the same." The documents referred to were letters and copies of letters from one of the plaintiffs to another. It was contended that the words quoted were not sufficient to sustain a claim of privilege. It was said that it was defective for not stating that the documents were "confidential." The Master said that he could not accede to this. In Bray's Digest of the Law of Discovery, p. 13, sec. 50, it is said that the true principle is stated by Cotton, L.J., in Southwark Waterworks Co. v. Quick, 3 Q.B.D. 315; and at p. 34 of Bray it is said that this case shews that "the true principle is, that, if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, then it is privileged—it need not have been prepared at the instance or request of the solicitor, or have been laid before him." The present action was begun on the 9th February, and it appeared that there was a lis mota as early as the 31st January. The Master said that the affidavit seemed to him to be correctly framed. It sufficiently stated the facts necessary to shew that the documents were *confidential*, i.e., protected from discovery. Motion dismissed with costs to the plaintiffs in any event. F. Arnoldi, K.C., for the defendant. J. R. Roaf, for the plaintiffs.

TAYLOR v. TORONTO CONSTRUCTION CO.—MASTER IN CHAMBERS —MARCH 28.

Venue — Motion to Change — Necessity for Speedy Trial —Neglect to Serve Notice of Trial in Time—Jury Notice—Practice.]—This action was commenced on the 18th January, 1912. The plaintiff sought to recover $22,000, on the basis of two contracts made with the defendant company—or, the

alternative, to recover almost $10,000 on a quantum meruit. Appearance was entered on the 26th January. The statement of claim was delivered on the 19th February, and statement of defence and counterclaim (so-called) on the 27th February. Issue was joined on the 15th March, which was the last day for giving notice of trial for the Hamilton sittings commencing on the 25th March. For some reason, notice of trial was not given until the 16th. The plaintiff moved to change the venue from Hamilton to Guelph, so that the action might be tried there on the 9th April. The Master said that the motion was made really to correct, if possible, the oversight in not serving the notice of trial in the time required by the Rules; but that which cannot be done directly cannot be done indirectly. It was strongly urged that it was most important to the plaintiff to have a speedy trial, on two grounds. His affidavit stated that four of his witnesses were obliged to go to Western Canada about the end of April and could not remain until the June sittings at Hamilton. There was no mention of their names nor of the nature of their evidence. But in a proper case this difficulty could be met by having their evidence taken de bene esse, and an order might issue for that purpose. The second ground was, that the plaintiff was a poor man, whose means had all been used in doing the work in question. He now wished to be free to go to New Brunswick, where he had obtained another contract since this action was commenced. The statement of defence alleged that the plaintiff had been paid over $14,000 up to the time when he abandoned the work, which was over $1,600 in excess of what had been earned; that the defendants had to take the work over and complete the same, which had not been done, but at the end of January this left $1,817.93 overpaid by the defendants in excess of the contract-price. They claimed to be allowed this sum, and also the sum found to be overpaid at the completion of the work. The affidavit of the president of the defendant company confirmed these statements; which, the Master said, seemed to shew that the whole matter could not be disposed of as early as the 9th April. If the notice of trial had been given in time, it might have been possible to have sent the trial to some other place; but the Master was not aware of any case in which a motion by a plaintiff to change the venue so as to expedite the trial and correct his own mistake had been successful—none such was cited on the argument nor was any to be found in Holmested and Langton's Judicature Act, under Rule 529. It seemed a necessary inference that the power to do so did not exist. The defendants' president in his affidavit stated that they would move to strike out the jury notice.

If they succeeded in this, as seemed most probable, the case could be tried in June at Hamilton, or even entered at Toronto if both parties agreed. But, as the case stood, the motion must be dismissed with costs to the defendants in any event. F. Morison, for the plaintiff. W. C. Chisholm, K.C., for the defendants.

DUNLOP v. CANADA FOUNDRY CO.—TEETZEL, J.—MARCH 28.

Master and Servant—Injury to Servant—Workmen's Compensation for Injuries Act, sec. 3 (5)—Negligence of Fellow-servant—Person in Control of Machine upon Tramway—Findings of Jury.]—Action by James Dunlop, an infant, for damages for personal injuries sustained by him, while working for the defendants in their foundry, by reason of a steel girder falling on him and crushing and breaking one of his legs, owing, as he alleged, to the negligence of the defendants or their servants. The action was tried with a jury. The learned Judge said that, in his opinion, there was no evidence to justify a finding of liability at common law; and he also thought that the answers of the jury to the questions submitted did not entitle the plaintiff to judgment at common law. The jury assessed the damages at $1,700 if there was a common law liability, and at $1,500 if there was liability only under the Workmen's Compensation for Injuries Act. The answers of the jury to the 5th and 6th questions entitled the plaintiff to judgment under the Act, because the workman in charge of the hoist was, within the ruling in McLachlin v. Ontario Iron and Steel Co., 20 O.L.R. 335, a person having the charge or control of an engine or machine upon a railway or tramway, within the meaning of clause 5 of sec. 3 of the Act, and that the defendants were answerable for his negligence. The answers of the jury to questions 9 and 10, finding the defendants' sub-foreman guilty of the negligence therein stated, entitled the plaintiff to judgment. Judgment for the plaintiff for $1,500 damages and costs. I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiff. G. H. Watson, K.C., and B. H. Ardagh, for the defendants.