THE

# ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MAY 26TH, 1906.)

VOL. VII. TORONTO, MAY 31, 1906. NO. 20

JOHNSTON, SURR. CO. J. APRIL 11TH, 1906.

SURROGATE COURT OF ALGOMA.

## RE KEHOE.

*Executors and Administrators—Foreigner Appointed Executor by Will—Letters of Administration with Will Annexed Granted to Trust Company—Surrogate Court—Powers of.*

Catherine Kehoe, of the town of Sault Ste. Marie, in the district of Algoma and province of Ontario, died on 15th November, 1905, at the said town of Sault Ste. Marie, her home.

The deceased in her lifetime duly made her last will and testament and therein appointed one Daniel Foley, of Emmett, in the State of Michigan, farmer, outside of the jurisdiction of the Court, and John George Blain, of the said town of Sault Ste. Marie, druggist, her executors.

John George Blain refused to act and renounced all his rights as executor under the will.

The Imperial Bank of Canada were creditors of the deceased.

The deceased left her surviving her husband and 4 children, all infants, her daughter Mary Brandon, her son Patrick Brandon, her daughter Catherine Kehoe, and her son Vincent Kehoe. The Brandon children resided out of Ontario, and the Kehoe children resided near Sault Ste. Marie.

The Imperial Bank of Canada as creditors asked to have the Toronto General Trusts Corporation appointed administrators with the will annexed of the property of deceased,

that corporation having consented to act and being also a joint petitioner with the Imperial Bank of Canada.

Daniel Foley also brought into Court the last will and testament of the deceased, and asked probate thereof.

A. E. Elliott, Sault Ste. Marie, for the bank and trusts corporation.

M. McFadden, Sault Ste. Marie, for Daniel Foley.

J. McKay, Sault Ste. Marie, for the official guardian.

JOHNSTON, SURR. CO. J.:—The late Catherine Kehoe, formerly Catherine Brandon, was by this Court on 9th September, 1895, duly appointed administratrix of the estate and effects of Patrick Brandon, deceased, her former husband, who lived in the district of Algoma, and this estate at the time of her death still remained unaccounted for and undisposed of, and the same will now have to be wound up for the benefit of her two children Mary and Patrick Brandon.

The question is, to whom shall the present estate be intrusted for the proper carrying out of the will and the trusts therein contained.

John George Blain having renounced, he need not be considered except that his appointment shews that apparently it was the intention of the deceased to have her interests properly protected by an executor resident in Ontario.

It is contended that Daniel Foley, the executor named, should be appointed, he having the prior right, and, failing him, that the next of kin should be appointed, in preference to the Toronto General Trusts Corporation, the nominees of the Imperial Bank of Canada, creditors of the deceased: Howell's Surrogate Courts Act, pp. 217, 136, 137; Kingsford on Executors, pp. 23-28.

The objection to Mr. Foley is, that he resides in the State of Michigan and outside the jurisdiction of this Court, and at present is a debtor to the estate of the late Catherine Kehoe to the extent of some $3,000, and would not be a proper person to manage the estate or to care for the infants, to see them properly maintained and educated, and to see to the investment of the funds of the estate, until, under the terms of the will, the youngest child shall come of age.

The next of kin have made no application herein, nor have they appeared on this petition. The fact that the deceased in no way named her husband for the position of executor

or as guardian seems to me to indicate that she preferred others to care for and manage the estate.

The Surrogate Courts Act, R. S. O. 1897 ch. 59, sec. 59, states who may be appointed executor or administrator of an estate, and gives the Court or Judge certain powers of appointment: Carr v. O'Rourke, 3 O. L. R. 632, 1 O. W. R. 331; and, having carefully considered the matter, I am of the opinion that the special circumstances which warrant the exercise of the discretion conferred on me by sec. 59 exist in this case, and that in order to have the terms of the will carried out, the funds safely guarded, the infants properly clothed, maintained, and educated, and the estate of the late Patrick Brandon also wound up, I should appoint the Toronto General Trusts Corporation to be administrators with the will annexed of the property of the late Catherine Kehoe.

---

CARTWRIGHT, MASTER. MAY 21ST, 1906.

CHAMBERS.

## RE SOLICITOR.

*Solicitor — Taxation of Bill — Motion for — Submission to Arbitration—Construction.*

Motion by Miller et al. for an order for taxation of a bill of costs rendered by the solicitor.

E. W. Boyd, for the applicants.

S. C. Biggs, K.C., for the solicitor.

THE MASTER:—The parties by agreement under seal referred "all existing and valid claims," arising out of "divers dealings and accounts" between them, to an arbitrator, from whose award "there shall be no appeal."

One of the questions was as to a bill of costs rendered by the solicitor to the Millers, which the latter wished to have taxed. . . . The arbitrator ruled that he was empowered to deal with it, and refused to send it up for taxation. Thereupon the Millers moved for an order for taxation.

I think there are three separate and conclusive answers to the motion:—

1. This is virtually an appeal from the arbitrator's construction of the submission. Without saying that there is no right of appeal anywhere, it certainly cannot be to me, unless such a provision had been inserted in the submission.

2. To give effect to the motion would be to contradict the agreement, which refers "all existing and valid claims" to the arbitrator chosen by the parties. It was admitted that he should be allowed to decide the question of retainers, but that the Millers had the usual right of clients to have the bill passed on by the taxing officer. It is said that this was the intention of the parties, and that it was only on this understanding that the Millers consented to the reference.

This is denied, and there is no documentary evidence to support it. The submission was evidently carefully considered by the solicitor for the Millers before execution.

If any such agreement could be proved, it could not be considered on this motion, though it might be a ground for reforming the submission if thought worth while to proceed to do so. See Dominion Bank v. Crump, 3 O. W. R. 58, and cases cited.

3. But in any case the motion is surely premature. The arbitrator may find that there is no liability to pay the bill, or he may reduce it below anything that the taxing officer would allow.

For these reasons, I think the motion fails and must be dismissed with costs.

---

CARTWRIGHT, MASTER. MAY 21ST, 1906.

CHAMBERS.

## JAMES v. SHEMILT.

*Venue — Change — Preponderance of Convenience—County Court Action.*

Motion by defendant, in an action in the County Court of Wentworth, for wages for services rendered to defendant at

his farm in the county of Ontario, nearly two years before action, to transfer the action to the County Court of Ontario.

A. W. Ballantyne, for defendant.

H. E. Rose, for plaintiff.

THE MASTER:—It is not denied that the whole alleged cause of action arose in the county of Ontario, and that all the witnesses will be found there.

Plaintiff has made an affidavit, but does not allege that he has any witnesses. This brings the case within the decision in Gardiner v. Beattie, 6 O. W. R. 975, affirmed in 7 O. W. R. 136.

As the action was not begun until almost two years after plaintiff left defendant's service, it does not seem to have been taken very seriously by plaintiff himself. He does not allege any difficulty in getting to Whitby for trial.

The order will go. Costs in the cause.

---

CARTWRIGHT, MASTER. MAY 21ST, 1906.

CHAMBERS.

## FARMER v. KUNTZ.

*Venue—Change—Preponderance of Convenience—Counterclaim.*

Motion by defendant to change venue from Toronto to Goderich.

Featherston Aylesworth, for defendant.

C. P. Smith, for plaintiff.

THE MASTER:—The plaintiff's claim for arrears of salary, as plaintiff admits, must depend upon the evidence of Buxton, who resides at Clinton, and for whom plaintiff worked before being engaged by defendant.

Defendant counterclaims for negligence and want of skill while plaintiff was in her service at her brewery near Goderich. The evidence as to this must also be found in the county of Huron, and therefore under McDonald v. Park, 2 O. W. R. 972, the action should be tried at Goderich.

If it is objected to this that plaintiff is dominus litis, the answer is to be found in the decision of the Court of Appeal in Amon v. Bobbett, 22 Q. B. D. 543, where Bowen, L.J., at p. 548, said of a counterclaim: "It is more than a defence, it is in the nature of a proceeding in a cross-action, and when necessary for the purposes of justice it must be so treated. A counterclaim is therefore to be treated for all purposes for which justice requires it to be treated as an independent action."

Here, so far as the counterclaim is concerned, there is a sufficient preponderance of convenience in favour of the trial at Goderich—and the order will go accordingly with costs in the cause.

---

ANGLIN, J. MAY 21ST, 1906.

WEEKLY COURT.

## LIVINGSTON v. LIVINGSTON.

*Reference—Local Master—Employment of, as Solicitor for Party, pending Reference—Disqualification—Setting aside all Proceedings—Costs.*

Motion by defendants to set aside the reference to the local Master at Berlin and all proceedings thereupon had before him, on the ground of the acceptance by the firm of solicitors in which the local Master was a partner of a retainer from defendant for some non-contentious business in the Surrogate Court of Waterloo.

The action was brought for the winding-up of the partnership which subsisted between the late John Livingston, who died on 21st May, 1896, and whose executors were the plaintiffs, and his brother, James Livingston, the defendant. The judgment of reference was pronounced on 27th March, 1902. The proceedings before the Master had at the time of the motion consumed nearly 100 hours, on 17 days, and involved an attendance by him at the city of New York. The accounts were taken by two expert accountants. Upon all points on which they agreed, their conclusions were by agreement accepted. Upon a number of points on which the parties were at issue, the reference proceeded before the Master. He took voluminous evidence, and on or about 9th

December, 1904, sent to plaintiffs' solicitors an unsigned document which contained a number of his findings upon points on which he was required to adjudicate between the parties. A duplicate was sent to the solicitors for defendant. Some correspondence ensued in regard to these findings and their effect and force.

On 30th September, 1905, defendant's solicitors filed supplemental accounts, and on 12th October a new account of John Livingston's drawings was put in. Some further correspondence ensued, but nothing further was done in the reference, and shortly after the last date plaintiffs became aware of the retainer of the firm by defendant.

The defendant's affidavit shewed that he had employed the firm of solicitors referred to above, to procure letters of administration to the estate of a deceased daughter and otherwise to act for him in connection with that estate, and that he employed the solicitors "in entire good faith, and without any reference whatever to or thought of the proceedings in this action."

The daughter died on 24th February and the petition for letters of administration was dated 1st March, 1905.

W. Nesbitt, K.C., and H. S. Osler, K.C., for plaintiffs.

W. Barwick, K.C., and J. H. Moss, for defendant.

W. E. Middleton, for the local Master.

ANGLIN, J. (after setting out the facts at length):—Upon the argument I declined to hear any suggestion that the Master's findings or his conduct indicated that he had been in any wise unduly influenced in defendant's favour by the relations which had been established between them, because no such charge is made in the notice of this motion. I therefore deal with the matter solely upon the admitted fact that the Master accepted a retainer from defendant before the reference pending in this action was finally concluded.

While, in respect of the matters covered by his findings contained in the document of December, 1904, the basis of the final report may have been then determined, I am not satisfied that the Master's remaining duties upon this reference are purely ministerial. On the contrary, it seems to me to be very clear that in respect of matters contained in the new accounts filed and in respect of matters not fully

covered by his findings in the document of December, 1904, the Master will still have duties of a judicial character to discharge. Moreover, the settlement of the report, in so far as it may proceed upon the findings made in that document, may require the exercise of judicial functions. I fully realize and much regret the expense which the making of the order asked for by plaintiffs may entail, but a careful consideration of all the authorities cited and others fully supports the conclusion to which, apart from any authority, my view of the requirements of natural justice would have led me, namely, that the indiscretion of the Master permits me to take no other course than to remove him as referee in this action, and to set aside all the proceedings had before him.

Section 148 of the Judicature Act by implication permits the local Master at Berlin to practise as a solicitor. But that statute was certainly not intended to sanction anything so abhorrent to natural justice as that a local Master, while discharging judicial or quasi-judicial functions, should assume towards one of the parties the relation of solicitor to client, than which the law recognizes none to be closer and more confidential.

This is not the case of a voluntary reference by consent to the arbitrament of a person chosen by the parties, such as was dealt with in Jackson v. Barry R. W. Co., [1893] 1 Ch. 238; and again in Eckersley v. Mersey Docks and Harbour Board, [1894] 2 Q. B. 667; In re Haigh and London and North Western R. W. Co., [1896] 1 Q. B. 647; In re Hopper, L. R. 2 Q. B. 367; Mosely v. Simpson, L. R. 16 Eq. 226; Bright v. River Plate Construction Co., . . .

But in our own Courts, even in the case of arbitrators voluntarily chosen, their fairness and impartiality has been scrupulously guarded against even suspicion of possible bias, and I doubt whether our Court of Appeal at the present day would follow the decisions in In re Hopper and Mosely v. Simpson. . . .

[Reference to Conmee v. Canadian Pacific R. W. Co., 16 O. R. 639; Vineberg v. Guardian Fire and Life Assurance Co., 19 A. R. 293; Burford v. Chambers, 25 O. R. 663, 667; Christie v. Town of Toronto Junction, 24 O. R. 443, 445; Kemp v. Rose, 1 Giff. 258; Russell's Power and Duty of an Arbitrator, 9th ed., pp. 93-6; Redman's Arbitrations and Awards, 4th ed., p. 116; Dobson v. Graves, 6 Q. B. 637, 648; Harvey v. Skelton, 7 Beav. 455, 462.]

But, whatever divergency of view there may be as to arbitrators voluntarily chosen by parties, the authorities are uniform that an officer of the Court, upon whom judicial duties are imposed in the ordinary course and as the tribunal constituted by law for the purpose, cannot be permitted to discharge such functions in circumstances where the faintest breath of suspicion of bias or partiality might arise.

In Race v. Anderson, 14 A. R. 213, after an arbitrator had taken all the evidence and prepared a written statement of his findings, which only required his signature to complete it, one of the parties sent him a letter containing an affidavit bearing on some matters in question on the reference. The arbitrator swore that his award was what he had previously embodied in his written findings and was in no way affected by the letter or affidavit, which he would have returned immediately had he not thought it better to place them, without filing them or treating them as evidence, amongst the papers, so that it could not be said he had in any way concealed the fact of their having been sent to him. The good faith of the referee was not questioned, and the Court "fully believed the referee's statement that he was not influenced by this communication." Nevertheless, the award was set aside, the Court observing that "in this particular case it may be somewhat of a hardship, but the leading principles that govern references to arbitration must be preserved inviolate." The action had been tried with a jury and a verdict returned for the plaintiff, subject to the award of the local Master at Guelph. The resemblance to the present case is close. But that judicial duties are still to be discharged in this case by the Master at Berlin, is, I think, much clearer than that the Master at Guelph had such functions to perform in Race v. Anderson after receipt of the letter and affidavit.

At put by Rose, J., in Conmee v. Canadian Pacific R. W. Co., 16 O. R. at p. 655, "It will never do to allow it to go abroad that one of two litigants may approach a judicial officer, pending the litigation, to open negotiations for any profit or advantage to such judge. It is better that they should know that such conduct, when complained of before the Court, will lead to the setting aside of the award 'as a lesson to all persons in future not to adopt that line of conduct.'"

The reference to the local Master at Berlin and all proceedings had before him must therefore be set aside, and this

reference transferred to the County Court Judge of the county of Waterloo as official referee, unless the parties agree upon some other officer of the Court as referee.

Much time and expense may be saved if the parties can agree that the new referee may treat the evidence already taken as taken before him. Unless it is important that the referee should have an opportunity to form an opinion as to the credibility of witnesses from their demeanour in giving evidence, this can probably be arranged. There can be no good reason why the work already done by the accountants should be duplicated.

As the present unfortunate situation is wholly due to an act, however innocent, of the defendant, he must pay to the plaintiffs their costs of this motion and of all the proceedings subsequent to the judgment of reference which shall have been lost through the making of the order now pronounced.

---

BOYD, C. MAY 22ND, 1906.

TRIAL.

## MORRIS v. CAIRNCROSS.

*Waste—Lease for Years by Tenant for Life—Settled Estates Act—Rights of Reversioners on Death of Life Tenant—"Without Impeachment of Waste"—Repair of Buildings—Short Forms Act—Permissive Waste—Wear and Tear.*

Action for a declaration that a certain lease was void and not binding on plaintiffs, and for other relief.

Plaintiffs were the grandchildren and heirs at law of Mary Gallagher, who died in 1870, having first made her will whereby she devised certain lands situate at the corner of Church and Ann streets, in the city of Toronto, then owned by her in fee simple, among other lands, to her son Robert Atkinson Gallagher for life, and appointed William Mulock and John Oliver executors.

The statement of claim alleged that, pursuant to the terms of the will, R. A. Gallagher duly entered into possession of the lands; that on 1st October, 1895, John Oliver and R. A. Gallagher assumed to make a lease of the lands to defendant for a term of 21 years, at an annual rental of $120; that R. A.

Gallagher died on 6th February, 1905, and on his death plaintiffs became entitled to an estate in fee simple in the lands; that John Oliver and R. A. Gallagher had no power to make a lease of the lands for a longer term than the life of R. A. Gallagher; that the lease was not made in pursuance of or in conformity with the requirements of the Settled Estates Act, in that the lease was not an ordinary lease, as contemplated by that Act, but was in effect a building lease, and in that the lease was made without impeachment of waste, and in that the rent reserved by the lease was not the best rent that could have been reasonably obtained therefor, but was an inadequate and insufficient rental; that, even if the lease had been made in conformity with the provisions of the Settled Estates Act, it was not binding upon or good as against plaintiffs; that defendant was in possession of the lands, and had excluded plaintiffs therefrom; that, upon the death of the life tenant, plaintiffs repudiated the lease and demanded possession from defendant, but defendant had neglected and refused to deliver possession.

The prayer was for a declaration that the lease was void and not binding upon plaintiffs; for a declaration that defendant had excluded plaintiffs from possession; for mesne profits or damages; for possession, costs, and other relief.

W. E. Raney, for plaintiffs.

C. A. Moss and Featherston Aylesworth, for defendant.

BOYD, C.:—In leases for years under the Settled Estates Act, 1895, 58 Vict. ch. 20 (O.), sec. 42, it is essential that they be not made "without impeachment of waste." In other words, the terms of the lease must be such as not to affect or vary the common law liability of the lessee for waste. The tenant must not be relieved from any duty the omission of which would constitute waste. It has been held that, if the covenant to repair be qualified by the words "fair wear and tear and damage by tempest excepted," that would be a fatal defect in the execution of the power as against an objecting and repudiating reversioner: Davies v. Davies, 38 Ch. D. 499. This decision has been unfavourably criticized by many writers of competent skill, and, while it has not been formally overruled, it is one that should not be implicitly followed. Upon the terms of the instrument, it is, I think, with difficulty distinguishable from the lease now in question, and, assuming that it cannot be so distinguished, and having to

decide for or against its authority, it would seem to be the better course to regard it (especially in this country) as not the law. It is very incisively criticized by Mr. Bewes, at pp. 216-219 in his Law of Waste (1894) . . .

In the 1st ed. of Pollock on Torts (Christmas, 1886), the author wrote thus: "As to permissive waste, i.e., suffering the tenement to lose its value or go to ruin for want of necessary repair, a tenant for life or years is liable therefor if an express duty to repair is imposed upon him by the instrument creating his estate: otherwise it is doubtful:" p. 286. In the 2nd ed. (Easter, 1890), the text is left unchanged (p. 301), and there is no reference to the Davies case, decided in February, 1888. In the 3rd ed. (August, 1892), at p. 307, the last sentence quoted above is altered thus—"otherwise he is not," and Re Cartwright (1889), 41 Ch. D. 532, is cited. The changed text is so continued in the 4th ed., at p. 313 (1895); also in the 5th ed. (1897) at p. 327, and in the 6th ed. (1901), at p. 338. In the last ed. (1904), p. 346, with the same text is added this note to Re Cartwright—"The correctness of this decision is disputed by Mr. C. B. Labatt, in 37 C. L. J. 533."

The modern doctrine as to non-liability of tenants for years and for life appears to proceed upon two grounds: first, a revulsion from the exposition by Coke of the Statutes of Gloucester and Marlbridge that the words "do make waste" include permissive as well as voluntary or commissive waste; and second, the prevalence of the equitable doctrine since the Judicature legislation by which the non-interference of equity in cases of permissive waste is adopted as the better principle by Courts of law: Zimmerman v. O'Reilly, 14 Gr. 646, and Barnes v. Dowling (1881), 44 L. T. N. S. 809.

In the last edition of Theobald on Wills it is stated as the result of the modern cases that a tenant for life, whether legal or equitable, of freeholds or leaseholds, is not liable to remaindermen for permissive waste; p. 465 (5th ed.) . . .

There is an interesting discussion in Farwell on Powers, 2nd ed., pp. 635-637, bearing against the doctrine in Yellowly v. Gower, 11 Ex. 274 (which was followed in Davies v. Davies, 38 Ch. D. 499). To the same effect Lord St. Leonards in Sugden on Powers, 8th ed., pp. 789, 790.

In the last ed. of Fawcett's Landlord and Tenant (1905), p. 352, it is said: "At present the illogical result appears

to have been reached that tenants for years are liable (for permissive waste), but not tenants for life." For the proposition that tenants for years are so liable is cited Davies v. Davies, 38 Ch. D. 499.

This decision proceeds upon the authority of Yellowly v. Gower, 11 Ex. 274, in which it is thus held: "We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53, Harnet v. Maitland, 16 M. & W. 257:" at p. 294.

The question as to a tenant for life or for years being liable for permissive waste was treated as an open one in Woodhouse v. Walker, 5 Q. B. D. 404.

In Davies v. Davies, supra, Kekewich, J., held that a tenant for years was so liable, but in a later case of Re Cartwright, 41 Ch. D. 532, where the same liability was argued to attach to a tenant for life and one for years, it was held that the tenant for life was not liable to an action for permissive waste. The closing words of Mr. Justice Kay are: "At the present day it would certainly require either an Act of Parliament or a very deliberate decision of a Court of great authority to establish the law that a tenant for life is liable to a remainderman in case he should have permitted the buildings on the land to fall into a state of dilapidation:" p. 536. That case was followed by North, J., in Re Parry and Hopkin, [1900] 1 Ch. 160.

Upon this state of authorities in England it is said in the last edition of Ringwood on Torts (1906), p. 169, that, in view of the conflicting cases, the point as decided in Davies v. Davies cannot be considered as clear.

Re Cartwright was followed by me in Patterson v. Central Canada Loan and Savings Co., 29 O. R. 134, so far as relates to a tenant for life, and also by Mr. Justice Teetzel in Monro v. Toronto R. W. Co., 9 O. L. R. at p. 305, 3 O. W. R. 14, but he held that the lease in that case was void under the authority of Davies v. Davies, without adverting to the uncertainty as to the present authority of that decision. However, in the Monro case the acts permitted by the lease were clearly such as involved actual waste—as it sanctioned the cutting down of trees for park purposes—and it would be a void instrument under sec. 42 of the Settled Estates Act, at the option of the remaindermen.

The objectionable element in the lease in the Davies case was a compound covenant as to repair, in these words, that the lessee would "at all times during the term keep the premises in good and substantial repair, and the same in good and substantial repair deliver up at the expiration or sooner determination of the term, fair wear and tear and damage by tempest excepted." The Judge read these words of exception in the last clause as referring not only to the later branch of the covenant, but to it as a whole. It was then construed as a provision exempting the tenant during the whole term for repairs rendered necessary by wear and tear or by damage from tempest. It was laid down as law that but for these words the tenant would be liable to replace dilapidations arising from the wearing out of the walls and floors, and also such as would arise from a storm blowing off the chimney-pot or breaking in the roof. In these particulars, therefore, it was said the tenant was rendered unimpeachable for waste: p. 505.

In the present lease, which is made under the statutory short form as found in R. S. O. 1887 ch. 106, the covenants . . are "to repair," "that lessors may enter and view repair," "that lessee will repair according to notice," and that the lessee will leave the premises in good repair (reasonable wear and tear and damage by fire or tempest only excepted). These occur in the short form as numbered 3, 6, and 8 respectively, with the corresponding expansions of meaning. The written lease goes beyond the statutory exception, which is limited to reasonable wear and tear and damage by fire only excepted. The lease also excludes damage by tempest, which was also the exception in the Davies case. But by the statutory collocation followed in the lease, this exception I do not read as applicable to repairs during the term, but only to what shall occur at the end of the term. Then the premises are to be left, according to the covenant, in as good a condition as they were in at the beginning of it, "subject to the exception of dilapidations caused by the friction of the air, by exposure, and by ordinary use:" see Fawcett, 3rd ed., p. 341. But if the building has at that period been destroyed by fire or tempest—through unavoidable casualty that is—it need not be replaced by a new structure. This exception relieves the tenant from putting up the buildings destroyed by pure accident as a matter of repair to the premises, but it will not save him from liability if the destruction has been caused by his negligent or wilful act.

Such an act would be one of actual and actionable waste committed on the premises, whereas the exception relieves him only if the loss is the result of casualty or accident, in which case the legal aspect is not one of actionable waste at all: White v. McCann (1851), 1 Ir. C. L. R. 205; Nugent v. Cuthbert, Sugden's Law of Property (H.L.) 475; . . . Wolfe v. McGuire, 28 O. R. 45. In this case the fire, which was accidental, was treated as permissive waste for which the lessee was not actionable.

So as to the wear and tear which is exempted; that is really a matter which in modern law is not accounted "waste" at all. It is a necessary incident arising out of the use of the property in a reasonable manner; and it has been held that no detriment to demised premises resulting from the use of them in a reasonable and proper manner, having regard to the class of structure, is to be regarded as "waste:" per Fry, J., in Saner v. Bilton, 7 Ch. D. 815, followed in Manchester Bonded Warehouse Co. v. Carr, 5 C. P. D. 507. Permissive waste of an actionable character is provided against by the covenant to repair, and any deterioration arising from reasonable wear and tear is of too trivial a character to be reckoned with by the Courts. When the wear and tear is so long continued that it takes the aspect of "want of repair," that is a different matter and one covered by the covenant. Here the wear and repair clause would only refer to a short period before the expiry of the last year of the term, and would be in effect inappreciable.

Upon the other points of the case arises no difficulty. The covenants are as provided by the Settled Estates Act "of usual and proper character," being in the recognized statutory form, and the rent reserved was the best that could have been reasonably obtained in the year 1895. The great preponderance of evidence is to this effect, and it so happened that the rents of land and houses in the city (Toronto) were in that year at the lowest ebb after the "boom." Houses were standing vacant—business was at a stand-still—the locality of the house in question was and has been unprogressive—and altogether I cannot condemn the lease on this ground. The criterion is not how the thing has turned out, but the proper test is, was the rent reserved fair and reasonable at the time?

The only question of fact is whether the lease was made agreeably to the statutory power, and I do not advert to the

relations between the parties, which does not appear relevant, and indeed is not raised on the record: see as to this, Davies v. Davies, 38 Ch. D. at p. 502.

The result is, that the action fails and should be dismissed, but, as it was apparently justified to a great extent by the Davies case, I give no costs.

---

BOYD, C. MAY 23RD, 1906.

WEEKLY COURT.

## RE HARKIN.

*Will—Construction—Devise—Misdescription of Land—Falsa Demonstratio—Evidence of Extrinsic Facts—Correction of Mistake.*

Motion by executors for order determining certain questions arising upon the construction of the will of Neil Harkin the elder.

A. J. F. Sullivan, Stayner, for executors.

H. H. Strathy, K.C., for adults contesting will.

H. E. Rose, for adults claiming under will.

F. W. Harcourt, for infants.

BOYD, C.:—The original will in this case was partly printed and partly written—a printed form being used for the introduction and conclusion, and the intermediate part, containing the particular disposition of the property, being filled up in ink and writing. The first part of the will is printed and reads: "I devise . . all my real and personal property of which I may die possessed in the manner following:" The last part reads, "All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto"—the blank after "unto" being left unfilled—so that there is in effect and fact no residuary clause. The lands disposed of by the terms of the will are (barring the error in description) all the lands owned by the testator.

Then in the body of the will these lands are thus disposed of: "I hereby direct that the N. E. ¼ of lot No. 1 in the 4th concession of the township of Sunnidale and the N.

E. ¼ of lot No. 12 in the 1st concession of the township of Nottawasaga, and also that part of lot No. 4 in the 7th concession of the said township of Sunnidale now owned by me, be sold as soon after my decease as my executors may determine and the proceeds divided in equal shares between" five daughters named.

There are sons who claim that the testator died intestate as to one lot he owned, viz., the north-west ¼ of lot 1 in the 4th concession of Sunnidale. The description in the will gives the north-east ¼ of this lot, which the testator did not own; his ownership at the date of the will, 25th April, 1902, and at his death, 24th September, 1902, was of the north-west quarter of that lot. If east in the will is read as if "west," or if "east" is left out as to this parcel, the testator's description will then fit his exact ownership, and all his lands will pass by his will as the intention is therein expressed.

The parenthetical clause in the devise "now owned by me" refers primarily and immediately, no doubt, to the part lot just before spoken of, but it may without violence be also used, I think, as applicable to the other devises of lots earlier mentioned in the same sentence. But, apart from these words, the general introductory words referred to, "all my real and personal estate of which I die possessed," would suffice to let in evidence whereby the erroneous course given by the will would be rectified or made applicable to the actual locality of his property.

The case falls within the rule laid down in Hickey v. Hickey, 20 O. R. 371, which, being followed by Falconbridge, C.J., in Doyle v. Nagle, was approved by the Court of Appeal in that case: 24 A. R. 168.

I think that the will operates on the lands owned by the testator and that the north-west quarter of lot 1 in the 4th concession Sunnidale passed by the devise to the five daughters along with his other lands.

I proceed upon Canadian cases, but in England there is a strong case decided in 1886 of Re Bright Smith, 31 Ch. D. 314, where the word "freehold" was rejected in a will as falsa demonstratio. The Court (Chitty, J.) proceeded upon the principle enunciated by Lord Selborne in Hardwicke v. Hardwicke, L. R. 16 Eq. 175, that if the words of description when examined do not fit with accuracy, and if

there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded.

Costs out of estate.

---

FALCONBRIDGE, C.J. MAY 23RD, 1906.

TRIAL.

## GIBSON ART CO. v. BAIN.

*Contract—Breach—Counterclaim—Damages.*

Action for price of goods and counterclaim for breach of contract.

J. A. Macintosh, for plaintiffs.

J. Bicknell, K.C., and J. W. Bain, for defendants.

FALCONBRIDGE, C.J.:—I am of the opinion that no contract has been established, breach of which would entitle defendants to recover damages.

If such contract had been proven, the major part of the damages claimed would have been too remote, i.e., general damage to business and loss of profits (Hadley v. Baxendale); and there was no evidence to shew the true measure of damages: Thol v. Henderson, 8 Q. B. D. 457; Williams v. Reynolds, 6 B. & S. 495; Hinde v. Liddell, L. R. 10 Q. B. 265; Hendrie v. Neelon, 3 O. R. 603, 12 A. R. 41.

Judgment for plaintiff for $624.75 and interest from 15th May, 1905, with costs; counterclaim dismissed with costs.

FALCONBRIDGE, C.J. MAY 23RD, 1906.

TRIAL.

## BOYD v. CHESSUM.

*Vendor and Purchaser—Contract to Sell and Convey Land—Action by Purchaser to Compel Specific Performance—Dispute as to Payment—Absence of Receipt—Burden of Proof.*

Action for specific performance of a contract by defendant to convey land to plaintiff.

J. E. Jones, for plaintiff.

J. D. Montgomery, for defendant.

FALCONBRIDGE, C.J.:—The whole matter in dispute is as to the alleged payment of $210 by plaintiff to defendant on 2nd August, 1905; defendant contending that he received only $110. Plaintiff and one Goldstein (now plaintiff's partner in the horse business) swear to the payment of 2 $50 bills, 5 $20 bills, and a 10 ($10). No receipt passed, and these two men swear they cannot read or write, but can tell the denomination of bank notes.

Plaintiff swears that he had $512 in his pocket that day, which he had counted out in presence of his wife—the money being the proceeds of sales of horses which he had effected in different parts of the country, and that he had no occasion to go to the bank that morning, and that he did not in fact go there. But it is proved that he did cash a cheque for $200 at the bank on that day, receiving 4 $50 bills.

Before cashing that cheque he had $451.30 at his credit, having deposited $100 on Saturday 29th July.

On the same Wednesday, 2nd August, the parties went to the office of the Imperial Loan and Investment Company, and plaintiff paid $97.93, defendant contributing the $7.93, which represented the interest due.

Defendant swears to the receipt of only $110, and there are undoubtedly circumstances connected with his subsequent conduct which make against the truth of his story.

The solution of the matter comes down to the application of the rule as to the burden of proof. If illiterate or literate

people don't take the trouble to get receipts, they must run their chances of having to pay twice.

However, the probability is that of the 4 $50 bills which defendant got at the bank he paid 2 to defendant (with the odd $10 out of his pocket), and that he paid the other 2 to the Imperial Loan and Investment Company.

Action dismissed with costs.

---

BOYD, C. MAY 26TH, 1906.

CHAMBERS.

## RE MCDONALD v. RICHMOND.

*Division Court—Jurisdiction — Title to Land—Occupation Rent—Statute of Limitations—Prohibition.*

Motion by defendant for prohibition to 3rd Division Court in county of Peel.

T. J. Blain, Brampton, for defendant.

R. E. Heggie, Brampton, for plaintiffs.

BOYD, C.:—Plaintiffs sue for arrears of occupation rent of land held by defendant under plaintiffs and the testator whom they represent for 3 years. Defendant pleads that claim is barred by Statute of Limitations and by the Real Property Limitation Act, and also raises counterclaim for work and services due from the testator for several years. It is admitted and proved that defendant entered into the possession of the garden under the testator and upon obtaining his permission to do so, in 1893, and into possession of the house in May, 1896, with like permission, and that the rent for several years was paid by work done for the testator by defendant and settlement therefor had up to August, 1901. The summons was issued in February, 1906.

No question arose about the title to land nor could arise, upon this evidence, which would oust the jurisdiction of the Division Court: Bank of Montreal v. Gilchrist, 6 A. R. 659, 664.

Defendant was found liable for arrears of rent, and got credit for some set-off on account of his work, but for the balance he must answer, as found by the Judge, against which no prohibition should issue. Dismiss with costs.

BOYD, C. MAY 26TH, 1906.

CHAMBERS.

## RE JOHNSON AND SMITH.

*Will—Construction—Absolute Estate in Fee—Limitation—"Die without Issue"—Vested Estate on Birth of Child.*

Petition by vendor under the Vendors and Purchasers Act for an order declaring that she could make a good title to property under a devise.

Shirley Denison, for the vendor.

No one for the purchaser.

BOYD, C.:—The words used in this will "dying without issue" or "children" are of flexible or ambiguous character, as is the expression "die unmarried:" In re Chant, [1900] 2 Ch. 345; In re Booth, [1900] 1 Ch. 768. In In re Hambleton W. N. 1884, p. 157, the words "die without children" were construed by Bacon, V.-C., as signifying "die without having had a child." This case is noted in Theobald on Wills, 6th ed., p. 678. Whereas in In re Booth the same words were read by Mr. Justice Byrne as meaning "dying without leaving children." In that case there was a gift over to persons named, who were indicated as the objects of the testator's bounty. In the present case there is no gift over, but a declaration that if the adopted daughter (the vendor), to whom the property has been previously given for her own sole use and benefit forever, "die without issue, all her interest shall lapse." Byrne, J., admits that the construction is of difficulty, and is open to two considerations, to one of which he does not give effect. That is, that there is a general rule in favour of making an absolute vesting as soon as possible, especially when it is intended to enable the parent to make some provision for the family: p. 770 of [1900] 1 Ch. That consideration appears to me to outweigh the other construction in construing this will, which contains no gift over. I would read this will as giving an absolute estate in fee to the adopted daughter upon the child being born, which happened after the will was made and after the death of testatrix in 1903. This construction is favoured by Jaffray v. Connor, 28 Beav. 328; and see Weakley v. Rugg, 7 T. R. 326.

The testatrix in this case speaks of "issue" with reference to the parent's share, and that indicates that she uses "issue" as synonymous with "child." By this reading of the will an intestacy is prevented, and there is a confirmation of the absolute gift intended for the adopted daughter by the first part of the will.

---

MABEE, J. MAY 26TH, 1906.

TRIAL.

## COSTELLO v. GRAND TRUNK R. W. CO.

*Railway—Carriage of Goods—Loss—Negligence — Contract Limiting Liability — Findings of Jury — Recovery of Amount Fixed by Contract—Costs.*

Action for damages for loss of horses in course of carriage by defendants. Plaintiff alleged negligence on the part of defendants.

E. F. B. Johnston, K.C., and R. McKay, for plaintiff.

D. L. McCarthy and W. E. Foster, for defendants.

MABEE, J.:—At the trial I was strongly pressed . . . to nonsuit—first, because . . . there was no evidence of negligence that could be submitted to the jury, and second, because, if there was negligence, there was nothing connecting plaintiff's loss with such negligence.

In my view of the case there was ample evidence of negligence, and the whole matter was one solely for the jury.

The findings of fact, then, upon which the case must be disposed of, are: that, by reason of defects in the floor of the car, and by not promptly delivering the horses at North Bay, defendants were guilty of negligence that caused the death of the two horses in question; that plaintiff was not guilty of contributory negligence; that he was not aware of the different freight rates, and did not assent to the terms upon which the lower rate was granted to him; and damages for the loss of the horses were assessed at $297.

The contract for shipment signed by plaintiff is in the same form as that in question in the recent case of Booth v. Canadian Pacific R. W. Co., ante 595, where it was held that this form of contract does not exempt the railway company from liability for the negligence of their servants.

It was argued by Mr. McCarthy that under this contract defendants were relieved from all liability for damages to stock except for injuries arising from collision, or the cars being thrown from the track during transportation, neither of which was the moving cause of the loss in the present case, he contending that the prohibition against the company contracting themselves out of liability for negligence provided for by sec. 214 of the Railway Act was avoided by reason of this contract having been approved by the Board of Railway Commissioners under sec. 275. It is unnecessary to consider this latter point, as the Booth case is clear authority for the contention that upon the proper interpretation of this contract defendants have not escaped liability for the negligence of their servants. See also Price v. Union Lighterage Co., [1904] 1 K. B. 412. The right of the company to limit their liability in consideration of a special rate was not under discussion in the Booth case, the question there being whether the contract in this particular form absolved the company from liability for the negligence of their servants.

Here defendants have, in consideration of a special rate granted to plaintiff, limited their liability to $100 for each horse, and upon the authority of Robertson v. Grand Trunk R. W. Co., 24 O. R. 75, 21 A. R. 204, 24 S. C. R. 611, they have the right so to do.

Against the objection of defendants' counsel, it was left to the jury to say whether plaintiff knew of the lower rate that was being given him, and assented to the terms upon which the lower rate was granted, that is, the limitation of defendants' liability. The contract was signed by plaintiff; he had an opportunity of reading it; no advantage was taken of him by defendants' agent; and, notwithstanding the finding of the jury upon this point, I think plaintiff is bound by its terms, and that it must govern the rights of the parties: Taylor v. Grand Trunk R. W. Co., 4 O. L. R. 357, 1 O. W. R. 447.

The result is that plaintiff is entitled to judgment for $200, being the damages fixed by the contract, and not the actual loss as found by the jury. In view of plaintiff's loss being one-third more than his recovery, he may have costs upon the High Court scale.

MAY 26TH, 1906.

DIVISIONAL COURT.

## PURCELL v. TULLY.

*Deed — Construction — Life Estate — Remainder in Fee — Grant of Land—Habendum—Repugnancy — Remaindermen not Named — Description of, as Children of Life Tenant—Sufficiency — Reformation of Deed—Claim for Equitable Execution.*

Appeal by plaintiff from judgment of CLUTE, J., at the trial, dismissing an action for equitable execution, and adjudging in favour of defendants the reformation of a conveyance of land to Alexander P. Tully, deceased.

The appeal was heard by MULOCK, C.J., BRITTON, J., MABEE, J.

D. B. Maclennan, K.C., for plaintiff.

R. Smith, Cornwall, for adult defendants.

M. C. Cameron, for infant defendants.

MULOCK, C.J.:—This is an action brought by . . . Patrick Purcell against Elizabeth Tully, administratrix of the estate of Alexander P. Tully, deceased, and Mary Jane Tully and others, his children and heirs-at-law, to recover $468.80 owing to plaintiff by deceased.

After setting forth the particulars of the indebtedness of deceased, plaintiff in his statement of claim alleges that deceased at the time of his death was seised in fee simple to his own use of certain lands therein mentioned; that by indenture of bargain and sale, dated 6th May, 1902, made between Isabella Purcell, the then owner thereof, and Alexander P. Tully, the former granted the said lands unto the latter for the term of his natural life, and after his death unto his children who should survive him, or should have died before him leaving lineal descendants surviving at his death, their heirs and assigns forever, in equal shares, in fee simple, as tenants in common; and that the said indenture was in law a conveyance to Alexander P. Tully of the said lands in fee simple, and that the same were liable to be sold under execution for payment of the debts of deceased. . . .

At the trial it was shewn that Mrs. Purcell, the grantor in the indenture, desired to make some provision for the family of Alexander P. Tully, who was an adopted son of hers, and accordingly gave certain instructions to Mr. Smith, her solicitor. She explained to him that Tully was improvident, and therefore she would not give him the land in fee simple, but only for his own life, with remainder to his children, and also an estate to his widow during her widowhood in case she survived him. Mr. Smith made known to Mr. Tully the nature of the proposed gift, to which he assented, and thereupon Mr. Smith prepared the necessary conveyance.

Mr. Smith testified that the terms upon which Mrs. Purcell was prepared to convey the property are set forth in the type-written part of the deed in question, which is as follows: "This indenture made . . . in pursuance of the Act respecting short forms of conveyances, between Isabella Purcell, of the first part, . . . and Alexander P. Tully, of the second part . . . witnesseth that, in consideration of natural love and affection and of the sum of one dollar . . . the said party of the first part doth grant unto the said party of the second part, for and during the term of his natural life, the lands and premises hereinafter mentioned, and upon his death unto those children of the said party of the second part who shall survive him or shall have died before him leaving lineal descendants surviving at the death of the said party of the second part, their heirs and assigns forever, in equal shares, in fee simple, as tenants in common. The said estate granted to the children of the said party of the second part to be subject however to the support and maintenance on the said lands hereinafter mentioned of Eliza Tully, wife of the said party of the second part; during such time as she shall remain widow of the said party of the second part"—and then follows a description of the lands.

It appears that Mr. Smith dictated to his stenographer the words above quoted, with instructions to her to type-write them in deed form, intending the words quoted, with a description of the lands, to be the complete instrument, and also instructed her to put a back upon it, and take it to Mrs. Purcell for execution.

The stenographer, having engrossed the dictation, proceeded to annex thereto the last page of a blank form of conveyance, filled up the blanks in this form, and took the instrument to Mrs. Purcell, who thereupon executed it.

The portions of the deed thus added by the stenographer without any authority, consisted of the habendum . . . "To have and to hold unto the said party of the second part, his heirs and assigns, to and for his and their sole and only use forever, subject nevertheless to the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown"—and also of the covenants and release numbered respectively 2, 4, 5, and 8 in the first column of the Act respecting short forms of conveyances. . .

Although the grant is to the children without their being actually named, the instrument should, I think, be construed as if they were named. In order to limit an estate in remainder it is not necessary to set forth the actual names: Cruise's Digest, ch. 21, sec. 16. . . .

If the rule in Shelley's case were to apply, whereby Patrick Tully took the fee, there would be no estate in the children charged with the support and maintenance of his widow, for it is not the estate granted to her husband which is so charged, but "the said estate hereby granted to the children," being the estate which the grantor had purported to grant to them "in fee simple as tenants in common."

This express grant of the fee in remainder to the children and the charging of that estate with the support and maintenance of the widow of the tenant for life indicate a clear intent that Alexander P. Tully should take only a life estate. To hold otherwise would defeat the provision in respect of his widow.

I therefore think that, according to the language of the premises of the deed, those children of Alexander P. Tully who survive or predecease him leaving lineal descendants him surviving took the remainder in fee simple as purchasers: Chandler v. Gibson, 2 O. L. R. 442; Grant v. Fuller, 33 S. C. R. 38; Van Grutten v. Foxwell, [1897] A. C. 658.

If effect were given to the habendum . . . it would defeat the grant of the fee simple in remainder to the children. The rule is, when the grantor has by the premises in the deed granted an estate to A. and his heirs, he cannot retract that disposition after using words in the habendum utterly inconsistent with the grant: Myers v. Marsh, 9 U.

C. R. 244; Houston v. Williams, 16 U. C. R. 406; Lesperance v. Langlois, 22 U. C. R. 683.

Therefore, in the present instance, the words in the habendum, being repugnant to the grant, are void.

In this view, it is not necessary to reform the deed, but there should be a declaration that by virtue of the deed Alexander P. Tully took a life estate only, and that the children took the remainder in fee as tenants in common, subject to the provisions in behalf of the widow; and the judgment should be varied accordingly.

The infants only are entitled to their costs of this appeal from plaintiff.

MABEE, J., gave reasons in writing for the same result.

BRITTON, J., also concurred.

---

MAY 26TH, 1906.

C.A.

## McCONNELL v. LYE.

*Vendor and Purchaser—Contract for Sale of Land to Plaintiff—Action for Specific Performance—Contract by Vendor to Sell to Others—Conduct of Plaintiff—Cancellation—Notice to Second Vendees—Defence—Registry Laws.*

Appeal by defendants other than Henry Lye from judgment of MEREDITH, J., at the trial (6 O. W. R. 314) declaring plaintiff entitled to the specific performance of an agreement made between him and defendant Lye for the purchase by plaintiff and sale by Lye of certain lands in the township of MacTavish, in the district of Thunder Bay.

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

H. Cassels, K.C., and R. S. Cassels, for appellants.

W. Nesbitt, K.C., for defendant Lye.

F. R. Latchford, K.C., for plaintiff.

Moss, C.J.O.:—. . . The present appellants are parties to the action because of an agreement entered into between defendant Lye, through one R. A. Ruttan his agent, and defendant Jones, dated 4th July, 1904, whereby Lye agreed to sell to Jones and Jones agreed to buy the same lands. The latter agreement was assigned by Jones to the appellants on 4th July, and registered on 21st July, 1904.

The main defence set up by defendant Lye was, that before the making of the agreement with Jones, plaintiff had repudiated and abandoned the agreement with him, and had therefore left defendant Lye free to re-sell the lands. The other defendants, besides urging that defence, rely upon their agreement and its registration, and claim the benefit of the registry laws.

Plaintiff alleged that Jones and the other defendants had notice of his agreement at the time of entering into the agreement under which they claim.

The trial Judge dealt with the case as one substantially between plaintiff and Lye; the question being whether Lye was relieved of his obligation to carry out the contract by reason of plaintiff's conduct; and he held that, in the circumstances appearing, Lye had not been relieved of his obligation to perform his contract with plaintiff, and he pronounced judgment in the latter's favour.

After the argument of this appeal it appeared to us, in considering the evidence, and more especially the correspondence between the solicitors for defendant Lye and his agent R. A. Ruttan, that it would be proper to hear the testimony of the latter and of defendant Jones, with a view to the elucidation of the circumstances attending the making of the agreement of 4th July, 1904. We therefore directed that Ruttan should be examined before the Court, with liberty to defendants to examine defendant Jones at the same time. Plaintiff produced and examined Ruttan, but defendants did not produce Jones, and their counsel stated that they did not desire to examine him or any other of the parties.

The testimony of Ruttan established beyond question that at the time of entering into the agreement in question Jones and his associates, or some of them, were fully aware of the agreement between plaintiff and Lye and of the existence of the latter's action to enforce it. They very probably derived

the impression that Lye was in a position to re-sell, but that impression was not due to anything said or communicated to them by or on behalf of plaintiff. And they had full notice and knowledge of his rights, whatever they were.

That being the state of the case, their only defence to this action is, that at the time of the agreement with them plaintiff's rights were at an end, and that Lye was legally in a position to re-sell the property.

But that was not the position. Lye's action to enforce the agreement with plaintiff was pending, and, although plaintiff had entered an appearance . . . he had done nothing to prevent his afterwards doing as he did, i.e., elect to perform the contract and pay the purchase money into Court. As between him and Lye, the agreement was still subsisting and in a position to be carried into effect. It was prior in point of date to the agreement made by Ruttan, and the registration of the latter gave no advantage to defendants in view of their knowledge of the facts.

It appears from Ruttan's testimony that the receipt he gave to Jones for the $500 paid at the time contained words similar to the stipulation in the agreement to the effect that "the vendor reserves the right, if he should be unable to make title to the lands herein described, to return the amount paid to the purchaser;" and that these words were inserted because of the uncertainty as to plaintiff's position under his agreement. It is obvious that all parties understood that if Lye was not off plaintiff's agreement, or could not free himself from it, the other agreement was not to be treated as a subsisting contract. And, in the circumstances, the appellants are not in a position to claim the benefit of the registry laws, or to set up the agreement as a shield against plaintiff's claim.

The appeal should be dismissed with costs, except those of and incidental to the examination of Ruttan, which plaintiff should pay to appellants.

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

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

MAY 26TH, 1906.

C.A.

## REX v. WILKES.

*Criminal Law—Omission to Provide Necessaries for Wife—Criminal Code, secs. 210 (2), 215—Injury to Health—Absence of Proof of—Necessaries Supplied by others—Conviction Quashed.*

Case stated by the junior Judge of the County Court of Wentworth exercising criminal jurisdiction under part LIV. of the Criminal Code, 1892, setting forth that Thomas C. Wilkes, the defendant, was charged before the police magistrate for the city of Hamilton with "criminal non-support" of his wife and child; that he elected to be tried and was tried before the Judge, and was found guilty; that sentence was suspended, and he was ordered to pay $3.50 per week to his wife and $10 costs to the solicitor for the private prosecutor, till the stated case should be disposed of; that Wilkes married the complainant in 1901; that they lived together as man and wife till August, 1902, when the wife left the husband; that the Judge found that she was justified in leaving him, and was still justified in living apart; that she and her child went to live with her mother, upon whose charity they have ever since been and are now dependent, and on account of such charity they have suffered no privation, but she has no means of her own of support; that defendant is a working man, and earns 30 cents per hour, and usually works 50 hours per week.

The question asked of the Court was whether, upon these facts, a conviction could be supported, in the absence of proof that the wife was actually in need of food, clothing, and shelter.

J. L. Counsell, Hamilton, for defendant.

G. S. Kerr, Hamilton, for private prosecutor.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

OSLER, J.A.:—The charge or indictment upon which the accused was tried, dated 13th February, 1906, after setting

forth that he had been committed for trial for an offence triable by the Judge under the provisions of part LIV. of the Criminal Code, and had elected to be tried therefor before a Judge without the intervention of a jury, stated such offence as follows: "For that the said Thomas C. Wilkes, at Hamilton, in the said county, for several months last past, did unlawfully omit, without lawful excuse, to supply his wife and child with the necessaries of life, whereby the health of each of them became and was and is likely to become permanently injured."

Presumably this is what is meant by the expression "criminal non-support" in the stated case.

The offence charged is created by sec. 210 (2) of the Code, which enacts that "every one who is under a legal duty to furnish necessaries for his wife is criminally responsible for omitting, without lawful excuse, to do so, if the death of his wife is caused or if her life is endangered or her health is or is likely to be permanently injured by such omission," and sec. 215, as amended by the Act of 1893, enacting that "every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in sec. 210, without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide."

The case states the facts in evidence upon which the Judge acted in convicting the accused. We cannot interfere merely on the ground that a conviction is against the weight of evidence: Regina v. Bowman, 3 Can. Crim. Cas. But, if there is no evidence to bring the charge within the terms of the Code, the conviction is contrary to law and cannot be maintained.

Assuming that, in the circumstances, a legal duty was cast upon the husband to provide necessaries for the wife, facts must be found which create the criminal responsibility for the omission to perform it, and these facts are either that the death of the wife has been caused (which gives rise to a prosecution of a different nature from that now in question), or that her life is endangered, or that her health is or is likely to be permanently injured by such omission. These conditions of criminal responsibility are expressly provided by sec. 210. It was, therefore, necessary to allege, and it is

alleged in the charge, that the wife's health was or was likely to be permanently injured by the accused's neglect of duty; but this fact was not found, and could not have been found, by the Judge, because there was no evidence whatever of it. On the contrary, it is found that the wife had "suffered no privation," that is to say, that she was not in want, because her needs had been supplied by her mother, with whom she was living. Unless the husband's omission to perform his legal duty, where it exists, causes danger to the wife's life or permanent or probably permanent injury to her health, there is no criminal responsibility on his part: Regina v. Nasmith, 42 U. C. R. 242. And the fact that she is maintained by the charity of others, or gains her livelihood by her own means or exertions, forms no ground for a prosecution under the Code, which was not intended as a means of enforcing the husband's civil responsibility for the wife's necessaries, either at her own instance or that of those who supply them. She may proceed against him, in a proper case, under the Deserted Wives' Maintenance Act, R. S. O. 1897 ch. 167; but the Criminal Code cannot be invoked in aid, as here it seems to have been, of an order made under that Act.

The conviction must, therefore, be quashed.