The
Ontario Weekly Notes

VOL. XI. TORONTO, JANUARY 12, 1917. No. 18

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 30TH, 1916.

*BAINES v. CURLEY.

Mechanics' Liens—Action to Enforce—Failure of Plaintiffs to Establish Lien—Rights of other Registered Claimants of Liens not Having Brought Actions—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, secs. 24, 31, 32, 37—Time for Registration—Appeal—Status of Appellants.

Appeal by the defendants Curley and Mosher from the judgment of the Assistant Master in Ordinary in favour of certain lien-holders in an action to establish a mechanic's lien for materials.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

J. J. Gray, for the appellants.

J. H. Fraser, for claimants of liens, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that the objection to the appellants' right to appeal and the objection to the respondents' lien, on the ground that it was not registered within the time limited by the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, were answered, adversely to the objectors in each case, in the recent case of Benson v. Smith & Son (1916), 37 O.L.R. 257.

If regard be had mainly to some particular words of the enactment, if one's attention be too much rivetted upon them, Mr. Gray's contention that all liens involved in this action are

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

lost, because it turns out that the plaintiffs had none, and no other action to enforce liens was brought within the time limited by the Act, might seem a somewhat formidable one, as well as a somewhat startling one. But, if regard be had to the purposes of the enactment and all its provisions and words, the formidableness of the objection may fade, and no difficulty be experienced in avoiding its startling and disturbing effects.

That which the Act aims at in regard to the enforcement of its provisions is simple, inexpensive, and speedy methods: McPherson v. Gedge (1883), 4 O.R. 246.

A narrow examination and interpretation of secs. 31 and 32 would doubtless lead to the conclusion that the plaintiff in the action of which other lien-holders may have the benefit must be himself a lien-holder.

But sec. 37 is by no words so restricted; and, under it, not only are all questions which arise in any action, tried under its provisions, to be determined, but also "the rights and liabilities of the persons appearing before" the Judge or officer who tries the action, "or upon whom the notice of trial has been served," are to be adjusted; and, among other wide provisions, "all necessary relief to all parties to the action and all persons who have been served with the notice of trial" is to be given.

The respondents were served with notice of trial before there was any adjudication upon the plaintiffs' claim; and they are entitled to the benefit of these provisions of sec. 37, upon even a narrow and literal interpretation of its words—because an action in which their lien may be realised, that is, this action, was brought within the time limited by sec. 24.

Giving the Act that liberal interpretation which we are required to give it, it may be that secs. 31 and 32 should be held to cover any action brought in good faith to enforce a lien, whether it should eventually turn out to be enforceable or not; but the respondents are not driven to that contention; they can safely take cover under sec. 37.

The appeal should be dismissed.

RIDDELL, KELLY, and MASTEN, JJ., agreed that the appeal should be dismissed; RIDDELL and MASTEN, JJ., giving reasons in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 30TH, 1916.

*CLAREY v. OTTAWA ELECTRIC R. W. CO.

Street Railway—Operation of Car—Injury to Passenger—Negligence—Contributory Negligence—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of MIDDLETON, J., who tried the action without a jury at Ottawa, in favour of the plaintiff in an action for damages for injuries sustained by him by reason of the negligence of the defendants in the operation of one of their street railway cars, as he alleged.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

Taylor McVeity, for the appellants.

W. J. Kidd, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment, in which he said that the plaintiff's story was that he ran to catch the car, got upon the lower step of the entrance, but could go no farther because it was crowded in front of him; that, when he was in this position, a woman came down the steps to leave, and in that way did leave the car, getting out by the entrance way instead of the exit way; that he and the man in front of him made way to let the woman pass; that, holding on with his right hand to a handle-bar, he swung back, taking his left foot off the step, but keeping his right foot on it; and that, after the woman had safely alighted, and before he had got back to his former position, the bell was rung to start the car—"the car gave a snap," and his right foot slipped off the step, and he was thrown down and his shoulder dislocated.

There was no finding of the trial Judge that there was any negligence in the starting of the car. The signal to start was given by the conductor in the usual manner, and was seen and heard by the plaintiff; and the whole evidence as to the way in which the car came into motion was not such as to indicate any unusual violence which would amount to actionable negligence if the proximate cause of any injury.

The judgment of the trial Judge was based upon the finding that the conductor of the car was guilty of negligence in starting the car when the plaintiff was in the position of having one hand on the handle-bar, one foot on the step, and the other off it.

The car was one of those in which passengers are required to pay their fares as they enter the car; there was an exit and an entrance on the back platform of the car.

It is, of course, the duty of the conductor to see that all persons who desire to and can board the car when it stops to take on passengers, are safely on board before giving the signal to start the car on its journey; but the plaintiff, having chosen to board a car that he knew was about to start, and so likely to start at once that he ran to catch it, and having chosen to board it when it was so crowded that he could get only a footing on the lower step, having chosen to do so and to take the ordinary chances of so doing rather than wait for the next car, was unreasonable in contending that the conductor was in duty bound not only to see him so on board, but to watch his movements afterwards and not to start the car until he was in such a position that no backward movement on his part could put him in danger. Conductors have other duties to perform; and passengers too have duties, one of which is not to put themselves needlessly in a dangerous position, not to attempt to board a car, known to be immediately about to be started, when the entrance to that car is so crowded that it cannot be safely boarded; if a passenger choose to make way for another coming out the wrong way, when it is known that the car is immediately about to be started, and, instead of getting off, swings around into an awkward position likely to cause his dislodgement if the car moves, the fault is his.

If the plaintiff be not blamed neither should the defendants for this accident.

The appeal should be allowed and the action dismissed.

RIDDELL, J., was of opinion, for reasons stated in writing, that, assuming that the defendants were negligent, on the plaintiff's own story he contributed to the accident by his own want of reasonable care. The appeal should be allowed.

KELLY, J., read a short judgment in which he stated the facts and said that, on the plaintiff's own evidence, he knowingly took chances and placed himself in a position of danger, and that but for his failure to take reasonable care he would not have been injured. The appeal should be allowed.

MASTEN, J., was of opinion, for reasons stated in writing, that the defendants were guilty of negligence which caused the

accident, in allowing a passenger to leave by the wrong entrance, and also in not being in his proper place on the rear platform when the car started; but (with some doubt) the plaintiff was guilty of contributory negligence. The appeal should be allowed.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 30TH, 1916.

*PHILLIPS v. GREATER OTTAWA DEVELOPMENT CO.

Infant—Contracts for Purchase of Land—Forfeiture of Payments Made on Default in Subsequent Payments—Void Contracts—Absence of Valuable Consideration—Right to Recover Money Paid—New Contract not Made after Majority—Ability to Make Restitution.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Carleton dismissing an action brought in that Court for a declaration that certain agreements entered into by the plaintiff (when an infant) with the defendants for the purchase of lands were void and for repayment of $303.84 paid thereunder.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

T. McVeity, for the appellant.

H. S. White, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that, if the contracts in question were voidable only, he would not feel disposed to find fault with the judgment in appeal, as there seemed to have been sufficient evidence adduced at the trial upon which it could be found circumstantially that there was a ratification of the transaction by the plaintiff after he attained his majority; though, if the finding had been the other way, there would also have been much difficulty in the way of reversing it here.

But that was really not the point in the case; the real main question was, whether the contracts in question were void; and

that was a question which was not considered by the learned County Court Judge: perhaps the point was not plainly made before him; and assuredly such cases as Beam v. Beatty (1902), 4 O.L.R. 554, could not have been brought to his attention.

Such cases compel the Court, as a matter of law, to consider that contracts "such as the Courts can pronounce to be to their prejudice" are void when made by infants; that their obligation, "with a penalty, even for necessaries, is absolutely void." So that the real question was, first, whether the contracts in question were void or only voidable: to be followed, if void, by the second and concluding question, whether anything had taken place which prevented the plaintiff from recovering the money paid by him under such void contracts.

The plaintiff was but a lad of 18 years when the defendants induced him to buy the land in question and to sign a contract for the purchase of it and payment of the purchase-money (all during minority), with a forfeiture clause, under which, though he might have paid all but the last mite, he might lose the land and all that he had paid upon it.

The defendants must have known the lad was legally incompetent to contract; that he could not resell, however rapid might be the decline or the rise in value of his purchase; that his hands were tied by his infancy so that he could not borrow to pay the purchase-money or otherwise save his purchase, if even at the last moment he had not the means to pay, no matter how much had been paid before; they knew his position in life, and that, if sickness or anything else prevented him from earning enough to make the payments, they were binding him to permit them to retake the land and retain all the payments he had made upon it. In these circumstances, it was not possible for any one to contend that the contracts were not prejudicial to the infant.

And, being void, the plaintiff might recover the money paid under the contracts, unless he had received valuable consideration for them; or unless it has been shewn that, after the plaintiff attained his majority, a new contract, binding in law or equity, was made by him, and the paid money applied upon it; but no consideration was received, and complete substantial restitution could be made: and there was no contention that any such new contract was made.

The appeal should be allowed and judgment should be entered for the plaintiff with damages in the amount paid by the plaintiff to the defendants under the contract, and with costs of the action and of the appeal.

KELLY and MASTEN, JJ., concurred, each stating reasons in writing.

RIDDELL, J., dissented, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 4TH, 1917.

*GIRARDOT v. CURRY.

Mortgage—Action against Executors of Mortgagee for Redemption —Oral Agreement with Testator—Evidence—Trust—Sale under Power—Notice of Sale—Irregularities—Possession of Land—Limitations Act—Rights of Dowress—Dower Act, sec. 10.

Appeal by the plaintiffs from the judgment of KELLY, J., 10 O.W.N. 441, dismissing the action.

The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., and LENNOX and MASTEN, JJ.

J. H. Rodd and F. D. Davis, for the plaintiffs.

A. R. Bartlet, for the defendants the executors and the Essex County Golf and Country Club Limited, respondents.

J. H. Coburn, for the defendant Woollatt, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the action was brought by a man and his wife against the executors of a mortgagee of the lands of the husband and against purchasers of the lands from the mortgagee, to have the mortgagee dealt with as if a trustee for the husband of the lands, and for redemption, or to recover damages from the estate of the mortgagee for breach of trust or for parting with the land so as to defeat a right to redeem which otherwise would still exist.

The answer to the action was a denial of any such trusteeship, and an assertion that the mortgagee, before action, became entitled to the lands, absolutely, by purchases and conveyances from prior mortgagees under powers of sale contained in their mortgages; and that, in any case, the plaintiffs' claims were barred by the Statute of Limitations.

There was no evidence in writing of the alleged trusteeship; and the learned trial Judge had found against the plaintiffs

upon the question of fact—a finding made conclusive by the evidence contained in a letter of the male plaintiff of the 9th October, 1903.

Then, as mortgagor only, it was contended that the male plaintiff had a right to redeem, or else his wife had a right to redeem, a part of the mortgaged lands, because the sale of them, under the prior mortgage, was invalid against the plaintiffs for want of notice to either of them of the mortgagee's intention to sell.

The evidence of actual service of the notice of sale was altogether circumstantial, but was quite sufficient to uphold the sale, in all the circumstances of the case. There was a qualified denial by the husband of the service upon him, but no denial by the wife of service upon her. In all the circumstances, the finding should have been, and should now be, that due service of the notice was effected upon the mortgagor: see Tanham v. Nicholson (1872), L.R. 5 H.L. 561; Doe d. Murphy v. Mulholland (1832), 2 O.S. 115; and Berard v. Bruneau (1915), 25 Man. R. 400.

Upon the question of the Limitations Act, the Chief Justice's opinion was in accord with that of the trial Judge; the male plaintiff's own testimony removed all doubt upon that question: see Kay v. Wilson (1877), 2 A.R. 133.

There could be no doubt, therefore, that the action was rightly dismissed as to the male plaintiff; and there was no good reason for thinking that it was not also rightly dismissed as to his co-plaintiff.

A copy of the Marentette mortgage being produced, it proved to be in the statutory short form; and under it service of notice of sale on the wife of the mortgagor is not required. The wife was a party to the mortgage, and barred her dower under its provisions, which gave the mortgagee power to sell after notice, to "the mortgagor, his heirs, executors, administrators, or assigns" only. No provision was made for notice to the wife.

Section 10 of the Dower Act, R.S.O. 1914 ch. 70, does not extend the wife's rights in that respect. Under it, the mortgagee's rights are to have full effect.

But the finding should be that the wife had due notice of the mortgagee's intention to exercise the power of sale.

The appeal should be dismissed.

HODGINS, J.A., concurred in dismissing the appeal. He was not able to agree that service of notice of exercising the power of sale as to the Newman property was properly proved by the evidence given. But, as the terms of the power were not shewn,

it was unnecessary to speculate as to whether notice was necessary; and, if necessary, whether it was given. The Limitations Act was a sufficient defence on this branch of the case.

LENNOX, J., agreed. The plaintiffs, he said, had failed to establish a trust in fact or in law. Service of the notice had been established. It would be dangerous and unwise to open the matter after a long lapse of time.

MASTEN, J., agreed that the appeal should be dismissed.

Appeal dismissed.

SECOND DIVISIONAL COURT. JANUARY 4TH, 1917.

JOBIN MARRIN CO. v. TYNE.

Attachment of Debts—Moneys Payable under Fire Insurance Policy—"Debt"—Election of Insurers to Pay Money to Insured—Payment into Court—Claim of Assignee of Insured.

Appeal by the assignee of a claim under a fire insurance policy from an attaching order made in the District Court of the District of Rainy River.

The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., and LENNOX and MASTEN, JJ.

D. Inglis Grant, for the appellant.

W. J. McWhinney, K.C., for the attaching creditors, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that two weeks before the appellant was in any way concerned in the subject-matter of this litigation, the respondents had obtained an order of the District Court by which that subject-matter had been appropriated to the payment of the debts of the person who afterwards went through the form of assigning it to the appellant.

But it was contended that, when the order of the Court was made, the subject-matter of this appeal was not a debt, and, as the Court had power to attach debts only, its order was ineffectual.

The subject-matter of this appeal was originally a fire insurance policy: a fire had occurerd, and a claim for indemnity had been made under the policy, and thereupon the respondents

had attached, in garnishee proceedings, under a judgment of the District Court in their favour against the insured, the money coming to her, under this policy, for such loss.

The sole ground of the appeal was that that indemnity had not, when the attachment took place, assumed the form of a debt, and, as only debts can be attached, that attachment was quite ineffectual to prevent the insured doing as she pleased with the benefit she was to derive from the policy; that there was no attachable debt, because, for one reason, the insurers had a right, if they chose, to reinstate the insured in the goods destroyed by the fire, instead of paying any money indemnity.

But what has that to do with the case, when the insurers chose to pay the amount of the insurance, instead of reinstating, or taking advantage of any other provision, in their favour, of the policy of insurance? The insured made her claim for so much money, and the insurers admitted the claim and were ready to pay the money; and had now paid it into Court. Neither the appellant nor the insured could prevent the insurers waiving any rights they might have had and acknowledging their indebtedness for the amount of the insured's claim; and, they having done so, the order of the District Court, made against them, as such debtors, must be valid; no one could prevent them saying then, as they did, or saying now, "We admit the insured's claim upon us, we are her debtor in the amount of it."

HODGINS, J.A., and LENNOX, J., agreed.

MASTEN, J., was of opinion that the attaching order was valid and the subsequent assignment bad.

Appeal dismissed.

HIGH COURT DIVISION.

MIDDLETON, J. DECEMBER 30TH, 1916.

*COLUMBIA GRAPHOPHONE CO. v. UNION BANK OF CANADA.

Banks and Banking—Forged Cheques Paid by Bank—Extensive Frauds of Clerk of Customer—Concealment—Agreements and Acknowledgments—Liability of Bank—Knowledge—Estoppel.

Action by customers of the defendant bank to recover $45,144.43, the aggregate amount of a large number of cheques to

which one Ott, a clerk of the plaintiffs, had forged their name, and which were paid by the bank and charged to the plaintiffs' account.

The action was tried without a jury at Toronto.

A. C. McMaster, J. H. Fraser, and J. M. Bullen, for the plaintiffs.

I. F. Hellmuth, K.C., C. P. Wilson, K.C., and W. B. Raymond, for the defendants.

MIDDLETON, J., in a written judgment, described the methods adopted by Ott of covering up the traces of his various crimes; they were extremely ingenious. His employment began in February, 1913, and his frauds in March of the same year; he absconded in April, 1915. The learned Judge also described the bank's system of agreements, receipts, and acknowledgments adopted in February, 1914, and said that they were intended to be real agreements and to define the relation between the parties; and these, he considered, relieved the bank from all liability down to the 30th May, 1914. This covered $6,976.37 of forged paper.

The fundamental principle is, that the relation of the bank to its customer is contractual; and that, in the absence of any other express agreement, the contract of the bank is to pay the money intrusted to it to the customer or upon his order. The bank does not discharge itself from its liability if it pays upon a forged cheque, and it is a matter of no importance that the customer has so conducted his business as to render forgery by a clerk easy, or that he has so carelessly drawn a cheque as to facilitate its alteration. A forged cheque is no justification to the bank for parting with the customer's money—it is a mere nullity.

Any conduct on the part of the customer after he has knowledge that a forged cheque has been issued, or that a genuine cheque has been altered, which is calculated to mislead or deceive the banker, or which will facilitate the commission of a fraud upon the banker, will preclude the customer from asserting that his signature is not genuine—but all these cases rest upon the existence of a duty or obligation which it is assumed arises from the knowledge of the existence of the forged document. This duty or obligation arises generally from the contractual relationship of the parties; but the Supreme Court of Canada found that it may also arise when there is no contractual relation, from moral and commercial obligations: Ewing v. Dominion Bank (1904), 35 S.C.R. 133, [1904] A.C. 806.

But the obligation cannot arise unless there is knowledge, and *â fortiori* when the fraud is perpetrated by one who has the skill and ability to conceal his fraud from both parties.

Here the case was in one aspect a hard one on the bank; but the bank could have protected itself in any one of three ways: (1) insisted upon a contract with the customer imposing upon him the duty to state accounts monthly and to accept as genuine all items not objected to in a reasonable time; (2) insisted upon the regular signature of the monthly acknowledgments; (3) delivered the statements and vouchers into the hands of the manager instead of to the fraudulent clerk.

Reference to Kepitigalla Rubber Estates Limited v. National Bank of India Limited, [1909] 2 K.B. 1010.

An estoppel could not be based upon the request of the bank for an acknowledgment and a refusal—for the neglect was eqivalent to a refusal—to give it. That which is not done cannot be treated as done. Nor could the retention of the vouchers by the plaintiffs be regarded as an acknowledgment of their genuineness. They were delivered to the fraudulent clerk, and never came to the knowledge of the plaintiffs.

The result was that the plaintiffs should recover for all cheques after the 30th May, 1914, less the true amount of the five raised cheques, with such interest as the bank would have allowed up to the date of the writ, and with 5 per cent. interest from the date of the writ to judgment, and costs.

SUTHERLAND, J., IN CHAMBERS. JANUARY 2ND, 1917

LINK v. THOMPSON.

Infant—Custody—Action by Father—Cause of Action—Refusal of Defendant to Answer Questions on Examination for Discovery—Contempt of Court—Order for Re-attendance—Defence to be Struck out upon Default.

Motion by the plaintiff to commit the defendant for contempt in refusing to answer questions on her examination for discovery.

The plaintiff, the father of a girl of 12 years, sought by this action to obtain from the defendant, the child's maternal aunt, the possession and custody of the child.

The defendant alleged an agreement between the plaintiff and herself by which the plaintiff waived in her favour the right to the possession and custody of the child.

Upon being examined, the defendant refused to answer questions in regard to the whereabouts of the child.

C. G. Jarvis, for the plaintiff.
T. G. Meredith, K.C., for the defendant.

SUTHERLAND, J., in a written judgment, said that it was argued on behalf of the defendant that the statement of claim disclosed no cause of action against the defendant, and that the plaintiff's remedy, if any, was by an application for a habeas corpus. The learned Judge was not disposed to agree with this contention. He was of opinion that on an examination for discovery the questions asked were proper ones and should have been answered.

Order that the defendant attend for further examination at her own expense and answer the questions which she refused to answer, and, in default, that her statement of defence be struck out.

Costs of the motion to be costs in the cause unless otherwise ordered by the trial Judge.

MIDDLETON, J., IN CHAMBERS. JANUARY 2ND, 1917.

*RE MONTGOMERY AND WRIGHTS LIMITED.

Execution—Seizure and Sale by Sheriff of Company-share—Writ Effective only from Date of Seizure—Prior Unrecorded Claim upon Share—Application by Purchaser to be Recorded as Owner—Execution Act, R.S.O. 1914 ch. 80, sec. 10—Companies Act, R.S.O. 1914 ch. 178, sec. 60—True Interest of Execution Debtor—Issue as to Bona Fides of Prior Claim.

Motion by J. D. Montgomery, the vendee at a sheriff's sale of one share of the capital stock of Wrights Limited, an incorporated company, for a mandatory order directing that company to record the applicant as owner of the share.

J. M. Bullen, for the applicant.
J. H. Hoffman, for the company.
M. Wilkins, for Roland C. Nelles, claimant.

MIDDLETON, J., in a written judgment, said that under execution against C. F. Wright, dated the 15th November, 1915, the

sheriff seized (some time after the 2nd February, 1916) and sold to the applicant, a share of stock standing in the name of Wright; the applicant paid $80 therefor, and that sum had been paid over to creditors of Wright.

After the sale, Roland C. Nelles made a claim to the ownership of the share or to some lien thereon, alleging that he had had the stock-certificate in his possession since the 15th January, 1916, as security for money lent to Wright.

It was argued for the applicant that the execution bound the share from the time the writ was placed in the sheriff's hands, and that, assuming the statement of Nelles to be true, he had no title as against the purchaser.

At common law an execution bound goods from the date of its issue; the Statute of Frauds made it bind only from the time it was placed in the sheriff's hands for execution; and this was again modified by protecting the rights of a bona fide purchaser without notice of the writ being in the sheriff's hands: Execution Act, R.S.O. 1914 ch. 80, sec. 10. This applied only to goods which were by common law exigible under the writ; and when, by statute, other property was made exigible, it was, generally speaking, made liable only from the time of actual or constructive seizure: Hatch v. Rowland (1870), 5 P.R. 223; McDowell v. McDowell (1862), 1 Ch. Chrs. 140; Allan v. Place (1908), 15 O.L.R. 476.

A transfer of stock must be duly recorded to complete the title, but any unrecorded dealing is not void, but is valid as "exhibiting the rights of the parties thereto towards each other:" Companies Act, R.S.O. 1914 ch. 178,sec. 60.

An execution creditor can take only the true interest of the execution debtor, and this principle applies to cut down the apparent to the true title in the case of stock—the true title is exigible: Morton v. Cowan (1894), 25 O.R. 529.

The applicant must take an issue with Nelles as to the bona fides of Nelles's claim, or the application must be refused. If an issue is taken, costs will be reserved to the trial. If not, no costs.

SUTHERLAND, J. JANUARY 2ND, 1917.

*RE WHITE AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Compensation—Award—Interest—Rents—Computation from Date of Expropriating By-law—Power of Arbitrator to Amend Award after Time for Appeal Expired—Enforcement of Amendment Award—Municipal Arbitrations Act, R.S.O. 1914 ch. 199, secs. 2 (2) (e), 7—Arbitration Act, R.S.O. 1914 ch. 65, secs. 4, 10 (c).

Motion by an owner of land expropriated by the city corporation under a by-law passed on the 19th May, 1913, for an order for leave to enter judgment in the applicant's favour for the amount awarded as compensation by an award of the Official Arbitrator, dated the 8th July, 1916.

By the award it was adjudged that the city corporation should pay to the claimant (land-owner) $41,000 in full compensation for taking his land, together with his costs of and incidental to the arbitration, with the fees of the arbitrator and stenographer.

The award was duly filed, together with the written reasons of the arbitrator, and notice given. The last clause of the arbitrator's reasons was: "The claimant is entitled to interest from the date of the expropriating by-law, and the contestant to the rents received from such day by the claimant."

In the award itself no reference was made to rents or interest. No appeal was taken from the award within the six weeks allowed by sec. 7 of the Municipal Arbitrations Act, R.S.O. 1914 ch. 199. Subsequently, upon the application of the corporation, on notice served on the 25th October, 1915—the claimant appearing and objecting—a written amendment of the award was made by the arbitrator on the 21st November, 1916, so as to accord with the clause of his reasons above-quoted, i.e., allowing the claimant interest and the corporation the rents received from the date of the by-law.

The claimant maintained that the arbitrator was functus officio when he made the amendment; and that there should be judgment for the amount of the award, together with the rents down to the time the corporation went into possession (1st September, 1915), and with interest from that date, after giving proper credit for a sum paid on account.

The motion was heard in the Weekly Court at Toronto.

J. J. Maclennan, for the claimant.
C. M. Colquhoun, for the city corporation.

SUTHERLAND, J., in a written judgment, after setting out the facts, referred to secs. 4 and 10 of the Arbitration Act, R.S.O. 1914 ch. 65, and sec. 2 (2) (*e*) of the Municipal Arbitrations Act, R.S.O. 1914 ch. 199. He was not sure that sec. 2 (2) (*e*) of ch. 199 would alone clothe the arbitrator with authority, after the hearing had been concluded and the award made, to amend it; but sec. 10 (*c*) of ch. 65 would seem to give him that power. Whether it could be exercised after the time limited for an appeal had elapsed, the learned Judge thought, he could not properly be called upon to determine upon this application.

The only award with respect to which he could be called upon to make the order for judgment was the amended award. If the claimant desired to appeal therefrom, the appeal must be to a Divisional Court. Unless the claimant was content to take an order under sec. 14 of ch. 65 to enforce the amended award, the motion must be dismissed with costs.

The arbitrator was right in determining that the corporation should be regarded as in possession from the date of the expropriating by-law, and entitled to the rents from and after that date, while the claimant was entitled to interest from the same date: Redman's Law of Awards, 3rd ed. (1897), pp. 158, 240; In re Stringer and Riley Brothers, [1901] 1 K.B. 105; Mordue v. Palmer (1870), L.R. 6 Ch. 22; Re Horseshoe Quarry Co. and St. Mary's and Western Ontario R.W. Co. (1910), 22 O.L.R. 429.

MIDDLETON, J., IN CHAMBERS. JANUARY 3RD, 1917.

RE CAYLEY.

Insurance—Life Insurance—Foreign Friendly Society—Change of Beneficiary by Will of Insured—Invalidity under Laws of Society—Preferred Beneficiaries—Inapplicability of Laws of Ontario—Payment of Money out of Court—Costs.

Motion by Eva Cayley for payment out of Court of $500 insurance money paid in by a friendly society.

J. P. MacGregor, for the applicant.
F. J. Hughes, for Emma Emilio.

MIDDLETON, J., in a written judgment, said that the insurance was for $1,000 under a certificate issued on the 20th September, 1909. The insurance was, by the certificate, made payable to Eva Cayley (applicant), the wife of the insured. Cayley died on the 8th February, 1916, having made a will by which he directed that $500, part of the insurance money, should be paid to his sister, Emma Emilio. This $500 was paid into Court; the remaining $500 was paid to the widow.

The society ("The Maccabees") was incorporated in the State of Michigan in 1885, and had a head office in Detroit, Michigan.

The deceased Cayley was a British subject, born in Canada, but living in Chicago, Illinois, at the time of his marriage and at the time of the issue of the certificate. In September, 1914, he came to Toronto, Ontario, leaving his wife in Chicago, and took up his residence with his sister in Toronto, and remained with her till his death. The will was made in Toronto.

The laws of Ontario could not affect the contract or its construction.

The laws of the society were really the foundation of the contract and governed the rights of the parties. By art. 341: "Any transfer of a life benefit certificate or any interest therein by assignment, will, or in any manner except as hereinafter provided, shall be void;" and art. 339 enumerates the persons who may be beneficiaries, the class including both wife and sister, and provides that, within the restricted class, "each member shall have the right to designate the beneficiary and from time to time have the same changed in accordance with the laws, rules, and regulations of the association, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the member."

The only way, under the rules, by which a member is permitted to change his beneficiary is by surrender of the certificate and a written request for the issue of a new certificate in favour of the new beneficiary. That was not done here, and the wife remains the sole beneficiary under the contract, and as such entitled to the money.

The claim of the sister to some personal right against the wife was not made out; and, even if made out, it was not a claim to any specific lien on the sum in Court.

The money must be paid to the wife, but it was not a case for costs against the sister.

HODGINS, J.A. JANUARY 3RD, 1917.

*RE TOWN OF ALLISTON AND TOWN OF TRENTON.

Municipal Corporations—Bonus to Manufacturing Business—By-law—Motion by Another Municipal Corporation to Quash—Injurious Affection—Municipal Act, R.S.O. 1914 ch. 192, sec. 285—"Business Established elsewhere in Ontario"—Sec. 396 (c) of Act—Ownership of Business—Identity—Company—Practical Control.

Motion by the Corporation of the Town of Alliston to quash by-law 1157 of the Town of Trenton, passed on the 31st August, 1916, granting a bonus of $11,000 to the Benedict Manufacturing Company of Syracuse, New York, in respect to a silver plated ware business to be carried on in Trenton.

The motion was heard in the Weekly Court at Toronto.

W. A. J. Bell, K.C., for the applicants.

I. F. Hellmuth, K.C., and A. Abbott, for the Corporation of the Town of Trenton, respondents.

HODGINS, J.A., in a written judgment, said that he allowed an affidavit to be filed on behalf of the applicants alleging, under sec. 285 of the Municipal Act, R.S.O. 1914 ch. 192, that they were injuriously affected; as the learned Judge thought they were.

A business was already in existence in Alliston, under the name of the Benedict Proctor Manufacturing Company; and it was said that, this being a business "established elsewhere in Ontario," sec. 396 (c) of the Act prohibited any bonus being granted by the Trenton corporation such as was contemplated.

Both counsel agreed that clause (c) deals with the ownership, and not the character or species of the business, and submitted the question as depending wholly on the identity or otherwise of the two concerns in point of proprietorship. The case was therefore to be disposed of on that assumption, giving "ownership" and "proprietorship" their largest meaning.

The applicants alleged that the Alliston company was a branch or subsidiary concern of or was controlled by the Syracuse company.

The business had not yet been removed to Trenton; it still existed in Alliston; and, if the professions of the respondents

were accepted, it was a new industry that was proposed for Trenton.

If, however, it appeared to be made out that legal separation had come about before the by-law was passed, and yet that commercial control of the Alliston concern was established in or continued by the Syracuse company, so that the transfer of the assets and the discontinuance of the business was entirely within the latter's discretion, and was in fact likely to be a matter of course, the mischief against which the statute was aimed would have presented itself.

The difficulty lay in the disappearance of the words of 63 Vict. ch. 33, sec. 9 (*e*), "to secure the removal of an industry established elsewhere in the Province." See the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 591, sub-sec. 11 (*e*), adding words which affected the removal, whether threatened or accomplished, and was intended to prevent its being said that, when the transfer had taken place before the by-law was passed, the decision in Re Village of Markham and Town of Aurora (1902), 3 O.L.R. 609, had no application.

The meaning of the clause is, that bonusing an industry already existing elsewhere in Ontario is not permitted in two municipalities, even though (1) the same individual is to carry on both, or (2) that some other person deriving title or claiming through or under him or otherwise is to do so, or (3) that the same proprietor operates it in partnership with others or by means of a joint stock company or otherwise. What is aimed at is the entire elimination of competing bonuses. The sense is not altered by the verbal changes found in the Municipal Act of 1913 and R.S.O. 1914 ch. 192, sec. 396.

Upon the facts, the learned Judge said, he had arrived at the conclusion that in what had been done there was a design, to which the respondents were parties, to accomplish that which the statute was intended to prevent. The design that had been carried out was one which, while vesting the stock of the Alliston company wholly in Proctor and divesting any shareholding interest by the Syracuse company, yet left the one company completely in the hands of the latter, in every other essential, as its creditor and manager and financial director.

Reference to Erichsen v. Last (1881), 8 Q.B.D. 414, 416; St. Louis Breweries Limited v. Apthorpe (1898), 79 L.T.R. 551; San Paulo (Brazilian) R.W. Co. v. Carter, [1896] A.C. 31.

The proposed factory in Trenton is carried on by the same persons who carried on and still in fact carry on the Alliston business; the latter enterprise was in fact a branch or subsidiary

company of the Syracuse concern, just as the Trenton factory will be. If the by-law stands, it will be quite possible for these same persons, either from their position as creditors of the Alliston company or creditors of its chief shareholder, and as controlling that company's financial affairs, to compel or induce the transfer of the plant and machinery of the Alliston company to Trenton.

If this view is not sound—if the legal entity is alone to be considered—the prohibition in the statute will be ineffective.

The by-law should be quashed with costs.

HODGINS, J.A., IN CHAMBERS. JANUARY 3RD, 1917.

MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Appeal—Leave to Appeal to Privy Council Given by Judicial Committee—Power of Court below to Stay Execution—Decision of Judge in Chambers—Leave to Appeal to Divisional Court——Conflicting Decisions—Privy Council Appeals Act, R.S.O. 1914 ch. 54.

Motion by the defendants for leave to appeal from an order of RIDDELL, J., in Chambers, in so far as it refused an application for a fiat to stay execution. The order allowed the security on an appeal to the Privy Council from the judgment of a Divisional Court, leave to appeal having been obtained from the Judicial Committee.

P. E. F. Smily, for the defendants.
J. H. Fraser, for the plaintiff.

HODGINS, J.A., in a written judgment, said that the view of RIDDELL, J., was, that the Privy Council Appeals Act, R.S.O. 1914 ch. 54, applied solely to appeals as of right, and that there is no power under it to stay execution in cases where the Judicial Committee has given leave.

The power to stay, in somewhat similar circumstances, has been considered and affirmed in Sharpe v. White (1910), 20 O.L.R. 575; and in Hughes v. Cordova Mines Limited (1915),

8 O.W.N. 372, an order was made which took for granted that the power existed notwithstanding that leave was necessary. And see Cotton v. Corby (1859), 5 U.C. L.J. O.S. 67; Quinlan v. Child, [1900] A.C. 496; Nityamoni Dasi v. Madhu Sudan Sen (1911), L.R. 38 Ind. App. 74; Mohesh Chandra Dhal v. Satrughan Dhal (1899), L.R. 26 Ind. App. 281.

In view of these decisions, which appeared to conflict with the effect of the order of RIDDELL, J., and as it was very desirable that it should be definitely decided in which Court the power to stay resided after leave to appeal granted in England, the applicants should have leave to appeal on the one point raised.

SUTHERLAND, J., IN CHAMBERS. JANUARY 4TH, 1917.

RE HAYCOCK.

Dower—Application for Order to Convey Land Free from Dower of Wife of Mortgagor—Dower Act, R.S.O. 1914 ch. 70, secs. 14 (2), 17—Proof that Mortgagor Alive—Necessity for Ascertainment of Value of Dower where Wife not Disentitled.

Motion by W. A. Brown for an order under sec. 17 of the Dower Act, R.S.O. 1914 ch. 70, authorising the applicant to convey or mortgage land in the village of Belmont free from the dower of Blanche Haycock, wife of Frederick Haycock.

On the 31st December, 1912, the applicant conveyed the land to Haycock, who gave back a mortgage to secure part of the purchase-money. Haycock's wife had then been living apart from him for about three years, and did not join in the mortgage to bar her dower. On the 5th January, 1914, Haycock released his equity of redemption in the land to the applicant.

The application was several times adjourned, and finally came before SUTHERLAND, J., on the 2nd December, 1916, when proof of service upon the sister of Blanche Haycock for her (as permitted by an interim order) was made, and it was also shewn that Haycock was alive in August, 1916.

P. H. Bartlett, for the applicant.
No one contra.

SUTHERLAND, J., in a written judgment, said that sec. 17 of the Dower Act required that the order should be applied for "during the lifetime of the grantor or mortgagor;" and proof that he was alive in August was hardly sufficient.

A more serious objection, having regard to the provisions of secs. 14 (2) and 17 of the Act, was, that it did not appear that the wife had been living apart from her husband in such circumstances as disentitled her to dower; and an order could not be made until a Judge had investigated and ascertained the value of her dower.

It was said that the land was worth little more than the amount of the mortgage: Re Auger (1912), 26 O.L.R. 402; but, even so, an order could not properly be made on this motion until after ascertainment of the value of the dower.

No order.

SUTHERLAND, J. JANUARY 4TH, 1917.

RE MILES.

Will—Construction — Residuary Clause—Executors to Dispose of Residue "in such Manner as may in their Discretion Seem Best"—Trust—Beneficial Interest—Next of Kin.

Motion by the executors upon originating notice for an order determining questions as to the construction of the will of Edmund Miles, deceased.

The motion was heard in the Weekly Court at Ottawa.
A. H. Armstrong, for William Northwood, executor.
J. R. Osborne, for C. H. Jones, the other executor.
J. F. Orde, K.C., for the Attorney-General for Ontario.

SUTHERLAND, J., in a written judgment, said that the testator bequeathed the assets and goodwill of his business in the city of Ottawa to three of his employees, and gave legacies of $100 to the Beachwood Cemetery Company and $200 each to the St. John's Church Ottawa Poor Fund and the Canadian Patriotic Fund. The residue of his estate, both real and personal, he devised and bequeathed unto his executors "to be by them disposed of in such manner as may in their discretion seem best."

A construction was sought to determine whether the next of kin of the testator took under the residuary clause, if any such living, and in default the Crown, or whether the executors were entitled to the beneficial interest in the residue. Nowhere else in the will was there evidence of an intention to benefit relatives or next of kin in any way.

The major part of the estate was given to old employees. It was contended on the part of the Crown that the executors took the residue impressed with a trust, and therefore were precluded from benefiting personally; and that, because the reference in the residuary clause was to "my executors," and not to them by name, it was not intended that they should personally benefit.

The learned Judge said that he was unable to see, from the language used, that any trust had been created or declared.

Reference to Gibbs v. Rumsey (1813), 2 V. & B. 294; Read v. Stedman (1859), 26 Beav. 495; Higginson v. Kerr (1898), 30 O.R. 62; Meagher v. Meagher (1915), 34 O.L.R. 33, 40.

The words used "to be by them disposed of in such manner as may in their discretion seem best" are wide and comprehensive, and permit the executors to name themselves as beneficiaries. The words give a general and absolute power of appointment in respect of the residue, which they can exercise in their own favour: Farwell on Powers, 3rd ed. (1916), p. 18.

Neither the next of kin nor the Crown could call upon the executors to account for the residue of this estate.

Costs of all parties out of the residue.

SUTHERLAND, J. JANUARY 4TH, 1917.

RE WAUCHOPE.

Will—Construction—Bequest of Money in Bank—"My Account"—Name of Bank not Correctly Given.

Motion by the Imperial Trusts Company of Canada, administrators with the will annexed of the estate of William Wauchope, deceased, for an order determining a question as to the construction of the will.

The testator, a soldier, died on the 24th April, 1915, on the field of battle. Two letters written by him from military camps to his brothers and sister were admitted to probate as "a soldier's will."

In the first letter, dated the 19th September, 1914, the testator referred to the contents of his trunk, and said: "I want it divided between Jack, Sarah, and you, and also what is in the Bank of Toronto. Martha can keep the lots. You can keep this if you like in case I don't get back."

The second letter, dated the 26th January, 1915, said: "If I don't come back I trust you will all agree to divide whatever is in my account between Charlie, Jack, and you, while Martha has the lots."

The motion was heard in the Weekly Court at Toronto.

H. Moore, for the applicants.

G. S. Hodgson, for Martha Wauchope.

SUTHERLAND, J., in a written judgment, said that the question for determination was, whether money deposited to the credit of the testator in the Dominion Bank passed by the will. As a matter of fact, no money was deposited to his credit in the Bank of Toronto; he supposed that there was money so deposited, but in reality the deposit was in the Dominion Bank.

The term "my account" is broad enough to cover money deposited in any account at the time of the death, and therefore the money in the Dominion Bank.

The money should be divided in equal shares among Charles Wauchope, Sarah Arbuckle, and John Wauchope—the real estate of the testator going to Martha Wauchope.

Costs of all parties out of the estate.

CLUTE, J., IN CHAMBERS. JANUARY 6TH, 1917.

*MORRISON v. MORRISON.

Partition—Summary Application for Order for Partition or Sale—Rule 615—Right of Dowress to Compel Partition—Partition Act, R.S.O. 1914 ch. 114, secs. 4, 5—Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 13—Time for Making Application—Three Years' Delay—Adverse Claim of Title by Possession—Rule 233—Issue Directed—Adjournment of Motion—Election of Dowress Deferred.

Motion by the plaintiff, a dowress, for an order for partition or sale of land.

H. S. White, for the plaintiff.
I. Hilliard, K.C., for the defendants.

CLUTE, J., in a written judgment, said that the plaintiff was the widow of Alexander Morrison, deceased, who died intestate on the 9th January, 1915. Letters of administration of his estate had not been granted.

The defendants were the brothers and sisters of the deceased; the defendant Philip Morrison was in possession of the land, asserted that he was the absolute owner, and opposed the motion.

By Rule 615, a person entitled to compel partition may, by originating notice, apply for partition or sale; but it was conceded that no order for partition or sale could be made until the question of title had been determined; and the learned Judge was asked, under Rule 233, to direct an issue to be tried to determine the claim of title made by the defendant Philip Morrison: Smith v. Smith (1901), 1 O.L.R. 404.

The plaintiff's right to dower was not disputed; but, before making her election, she claimed the right to know of what the estate of her husband consisted, as, if she elected to take under the Devolution of Estates Act, and the defendant's title prevailed, she would get nothing.

The plaintiff came within the class entitled to compel partition under secs. 4 and 5 of the Partition Act, R.S.O. 1914 ch. 114.

Effect could not be given to the argument that the application for partition was premature: it was urged that under sec. 13 of the Devolution of Estates Act, R.S.O. 1914 ch. 119, no partition could be had until after three years from the death. If that applied to dower, it must equally apply to other interests, which would be unreasonable.

The Devolution of Estates Act has reference to the administration of estates, and not to partition, and the three years' limit has no application.

The plaintiff was entitled to apply for partition; but, the title being disputed, no order could be made at present.

Order to go adjourning the further hearing of the motion, and directing the trial of an issue as to whether or not the defendant Philip Morrison has acquired title to the land by virtue of the Limitations Act; the present plaintiff to be plaintiff in the issue; and the motion to be disposed of by the Judge after the trial of the issue.

Reference to Fry and Moore v. Speare (1915-6), 34 O.L.R. 632, 36 O.L.R. 301.

WODEHOUSE INVIGORATOR LIMITED v. IDEAL STOCK AND POULTRY FOOD CO.—FALCONBRIDGE, C.J.K.B.—DEC. 30.

Sale of Goods—Passing off Goods as those of Plaintiffs—Use of Secret Processes—Evidence—Injunction—Damages.]—Action for an injunction restraining the defendants from representing that the stock, foods, and products manufactured by the defendants are the manufacture of the plaintiffs and from using the formulæ and secrets of the plaintiffs and for damages. The action was tried without a jury at Hamilton. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs had, in his opinion, proved their case as to the allegations contained in both paras. 5 and 6 of the statement of claim. Pringle, the person named in answer to the defendants' demand of particulars—salesman and agent of the defendants—was said to have been in Court. The defendants did not call him to contradict the statements of the plaintiffs' witnesses nor to speak of the extent or limitations of his own agency. There should be judgment for an injunction in terms of the prayer of the statement of claim with a reference to the Master at Hamilton as to damages, with costs. Further directions and subsequent costs reserved until after report. The plaintiffs to have leave to amend their statement of claim as to any matter covered by the evidence. S. F. Washington, K.C., and J. G. Gauld, K.C., for the plaintiffs G. Lynch-Staunton, K.C., and T. Hobson, K.C., for the defendants.

WETMORE v. MARTIN—SUTHERLAND, J.—JAN. 4.

Release—Settlement of Estate—Binding Agreement—Evidence.]—Action by Frank G. Wetmore against John C. Martin, his step-father, to recover certain personal property forming part of the estate of Ida D. W. Martin, the deceased mother of the plaintiff and wife of the defendant. The deceased made a will of which she appointed the defendant executor; but the defendant refused to apply for letters probate, and the plaintiff proved the will and was appointed administrator with the will annexed. The action was tried without a jury at Goderich. SUTHERLAND, J., set out the facts in a written judgment, and said that he had come to the conclusion that a settlement binding upon the plaintiff was come to on the 8th November, 1915, substantially as the defendant had testified, and evidenced by a signed release. The estate had been settled and divided practically in accordance with the directions of the will. Action dismissed without costs. W. Proudfoot, K.C., and J. L. Killoran, for the plaintiff. C. Garrow, for the defendant.