The
Ontario Weekly Notes

VOL. XII. TORONTO, MARCH 30, 1917. No. 3

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. MARCH 19TH, 1917.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. BANK OF OTTAWA.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. MURPHY.

Consolidation of Actions—Addition of Parties—Attorney-General—Avoidance of Multiplicity of Actions—Judicature Act, R.S.O. 1914 ch. 56, sec. 16 (h)—Rules 66-69, 134, 320—Costs.

These three actions followed the determination by the Privy Council of three previous actions. In Mackell v. Ottawa Separate School Trustees, the judgment of the Appellate Division (1915), 34 O.L.R. 335, was affirmed by the Judicial Committee, which held that the regulations of the Ontario Department of Education governing separate schools were valid. In Ottawa Separate School Trustees v. City of Ottawa and in Ottawa Separate School Trustees v. Quebec Bank, the judgment of the Appellate Division (1916), 36 O.L.R. 485, was varied, and the Act of the Ontario Legislature appointing a Commission to manage the schools in place of the trustees was declared ultra vires and invalid, and liberty was reserved to the appellants (the trustees) to apply to the Supreme Court of Ontario for relief in accordance with this declaration. The trustees did not apply in the former actions, but brought three new actions, the third one being against Murphy and others, the members of the Commission appointed under the statute which was declared ultra vires, to recover $84,000 paid to the Commission from separate school taxes collected by the

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

Corporation of the City of Ottawa. The first action was to recover $107,000 paid by the Quebec Bank to the Commission, being moneys which stood to the credit of the trustees when the Commission took over the management of the schools, and some portion of which was used by the Commission in carrying on the schools pending the litigation. The second action was against the Bank of Ottawa in the same or similar circumstances. The banks, in paying over the money to the Commission, had the authority of the Provincial Executive, and an undertaking for indemnity.

The Attorney-General for Ontario desired to intervene in the present litigation; and Mackell and others, the ratepayers who were successful in their action, desired to be represented in the new actions to see that the money of the ratepayers was not sacrificed.

Three motions were now made: (1) by the Commission and Mackell et al., in the old action of Ottawa Separate School Trustees v. Quebec Bank and in the new action of the trustees against the same bank, for an order staying all proceedings in the second action until an application should be made pursuant to the leave reserved by the Judicial Committee or for an order adding as parties those interested in the fund; (2) a motion by the Quebec Bank for an order adding as defendants the Commission or the individual members and the Attorney-General; (3) a similar motion by the Bank of Ottawa.

The motions were heard in Chambers.

G. F. Henderson, K.C., for the Quebec Bank.

H. S. White, for the Bank of Ottawa.

A. C. McMaster, for the trustees.

W. N. Tilley, K.C., for the Commission and for Mackell and others.

McGregor Young, K.C., for the Attorney-General.

MIDDLETON, J., in a written judgment, said that the ends of justice required that the rights of all parties in respect to all questions which might arise by reason of the finding of the Judicial Committee that the legislation appointing the Commission was ultra vires should be determined in one action. The Rules and practice are sufficient to prevent a contrary result; and no cases stand in the way of an order which will enable all the matters to be dealt with at a single trial.

Reference to Smurthwaite v. Hannay, [1894] A.C. 494; Judicature Act, R.S.O. 1914 ch. 56, sec. 16 (*h*); Rules 66, 67, 68, 69, 134, 320; Byrne v. Brown (1889), 22 Q.B.D. 657; Barton v. London

and North Western R.W. Co. (1888), 38 Ch. D. 145; McCheane v. Gyles, [1902] 1 Ch. 911; Kendall v. Hamilton (1879), 4 App. Cas. 504; McArthur v. Hood (1855), 1 Cab. & El. 550; Montgomery v. Foy Morgan & Co., [1895] 2 Q.B. 321; Moser v. Marsden, [1892] 1 Ch. 487.

The proper order is to direct the consolidation of the three actions now pending and to direct that they shall proceed as one action in which the Ottawa Separate School Trustees shall be plaintiffs, and the banks, the members of the Commission, the Attorney-General, and Mackell et al. (representing the class of ratepayers), shall be defendants, and the statements of claim already delivered shall stand, unless the plaintiffs elect to deliver a new statement of claim.

The question of costs occasioned by the addition of these parties against the plaintiffs' desire is reserved to be dealt with at the trial, so that justice may be done—due regard being had to all circumstances that may then appear.

The defendants must evolve the issues between the plaintiff and themselves and among themselves as they may be advised.

Costs of the motions to be costs in the cause.

SUTHERLAND, J. MARCH 20TH, 1917.

RE DOAK AND FREEMAN.

Vendor and Purchaser—Agreement for Sale of Land—Title under Will—Life Estate—Direction to Sell—Distribution of Proceeds—Vested Interests—Executor—Implied Power of Sale—Conveyances—Parties to.

Motion by the vendors in an agreement for the sale and purchase of land (a farm) for an order under the Vendors and Purchasers Act declaring that the vendors can give a good title thereto.

The motion was heard in the Weekly Court at Toronto.

T. J. Agar, for the vendors.

J. D. Bissett, for the purchaser.

SUTHERLAND, J., in a written judgment, said that John B. Freeman was the owner at the time of his death on the 22nd November, 1890, of the land in question, and that by his last will and testament, dated the 27th September, 1888, he disposed

of his real estate as follows: "My real estate, consisting of the farm . . . I give in trust to my wife Jane Freeman during her lifetime for her use and benefit, excepting the following charges upon the same . . . my sister Marianna Freeman is to have a home and her support from the farm as long as she desires to remain there and is unmarried; my adopted daughter Isabel to have a home upon the farm, and her support also, as long as she remains unmarried. . . . At the death of my wife . . . the aforesaid farm shall be sold and the proceeds divided as follows: my sister Marianna Freeman to have one-third of the moneys from sale of farm, and my adopted daughter Isabel Freeman to have one-half of the proceeds from sale of farm, if single, and one-third if married; such moneys to be paid them as soon as the payments are made upon the property sold. The residue from sale of farm shall be divided between any of my sisters living, share and share alike, excepting my sister Marianna Freeman. Should my wife . . . outlive my sister Marianna Freeman and my adopted daughter Isabel Freeman, then the shares that would have gone to them shall be divided, and two shares I give to my brother Charles Edwin Freeman, one share to his son Charles, and the remainder to such of my sisters as may be living, share and share alike."

One John D. Freeman, a son of Isaac W. Freeman, a brother of the testator John B. Freeman, who died in his lifetime, was desirous of purchasing the farm. He had obtained conveyances from Jane Freeman, the widow, Marianna Freeman and Isabel Freeman, now Plaistow, as well as from Charles Edwin Freeman and his son, Charles Archibald S. Freeman, and the other heirs and heiresses at law and next of kin of John B. Freeman.

Upon this application an opinion was desired as to whether a good and sufficient title in fee simple could be given under these conveyances alone, or, if not, by supplementing them with a conveyance from the surviving executor.

The learned Judge was of opinion that the interests taken by the persons named, subject to the life estate of the widow, were vested interests, and that a good title might be made to the purchaser by the conveyances, provided a deed was also obtained from the executor.

In the will it did not appear that any power of sale was expressly conferred upon any one, but the provision for the sale of the farm at the death of the wife would seem to raise an implied power to that effect in the executor, and for this reason it would appear appropriate and necessary for him to execute a conveyance in favour of the purchaser.

SUTHERLAND, J. MARCH 21ST, 1917.

*OTTO v. ROGER AND KELLY.

Ditches and Watercourses Act—Award of Township Engineer—Objections of Land-owner—Drain Crossing Lines of Railway—Railway Company not Subject to Provisions of Act—Insufficient Outlet—Default of Engineer in Personal Attendance—Action to Restrain Engineer and Contractor from Proceeding with Work—Remedy by Appeal to County Court Judge—R.S.O. 1914 ch. 260, sec. 23—Objections Covered by—Dismissal of Action.

Action by J. R. Otto, the owner of a lot in the 3rd concession of the township of South Easthope, against John Roger, the township engineer, and Thomas Kelly, the contractor for certain drainage or ditching work directed, by an award under the Ditches and Watercourses Act, R.S.O. 1914 ch. 260, to be done in the township, to restrain the defendants from proceeding with the work upon the plaintiff's land and for damages.

The action was tried without a jury at Stratford.

R. S. Robertson, for the plaintiff.

G. G. McPherson, K.C., for the defendant Roger.

W. G. Owens, for the defendant Kelly.

SUTHERLAND, J., in a written judgment, after setting out the facts and summarising the pleadings, referred to the following sections of the Act: 3 (*f*), 5 (1), 6 (1), 13, 14, 16 (1), (3), 19 (2), (3), 22, 23; and said that the Act was intended to simplify and make as inexpensive as possible local drainage works; and the tendency of legislation with respect to such matters seemed to have been in the direction of preventing litigation and making an award, when once published and after the time for appeal therefrom had elapsed, binding upon parties who had notice of the proceedings and of the award, notwithstanding a failure to comply strictly with the provisions of the Act, or defects in form or substance in the award or the proceedings prior to the making thereof.

The purpose of the action was to prevent further work upon the drain; damages were claimed, but they were admittedly trivial and merely incidental.

The plaintiff contended that, as the award directed the Grand Trunk Railway Company to do certain things and pay certain sums, that in itself made the award a nullity unless the company had agreed to be bound, or the approval of the Board of Railway

Commissioners for Canada had previously been obtained under sec. 251 (4) of the Railway Act, R.S.C. 1906 ch. 37. No agreement or approval was shewn; but it was shewn that the drain crossed the line of the Grand Trunk by a culvert nearer the head or starting-point of the drain than the land of the plaintiff, and that a portion of the drain through the company's land had been already constructed without any objection on the part of the railway company so far as anything disclosed at the trial shewed.

In Miller v. Grand Trunk R.W. Co. (1880), 45 U.C.R. 222, it was held that the defendants were not subject to the provisions of the Act as it then stood, R.S.O. 1877 ch. 199.

The second objection was, that the outlet provided was not sufficient: sec. 6 of the statute.

The third contention was, that it was obligatory on the part of the engineer, under sec. 16 (1) of the Act, to attend personally at the time and place appointed by him and examine the locality, and that, having failed to attend, he had no power to make an award at all.

Re Robertson and Township of North Easthope (1888-9), 15 O.R. 423, 16 A.R. 214, referred to.

The learned Judge, after discussing the three grounds of action mentioned, pointed out changes in the Act made in the Act of 1912 (secs. 21, 22, 23, which are the same in R.S.O. 1914 ch. 260). Section 23 provides that an award, after the time limited for an appeal to the County Court Judge has elapsed, shall be valid and binding notwithstanding any defect in form or substance either in it or in any of the proceedings prior to the making of the award. This covered all the objections referred to. The plaintiff said that he contemplated appealing from the award, but through ignorance or inadvertence failed to do so within the time allowed by the Act. He did not say that he was misled.

Action dismissed with costs.

CLUTE, J. MARCH 22ND, 1917.

POLAK v. SWARTZ.

Covenant—Assignment of Covenant Contained in Deed—Covenantors not Executing Deed—Exchange of Properties Subject to Mortgages—Action by Assignee to Enforce Covenant.

The plaintiff, as assignee of a covenant in a deed, sued to recover the amount which the defendants had covenanted to pay.

The defendants denied that they signed the deed containing the covenant, and also alleged that they had an equitable set-off greater than the plaintiff's claim under the covenant.

The action was tried without a jury at Toronto.

L. F. Heyd, K.C., for the plaintiff.

J. A. Macintosh, for the defendants.

CLUTE, J., in a written judgment, said that there was an exchange of properties between one Sonshine and the defendants, upon which properties there were existing mortgages, and the purchasers in each case assumed the mortgages on the property which they received in exchange for their property. No money passed, and default was made by both parties. The plaintiff received from Sonshine an assignment of his interest in the covenant by the defendants, and claimed to recover the full amount due upon the mortgage in respect of which the covenant was said to have been given. The assignment was dated the 26th January, 1916, and, in consideration of one dollar, purported to "grant and assign unto the assignee, his heirs, executors, administrators, and assigns, the said covenant with the said Morris Swartz and Simon Rabinovitch and all benefit and advantage to be derived therefrom."

In the deed of land from Sonshine to the defendants Swartz and Rabinovitch, there was this covenant: "Subject also to registered mortgage incumbrances which the purchasers assume and covenant to pay as part of the said purchase-price;" but this deed was not signed by the defendants, but only by the grantor; and for that reason the assignee could not maintain the action.

Reference to Credit Foncier Franco-Canadien v. Lawrie (1896), 27 O.R. 498; Furness v. Todd (1914), 5 O.W.N. 753, 25 O.W.R. 708; Burnett v. Lynch (1826), 5 B. & C. 589; Witham v. Vane (1881), 44 L.T.R. 718.

Mr. Heyd relied upon British Canadian Loan Co. v. Tear (1893), 23 O.R. 664; Campbell v. Morrison (1897), 24 A.R. 224. These cases shewed that an equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, but were not in conflict with the Credit Foncier case.

It was unnecessary, in this view of the case, to consider the equitable rights which the defendants claimed in respect of the exchange.

Action dismissed with costs.

MIDDLETON, J. MARCH 22ND, 1917.

BALLARD v. MORRIS AND SILVERTHORN.

Master and Servant—Servant "Lent" by Master to Stranger to Assist in Work—Injury to Servant by Negligence of Stranger—Liability of Stranger as Temporary Master or Directly for Negligent Breach of Duty—Non-liability of Real Master.

Action for damages for personal injuries sustained by the plaintiff by reason of negligence for which one or other of the defendants was alleged to be responsible.

The action was tried with a jury at Brantford.

W. S. Brewster, K.C., for the plaintiff.

J. Harley, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that Ballard, a young man employed by Silverthorn, was "lent" by him to Morris to aid in the operation of a small power-saw owned by a syndicate of farmers and used by them to cut wood for domestic purposes on their respective farms.

Ballard, according to the findings of the jury, was injured, while aiding Morris in the operation of the saw, by the personal negligence of Morris.

Ballard assented to the "lending" to Morris, and he then became the servant of Morris during the period of the lending. The work was the work of Morris; and in the numerous cases upon the subject this was shewn to be the test.

But, even if Morris was not the master, he still owed Ballard a duty not to injure him in the course of his employment: Algoma Steel Corporation v. Dubé (1916), 53 S.C.R. 481.

It was argued that Morris as master was not liable for the consequences of his own negligence. But see Thomas v. Quartermaine (1887), 18 Q.B.D. 685, at p. 691, where Bowen, L.J., says: "For his own personal negligence a master was always liable and still is liable at common law both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned."

Common employment as a risk assumed by the servant can only be invoked when the servant seeks to make the master liable for the negligence of a fellow-servant.

No negligence was found against Silverthorn, and there was no justification for suing him.

There should be judgment against Morris for $1,000 and costs, and dismissing the action against Silverthorn with costs.

MIDDLETON, J. MARCH 23RD, 1917.

LINDSAY v. ALMAS.

Contract—Exchange of Plaintiff's Land for Defendant's Goods—Title to Land—Failure of Defendant to Perform Contract—Damages—Value of Goods—Conveyance of Land—Vendor's Lien.

Action for specific performance of an agreement for an exchange of land for goods, or for damages for breach.

The action was tried without a jury at Brantford.

W. S. Brewster, K.C., for the plaintiff.

W. E. Kelly, K.C., for the defendant.

MIDDLETON, J., in a written judgment, made the following findings of fact:—

(1) Almas agreed to the exchange in reliance upon his own judgment as to the value of the farm.

(2) There was no representation as to value—$7,000 was named as a value for exchange merely.

(3) The incumbrances were stated to be $3,000. There was no statement that this was one mortgage.

(4) Objections to title were not made in due time or before the day fixed for closing. There was an agreement extending the time to the following Monday, and no objections in writing were then made.

(5) After action, objections were made, and the plaintiff agreed, without prejudice to his rights, to attempt to answer them.

(6) The objections were satisfactorily answered by the 16th February, within a reasonable time.

(7) A good title was then shewn.

(8) The defendant had, before making the agreement in question, agreed to exchange with one Robinson. He repudiated this agreement, and made a bill of sale to the plaintiff before the time for completion of the exchange, fearing an injunction would be applied for; but this bill of sale never became operative, and the defendant wrongfully refused to carry out the transaction.

(9) While the correspondence over the title was on foot, the defendant made a third agreement for exchange with one Elliott, which was far more advantageous than the bargain in question. This agreement was carried out on the 20th February. This was the real excuse for the repudiation of the bargain in question.

(10) The real value of the goods to be given the plaintiff was $2,000, and the flour was worth $2 per barrel more than the price called for by the contract. The agreement called for 430 barrels. So the damages were $2,000 plus 430 x $2=$2,860 in all.

The defendant, being unable, through his own misconduct, to give the property he promised, was not in a position to complain if called upon to pay its true value. Upon the plaintiff lodging with the Registrar a conveyance of the farm, in which he should be at liberty to reserve a vendor's lien for $2,860 as unpaid purchase-money, he was entitled to recover that sum.

Judgment for the plaintiff for $2,860; no execution to issue till deed lodged with Registrar, with due affidavits of execution, so that, if desired, it may be registered.

The defendant to pay the costs.

CLUTE, J. MARCH 24TH, 1917.

RE FAULKNER LIMITED.

Company—Winding-up—Creditor's Claim for Price of Goods—Preference or Priority over Ordinary Creditors—Sale by Sample—Goods Shipped from Scotland—Freight to be Paid by Purchaser—Act of Insolvency before Acceptance of Goods—Time when Property in Goods Passed—Right of Inspection—Fraud.

Appeal by Arthur & Co., creditors, from the finding and certificate of an Official Referee, upon a reference for the winding-up of Faulkner Limited, an incorporated company, that the appellants were entitled to rank upon the assets of the company in the hands of the liquidator, for the amount of their claim for the price of goods sold, as ordinary creditors only.

The appeal was heard in the Weekly Court at Toronto.

A. C. Heighington, for the appellants, contended that they were entitled to priority for their claim upon two grounds: (1) that the property did not pass before the insolvency; (2) that the company received the goods after asking for a compromise at 60 cents on the dollar, which amounted to a fraud upon the appellants.

G. D. Kelley, for the liquidator, respondent.

CLUTE, J., in a written judgment, said that in October, 1914, the appellants sold to the company, by sample, certain merchan-

dise; the company was to pay freight from Glasgow. The goods were shipped, and arrived at the goods-station in Ottawa on the 19th February, 1915, the company not having money to pay the freight, the goods were transferred to the Customs warehouse. On the 4th March, the company paid the freight on certain of the goods, transferred them to the company's premises, and put them on the shelves. On the 6th March, further freight was paid; on the 8th, the balance, except a small portion, was paid, and a proportionate quantity of the goods was transferred. On the 2nd March, the company, through its agent, offered a compromise at 60 cents on the dollar to its creditors. This was refused; and the company, on the 12th March, made an assignment for the benefit of its creditors; a winding-up order followed.

The contention was that the offer of compromise made on the 2nd March, the company then being insolvent, was such an act of bankruptcy, that the receipt of the goods afterwards amounted to a fraud upon the appellants, and they should have a preference; further, that the property did not pass, as the company was entitled to a reasonable time to inspect, and the assignment was made before that time had elapsed.

The creditors could not succeed upon either of these grounds. The purchaser paying the freight, the delivery was at Glasgow, and upon such delivery the property passed, and nothing occurred subsequently which caused the property to revest. Even if the property did not pass until delivery at Ottawa, the company, before assignment, took possession of the goods and accepted them without objection. There was no stoppage in transitu, nor any action taken by the appellants in any way to retain their claim. The suggestion that an act of insolvency could prevent the property passing, if it had not already passed, was wholly unsupported by authority.

Appeal dismissed with costs.

MIDDLETON, J. MARCH 24TH, 1917.

*MARTIN v. EVANS.

Mortgage—Foreclosure—Final Order—Motion to Open up—Reversionary Interest in Land—Limitations Act, R.S.O. 1914 ch. 75, sec. 20—"Possession"—Effect of, notwithstanding Irregularity in Judgment—"Land"—Sec. 2(c)—Effect of Laches for Statutory Period if Statute not Applicable—Equity Following the Law.

Motion by James Evans and William Evans the younger for an order setting aside a final order of foreclosure dated the 18th June, 1897, or suspending the operation thereof, or directing that the judgment for foreclosure be amended by declaring that William Evans the elder was, at the time the judgment was signed, under no liability under the mortgage proceeded upon in the action.

The mortgage was made on the 7th June, 1893, by William Evans the younger and William Evans the elder to Edward Martin. The property mortgaged by William the elder was his reversionary interest in land after the termination of a life estate. This interest was mortgaged as additional security for an advance made by Martin to William the younger upon a mill property included in the mortgage.

Martin, the original plaintiff, died in February, 1904. William Evans the elder died on the 3rd September, 1907, intestate. The applicants were his heirs; no letters of administration of his estate had been issued. The life-tenant died on the 10th August, 1916.

The motion was heard in the Weekly Court at Toronto.

W. S. MacBrayne, for the applicants.

E. D. Armour, K.C., for the executors of the deceased plaintiff.

MIDDLETON, J., in a written judgment, after setting out the facts and the grounds of attack, said that Mr. Armour's contention that, the Limitations Act having run in favour of the mortgagee, the Court should not interfere, even if the judgment were irregular, was entitled to prevail: R.S.O. 1914 ch. 75, sec. 20.

The "land" in question was a reversionary interest in the three parcels, owned by William the elder. The life-tenant was, until her death in August, 1916, in occupation of the land; and, for this reason, it was said, this section did not aid the mortgagee. But by the interpretation section (2(c)), "land" includes estates

in remainder or reversion, and the mortgage was not of the fee, but of the estate in remainder; and that of which the mortgagee must be in possession is not the land itself, but the estate in remainder, which is covered by the security. "Possession" of this estate must mean something widely different from possession of the land itself.

Reference to Kirby v. Cowderoy, [1912] A.C. 599.

Here, in the writ of summons the plaintiff claimed possession, and by the judgment the defendants were directed to give possession, and the mortgagee had ever since regarded the reversionary interest as his, and had done all that an owner could do; and, after his death, those claiming under him had dealt with the reversion as their own. There was as much possession as the nature of the estate permitted.

The mortgagor had acquiesced in the situation, submitted to the foreclosure and the judgment for possession, and had never done anything which an owner might be expected to do.

When once the Court recognised that physical occupation of land and possession under the statute are two quite different things, it in effect established that, when there can be no physical occupation, possession in the eye of the law must follow the legal estate; as soon as the mortgage becomes in default and the mortgagee becomes entitled to possession, he must be deemed to be in possession, unless the contrary can be shewn.

In the alternative, if, for any reason, the statute should not be regarded as applicable, this application is in the nature of a proceeding for redemption; Equity should follow the law and hold that the laches of the mortgagor for a period exceeding the statutory limit precludes the granting of any relief.

Motion dismissed with costs.

RE JOHNSTON—FALCONBRIDGE, C.J.K.B.—MARCH 17.

Will—Construction—Bequest to Widow—"Full Dower Rights in all my Property"—Non-technical Use of "Dower"—Absolute Gift of one-third of Whole Estate.]—Motion by the administrators with the will annexed of the estate of John Johnston, deceased, for an order determining a question as to the construction of the will. The motion was heard in the Weekly Court at Toronto. The learned Chief Justice, in a written judgment, said that the testator had no real estate when he made the will. He meant to give his wife something besides the $1,000 bequeathed to her. Following

the judgment of Magee, J., in Re Manuel (1906), 12 O.L.R. 286, it should be determined that the legal effect and meaning of "full dower rights in all my property" is to make a gift or endowment to the widow of one-third of the whole estate absolutely—the remainder of the estate to be distributed equally among all the children. Order declaring accordingly. Costs out of the estate. R. S. Colter, for the applicants. J. H. Spence, for the widow. W. T. Robb, for the adult beneficiaries. F. W. Harcourt, K.C., for an infant.

RE HICKS AND PRINGLE—FALCONBRIDGE, C.J.K.B.—MARCH 19.

Contract—Partnership Articles—Clause Providing against Resort to Courts—Penalty—Void Provision—Rights of Representatives of Deceased Partner.]—Motion by W. R. Hicks, upon originating notice under Rules 604 and 605, for a declaration and determination of his rights under para. 20 of the articles of a partnership. The motion was heard in the Weekly Court at Toronto. The learned Chief Justice, in a written judgment, said that the provisions of para. 20 were void as being an agreement which ousted the jurisdiction of the Court: Halsbury's Laws of England, vol. 7, para. 828, p. 399; Scott v. Avery (1856), 5 H.L.C. 811. But, if it were not so, those provisions would not bind the persons representing the estate or interest of William A. Pringle, deceased; they were not partners and were not named in the covenant. An action or proceeding might, therefore, be maintained by the representatives of William A. Pringle for the winding-up of the partnership or for such other relief as they might be advised to seek, without incurring the penalty provided in the articles. Order declaring accordingly. Costs of this motion to be costs in the cause or proceeding. H. S. White, for the applicant. W. C. Mikel, K.C., for the representatives of the deceased Pringle.

MALCOLM V. DICKIE—MIDDLETON, J.—MARCH 22.

Promissory Note—Action on—Gift of Money to Daughter—Note of Son-in-law Held by Payee as Trustee for Daughter—No Debt Due by Maker of Note.]—Action by the executor of the will of the defendant's deceased father-in-law to recover $1,500, the amount of a promissory note made by the defendant payable to the order of the deceased. The action was tried without a jury

at Brantford. MIDDLETON, J., in a written judgment, said that the deceased had given $1,500 to his daughter, paying it to her husband to enable him to purchase a farm in the west, where they intended to make their home. Having ascertained that the law of Saskatchewan did not entitle the wife to any interest in her husband's lands which could not be defeated by her conveyance, the deceased asked his son-in-law for a note for the amount advanced, this being intended as a means of securing the daughter in the event of trouble with her husband. The gift was complete before the note was given; and, if there ever was any liability upon the note, the father held as trustee for the daughter. There was no effective gift of the note to the daughter; but the deceased held the note for his daughter, and recognised her right. Action dismissed with costs. J. Harley, K.C., for the plaintiff. W. S. Brewster, K.C., for the defendant.

BERLIN LION BREWERY LIMITED v. D'ONOFRIO—CLUTE, J.—MARCH 23.

Account—Reference—Report of Referee—Appeal—Questions of Fact.]—Appeal by the defendant from the report of READE, Jun. Co.C.J., Waterloo, upon a reference to take an account and find the amount due to the plaintiffs for goods sold, after making proper deductions. The appeal was in respect of certain items which the defendant insisted should be deducted from the amount found by the Referee. The appeal was heard in the Weekly Court at Toronto. CLUTE, J., in a written judgment, said that, after a very full argument, it was quite clear that the defendant ought not to succeed. The questions were solely as to facts, and upon the evidence the learned Judge would have found as the Referee did. Even if he had differed, there was no such weight of evidence as would justify a reversal of the findings. Appeal dismissed with costs. George Wilkie, for the defendant. H. J. Sims, for the plaintiffs.

GOODCHILD v. WILCOX—LATCHFORD, J.—MARCH 24.

Will—Deed—Action to Set aside—Mental Incapacity of Testator and Grantor—Undue Influence—Evidence—Title by Possession to Portion of Lands of Testator Acquired by Son.]—Action by Robert and James Goodchild, two of the sons of John R. Goodchild,

deceased, a farmer and fisherman, who died on the 2nd March, 1915, aged 83, against Annie Wilcox, a daughter of the deceased, the London and Western Trusts Company, administrators ad litem of his estate, and others, for a declaration that the parcels of land formerly owned by the deceased of which the plaintiffs were respectively in possession were owned by them respectively, and that the conveyance of these parcels by the deceased to the defendant Annie Wilcox, dated the 23rd February, 1915, was invalid and a cloud upon the title of the plaintiffs; and that the will of the deceased, executed a week before his death, was also invalid. The action was tried without a jury at Sandwich. LATCHFORD, J., in a written judgment, after summarising the evidence, stated his conclusions as follows. The plaintiff Robert Goodchild, as against his father and all persons claiming under his father, had and has a good title by possession to that part of lot 61 in the 7th concession of Malden referred to in the pleadings and containing 69 acres, 3 roods, 36 poles; and his father had no power by will or deed to dispose of this farm. James Goodchild has not a good title to the homestead. Up to 1909, possession of that farm was in his father, who had power to dispose of it by will or deed. The conveyance of the farms in Malden to Mrs. Wilcox is invalid, as is also the will. Both were made when the father was incapable of making a deed or a will. The evidence to the contrary was utterly incredible. Moreover, the dying man, so far as he had any mental power, was, at the time and long previously, completely under the dominion of his daughter Annie Wilcox. The deed and will fall together. The other deeds made at or about the same time are not in question in this action. If, however, the defendant Caldwell releases to the administrators the property attempted to be conveyed to him on the 23rd February, 1915, he will be entitled to a declaration that he has a half interest in the Morin farm. The plaintiffs are to be paid their costs by the defendant Annie Wilcox, excepting such costs as have been occasioned by the abortive attempt of James Goodchild to establish his claim to the homestead, which are to be borne by him. The defendants the London and Western Trusts Company are to have their costs out of the estate. No order as to costs of the other defendants. M. K. Cowan, K.C., and F. A. Hough, for the plaintiffs. F. D. Davis, for the defendant company and the defendant Caldwell. J. H. Rodd, for the defendants Annie Wilcox and other defendants.