The
Ontario Weekly Notes

VOL. XVII. TORONTO, DECEMBER 5, 1919. No. 11

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

MORRISON v. CONNOR.

Fraud and Misrepresentation—Sale of Farm—Representation as to Acreage—Proof of Fraud Inducing Contract—Evidence—Finding of Trial Judge—Appeal—Remedy—Rescission—Damages—Measure of.

Appeal by the plaintiff from the judgment of LENNOX, J., 16 O.W.N. 166.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

G. A. Stiles, for the appellant.

J. A. Macintosh, for the defendant, respondent.

LATCHFORD, J., in a written judgment, said that he was convinced that the defendant knew that the area of his farm was not "97 acres" or "97 acres more or less," as expressed in the respective advertisements offering it for sale, but at the most less than 80 acres. It was unquestionable that the defendant had not measured his property, and consequently did not know its *exact* area; but, upon the uncontradicted evidence of three witnesses, the defendant had no reason to suppose that the farm had any greater area than the area stated by them. Moreover, he had reason to believe that its area was about 60 acres. The finding that the defendant did not know the quantity of land he was selling to the plaintiff must be taken to mean nothing more than that the defendant, because he did not measure the land, did not know its exact, or even perhaps its approximate, area. From the finding, so regarded, the learned Judge did not dissent. But the conclusion seemed also inevitable that the defendant did know

that it had probably no greater area than the 70 or 74 acres mentioned to him by Barkley, if not the similar area stated by Merkeley, Sullivan, and Mrs. Davidson. The defendant's advertisement represented the farm as having a far greater area than he had been told it contained, and a far greater area than a half lot in a concession known to him to be only three-quarters of a mile in length could possibly contain. This was a false representation, made with knowledge of its falsity.

The admittedly false representation in the advertisement, not corrected in a very material particular, when inquiry was made, induced the plaintiff to purchase the farm—the sale of the farm to the plaintiff was induced by the defendant's fraud.

The case was not one for rescission, owing to the fact that, even when action was brought, it was practically impossible to restore the parties to their original position: Clarke v. Dickson (1858), E.B. & E. 148. A contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded in toto, it cannot be rescinded at all; but the party complaining of the fraud must resort to an action for damages: per Lush, J., in Sheffield Nickel Co. v. Unwin (1877), 2 Q.B.D. 214, 223.

The plaintiff was not without a remedy. Having charged and proved fraud, he was entitled, in an action founded on the fraud, to the true amount of the damages sustained: Urquhart v. Macpherson (1878), 3 App. Cas. 831.

The land, as of its true area, cost the defendant $75 an acre, and had not diminished in value. The damages might be fairly estimated at that price, at least for the 16 acres' difference between the actual acreage and the acreage the plaintiff would have been content with—$1,200.

The appeal should be allowed, and judgment should be entered for the plaintiff for $1,200 damages with costs of the action and appeal.

RIDDELL and MIDDLETON, JJ., agreed with LATCHFORD, J.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

McKENZIE v. BLUE.

Building—Erection upon Land of Stranger—Right of Builder to Remove within Reasonable Time—Failure to Remove—Building Becoming Property of Owner of Land—Assertion of Title by Plaintiff—Action for Trespass—Removal of Building.

Appeal by the defendant from the judgment of the County Court of the County of Hastings in favour of the plaintiff for the recovery of $75 and costs in an action for trespass in tearing down a dilapidated driving-shed and in carrying away the wooden materials of which it was composed.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

W. C. Mikel, K.C., for the appellant.

W. Carnew, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that the plaintiff and defendant were tenants in common of premises in the village of Madoc, known as Moon's Hotel, with the lot upon which the hotel stood. On one adjoining lot there was a shed used with the hotel, but on land to which the parties had no paper-title.

In 1917, the defendant, by an indenture in pursuance of the Short Forms of Conveyances Act, granted to the plaintiff in fee simple his undivided half-interest in the hotel premises and lot. Thereafter the defendant took away the shed for his own use. The plaintiff sued in the County Court of the County of Hastings and got judgment for $75 and costs; and the defendant appealed.

The defendant set up in his pleading a claim of ownership of the shed, but he did not support that claim by sufficient evidence, and he made no such claim in the appellate Court. He relied—as he had every legal right to do—upon the weakness of the plaintiff's case. It was necessary to examine into the title to the shed to see if the plaintiff could make out his case.

The lot upon which the shed was built was the property of one Wilson, who in 1894 leased it until the 3rd October, 1899, to Mrs. Moon, by an indenture which "provided that the lessee may at the expiration of the term hereby granted remove any buildings erected thereon by the said lessee." Mrs. Moon erected this shed, and in December, 1900, conveyed the hotel to the plaintiff and one Coe, whose interest the defendant subsequently acquired.

On the determination of the lease, the tenant, Mrs. Moon, had a reasonable time to remove the shed: Gray v. McLennan

(1886), 3 Man. R. 337; Devine v. Callery (1917), 40 O.L.R. 505, at p. 510, and cases there cited.

She did not remove it, nor did she make any new contract concerning it. It therefore became the property of the owner of the land.

The plaintiff did not affect to prove that he purchased the shed or acquired it otherwise from the owner, so as to be able to stand in the owner's shoes—his claim must be that he had acquired it adversely to the owner of the land.

The evidence fell far short of proving such a claim; and the learned Judge (Riddell, J.) was of opinion that the plaintiff had no rights in or to the shed.

In that view, it was wholly unnecessary to consider the effect of the letter of the 11th December, 1917, by the present owner of the land to the defendant, asking him to remove the shed. It was also unnecessary to discuss the vexed question of "appurtenances" and the like. Assuming that the defendant had no right to remove the shed, the plaintiff had no right to prevent him from so doing or to claim damages if he did.

The appeal should be allowed with costs here and below.

MEREDITH, C.J.C.P., reached the same result, for reasons stated in writing.

LATCHFORD and MIDDLETON, JJ., also agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*BRAGG v. ORAM.

Costs—Scale of Costs—Rule 649—Action Brought in Supreme Court of Ontario—Cause of Action—Remedy—Injunction—Damages—Value of Land in Question—Jurisdiction of County Courts—County Courts Act, R.S.O. 1914 ch. 59, secs. 22 (1) (b), (c), (i), 28.

Appeal by the defendant from an order of SUTHERLAND, J., ante 69.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

W. E. Raney, K.C., for the appellant.

J. M. Ferguson, for the plaintiff, respondent.

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

MIDDLETON, J., in a written judgment, said that the defendant contended that the action might have been brought in a County Court, and so, under Rule 649, the costs awarded must be taxed upon the County Court scale with a right of set-off.

The plaintiff purchased certain lots laid out upon a subdivision plan, and the defendant had now acquired title to the remaining lots. The defendant had ploughed up the land, villa lots and streets, visible to the eye upon the plan, but not upon the ground. The plaintiff's land was in the centre of the block, and upon it an old house. The means of access to it when the place was a farm was a lane, but this lane was now owned by the defendant. The mode of access on paper was over the streets laid out upon the plan, and this was the only lawful means of access and the one in actual use. If the defendant could acquire title to this house and land, the whole place could become a farm once more; but, so long as the plaintiff refused to sell, he had the right to insist upon the streets remaining. The defendant having ploughed the highway, the plaintiff alleged that this was a nuisance, and that he was so particularly prejudiced that he was entitled to maintain an action. Both parties asserted that these streets were public highways, and for the purpose of this case that should be assumed to be the fact.

At the trial judgment was given in favour of the plaintiff restraining the defendant from further ploughing the streets or otherwise obstructing access to the plaintiff's land.

It was held by the Judge below, affirming the ruling of the Taxing Officer, that the action could not have been brought in a County Court, because the action concerned the plaintiff's land, which was worth more than $500.

The appeal was argued as if the case came under sec. 22 (1) (*c*) or (*i*) of the County Courts Act. But the case really came under sec. 22 (1) (*b*), and the action was a "personal action" within the meaning of that clause. It was nothing more than an action for damages for an obstruction to a highway and for the abatement of the nuisance caused by the obstruction.

By sec. 28 of the same Act, a County Court can grant all appropriate remedies in any action where the cause of action is within its jurisdiction. An injunction or a mandatory order is a remedy, and not a cause of action.

Reference to Martin v. Bannister (1879), 4 Q.B.D. 491.

Section 22 (*i*) is not in this way rendered meaningless—it applies to actions to set aside conveyances, to actions for specific performance,and all other actions for equitable relief, when the subject-matter does not exceed in value $500.

So far as Ross v. Vokes (1909), 1 O.W.N. 261, is in conflict with the views now expressed, it must be regarded as overruled by this decision.

The appeal should be allowed with costs to the defendant throughout.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., was also for allowing the appeal, giving reasons in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*RE LUNNESS.

Will—Construction—"Property Situated in Ontario"—Testator Domiciled in Ontario—Shares of Dominion Railway Company Stock—Head Office of Company in another Province—Certificates Kept in Ontario—Real Property in Saskatchewan and Alberta—Intention of Testator—Division of Property among Children—Equal Division—"Real Property"—Situs of Personal Property.

Appeal by the three daughters of Joseph Lunness, the testator, from the judgment of SUTHERLAND, J., 16 O.W.N. 374, and cross-appeal by J. R. Lunness, the testator's son, from the same judgment.

The appeal and cross-appeal were heard by MEREDITH, C.J C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

T. R. Ferguson, for the daughters.

R. McKay, K.C., for the son.

R. U. McPherson, for the executor.

MIDDLETON, J., read a judgment in which he said, after stating the facts, that, as he understood the will, the intention of the testator was, that the great bulk of his estate should be divisible upon the death of his wife. He does not set apart a fund for the purpose of securing to her the annuity, but until she dies the bulk of the estate is to remain intact.

It is common ground that the testator was on most affectionate terms with all the members of his family, and that he had conferred some benefits upon his son. There was some conflict as to the extent of the benefits so conferred, but there was nothing to lead one to suppose that he intended to discriminate against the son beyond what was necessary to produce a condition of equality,

having regard to the transactions which had taken place during his lifetime. This was the probable explanation of the greater benefits conferred upon the daughters by the clause dealing with the partial distribution of the Canadian Pacific Railway stock held by him.

It was erroneous to assume that the effect of clause 2 was that the testator intended to classify all his property as being *situated* either in the Province of Ontario or in the Provinces of Saskatchewan and Alberta. He might have owned real estate within the Province of Quebec, and it clearly was not his intention that he should die intestate as to any part of his property. The devise to his executors and trustees was expressed in the widest possible terms. The true effect of clause 2 was to provide a minor benefit for his daughters by permitting them to receive, at what he evidently thought was a comparatively early date, the proceeds of the property situate within Ontario. This should be regarded as realty, not because a narrow meaning should be attributed to the word "property," but because the testator speaks here of "property situated within Ontario." The word "situated" was properly used only in connection with realty: see Hall v. Hall, [1892] 1 Ch. 361.

The "property" situated in Saskatchewan and Alberta, which is to be divided among the four children must be taken to mean the realty situated in those Provinces. It may also include the cattle and farm implements owned in connection with the ranch, but no opinion is expressed as to that.

Clause 3 speaks of the division authorised by clause 2 as "a partial division of my estate," and provides that the balance of the income shall be equally divided amongst the four children. This again points to the fact that the great bulk of the estate is yet to remain in the hands of the executors. Clause 4, authorising the continuance of the business, is again followed by the same provision, "all share or profit received from the said business shall be divided equally amongst my said four children."

Clause 5, the main provision of the will, provides that, upon the death of the wife, the real estate retained for her benefit and the "balance of my property real and personal shall be sold and divided equally among my said children as hereinbefore set forth."

The intention to be attributed to these words is, that all the property shall be divided equally among the testator's children, as hereinbefore set forth. The testator did not intend the words "as hereinbefore set forth" to conflict with the word "equally."

Throughout the will there was a clear distinction between the daughters, who were referred to as a separate class only once, and the four children, who were referred to in almost every clause.

Underlying the argument made on behalf of the daughters

was the fallacious assumption that incorporeal property must be deemed to have a situs. That argument was based almost entirely upon the maxim "mobilia sequuntur personam," which is a convenient statement of the rule of private international law with reference to the descent of personal property. The law of the domicile, the personal law, is to apply to those who take upon the death of the testator. In the same connection a situs is attributed to things that cannot have any real situs. Thus the testator, when he used the word "situated," intended it in the sense in which it is used and understood by ordinary people—"located" or "placed with regard to its surroundings."

It is the duty of the Court to interpret the will by attributing to the words used their plain meaning, probably well-understood by the testator, rather than by attempting to attribute to these words an inaccurate and highly technical meaning, only vaguely understood by most lawyers.

The appeal of the son should be allowed, and it should be declared that the Canadian Pacific Railway Company shares and the proceeds of the homestead are divisible under the provisions of clause 5 of para. 7 of the will, that is, among the four children.

The appeal of the daughters should be dismissed.

Costs of all parties should be paid out of the estate.

LATCHFORD, J., agreed with MIDDLETON, J.

RIDDELL, J., agreed in the result, for reasons stated in writing.

MEREDITH, C.J.C.P., dissented as to the son's appeal, giving reasons in writing.

Judgment below varied (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*BIRDSILL v. BIRDSILL.

Deed—Construction—Conveyance of Land under Short Forms of Conveyances Act, C.S.U.C. ch. 92—Life-estate—Estates Tail in Remainder—Protector of Settlement—Estates Tail Act, R.S.O. 1914 ch. 113, secs. 9, 19—Conditions and Charges—Fee Simple.

Appeal by the plaintiff from the judgment of MASTEN, J., 45 O.L.R. 307, 16 O.W.N. 91.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. E. Jones, for the appellant.

T. J. Agar, for the defendant Birdsill, respondent.

H. S. White, for the defendant Ross, executor.

RIDDELL, J., read a judgment in which he said that it was obvious that the widow had a life-estate in the land with remainder over, and that the sons had each a fee-tail in the land allotted to him. Then, under the Estates Tail Act, R.S.O. 1914 ch. 113, sec. 9, the widow was protector of the settlement, and her consent was necessary to give the deed a disentailing effect (except as to the issue in tail or other persons claiming by force of the estate tail: sec. 19). This consent was not obtained, and the deed, therefore, did not destroy the estate tail quoad remainders and reversions. But, the issue in tail being barred, there remained over but the estate to James in default of the issue of Edward—and the result was, that Edward had in himself the whole fee, unless the special terms of the conveyance prevented this result.

The actual object of the grantor was not important; he must take the effect in law of his conveyances: Lawlor v. Lawlor (1881-2), 6 A.R. 312, 10 Can. S.C.R. 194; Culbertson v. McCullough (1900), 27 A.R. 459, and cases cited.

It was urged that, the grant being "subject to the terms, conditions, and charges and legacies concerning the same expressed in the last will and testament of James," the estate tail could not be enlarged by this deed. But "the terms, conditions, and charges and legacies" were those specifically mentioned in the will—"on condition that James . . . shall . . . pay . . . unto" the children named each the sum of $100.

The learned Judge was, therefore, of the opinion that Edward took a fee simple. His conveyance to James the younger conveyed that fee. And the judgment of the learned trial Judge was right.

The appeal should be dismissed with costs.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal dismissed (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*REX v. COLLIER.

Criminal Law—Charge of Theft of Property Exceeding $10 in Value—Summary Trial and Conviction by Police Magistrate—Plea of "Guilty"—"Consent"—Jurisdiction of Magistrate—New Trial—Criminal Code, sec. 1018 (b).

Case stated by the Police Magistrate for the Town of Petrolia upon the trial and conviction of the defendants by him upon a charge of stealing property of the value of $75 from a building owned by the Michigan Central Railroad Company in Petrolia.

The case was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

J. E. Corcoran, for the defendants.

Edward Bayly, K.C., for the Crown.

RIDDELL, J., in a written judgment, said that the defendants were charged with stealing property of the value of $75; they were brought before the Police Magistrate at Petrolia, and pleaded "guilty." They were released and sentence suspended, upon their making restitution. Afterwards they applied for a stated case, asserting that they could not be convicted, even on their own confession, without their consent having been first given.

Counsel for the Crown consented to the conviction being quashed, and the Court acted on that consent. The learned Judge did not decide that, had the Crown not consented, the conviction could not stand—as at present advised, he was not prepared to say that a plea of "guilty," made in open Court, was not a "consent" within the meaning of the Criminal Code.

But, acting on the consent of the Crown, this was a case in which the Court should order a new trial, under sec. 1018 (*b*) of the Code. Nothing is of more evil effect than an encouragement of the idea that a guilty man may escape through the technicalities of the law or the neglect or ignorance of prosecutors.

LATCHFORD and MIDDLETON, JJ., and FERGUSON, J.A., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., in a written judgment, expressed the opinion that the conviction should be quashed, leaving it open to the Crown or the private prosecutor to carry on the prosecution in a regular manner if that was desired.

New trial directed (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

BUCK v. EATON.

Negligence—Collision between Motor Vehicles on Highway—Evidence—Rule of Road—Cause of Collision—Contributory Negligence—Unlicensed Driver under Eighteen Years of Age—Motor Vehicles Act, secs. 4(3) and 13(7 Geo. V. ch. 49, sec. 10)—Unlawful Use of Highway.

Appeal by the defendant from the judgment of the County Court of the County of Elgin in favour of the plaintiffs, William Buck and Herbert Buck, in an action to recover damages for injury sustained by Herbert and expense incurred by William by reason of Herbert having been injured when riding upon a motor-cycle in a highway in the town of Aylmer by a collision with the defendant's automobile, by reason of the negligence of the defendant, as the plaintiffs alleged. William Buck's damages were assessed at $220.50 and Herbert Buck's at $200, and judgment was directed to be entered for the plaintiffs for these sums and costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. M. McEVOY, for the appellant.

Shirley Denison, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the defendant seemed to have been at fault in two respects: failure to give way to the other vehicle, which was when the accident happened upon the defendant's right hand side, and so had the right of way; and failure to make a wider turn to the left in Talbot street, as required by the Aylmer town by-laws.

But the plaintiffs could not take advantage of the defendant's two faults, because the plaintiff Herbert was, at the time of the accident, unlawfully driving the motor-cycle—driving it in violation of a plain provision contained in the Motor Vehicles Act, R.S.O. 1914 ch. 207.

The duties which the defendant disregarded were duties towards those who were lawfully using the highway—they could not have been enacted for the benefit of one protected by the Motor Vehicles Act from being upon the highway.

If the plaintiff Herbert had not the right of way, then, put on the lowest grounds, the plaintiffs could not recover because of his contributory negligence. He might have avoided the collision by stopping, which, he testified, could have been done in a distance of 6 feet; by turning more to the right—he testified that

he had about 5 feet to his right to spare; by passing the defendant's car on the left hand side—that is, behind it, the proper side to pass if the car were going eastward, as it was according to the defendant's testimony, and according to the other testimony within a quarter or a third of it; and the independent witness passed on that side. There was no traffic on the road to interfere.

If the plaintiff Herbert did not see the car being turned around he was very neglectful of his duty to look out for the traffic ahead. His excuse, that he took a glance up Wellington street, really only tends to condemn him; a glance was all that was needed, for there was no traffic there; and a momentary glance was enough; then his outlook should have been ahead, and if it had been he could not have failed to see, and should not have failed to avoid, the turning car—unless he really had the right of way, and, not unreasonably, thought it would be accorded to him.

The appeal should be allowed and the action dismissed.

RIDDELL, J., in a written judgment, said that it was argued that the plaintiff Herbert, being between 16 and 18 years of age, and having no license, was a trespasser upon the road, and therefore his rights were limited as stated in Sercombe v. Township of Vaughan (1919), 45 O.L.R. 142, and similar cases. Reference was made to the Motor Vehicles Act, R.S.O. 1914 ch. 207, secs. 4(3) and 13, and the amending Act of 1917, 7 Geo. V. ch. 49, sec. 10.

An attentive perusal of the evidence convinced the learned Judge that the rider of the motor-cycle was guilty of negligence disentitling him to recover; and, in that view, the legal point need not be considered.

The appeal should be allowed and the action dismissed with costs throughout.

MIDDLETON and LATCHFORD, JJ., agreed with RIDDELL, J.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

McGIBBON v. CRAWFORD.

Principal and Agent—Solicitor Acting for Syndicate—Authority to Permit Part Discharge of Mortgage—Evidence—Finding of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of BRITTON, J., 16 O.W.N. 223.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

William Laidlaw, K.C., for the appellant.

G. W. Mason, for the defendants, respondents.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said, after stating the facts, that substantially the action was for loss sustained by the plaintiff by the making of a part discharge of a certain mortgage; and the action was rightly dismissed by the trial Judge.

It was not proved that the plaintiff sustained any loss by the part discharge of the mortgage.

A certain Brampton solicitor, now deceased, was authorised to act for the syndicate of purchasers of the land upon which the mortgage in part discharged was made, and the part discharge complained of was authorised by him, acting for the members of the syndicate.

The plaintiff, at the time, knew of the transaction and approved of it.

The appeal should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*RE McDONALD.

Will—Bequest to Widow of Right of Occupancy of Dwelling-house for Life or until House Sold—Liability of Widow for Taxes—Legacy of Lump-sum to Widow—Payment Made by Executor in Instalments—Payment of Interest from Death of Testator—Right of Executor to Recover or Set off Interest Paid for First Year—Mistake.

An appeal by the executor of the will of William McDonald, deceased, from the judgment of SUTHERLAND, J., ante 70.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

L. A. Landriau, for the appellant.

D. Inglis Grant, for Bridget McDonald, the widow, respondent.

MIDDLETON, J., in a written judgment, said that the testator died in July, 1915, and by his will bequeathed $10,000 and his household furniture to his wife, to whom he also gave "the right to occupy free of rent the dwelling in which we are now residing . . . during the remainder of her natural life or so long as she desires to continue to occupy such dwelling excepting as hereinafter provided." The exception was: "If my executor deems it advisable at any time after my death to sell the property in which I am residing he is to do so and my widow is to give up immediate possession without any claim for dower."

The widow was still residing in the house; no sale had been made, and none was contemplated.

The learned Judge below decided that the widow was entitled to occupy the property without paying the taxes upon it. With this MIDDLETON, J., was unable to agree. He referred to Bartels v. Bartels (1877), 42 U.C.R. 22. Although the life-estate of the widow was determinable at the option of the executor, it was subject, so long as it existed, to the ordinary incidents of a life-estate—the obligation of the life-tenant to pay the ordinary outgoings.

On the death of the testator, his widow was left without any ready money. The executor assumed that the legacy to her would bear interest, and paid her interest at the rate of 5 per cent. upon the legacy from the date of the death. The estate was not in such a position as to permit the legacy to be paid at the expiry of a year from the death, and interest had been from time to time paid upon the unpaid balance. There was yet money due to the widow with respect to the legacy. The executor now contended that the legacy did not bear interest until the expiry of a year from the death, and sought to set off the $500 paid as interest for the first year against the balance due to the widow. By the judgment in review it was declared that the executor could neither recover nor set off the $500.

If the case had to be determined according to the strict rules of law applicable between debtor and creditor, the widow's contention would be entitled to prevail: see Stewart v. Ferguson (1899), 31 O.R. 112; In re Hatch, [1919] 1 Ch. 351.

But the principle is different where the question arises with respect to payments made by an executor or trustee to a beneficiary entitled under a will or trust instrument. The executor having, by mistake in law, overpaid the widow, should be permit-

ted to deduct the amount overpaid from subsequent payments. Reference to Barber v. Clark (1891), 20 O.R. 522, 18 A.R. 435; Daniell v. Sinclair (1881), 6 App. Cas. 181; Livesey v. Livesey (1827), 3 Russ. 287.

The appeal should be allowed upon both grounds, and the judgment below should be varied accordingly.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., for reasons stated in writing, agreed that the appeal should be allowed on both grounds; and said that there should be no order as to costs here or below.

Appeal allowed; no costs here or below.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*RE RICHER.

Will—Construction—Devise and Bequest to Widow—Use of Estate for Lifetime—Devise and Bequest to Children of what "will Remain Unspent"—Application to Money and other Personal Property—Inapplicability to Land.

Appeal by the children of Honore Richer, deceased, from the judgment of KELLY, J., 16 O.W.N. 345.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

C. A. Seguin, for the appellants.

E. R. E. Chevrier, for the widow of the testator, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the testator gave to his widow the free use of all his property, real and personal, for her lifetime; and he gave to his four children, to be divided among them in equal shares, the "balance" of his said property "that will remain unspent," after his widow's death, "if any." It was held below that the widow took the whole property absolutely—that the gift to the children was void for uncertainty.

The more recent cases in this Province, as well as elsewhere, inclined towards giving effect to what the testator desired and what he plainly said was his will: see Bibbens v. Porter (1879), 10 Ch. D. 733; British and Foreign Bible Society v. Shapton

(1915), 7 O.W.N. 658; Re Gouinlock (1915), 8 O.W.N. 561; and Matte v. Matte (1915), ib. 605.

The word "unspent" is applicable to many more things than money—things which would be unspent, as, for instance, household furniture, so long as they remained serviceable.

If that were not so, the implied gift in question might be held to be applicable to money only, and the widow's right to spend confined to it.

The learned Chief Justice's understanding of the will was, that the widow was to have the use of all for her life, and all that remained at her death, unspent, in the sense of not worn out as to goods, and as to money unexpended, was to go to the children. The word was quite inapplicable to the land, but applicable to all parts of the estate except land.

The testator did not mean that the widow might, immediately after his death, sell all and squander the money realised.

The appeal should be allowed, and there should be no order as to costs.

RIDDELL and MIDDLETON, JJ., agreed in the result, each giving reasons in writing.

LATCHFORD, J., also agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

BAKER v. RYCKMAN.

Title to Land—Dispute as to Ownership of Small Strip—Deed—Description—Evidence—Onus—Finding of Trial Judge—Reversal on Appeal—Claim for Possession—Damages—Costs—Scale of—Action Brought in Supreme Court—Jurisdiction of County Courts.

Appeal by the plaintiff from the judgment of KELLY, J., ante 41.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Shirley Denison, K.C., for the appellant.

H. W. Macoomb, for the defendant, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the real question was, whether the defendant had trespassed upon and was now trespassing upon a part of the plaintiff's land.

The learned trial Judge seemed to have considered that the plaintiff could not recover without proving that the land in question—a strip of 10 inches in width—was covered by the deed to him of his property; that that he had failed to do; and so the action was dismissed—the Judge expressly declining to decide where the true boundary is, deeming that the evidence adduced at the trial did not warrant a judgment one way or other on that question, which was the most important matter in contest between the parties.

In the opinion of the Chief Justice, the trial Judge erred in both respects.

The plaintiff had been for several years before the time of the alleged trespass, and he was then, in possession of the land in question. He had been most of the time in possession as tenant of the owner, and then purchased from her and was in as owner.

The defendant purchased his land from the same owner; his purchase and deed were subsequent to the purchase by the plaintiff and the plaintiff's deed; but nothing turned on these facts or on priority of registration, because the land in each was described in the like manner.

The plaintiff's possession was quite enough evidence of title as against any one unable to prove a better title; and so the onus of proof was on the defendant as to the paper-title; and therefore, dealt with on the basis adopted by the trial Judge, the case should be decided in the plaintiff's favour.

But the evidence was quite sufficient to enable the Court to determine the actual rights of the parties under their deeds, and quite sufficient to require that the case should be so determined.

[Review of the evidence.]

The plaintiff was to have that 41 feet frontage of his vendor's land which begins at the point 217 feet from the Regent and Welland streets corner of the block; and the defendant was to have the next adjoining 41 feet frontage, commencing at a point 176 feet from the same corner.

There was no room in either case for doubt, and no excuse for not beginning at the point made plain in each deed.

The judgment should have been in the plaintiff's favour.

Apart from the value of the land in question to the plaintiff, he claimed $200 damages for injury sustained by the defendant's entry upon it, up to the present time; and, all things considered, it might be that County Court jurisdiction was excluded; but, whether it might be found upon a close inquiry to be so or not so, the plaintiff should have his costs of action as if the case were

one beyond the County Court jurisdiction; there should be no inquiry as to damages either: the plaintiff should be content with the sum of $25 and possession of the land in question, with costs of action upon the Supreme Court scale and costs of this appeal.

RIDDELL, J., agreed in the result, for reasons stated in writing.

MIDDLETON and LATCHFORD, JJ., agreed with RIDDELL, J.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

RE GOODWIN.

Will—Construction—Provisions for Benefit of Widow and Children of Testator—Use of "Residence" and Household Effects—Alternative Provisions—Maintenance—Annuity Payable out of Income only—Period of Distribution of Estate—Costs.

Appeal by Mabel Goodwin and others from the order of SUTHERLAND, J., 16 O.W.N. 339.

The appeal was heard by RIDDELL, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

W. H. Gregory, for the appellants.

W. G. Owens, for Kate Goodwin and others, respondents.

F. W. Harcourt, K.C., for the infants, respondents.

W. Lawr, for the Toronto General Trusts Corporation, trustees under the will of Michael Francis Goodwin.

MIDDLETON, J., in a written judgment, said that the question for decision arose upon clause 8 of the will. The contention put forward on behalf of certain children of the testator was that by this clause the legacy to the widow terminated upon the youngest child attaining the age of 21; and that, although under an earlier clause the widow was entitled to occupy the family residence and use the furniture for the term of her natural life, so long as she remained unmarried, yet her right to maintenance ceased upon the majority of the youngest child.

The language of clause 8 was much involved, and, while it was possibly capable of the meaning attributed to it, that was not its true meaning, reading the will as a whole. Had the will

contained some other provision dealing with the maintenance of the wife after the time named, the suggested meaning might well be attributed to clause 8. But it was not conceivable that the testator intended that the provision made for his wife's maintenance should not continue during her entire life, provided that she remained his widow.

Clauses 10 and 11 should be regarded as becoming operative only upon the death or remarriage of the widow before the youngest child attained majority, or upon a disagreement taking place between the widow and the children during the time for which she was obliged to maintain them, as provided in clause 8, that is, until they respectively attained full age; and, having this in view, these clauses could not now be invoked, even if the executors should think the separation of the widow and children desirable by reason of their disagreement. These clauses, however, were important as shewing the testator's intention. It was impossible to believe that the testator did not intend that the annuity payable to her in the event of her doing that which the testator mainly desired—maintaining the home for the family—should come to an end before her death.

The provisions of clause 8 are contradictory if the contention of the children prevails; for, while it commences by speaking of payment of an annuity to the widow until the youngest surviving child attains the age of 21, it clearly contemplates that this payment shall continue thereafter "for the support and maintenance of my said wife while she remains my widow." Full effect can be given to the limitation found in the first line of the clause by reading the clause as providing for payment of this annuity until the youngest child attains the age of 21 for the support of the widow and the children and thereafter for the widow's own use.

As this annuity is to be paid out of the entire income of the estate, it follows that the distribution, or part distribution, provided for by clause 12, must be postponed until the widow's death. It was not the testator's intention that the widow's right to maintenance should be sacrificed for the purpose of making an early distribution among his children; and it is more consistent with the will that the provision for distribution should have to give way to the dominant intention of providing what the testator thought was an adequate maintenance for his widow.

As the widow's annuity was payable out of income—and income alone—there was no right to resort to the capital.

LATCHFORD, J., and FERGUSON, J.A., agreed with MIDDLETON, J.

RIDDELL, J., in a written judgment, after discussing the terms of the will, said that, being of the opinion that the children had

the right to live in the house during the widow's lifetime, he could see no reason why the provision for maintenance did not continue until the death of the widow or her remarriage, the children or some or one of them living or desiring to live in the house.

The order of SUTHERLAND, J., was varied. The order as varied will declare that the widow's annuity is payable out of income and that there is no right to resort to the capital; that the period of distribution is at the death of the widow. Costs of all parties out of the estate—those of the trustees as between solicitor and client.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

RE TOWNSHIP OF CULROSS AND COUNTY OF BRUCE.

Municipal Corporations—Bridge over River—Length of—Municipal Act, sec. 449—Amending Act, 7 Geo. V. ch. 42, sec. 21—Liability of County Corporation for Half Cost of Maintenance—Finding of County Court Judge—Appeal.

An appeal by the county corporation from an order of the Judge of the County Court of the County of Bruce declaring a certain bridge over the river Teeswater to be a county bridge and the county corporation responsible for half the cost of maintenance.

The appeal was heard by RIDDELL, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

William Proudfoot, K.C., for the appellants.

David Robertson, K.C., for the township corporation, respondents.

RIDDELL, J., reading the judgment of the Court, said that the order was made and the appeal taken under sec. 449 of the Municipal Act, R.S.O. 1914 ch. 192, as amended by (1917) 7 Geo. V. ch. 42, sec. 21. It seemed to be clear, upon the evidence, that the length of what the amending Act called the "bridge" was much more than 300 feet, and there was, consequently, jurisdiction to make the order. There was also ample evidence upon which the County Court Judge could find, as he did, that clauses (*a*) and (*b*) of sec. 449(1) were satisfied. His finding, therefore, could not be reversed.

On the law and facts the order was right.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 28TH, 1919.

*ROYAL BANK OF CANADA v. WAGSTAFFE.

Promissory Note—Endorsement to Bank as Collateral Security to Note for Smaller Amount—Position of Maker of Note—Surety—Notice to Bank—Time Given to Principal Debtor for Payment of Smaller Note—Effect of—Prejudice.

An appeal by the defendant from the judgment of the County Court of the County of Halton, in an action upon a promissory note made by the defendant. The County Court Judge gave judgment against the defendant for $430.22 and costs.

The appeal was heard by RIDDELL, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

J. L. Counsell, for the appellant.

E. H. Cleaver, for the plaintiffs, respondents.

RIDDELL, J., in a written judgment, said that the defendant, on the 10th August, 1917, made a promissory note for $1,000 and interest at 6 per cent., payable 6 months after date, to the order of one Richard, who, desiring to borrow $400 from the plaintiffs' bank, on the 4th May, 1918, gave the defendant's note to the bank-manager as collateral security for his (Richard's) own note for $400, payable on the 7th July, 1918, with interest at 7 per cent. Richard endorsed the defendant's note over to the plaintiffs and waived protest and notice of dishonour. Richard received $400 from the bank, but did not pay his note when due. The plaintiffs had no notice or knowledge of an agreement made between Richard and the defendant that the note was not to be negotiable except on the happening of an event which had not happened— or (if such were the effect of the agreement) that the note was to be void if such event did not happen. Before the defendant's note became due, he notified his bankers not to pay it when due. Richard's note was renewed twice, and was still unpaid when this action was brought to recover $400 and interest from the defendant.

The defendant based his defence on the extension of time given to Richard to pay the loan of $400, but that was clearly untenable.

The rule that giving time to a principal releases the surety is based upon the fact that by so doing the creditor ties his hands so that he cannot sue the principal, and consequently the surety is deprived of his right to pay the amount as originally agreed and use the creditor's name to enforce payment from his principal.

In the present case, on Richard giving his own note for $400

and the note of the defendant for $1,000 as collateral, there were two contracts—one, with which the defendant had nothing to do, for Richard to pay $400, and the other for the defendant or Richard to pay $1,000. If the extension of time on the former contract had the effect of suspending the remedy beyond its due date (assuming that the relation of principal and surety existed, to the knowledge of the bank), the defendant would be discharged.

But that was not the effect of the extension of time: the defendant could, if he wished, have come in and paid the bank, and then compelled the bank to realise the amount of the note for him.

There was never any extension of time for the payment of the $1,000 note; and, consequently, the principle of Frazer v. Jordan (1857), 8 E. & B. 303, did not apply.

Devanney v. Brownlee (1883), 8 A.R. 355, distinguished.

Another ground was equally available to the plaintiffs. Admittedly the plaintiffs had no notice or knowledge that the defendant's note was not a debt from the defendant to Richard or anything else than a promise to pay without condition. No notice was given by the defendant or any other person of anything concerning the note until March, 1918, and then the only notice was an order by the defendant not to pay it. The next notice was by the solicitor for the defendant on the 11th February, 1919, asserting that the note had been left with the bank for safekeeping; and no other notice was given until after the commencement of this action. There was nothing to affect the plaintiffs with notice that the defendant was merely a surety for Richard.

The appeal should be dismissed with costs.

MIDDLETON, J., in a written judgment, said that the law applicable to this case was well stated in Bailey v. Griffith (1877), 40 U.C.R. 418. Nothing was done by the plaintiffs to the prejudice of the defendant after they learned that he was in the position of a surety only.

The appeal should be dismissed.

FERGUSON, J A., agreed with MIDDLETON, J.

LATCHFORD, J., agreed in the result.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MASTEN, J., IN CHAMBERS. NOVEMBER 24TH, 1919.

*REX EX REL. DART v. CURRY.

Municipal Elections—Application to Unseat Reeve of Township—Disqualification—Claim against Municipality—Indebtedness to Municipality for Moneys Improperly Received—Municipal Act, sec. 53—Voting for By-law Authorising Improper Borrowing—Sec. 319—Claim of Relator to Seat.

Appeal by the defendant from an order of the Master in Chambers setting aside the election of the defendant as Reeve of the United Townships of Dysart, Dudley, Harcourt, Guilford, Harburn, Bruton, Havelock, Eyre, and Clyde; and cross-appeal by the relator from that part of the order of the Master which dismissed the relator's application to have the relator himself declared entitled to hold the office of Reeve.

R. J. McLaughlin, K.C., and A. M. Fulton, for the defendant.
Peter White, K.C., and H. C. Fowler, for the relator.

MASTEN, J., in a written judgment, said that the first ground of the cross-appeal was that the defendant was, at the time of the election, disqualified on account of a claim he had against the municipality, which had not been properly released. As to this the learned Judge agreed with the Master that the defendant, at the time of his nomination and at the time of his election, had no claim against the municipality.

The second ground of the cross-appeal was, that the defendant, in June, 1919, being a member of the township council, voted for by-law 613, which authorised the borrowing of a larger sum than was permissible under sec. 319 of the Municipal Act, and so had become disqualified from holding any municipal office for two years (sub-sec. 3). While the recitals in the by-law were defective and irregular, having regard to the existing provisions of the statute, the question whether the defendant had incurred the penalty imposed by sec. 319 (3) must be disposed of on the real facts, and not on the form of the by-law: Re Cartwright and Town of Napanee (1910), 1 O.W.N. 502. Sub-section 2 of sec. 319 specified the amount which the township council might borrow for current expenditure, and was essentially different from the statutory provision in force when Holmes v. Town of Goderich (1902), 5 O.L.R. 33, was decided. There is now no necessity for a separate by-law with regard to moneys required for public

school purposes, and the sum to be borrowed depends, not on the estimates for the current year, but on the ordinary expenditure of the next preceding year. Both the county rate and the school taxes formed part of the ordinary expenditure of the township corporation for 1918; and so the amount of the borrowing authorised by the by-law was well within the powers of the council, and no penalty was incurred.

The cross-appeal was, therefore, dismissed.

The Master unseated the defendant on the ground that the township corporation had a claim against him for repayment of moneys paid to him out of the funds of the corporation in 1918 and in 1919 for the use of his teams for township road-work.

With regard to the construction to be placed upon sec. 53 of the Municipal Act, the learned Judge said that he thought it was exclusive, and that the defendant could not be unseated, as one disqualified under that section, unless he came within one of the specific provisions of that section. The maxim "expressio unius exclusio alterius" applied and displaced any general principle such as that because a candidate had some special interest in the affairs of the corporation be was ineligible for election because his special interest might conflict with his duty if he were elected. Assuming that there was an effective right of action such as was contended for by the relator, it did not come within any of the provisions of sec. 53.

The defendant's appeal should be allowed with costs and the motion to unseat and disqualify the defendant should be dismissed with costs.

RIDDELL, J. NOVEMBER 25TH, 1919.

RE YOUNG AND ONTARIO AND MINNESOTA POWER CO.

Arbitration and Award—Submission—Agreement to Pay Damages to "Property-owners"—Award in Favour of Unnamed Owner—Dispute as to Ownership—Reference back to Arbitrator to Determine.

Motion by Young, under the Arbitration Act, for an order or judgment enforcing an award.

The motion was heard in the Weekly Court, Toronto.

R. T. Harding, for Young.

G. R. Munnoch, for the companies.

RIDDELL, J., in a written judgment, said that two companies, desiring to build a steam tramway along the river at Fort Frances, entered into an agreement with the town corporation—they agreed with the town corporation and the land-owners who should sign schedule A to the agreement, forthwith "to agree upon what if any damages such owners may be . . . entitled to . . . but if any of the said property-owners and the companies are unable to agree on the existence of liability for damages . . . or on the amount thereof . . , such matters shall be referred to . . . the District Court Judge as arbitrator, and his decision shall be final," subject to the provisions of the Arbitration Act, "and the said amount, if any, found due by the award of the said arbitrator, shall be paid by the companies to the party . . . entitled to it within 10 days after final award . . ."

To schedule A were signed the names of Young and Mrs. Harty—the latter signing as to lots 62 and 63 only, the former signing as to these lots and also lot 10.

These two persons could not agree with the companies, and an arbitration was held before the District Court Judge.

It appeared that Mrs. Harty, being the owner of lots 62 and 63, had given a mortgage thereon to Young; that Young had issued and served a writ of summons in an action for foreclosure, but that the action had not proceeded to judgment. The District Court Judge concluded that Mrs. Harty was, and Young was not, the "property-owner" within the meaning of the agreement, and decided that the sum which he awarded for damages to the land should be paid to Mrs. Harty. On motion, Clute, J., referred the matter back to the District Court Judge for a new award, and a new award had been made. In this, after a number of recitals, he said: "I find and adjudge that the said companies by the construction and operation of said dyke and railway depreciated the value of said lots 62 and 63 to the amount of $600 and rendered themselves liable for damages to that amount under the terms of said agreement to the owner thereof." A similar adjudication of $100 damages "to the owner thereof" was made concerning lot 10. The companies, it was said, had paid the sum of $600 to the mortgagor, Mrs. Harty.

A motion was now made by Young to enforce the award.

There was nothing to enforce; and the so-called award was, in respect of lots 62 and 63, so much waste-paper.

The agreement was with "the owners of land abutting on Front street in the town of Fort Frances . . . who have signed the schedule A . . ."—and the arbitration is to determine: (1) the existence of liability for damages, i.e., liability to such owners; and (2) the amount, if any.

Obviously it was not damages in the abstract or the amount

of injury to the property, but the amount to be paid to the owner, which was to be determined.

For lots 62 and 63 there were two claimants, and it was the duty of the arbitrator to find to which of them the money should be paid. It was idle to award damages to the "owner" if the owner was not ascertained. The award should be for the payment of a certain specified sum of money to some person named (unless there was no dispute as to the ownership).

On a motion to enforce an award such a question should not be determined. The matter should be referred back to the District Court Judge to make an award which could be enforced.

Young should have his costs.

RIDDELL, J., IN CHAMBERS. NOVEMBER 26TH, 1919.

*HAMILTON v. QUAKER OATS CO.

Discovery—Examination of Officer of Defendant Company—Action for Nuisance—Questions Directed to Acts of Defendant Company since Action Brought—Irrelevance—Rules 260, 327, 339.

Appeal by the defendant company from an order of the Local Judge at Peterborough requiring Robert W. Cormack, an officer of the defendant company, to attend for re-examination and to answer certain questions which he refused to answer when examined for discovery by the plaintiff.

F. D. Kerr, for the defendant company.
Daniel O'Connell, for the plaintiff.

RIDDELL, J., in a written judgment, said that the action was for damages for injury to the health and property of the plaintiff occasioned by smoke, smells, dust, and noise from the defendant company's factory in Peterborough; the defendants pleaded that they had the right by prescription to operate their factory as they did, and that they were operating it in a reasonable and proper manner, in the ordinary course of business, and that they did not cause such damage to the plaintiff or her property as to amount to a nuisance. They pleaded specially that they had employed all the modern methods, and were taking all reasonable and proper precautions, to prevent noise and the escape of dust, smoke, or smell; and the plaintiff replied with what was in substance a joinder of issue.

The superintendent of the defendant company's plant was examined for discovery, and was asked certain questions as to the

effect of placing outside windows on the defendant company's factory and whether that had been tried, and, on the advice of counsel, declined to answer unless the application of the question was confined to the period before this action was brought.

The Local Judge ordered that questions Nos. 134, 135, 136, 137, and 138 should be answered, and the defendants appealed.

Rule 327 entitles a party to examine the other, or the officer of the other if that other be a corporation, "touching the matters in question" in the action. That does not mean that all questions which may be asked at a trial must be answered upon the examination for discovery: Kennedy v. Dodson, [1895] 1 Ch. 334.

Rule 339 does not mean that—it refers to the manner and order of examination, etc., not to the questions which may be properly put. The one test is: "Will the answer to the question prove or help to prove some issue which arises in the action—evidence 'touching the matters in question?'"

In the present case there are two issues—not to speak of the alleged prescriptive right—viz.: (1) Was the defendant company's factory a nuisance as against the plaintiff? (2) If so, what are the damages to be awarded?

The first question applies to a nuisance, not at the time of the trial, but at the time of the teste of the writ of summons.

Rule 260 provides that "damages in respect of any continuing cause of action shall be assessed down to the time of assessment," but this is only where there was a cause of action when the writ was issued, not a cause of action arising thereafter.

The subsequent placing of outside windows and the effect would not prove nuisance at the teste of the writ. Nor would the evidence be admissible to prove the belief of the defendants that their plant was defective—that, in an action for a nuisance, is wholly immaterial, either on the question of nuisance or not, or on that of the quantum of damages.

The evidence sought would not assist the plaintiff in selecting her remedy—damages or injunction. Damages or injunction depends on the damage done, its kind and amount, not in the means taken to avoid a nuisance.

The questions were wholly irrelevant, and the appeal must be allowed—costs throughout to the defendants in any event.

RIDDELL, J., IN CHAMBERS. NOVEMBER 26TH, 1919.

SUCKLING & CO. v. RYAN & HUGHES.

Judgment—Motion for Summary Judgment—Rule 57—Affidavit Filed with Appearance—Cross-examination of Deponent—Action for Price of Goods—Defence—Defect in Quality of Goods and Misrepresentation—Affidavit not Shewing Amount of Reduction Asserted—Leave to File new Affidavits—Waiver of Irregularity—Costs.

An appeal by the plaintiffs from an order of the Master in Chambers dismissing their motion for summary judgment under Rule 57, after appearance and affidavit of defence.

L. Davis, for the plaintiffs.
T. L. Monahan, for the defendants.

RIDDELL, J., in a written judgment, said that, by a specially endorsed writ of summons, the plaintiffs claimed from the defendants the sum of $1,528.60 for goods sold and delivered; the defendants, in their affidavit filed with their appearance, set up misrepresentation as to quality, and that the goods, being sold by sample, were not up to sample. Two paragraphs of the affidavit read:—

"4. That, relying upon the representations made to me and the sample submitted, I agreed to purchase the goods in question, but the said goods are not according to the representations made to me nor to the sample submitted; and, upon examination and inspection by the Department of Public Health, Toronto, it was found that the said goods were greatly damaged and the greater portion of the same unfit for sale or use.

"5. That the said defendants have a good defence to this action upon the merits, and the appearance herein is not entered for the purpose of delay only."

The plaintiffs seemed to have thought that this was a good defence, for they took out an appointment to examine and did examine the deponent.

Then the plaintiffs moved before the Master in Chambers for judgment on the affidavit and the examination; the Master in Chambers refused, and the plaintiffs appealed.

It was argued that the facts stated by the defendants only entitled them to a cross-action for damages. That once was the practice; but with Basten v. Butter (1806), 7 East 479, a different practice began to prevail, and since Mondel v. Steel (1841), 8 M. & W. 858, had been uniformly followed, which is to allow the

defendant to set up by way of diminution of the price the amount by which the goods were less valuable by reason of the breach of contract: Catalano & Sansone v. Cuneo Fruit and Importing Co. (1919), ante 60, 46 O.L.R. 160.

But the affidavit which sets up this defence must shew what reduction is claimed in respect to the quality of the goods: Carter v. Hicks (1915), 33 O.L.R. 149, and, on that authority, the affidavit must be held insufficient.

That, however, is an irregularity only, which can be cured; the plaintiffs had taken a very important step with knowledge of the irregularity—they had examined on the affidavit which, they now contended, was wholly insufficient—and they could not be allowed now to set up this irregularity.

The defendants must, however, file and serve an affidavit setting out the amount of deduction claimed by them.

Upon the defendants filing and serving the affidavit, the appeal should be dismissed, without costs.

RIDDELL, J. NOVEMBER 27TH, 1919.

RE BROWN AND McMASTER.

Will—Construction—Devise of Land—Executors—Estate pur autre Vie—Equitable Vested Remainder in Fee—Trustees—Remaindermen—Title to Land—Vendor and Purchaser.

Motion by a vendor of land for an order, under the Vendors and Purchasers Act, declaring the purchaser's objections to the title invalid, and that the vendor could give a good title.

J. Hales, for the vendor.

C. B. Henderson, for the purchaser.

RIDDELL, J., in a written judgment, said that S.C., by his will, after certain devises and bequests, directed his executors "to retain all the residue and remainder of my estate real and personal . . . for and during the . . . life of my said wife and pay to her the income . . . upon the death of my said wife to . . . convey to C.P.A. houses numbered 775, 777, and 779 . . . with land thereunto appertaining . . ." These houses and the land were part of the residue. C.P.A. had sold the lots, the widow still living; the widow joined in the conveyance with C.P.A. and the executors.

It was clear that the executors had an estate pur autre vie for the lifetime of the widow, followed by a remainder in trust to convey to C.P.A.; C.P.A. had an equitable vested remainder in fee. She could, therefore, call upon her trustees to convey as she should direct: Lewin on Trusts, pp. 580 sqq.

As to the widow's rights, they were that the trustees should hold the land during her lifetime and pay her the income; this being a trust in which she was the only cestui que trust, she might give up all her interest, and then the trustees might convey—so long as they did not interfere with the rights of the remaindermen. She agreeing with the widow, the trustees could and should convey.

No question of public policy or of special direction in the will arose, and the property could be dealt with as though under a settlement.

The title was good; the vendor should have his costs.

MULLEN CO. v. PULLING—KELLY, J.—NOV. 26.

Discovery—Examination of Officer of Plaintiff Company—Refusal to Answer Questions—Amendment of Pleadings—Direction to Answer Certain Questions—Attendance for Re-examination—Costs.]—Motion by the defendants for attachment against Norval J. Mullen, superintendent of the plaintiff company, for refusal to answer certain questions put to him on his examination for discovery on the 16th October, 1919, or to compel him to attend at his own expense and answer the questions, and to refresh his memory for further examination, and to produce certain books and documents in his possession, as required by a notice to produce served on his solicitors. The motion was heard at Sandwich on the 30th October. Subsequent to Mullen's examination, the defendants launched a motion for leave to amend the defendant Pulling's defence and counterclaim: this latter motion came on at Sandwich on the 21st October, and leave was given to amend, and the trial was then postponed to the ensuing non-jury sittings at Sandwich. KELLY, J., in a written judgment, said that in the form in which the pleadings appeared at the time of the examination, and down to the amendment of the 21st October, it was doubtful whether some of the questions to which answers were now sought had such relevancy to the matters then in issue as made it obligatory upon Mullen to answer them. In the amended form, however, the scope of the record had been enlarged, and all the questions referred to in the notice of motion, except numbers 10, 12, 48, 56, and 121, should now be answered, to the extent of the deponent's

ability and knowledge, after informing himself from books, records, and such means as were in his possession or under his control. As some of the questions which he should now answer were proper to have been answered even before amendment to the defence and counterclaim, his attendance to answer the questions indicated should be at his own expense. Owing to the somewhat unusual circumstances, the costs of the motion should be disposed of by the trial Judge. T. Mercer Morton, for the defendants. H. L. Barnes, for the plaintiffs and their officer.