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COURT OF APPEAL.

JUNE 6TH, 1911.

BRULOTT v. GRAND TRUNK PACIFIC R.W. CO.

Railway—Repair Shops—Injury to Helper in—Neglect to Put Out Flag—Direction of Superior—Questions Submitted to Jury—Findings of Jury—Contributory Negligence—Proximate Cause—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 2, 3.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., of the 11th October, 1910, at the trial with a jury in an action for damages for injuries sustained by the plaintiff while in the defendants' employment.

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

D. L. McCarthy, K.C., for the defendants.
T. N. Phelan, for the plaintiff.

MAGEE, J.A.:—The plaintiff, a young man of 23 years, was a helper in the defendant company's repair shops at Fort William. One Teasdale, a machinist also employed in the shops, was making some repairs on a wrecking car on a siding near to the shops. In the course of his work at one stage of it he needed some one to assist him, and the plaintiff was selected. He had instructions from the shop foreman to do whatever Teasdale told him to do, and went with Teasdale. He says Teasdale was for the occasion his "boss" and he was obliged to obey his orders. It was necessary to repair the grate-bars of a boiler on the west end of the wrecking car, and Teasdale had placed a trestle or horse between the rails of the siding close to that end of the car. The plaintiff was told by Teasdale to stand on this trestle and with a piece of board hold up some bolts in the grate-

bar, while Teasdale would get on the car and fasten them. About 6 feet to the west stood another car on the same siding so that the plaintiff, on the trestle, would be standing with his back towards it, and between it and the wrecking car.

It is usual when men are engaged in repairing cars on a track to put out a flag or flags as a danger signal to the crews of other engines or trains, that men are working there and that the car must not be interfered with. The plaintiff had previously worked on cars on the track, and the foreman had always seen that there were flags put up, and the plaintiff says that regular car repairers always carry such flags. The plaintiff admits that was the rule in practice.

The defendants in their reasons for appeal say they had a rule requiring a blue flag. The plaintiff had only seen red flags used. There is no evidence that there was any written rule, or that he had ever been made acquainted with any, but he admits knowledge of the practice and the reason for it, and that other companies had such rules, and that in working about a car the flags should be there, and that they were as necessary as their tools and were part of the equipment of car repairers, and that Teasdale might have got flags in the repair-shop. But so far as appears, it was the practice for the foreman on the job to see to the flags, and there is no rule or practice proved prohibiting the men from working without flags.

On this occasion, before they began work, Teasdale told the plaintiff that there were no flags out, and the plaintiff would have to be careful and listen for any noise. The plaintiff then said if there were no flags out he could not work, it was too dangerous and he was liable to get caught there. Teasdale said to him that they did not need any flags as it would only take four or five minutes, but he would take a look to see if there was any train coming. Teasdale did look around and told the plaintiff that he did not see any smoke around and the engine must be up at a point called the mission, which is three miles away, and that all was safe in between the cars. The plaintiff says, "He was my boss there." "He gave me orders to hold the bolts," and he says he was obliged to obey, and "I had to do whatever he told me." They went to work and in the course of it Teasdale was hammering on the grate-bars, and the noise made thereby, the plaintiff says, prevented him from hearing any approaching noise, and within the five minutes the car to the west was "kicked" by an engine or other cars and ran against the wrecking car, the plaintiff being caught between the two and injured. He admits that the accident was really caused by the failure to put out the flags.

At the close of the plaintiff's testimony the defendants' counsel moved for a nonsuit which was refused; the learned Chief Justice remarking that it was for the jury to say whether what passed did not amount to a direction by his superior to go on and do it without the flag. Counsel for the defendants then said no evidence for the defence would be offered, and the learned Chief Justice then announced the questions which he proposed to submit to the jury. Of these the 5th and 6th were as follows:—

"5th. Or, were the plaintiff's injuries caused by his own want of care and disregard of the duties which he had to perform?"

"6th. If so, wherein did his want of care and disregard of his duties consist?"

After the evidence had all been taken and counsel for both sides had addressed the jury, the 5th and 6th questions were on the suggestion of defendants' counsel changed so as to leave out the words "and disregard of the duties which he had to perform." Counsel for the defendants then asked that another question be submitted to the jury: "Did the plaintiff voluntarily perform the acts which caused his accident, knowing of the dangers which he ran?" The learned Chief Justice pointed out that such a defence had not been pleaded, and considered it unfair to be introduced at that stage of the case, and refused to put the question.

The following are the questions and answers of the jury:—

"1. Were the injuries which the plaintiff sustained caused by any negligence of the defendants? Answer—Yes.

"2. If so, wherein did such negligence consist? Answer—Neglect of Mr. Teasdale, in not placing the flag for protection.

"3. Were the said injuries caused by the negligence of any person in a position of superintendence over the plaintiff and to whose orders he was bound to conform? Answer—Yes.

"4. If so, who was such person and wherein did his negligence consist? Answer—Teasdale, by not placing flag.

"5. Or were the plaintiff's injuries caused by *his own want of care?* Answer—*No, it was no part of his duty to place these flags.*

"6. If so, wherein did his want of care consist? No answer.

"7. In case the plaintiff should be entitled to recover, at what sum do you assess the compensation to be awarded? Answer—$1,980; $26 doctor's expenses.

"His Lordship: 'Does the $1,980 include the $26?'

"Jury: 'No, your Lordship, we thought that was the wages, and he had incurred those expenses of $26. *The* $26 *are in addition to the* $1,980.'"

The $26 was struck out and the damages assessed at $1,980, for which judgment was directed to be entered.

In his charge to the jury the learned Chief Justice pointed out that counsel for the defendants conceded "that as far as what took place on that forenoon, Teasdale was the plaintiff's boss, that is, he was in a position of superintendence to the plaintiff." And again, "that as to this particular job, however it might be ordinarily, Teasdale was the boss and Brulott under him."

After dealing with the first four questions, the learned Chief Justice proceeded, "Then you will consider seriously the 5th and 6th questions, 'Or, were the plaintiff's injuries caused by his own want of care,' and 'If so, wherein did his want of care consist?' The strenuous argument presented to you upon that branch of the case is, that while it was true that Teasdale was the superior person, the person in a position of superintendence, Brulott ought to have had regard for his own life and safety and have refused to go on without having proper protection, or have gone a car and a half length to the roundhouse or shop where these flags were stored and got one for himself. That is a matter for you to consider seriously; there is no doubt that he was not under any compulsion, there is no evidence that he said, 'I will not go on without that flag,' and that he was ordered to go at all hazards; the evidence is not that; the evidence is that he acceded to the persuasion of Teasdale, and so remained in this position of danger. Does that amount to negligence on his part? I mean that kind of negligence which is the cause of his injury and which deprived him of the right to recover? Mr. McCarthy calls your attention to the fact that the very beginning of the conversation about the flag was Teasdale telling him that there was no flag, to be careful and listen for any noise of anything approaching. So that is his argument. He says, granting that Teasdale was negligent, was Brulott right in taking the matter into his own hands and running his own risk? It is for you to judge." And again, "You will have to just follow this, was the injury caused by his own want of care, or was it caused by the want of care of a person in superintendence? It is the negligence causing the accident which you have to consider. It is the proximate cause of the accident. I cannot make it any clearer, if I tried to refine upon it. It is whichever way you think it is, whether it was his own carelessness or the negligence of the defendants in the person of Teasdale."

No objection was taken to the charge.

The defendants now give as reasons for appeal that Teasdale was not a person to whose orders the plaintiff was bound to con-

form, and did conform, within the meaning of the Workmen's Compensation Act, and though the plaintiff was sent to do what work Teasdale required of him, and for that purpose take his instructions from Teasdale, it was not because Teasdale was a person in superintendence, but simply because he was the man who knew what was required to be done by each of them—and that the accident did not happen by reason of the orders of Teasdale, but by reason of the failure of both men to satisfy themselves that there was no danger, and that they were equally guilty of negligence to obey the company's rule, and also that the plaintiff voluntarily undertook the risk, or the question whether he did so should have been submitted to the jury.

The questions to the jury were evidently intended to ascertain whether the facts brought the case within sub-sections 2 and 3 of section 3 of the Workmen's Compensation for Injuries Act. Sub-section 2 applies to negligence of an employee who has any superintendence entrusted to him, whilst in the exercise of such superintendence. Sub-section 3 applies to negligence of an employee to whose orders or directions the plaintiff was bound to conform, and did conform, where the injury resulted from his having so conformed.

Read by themselves the questions to the jury do not in terms ask whether the negligence of the person in superintendence was whilst in the exercise of such superintendence, nor whether the plaintiff did conform to orders or directions.

As to the first of these inquiries, the issue before the jury was whether it was Teasdale's duty, as the superintendent for the time being, to put out the flags, or the plaintiff's duty not to work unless they were out. The jury find that it was not the plaintiff's duty, and indeed it would seem from the change in the form of the fifth and sixth questions made at the defendants' instance, that disregard of his duties was not being strongly relied upon by the defence. The jury also find the negligence was Teasdale's in not putting out the flags. That involves the finding that the negligence was whilst in the exercise of the superintendence. The second inquiry as to whether the plaintiff acted under an order or direction, is perhaps not so clearly decided. It is manifest from the statement of the learned Chief Justice, on the motion for nonsuit, that he intended the jury to pass upon it, and in dealing with the fifth and sixth questions, he stated his own view that the plaintiff did not act under any compulsion. That would clearly be a matter for the jury, and they would have to consider not only the relations of the parties and their words,

but the time and manner in which they were spoken and the occasion. A very mild request or suggestion in form, might be an absolute command: a velvet glove may cover the iron hand. The plaintiff says he was ordered.

But it is not necessary to consider whether the jury did in fact necessarily have to find upon that subject. As I have said the third question was evidently intended to cover possible liability under both clauses, 2 and 3, of the third section of the Workmen's Compensation Act. By the answer that the negligence was that of a person in superintendence, and the necessary implication that it was whilst in the exercise of such superintendence, the case is brought within the second clause, and the defendants become liable.

As to whether a question should have been put, as asked by the defendants, whether the plaintiff voluntarily incurred the risk, the learned Chief Justice pointed out that it would have been unfair at that stage. Neither the pleadings, the questions to the plaintiff, nor the conduct of the trial were directed towards such an issue, and asked as it was after even the counsel on both sides had addressed the jury, it would not have been fair to the plaintiff, who was given no opportunity of stating other than as he did, in what position he was acting. So far as he did state it, the evidence is against the defendants.

It was a case for a jury and in my opinion could not be withdrawn from them. In my opinion the appeal should be dismissed.

MOSS, C.J.O., gave written reasons for arriving at the same conclusion.

MACLAREN, J.A., concurred in dismissing the appeal.

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that the judgment for the plaintiff could not be supported upon the findings of the jury, nor upon the evidence, even had the findings been sufficient.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JUNE 7TH, 1911.

COHEN v. WEBBER.

Contract—Assignability—Contract for Personal Services as Singer—Attempted Severance of Damages from Contract—Chose in Action—Judicature Act, sec. 58(5).

Appeal by the plaintiff from the judgment of the County Court of York of the 15th March, 1911, in an action by the plaintiff personally and as assignee of others, to recover $150 alleged to be due under contracts with the plaintiff and his assignors to sing for the defendants, who are the president and cantor respectively of the Goll Zadok Congregation at Toronto.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. MacGregor, for the plaintiff.

H. C. Macdonald, for the defendants.

BOYD, C.:—In Tolhurst v. Associated Portland Cement Manufacturers, [1903] A.C. 424, Lindley, L.J., says as to the Judicature Act, 1873, sec. 25, clause 6: "It has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor."

The contract with the plaintiff in this case was for personal services as the singer in a choir, and was in its nature not assignable: Kemp v. Baerselman, [1906] 2 K.B. 604. Of like kind are all the other contracts made by the defendants with Gordon, Jacobson, Geld, etc., for services to be performed as singers. The contracts not being assignable, what has been assigned to the plaintiff by the other singers are their several claims to be paid damages for alleged breach of the several contracts.

In other words the right to unliquidated damages is attempted to be severed from the contracts and turned over to the plaintiff in order that he may in his own name sue for the contracted amounts. It is only by virtue of the provisions of the Judicature Act that this can be successfully presented in the Courts, that, "an absolute assignment of any debt or other legal chose in action . . . shall be effectual in law . . . to pass and transfer the legal right to such debt or chose in action . . . and the power to give a

good discharge for the same without the concurrence of the assignor:" R.S.O. ch. 51, sec. 58(5).

Now I think that the law has been made plain since the Judicature Act (which is the same in England and Ontario on this head of assignments) that not every "chose in action" is contemplated or covered by the words of the statute, and also that when the contract has not been or cannot be (as in this case) assigned, . . . when a breach of contract has occurred in respect to which the original party to the contract could sue for damages, he can not assign these damages, or a claim to these damages, so as to enable the assignee to sue in his own name. That was so laid down in the case cited of May v. Lane, 64 L.J. Q.B. 236, as explained in the later case of Torkington v. Magee, [1902] 2 K.B. 427 at pp. 433-4. (This case was reversed on the facts, in appeal: [1903] 1 K.B. 644.)

The objections in law to the maintenance of this action are therefore in my opinion two-fold: the contract itself is inherently of a non-assignable character, and (secondly) the possible damages, separated by means of the assignment, are not susceptible of being enforced in the Court by the assignee in his own name.

The appeal is dismissed with costs.

LATCHFORD and MIDDLETON, JJ., concurred.

DIVISIONAL COURT. JUNE 9TH, 1911.

DAVY v. FOLEY.

Water and Water Courses—Adjoining Proprietors of Pulp Mills—Description—Tail Race—Cross Wall—Obstruction of Flow—Easement—Damages.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 1028.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

M. K. Cowan, K.C., for the plaintiff.

W. M. German, K.C., for the defendants.

MIDDLETON, J.:—The two mills were owned by Keefer. When Keefer sold the cotton factory it was described as the

cotton factory lot, bounded on the north by a lane and the Christy mill lot, on the south by the Keefer mill lot, on the east by the mill race, and on the west by the Board of Works line. It has been assumed that this description operated to convey a portion of the tail race which crossed the south-west corner of the lot, if its true boundaries on the south and west are the Board of Works line and the north boundary of the Keefer mill lot as described in a subsequent conveyance of this mill. I am satisfied that this is not the true meaning of the conveyance, and that the property intended to be conveyed did not include any portion of the tail race of the Keefer mill. The metes and bounds are not given, save in a general way, and according to Attrill v. Platt, 10 S.C.R. 425, they yield to the designation of the parcel conveyed. I think that effect can in this case be more readily given to the designation, because the metes and bounds given in this general way still truly describe the parcel, and there is not really any repugnancy.

This is also aided by the fact that in some earlier conveyances the land was described as the cotton mill lot and no metes and bounds were given. The defendant so understood as in the plan, Ex. 7, he shews his land bounded by the race.

At the time of the grant the plaintiff's mill did not use the tail-race in question at all, but discharged its spent water by a flume crossing the tail-race at right angles. In 1886, with the acquiescence of the then owner of the Keefer mill, the plaintiff discarded the flume and inserted a new system of wheels and used the tail-race. To prevent injury to the system of the Keefer mill he erected in the bed of the race a retaining wall to hold back the water discharged from it, to prevent the wheels running dry. This user, by permission in the first place, has by the lapse of time ripened into an easement by prescription, and cannot be interfered with by the owner of the Keefer mill. In 1910, the defendant, who had purchased the Keefer property made a change in his mill and increased the flow from 100 h.p. to 400 h.p., and excavated so as to increase his head to the same as the plaintiff's 23 feet, and the effect of the discharge of all this water is to raise the head in the tail-race 6 inches and to reduce the h.p. of the plaintiff's mill, normally 600, by 19, or in round figures 1/30, . . . but the plaintiff has no right to complain of 100 h.p., so that the most that he can attribute to the 300 would be ¾ of 19 h.p., lost, say 15 h.p., or 1-40 of his whole power.

The defendant as the owner of the tail-race was entitled to remove the cement wall, and is entitled to enlarge the race so as to enable it to take care of the whole flow, and is ready to

undertake to do so. The claim for damages is greatly exaggerated, and as the plaintiff substantially fails in the action, we think justice will be done by declaring that the plaintiff has no title to the tail-race in question, save an easement, acquired by prescription, to discharge therein the water flowing from his mill, to the same extent as discharged in 1886, and that the defendants own the tail-race subject to this easement, and further declaring that the defendants have no right to interfere with the discharge of this water by discharging into the said tail-race any more water than 100 h.p., unless and until the tail-race has been so enlarged as to make it capable of taking care of any water the defendants desire to discharge in excess of 100 h.p., and enjoining them accordingly. The operation of this injunction to be stayed for six months to enable the tail-race to be enlarged.

The damages sustained, and to be sustained during these six months, may be assessed on a liberal basis at $250, but the plaintiff should have no costs.

BOYD, C., and LATCHFORD, J., concurred.

DIVISIONAL COURT. JUNE 9TH, 1911.

HAMEL v. GRAND TRUNK R.W. CO.

Railway Company — Common Carriers — Change of Status to Warehousemen—Liability for Loss of Baggage.

Appeal by the defendants from the judgment of the County Court of the 2nd May, 1911, in an action by the plaintiff, a passenger on the defendants' train, to recover the value of a trunk and contents, checked by the defendants, but alleged to have been lost by them, or so injured as to be of no use. At the trial, judgment was given for $156.05, the full amount claimed and costs.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. E. Foster, for the defendants.

A. Lemieux, for the plaintiff.

BOYD, C.:—The case of Penton v. Grand Trunk R.W. Co., 28 U.C.R. 367, turns upon the fact that the traveller, the plaintiff,

was present when his trunk arrived at the station, and assisted in removing it into the baggage room to be kept for him. He had a reasonable opportunity to take it away, but he did not avail himself of it, but had it removed into the baggage room for his own convenience. The Court held that in these circumstances the railroad had ceased to be the carrier of the trunk and had assumed the character of warehousemen, and the trunk having been in a few hours after feloniously stolen, the company were not liable. The case is cited for this purpose, and is followed in Vineberg v. Grand Trunk R.W. Co., 13 A.R. 93, where it is laid down that the duty of the company is to have the baggage ready for delivery at the usual place, until the owner can, in the exercise of due diligence, call for and receive it.

The question of what is a reasonable time will require to be modified when the railway company acts on the new provisions made for the transport of baggage by the Board of Railway Commissioners in June, 1908. These may be found set forth in Jacob's Railway Law of Canada, p. 736. By rule 7(*d*) it is provided that "passengers can frequently expedite the movement of baggage by presenting same for checking for one train . . . in advance of that on which they expect to travel." The agent at Chicago checked this baggage in advance, and told the plaintiff that she was incurring no risk in sending the trunk in that way and that she might be sure her trunk would be safe. Taking it that it has been proved, (which is not the case), that the trunk reached its destination at Hawkesbury after 6 p.m. on the 14th April, and that it was destroyed by fire without negligence on the part of the company about 10 o'clock that same night, it cannot be said that that interval of four hours was sufficient to change the status of the railway from carriers into that of warehousemen, when it was known to the company that the owner was coming by another train on a later day from Chicago to Hawkesbury. On this ground I would affirm the judgment below, and it may well be supported on other grounds. Dismiss the appeal with costs.

LATCHFORD and MIDDLETON, JJ., concurred.

DIVISIONAL COURT. JUNE 10TH, 1911.

CLARK v. LOFTUS.

Life Insurance—Benefit Certificate—Change of Apportionment—Undue Influence—Suspicious Circumstances—Onus on Person Benefiting by Change—Agreement that Apportionment Should not be Changed—Insurance Act, secs. 151, 160, *and Amendments thereto.*

Appeal by the defendant from the judgment of MIDDLETON, J., of the 6th February, 1911.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

G. H. Watson, K.C., and J. T. Loftus, for the defendant.

J. B. Clarke, K.C., and E. J. Hearn, K.C., for the plaintiffs.

CLUTE J.:—The plaintiffs claim two-thirds of certain insurance moneys paid into Court by the Independent Order of Foresters on an endowment certificate of $3,000, dated the 6th March, 1893. The original insurance was for $1,000 dated the 19th January, 1892. This certificate was surrendered and a new certificate for $3,000 issued. The beneficiaries named therein are the plaintiffs and the defendant in equal shares. The certificate continued in force until the death of the assured, James E. Clark, on the 16th February, 1910.

The plaintiff, Jane Clark, is his second wife and May Clark their daughter. The defendant, Florence Loftus, is a daughter by a previous marriage. The plaintiff, Jane Clark, was married in 1882 and she continued to reside with her husband until the 22nd November, 1909. The deceased had been in business, occupying premises owned by his wife, the said Jane Clark, until about 1900, when being unable to carry on the business successfully any longer he gave up the business.

He had prior to this received an injury from an explosion, which for a length of time rendered him unable to walk. The injury was from a scald upon the legs, which from time to time broke out in running sores and to a certain extent affected his health and earning power, so that after he gave up the business, his earning power was not sufficient to support his family and keep up the premiums upon his insurance, and he determined to drop it. It was, however, arranged between his wife and himself that she should pay the premiums out of certain rents coming to

her from her own personal estate, and that the insurance should remain as it then was, apportioned equally between the plaintiffs and the defendant.

In pursuance of this agreement which the trial Judge, upon sufficient evidence, finds was duly entered into, the plaintiff, Jane Clark, paid the premiums from July, 1900, to September, 1908. During this period the defendant was applied to by the plaintiffs to pay her proportion of the premium, but she declined to do so. She, however, on one occasion applied to the secretary of the said society and asked if she could be permitted to pay her one-third share independently of the plaintiffs. She was informed, however, that this could not be done, and that if default was made in any part of the insurance premium it would void the whole.

With respect to the increased calls or premiums to be paid upon the policy, it was arranged that the society should advance the increase and charge the same against the policy, and this was done down to the date of the assured's death, and amounted to some $82.

In January, 1909, the said James E. Clark, suffered a paralytic stroke which rendered him unconscious, and from which he never fully recovered. He remained at the hospital for some weeks, and afterwards went to the country for a part of the summer to recuperate, but he never regained his normal strength. It was during his illness in January, and without his knowledge, that the defendant found that the premiums were over-due, and then for the first time she paid up the arrears, and continued to pay the premiums until his death. This appears to have been done without reference to the plaintiff, Jane Clark. The total payments made by the defendant amounted to $82.50.

On the 20th November the said James E. Clark first spoke to his daughter about going to live with her, and two days later, namely, on the 22nd November, 1909, he left his home without stating where he was going and went to the defendant's, and continued to reside with his daughter until his death. On the same day the trial Judge finds "steps were taken to communicate with a solicitor, Mr. Loftus, the brother of Dr. Loftus, with whose wife he was staying, and steps were taken to secure the necessary documents to bring about a transfer of beneficiaries. Now I am not satisfied at all with the explanation that has been given by Mrs. Loftus of what took place at that time. It may be that I am doing her an injustice in not accepting her story in its entirety, but I find myself unable to do so. The situation was one which more than any situation one can think of, called for

the exercise of great precaution. I think it called for Mr. Clark receiving advice from an absolutely disinterested and independent solicitor. Mr. Loftus, the solicitor, when he went into the box, said that he felt himself in an awkward position owing to his interest, his indirect interest in the matter. He did not feel free to give Clark the advice which I think he ought to have had."

The trial Judge comments somewhat severely upon Dr. Macmahon's evidence, who seems to have been called in before the change of beneficiaries was made, to report upon the mental condition of the said James E. Clark. His evidence impressed the learned trial Judge unfavourably, and he accepts the evidence given by May Clark as to what took place on that occasion. He further finds that "from that time on the old man's mind was in the extremity of weakness, and that he was not fit to exercise testamentary powers, unless he had very careful guidance to see that all proper precautions were taken to compel him to realize the actual situation."

The learned trial Judge further says: "I am not satisfied that he had no testamentary capacity, but I think that it is incumbent upon those attempting to set up any testamentary act, or any act in the nature of a testamentary act, to see that all extraneous influence was excluded." He entirely discredits the evidence of Compton at whose place Clark stayed during the summer. He does not accept the evidence of the witness in any degree. He does not think he is to be relied upon in any respect. He expressly finds that the deceased "agreed with his wife that if she would pay these premiums as they fell due upon the policy, that that apportionment should be permitted to stand."

From a careful perusal of the evidence and the Judge's findings a fair outline of the case may shortly be stated thus:

The father makes an insurance apportioned equally between his wife and two daughters, one of the daughters being by a prior marriage. He pays the premiums upon the policy containing this apportionment for some ten years, when, from force of circumstances, being unable longer to keep the policy alive, he comes to an understanding with his wife that if she will pay the premiums the apportionment shall remain unchanged. The wife accepts this arrangement and continues to pay the premiums from 1900 to September, 1908. The father suffering from a severe illness from which it is doubtful that he will recover, the defendant intervenes and continues to pay the premiums thereafter until his death, amounting to some $82.00, although the plaintiff, Jane Clark, states that she was willing to do so. After

this severe illness and while the father was in a feeble state, he leaves the wife and family with whom he had resided for 28 years and goes to reside with the defendant, where he continues until his death. On the very day that the arrangement was made that he should leave his home, and unknown to the plaintiffs, steps were taken with a view of having a change in the apportionment, and to make the same wholly in favour of the defendant.

The brother of the defendant's husband was called in as solicitor, who, feeling his position was equivocal, declined to act. The defendant's version of what took place leading up to, and resulting in the change of beneficiaries is not accepted as satisfactory by the trial Judge.

The whole transaction was suspicious. It bore every appearance of being an endeavour on the part of the defendant, at a time when her father was in a feeble state of health, to prevail upon him to undo what was a reasonable and equitable settlement, contrary to the express understanding between the parties, in pursuance of which the plaintiff, Jane Clark, had contributed of her own means to keep the policy alive.

The deceased had no good ground for leaving his home. He had become depressed and melancholy after the first stroke and was often irritated, and took as an affront remarks made by his wife which had no reference to him at all in regard to his earning a livelihood. The finding of the trial Judge that he had no ground for leaving his home is well supported by the evidence, and I think it a fair inference that the defendant, believing that it was exceedingly probable from the nature of his recent illness that her father would not live very long, took advantage of his enfeebled condition and expressed dissatisfaction with his treatment at home, to invite him to come and reside with her, with a view of inducing him to appoint her as the sole beneficiary under his certificate of insurance.

Having regard to all the circumstances of the case, I am of opinion that the present case falls within the rule laid down in Fulton v. Andrew, 7 H.L.C. 448, at page 471, as follows: "There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called uopn to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and

memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction."

The latest cases on this subject appear to be Tyrrell v. Painton, [1894] P. 151, in the Court of Appeal; Adams v. McBeath, 27 S.C.R. 13; Collins v. Kilroy, 1 O.L.R. 503; Low v. Guthrie, [1909] A.C. 278; Malcolm v. Ferguson, 14 O.W.R. 737.

The rule appears to me as applicable to a case of this kind which closely resembles a will. So far from the evidence removing the suspicious nature of the transaction, and shewing the same to be a righteous transaction, quite the reverse is the case. The learned trial Judge largely discredited the evidence of the defence, and considered the transaction a most unrighteous one. Having regard to all the circumstances, and especially to the mental and physical condition of the deceased, I agree that upon this ground the transaction ought not to stand.

I am further of opinion that the finding of the trial Judge that an agreement between the husband and the wife that the apportionment should not be changed is well supported by the evidence.

The question, however, is whether having regard to the Insurance Act, effect can be given to this agreement; it not appearing upon the face of the certificate that the plaintiffs claim as beneficiaries for value. [Reference to Book v. Book, 32 O.R. 206.] . . .

Sec. 151 of the Insurance Act was amended, probably owing to the decision in Book v. Book, by 1 Edw. VII. ch. 21, sec. 2 (5), by adding to the end of sub-sec. 3 of sec. 151, the words: "but a beneficiary shall only be deemed to be a beneficiary for value when he is expressly stated to be so in the policy."

By sec. 2, sub-sec. 6 of the same Act, the following words were added to sub-sec. 2 of sec. 160: "but no beneficiary shall be deemed to be a beneficiary for value unless in the policy expressly stated to be so."

Sub-sec. 4 of sec. 151 declares that the section shall apply not only to any future contract of insurance and to any declaration made on or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made. But for the amendment effect could, and I think, should be given to the agreement between the husband and wife not to alter the apportionment.

Does sub-sec. 4 apply to the amendment so as to make it

retroactive? I have been unable to find any express authority upon this point. It will be observed that on the agreement between the plaintiff and her husband, the said Jane Clark paid the premiums either through her husband with her own money, or paid them herself, from July, 1900, to 1908. Both the certificate, therefore, and the agreement are prior.

Sub-sec. 5 of sec. 160 also makes that section retroactive.

Having regard to the clauses making the sections 150 and 160 retroactive, I am unable to say that such clauses do not cover the amendment. With some hesitation, I think they do, and as the alleged agreement claiming to be a beneficiary for value comes distinctly within the language of the amendment I do not think effect can be given to the agreement. The appeal should be dismissed with costs.

MEREDITH, C.J., agreed in the result, concurring in the view of CLUTE, J., that the transaction as the result of which the defendant claimed to be entitled to the whole of the insurance money could not stand, but expressing no opinion as to the other question dealt with in his judgment.

TEETZEL, J., also agreed in the result.

RIDDELL, J., IN CHAMBERS. JUNE 12TH, 1911.

BOYLE v. McCABE.

Security for Costs—Defendant out of Jurisdiction—Real Actor —Onus.

Appeal by the defendant from the order of the Master in Chambers, ante 1248.

R. G. Smyth, for the defendant.

C. Kappele, for the plaintiff.

RIDDELL, J.:—Margaret McCabe applied to the Master of Titles under the Land Titles Act to be registered as owner in fee of certain land in Toronto. She established her title to the satisfaction of the Master in a manner; but one Lawrence Boyle of San Francisco being alleged to claim an interest, he caused Boyle to be served with notice. Boyle had in 1886 brought an action against Mrs. McCabe for partition or sale of the land; upon his failing to comply with an order for

security for costs, this action was dismissed and the costs are unpaid—again in 1905 he had begun an action to establish a claim to the same land with the same result. It was therefore proper for the Master of Titles to cause him to be notified. Upon being notified he filed a claim. On the 24th April, 1911, the Master of Titles decided that if Boyle were really the brother of Mrs. McCabe as he claims, and she denies, he was entitled to a 1-6 share in the land. An appeal from this finding taken by Boyle, was abandoned on the 11th May, 1911.

On the 12th May, the Master of Titles referred the question of the identity of Boyle to the Court, naming Boyle as plaintiff and Mrs. McCabe as defendant, unless the Court should think fit to order otherwise, and stated that a commission would be necessary.

Mr. Justice Middleton on the 19th May made an order for the trial of an issue to be tried at the non-jury sittings at Toronto with Boyle as plaintiff and Mrs. McCabe as defendant, but that the naming of Boyle as plaintiff "shall be without prejudice to his right and position in regard to the pending or any further motion by the said . . . McCabe for security for costs." The application for security for costs came on before the Master in Chambers and he gave judgment dismissing the application on May 31st. [Reference to the reasons for judgment set out ante, 1248.]

There is no mystery about the rules for determining whether security for costs will be ordered against a litigant outside the jurisdiction of the Court—no one, for that reason, will be ordered to give security unless he is a real actor, the form being immaterial. In the ordinary case it is the plaintiff who is such actor, but in cases of interpleader, e.g., both parties may be considered actors, or the party substantially moving in the issue: Swain v. Stoddart, 12 P.R. 490; Knickerbocker v. Webster, 17 P.R. 189; Re Milward, [1900] 1 Ch. 405; Re Foresters & Castner, 14 P.R. 47.

In the present case, Mrs. McCabe desiring to have her title to certain land put in a more satisfactory condition, puts the law in motion. She is the actor. A claimant Boyle appears and, until that claim is disposed of, the desire of Mrs. McCabe cannot be gratified. If she then dropped all proceedings, she could not procure her title and the continuation of the proceedings was in her hands as *domina litis*. She is still the actor just as in Shepherd v. Hayball, 13 Gr. 681, in which the right of the plaintiff to an order under the Quieting Titles Act was contested by the defendant: and Spragge, V.C., set aside an order for security for costs made against him.

[Reference to Re Percy & Co., 2 Ch. D. 531, per Jessel, M.R. at p. 532.]

So far there can in my view be no question.

But the Master of Titles decides that some person named "Lawrence Boyle," if alive, is entitled to one-sixth of the land —not having proper machinery in his own office to determine whether this plaintiff is that "Lawrence Boyle," he refers this to the Court under sec. 93 of the statute. The Court has directed an issue to determine if the person called Lawrence Boyle be the Lawrence Boyle, and made that Lawrence Boyle the plaintiff. Who is now the actor?

I have seen the Master of Titles, and he informs me that, on the evidence he has already had, he must find against the plaintiff. Therefore, if the issue be not proceeded with, the plaintiff must fail. It is accordingly plain that the plaintiff must be the real actor in the issue, as well as being plaintiff in name—the plaintiff must proceed with the issue upon peril of being barred. This in my view making the plaintiff a real, and not merely a nominal actor and plaintiff, the order appealed from is wrong.

I am not at all attacking the authority of the cases cited; but they are distinguishable—the Court would not grant an order for security for costs against a non-resident claimant until enough had been done to throw the onus upon him, so that if he failed to prosecute his claim further he would be barred.

The appeal should be allowed with costs here and below.

BRITTON, J. JUNE 12TH, 1911.

RE PITTSBURG COBALT CO. AND ROBBINS.

Ontario Companies Act—Winding-up—Foreign Action—Application for Leave to Proceed with, Refused—Judgment Obtained Notwithstanding—Claim on, Disallowed by Master—Terms on Filing New Claim.

Appeal by Harre Robbins from the order of the Master in Ordinary, of the 23rd February, 1911, disallowing his claim, and application by said Robbins to extend the time for appealing from the order of the Master of the 9th December, 1910, particulars of which orders are given in the judgment of BRITTON, J., *infra.*

F. E. Hodgins, K.C., for Harre Robbins.
C. A. Moss, for the liquidator.

BRITTON, J.:—On the 9th August, 1910, Harre Robbins commenced an action in the Court of Common Pleas, No. 2 Allegheny Co., Pa., against the above company. Service of the summons in that action was made by leaving a copy in the office of one S. W. Heckart, who was then the treasurer and secretary of that company.

On the 18th August, 1910, a winding-up order was made at Toronto of the said company, and an interim liquidator was appointed.

On the 14th October, 1910, E. R. C. Clarkson was appointed permanent liquidator.

In August, the then solicitor of the company at Pittsburg caused to be entered a conditional appearance to the Robbins action. Such appearance reserves the right to the defendant to object to the jurisdiction of the Court. Robbins took no further action upon his first summons, but caused an alias summons to be issued which was served personally upon Heckart on the 16th September, 1910. No appearance was entered, but on the 14th October an affidavit was filed in the action by Heckart, objecting to the jurisdiction of the Court. Robbins did not on the return day of the writ take any step in that suit, but on the 7th December, 1910, he made application to the Master in Ordinary for leave to proceed as a creditor of the company with his action in the Allegheny County Court. On the 9th December, an order was made refusing such leave. On the 14th December, Robbins, in the face of that order, continued proceedings in the foreign Court and as a result, and without any trial upon the merits, obtained on the 5th January, 1911, a judgment against the company for $8,810.39. Robbins then presented his claim to the liquidator, supporting it by his affidavit and by exemplification of the record of the judgment, and this claim coming before the Master in Ordinary was disallowed by the Master's order of the 23rd February, 1911. This order in addition to disallowing Robbins' claim, further directed:

(1) That before Robbins be permitted to file proof of any claim as a creditor in the winding-up of the said company, he vacate the judgment obtained by him in the foreign Court.

(2) That the said Robbins within 4 weeks from the date of that order vacate his judgment and file a claim as creditor if he be advised to file such claim.

(3) That in default of the vacating of such judgment and filing his claim, the claim of Robbins be disallowed; and

(4) That Robbins pay to the liquidator his costs, if any, in connection with the claim of Robbins since the order of 9th December, 1910, refusing Robbins leave to proceed with his action against said company, including the costs of the last motion.

Robbins now asks to extend the time for appealing from the order of the 9th December, 1910, and if extension of time for appealing be granted, he appeals accordingly.

I am of opinion that the order of 9th December, 1910, was within the jurisdiction of the Master in Ordinary and that the time for appealing should not be extended.

The proceedings for winding up were within the Ontario Companies Act, 7 Edw. VII. ch. 34, and sec. 177 applies. The applicant was well aware of his rights and of his limitations, and so the action by him having been commenced he applied, as I have already stated, to the Master in Ordinary for leave to continue that action, and such leave was refused.

The applicant's plain duty then was to submit to that order, not having appealed, and to prove his claim in the regular way in the winding-up proceedings. Instead of doing that, he went on with his action in the foreign Court, apparently not for the purpose of reaching assets out of Ontario, but to obtain what would be proof here of his claim. He recovered a judgment, or what is put forward as such, not upon the merits, but by reason of the affidavit of defence not being sufficient to put the plaintiff to proof of his claim. The company did not, nor did the liquidator, attorn to the jurisdiction of the foreign Court. The appearance to the first summons, and the affidavit, objected to the jurisdiction.

Robbins, the claimant in these proceedings, was bound to conform to and obey the orders in the winding-up, and I am of opinion that the Master in Ordinary was quite right in rejecting as proof of the claim of Robbins proof of his judgment so obtained.

The appeal from the order of the 23rd February, is upon several grounds as stated in the notice of motion. No effect can be given to the objection, if I correctly understand it, that there is no declaration in the order as to whether the winding up is under sec. 173 or sec. 190 of the Ontario Companies Act, 7 Edw. VII. ch. 34. Section 177 applies in either case. Under sec. 190 a company may be wound up (sub-sec. 3): "When on the application of a contributory the Court is of the opinion that it is just and equitable that the corporation should be wound up."

Mr. Moss for the liquidator applied to amend the order, if necessary, and Mr. Hodgins did not object to an amendment if the applicant was "placed in proper position." No injustice on that

account will be done to the appellant. He was of the first, apparently, to recognize that it was just and equitable that the corporation should be wound up, and he recognized the validity of the winding-up order by applying to the Master in Ordinary for leave to proceed with his action. I will allow the amendment as asked, so that the winding-up proceedings may be properly carried on as intended under the Ontario Companies Act. The terms of the order have given me a great deal of difficulty. With great respect I am unable to agree with the learned Master as to the terms imposed by the order complained of. Nor can I see what is to be gained by the claimant in holding on to a judgment which the Master will not accept, and is not bound to accept, as proof of Robbins' claim. I would require express authority before holding that the mere refusal to refrain from proceeding in a foreign country in a Court of that country without leave of a Judge in this country, would warrant the exclusion of the person so proceeding from coming into winding-up proceedings here and proving a just claim, if any, against an estate being so wound up. The Master, as I have said, may reject the judgment as sufficient proof, but the claimant should not be penalized because in the assertion of his alleged right he did get a judgment in a Court in the United States. The vacating of the judgment may require action by the claimant in that country, which he is unwilling to take, and which the Court here cannot compel him to take, and to make it a condition of proving any claim in any way is beyond the power of the Master in Ordinary.

As to the right to reject the judgment as proof of the debt, see Keating v. Graham, 26 O.R. 361. Proceeding to obtain judgment in a foreign country against a company being wound up in Ontario is a very different thing from seizing property of such company out of Ontario. A creditor would not be allowed to hold property seized, merely for debt, and apart from any question of lien. [Reference to the following cases as being "the strongest in favour of the liquidator": In re International Pulp & Paper Co., 3 Ch. D. 594; Flack's case, [1894] 1 Ch. 369; In re Jenkins & Co., Solicitors' Journal (1907), vol 51, p. 715.]

As against the liquidator's contention is the case of In re Lake Superior Native Copper Co., Limited, 9 O.R. 277 . . .

Upon the best consideration I can give to the case, the order is in excess of the jurisdiction of the Master in Ordinary, and the appeal should be allowed, but only to the extent of striking out those parts which seek to compel the claimant to vacate his foreign judgment. As that requires some action to be taken by him in a foreign country and in a foreign Court, nothing in the

nature of a penalty should be imposed upon the claimant for not doing what he may not be able to do, or whether able or not, for not doing something which in no way affects the assets of the company.

The order should be (1) that the claim as filed by Harre Robbins upon his foreign judgment should be disallowed; (2) that he be allowed within 4 weeks from this date to file as a creditor another claim if so advised, and upon proper proof of such claim, that he be entitled to a dividend with other creditors of the company, saving all just exceptions as to proof, ranking, etc.

As success on this appeal has been divided, there should be no costs to the appellant, and the costs of the liquidator, of this appeal should be paid to him out of the assets of the company.

I do not interfere with the disposition of costs made by the Master in Ordinary in the order appealed from.

DIVISIONAL COURT. JUNE 13TH, 1911.

FOXWELL v. KENNEDY.

Will—Executors and Trustees—Renunciation of Executorship—Right to Exercise Office of Trustee—Duties of Office not Separable—Jurisdiction of High Court to Set Aside Renunciation—Surrogate Courts Act—Judicature Act—Interest in Residuary Estate—Doctrine of Perpetuities.

Appeal by the plaintiff from the judgment of TEETZEL, J., of the 1st March, 1911, ante 821, where the nature of the case and the questions for determination are stated.

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

E. D. Armour, K.C., for the defendant James H. Kennedy.

A. J. Russell Snow, K.C., for the defendants Madeline and Frederick Kennedy.

A. J. Anderson, for the defendants David and Joseph Kennedy.

W. A. Proudfoot, for the defendant Downs.

W. A. Skeans, for the defendant Maria Hill.

RIDDELL, J.:—The will of the late David Kennedy in question in this action is that in question in Kennedy v. Kennedy, 13 O.W.R. 984.

The plaintiff is a granddaughter of the deceased, her mother being still alive: the defendant James H. Kennedy is a son of the deceased and is named as an executor in the will: David Kennedy, Robert Kennedy, Frederick Kennedy, Margaret Downs, Joseph H. Kennedy, and Marion Hill are other children of the deceased. We were informed that Charles Kennedy, another child of the deceased, died in the United States recently leaving a widow who has since died, it not being known whether he had or not, left any children; the defendant Madeline Kennedy is a daughter of Frederick Kennedy, the defendant Annie Maude Hamilton is a legatee under the will, and the defendant the Suydam Realty Co., Limited, has an agreement with James H. Kennedy to purchase from him as executor for $75,000 the land belonging to the estate not specifically devised.

The following is the will: [The will is here set out in full, but for the purposes of this note, reference may be made to the judgment of TEETZEL, J., ante, 822-825.]

David Kennedy, the testator, died in February, 1906; Annie Maude Hamilton renounced her right to probate and, as the plaintiff was still a minor, probate was granted to James H. Kennedy, reserving the right to the plaintiff to apply upon attaining majority. Shortly after attaining full age, she at the request of James H. Kennedy, also renounced her right to probate by an instrument in writing. She claims (1) that the renunciation was obtained by undue influence, and in ignorance of her rights; (2) and that in any case she did not renounce her right to act as trustee. Then she says (3) that the sale to the Land Company was at a gross undervalue and that she did not consent to it, and accordingly it should be set aside. Claims not to be disposed of upon this motion I pass over. The plaintiff then (4) asks an interpretation of the residuary clause (clause 20) of the will, in several respects.

James H. Kennedy puts in a statement of defence, claiming as to (1) that this Court has no jurisdiction, as to (2) there is no trust as distinct from the executorship, as to (3) the plaintiff has no interest, and as to (4) the same. An order was obtained for the trial of these questions of law under Con. Rule 259, and a motion was made before Mr. Justice TEETZEL, whose disposition of the case will be seen in the report, 2 O.W.N. 821; 18 O.W.R. 782.

The plaintiff now appeals, and the matter has been argued before us by counsel for all concerned, except certain of the defendants who appeared in person.

In respect of the first claim, I think the judgment appealed from is right. Under the original English practice it is said that

a renouncing executor was allowed, without leave of the Court, to retract his renunciation at any time so long as administration had not actually been granted; Tristram & Coote, 14th ed., 1st Canadian ed., 230—now by the English practice he may retract by permission of the Court in a case fit for it, and of this the Court is the sole judge. [Reference to Re Badenach, 3 Sw. & Tr. 466; Re Gill, 3 P. & D. 113; In re Whitham, 1 P. & D. 303, at p. 305, *per* Sir J. P. Wilde.] . . .

The statute of 1910, 10 Edw. VII. ch. 31, sec. 19, gives the jurisdiction "in relation to the granting or revoking probate . . . etc." to the Surrogate Court, and not to the High Court of Justice. The expression "subject to the provisions of the Judicature Act" does not affect the present matter—that refers to secs. 38, 39, and 40 of the Ontario Judicature Act.

As to the second question, I think the appeal must also fail for the reasons given by Mr. Justice Teetzel. It is in my view clear that the testator did not intend to create two sets of persons, viz., (1) executors, and (2) trustees, but that he used the expression executors, executrices, and trustees, as meaning the one class—in the very beginning of the will he appoints persons "hereinafter called my trustees to be the executor and executrices of this my will," which being paraphrased means, "I shall hereinafter call my executor and executrices my 'trustees.'"

Claim No. 3 will or may depend upon the conclusion arrived at on claim No. 4.

The plaintiff claims that she is a pecuniary legatee (as she undoubtedly is under paragraph 13 of the will as above set out), and that she is under paragraph 20 of the will entitled to a share of the proceeds of the sale—if that were so, she would no doubt have the right to complain if the land were sold at a sacrifice. The defendant, James H. Kennedy, however, claims that the provision in favour of the legatees is void for perpetuity. Mr. Justice Teetzel gave no independent judgment upon this question, but followed the decision of Mr. Justice Latchford in Kennedy v. Kennedy, 18 O.W.R. 442.

Very many cases have been cited to us by counsel for all parties, but a perusal of them does not vary the law as laid down by Kay, J., cited by my brother Latchford, 18 O.W.R. at p. 443. The history of the doctrine of Perpetuities is somewhat singular and most interesting, but no good end would be attained by going into this history or multiplying authorities. Marsden, Lewis, and Gray in their text-books have displayed great diligence and learning and have said all that could be said. (The last named work, able as it is, must be read with

caution—and the Courts bound by English authorities cannot always agree with the conclusions there stated). I am of opinion the judgment below is right for the reasons given by Mr. Justice Latchford.

The plaintiff then has no interest in the interpretation of the will, and her appeal and the objectionable part of her action should be dismissed both with costs.

The application of certain of the defendants to be made plaintiffs should not at this stage be granted—no doubt the Court has power to make such an order, but the circumstances of this case are not such as to call for the exercise of such power—nor can any provision be made for the payment of the costs of the defendants, other than James H. Kennedy, supporting, as they did, the claim of the plaintiff.

FALCONBRIDGE, C.J.K.B.:—I agree.

BRITTON, J.:—I concur.

IRISH v. SMITH—DIVISIONAL COURT—JUNE 8.

Mining Act of Ontario, sec. 81—*Agreement of Parties.*]—Appeal by W. J. Smith from the judgment of the Mining Commissioner, of the 29th April, 1911. The case was heard before BOYD, C., LATCHFORD and MIDDLETON, JJ., and the judgment of the Court was delivered by MIDDLETON, J., who said that the case did not come within sec. 81 of the Mines Act. "That section confers a new right upon a joint owner of a mining claim, and can only be applied where the case falls within its provisions. It provides that 'the holders of an unpatented mining claim shall each 'contribute proportionately to his interest, or as they may otherwise agree between themselves, to the work required to be done thereon.' The work 'required to be done' is the work stipulated for by sec. 78 as a condition of the holding of the claim, and does not cover any work beyond this, which the parties or either of them may think desirable. In this case the parties 'otherwise agreed,' as they arranged that subscriptions should be obtained for stock in a company to be incorporated if circumstances should justify it, and that the money so obtained should be used in the development of the property. The money expended was the money so obtained. The money received was in truth received on account of both owners, and the fact that one only of the two owners succeeded in obtaining subscriptions does

not bring the case within the section. Neither owner has expended any money of his own, and both are accountable to the subscribers for the money received. The appeal should be allowed and the order should be vacated, but it is not a case for costs." A. B. Drake, for the appellant. E. S. Wigle, K.C., for the respondent Irish.

RENNEY v. DEMPSTER—DIVISIONAL COURT—JUNE 10.

Mechanics' Lien—Preservation of Lien—Materials Furnished after Completion of Building—Scheme between Parties—Mala Fides.]—Appeal by Keating and Sunridge from the judgment of J. A. C. Cameron, an official referee, in a mechanics' lien action to enforce a lien for bricks supplied in the erection of a certain building. The referee dismissed the claim. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., and dismissed with costs. RIDDELL, J., gave a written judgment in which he stated that the Court had called upon the referee for the reasons for his judgment, which had been furnished, and from which it appeared that the brick which it is claimed kept the lien alive, were furnished after the building was completed, and were not to be used in the building. This was the outcome of a scheme between the parties, in bad faith, to advantage the appellants at the expense of others; and does not come within the Act. W. A. McMaster, for Keating and Sunridge. J. E. Jones, for the plaintiff. S. H. Bradford, K.C., for the Watt Milling Co.

BENNETT v. HAVELOCK ELECTRIC LIGHT AND POWER CO.—MOSS, C.J.O., IN CHAMBERS—JUNE 12.

Appeal—Court of Appeal—Motion to Remove Stay of Execution — Circumstances Unchanged since Judgment Appealed from.]—Motion by the plaintiffs under Con. Rule 827, to remove stay of execution, pending the defendants' appeal to the Court of Appeal from the judgment of the Divisional Court, 21 O.L.R. 120, as varied by the judgment noted, ante 1046. "Upon the material now before me, I am unable to distinguish the case from the case of Centaur Cycle Co. v. Hill, 4 O.L.R. 92. There has been no change of circumstances since the trial, or the judgment of the Divisional Court from which the present appeal is brought; and I am unable to say that the appeal is not being prosecuted in good faith, or not on substantial grounds. The

motion must be dismissed. Costs to the appellants in any event of the appeal." D. O'Connell, for the plaintiffs. W. C. Chisholm, K.C., for the defendants.

GARTHORNE v. WICKERSON—FALCONBRIDGE, C.J.K.B.—JUNE 13.

Representation of Heirs and Next of Kin—Order for—Application to Vary—Service by Mailing.]—Motion for an order for representation of heirs-at-law and next of kin. FALCONBRIDGE, C.J.K.B., made an order striking out the defendants other than the defendant Mabel Wickerson, and declaring that the plaintiffs sufficiently represent the heirs-at-law and next of kin of Agnes Garthorne, deceased, and that the judgment upon the trial of the action shall bind them as though they were parties thereto. It was also ordered that a copy of the order for representation, together with a copy of the statement of claim, should be within one week mailed to each of the heirs and next of kin by registered letter, postage prepaid, at their present addresses, and that any of the said heirs or next of kin not content to be so represented might apply to be made parties to this action, or to vary this order, at any time within two months from the mailing of the said copies. The action is not to be entered for trial for ten weeks from the mailing of the said copies. The learned Chief Justice said that he had arrived at this solution of the matter without reference to the letters from other next of kin or heirs-at-law which he had called for, and which were handed to him by Mr. Bartlett. These letters had been sealed up in an envelope, unread, and would be returned to him in the same condition. P. H. Bartlett, for the plaintiffs. J. B. McKillop, for the defendant Mabel Wickerson.

KENNEDY v. KENNEDY—DIVISIONAL COURT—JUNE 13.

Will—Construction—Direction to Apply Fund for Maintenance of Residence—Provision for Distribution of Fund if Residence Sold—Executory Interest of Distributee—Rule against Perpetuities.]—Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 625. This appeal has already been disposed of, so far as questions of practice are concerned (see ante 1173), but the plaintiff was allowed to make her argument upon the law when Foxwell v. Kennedy came on to be argued. See ante 1174.

Counsel for the plaintiff stated that he adopted the argument of counsel for the plaintiff in the Foxwell case, upon the merits of the action. The judgment of the Court (FALCONBRIDGE, C.J. K.B., BRITTON and RIDDELL, JJ.) was delivered by RIDDELL, J., as follows: "We have now had the advantage of a very full and able argument of this case upon the merits. For reasons set out in Foxwell v. Kennedy, ante 1299, I am of opinion that the appeal fails, so far as the main ground is concerned, and I think the same result must follow in the matter of the claim of the plaintiff to be added as the assignee of Fred. Kennedy. The appeal should be dismissed with costs." A. J. Russell Snow, K.C., for the plaintiff. E. D. Armour, K.C., for the defendant James H. Kennedy.