THE
ONTARIO WEEKLY REPORTER

VOL. 26. TORONTO, SEPTEMBER 17, 1914. NO. 12.

HON. SIR JOHN BOYD, C. JUNE 22ND, 1914.

RE OTTAWA & CARLETON.

Municipal Corporations—Bridge Across River Dividing City and County—Liability for Cost of Construction and Maintenance—Ascertainment of Boundary between City and County—Municipal Act, R. S. O. 1914, ch. 192, sec. 452—Territorial Division Act, R. S. O. 1914, ch. 3, sec. 9—Joint Undertaking—Originating Notice—Municipal Act, sec. 465 (1).

HON. SIR JOHN BOYD, C., *held*, that the obligation to build and maintain Billings Bridge, in its entirety, across the River Rideau, rested on the Corporation of the City of Ottawa and the Corporation of the County of Carleton.

Motion on behalf of the Corporation of the City of Ottawa, upon originating notice, for a summary order determining and fixing the liability of the applicants and the Corporation of the County of Carleton, respectively, to contribute to the cost of the construction and maintenance of the temporary bridge over that portion of the waters of the Rideau River which lie between the southerly end of Bank street and a certain island designated C., and across that island, and to the cost of such bridge or bridges as may hereafter be erected in the place of the temporary bridge.

F. B. Proctor, for the applicants.

D. H. Maclean, for the county corporation.

HON. SIR JOHN BOYD, C.:—Disputes between two municipal corporations as to their joint or several obligation to erect and maintain bridges, may be brought up summarily before the Court as on an originating summons, R. S. O. 1914, ch. 192, sec. 465 (1). This was done on the present application before me at Ottawa on materials which so far as

they go shew the boundary line between the city of Ottawa and the county of Carleton as fixed by the River Rideau. It was said that at the point where the bridge in question exists "Billings bridge" the true boundary is not the river but the southerly limit of land on a small island in the river and near its north bank. This island was by Crown patent granted to Bradish Billings in April, 1857, as an island reserving the line of road over it, which road forms part of street called Bank street in Ottawa. The former bridge now out of repair and calling for reconstruction, was from bank to bank of the Rideau, passing across the island and giving as part of Bank street means of communication between city and country.

The contention at present is by the county that there are here legally speaking two bridges, one entirely within city limits from the north shore of the Rideau to the south side of the small island over a shallow stretch of the river and the second bridge, the real boundary bridge contemplated by the statute in that behalf, runs from that south side of the island to the north bank of the Rideau over the navigable part of the stream. The agreement is that this northerly part of the bridge should be built and kept up at the sole expense of the city, and as to the southerly part the county agrees to share in the expense. It is stated that further evidence might be put in to clear up the question of the boundary of the city on this limit, but as none has been furnished I decide upon the materials now before me.

On 10th December, 1907, upon the application of the city, an order was issued by Ontario Railway and Municipal Board extending the boundaries of the city of Ottawa to the northerly bank of the Rideau river. The order deals with that portion of the township of Nepean in the county of Carleton lying between the Rideau river and the Rideau canal and the western boundary of the village of Ottawa East and Concession street in the said city produced to the Rideau river and declares that portion of territory to be added and annexed to the city of Ottawa. It is conceded that this area includes the *locus in quo* of the bridge, and it appears to me conclusive as to where exists the boundary between the city and the county. That boundary is the whole river from bank to bank (the intermediate small island is negligible and immaterial on this enquiry.)

Section 452 of the Municipal Act declares "that where a river . . . forms or crosses a boundary line between a county and a city . . . it shall be the duty of the corporations of the county and city to erect and maintain bridges over such river."

The very point before me has been passed upon by Mr. Justice Kelly in *Ottawa and Gloucester Road Co.* v. *Ottawa*, 24 O. W. R. 344, after the city boundary had been extended to the Rideau river. He treats it as settled that the centre of the river was the actual boundary line between the city of Ottawa (as so extended) and the township of Gloucester (which is part of the county of Carleton) *ib.* p. 346, and at p. 351 he says: "The northerly portion of the bridge became the property of the city on the extension of the city limits . . . and the city and the county are together now liable for the erection, repair and maintenance of the whole bridge."

It was urged before me that this case was dealing only with "a certain bridge from an island within the township of Nepean and thence across the main stream of the Rideau river to the shore of the township of Gloucester and commonly known as Billings bridge," but the case itself shews that this section was regarded as only a part of the whole bridge from bank to bank and not a separate bridge. Thus the Judge puts it: "The Rideau river where this road crosses it, then formed the boundary line between the township of Nepean (on the north) and the township of Gloucester (on the south) and the bridge was the connecting link between the parts of the road to the north and south of the river respectively" p. 345. The learned Judge also held that the statute cited by Maclean, 42 Vict. ch. 48, did not change the statutory liabilities of the contestants.

The river is the natural boundary between city and county though the exact line of territorial subdivision may be in the middle of the main channel (*ad medium filum aquae*) according to the Territorial Division Act (1914), R. S. O. ch. 3, sec. 9. In this view the small island on the north would be the property of the city, but its situation would not detract from the effect of the Municipal Act as to bridges over rivers which bound two municipalities. The whole question as to this same and a like locality has been passed upon by the Queen's Bench Division in *Regina* v. *Carleton* (1882), 1 O. R. 277, where the three Judges, speaking by Mr. Justice Armour, thought that the duty of maintaining the bridge

was cast upon the county and the city by the Municipal Act cited. He continues in these words: "The River Rideau—that is the whole river—without regard to the accident that Cummings island is in it and notwithstanding that fact—forms in our opinion a boundary line between the county of Carleton and the city of Ottawa within the meaning of that section" p. 284. He refers to sec. 495 of the Revision of 1877 which is sec. 452 of the Revision of 1914. See also *Harrold* v. *Simcoe,* 18 U. C. C. P. 9.

I hold, therefore, that the obligation to build and maintain Billings bridge in its entirety across the River Rideau rests on the corporation of the city of Ottawa and the corporation of the county of Carleton.

It is a joint undertaking, but it is not my duty on this application to deal with questions as to the character of the work or the proportion of the expense to be borne by each; in regard to which the differing lengths of the bridge on each side of the mid-stream line may be a material factor.

The notice of motion does not ask for costs and the question was not mentioned, and I therefore say nothing about them.

HON. MR. JUSTICE KELLY. JUNE 22ND, 1914.

McINTYRE v. GRAND TRUNK RW. CO.

6 O. W. N. 618.

Master and Servant—Injury to Servant—Railway Brakesman—Negligence—Liability—Finding of Jury—Evidence.

A brakesman in the course of his duty was thrown from a train by reason of accidental contact with a poker in the hands of the fireman.

HON. MR. JUSTICE KELLY *held*, that a finding of negligence by the jury on the part of the fireman was not sufficient to support an action for damages at common law; that a servant who has been injured by the negligence of a fellow-servant cannot recover damages at common law from the master, unless a breach of duty be shewn on the part of the master to select fit and competent servants.

Action by a brakesman employed by the defendants to recover damages for injuries sustained by him by reason of the negligence of the defendants, as he alleged.

T. G. Meredith, K.C., and R. G. Fisher, for plaintiff.

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

HON. MR. JUSTICE KELLY:—Plaintiff was a brakeman in the employ of defendants, and on December 16th, 1912, was injured by coming in contact with a poker which was being used by another of defendants' employees—a locomotive fireman.

He was what is known as a front brakeman, that is, a brakeman whose duties are on the forward part of a freight train. When not actually at work during the run the front brakeman is assigned a place in the cab of the locomotive with the engineer and fireman. This was the condition of things at the time of this happening, which took place about six miles east of Sarnia, while the train was running in an easterly direction. The train was approaching a station, and plaintiff, as was his duty, stepped to the gangway or passage between the locomotive cab and the coal tender for the purpose of looking for signals and observing if there were any hot boxes in the trucks of the cars. Stepping backwards from having done this he was struck or came in contact with a long poker then in use by the fireman in the performance of his duties. The blow threw the plaintiff from the train and the cars or some of them, passed over his left leg, injuring it so seriously that amputation was necessary about four inches below the knee.

He bases his claim upon what he alleges was the improper, careless and negligent handling of the poker by the fireman, and claims further that the fireman was, as the defendants knew, or should have known, incompetent, unfit and not a proper person to do the work which he was thus engaged in, and that he was not a proper person, as the defendants knew, or should have known, to have in their employ.

On the opening of the trial the claim was amended by adding allegations that his occupation as a brakeman in defendants' employ was a dangerous one and that defendants were bound to take all reasonable precautions for his safety, which they omitted to do; that the place provided for plaintiff to do his work was not fit and proper; and that defendant omitted to provide a proper system by which the dangerous character of plaintff's employment might be mitigated or lessened.

The jury's only finding of negligence was that the "accident was caused by the lack of care by the fireman in handling his poker in the restricted place which he had to work

in while the plaintiff was in a dangerous place in performance of his duty."

This action was not commenced within the time entitling plaintiff to claim under the Workmen's Compensation for Injuries Act; moreover the relationship between the fireman and him was not such as to entitle the latter to succeed under that Act.

The evidence lacks the essentials to constitute negligence for which at common law defendants can be made liable, having regard to the finding of the jury. The duty of the defendants in the interest of the safety of the employee in respect to the act of a fellow-servant is to select fit and competent fellow-servants. Plaintiff was familiar with what was required of him and was aware of the dangerous character of the employment. His own evidence and that of Greenleaf, a witness called on his behalf, is that the fireman's time is practically fully taken up in shovelling coal and poking and otherwise attending to the fire. This may well be when we bear in mind the statement of Turner, another of plaintiff's witnesses, that a locomotive drawing a heavily-loaded train, while running from Sarnia to London (a distance of about 59 miles) will consume between six and eight tons of coal, which must be shovelled by the fireman.

The train from which plaintiff fell was made up of fifty freight cars. Plaintiff stated in his evidence that the accident happened through the carelessness of the fireman in not looking at what he was doing; that he could have seen the plaintiff had he looked, and that had he done so the plaintiff should not have been struck.

I cannot see that under the circumstances this constitutes negligence on the part of the fireman; and even if my conclusion were otherwise I am satisfied that what the jury characterised as negligence was not negligence of the defendants. There is no evidence of incompetency or unfitness of the fireman or even that the defendants believed that he was otherwise than fit and competent, or that they were negligent or wanting in care in selecting him for their employee. What plaintiff's counsel contended is that the place on the locomotive where the fireman and plaintiff were required to work was contracted in space and therefore dangerous. If the inference is to be drawn from the answer of the jury that they intended their finding of negligence to extend to

this place as being too restricted, and, therefore, an improper place to work in, the plaintiff's claim cannot be supported on that ground; for there is no evidence that this place was an improper one in the sense that it could have been made more spacious, or that there is any known method of operating locomotives, in respect of the place where these men necessarily work, superior to or safer than that in use in this locomotive.

Much as one regrets the unfortunate occurrence, which has been attended with such serious results to the plaintiff, there is but one conclusion to be come to, namely, that the negligence found by the jury is not negligence of the defendants, or such as to entitle the plaintiff to succeed.

The action will, therefore, be dismissed with costs.

HON. MR. JUSTICE BRITTON. JUNE 15TH, 1914.

CLARKSON v. FIDELITY MINES CO.

6 O. W. N. 604.

Contract—Breach—Repudiation — Recovery of Moneys Paid without Consideration—General Damages — Evidence—Lis Pendens.

A. upon the implied request of company B. paid a sum of money to company C. As a result of the breach of an agreement between the said A. and company B. the former did not receive any consideration for the said payment.

BRITTON, J., gave judgment against both companies since company C. had received the benefit of the payments and since company B.'s breach of its agreement was the cause of the failure of consideration.

Action brought for breach of an agreement made between the plaintiff and the Fidelity Mines Co.

Tried at Toronto without a jury.

K. F. Henderson, for plaintiff.

R. H. Greer, for defendants.

HON. MR. JUSTICE BRITTON:—In the agreement that company is styled the Fidelity Mines Co. of Buffalo, but the words "of Buffalo" are no part of its corporate name.

The Ontario Fidelity Mines Co., Ltd., has been made a defendant.

These companies, as corporations, are entirely separate and distinct, each from the other, although they are acting together, and have interests in common in certain business transactions.

It was stated and not denied at the trial, that the Fidelity Mines Co. owns all the stock of the Ontario Fidelity Mines Co., Ltd.

The evidence given is meagre.

There was not from the first, any attempt on the part of the Fidelity Mines Co. to carry out their part of the agreement.

The plaintiff did, however, pay to the Bank of Montreal $700 on account of a judgment held by that bank against the Ontario Fidelity Mines Co., Limited, and did pay the further sum of $150 for the last mentioned company.

The Ontario Fidelity Mines Company, Limited, got and accepted the benefit of these payments, for which neither company paid or gave any consideration, and the plaintiff received no consideration directly or indirectly, the expected consideration having wholly failed by reason of the breach and repudiation by the first-mentioned company of the agreement with the plaintiff.

At the time of the payment by the plaintiff to the Bank of Montreal, the effects of the Ontario Fidelity Mines Co., Ltd., were under seizure and about to be sold. This payment reduced the liability of that company to the Bank of Montreal, and the sale of that company's property did not take place at the time appointed, even if it ever did.

There was the implied request of the first company to the plaintiff to make the payments named and the acceptance by the other company, for which payments plaintiff has received nothing.

The plaintiff is entitled to judgment against both companies—defendants—for the $700 and $150 with interest at 5 per cent. from 1st March, 1913.

The plaintiff was asked by the Fidelity Mines Co. to draw for the $850 and on 12th April, 1913, he did draw upon that company for $850, but payment of the draft was refused.

The plaintiff is not entitled to recover as against either company for general damages for breach of the contract, because such damages have not been established, and as to the

Ontario Fidelity Mines Co., Ltd., that company is not a party to the contract.

The judgment will be with costs. This is not a case for *lis pendens*. The plaintiff will have this withdrawn or dissolved.

HON. MR. JUSTICE MIDDLETON. JUNE 16TH, 1914.

HERRIES v. FLETCHER.

6 O. W. N. 587.

Contract—Alleged Agreement to Devise Farm—Services Rendered by Expectant Devisee—Remuneration—Action to Enforce Agreement against Executors—Evidence—Corroboration—Intention of Testator—Failure to Prove Contract—Statute of Frauds—Quantum Meruit—Alleged Gift of Chattels and Promissory Note—Possession not Changed—Costs.

MIDDLETON, J., *held*, that a mere expression of intention by the testator in his lifetime to devise property was not binding; that there must be a contract and that the Statute of Frauds requires said contract to be in writing.

Maddison v. *Alderson*, 8 A. C. 467; *Cross* v. *Cleary* (1898), 29 O. L. R. 842: followed.

Held, that a gift of personalty made by the testator during his lifetime failed since there was not a change of possession.

Cochrane v. *Moore*, 25 Q. B. D. 57, followed.

Action tried at Hamilton on 11th June.

Action against the executors of John Fletcher, deceased, for specific performance of an alleged agreement between the plaintiff and the deceased.

G. Lynch-Staunton, K.C., and J. G. Farmer, K.C., for the plaintiff.

S. F. Washington, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff was the housekeeper of the late John Fletcher, who died on the 27th of August, 1913, possessed of two farms and considerable personal property. Although she was paid wages during the testator's lifetime, at the rate of twelve dollars per month, the plaintiff claims that there was an agreement by which she was entitled to receive his homestead farm at his death. There are some minor disputes with reference to some alleged gifts of chattels and a promissory note.

Fletcher was a married man living separate from his wife. His children were all grown up and living away from him. In August, 1906, he advertised for a housekeeper. The plaintiff applied and was employed. She was then a widow, about fifty-five years of age. Fletcher was some eight or nine years older. Matters progressed rapidly, for in October, while the plaintiff was away, Fletcher wrote her a letter of October 24th, 1906, addressing her as "dear Helen," "dear Nellie" and as "darling." These affectionate relations were broken in upon before a year had gone by, and the plaintiff left some time in the summer of 1907. Her intention then was to leave for good and all.

It is not clear whether the farm had been promised before this disruption, but Mr. Haines Elmer, a nephew of the lady, was employed by Mr. Fletcher as an emissary to conduct peace negotiations, and he was authorised to hold out the prospect of the ownership of the farm as an inducement. The lady yielded; she returned, and matters appear to have gone very smoothly for some time, for in June, 1910, the plaintiff and Fletcher went to Detroit to consult Mr. Proctor K. Owens, an attorney of repute, with reference to the obtaining of a divorce from the separated wife and with reference to the drawing of a will. Although a bill of divorce was drawn, it does not appear to have been prosecuted; and upon learning that a will would cost about twenty-five dollars Mr. Fletcher declined to go to the expense incident to its preparation. Although not expressly stated, it is clear that the whole substratum of these negotiations was a contemplated divorce from the first wife and marriage with the plaintiff. The letters filed, bearing date in May, 1910, indicate the relation between the parties just prior to the visit to Detroit.

Another letter is put in which is undated, in which Fletcher speaks of himself as the plaintiff's husband, and addresses her as his wife, although in view of the then present separation he frankly states his intention of getting yet another wife. From the reference to the plaintiff's age in the letter, probably this letter was written before the visit to Detroit in 1910.

The testator made his last will in January, 1909. It contains no reference to the plaintiff. Four of his sons (or their issue) take the estate, save some small legacies. What-

ever intentions the testator may have had towards the plaintiff, he has failed to express them by any testamentary instrument.

After the testator's death the plaintiff claimed to be entitled to receive a balance of several months' wages due to her, and this has been paid. The claim to the ownership of the property was not put forward until some time later.

I have no doubt that at different times the testator has expressed his intention to devise the farm in question to the plaintiff, but I have a great deal of doubt as to there ever being a contract to do so.

There are many circumstances of suspicion attending the plaintiff's claim. She remained in the testator's employment, nominally as his housekeeper, and undoubtedly in receipt of a stipulated monthly wage. In the letters produced there is no suggestion of giving the farm. The plaintiff says there was another letter, in which this was set forth, but that she has destroyed it. The corroborative evidence given by Mr. Owens I accept to the fullest extent, but it falls far short of establishing a contract. It only shews an intention at that time to make a will. The evidence of Haines Elmer, the nephew, requires to be accepted with great caution; and outside of this there is no corroboration of the plaintiff's own story. It is so easy to turn a statement of an intention to devise into a contract to devise, that the evidence here lacking in precision and convincing force falls very short of that standard set by the Divisional Court in *Cross* v. *Cleary*, 29 O. R. 542, where it is said that such an agreement as that set up by the plaintiff "must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it."

Not only does the evidence, even if accepted, fail to establish and corroborate a bargain, but I have the greatest difficulty in giving it credence.

I think this case is, in this aspect, quite like *Maddison* v. *Alderson*, 8 A. C. 467, and that there was not in truth a contract.

Other difficulties also confront the plaintiff. The contract is not in writing, and the Statute of Frauds would afford a complete answer to a claim for specific performance. She would then be entitled to recover upon a *quantum mer-*

uit for the value of the services rendered by her; but she did not render these services gratuitously and has already received the precise wage stipulated for even before the giving of the farm was ever mentioned. The amount paid was, according to the evidence, a fair wage for a woman occupying the position of housekeeper upon a farm, and I fail to find that any services were rendered going beyond the scope of the original employment; so that if the plaintiff is entitled to recover upon a *quantum meruit* there is nothing coming to her beyond what she has already received.

With reference to the claim for the horse and buggy and cow, the case appears to me to be governed by the decision in *Cochrane* v. *Moore*, 25 Q. B. D. 57. The gift fails because there was not a change of possession.

Then with reference to the $200 note; I think the plaintiff also fails as to this. No doubt there was a $200 note at one time. The note is not produced. The plaintiff admits that at one time it was with Fletcher's papers. Her whole account as to it is full of contradiction and discrepancies. The daughter-in-law and her husband give clear evidence of payment. Such discrepancies as exist between the stories of these two witnesses shew conclusively that there was no collusion between them.

I think the action throughout fails, but the case is not one in which costs should be awarded.

In view of the relations which evidently existed between the plaintiff and the late Mr. Fletcher, I think those interested in the estate ought to be content to voluntarily make her some allowance. The wages paid were small, the services rendered appear to have been very satisfactory, and the intention to confer some benefit no doubt existed. Why that intention was not given effect to by a will is not plain; and I would suggest to the parties the wisdom of making some arrangement upon the lines indicated, as a compromise and settlement of this litigation.

HON. MR. JUSTICE MIDDLETON. JUNE 16TH, 1914.

ROYAL BANK v. SMITH.

6 O. W. N. 605.

Promissory Notes — Indebtedness of Makers to Payee—Finding of Trial Judge against Plea that Notes Made for Accommodation of Payee—Third Party Issues—Indemnity—Judgment—Enforcement.

P. and S. were the makers of two promissory notes in favour of one P. S. had conducted negotiations in behalf of a syndicate which was being formed for the purpose of purchasing land from R. Stock certificates and two notes were handed to the solicitor of R. in part payment for the land. The certificates represented the same amount of money as the two notes. The question was whether the stock certificates or the notes were given as collateral security to the other.

MIDDLETON, J., *held*, upon the evidence, that the notes were given as payment and the stock as collateral security and that, therefore, P. and S. were liable upon them. Accordingly, P. and S. were not entitled to indemnity from R. since their contention that the notes were made for the accommodation of R. failed.

Trial of third party issue at Hamilton on 11th June, 1914.

S. H. Bradford, K.C., for defendants Smith and Puddicombe.

S. F. Washington, K.C., for Reinke, third party.

HON. MR. JUSTICE MIDDLETON:—On the 11th November, 1912, Messrs. Puddicombe and Smith made a promissory note in favour of Reinke for $10,000; and on the same date Smith made another promissory note, also in favour of Reinke, for $5,000. The bank brought action upon these two notes and the defendant resisted payment, claiming that they were accommodation notes and there was no liability as between the original parties.

It appearing that the notes were held by the bank as collateral security for advances made to Reinke, and that the bank held in good faith and without notice, the actions were consolidated and judgment was given against both defendants for $9,220.50, the amount due to the bank at the date of the judgment, 16th February, 1914. Smith and Puddicombe now claim to recover this amount against Reinke, upon the theory that the debt is his and not theirs; and Reinke claims to recover against them the amount of the

notes in excess of the amount for which judgment was recovered by the bank.

The documentary evidence is all one way. The conflict of evidence, between two entirely reliable solicitors is most unfortunate, and shews the wisdom of invariably reducing to writing any agreement by which the liability of parties to negotiable instruments is made other than as indicated by the paper signed.

Reinke owned some land. A syndicate was to be formed for its purchase. The price was $62,730. $32,730 was to be secured by a first mortgage; the balance, it was originally proposed, should be paid in cash upon the signing of the agreement. Smith had charge of the negotiations on behalf of the syndicate, and was named as purchaser in the agreement with Reinke. When the agreement came to be signed the purchase money had not been arranged for. Reinke insisted upon a sale deposit, and it was arranged that $10,000 stock of the Trust and Guarantee Co. should be deposited pending completion of the sale, and the draft agreement was modified to give effect to this. The stock certificate was handed over at the time, but it was not endorsed. This sale agreement bears date October 3rd, but was probably executed on the 4th.

The stock was the property of Mrs. R. B. Puddicombe, the mother-in-law of Smith and mother of the defendant Puddicombe. She had been persuaded to take shares in the syndicate in consideration of this stock. It is not clear whether she is beneficially entitled to the stock or whether it represented the distributive share of the defendant Puddicombe in his father's estate.

The date fixed for completion of the sale was the 12th October, but the time was extended and the sale was not actually completed until the 11th or 12th of November. In the meantime Mr. Martin, who was acting for the purchaser, prepared a draft receipt to indicate the terms upon which the stock was held. This draft receipt acknowledged receipt of the stock as part payment to the extent of $10,000 under the agreement of sale. It purported to give Mrs. Puddicombe the right to redeem at any time, and provided that the certificate should be held as security for the payment of the sum.

This did not at all suit the vendor; and his solicitor, Mr. Lang, prepared another receipt, in which it was made perfectly plain that this stock was to be held as collateral security to a note to be given for the $10,000. This was signed by Reinke and sent forward to the solicitors. At the same time the stock certificate was sent over for proper endorsation and the statement was made that the receipt was not to be handed over until the note was given. This was acknowledged on the same day and the statement is made that Mr. Smith had taken the certificates away to obtain Puddicombe's signature to the endorsement. No complaint was made that the receipt sent forward was not in accordance with the bargain.

Subsequent to the signature of the original agreement it was arranged that $5,000 of stock in the Moyes Chemical Co. should be dealt with in the same way; as security, as contended by Reinke; as payment, according to Smith's contention; with respect to the $5,000 subscription to the syndicate made by Smith. No receipt was given with respect to this.

It is said by Mr. Martin that he drew Mr. Reinke's attention to the unsatisfactory shape of the receipt; but Mr. Martin admits that he did not mention this to Mr. Lang; and any mention of the matter is denied by Reinke.

When the matter came to be closed on the 11th November, the two notes were handed over, and in the statement of adjustment concurred in by both parties credit was given upon the purchase price for those notes thus: "by Puddicombe note and collateral $10,000; by note H. W. Smith $5,000"; and the transaction was closed upon that footing. The contention is now made, as already indicated, that these notes were taken merely for the accommodation of Reinke and that Reinke accepted the stock as payment.

I think this contention fails, and that on the evidence I must find that there is an indebtedness upon the notes to which the stock is merely collateral. It follows that the claim of the defendants to indemnity fails and that Reinke is entitled to claim against them the face amount of the note over and above the amount of the bank's judgment.

Judgment will therefore go against Smith for $5,478.55, the amount of the $5,000 note, with interest and notarial fees, and against Puddicombe & Smith for $995.40, the

amount of the $10,000 note less the amount for which judgment has already been given in favour of the bank and less the amount of two dividends upon the stock received by Reinke.

It may also be declared that upon payment of the judgment in favour of the bank Reinke is entitled to enforce it against Puddicombe and Smith for the amount due, less the credit that should be given for the amount realized upon the sale of the Trust and Guarantee stock which has now taken place.

Reinke is also entitled to costs throughout, including the costs reserved upon interlocutory applications.

HON. MR. JUSTICE MIDDLETON. JUNE 24TH, 1914.

PERRY v. BRANDON.

6 O. W. N. 621.

Contract—Rent of Plant at Sum per Diem—Computation of Days—Construction of Written Agreement—Inclusion of Sundays—Deduction from Contract-price.

MIDDLETON, J., *held*, that an agreement to pay for the rental of certain machinery at "$62 per day" included Sundays, in the absence of a contrary expression of intention.
Gibbon v. *Michael's Bay Lumber Co.*, 7 O. R. 746, followed.

Action brought to recover upon a written contract by which plaintiff rented to defendants a certain plant for the purpose of excavating a siding and a site for a building upon defendant's land.

Tried at Toronto, 22nd and 23rd June, 1914.

R. H. Greer, for plaintiff.

W. Laidlaw, K.C., and W. I. Dick, for defendants.

HON. MR. JUSTICE MIDDLETON:—The plant consisted of a locomotive, shovel, and some cars; and the rental stipulated was $62 per day, "to start immediately on outfit leaving main line and to run each and every day."

The contention put forward by the defendants is that this means excluding Sundays, and they contend that if this is not the meaning of the contract, the contract ought to be reformed.

I am against the defendants on both contentions. The contract was deliberately and carefully prepared, and embodies the agreement arrived at. The intention was that Sunday should be paid for, and that is, I think, the true construction of the agreement. *Gibbon* v. *Michael's Bay Lumber Co.*, 7 O. R. 746, is, I think, conclusive.

The argument that this would involve work upon Sunday is met by what is said by Wilson, C.J., at p. 751: "When Sunday is not computed, it is not because in England or in this country work is prohibited to be done on that day, but because, by the contract, it has been expressly excluded from the computation named or by the time being restricted to working days." It may be, as in the case referred to, computed as a day to be paid for, although the law will not suffer any work to be done upon that day.

The point that most strongly impressed me against this view was the fact that the $62 includes a sum to be paid for wages; but the parties have carefully stipulated that $62 is to be paid by way of rental, although certain men were to be supplied free by the lessor.

I do not think it necessary to deal with the other matters in detail. I accept the evidence of the plaintiff that it cost less to move the machine from the end of the siding than to move it from the place where the defendants contend it should have been brought upon their land, and no time was consumed in moving the cars and plant over the adjacent siding.

I do not think the credit given for the delay, owing to the absence of the full quota of men contracted for, between the 9th and 14th October, is sufficient, and I have increased this sum to the $60 suggested by Mr. Laidlaw.

After making all adjustments, I think that there should be judgment for the plaintiff for $724, with costs.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

FAWCETT v. CANADIAN PACIFIC RW. CO.

6 O. W. N. 634.

Stay of Proceedings—Rule 523—Railway—Destruction of Timber—Action for Damages—Statutory Limitation of Amount Recoverable—Trial — Findings of Jury — Judgment—Issue Directed—Negligence—Order Staying Execution Pending Trial of Issue.

MIDDLETON, J., gave relief to defendants, under Rule 523, after judgment had been entered in an action for damages for the loss of timber on plaintiff's land by fire caused by defendants. A second trial was ordered to decide an issue neglected by the jury on the first trial and also to reconsider the amount of damages allowed in view of information which had come to light since first trial.

Motion to stay operation of judgment.

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

Angus MacMurchy, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—This action is brought to recover damages sustained by reason of the burning of certain timber lands. At the trial, both counsel agreed that the main issue was whether certain lands owned by the plaintiff, which had undoubtedly been burned over, were burned by a fire which undoubtedly originated from the defendants' railway or whether they were burned by another fire which had a separate origin; in other words, was there one fire only or were there two independent fires?

The amount of the damage sustained by the destruction of the timber has been agreed upon. The figures were not mentioned. Both counsel also agree that if there was only one fire, it would be necessary for the jury to ascertain whether there was negligence, as, in that case, the loss would exceed $5,000.

My recollection is clear that Mr. Laidlaw told the jury that it would not be necessary for them to ascertain whether there was negligence, if they found that there were two fires, as, in that case, the loss sustained by his client and others within the area of the first fire would not exceed $5,000.

I submitted two questions to the jury, in effect: Were there two fires? Was there negligence? The jury found there were two fires, but did not answer the question as to negligence.

When the jury came in with this answer, some discussion took place as to the necessity of obtaining an answer to the question of negligence. This was because I did not know whether the finding of the jury would be accepted as final. If it was not so accepted, and a new trial should be had, then the $5,000 limit might become of importance with reference to the money payable in respect to the first fire. It is necessary to bear this in mind to understand what appears in the notes after the bringing in of the verdict. Mr. Laidlaw stated that he accepted the finding of the jury as conclusive, and I, therefore, gave judgment for the amounts payable in respect of the first fire, these being less than the $5,000.

Mr. MacMurchy has now ascertained that, contrary to what was supposed by everyone at the hearing, there are claims made for losses which would make the total exceed $5,000, which Mr. MacMurchy claims fall within the area of the first fire; and he has applied to me for relief.

Even though there are these losses, it does not follow that the $5,000 limit applies. This depends upon the determination of the issue, not yet found, as to negligence; and, of course, Mr. Laidlaw has the right to test the existence of these other claims and to test the question whether these claims are in respect of the same fire or another and independent fire.

The only power that I have to deal with the matter is that conferred by Rule 523. I think this is wide enough to enable me to deal with the situation, instead of driving the parties to an appeal to the Divisional Court. I, therefore, direct the parties to proceed to the trial of an issue at the next sittings of the Court at Bracebridge, for the purpose of ascertaining whether the fire which destroyed the plaintiff's timber was the result of negligence on the part of the railway, and consequently to ascertain whether there are any other claims for damages recoverable from the fire in question, and, if so, the amount of such claims.

In the circumstances that exist in this case, I thought it proper to suggest the desirability of some arrangement avoiding the expense and delay incident to a further trial; but neither side would yield, so that no course is open, save that now adopted.

Costs will be dealt with by the trial Judge.

The execution of the judgment will be stayed meantime, but the railway should pay Mr. Fawcett as much as can safely be paid, having regard to the amount of the claim.

HON. R. M. MEREDITH, C.J.C.P. - JUNE 26TH, 1914.

REX v. ROACH.

6 O. W. N. 630.

Criminal Law—Magistrate's Conviction—Absence of Information or Specific Charge—Accused not Given Fair Trial nor Opportunity to Defend Himself—Unsworn Testimony not Audible to Accused —Conviction for Several Offences — Uncertainty—Invalidity— Motion to Quash—Impossibility of Amendment—Criminal Code, secs. 682, 686, 710 (3), 714, 715, 721, 942, 943, 944—Quashing Conviction—Protection of Magistrate—Costs.

A Police Magistrate convicted the applicant "for that the accused man, within two months prior to the 20th day of May, 1914, did in the City of Hamilton, at various times and in public places, unlawfully commit acts of indecency."

MEREDITH, C.J.C.P., *held*, that the conviction was invalid on the ground that it included several offences, and was uncertain.

Held, that the conviction was not reparable under any of the powers of amendment conferred by the Criminal Code.

Held, that a summary conviction must be quashed where a prisoner has not been given that unprejudiced, full, and fair trial required by secs. 721, 714, 715, 942, 943, 944, 686 and 682 of the Criminal Code.

Martin v. *Mackonochie*, 3 Q. B. D. 730, referred to.

Motion by defendant to quash a magistrate's conviction.

M. J. O'Reilly, K.C., for defendant.

J. R. Cartwright, K.C., for Crown.

HON. R. M. MEREDITH, C.J.C.P.:—There was no real trial, in a legal sense, of the applicant, though he was found guilty of a crime for which he might have been imprisoned with hard labour, for 6 months, and fined $50, on a summary conviction.

By the term real trial I mean that unprejudiced, full and fair trial which everyone charged with crime is entitled to, and which the Criminal Code of Canada explicitly requires: see secs. 721, 714, 715, 942, 943, 944, 686, and 682; a trial none the less, but sometimes the more, necessary where preconceived notions of guilt exist, even though they may be well founded. Such a trial does not necessarily involve any waste of time, nor need more be expended in it than is sometimes

spent in trials which have to be gone over again because not real trails. Waste of time is often the result of superfluous words, and other things not pertinent.

No information was laid against the accused man; no specific charge was made against him; only a general one of indecent exposure. Neither the shorthand notes of the trial, nor the magistrate's full report of the case, shews that there was any arraignment of the prisoner; see sec. 721 of the Criminal Code; nor that he was otherwise informed, in any formal way, of the charge against him. The school-girl witnesses were not sworn, although there does not appear to have been good reason for not taking their testimony under oath. According to the testimony of a bystander, who is described as a Clergyman, the testimony of the girl witnesses was whispered into the magistrate's ear; and the prisoner's request for an adjournment of the trial so that he could procure counsel to conduct his defence was refused, the magistrate telling him that a lawyer could do him no good. The only reason suggested for the whispered evidence is modesty; but modesty, whether properly described as false or not, cannot justly be permitted to deprive any person upon trial for a claim of his right to hear all the evidence adduced against him.

And after the prisoner was represented by counsel, he was not permitted—as the shorthand notes of the trial clearly shew—to make his full defence, as, whether strictly regular or not, he ought to have been; but was restricted to evidence of his good character.

It ought not to be, and it may not be, necessary, even if excusable, to again repeat the oft-quoted words of the Lord Chief Justice of England, upon this subject, so forcibly expressed in the case of *Martin* v. *Mackonochie*, 3 Q. B. D. 730, but I do so lest we justices, whether of superior or inferior Courts, forget, and because that case is in point upon the main question involved in this case, as the first words I intend reading, shew:—

"It seems to me, I must say, a strange argument, in a Court of Justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a Court of law such an argument *a convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether sub-

stantial justice has been done, but whether justice has been done according to law. All proceedings *in poenam* are, it need scarcely be observed, *strictissimi juris;* nor should it be forgotten that the formalities of the law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has a right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the legislature to amend. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and the ends of justice, is as much part of the law as the substantive law itself."

Amendments by the legislature, from time to time, to the law have made escapes from substantial justice on mere technicality few and far between, if they ever need occur. And I may add that as the provisions of the law exist for the purpose of making a case so plain that substantial justice can be done, how is it possible to assert that justice has been done when some of the means the legislature has deemed necessary in reaching that end have been disregarded.

But, apart from all such irregularities, the conviction, upon its face, is plainly invalid. It is: for that the accused man, within two months prior to the 20th day of May, 1914, did, in the city of Hamilton, "at various times and in public places, unlawfully commit acts of indecency." . . . That the conviction is invalid because it includes several offences, and is uncertain, seems to me to be too obvious to require, or excuse, much argument: and, unfortunately, it is not reparable under any of the wide powers of amendment by the Criminal Code conferred upon this Court on motions such as this; because the evidence relates to a number of offences, entirely separate from one another, extending over 2 years, most of them within "two months prior to the 20th day of May, 1914;" and it is impossible to pick out any one of them as one upon which the prisoner was found guilty: he has not

been found guilty on all the occasions testified to, nor has the magistrate in any way indicated any particular occasion regarding which he found the man guilty; indeed, it is hardly likely that he made any finding of that character; but is altogether likely that he merely found that having regard to all the evidence the man must have been, on some occasion or other, guilty. It is therefore quite impossible to change the generality of the conviction into a particular one out of all that were deposed to with more or less weight; which is enough to invalidate the conviction without considering whether it would be proper to amend, in the circumstances of this case, were it possible.

The evidence should have been confined to one offence, as also the charge should have been; there was no need for giving evidence of other offences to prove intent; and there was no such purpose, or excuse in adducing it; the evidence in each case was given for the one and same purpose, namely, to prove the prisoner guilty of separate and distinct offences, in a trial upon all that might come out in the evidence.

Since the argument Mr. Cartwright has referred me to the case of *Rex* v. *Sutherland,* noted in 2 O. W. N. at p. 595; that case affords to me no assistance in this case. It was, doubtless, intended to be decided under the special provisions of the liquor license laws of this province, and not intended for citation in support of a similar ruling in a case such as this: as to the liquor license laws the well known cases of *Regina* v. *Hazen,* 20 A. R. 633, and *Regina* v. *Alward,* 21 O. R. 519, deal with the subject to some extent. But, if not, I must hold the law to be quite too plain, that conviction must be, generally speaking, single and certain, to hold the conviction in question, which offends so much in these respects, to be supportable upon any case. The necessities of justice, as well as the laws of the land, require that they be single and certain; see the Criminal Code, sec. 710, sub-sec. 3.

It is of course quite true to say that the gist of the charge is the crime or other offence, whether indecent exposure or murder or an illicit sale, but none of these offences can be committed except in an actual concrete case, and there can be no legal conviction or regular prosecution except upon such a case. It ought not to be necessary to say so.

The conviction must be quashed, but without costs; and the usual protective terms may be inserted in the order quashing it. There is special reason for not awarding the appli-

cant any costs; he might have appealed to a local Court, which Court would have had a wider power upon the appeal than this Court has on this motion; and he ought to have done so.

HON. MR. JUSTICE LATCHFORD. JUNE 26TH, 1914.

COFFIN v. GILLIES.

6 O. W. N. 643.

Contract—Sale of Valuable Animals—Selection by Vendor—Failure to Deliver—Construction of Agreement—"Unforeseen Occurrence or Accident"—Breach of Contract — Damages—Loss to Purchaser.

LATCHFORD, J., gave judgment for plaintiff in an action for damages for the breach by the plaintiff of an agreement to supply defendant with a pair of foxes, the amount of damages allowed being the difference between the contract price and the selling price at the time of the breach.

Action for damages for breach of contract.

A. F. Lobb, K.C., and D. C. Ross, for plaintiff.

W. M. Douglas, K.C., and J. E. Thompson (Arnprior), for defendant.

HON. MR. JUSTICE LATCHFORD:—Apart from the question of damages, no issue of fact arises in this case.

On May 15th, 1913, by an agreement in writing the plaintiff agreed to purchase and the defendant to sell "two black foxes—silver tips—male and female, whelped in 1913, on the ranch of the vendor near the town of Arnprior—the said young foxes to be the offspring of certain foxes purchased by vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000."

Ten per cent. of the purchase money, or $1,200, was payable, and was paid, upon the execution of the agreement. Delivery was to be at Arnprior not later than 10th September, 1913.

The agreement provided that should the vendor be unable "by reason of any unforeseen occurrence or accident" to deliver the foxes, the deposit should be returned and the agreement should thereupon be null and void.

It was known to the plaintiff that the defendant had at his fox ranch in this province at least four Prince Edward Island black foxes—one pair of Dalton ancestry, and one pair of Oulton ancestry. The plaintiff does not appear to have known what other foxes the defendant had, as in his letter of 7th May, written after the purchase had been made, though before it was embodied in the formal agreement, the plaintiff asks the defendant to "state breeding of parents and from whom purchased and when."

Each pair produced cubs in the summer of 1913. All the Oulton liter died. Several, if not all, of the Dalton litter survived. The plaintiff was willing to accept a pair of the Dalton foxes, but the defendant refused to supply them, contending, as he now contends in this action, that upon the true interpretation of the agreement, one of the foxes to be delivered was to be of the Dalton strain, and the other of the Oulton strain, and that as by an "unforseen occurrence or accident"—the loss of the Oulton litter—he was unable to deliver an Oulton cub, the contract with the plaintiff, upon the return (which was made) of the $1,200, was at an end.

The defendant's original contention, made as early as May 24th, or within ten days of the date of the agreement, was that the plaintiff had but the "third option" on the litters of 1913—"the Dalton, also the Oulton" stock— and that as the female of the pair the plaintiff was to receive—inferentially the third pair—had died, the agreement could not be carried out. That the inference mentioned is correct is shewn by a letter in evidence written by the defendant a few days later—on May 28th, to J. Walter Jones of Charlottetown, offering to supply a pair, a male and a female, from the Dalton litter of six puppies. It seems clear that as the Oulton litter had perished, the defendant at first intended to supply the plaintiff with a pair of cubs from the Dalton litter. This litter must on the defendant's statement have contained at least two females—the one mentioned as having died, and the one the defendant was willing to sell to Mr. Jones.

Jones was—unknown to the defendant—interested in the purchase which the plaintiff had made, and informed the plaintiff of the offer of the Dalton pair made to him by the defendant. The plaintiff then claimed to be entitled under the agreement to a pair of the Dalton litter; and the defendant, after assuming a manifestly untenable position as to the

order in which the agreement was to be fulfilled—after two other pairs had been set apart—ultimately, on July 9th, in a letter to the plaintiff, set up the construction on which he now relies.

In my opinion his contention cannot be upheld. The Dalton and Oulton strains were regarded as the best known to black fox breeders. They were the longest established, and their characteristic melanism was thought to be the most permanently fixed. The defendant was known to have purchased foxes of both strains. Any pair of cubs—a male and a female—from the Dalton or Oulton litters would have satisfied the description in the agreement as well as a pair, one of which was of one litter and the other of the other. The loss of the Oulton litter did not relieve the defendant from his obligation. He still had for sale, as stated, a pair, a male and a female, of the Dalton ancestry, which would have complied with the description, and should, I think, have delivered them to the plaintiff as the plaintiff desired him to do.

There has been, in the view I have expressed, a breach of the contract; and the plaintiff is entitled to such damages as he has proved he sustained. The evidence on the point is not altogether satisfactory. While $12,000 seems an extraordinary sum to pay for a pair of fox cubs, it appears that they sold for even higher figures in the summer of 1913. In October of that year, the defendant advertised for sale in a Charlottetown newspaper a mated pair of Dalton ancestry, for which he asked $14,500. He received no offers. The plaintiff says he could have obtained $16,000 for the pair. McRae, a fox company promoter from the island, says that pairs of choice strains sold for $15,000 to $18,000. The defendant and his son were not in a position to contradict a statement read to them from a circular manifestly issued by fox-company promoters embodying a report or what purports to be a report of United States Consul Frost stating that in 1913 quotations rose "conclusively from $13,000 in April to $14,000 and $15,000 in May, and finally to $17,500 and $18,000 in June. Numerous transfers were made at still higher figures, but the majority ranged at $15,000 and $16,000." In the same circular, however, in an estimate of the value of the fox industry, "Young silvers," such as these mentioned in the agreement, are valued at $7,000 each. Having regard also to what is stated in the letter to the defendant from Mr. Jones, I think the fair

value to the plaintiff of the pair which the defendant ought to have supplied, if they safely reached the Island, would not be more than $14,000. At Arnprior, the point of delivery, they would be worth less. Express charges, attendance during transportation, insurance—if they are insurable, and, if not, the possibility of loss, I am obliged to estimate in the absence of evidence. I place these probable charges at $250, bringing the value at Arnprior to $13,750. The damages sustained by plaintiff are the difference between the $12,000 he was willing to pay and $13,750. There will, therefore, be judgment for plaintiff for $1,750 and costs.

Stay, 30 days.

HON. R. M. MEREDITH, C.J.C.P. JUNE 26TH, 1914.

RE SOLICITORS.

6 O. W. N. 625.

Solicitor—Costs—Taxation — Retrospective Application of Tariffs of Costs Appended to Rules of 1913 — Appeal from Taxation of Local Officer—Right of Appeal under Rule 508—Objections to Taxation — Procedure under Rules 681, 682—Application of—Reference to Senior Taxing Officer at Toronto.

MEREDITH, C.J.C.P., *held*, that tariffs "A" and "D" of the tariffs of costs which came into force on the first day of September, 1914, were retrospective and, accordingly, were applicable to costs incurred before, as well as after, they came into force not taxed before they came into force.

Held, that Rules 508 and 509 gave a right of appeal against a solicitor and client taxation under the Solicitors Act, as if it were an appeal from a Master's report, and that Rules 681 and 682 only applied to appeals against taxations other than a solicitor's bill under the Act.

Délap v. *Charlebois*, 18 P. R. 417, distinguished.

Appeal by the client from the taxation of the solicitors' bills of costs by the Local Registrar at London.

J. I. Grover, for the appellant.

Featherston Aylesworth, for the solicitors.

HON. R. M. MEREDITH, C.J.C.P.:—More questions than one, of some general importance, are involved in this appeal, as well as questions of very considerable importance to the parties to it.

The first question is whether the former tariff of costs is at all applicable to any of the bills in question. The solici-

tors drew them, in the first instance, on the supposition that it was; the taxing officer who taxed them held that it was not, and the bills were accordingly redrawn and taxed in accordance with that ruling.

It is said that the practice throughout the province is "at sixes and sevens" on the subject: those who exclude the former tariff, doubtless, relying upon a note at the foot of the present tariff, whilst those who take the other view, doubtless do so relying upon the case of *Delap* v. *Charlebois*, 18 P. R. 417.

If that case were quite like this case, I should follow it, and the more readily because it probably guided the practice on the subject entirely until the new tariffs came into force; though it may be that, if the question had first come before me for consideration, I might not have been able to reach the conclusion arrived at by the learned Judge, who decided that case so easily and firmly as he seems to have reached it.

Whether a statute, or rule, is or is not retrospective, is, of course, a question of intention; it must be given effect according to its true meaning, and the character of the enactment or rule, as well as other circumstances may be very helpful in reaching a true interpretation. Generally, statutes and rules respecting procedure are considered retrospective in criminal, as well as civil proceedings: See *Rex* v. *Chandra Dharma*, [1905] 2 K. B. 335.

My impression has always been that "costs are practice;" and I have some memory of an ancient decision in those words. The first work on the subject at hand, I now find, deals with it in these words: "Statutes governing costs are rules of practice, and the power to award them, and the amount and items to be awarded, depend upon the statute in force, not at the commencement, but at the termination of the controversy, or when the right to costs accrues. In the absence of any provision to the contrary, statutes regulating costs are usually held to apply to pending suits: Encyclopedia of Pleadings and Practice, vol. 5, pp. 111-113; see also the case of *Pickup* v. *Wharton*, referred to in a footnote to the case of *Foreman* v. *Moyes*, 1 Ad. & Ell. 338.

I am quite unable to give any weight to the contention that there is to be implied an agreement between solicitor and client that the solicitors shall charge, and the client pay for each service rendered, a fee according to some particular

tariff; the client, probably, has no knowledge of tariffs or any intention to contract for anything, but to pay what the law allows, when, according to law, that which is so allowed becomes payable.

The case of *Delap* v. *Charlebois* was not like this case; it might have been a "hard case" if the ruling had been the other way. In it the party taxing the costs became entitled to them under a judgment pronounced in June, 1895; the taxation did not take place till the year 1899; the tariff relied upon to increase the fees came into force in September, 1897. In a case such as that much, perhaps, might depend upon whether the costs there in question could and ought to have been taxed before the tariff of 1897 came into force; and it may be that it had much force.

But, as to this case, a foot-note to the tariffs now in force shews that the draughtsman of them intended them to be applicable retrospectively in the widest sense. It is in these words: "Note. Tariffs A. and D. shall be used in all taxations after these Rules come in force;" words which doubtless were intended to give a retrospective effect to such tariffs, though that might easily have been made plainer by the adding of, for instance, such words as: And shall be applicable to all services rendered before as well as after such rules come into force.

Then these rules and tariffs, having been given, by legislation, the same force and effect as if embodied in a legislative enactment, the footnote, I have read, must be given the same force and effect as if part of such an enactment, and so there is the expressed intention, with statutory effect, that these tariffs shall be retrospective; and I rule accordingly that they are applicable to costs incurred before as well as after they came into force, not taxed before they came into force.

Another important question involves the rights of an inspector of an insolvent estate in respect of charges as solicitor and counsel for the assignee of the estate; the amounts involved being large.

Other questions involve the propriety of "additional allowances" made in the discretion of the local taxing officer, which are expressly made subject to review upon appeal.

There is also in this as in all other cases, especially where large bills are in question, the desirable end of uniformity,

as far as practicable, in regard to all taxations, to be striven for, and which can best be attained through the interposition now and then of the taxing officers at Toronto.

I have therefore no doubt that the assistance of the senior taxing officer should be had before dealing finally with the several items in contest upon this appeal.

But it is said that cannot be done; that the appellant has not put himself in any position which gives him a right of appeal as to any of the items with which he is dissatisfied. That it was necessary to make objection in writing, delivered to the taxing officer and to the opposite party, respecting each item the allowance of which he objected to, and that there should have been a reconsideration and review by the taxing officer of the taxation before there can be any appeal; in other words, that Rules 681 and 682 apply and that they have not been complied with.

In that contention I cannot agree. Rule 508 gives a right of appeal against a solicitor and client taxation under the Solicitors' Act, as if it were an appeal from a Master's report; the partial restriction contained in Rule 509 respecting items as to which objections in writing must have been filed affects only appeals against taxations other than of a solicitor's bill under the Act, and the note to the tariff which authorises increased fees in the discretion of the taxing officer, in solicitor and client taxations, also provides, as I have mentioned, that any exercise of such discretion shall be subject to review on any appeal.

I direct that the senior taxing officer make all necessary enquiries regarding the items in question and report which of them, and to what amount, would be allowed by him in a taxation in accordance with the practice in his office—treating tariffs A. and D. as retrospective: after report the appeal shall be considered with any light that report may throw upon, in addition to the light which the very full arguments of counsel have already thrown upon it.

HON. MR JUSTICE KELLY. JUNE 25TH, 1914.

RE PALMER AND REESOR.

6 O. W. N. 622.

Vendor and Purchaser—Title to Land Agreed to be Sold—Building Restriction—Covenants — Intention — Building Scheme—Application under Vendors and Purchasers Act—Probability of Litigation—Title not one to be Forced on Unwilling Purchaser.

A. who owned five lots conveyed two of them to B., the conveyance containing a covenant by the latter that he would not build more than one house on each lot and that the cost of each house would not be less than $2,500. A. in the same instrument covenanted with B. that he would impose a similar building restriction upon the purchasers of the other three lots. After the conveyance to B. A. conveyed the other three lots and the deed contained a similar covenant to that exacted from B. B. conveyed one of said two lots to C., the conveyance containing no express restrictions as to building.

KELLY, J., *held*, that the effect of the covenant was to constitute a building scheme since there existed the requisite conditions of such a scheme, viz., community of interest and reciprocity of obligation between the several purchasers.

Reid v. *Bickerstaff*, [1909] 2 Ch. 305, followed.

Motion under the Vendors and Purchasers Act for an order determining a question of title arising upon a contract for the sale and purchase of land.

L. C. Smith, for vendor.

D. Urquhart, for purchaser.

HON. MR. JUSTICE KELLY:—The material before me is in the form of a statement of facts submitted by counsel, the question involved being whether there is any restriction binding on the vendor, Palmer, not to erect more than one house on lot 287 on the south side of Pleasant Avenue in Toronto according to plan 895.

On April 26th, 1907, Annie A. Moore, the owner of this lot and lot 288 adjoining it, and apparently the owner also of lots 289, 290 and 291 on the north side of Pleasant Avenue, according to the same plan, conveyed lots 287 and 288 to George H. Tod, the conveyance containing covenants in the following form: "The party of the second part, the grantee, covenants with the party of the first part to erect only one dwelling and necessary outbuildings on each of the said lots, each building to cost not less than $2,500 when completed."

"And the said party of the first part covenants with the party of the second part that any conveyance of lots 289, 290 and 291 on the said plan, or any of them, hereafter executed by her, shall contain the covenant immediately preceding this covenant, or words to that effect."

This conveyance was not executed by the grantee; but having taken the benefit thereby assured to him he was obliged to perform and observe all the covenants on his part therein contained: Halsbury, vol. 10, p. 401.

On December 8th, 1909, Tod conveyed lot 288 to one Hamlyn, by deed which contained this covenant: "The party of the second part covenants with the party of the first part to erect only one dwelling and necessary outbuildings on said lot 288, such dwelling to cost not less than $2,500 when completed."

On 18th April, 1910, Tod conveyed lot 287 to Palmer (a party to this application) the conveyance containing no express restrictions as to building. After Annie A. Moore had conveyed lots 287, and 288 to Tod (namely on December 5th, 1907), she conveyed to another party the above referred to lots 289, 290 and 291, by deed which contains the following covenant by the grantee: "The party of the second part covenants with the party of the first part to erect only dwellings and necessary outbuildings on the said lands, and that each of the said dwellings shall cost not less than $2,500 when completed."

All of these conveyances are registered.

A further statement of fact is that the purchaser has bought lot 287 for the purpose of erecting two houses thereon; that he has been notified on behalf of certain property holders in the locality that if he proceed to erect two houses proceedings will be instituted to restrain him.

At the time of the conveyance from Annie A. Moore to Tod of lots 287 and 288, the intention seems to have been that uniformity should be maintained in respect of the buildings on these lots and her other lots mentioned in the conveyances, namely, 289, 290 and 291, the same restrictive covenant as to the class and manner of building applying to all these lots, thus indicating a building scheme. In *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, it is laid down that some of the essentials of such a scheme are definite reciprocal rights and obligations extending over a definite area. At p. 319

the Master of the Rolls, after having stated these essentials, adds: "A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area." If on a sale of part of an estate the purchaser covenants with the vendor not to deal with the purchased property in a particular way, a subsequent purchaser of part of the estate does not take the benefit of the covenant unless he is an express assignee of it, or unless the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser, in which latter case the benefit of the covenant passes to the purchaser, it being in the nature of an easement attached to his property. Here the restrictive covenant is not in so many words expressed to be for the benefit and protection of the parcels purchased by subsequent purchasers, but there was an apparent intention of imposing upon the owners of all of the five lots the obligation to observe the reciprocal covenants and of conferring the benefits thereof, in so far as they were a benefit.

A clear explanation of the scope and effect of these restrictive building covenants is the following from the judgment of Buckley, L.J., in *Reid* v. *Bickerstaff*, *supra*, at p. 323: "There can be no building scheme unless two conditions are satisfied, namely, first, that defined lands constituting the estate to which the scheme relates shall be identified, and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condition identifies the class of persons as between whom the reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation."

I am inclined to the view that the facts of the present case shew a building scheme extending over these five lots,

bringing it within the application of this statement of the law, and that there is a restriction against building more than one house on lot 287. If that view be correct the restriction may be taken to extend to the other four lots, but as to that I do not offer any opinion intended to be binding, the owners not being parties to or represented on this application.

In the form the matter is submitted it is sufficient to say that, owing to the reasonable probability of litigation as indicated by the notification to that effect (I am assuming the notification came from the owners of the other four lots or some of them), the title in respect of this restriction is such that it should not be forced upon an unwilling purchaser, especially as the owners of the other four lots are not before the Court.

Thus indicating my view I do not make further order. I think this is not a case for costs.

HON. MR. JUSTICE KELLY. JUNE 26TH, 1914.

RE BRADING ESTATE.

6 O. W. N. 1642.

Executors—Application for Advice and Direction of Court as to Disposal of Assets—Sale or Retention of Shares—Matter in Discretion of Executors—Refusal of Court to Entertain Application.

KELLY, J., refused to entertain an application by executors upon originating notice on the ground that the Court would not determine something which was altogether within the scope of the executors' duties.

Application upon an originating notice, by one of the executors of William Thomas Brading, deceased, for an order determining questions arising in the administration of the estate.

W. Greene, for the application.

W. C. McCarthy, for the widow of the testator.

A. T. C. Lewis, for the Official Guardian.

HON. MR. JUSTICE KELLY:—What is sought on this application, which is made by one of the executors of the will of William Thomas Brading, is an order or direction declaring

whether the executors should sell or abstain from selling certain shares of stock forming part of the testator's estate; and in event of the Court directing a sale, a further direction is asked as to what amount of the income to be derived from the proceeds of such sale should be paid to Marguerite Mitchell (testator's widow) to whom the income from the estate is given for the purposes specified in the will.

The applicant has evidently misconceived the position and duties of the executors in a matter such as this. During the argument I pointed out that the Court was being asked to determine something which is altogether within the scope of the executors' duties. Executors are required to use their own good judgment and exercise with due care their own discretion, within the terms and directions of the will, in determining whether they should or should not make sale of the assets at a particular time or for a stated price. The responsibility is theirs, not the Court's.

The application is one that should not be made and I cannot entertain it.

HON. R. M. MEREDITH, C.J.C.P. JUNE 26TH, 1914.

RE LANG & KILLORAN.

6 O. W. N. 629.

Municipal Corporation—Transient Traders' By-law—Municipal Act, R. S. O. 1914 ch. 192, sec. 420 (7)—Company Occupying Warehouse and Selling Goods without Being on Assessmest Roll or Having License—Conviction of Servant or Agent—Evidence—Quashing Conviction—Costs.

The agent of a company, which occupied a warehouse, sold and delivered goods at the said warehouse. He was convicted by a magistrate for a contravention of a by-law passed under the power conferred by R. S. O. (1914) ch. 192, sec. 420 (7), authorizing municipal corporations to pass by-laws requiring traders who are not on the assessment roll to take out a license before transacting business.

MEREDITH, C.J.C.P., quashed the conviction on the grounds that it was the company, and not the convicted man, which violated the by-law, and that, even if the legislation was applicable to an agent for the trader, there was not enough evidence to support a conviction of the applicant.

Regina v. *Caton*, 16 O. R. 11; *Regina* v. *Cuthbert*, 45 U. C. R. 18: followed.

Motion to quash conviction of applicant under a municipal by-law, "for that he did . . . as agent for the Wrought Iron Range Co. occupying a warehouse in the said

village and not being on the assessment roll, and not having a license, sell and deliver at their said warehouse one steel range . . . contrary to a certain by-law of the said village municipality." . . .

O. H. King, for the applicant.

No one contra.

HON. R. M. MEREDITH, C.J.C.P.:—It was the company, not the convicted man, which was found to be occupying the warehouse without having a license, or being upon the assessment roll; that is put beyond any doubt by the evidence; and it was the man who was found to have sold and delivered the range; such sale and delivery having been made by him "as agent" for the company.

Only those who might, and do not, obtain a license are liable to punishment for selling without having a license: R. S. O. (1914) ch. 192, sec. 420 (7), and only those who are not entered upon the assessment roll, or are entered upon it in respect of income or business assessment for the first time, are required to take out a license: see *Regina* v. *Caton*, 16 O. R. 11.

That being so, it is plain that the conviction cannot stand. There is nothing to shew that the applicant had not a license, or that he was not entered upon the assessment roll in such a manner as to exempt him from the provisions of the law under which he was convicted. So that, even if the legislation were applicable to an agent for the trader, in any case, far from enough to support a conviction of the applicant is proved or even asserted: see *Regina* v. *Cuthbert*, 45 U. C. R. 18.

Taking this view of the case it is not necessary to consider any of the grounds urged in the applicant's behalf in support of the motion.

The conviction must be quashed; the order will go in the usual form, without costs; the complaint against the company was dismissed by the magistrate, and so, if an infraction of the by-law were committed, both master and servant escape—that is, escape altogether except from their own costs of this motion.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

RE CANADIAN MINERAL RUBBER CO.

6 O. W. N. 637.

Company—Winding-up—Claims of Creditors—Preference—Contract—Construction—Assignment to Bank—Determination of Issues by Litigation outside of Winding-up Proceeding.

MIDDLETON, J., vacated an order of the Master directing the liquidator of a company to consent to give certain creditors a preference over the other creditors of the company on the ground that the said question could not be determined until certain litigation had taken place.

Appeal from an order or direction of the Master in Ordinary, by which he instructed the liquidator to consent to the payment in full by the municipality, out of the balance due upon a certain construction contract for paving in the municipality, of all claims arising out of or in connection with the contract, thus giving these particular creditors a preference over the other creditors of the company.

Argued 25th June, 1914.

R. H. C. Cassels, for the appellant.

W. B. Raymond, for the claimants.

Featherston Aylesworth, for the district of Burnaby.

HON. MR. JUSTICE MIDDLETON:—The formal order of the Master is not put in, but an extract from the proceedings before him is filed. This states that the Master directs the matter of the construction of the contract to be referred to the Court.

By the contract it is stipulated that the municipality pay all claims for wages, material or otherwise, arising out of the contract, before the paying the contracting company, and that the engineer is not to certify until satisfied that all such claims have been paid off and discharged. Upon the argument it was admitted that the contract had been assigned by the company to the Bank of Commerce, and that the claim of the Bank of Commerce exceeds the balance due. The liquidator is therefore only interested indirectly, as if the bank is entitled to demand the money without satisfying the outstanding claims, then the bank's claim will be so much the less.

I do not think this is a matter which can be adjudicated upon at this stage. There will probably have to be litigation between the bank and the municipality. That litigation will take place in the British Columbia Court; and it appears to me that no good purpose would be served—in fact, that it would be most pernicious—to attempt to deal with the question which arises, in the way suggested by the present application.

I think the direction of the learned Master should be vacated and that the liquidator should be instructed not to interfere until after the rights as between the Bank of Commerce and the municipality and other creditors are determined, in any litigation that may take place between them.

There should be no order as to costs, save that the liquidator may have his out of the estate.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

BELL v. ROGERS.

6 O. W. N. 639.

Judgment—Satisfaction or Payment—Issue of Fact—Bills of Exchange Drawn on Judgment Debtor—Payment to Judgment Creditor—Presumption from Endorsement—Evidence—Opposite Party Called as Witness—Party Calling Opponent not Bound by Testimony.

MIDDLETON, J., *held*, that the production of a bill of exchange bearing an endorsement raises a presumption that the endorser received payment therefor.

Held, that the evidence of one party who is called by an opposite party does not bind the latter.

Stanley Piano Co. v. *Thompson*, 32 O. R. 341, followed.

Appeal by defendant from the report of the Master in Ordinary upon a reference to him to ascertain the amount due upon the plaintiff's judgment against defendant.

J. W. Bain, K.C., for appellant.

J. P. McGregor, for plaintiff, the respondent.

HON. MR. JUSTICE MIDDLETON:—J. W. Rogers and J. C. Bell many years ago carried on a partnership business. The plaintiff, Hannah Bell, wife of J. C. Bell, endorsed or became otherwise liable as surety for the firm. The firm sold

out to a man named Ballantyne, and he gave promissory notes securing a portion of the purchase money. Mrs. Bell sued to recover the amount of her claim, giving credit upon it for moneys received from Ballantyne. At the time judgment was recovered, 19th March, 1898, some of the Ballantyne notes were outstanding. These were placed in the hands of Messrs. Pinkerton and Cook for collection. The notes were then in the hands of Mr. J. C. Bell, the husband. Pinkerton and Cook collected from time to time and remitted the proceeds by draft. The draft in each case was in favour of Pinkerton and Cook, and endorsed by them: "Pay to J. C. Bell or order." The drafts are now produced, and bear the signatures of J. C. Bell and Hannah Bell. The drafts were paid, and bear the bank's stamp to that effect. There is no evidence to shew who received the money. An issue is directed to ascertain the amount due upon the judgment. Mrs. Bell stated generally that nothing had been paid. Upon being confronted with the drafts her evidence is in effect that she knows nothing about them. She recognizes her signature, but she does not know how it comes to be on the back of the draft, and has absolutely no recollection of the matter.

The Master has taken the view that there is nothing to indicate any presumption that Mrs. Bell received the money from the fact that her name appears upon the back of the draft. I cannot agree with this. Upon the documents being produced the presumption is that the money was paid to her. The reasonable inference from her evidence is that she has forgotten that this money was received after the date of the judgment; for she has given credit upon the judgment for moneys received prior to its date in precisely the same way.

I do not think it is necessary to discredit or disbelieve Mrs. Bell, and her failure to recollect is nothing to her discredit. Her evidence, p. 13, line 30, and p. 14, is that she knew her husband was collecting the notes and that although there was no arrangement, what he collected he handed to her.

The learned Master, I think, is also in error in a statement that the plaintiff's evidence binds the defendant because she was called by him. Since *Stanley Piano Co.* v. *Thompson,* 32 O. R. 341, I had thought that the last ghost of this heresy had effectually been laid.

The appeal should, therefore, be allowed, with costs, and credit should be given for the amount of the three drafts in question. The interest account should be adjusted accordingly. There should be no costs before the Master, as there credit was claimed for further sums.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

O'FLYNN v. JAFFRAY.

6 O. W. N. 648.

Exchanges—Stock Exchange—Sale of Seat on—Regulations of Exchange—Member Transacting His Own Business by Virtue of Seat Held in Trust for Another—Absence of Injury to Cestui que Trust — Compensation for Mis-user of Trust—Property—Costs.

MIDDLETON, J., *held*, that a member of a stock exchange, who holds a seat in trust for another and uses that seat for his own benefit, must compensate the *cestui que trust* although the latter has suffered no actual damage.

I. F. Hellmuth, K.C., and A. C. McMaster, for the plaintiff.

W. N. Tilley, and J. M. Langstaff, for the defendant.

HON. MR. JUSTICE MIDDLETON:—Mr. W. G. Jaffray, the defendant, was a member of the Stock Exchange in Toronto and held a seat therein in his own life. Mr. O'Flynn desired to purchase a seat from the exchange. On the 14th October, 1905, he succeeded in making a purchase, but he could not take the seat in his own name because that privilege is accorded only to members of the exchange. He, therefore, had the seat placed in the name of Mr. Jaffray. Contrary to Mr. O'Flynn's expectations, when he sought election to the exchange, he failed. The seat remained in Mr. Jaffray's name until its sale in July, 1912, when Mr. Jaffray transferred it in accordance with Mr. O'Flynn's directions.

According to the regulations of the Stock Exchange, a member of the exchange may be represented by a business partner holding a power of attorney. Mr. Jaffray's partner, Mr. Cassels, acted for him as his attorney upon the Stock Exchange. Owing to a change in the domestic affairs of Mr. Jaffray's firm it was desired that Mr. Cassels should be

upon the exchange holding a seat in his own right, and Mr. Jaffray transferred to him his seat. During the occasional absences of Mr. Cassels, and during one year owing to Mr. Cassel's condition of health, Mr. Jaffray desired to transact the firm's business upon the exchange. He could not act as Mr. Cassels' attorney, because he had the seat which he held in trust for Mr. O'Flynn standing in his own name, and which made him a member of the exchange. He, therefore, attended the exchange and transacted the firm's business by virtue of the membership which he held in trust. This action is now brought to recover ten thousand dollars damages for the wrongful user of Mr. O'Flynn's property in this way.

Fees are payable where a member of the exchange is represented by an attorney. Fees are also payable for carrying a seat on the exchange. What was done in this case by Mr. Jaffray was to set one off against the other, so that O'Flynn's seat was carried for him without expense. Mr. Jaffray is a conspicuously honest witness. He can recall no arrangement by which this was done. I feel satisfied that there must have been some understanding, but no one has proved it, and I think it would be going too far to infer it from the facts which have been proved.

I think the claim put forward by the plaintiff is exaggerated and ridiculous. He has not in any way been damnified to the slightest degree; but I think that Mr. Jaffray having made use of the property vested in him in trust must make some compensation. Assessing this as best I can, and after making allowance for the carrying charges paid by Mr. Jaffray, I award the plaintiff four hundred dollars, with costs upon the County Court scale, subject to a set-off.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

FIELDING v. LAIDLAW.

6 O. W. N. 636.

Judgment—Motion to Continue Interim Injunction Turned into Motion for Judgment—Rule 220—Motion to Vacate Judgment and Execution Issued Thereon—Costs.

A motion to continue an injunction restraining a bank from paying out to a solicitor certain money of the applicant deposited by the solicitor to his own credit. The motion was turned into a motion for judgment since both parties desired the money to be paid to the applicant.

MIDDLETON, J., *held*, that the motion was rightly turned into a motion for judgment since Rule 220 provided that the Court might direct any application to be turned into a motion for judgment.

Motion to vacate a judgment and set aside an execution.

K. F. Mackenzie, for the applicant.

R. Wherry, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The defendant Laidlaw, as a solicitor, was intrusted with certain clients' money. It was placed by him in the Molsons Bank to his own credit. For some reason—I am told arising out of a misunderstanding—the plaintiff desired to reclaim his money. He brought an action and sought an injunction to restrain the defendant from drawing the money from the bank. An *ex parte* injunction was obtained. When this was served, Mr. Laidlaw took the position that if Mr. Fielding wanted his money he was welcome to it; and he drew his cheque for the fourteen hundred dollars in question, in the plaintiff's favour.

The bank had been served with the injunction, and although the cheque presented indicated that the parties had settled their differences, the bank declined to pay, owing to the existence of the Court order. The bank's solicitor supported the bank in this attitude. The result was that on the return of the motion, the situation being explained, I suggested that the motion to continue the injunction be turned into a motion for judgment and that the bank be directed to pay the money to the plaintff as his own. The bank was not represented, and I understood that it desired simply the protection of the Court order. Judgment was drawn and issued, and was taken to the bank.

The bank manager declined to act upon the order until it had been initialled by the bank's solicitor to indicate his approval. The manager did not offer to himself submit it to the solicitor, but apparently sought to place the onus of consulting the bank's solicitor upon the plaintiff. It was a matter of importance to the plaintiff to have the money and to have it at once; and apparently the patience of the plaintiff's solicitor was exhausted. He issued an execution and placed it in the hands of the Sheriff.

Motions of this kind are peculiarly disagreeable. Solicitors are sometimes impatient; bank managers are sometimes discourteous. I do not think that Mr. Broderick acted properly when presented with an order of the Court for the payment of the money. It was not sufficient, I think, for him to answer, as he says he did, that he knew nothing about the order; nor had he any right to compel the plaintiff to consult the bank's solicitor.

The main question argued was the right to make this judgment upon the return of the motion to continue the injunction. Rule 220 provides that the Court may direct any application to be turned into a motion for judgment. When it was known to the bank that both parties desired the money to be paid to the plaintiff, I think this result ought to have been anticipated; and when the manager of the bank received a copy of the order I cannot believe that he did not thoroughly understand its purport and effect.

In motions of this kind, where there is no spirit of give and take, and each party is insisting on strict right, I think it is better to refuse to award costs; and so I dismiss the motion without costs. There was probably temper on both sides, and disputes of this sort ought to be discouraged.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

DUFFIELD v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

6 O. W. N. 646.

Life Insurance — Presumption of Death from Absence for Seven Years, Unseen and Unheard of—Time-limit for Bringing Action —Insurance Act, R. S. O. (1914) ch. 183, sec. 165—Construction of—Declaration of Death.

MIDDLETON, J., *held*, that, where the presumption of the death of an insured person has been established, an action on the policy can not be defeated by the technical objection that it was not begun within a year and six months from the expiration of the seven year period. The learned Judge was constrained in the interests of justice to construe sec. 165 of the Insurance Act, R. S. O. (1914), ch 183, to mean that it did not of itself purport to limit the time within which an action might be brought but only gave the assured the time there stipulated, notwithstanding the provisions of the insurance contract.

Action to recover the amount due under a policy of insurance on the life of George M. Duffield, alleged to be deceased.

Action was tried without a jury at Toronto.

J. E. Jones, for the plaintiff.

F. Arnoldi, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—By a policy of insurance bearing date 20th May, 1901, the defendant company promised to pay $2,500 upon the death of George M. Duffield. By a supplementary memorandum this money was made payable to Mary J. Duffield, mother of the insured. This policy is a paid-up policy issued upon the surrender of a former policy for a larger amount.

The insured unfortunately was a man of bad habits, addicted to excessive drinking. He was married, and was living separate from his wife. At that time he was living with his brother-in-law, Mr. Heath. It was difficult for him to find occupation, owing to his physical unfitness resulting from dissipation. The last seen of him was when Mr. Heath met him in Toronto in 1903. He was then in very bad condition, and it was stated that he was employed upon an orchestra in connection with some theatre in Buffalo. Apparently Duffield was throughout on the best of terms with his own family, though his conduct had entirely estranged his wife. He,

however, was not in the habit of communicating, at any rate with regularity, with any of them; and after this chance interview in 1903 no trace of him can be found. He was heard of in 1905, but the information then received was in connection with his movements some two years previously; so that it may safely be said that he finally disappeared in 1903 or 1904. Every reasonable inquiry has been made, and I think the proper inference from the evidence is that he must be presumed to be dead.

The insurance company has throughout taken the position that Duffield has not been shown to be dead. They now take the alternative position that if on the facts shewn Duffield is to be presumed to be dead that presumption arose at the expiry of seven years from his disappearance, that is, in 1910 or 1911, and that this action, brought on the 16th of July, 1913, is too late, as it is more than one year and six months from the end of the seven years.

There is not in this case any shadow of doubt as to the *bona fides* of the claimants.

Throughout, there has been a real and earnest desire to ascertain the fate of the insured. There is no room for suspicion or for the feeling that there has been any attempt on the part of those claiming to avoid obtaining information so as to allow the presumption of death to arise. The company from the beginning knew of the situation, and all possible information was given to it, and it made its own inquiries, all resulting in confirmation of what was said by Duffield's relatives. Negotiations were on foot looking to the payment of the money upon a bond being given to indemnify the company against any possible claim that might turn up by reason of any change of beneficiary. This was an entirely imaginary danger, as the policy was payable to the preferred beneficiary, and all those within the class were concurring in the payment, except perhaps the wife, from whom Duffield was separated, and she would no doubt have joined if the suggestion had been made. Without any reason that has been disclosed the company suddenly changed its attitude and refused payment; and this action at once followed.

I have come to the conclusion that the provisions of the Insurance Act now found as sec. 165 of ch. 183 of the Revision of 1914 do not afford an answer to this action. The

policy is a contract to pay, and it contains no conditions or limitations as to the time to sue. Section 165 gives a time to sue, notwithstanding any agreement or stipulation limiting the time to be found in the contract. It does not itself purport to limit the time within which an action may be brought, but in case of the assured it gives the time there stipulated, notwithstanding the provisions of the contract.

I am glad to find a way to defeat what appears to me an unconscionable defence, and one which ought not to have been urged by the insurance company in this case. Statutes of Limitation are generally regarded as a means of protecting the defendant against a stale or unjust claim. To allow the statute to be used to defeat a claim arising upon a policy which has for years been paid up, where there is no shadow of doubt as to the justness of the claim, and where the time limited is supposed to have gone by during negotiations looking to a friendly adjustment of the whole matter, would be a thing so unjust and unreasonable as to shock the conscience of any right-thinking man.

There will, therefore, be judgment for the plaintiff for recovery of the amount, with interest from the date of the writ, and costs. If the insurance company desires the protection afforded by sec. 165, sub-secs. 5 to 9, I am ready to make an order under that Statute upon the evidence already taken.

HON. MR. JUSTICE MIDDLETON. JUNE 25TH, 1914.

RAIKES v. CORBOULD.

6 O. W. N. 651.

Principal and Agent — Solicitor Collecting Moneys for Client — Account — Evidence — Action by Executor of Client.

The deceased or his brother had invested money in mortgages through the defendant, a solicitor. The executor claimed that payments were made to said solicitor and were not accounted for.

MIDDLETON, J., after an exhaustive examination of the evidence, gave judgment for the plaintiff on the ground that it was not established that the moneys claimed by the plaintiff had been paid to the deceased in his lifetime.

Tried at Toronto 10th December, 1913, and 5th June, 1914.

D. W. Saunders, for the plaintiff.

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

HON. MR. JUSTICE MIDDLETON:—This action is peculiarly unfortunate in its nature. The late Edgar Hallem resided for many years in the town of Orillia. He died on the 21st December, 1911. At the time of his death he was an old and feeble man, and for some considerable time attended to business with great difficulty. The late James Henderson had been a lifelong friend and his solicitor and confidential business agent. Mr. Henderson died on the 28th December, 1911.

Mr. Corbould has practised law for many years in Orillia. He was the solicitor for Richard Hallem, brother of Edgar Hallem. Upon the death of Richard Hallem his estate passed to Edgar. Arrangements were made by which Corbould continued to act with reference to the securities then in hand, but subject to general supervision by Mr. Henderson. The exact terms of Corbould's employment will have to be investigated more fully later.

The plaintiff, as executor of Mr. Edgar Hallem, found among his papers a statement in Mr. Corbould's handwriting, dated 29th May, 1909, headed: "List of securities, Edgar Hallem, re Richard Hallem estate." This covered nine separate mortgages. Subsequent to the date of that statement two of these mortgages, namely, the two Drinkwater mortgages, were realized upon and the proceeds paid over to Mr. Hallem.

The plaintiff then demanded from Corbould an accounting with respect to the remaining seven mortgages. The statements made by Corbould being regarded as unsatisfactory, this action was brought; the statement of claim setting forth the list and alleging the neglect and refusal of the defendant to account for these securities which are in his hands.

To this the defendant answers, alleging that these securities were not in his possession but in the possession of Mr. Henderson, and that his authority was only to collect the interest due. He then says that the statement was not a statement of securities held for the late Mr. Hallem, but was a mere statement of securities referred to in a passbook with which the defendant had to do, and that he duly accounted for all the interest collected upon the securities. He further claims that from 1903 to 1910 he regularly rendered

accounts of receipts and disbursements to Mr. Hallen and Mr. Henderson, and paid over all balances in his hands, and that in 1911 he had a final accounting with Mr. Henderson, at which time he handed over every security, document and account he had in his possession and that his business relation with Mr. Hallem finally ended; and that Mr. Henderson was not only the solicitor for Richard Hallem but also executor for Edgar Hallem, and that he reported and accounted and handed over all documents, including certain books in which the accounts were kept, to Mr. James Henderson, and without these he cannot now account.

Particulars were asked of these allegations in the defence, and reference is then made to certain letters and accounts delivered in 1912 after the death of Mr. Edgar Hallem.

At the hearing the position taken by Mr. Corbould differed somewhat radically from that taken in the pleadings. He now claims that he acted as solicitor for the purpose of collecting interest on these securities, which were retained in his possession, but that he had no authority to receive the principal. He did collect the interest and pay it over to Mr. Hallem from time to time by cheque; and that the reason he was left in possession of these securities was that the investments originated with him. When Richard Hallem was alive, he invested his money for him as opportunity offered, when other clients sought loans; that the mortgagees were throughout his clients, and that after Richard Hallem's death he had no authority to do more than collect the interest. When the mortgagors desired to discharge the securities they gave him the principal moneys, which he received as agent for the mortgagors; that all this principal money as it came in from time to time was paid over to Mr. Hallem in cash and not by cheque, and in this way all the securities were wiped out.

That the matter may be more clearly understood it is perhaps desirable to go to the time of the death of Richard in 1903. At that time Mr. Henderson sought from Mr. Corbould a statement of the investments held by him on behalf of the estate. A statement was rendered by Mr. Corbould to Mr. Hallem, and transmitted to Mr. Henderson. Henderson went to Orillia, saw Corbould, and subjected this statement to a very careful scrutiny.

Concerning some of these securities there is no question, and nothing need be said. The seven securities now in question appear as follows, rearranging them in the order in which they appear in the memorandum of 1909:

(a) George C. Gillett, agreement balance of purchase money $200.

(b) John McDaniel, mortgage, $500.

(c) Susan E. Mitchell, mortgages, $300.

(d) E. E. Newberry, mortgage, $900.

(e) Thomas McNabb, mortgages, $500.

(f) Mary and John Morrison, mortgages, $475.

In addition there is a statement as to the rate of interest in each case and the date up to which interest is paid.

Upon investigation, two of these securities—Newberry and Nicholls—for reasons which will be apparent later on, were regarded as being really liabilities of Corbould, and a memorandum was written on the face of the statement, signed by Corbould, by which he guaranteed these items.

Mr. Corbould states that whenever any principal came due upon these securities the intention was that the principal money should be received by Mr. Henderson and should fall into Mr. Edgar Hallem's general property, which was being managed by Mr. Henderson. Mr. Hallem had an estate which yielded him practically enough income to enable him to live comfortably.

From correspondence produced it appears that he was encroaching slightly upon his capital and that Mr. Henderson was keeping track of everything for him with the greatest care, to see that he understood thoroughly the situation. He, therefore, desired to conserve the principal coming from the brother's estate, and at the same time apparently was not unwilling to accede to what was desired by Mr. Corbould and not disagreeable to Mr. Edgar Hallem—to permit the collection of interest to remain with Mr. Corbould, so as not to dissociate him from his mortgagor clients.

In 1903 a good deal of correspondence took place with regard to different securities and their realization, and on more than one occasion there were personal interviews. When $100 principal came in on one of the mortgages Mr. Corbould sought to re-invest, but he was directed to pay the money over and did so by cheque. At a subsequent interview Mr. Henderson, forgetting the receipt of this cheque, asked

for it again, and was confronted with the cheque. Mr. Corbould says that he then made up his mind that he would thereafter pay no principal money by cheque. He makes this statement at the trial, apparently unconscious of its illogical nature.

According to the evidence given at the trial by Mr. Corbould, the fate of the individual securities was as follows:

(a) Gillett. This it is said was an agreement made by Gillett for the purchase of certain lands. The sale was carried out and the land conveyed in 1907. Corbould says he received the purchase money from Gillett and prepared a deed dated 27th March, 1907, and that he paid the money over to Hallem at the time he got the deed executed. The deed was handed over to Gillett on the 10th April, 1907. Corbould says that Henderson knew all about this transaction. At the trial the back of an old envelope was produced which possibly had contained the papers connected with the transaction, and upon it, as a memorandum endorsed giving the date of the conveyance; but there was no record there of the payment over of the money. At the hearing Mr. Corbould was very emphatic in the statement that he had kept no books or record.

The case stood over for argument, and at the time I made the suggestion that a more careful inquiry into the bank accounts and other records of the parties might possibly throw some light upon the controversy. When the case came up for argument some considerable time later, Mr. Corbould was not in a condition physically to attend the hearing, but in the meantime he had produced a very roughly kept blotter running over a series of years, in which there was entered in great detail particulars of many transactions. This book was admitted without verification, owing to the impossibility of Mr. Corbould's attendance. The book contains the following entries with relation to the Gillett transaction:

On 26th March, 1907, apparently a man named Radcliff paid a note of $206 due. On 27th March there is an entry, "Geo. C. Gillett memorandum amount due under agreement, balance of principal $200, one month's interest at six per cent., $1.00—$201." The deed of the land is dated 27th March; the affidavit of execution made by Mr. Corbould was sworn on the 28th of March. The statement is that the Radcliff money was used to pay Mr. Hallem; this money, Mr.

Corbould says, belonging to himself. There is a note opposite the Gillett computation, "Radcliff's money, see ante, 26th March, '07, 36 x 5, $180; 2 x 10, $20; $200, 1 x 1, $1.00, $201."

On 10th April, 1907, there is the following entry: "G. C. Gillett. Gillett called and paid balance of purchase and interest, $201. Credit by amount due him for maple syrup, $3.90, $204.90, less costs $4, paid balance to him in cash, 90c—(a sample of bookkeeping accuracy quite in accord with many other details, for Mr. Corbould seems to have paid 90c instead of receiving $1.10).

It will be noted that there is no entry made of payment over of the money to Mr. Hallem. On the other hand, the cash received from Radcliff does not appear to have been absorbed in Mr. Corbould's bank deposits.

Hallem's bank books are produced, and they have been carefully analysed. As the result of the analysis it appears that every deposit, save one only, can be traced and explained. This deposit is a deposit of $160 on April 7th, 1908, a year after the supposed payment. Every cheque issued by Mr. Henderson, save a few that were cashed and not deposited, appears as a deposit in the bank. Five cheques issued by Corbould for interest paid by him are also deposited. It is plain that any moneys paid by Corbould, not merely as representing the Gillett security but as representing other securities, did not reach Mr. Hallem's bank. Mr. Hallem had living with him Miss Radenhurst as his housekeeper. She is an estimable and absolutely reliable person. She states that all money received was deposited. She frequently went to the bank with Mr. Hallem: she knew generally what was going on; and she is positive that no money was received that was not deposited; the custom being not to keep money in the house, the running household accounts, even to small amounts, being paid by cheque. This statement is corroborated by the production of the bank book shewing the issue of numerous small cheques every month; and it is significant that even at the very time when considerable sums were paid to Hallem, according to Mr. Corbould's statement, the issue of these small cheques does not appear to have been in any way interfered with. The only other material fact is the fact that in a statement rendered by Corbould in August, 1912, covering interest received by him from 1907 to the

end of 1910, he shews the receipt on March 2nd of $12 Gillett interest and on March 27th "balance one dollar," making $13 in all. As an instance of inaccuracy, it may be pointed out that he charges the cost of the Gillett deed, $4, to Mr. Hallem, although he had collected this also from Gillett.

(b) McDaniel mortgage $500. Mr. Corbould's statement as to this was that it was paid off in 1910. He received the money in cash from a man named Carrick. Mr. Henderson, it is said, was notified. In this case again there is produced an envelope with a memorandum endorsed, shewing the facts of the registration of the discharge on the 30th November, 1910. The mortgage, it is said, was made by a man named Bissell, who conveyed to McDaniel in May, 1908. This fact is also endorsed on the envelope. The discharge is now produced. It appears to be dated the 5th December, 1903, Mr. Corbould being the witness. A memorandum has been handed in to me by Mr. Corbould, stating that although this mortgage was to have been paid off in 1903 it was not in fact paid off at that time and that the discharge was held until 1910 before registration, Carrick going on paying interest until then. This is, of course, an entirely new story, differing from the evidence given at the trial. In the blotter there is found an entry under date 12th October, 1910: "Carrick. John McDaniel mortgage—principal $500, interest $13.50, cash $513.50." The next deposit in Corbould's account appears to have been on the 29th of October. It was $348.14, and an entry in the blotter shews how this amount was made up; and it evidently does not include that sum. The account already referred to shews a receipt of interest, as I understand it, down to November 30th, 1910. This, however, I do not regard as of great moment. I regard it as far more important to bear in mind the date of the execution of the discharge, 5th December, 1903, in view of the statement made that no discharge was executed without Mr. Henderson's approval and the actual receipt of the money.

(c) Mitchell mortgage, $140. Originally, there were two mortgages made by Mrs. Susan Mitchell: In January, 1895, $200; March, 1897, $100. By a discharge, dated 1st August, 1905, the $100 mortgage was discharged; and on the 26th December, the 1895 mortgage was discharged. Both of these

discharges were executed by Mr. Hallam in the presence of Mr. Corbould as witness. Both discharges were registered on the 25th January, 1908. In 1903, Mrs. Mitchell saw Mr. Henderson, and she produced some correspondence, and it was then agreed that there was $300 due upon the mortgages, and the time for payment was extended and the rate of interest reduced. Mr. Henderson reported to Mr. Corbould the arrangement made. Mr. Corbould's blotter is produced, and it contains a memorandum shewing the amount of the mortgages at $300; three payments of $50 each—29th July, 1904; 30th July, 1905; and 4th August, 1906. Opposite the first two payments is marked "second mortgage discharged 8th August, 1905." Opposite each of these three payments is also written in the words "to E. H." To the balance of $150 is added $4.50 interest; and credit is given, 15th January, 1908, "A. B. Thompson's cheque to E. H. for him and deposited same in Dominion Bank, $154.50," and then, in brackets, "credit Clark:" an entry which is said to be explained by an entry upon the previous page, "John E. Clark called and paid an account in cash $205;" the suggestion being that this $205 was used in part to cash the cheque. The cheque for $154.50 was deposited to Mr. Corbould's credit in the bank on the 15th January, after having been endorsed by Hallem. Mr. Thompson, who was acting for Mrs. Mitchell, wrote to Mr. Henderson in December, 1907, stating that he was about to pay off the mortgage, on which he understood $150 was due. There was also some correspondence in 1906 relative to a further loan, from which it appears that Mr. Henderson then knew that the mortgage stood at $200. On 20th December, 1907, in contemplation of the payment off, Mr. Henderson wrote to Mr. Corbould, forwarding Thompson's letter and forwarding copies of the letters of 1903, then stating "you will know what moneys you have since received and will have no difficulty in making out the account correctly. Perhaps it will be preferable that Mr. Thompson should give you a cheque to Mr. Edgar Hallem—(these words are underlined)—for the amount of his principal and interest, and pay you separately for your costs." To this, Corbould replied in December, 1907, "your letter received. Thompson has not yet turned up. When he does, I will have the matter attended to. I gave Edgar a statement with last cheque." After the cheque had been received

and endorsed in favour of Corbould on the 15th, Hallem wrote to Mr. Henderson: "Corbould was here yesterday on Mrs. Mitchell's business. I do not see quite clearly in the matter, but if I have done anything to disturb arrangements that have been made between us, I hope it may not annoy you in any way. Perhaps you will have heard from Mr. Corbould by this time. Corbould wants the money Mrs. Mitchell has paid for investment."

The only statements produced, found among Mr. Hallem's papers, are two statements put in as exhibit six, one of them commencing in 1903 and continuing to the end of 1906; the other statement covering 1907. In these statements, credit is given for the interest received from time to time, but no mention is made of the payments of principal, although the interest is reduced.

In the scribbling book, under date of 30th July, 1904, there is a deposit which includes an item of $59. The name of this item has been obliterated with some care. It is suggested that it originally was "Mitchell;" but this suspicion is probably not well founded, as there is a memorandum lower down on the page referring to a cheque for $59, the name appended being illegible, but clearly not "Mitchell." Singularly enough, on the 9th August, 1905, there is another entry of a deposit of $57.50. The entry again has been erased and again looks as though it had been Mitchell. Credit is given in the statement exhibit 6 at the end of July, but the blotter contains no corresponding entry, there being a blank from the 31st July to the 9th August. This, however, is not in itself significant, as there are many periods during which no entry is made.

Great emphasis is also laid upon the fact that when the statement was asked for shortly before Hallem's death, this mortgage was represented by "Black $150;" the suggestion being that the name was changed owing to the fact that Mr. Henderson knew that the Mitchell mortgage had in fact been paid off. There was no "Black" investment, but Black is said to have been a tenant of the Mitchell property.

(d) Newberry mortgage $900. Mrs. Corbould owned some property in Belleville very many years ago. She sold this property and got back a mortgage upon it. Mrs. Newberry then abandoned the property to Mrs. Corbould. Mrs. Corbould entered into possession, and rented. All this was

before Corbould and his wife moved to Orillia in 1879. For some reason, not by any means clear, when Mrs. Corbould made up her mind to foreclose the mortgage in 1882, proceedings were not taken in the name of her husband as solicitor, but in the name of Green, who appears to have been his Toronto agent.

Mrs. Corbould desiring to erect a house in Orillia, and expecting to sell the Belleville property, Corbould arranged that Richard Hallem and another brother, Preston—now dead—should each lend his wife $900 upon the security of this property. As the security, he gave a mortgage made by his wife and also an assignment of the mortgage which she had foreclosed. The money was advanced in 1896, but Corbould never registered either the mortgage or the assignment, retaining them in his possession. This was the unsatisfactory position of matters, when, on the death of Richard Hallem, Mr. Henderson took up the matter. The statement then rendered by Mr. Corbould described the security simply as "the Newberry mortgage;" but in an accompanying one, he refers to "the Newberry mortgage" as a mortgage made to Mrs. Corbould and assigned by her to Preston and Richard Hallem. On Mr. Henderson investigating the matter, he took, upon the face of the statement, a guarantee by Mr. Corbould of this security. In 25th September, 1909, a discharge was signed by Hallem. Mr. Henderson was in Orillia that day, and his initials appear on the back of the discharge. Mr. Henderson did not witness the discharge. The blotter produced shews on date of 22nd September, 1909, "re Newberry mortgage principal, E. H. share, $900, interest from 15th May to 25th September, 1909, $19.45, $919.45; from bank cheque, $476.45, house 443." The cheque for $476.45 was drawn by Corbould on his own bank account, in his own favour, on the 1st September, 1909, and it appears to have been cashed on that day. The money taken by Mr. Corbould from his house, he says, he kept there in cash. The $476.45 was the exact amount received as the result of the realization on a mortgage called the Hutchinson mortgage. In the blotter, under date 1st September and 16th September, there are memoranda shewing the $500 in the house and also the money in the safe at the office.

The discharge of the mortgage, to which I have referred, was never completed and never registered. It has no witness

and no affidavit of execution. Mr. Corbould's explanation is that he expected Mr. Henderson to call and sign as witness at his office, but that Mr. Henderson left town without doing so. The initials on the back are said to have been placed to indicate that Mr. Henderson was the witness, though it is hard to see why Mr. Henderson could not have witnessed with the same pen and ink as used by Hallem in signing.

(e) McNabb mortgages, $500. These were two mortgages, $400 and $100. They were paid off and discharged in 1910. The money reached Mr. Corbould's hands. He says that he handed it over to Hallem, in the presence of Henderson; the discharge was then signed and witnessed by Mr. Corbould. The $500 which reached Mr. Corbould's hands was undoubtedly deposited to his credit on the 8th October. On the same day, he drew from the deposit $400. He says that he had $100 cash on hand, which he used to make up the amount which he paid over to Hallem. No trace can be found in Mr. Henderson's office of his having been in Orillia on that day.

(f) Morrison mortgages, $475. This mortgagor died, and it is said that the husband desired to make title; so the property was offered for sale under the power of sale, and sold. Hallem executed a conveyance prepared by Mr. Corbould, dated 21st July, 1911, registered on the 1st August, 1911. The affidavit of execution was sworn on the 31st July. Mr. Corbould undoubtedly received the money, and he claims that he paid it over to Hallem in the presence of Henderson at the time the deed was executed.

After thus outlining in some detail the nature of the securities and Mr. Corbould's statements as to what became of them, it is important to go back to 1903. Evidently, then, there was some distrust of Corbould's, particularly on the part of Mr. Henderson, and equally plainly there was a desire to avoid giving him offence by taking all the business out of his hands. Corbould admits that he was forbidden to receive any principal on account of Mr. Hallem, and he claims that, although he did receive principal, he was, in truth, to receive it for the mortgagors, so that the money never reached his hands as solicitor or trustee. Early in the transaction, after Mr. Henderson's intervention, $100 was received. Mr. Corbould paid over the interest then in hand to Mr. Henderson, retaining $100, the principal, con-

cerning which he wrote Mr. Henderson that Mr. Hallem had asked him to re-invest. This was not acceded to, and Mr. Corbould paid over the $100. Mr. Henderson, in fact, wrote Mr. Hallem on the 22nd January, 1906, that it would be more satisfactory if he instructed Corbould to pay all principal moneys over to him (Henderson) or to Hallem direct. When the Mitchell mortgage was about to be paid off in 1907, a request was made that the money should be paid to Henderson and that a statement should be sent as to the investments. See letter of 28th November, 1907.

The genesis of the statement relied on in the pleadings is also most important. Mr. Henderson wrote Corbould on the 28th May: "You will oblige me by making up and having ready for me to-morrow, when I call at your office in the afternoon, a list of the mortgages held for Mr. Hallem, with the capital amount secured by each. I am to have a business meeting with him to-morrow, and I shall want the above information. In making up the amounts, you might note the amount of interest on each security at the same time. This will not take you more than a few minutes, and you will oblige by letting me have it when I call." The statement produced, exhibit four, bears date the 29th May, 1909, covers all these mortgages, and is endorsed in Mr. Henderson's handwriting: "See Corbould's list of mortgages he holds for Edgar Hallem, 29th May, 1909. He reports no arrears of interest on them." The explanation given of the fact that some of these were then paid off is that the list was made out before the letter was received, in response to a verbal request from Mr. Henderson, and that it covered not only all the mortgages then current, but all the mortgages that there had been.

Another matter should be mentioned. Mr. Corbould claims that on payment off of the last of the securities he handed over to Mr. Henderson a pass book containing full entries concerning the mortgages. A pass book has been found and produced, but it does not shew the payment off of these mortgages; it treats them as current. This Mr. Corbould says is not the book containing the entries on which he relies.

What I said, in discussing the claim with reference to the Gillett mortgage, as to the failure to find any trace of the receipt either by Mr. Henderson or by Mr. Hallam of the

moneys then paid, applies equally to all these other moneys; and aftter considering the matter most carefully and most anxiously, I can come to no other conclusion than that it has not been shewn to my satisfaction that these moneys were paid. Mr. Hallem had no way of disposing of these moneys, so far as is known or has been suggested, which would account for their disappearance; and the case set up for the defendant is so full of inconsistencies and difficulties, and is so surrounded with the absence of all that one would expect to find in the course of a solicitor's dealing with his client, that with every desire to avoid being unduly suspicious one cannot help having a suspicion aroused which the defendant has utterly failed to allay. The extraordinary scheme adopted, as Mr. Corbould says, of paying over in cash without taking any proper receipt all moneys representing principal, and of keeping no proper books, invite adverse criticism. The course taken in setting up the defence pleaded, and the disingenuous suppression of the blotter, the manifest attempt to place the responsibility upon the shoulders of Mr. Henderson, and the failure to give full and accurate information when detailed entries had been made in the blotter, all go to intensify the feeling of distrust.

I cannot see my way clear to anything other than to award judgment for the amount claimed, with costs.

HON. MR. JUSTICE BRITTON. JUNE 29TH, 1914.

RE LEISHMAN ESTATE.

6 O. W. N. 653.

Will—Construction—Devise and Bequest to Son, Subject to Charge for Maintenance of Widow—"Comforts she has been Used to"—Ascertainment of Proper Sum for Maintenance — Powers of Court—Originating Notice—Rule 600 — Additional Bequest to Widow of Life Income from Insurance Moneys.

A will contained a provision devising and bequeathing property to one of the testator's sons subject to a charge for the maintenance for life of the testator's wife "so that she may have the comforts she has been used to." There was also a clause bequeathing insurance money to another son subject to a life interest in favour of the testator's wife "to use and enjoy the income during her lifetime and after her death the principal shall go to my son Abial."

BRITTON, J., ascertained the proper sum payable under the first clause.

Held, that the incomes bequeathed by the above clauses were separate and cumulative.

Davidson v. *Davidson*, 17 Grant 219, followed.

Motion by Charlotte Leishman, widow of the late John Leishman, for an order determining her rights and interests under her husband's will, as between her, and her son Robert.

D. I. Grant, for Charlotte Leishman.

A. E. H. Creswicke, K.C., for executors of John Leishman and for Robert.

HON. MR. JUSTICE BRITTON:—The will was dated the 25th October, 1905, and the testator died the latter part of the year 1909. At and before the time of testator's death, he and his son Robert were carrying on, in partnership, at Bracebridge, a hotel and livery business, each owning an undivided one-half of that business—its plant and property.

The following is a copy of the will:—

"I direct that my just debts and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my decease.

I give devise and bequeath my undivided interest in the hotel property known as the Albion hotel and the lands connected therewith, being lot No. 15 on the westerly side of Main street, part of lot No. 14 on the westerly side of Main street, part lot No. 10 on the north side of Thomas street and part of lot No. 1 on the easterly side of Manitoba street, together with all my interest in the furniture, chattels, fix-

tures in said hotel also in the horses, rigs and other chattels to my son Robert subject to his supporting and keeping my wife Charlotte during the remainder of her natural life in a suitable and proper manner according to her station in life, and so that she may have the comforts she has been used to.

"I further give devise and bequeath my life insurance in the Ancient Order of United Workmen amounting to $2,000 and my insurance in the Independent Order of Foresters, amounting to $1,000, which are both payable to my wife Charlotte to my son Abial subject to a life interest therein to my said wife, it being my desire that she shall use and enjoy the income from said moneys during her lifetime and that after her death the principal shall go to my said son Abial.

I further give devise and bequeath to my said son Robert any moneys I may have in the Bank of Ottawa together with the residue of my property of whatsoever kind and wheresoever situated.

And I hereby nominate constitute and appoint Isaac Huber and Henry B. Bridgland both of the town of Bracebridge aforesaid to be the executors of this my last will and testament contained on this and the preceding page."

The executors have not taken any active part in the administration of the estate. Robert states, and it is not denied, that the money in the bank at the time of his father's death was not sufficient to pay his father's debts and the funeral expenses. Robert gives, what appears to me a fair and candid statement of what he has contributed and done in the maintenance of his mother since the death of his father. Robert's statement is practically accepted as to the money payments, but the mother complains that she is not being supported and maintained in a suitable and proper manner according to her station in life, and that she is not being supplied with "the comforts she has been used to."

The testator has charged his property with such maintenance, and Robert has accepted the property subject to the charge. The question is, is Robert doing his whole duty under the circumstances? I am of opinion that he is not, and that the mother's complaint is well-founded—although I am not able to agree with the argument of her counsel that she is entitled to as large a sum as is claimed. The question is not what Robert can do, retaining the property received from his father, and continuing in a business not now so

profitable as formerly, but what Robert may be compelled to do in carrying out his father's direction, with his father's property bequeathed to Robert subject to its being used for the maintenance and support of the widow and mother. Robert is able to pay a larger sum than he has been paying.

The widow is now 75 years of age—in feeble health, and her wants are different now from those in former years. In addition to food and raiment she requires personal care and attention and watchfulness in her day-by-day going about. After the death of the testator, and down to the end of 1912, the maintenance provided was irregular in times of payment and as to amount paid. The amount paid was quite insufficient. And if the mother was satisfied with it, as Robert says, it is evidence that she was not disposed to lightly or hastily complain. Since 1912 Robert has paid regularly $20 a month. The regularity of these later payments has satisfied the mother upon that point for she knew what she was getting and when. That is not sufficient for the reasonable requirement of a woman of her age and health, and considering what she had been accustomed to. It may be, that with advancing years, and considering the way support was at first given, the widow is now more restless and exacting. At first her complaint was of irregularity and uncertainty. She said, and no doubt truly, that she would rather have a little and have it regularly and without asking for it, than more, given grudgingly after request on her part, and questioning on the part of Robert. Mother and son drew apart and they are now standing on their strict legal rights. It is not easy to determine just what the widow "had been used to." In the days of her health and during her husband's lifetime, she worked with her husband, and was content even if without what were called luxuries. She had what she desired so far as appears. The charge for maintenance, entitles the widow to it from the property bequeathed to Robert, apart from the interest upon the money from life insurance.

The words of the will in reference to the insurance money are: "to my son Abial subject to a life interest therein, to my said wife, it being my desire that she shall use and enjoy the income from said moneys during her lifetime, and that after her death the principal shall go to my said son Abial." That seems to be something over and above

mere maintenance—addition to maintenance. See *Davidson* v. *Davidson,* 17 Grant 219.

It is quite clear that a money payment will be best for both mother and son—in fact, to supply food and clothing in kind would lead to constant friction.

I am of opinion that until and unless otherwise ordered, Robert Leishman shall pay to his mother, Charlotte Leishman, for her maintenance as provided in the will the sum of forty dollars for each month, payments to be made on the 15th day of each month, unless that day is Sunday or a holiday, and in case of the 15th being a Sunday or a holiday, payment shall be made on the next working day, the first payment is to be made on the 15th August next, arrears from the time Robert ceased paying at rate of $20 a month to be paid on or before 15th July next.

Upon the question of jurisdiction Rule 600 is wide enough to cover such an application as the present, and to permit its being disposed of on originating motion.

No order as to costs.

Order accordingly.

HON. MR. JUSTICE LATCHFORD. JUNE 29TH, 1914.

ELLIS v. ELLIS.

6 O. W. N. 671.

Husband and Wife—Fraudulent Conveyance — Action by Judgment Creditor of Grantor to Set Aside.

Plaintiff had recovered judgment against her husband for the delivery to her of certain chattels and the payment of a sum of money. About six months after the issue of the writ the husband conveyed certain property to one B.

LATCHFORD, J., *held,* upon the evidence, that the conveyance was fraudulent and void as against the plaintiff.

Action for a declaration that a certain conveyance of land made by defendant Ellis, the plaintiff's husband, to defendant Bowman, was fraudulent and void as against the plaintiff, who on the 18th June, 1913, recovered judgment against her husband for the delivery to her of certain chattels and payment of $2,288, with interest, the judgment being un-

satisfied as regards the money, and to vacate the registration of the conveyance.

J. G. Wallace, K.C., and J. Rowe, for plaintiff.

S. G. MacKay, K.C., for defendants.

HON. MR. JUSTICE LATCHFORD:—The plaintiff is the wife of the defendant Ellis, and by the judgment of his Lordship the Chancellor, reported in 4 O. W. N. 1461, and affirmed on appeal, 5 O. W. N. 561, she was declared entitled to recover from her husband $2,288, with interest, from the date of an agreement regarding separation made on November 21st, 1910. The writ issued on the 9th October, 1912. The judgment of the learned Chancellor was rendered June 18th, 1913, and that of the Appellate Division on the 23rd of December in the same year.

In February, 1914, the plaintiff placed in the hands of the Sheriff of the county of Oxford a writ of *fieri facias* in answer to which the Sheriff certified that the defendant was possessed of no goods out of which any part of the amount of the judgment could be realized. Search in the Registry Office of the county resulted in disclosing that by a conveyance dated April 29th, 1913, nearly six months after the issue of the writ, Dr. Ellis for the expressed consideration of "one dollar and other valuable considerations" had conveyed to Mrs. Martha Bowman, his co-defendant in the present action, his residence in Norwich, called Maplehurst, situate on lot 15 on the west side of Glover street.

By the same conveyance he granted to Mrs. Bowman lot No. 16, adjoining Maplehurst. This was vacant property purchased from Dr. Ellis by Mrs. Bowman some years ago, and in fact conveyed to her. The deed, however, was not registered and was lost or mislaid. It was conceded at the trial before me that Mrs. Bowman is rightfully entitled to lot No. 16. The attack made in the pleadings on the transfer to her by Dr. Ellis in September, 1913, of two mortgages, was formally abandoned at the hearing, where the plaintiff's claim was limited to the contention that the conveyance of Maplehurst to Mrs. Bowman was fraudulent and void as against the plaintiff.

The sorrowful story of some of the domestic troubles in the Ellis household, and of the litigation which ensued is indicated in the exhibits filed and in the judgment of the learned Chancellor.

After the settlement in November, 1910, of the action for alimony, Dr. Ellis considered that he was not bound to pay his wife more than the $400 a year which he agreed to pay her in settlement of that suit, and, to quote from his Lordship's judgment (p. 1462): "A further concession of one-third out of the proceeds to be derived from the sale of the husband's house when it was sold (which holds good for all the future); and that house is said to be worth at least $4,000." The house referred to is Maplehurst.

Dr. Ellis was, however, found by his Lordship to be liable to his wife not only for the $400 and the share which he had conceded to her out of Maplehurst, whenever sold, but also for $2,288, money advanced to him for investment and not claimed in the action for alimony. The finding was arrived at in a conflict of evidence between the parties themselves, in which the experienced and observant Judge who heard their testimony determined that the wife's recollection was the more accurate, and her version of affairs the more correct.

Upon the main issue so determined—a mere question of fact—there could be but slight prospect of success upon the appeal which was taken by Dr. Ellis. However this may be, Dr. Ellis, while the appeal was pending, made the conveyance of Maplehurst now attacked by his wife. Had he sold the property, as was contemplated when the settlement was made of the alimony action, Mrs. Ellis would have been entitled to one-third of the price. He conceived a scheme for the disposal of Maplehurst to Mrs. Bowman in such a manner that while its value was $4,000, there would be no proceeds out of which the stipulated third could be paid. When asked by his wife's solicitor upon examination for discovery (Q. 56), "Why did you convey this property?" he answered: "Because I do not think that you and she are any better than thieves." So far as Dr. Ellis is concerned, a fraudulent purpose and design was undoubtedly formed and carried out to prevent his wife from realizing a cent out of the sale of Maplehurst, or upon a judgment in the suit which had been determined against him, if not when he made, at least when he registered, the conveyance now impeached.

He and his co-defendant proffer an agreement purporting to be made on December 1st, 1910, or within ten days

after the date of the agreement that Mrs. Ellis should receive $400 annually and one-third of the proceeds of the sale of the residence. I am inclined to doubt that it was made on the date it bears, although there is no evidence to contradict the statement to that effect of the parties concerned. It was made in two parts—both in the handwriting of Dr. Ellis. He held one; the other he gave to Mrs. Bowman. None but themselves knew the purport of the agreement. It recites that Dr. Ellis has recently obtained a judicial separation from his wife—an inaccurate statement; that it is therefore necessary for him to engage a suitable housekeeper; that he has been unable to secure such a person; that he is the owner of Maplehurst; that Mrs. Bowman has agreed to become his housekeeper and do certain painting and decorating in the residence within two years. Then Dr. Ellis agrees that he will "whenever required" execute for value received a conveyance of Maplehurst to Mrs. Bowman, who is "declared to be the owner of the above-mentioned property whenever required" by her. Dr. Ellis is to pay taxes and repairs apart from the painting, etc., mentioned. He is to "have quiet occupancy while he desires to live in Norwich." No sale is to be made without the consent of both parties.

Upon the execution of the deed of transfer to Mrs. Bowman she is to make a will devising to Dr. Ellis at her death all her interest in Maplehurst—that is, the freehold conveyed subject to the dower of Mrs. Ellis if then living.

In case the menage should terminate owing to the incapacity or unwillingness of the lady to continue as housekeeper, she is to be entitled to receive "such sum of money or its equivalent" as arbitrators may determine. Should she die the agreement is to be null and void if the conveyance referred to has not been executed.

Dr. Ellis agrees to make a will consistent with the agreement to secure Mrs. Bowman from loss in the event of his death. Should he cease within five years to reside in Norwich, an arbitration is to decide "what sum of money or its equivalent" Mrs. Bowman is entitled to "over and above a fair claim for services."

The decision of the arbitrators in both cases is "to be final and a bar to any legal process and (scil. in the event of arbitration) this agreement to be void.

On the date stated in the agreement Dr. Ellis had living with him two grown-up daughters, either of whom was competent to assume the direction of his household, and a son of about seventeen—an invalid, but capable of doing such work as attending to the heating of the residence.

There was accordingly no such necessity as the defendants speak of for the engagement of Mrs. Bowman as housekeeper, though it is doubtless the fact—as she states—that owing to the scandal no other woman in Norwich would have accepted the position. How far she herself was affected by the scandal does not appear except from the insulting and disgusting letters which she addressed to Mrs. Ellis and her surviving daughter. The letters shew an intimate knowledge of Dr. Ellis's affairs, and a malignity towards the two women unrestrained by any consideration of propriety or decency. They otherwise manifest the writer to be of such a character that, after seeing and hearing her, I am not inclined to accept any of her testimony in support of the attacked conveyance, or the agreement on which it is based, except where corroborated by some one other than Dr. Ellis, or by the circumstances of the case.

No such corroboration exists. On the other hand there are many circumstances in addition to her familiarity with the doctor's affairs and her hostility to his wife, which lead me to conclude that Mrs. Bowman was a party to the scheme of her co-defendant not only to deprive his wife of any share out of the proceeds of a sale of Maplehurst, but also to prevent her from recovering under the judgment obtained against him in June, 1913.

The conveyance attacked bears like the agreement, a date prior to the date of the judgment. I doubt that it was made on the date it bears. The script in the document is all in the handwriting of the defendant Ellis, who could insert any date he pleased. The ink of the date is quite different from that used in the body of the conveyance and in the signatures, but is like that employed in the endorsement made by the doctor, probably in the Registry Office, of his co-defendant's name on the assignments of mortgage. The deed was not registered until September 8th, 1913, when it was registered by Dr. Ellis himself. On the same occasion he registered the transfers to Mrs. Bowman—also prepared by himself—of his only other property eligible under execu-

tion—the two mortgages. Mrs. Bowman gave Dr. Ellis a cheque for the amount of the two mortgages, but she had no examination of the conveyance or the assignments of mortgage made, nor did she cause the title of any of the properties to be investigated. There was no adjustment of taxes. Maplehurst continued assessed as the property of Dr. Ellis. He continued to occupy it, and paid Mrs. Bowman no rent. Mrs. Bowman continued to be his housekeeper, receiving, however, no salary. She executed a will benefitting Dr. Ellis, at least as far as Maplehurst was concerned. There are no other suggestive circumstances, but I have, I think, stated sufficient to shew that while fraud is not lightly to be inferred, Mrs. Bowman's whole conduct in regard to the transfer, to her of Maplehurst is as inconsistent as her co-defendant's with honesty of purpose and good faith.

I therefore direct that judgment should be entered declaring the conveyance in question fraudulent and void as against the plaintiff, and that the registration thereof should be vacated. The plaintiff is also entitled to costs.

Stay of thirty days.

HON. MR. JUSTICE MIDDLETON, JUNE 30TH, 1914.

RE RISPIN.

6 O. W. N. 669.

Will—Legacies—Insufficiency of Estate to Pay in Full—Abatement—Legacy to Creditor in Satisfaction of Debt—Claim to Priority—Payment of Legacy in Full by Executors—Allowance by Surrogate Court Judge—Appeal — Originating Notice—Determination of Question Arising on Will.

MIDDLETON, J., *held*, that a legacy given in satisfaction of an ascertained debt did not take priority to the claims of the other legatees and that, therefore, such legacy abated *pari passu* with the other legacies in order to satisfy the claims of creditors.

Re Wedmore, [1907] 2 Ch. 277, followed.

Motion by way of an appeal from the determination of the Surrogate Judge with reference to a payment of a legacy of $1,500, made by the executors to Dr. Tisdall, heard at London Weekly Court, 27th June, 1913.

T. G. Meredith, K.C., for the applicant.

W. R. Meredith, for the executors.

U. A. Buchner, for Dr. Tisdall, a legatee.

HON. MR. JUSTICE MIDDLETON:—Some question was raised as to the jurisdiction of the Surrogate Judge to deal with this question upon an audit. To avoid doubt it was agreed by all parties that this motion should be treated not merely as an appeal from the learned Surrogate Judge, but also as a motion as upon originating notice to determine the question now arising.

By his will the testator gave a number of pecuniary legacies, including among others a legacy of $1,500 to Dr. Tisdall, who had been attending him during his last illness. This legacy was to be taken in satisfaction of the doctor's bill against the testator. This bill at the time of the decease would amount to about $300. The question is whether the fact that Dr. Tisdall was a creditor, and that the legacy was to be accepted by him in satisfaction of his claim, gives him priority over the other legatees. The estate has not turned out as well as contemplated by the deceased and the general pecuniary legatees will not receive more than fifty cents on the dollar.

The precise point is determined in favour of the statement by the decision in *Re Wedmore*, [1907] 2 Ch. 277, where it was determined that the principle by which a legacy given in satisfaction of dower was entitled to priority and did not abate, was inapplicable to the case of a legacy given in satisfaction of an ascertained debt. The learned Surrogate Judge has declined to follow this decision, deeming it to be in conflict with the principles enunciated in a number of earlier cases.

No doubt, there are dicta looking the other way; but this is the only decision upon the precise question; and I think the safer course is to follow this decision, so long as it is not overruled by some Court of higher authority. In the last edition of Theobald, the case is accepted without question, and the statement adhering in the earlier editions of that work which favours the view entertained by the learned Surrogate Judge has been modified so as to accord with the decision.

With all respect to all those who entertain the contrary view, the decision in question commends itself to me. The law by which a legacy to a widow, in view of dower, is entitled to priority is now too well settled to admit of question. It is in truth based upon the doctrine of election. The

testator, desiring to dispose of property which is not his, namely, his wife's dower interest, in effect offers her a price which he is willing to pay for it. Before those claiming under the testator can take a benefit under his will which deals with this property sought to be purchased from the widow, they must pay the price.

This has no application whatever to the case of a creditor. The testator is not purchasing anything from him; and, although his failure to rank as a creditor may benefit the legatees, it cannot be said that any assets pass from him to the testator or his estate. He takes the legacy by the bounty of the testator. The testator has chosen to limit his bounty by directing that it is conditional upon the creditor waiving his claim as creditor. The bounty is so much the less, because part of the money received in truth represents a debt. The creditor should have the right, and, no doubt, has the right, to decline to receive the legacy upon these terms. He could then assert his claim; but I conceive no foundation for the statement that because a debt, which may be trivial in amount, has to be forgiven as a condition for the receipt of the legacy, the legatee, therefore, acquires priority.

The testator's bounty is limited by the inadequacy of his estate, so all the beneficiaries should abate.

If the intention of the testator is to be sought, it is inconceivable that this would justify the contention of the legatees. If the testator had realized that his estate might not be sufficient to pay all, is it likely that he would intend his doctor, whose bill was only $300, to receive the $1,500 in full, at the expense of the mere relatives whose legacies would have to abate?

For these reasons, I think the appeal should be allowed and that an order should now be made on the originating notice declaring that the legacy to the doctor abates *pari passu* with the other legacies.

The costs will come out of the estate.

HON. MR. JUSTICE LENNOX. JUNE 30TH, 1914.

MATILDA SODEN v. TOMIKO MILLS.

6 O. W. N. 656.

Master and Servant—Death of Servant—Negligence—Knowledge of Possible Danger—Instruction — Warning — Death Caused by Want of Care on Part of Deceased—Findings of Fact of Trial Judge—Costs.

A new and unskilful employee of defendant company was killed while operating one of their machines which was proved to be efficient and safe. The conditions involved liability to injury to an inexperienced operator. The deceased was instructed and warned before he entered upon his employment, and, accordingly, realized the dangers of his occupation.

LENNOX, J., *held*, that the employer was not liable since the *causa causans* of the accident was the negligence of the deceased. *Drolet* v. *Denis*, 48 S. C. R. 510, followed.

Action by Matilda Soden, widow of John Soden, to recover damages for his death, while working in defendants' lumber yard, by lumber falling upon him while he was engaged in removing it, owing, as the plaintiff alleged, to the negligence of the defendants.

The action was tried without a jury.

J. C. Makins, K.C., for plaintiff.

A. E. Fripp, K.C., for defendants.

HON. MR. JUSTICE LENNOX:—The plaintiff has failed to establish a cause of action against the defendant company. In the situation in which he was placed by the company on the 28th September, 1912, the plaintiff's husband, John Soden, could, notwithstanding the negligence of the company, if there was any, by the exercise of reasonable care on his part have avoided the accident, which resulted in his death.

It is true that if employers of labour knowingly place an ignorant or unskilled employee in a situation which, although not necessarily unsafe, is yet likely or liable to cause injury to an ignorant or inexperienced operator, it is the duty of the employers to instruct their employee as to the proper method of operation, approach or control, and to warn him of incidental dangers before exposing him to the risk. Neglect of this, and injury resulting as the proximate cause, will subject the employers to damages. *Drolet* v. *Denis*, 48

S. C. R. 510. It is alleged that the gangway and appliances in connection with it were constructed in an improper way and were defective in detail, and I think they were at one time. Subsequently, however, and before the happening of the accident complained of, a new system of fastening the levers was adopted, and there is evidence, which has not been directly met, that by this means a condition of efficiency and safety was secured. I cannot, therefore, find as a fact, because there is no evidence to establish it, that at the time of the casualty, the condition or arrangement of the ways and their appliances were defective, or were out of repair, or were unsafe for an employee, acquainted with the conditions and situation, and exercising ordinary intelligence and care; but, all the same, the arrangements were of a character that might readily prove fatal to a green hand—to a new or inexperienced operator—and the defendant company, if legally, are not morally, blameless, for by a few moments' thought, a trifling expenditure, and the exercise of the most elementary mechanical skill, every element of danger could have been eliminated.

The question then is: Had the deceased, in the circumstances of this case, having regard to the condition of the ways at the time, a fair chance to protect himself, did the defendant company negligently expose him to a danger, of which he was ignorant, and what was the immediate cause of the injury?

If, as I have said, the conditions involved a liability to injury, obvious to the company, though remote—and I have already found this to be the fact, and the event proved it, and if this man was wholly ignorant of the danger and met his death through want of instruction and warning, the plaintiff is entitled to damages.

The plaintiff's husband was not directly instructed by the defendant company or by anyone in superintendence as to the proper method of executing the work he was engaged in at the time of the accident, nor was he directly warned as to the probable consequence, in case of pulling out the wrong pin. But he was working in the yard for a long time in the neighbourhood of others who were performing this service from day to day, and the proper method to be employed to lower the pile of lumber, and the effect of pulling a pin in an adjoining compartment while standing in the compart-

ment was so obvious that it would not be unreasonable to infer that he knew just what ought to be done and how to do it with safety to himself, before he ever engaged in this service for the company. But there is more than this. He had on several occasions before the day of the accident been engaged in the same work, and had been shewn how to do it by a fellow-labourer, and had at least upon one occasion been warned by this man, Howe, of the danger involved in pulling out the pin in the compartment he was standing in; and his answer at the time would indicate that he fully appreciated the risk involved. He had, too, on the day of the accident, in conjunction with Foucault, but each taking his own part of the work, already successfully let down three piles of lumber and apparently understood just how to do it.

I am forced to the conclusion that at the time of the casualty the deceased understood how to perform the work in which he was engaged, with safety to himself; that he knew that the pin he should then pull was the pin near him in compartment No. 5; that he appreciated the danger involved in pulling the pin in compartment No. 6, in which he was then standing; that he thoughtlessly and inadvertently—but not through want of knowledge—pulled the pin in No. 6, instead of No. 5, and that this was the cause of his death.

The action will be dismissed, and, as the defendants are not entirely blameless, it will be dismissed without costs, but with liberty to the defendants, if they desire to do so, to appeal on the question of costs.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

RE ELLIOTT INFANTS.

6 O. W. N. 664.

Infants—Custody—Children's Protection Act of Ontario—Order of Police Magistrate—Application by Father for Custody—Welfare of Children.

MIDDLETON, J., refused to interfere with a magistrate's order giving into the custody of the Children's Aid Society, the children of a father who deserted and neglected them, on the ground that the said order was for the welfare of the children.

Application by the father of the infants, on return of a *habeas corpus,* for an order for delivery of the custody of the infants to the applicant by a Children's Aid Society.

Eric N. Armour, for the father.

J. R. Cartwright, K.C., for the Children's Aid Society.

HON. MR. JUSTICE MIDDLETON:—These children have been taken into custody by the Children's Aid Society, and the case was heard at great length before the Police Magistrate at Belleville.

The evidence, taken in shorthand, covers 137 full pages. In the result, the Magistrate, by reason of the father's neglect, ordered the children to be made wards of the Children's Aid Society, and directed the County of Hastings to contribute towards their maintenance and support until a foster home is provided. The children are yet in the custody of the Society. Application is now made by the father for an order restoring to him the custody of the child.

Upon the evidence, which commended itself to the Magistrate, and which I see no reason to disbelieve, it is quite plain that the father did desert and neglect his children; and I think that as a matter of discretion, I should now decline to interfere. Having regard to the welfare of the children, I am satisfied that they will be better cared for as wards of the society than they ever have been by the father.

As usual in cases of this kind, there are not lacking those whose sympathy with the father has resulted in affidavits strongly suporting his case; but these are more than offset by the affidavits in answer; and the police magistrate, who is a careful and experienced man, has had the great

advantage of seeing the witnesses and hearing the oral evidence; and his view is not lightly to be interfered with. Quite apart from this, my own view is that the children are better as they now are.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

RE MILLER.

6 O. W. N. 665.

Will—Construction—Absolute Gift—Subsequent Words Cutting down—Effect of—Gift over—Failure.

MIDDLETON, J., *held*, that a gift over of any balance that might remain at the death of a beneficiary of an absolute gift was repugnant and void.

Constable v. *Bull*, 3 DeG. & Sm. 411; *Re Walker* (1898), 1 Irish 5; *Re Jones* (1898), 1 Ch. 438: referred to.

Motion by the executors of Sarah E. Miller, deceased, upon an originating notice, for an order determining a question arising as to the construction of her will.

F. P. Betts, K.C., for the executors.

T. G. Meredith, K.C., for the next of kin of W. B. Chase.

T. Coleridge, for the residuary legatee of the testator.

HON. MR. JUSTICE MIDDLETON:—By her will, dated the 4th March, 1904, Sarah E. Miller, who died on the 23rd of February, 1911, after certain minor bequests, gives her property to her brother William B. Chase, "with power to sell and dispose of, as full as I could do now, my real estate, consisting of houses 147 and 151 on Horton street in the city of London, and 7 lots in Knowlwood Park near the city of London, and 3 lots in Oxford Park, also in and near the city of London; and it is my will and intent that my said brother William B. Chase shall use so much of the proceeds of my property as shall be necessary to provide a comfortable maintenance for him during his lifetime, and that if any of my property, or the proceeds thereof shall not be necessary for the comfortable maintenance of my said brother and shall remain at his death, then such part so remaining shall be divided equally between my niece Sarah Smuck, and my

nephew LeRoy Chase." The brother, William B. Chase, was appointed sole executor of the will.

Chase was a paralytic; and evidently the main object of the testator's beneficence. He survived the testatrix, and died at the Home for Incurables in the city of London, on the 22nd June, 1913. At the time of his death he had $501.85 in cash, and there was a balance due upon an agreement for sale of the houses amounting to $1,911.35. The 3 Oxford Park lots also remained; they are valued at $200. This makes a total of $2,613.20; all of which originated, it is admitted, from the sister's estate.

The question is whether the gift over to his nephew and niece can take effect. This question resolves itself into a determination whether there can be found in the will anything to cut down the absolute gift to the son.

In the much discussed case of *Constable* v. *Bull*, 3 DeG. and Sm. 411, it was held that the words there found, perhaps not very widely different from the words here used, cut down the gift to a life estate. In the Irish case of *Re Walker* (1898), 1 Irish p. 5, the true principle is well explained.

The choice is between an absolute gift and a life estate. There does not seem to be any middle ground. If the beneficiary has the right to deal with the corpus, then the gift of any balance that may remain is repugnant and void, for the property is vested in the first taker absolutely, and the attempt to give what remains at the death of that first taker is an attempt to do something not permitted by law.

The same result is arrived at in *Re Jones* (1898), 1 Ch. 438. There a testator gave absolutely to the widow, and what remained at her death over. It was held that this failed.

It is probably impossible to reconcile all the cases satisfactorily; but the tendency of all the later cases is against the attempt to cut down an absolute estate to a life estate, unless the testator's intention is clear beyond peradventure.

The order will therefore declare that the property vested in William B. Chase absolutely, and that the attempted gift over fails to take effect.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

MCPHERSON v. U. S. FIDELITY CO.

6 O. W. N. 677.

Execution—Judgment—Satisfaction—Interpleader Issue—Fraudulent Claim — Judgment for Instalments of Purchase-price of Land — Resale of Mill on Land by Vendor — Sale of Land — —Effect Upon Judgment—Judgment for Costs—Damages—Independent Cause of Action—Action on Interpleader Bond—Limitation of Amount Recoverable.

MIDDLETON, J., *held*, that "a mill and machinery" constituted an interest in land.

Lavery v. *Pursell*, 39 C. D. 508; *Marshall* v. *Green*, 1 C. P. D. 35; *Kauri Timber Co.* v. *Commissioner of Taxes*, [1913] A. C. 771: followed.

Held, therefore, where A. sold to B. a "mill and machinery" to be paid for by instalments, that a re-sale by the vendor who had recovered judgment for only two of the instalments operated to wipe out the said judgment and precluded him from proceeding upon the judgment for the balance of his claim.

Cameron v. *Bradbury*, 9 Grant, 67; *Gibbons* v. *Cozens*, 29 O. R. 356: followed.

Held, however, that the vendor was not precluded from enforcing the judgment for costs on the ground that costs were a new and independent cause of action.

Action upon an interpleader bond tried contemporaneously with an issue for the purpose of determining whether the judgment in the action of *McPherson* v. *McGuire* has been satisfied in whole or in part. See *McPherson* v. *Temiskaming Lumber Co.* (1911), 18 O. W. R. 319, 811, 2 O. W. R. 13, [1913] A. C. 145.

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

G. H. Kilmer, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—On the 3rd of August, 1907, an agreement was made between McPherson and McGuire dealing with many matters. Clause 10 is the only one now of importance. McGuire agreed "to buy the Maclean sawmill and machinery as it stands to-day at the sum of $7,500 to be delivered in as good state and condition as at the present, at the end of the present season of sawing."

In April, 1908, a further agreement was arrived at by which the price of the mill was agreed to be paid in three annual instalments, of $2,500 each, with interest, the first instalment to be paid in one year.

In December, 1908, an accounting took place and an agreement was drawn embodying the result of the accounting.

An action was brought to recover the first instalment of the price of the sawmill and other moneys alleged to be due to McPherson. In this action judgment in the first instance went by default, and upon an application being made the action was allowed to proceed to try the amount due, the judgment in the meantime standing as security to the plaintiff. The result of the litigation was to reduce the amount for which judgment had been signed from $3,961 to $3,232.42; but the execution issued upon the judgment has not been correspondingly amended. It was agreed by all parties that this should now be done. As the result of this litigation further costs were awarded and executions have been issued for these, $504.17 and $78.98.

When the second instalment came due another action was brought. Judgment was recovered in it for $2,590.62 and $135 for costs.

In addition to these executions, two other executions were issued by Booth for $1,007.50, but it is admitted that there is only one debt. This makes a total upon the execution in the sheriff's hands, exclusive of sheriff's fees, of something in the neighbourhood of $9,500, under these executions when interest is added.

The sheriff seized certain logs. These were claimed by the Temiskaming Lumber Co., Limited. An interpleader issue was directed, and it was provided that upon the lumber company giving to the execution creditors, McPherson & Booth, security for the amount of the appraised value of the goods seized, after deducting the sum of $6,381, the Crown dues, the sheriff would withdraw from possession.

Although all these different writs of execution were in the hands of the sheriff, the interpleader issue referred to McPherson's writ under the first judgment and Booth's writ, by an erroneous date; but the issue was whether at the time of the seizure the goods were the property of the claimant as against the execution creditors.

An interpleader bond was given by the defendant company in the penal sum of $10,000. It recites the recovery of McPherson's first judgment, $3,961, Booth's judgment for $1,007.50, giving the correct date of the execution, the interpleader order, and the terms under which the sheriff was to withdraw from possession; and the condition is then

that if, upon the trial or determination of the said issue, the finding is in favour of McPherson and Booth, the company shall pay to them $10,000 or a less amount according to the direction of any order to be made in the matter of the interpleader.

The interpleader issue was finally determined in favour of the execution creditor upon an appeal to the Privy Council on the 16th December, 1912.

The first contention now made arises from the fact that after the recovery of the judgments for the two instalments of the purchase price of the mill, McPherson sold not only the land upon which the mill was, but the mill itself. McPherson claims that he did this with the knowledge and approval of McGuire. I do not think he has established any agreement with McGuire authorizing the sale. The mill stood upon the land, unused and deteriorating. Insurance and taxes had accumulated against it, amounting to $1,200. It was sold for $1,780. McPherson is ready to allow this sale to wipe out any balance due to him by McGuire, without prejudice to his claim against the defendant company. What is contended is that this re-sale by the vendor operates, as a matter of law, to wipe out the judgments obtained for the past due instalments.

Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass.

The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the re-sale by the plaintiff prevents the further enforcement of the judgment.

In *Lavery* v. *Pursell*, 39 C. D. 508, it was held by Mr. Justice Chitty that the sale of the building materials of a house, with the condition that such building should be taken down and the building materials removed from the land, was a contract for a sale of an interest in lands. I think I should follow this case. It purports to distinguish the sale of materials in an existing building from a case of the sale of growing timber. The distinction is by no means easy to follow. I do not think that Mr. Justice Chitty is

to be taken as dissenting from the view expressed in *Marshall* v. *Green,* but rather as distinguishing the case of a building from the case of a tree growing upon the land.

Marshall v. *Green,* 1 C. P D. 35, to which he refers, is cited with unqualified approval in *Kauri Timber Co.* v. *Commissioner of Taxes,* [1913] A. C. 771.

If this building is to be regarded as land, then, according to the decision in *Cameron* v. *Bradbury,* 9 Grant, 67, and *Gibbons* v. *Cozens,* 29 O. R. 356, by re-selling, the vendor has precluded himself from afterwards proceeding upon his judgment for the balance of the claim.

I do not think that this precludes the enforcing of the judgment for the costs thereby awarded. These costs are not like interest, accessory to the demand, but are damages awarded to compensate for the trouble and expense to which the plaintiff is put by the litigation. They are a new and independent cause of action.

If I am right in these findings, it follows that the execution in respect of the instalments should be directed to be withdrawn, owing to the re-sale of the mill by the plaintiff, and that the executions with respect to costs should be declared to remain in force.

The defendants make a further contention which requires to be carefully examined. At the time the claimant acquired title, there were only the earlier executions in the sheriff's hands, and the issue was confined to these executions. I quite agree with Mr. Laidlaw's contention that the interpleader order was intended to be, and is, wide enough to allow these creditors to come in and participate with their executions; but the point is that the judgment of the judicial committee merely determines the invalidity of the claimants' title as to the executions in the hands of the sheriff at the time that title was acquired. The head-note states accurately the ground of decision:

"Where execution is levied upon timber cut by an assignee of the licensee under an assignment made subsequent to the issue of the writ, the levy is valid unless it is shewn that the assignee acquired his title in good faith and for valuable consideration, without notice of the execution, and has paid his purchase money."

The concluding paragraph of the reasons for judgment is: "In the result, their lordships are of opinion that the

right of both of the appellants under the three executions referred to fall to be satisfied out of the $10,000 secured by the bond." From this, it is argued that the effect of the judgment is to confine the liability of the defendants to the amount remaining due on these three executions.

I cannot assent to this, because it is clear that it is held that the Temiskaming Lumber Co. never became in fact *bona fide* purchasers, that their whole claim was fraudulent, and, therefore, I think it should be held that it was invalid as to all the executions which became entitled to share under the interpleader order.

The bond provides for payment of the full $10,000 or a less amount thereof, according to the directions of any order of the Court or Judge to be made in the matter of the interpleader.

I draw the attention of counsel to this, and they consented to my dealing with the matter upon the theory that such an application had been made. I think that the amount should be reduced so as to cover the costs due to McPherson and any further balance outside of the instalments of the purchase money of the mill. As I understand the case, the first judgment covers more than the first instalment.

In the result, I think that the Booth execution and the other executions placed in the sheriff's hands, so far as they are not wiped out by the declaration I have made, are entitled to share. If the parties cannot agree upon the amount, I may be spoken to.

As the defendants did not pay into Court anything upon the bond, I think they should pay the costs of the action, and that McPherson should pay the costs of the issue.