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APPELLATE DIVISION.

OCTOBER 27TH, 1913.

KOVINSKI v. CHERRY.

Limitation of Actions—Possession of Land—Statute of Limitations — Boundaries — Fences—Encroachment—Buildings—Survey—Confirming Statute 33 *Vict. ch.* 66—*Tax Sale—Objections to—Taxes not in Arrear.*

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Kent in an action in that Court to recover possession of land and for other relief.

The appeal and cross-appeal were heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

M. Houston, for the defendant.

O. L. Lewis, K.C., and S. B. Arnold, for the plaintiff.

The judgment of the Court was delivered by LEITCH, J.:—An appeal from the judgment of His Honour Judge Bell, Judge of the County Court of the County of Kent, sitting without a jury. The judgment is dated the 19th May, 1913. The defendant appeals against the second and third clauses of the judgment, which are as follows:—

"2. This Court doth further order and adjudge that the plaintiff, as the owner of an undivided eight-ninths of lot number 6, plan 9, Beatty's survey, on the east side of William street, in the city of Chatham, in the county of Kent, recover possession of the said land to the line between lots 6 and 7 in the said survey, as shewn on the plans of W. G. McGeorge, Esq., P.L.S., filed at the trial as exhibits 29 and 30, except that portion there-

of upon which now stands the old brick-veneered portion of the present building claimed to be owned by the defendant.

"3. And this Court doth further order and adjudge that the defendant do pay to the plaintiff the general costs of the action, except the costs incurred by the plaintiff in attempting to prove a tax title to said lands."

The plaintiff cross-appealed against that portion of the judgment which declared the tax deeds invalid, and asked to have them declared valid and binding, and for an order allowing the plaintiff damages for preventing him from occupying the land in question.

The action was brought by the plaintiff, as purchaser and grantee of all the right, title, and interest of the heirs and heiresses at law of James Carleton, late of the city of Chatham, deceased, in lot 6 and the southerly half of lot 5 on the east side of William street, in the city of Chatham, according to plan number 9, in the pleadings mentioned, to recover possession of the land, and for the removal of buildings, and for $300 damages for refusal to give up possession, and for an injunction. The plaintiff also claimed title to the said land under a tax sale held by the Corporation of the City of Chatham on the 6th December, 1911, and a tax deed from the said corporation dated the 28th January, 1913. It was conceded that the defendant was entitled to possession of the land occupied by the brick building shewn on the plan.

The chief controversy was as to the frame structure, commonly called a "lean-to," which extended beyond the line of lot number 6 as surveyed by W. G. McGeorge and shewn on his plan. The defendant claimed up to the fence built five or six years ago, and marked on the plan "by possession."

I do not think that the defendant has shewn that quiet, peaceable, exclusive, and continuous user and occupation which would entitle him to hold any of lot number 6 beyond McGeorge's line. There was no permanent fence between the lots; there was no regular cultivation or cropping of the land; the garden which Mrs. Charlton is said to have had, was open to the neighbours' cattle and subject to their depredations.

I think that W. G. McGeorge's line, which forms the boundary between lots 6 and 7, shewn on the plans exhibits 29 and 30, is the true line. By reason of a complication of surveys, and in order to define the limits of the town and the proper boundaries of the streets and lots, the Corporation of Chatham caused a re-survey to be made and stone monuments to be planted indicating the boundaries and the streets and lots.

An Act was passed by the Legislature of Ontario in 1869—33 Vict. ch. 66—confirming the survey and declaring it to be the true and unalterable survey of the town of Chatham. McGeorge in his evidence states that he procured from the registry office a copy of the plan and field-notes of the survey legalised by the Act of 33 Vict., and uncovered several of the monuments, and, with those that appeared through the pavement, was able to prepare the plans, exhibits 29 and 30. These plans are from actual survey and work on the ground, and there can be no doubt of their accuracy.

As to the plaintiff's cross-appeal, to have it declared that the tax deed set up by him was valid: at p. 152 the learned trial Judge says: "I think the tax sale was a very lax one. I am of opinion that the tax sale was not properly conducted."

On the argument Mr. Houston urged several objections to the tax title set up by the plaintiff; and a perusal of the cases cited shews these objections to be well taken.

It is not necessary for me to go over the cases, as it was proven that the defendant had paid his taxes. The defendant proved the payment of the taxes for every year from 1905 to 1912 inclusive, and the trial Judge so found. If any authority is necessary for the proposition that this objection is fatal, Street v. Fogul, 32 U.C.R. 119, may be referred to.

I think the appeal and cross-appeal should be dismissed; and without costs, both parties having failed.

OCTOBER 27TH, 1913.

VOGLER v. CAMPBELL.

Gift—Money in Bank Deposited in Names of Deceased and Daughter — Right of Survivor — Evidence — Validity of Transaction as Gift inter Vivos—Next of Kin—Right of Action against Donee who is Administratrix.

Appeal by the defendant from the judgment of LENNOX, J., 4 O.W.N. 1389.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

M. Wilson, K.C., and W. Mills, K.C., for the defendant.

O. L. Lewis, K.C., and H. D. Smith, for the plaintiff.

MULOCK, C.J.:—This is an appeal from so much of the judgment of Lennox, J., as finds that the money in question belonged to the estate of John L. Campbell, deceased.

John L. Campbell, an old man, resided with his daughter Margaret A. Campbell, the defendant, and on the 11th July, 1908, he and the defendant signed and delivered to the Traders Bank at Ridgetown a document in the following words and figures:—

"To the Traders Bank of Canada:—

"We, the undersigned, John L. Campbell and Margaret Ann Campbell, hereby agree, jointly and severally, and each with the other, to deposit certain moneys with the Traders Bank of Canada to the credit of our joint names; any moneys so deposited to be our joint property, and the whole amount of the same, and of the interest thereon, to be subject to withdrawal by either of us, and, in the case of the death of one, by the survivor. And each of the undersigned hereby authorises the said bank to pay any moneys which may be at any time so deposited, and any interest there may be thereon, to either of the undersigned, and, in the case of the death of one, to the survivor.

"Dated at Ridgetown this 11th day of July, 1908.

"John L. Campbell.

"Margaret A. Campbell.

"Witness: Hugh Ferguson."

John L. Campbell then deposited in the Traders Bank to the credit of the joint account of himself and his daughter Margaret A. Campbell a sum of $2,000, which theretofore he held on deposit to his own credit. During his lifetime, Margaret A. Campbell drew $500 out of this joint fund, the balance remaining there until the death of the settlor, John L. Campbell, who died intestate, when the defendant was appointed administratrix of his estate.

This action is brought by the plaintiff, another daughter of the deceased, who, among other things, asks that the $2,000 be declared to be part of the estate, and that she be declared entitled to share therein as one of the next of kin of the deceased.

The question, I think, turns wholly on the construction to be placed upon the document above set forth. The intestate deposited the money, subject to the terms of that document, to the credit of himself and the defendant, and when so deposited it became the joint property of the two, and on the death of one became the property of the survivor. Nothing remained in order to perfect the gift to the defendant of a joint interest in the fund during their joint lives; and the exclusive owner-

ship of so much as remained on deposit at the time of his death, in the event of her surviving him. John L. Campbell predeceasing her, the fund formed no part of his estate at the time of his death.

The learned trial Judge considered himself bound by Hill v. Hill (1904), 8 O.L.R. 710. The facts, however, in that case were different. There a person, having money on deposit in a bank, procured from the bank a deposit receipt therefor "payable to William Hill senior" (the depositor) "and John R. Hill" (his son) "or either or the survivor." This instrument did not transfer the ownership of or any interest in the fund to the son, during the lifetime of the father, and on his death the legal estate in the fund devolved on the father's legal representative. As regards the son, the deposit receipt at most was but an incomplete gift or settlement, and, being voluntary, was not enforceable against the estate.

In the present case, the gift being complete in John L. Campbell's lifetime, I am of opinion that the defendant is entitled to retain the fund. I, therefore, with respect, find myself obliged to differ from the learned trial Judge, and think this appeal should be allowed with costs.

Having regard to the state of the pleadings, I think we should not deal with the item of $500 referred to in the case, but reserve to the plaintiff any rights thereto to which she may consider herself entitled.

SUTHERLAND, J.:—I agree.

LEITCH, J.:—I agree.

RIDDELL, J., delivered a written opinion in which he reached the same result. He referred to and distinguished Hill v. Hill, supra; and cited his own decision in Schwent v. Roetter (1910), 21 O.L.R. 112. His conclusion was expressed as follows:—

The appeal should be allowed generally and the action dismissed.

The sum of $500 was withdrawn by the deceased a short time before his death, and was delivered to the defendant. Some evidence was given at the trial, but the matter was not fully investigated; there was nothing in the pleadings about it; and, while we dismiss the action, we reserve to the plaintiff the right to bring any action she may be advised in respect of the $500.

As to costs, I can see no good reason for taking this case out

of the general rule; and I think that the plaintiff must pay the costs of the action and appeal.

I have assumed that the plaintiff has the right to sue, since the defendant is herself administratrix: Hilliard v. Eiffe (1874), L.R. 7 H.L. 39, at p. 44, n., and other cases considered in Empey v. Fick (1907), 15 O.L.R. 19, at p. 24.

Appeal allowed.

OCTOBER 27TH, 1913.

ROSCOE v. McCONNELL.

Contract—Conveyance of Equity of Redemption to Mortgagee—Option of Repurchase—Construction of Written Document—Mortgage or Sale with Right to Repurchase—Evidence—Option to be Exercised within Fixed Period—Privilege—Strict Compliance with—Failure of Action for Redemption.

Appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. P. MacGregor, for the plaintiff.

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

The judgment of the Court was delivered by MULOCK, C.J.:—The action is brought by Maglen Roscoe, daughter and administratrix of the estate of Thomas McConnell, deceased, to have it declared that a certain transaction carried out by deed from one James H. Simmons, bearing date the 20th December, 1906, to the defendant, of certain lands on Yonge street, in the city of Toronto, and by a contemporaneous agreement between the defendant and the plaintiff's father, was in fact a mortgage transaction, and not a bonâ fide sale to the defendant with a right of repurchase by the father.

The facts established by the evidence are as follows:—

The lands in question had been vested in fee simple in Simmons, but on a secret trust for Thomas McConnell, the beneficial owner, and at McConnell's request and for his benefit were mortgaged to certain persons, one of them being Samuel C. Smoke, who, on the 15th August, 1905, became mortgagee thereof for $500, subject to the prior mortgages.

At this time, Thomas McConnell was erecting buildings on the land, intending in the near future to effect a larger loan wherewith to pay for the buildings.

In October, 1905, he applied to Mr. Smoke for a further advance, which was refused unless McConnell gave further security. McConnell then applied to his son, the defendant, for assistance, and the latter, for his father's accommodation, on numerous occasions, gave to him his promissory notes for sums amounting to between $3,000 and $4,000, and these notes Thomas McConnell discounted with Mr. Smoke.

Thomas McConnell having made default in payment for the buildings, mechanics' liens were registered against the land, and proceedings were taken to realise on these liens, Mr. Smoke being a party defendant in those proceedings. On their culminating in a judgment, he, with the consent of Simmons and Thomas McConnell, paid the amounts owing, and obtained a further mortgage to secure the amount then due to him, being something over $8,000; John E. McConnell still remaining liable to Mr. Smoke in respect to the notes above-mentioned. Subsequently, interest on this mortgage falling into arrear, Mr. Smoke, in October, 1906, began power of sale proceedings, when Thomas McConnell applied to the defendant for his assistance towards obtaining their discontinuance.

It was then agreed between Thomas McConnell and the defendant that, if the defendant would secure a discontinuance of the proceedings by becoming liable to Mr. Smoke for the amount of his mortgage-claim, Thomas McConnell would cause the property to be conveyed to him for his own use, on the condition that he should be given the option of repurchasing it within three months.

In pursuance of this agreement, the defendant gave to Mr. Smoke his written undertaking (to which his father was a party) whereby the defendant undertook with Mr. Smoke that "unless your (Smoke's) claim is otherwise paid by the 31st November, 1906, I will then pay your claim, including principal, interest, and costs; you at the same time assigning to me your securities."

In consideration of this undertaking, Mr. Smoke discontinued the sale proceedings, whereupon Thomas McConnell refused to carry out his promise to have the property conveyed to the defendant. In consequence, the defendant, by letter of the 3rd December, 1906, requested Mr. Smoke to bring the property to a sale; and, accordingly, Mr. Smoke again instituted sale proceedings.

Then again Thomas McConnell agreed with the defendant to have the property conveyed to him—he, Thomas McConnell. "to have three months within which to take the property off the owner's hands at what it had cost the son to buy the property back," according to the evidence of Mr. Smoke.

Thomas McConnell and the defendant then instructed Mr. Smoke to prepare the necessary papers for carrying out the agreement, and the latter then caused to be prepared the deed in question in this action, bearing date the 20th December, 1906, from Simmons to the defendant, and the contemporaneous agreement between Thomas McConnell and the defendant, securing to the former the right of repurchase within three months. The deed vested the property in the defendant in fee simple, subject to the existing incumbrances, and the contemporaneous instrument is worded as follows:—

"Agreement made this 20th day of December, 1906, between John E. McConnell, of the first part, and Thomas McConnell, of the second part, witnesseth that, in consideration of the sum of $1 now paid by the party of the second part to the party of the first part, the party of the first part hereby gives and grants to the party of the second part, or his nominees, the right, at any time within three months from the date hereof, of purchasing from the party of the first part the property now belonging to the party of the first part and known as" (describing the land in question) "at a price equal to the now existing mortgages and other incumbrances, charges, and liens upon the said lands, and interest thereon according to the terms of the said mortgages, together with all costs which have been incurred or may hereafter be incurred by the party of the first part in respect of the said property, and all moneys which may be hereafter paid by the party of the first part in respect of the said properties, . . . The party of the second part, in the event of his exercising the said option or right, must accept the title of the party of the first part as it stands and must bear all expense to which the party of the first part may be put in carrying out the said sale. Time is strictly of the essence of this agreement; and, unless the said option or right shall be exercised and the transaction wholly carried out within the said period of three months, the party of the second part and his nominees shall have no right whatever in or to the said property under or by virtue of this agreement or otherwise howsoever." (Signed and sealed by the parties.)

Whether this transaction was a mortgage transaction to

secure the defendant in respect of his suretyship for his father, or an actual sale with a right of repurchase, is the real issue here. If the latter, then the condition that, on failure to exercise the option within the stipulated time, Thomas McConnell should lose his right to repurchase, is not a penalty or forfeiture, but a privilege, and its terms must be strictly complied with: Barrell v. Sabine, 1 Vern. 268; Perry v. Meadowcroft, 4 Beav. 202; Gossip v. Wright, 9 Jur. (part 1) 592; Shaw v. Jeffrey, 13 Moo. P.C. 432.

Mr. MacGregor seemed to attach much weight to Samuel v. Jarrah Timber and Wood Paving Corporation, [1904] A.C. 323, and other cases of that nature, but they can have no application to this case. Those are all cases in which, as part of the original transaction, the borrower conveyed to the lender the estate as security, by instrument absolute in form, and where, at the same time and as part of the original transaction, it was agreed between the parties that the grantor might repurchase within a named period, failing which the right should cease. In those cases, in each of which the grant was in fact a security, it was not competent for the parties by any contemporaneous contract to override the equitable doctrine "once a mortgage always a mortgage," and those cases simply affirm that well-established equitable doctrine.

But a mortgagor may, by subsequent independent transaction, extinguish in favour of his mortgagee his equity of redemption, at the same time acquiring the option to repurchase; and, if such be the real agreement, the equity of redemption ceases to exist, and the former mortgagor has only an option or privilege.

In the present case, the mortgage to Mr. Smoke for some $8,000 had been made some months previously, and it was competent for Thomas McConnell on the 20th December, 1906, to extinguish his equity of redemption in favour of his mortgagee or the defendant, his surety, acquiring as part of that arrangement an option to repurchase. If such was the real agreement between the parties, Thomas McConnell thereafter had no rights incident to the right to redeem, but only such as the option gave him; thus, the question resolves itself into one of fact, what was the real nature of the agreement between the parties?

The written agreement of the 29th December, 1906, purports to set forth the terms in plain, unmistakable language, and I see no reason for thinking that it does not contain the real agreement.

An examination of the conduct of Thomas McConnell shortly before, and also subsequent to, the transaction on the 20th December, 1906, is helpful, as indicating his view of the transaction. . . .

[References to the documentary and oral evidence.]

Thomas McConnell died on the 23rd July, 1912. His conduct in acquiescing in the oft-repeated notice of the defendant's interpretation of the true nature of the transaction, must be construed as an admission that the transaction of the 20th December, 1906, in substance, was an extinguishment of Thomas McConnell's equity of redemption, and secured to him merely an option to repurchase on the terms set forth in the agreement; and I do not think that the plaintiff, a mere volunteer, can be heard to make a claim inconsistent with the attitude of Thomas McConnell, through whom she claims.

The plaintiff also charges undue influence, but wholly fails to establish the charge, which is unsupported by any evidence.

I, therefore, think this appeal should be dismissed with costs.

OCTOBER 27TH, 1913.

*PALO v. CANADIAN NORTHERN R.W. CO.

Railway—Animal Killed on Track—Finding of Fact of Trial Judge—Reversal by Appellate Court—Absence of Fences—Duty of Railway Company—"At Large"—Negligence of Owner—"Wilful Act"—Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 294, *sub-sec.* 4 (9 & 10 *Edw. VII. ch.* 50, *sec.* 8).

Appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Thunder Bay, dismissing the action, which was brought to recover damages for the loss of a horse of the plaintiff's, which got upon the defendants' track, owing, as the plaintiff alleged, to their omission to fence.

The plaintiff was a farmer, residing on his farm; the defendants' line of railway ran westerly along its south side. His house was in a clearing, fenced on all sides. At the west side of this clearing was the stable, the west door of which opened into another portion of the plaintiff's land, which portion was unfenced and extended down to the defendants' line of railway. The plaintiff permitted the horse to pasture on this unfenced portion of his land.

*To be reported in the Ontario Law Reports.

At about five o'clock of the day on which it was killed (the 27th September, 1912), the horse was pasturing near the stable on the plaintiff's land. A passenger train went westerly past the farm at about 7.30 p.m.—it being then quite dark. Shortly thereafter, the horse was found at the south side of the track, so seriously injured that it had to be destroyed. There was hair and blood on and along the south rail near which the horse was found.

The County Court Judge found that there was no evidence that the injury was caused by the defendants' train; and, therefore, dismissed the action.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

H. E. Rose, K.C., for the plaintiff.

A. J. Reid, K.C., for the defendants.

MULOCK, C.J.:—The facts established on behalf of the plaintiff are not controverted, and an appellate Court is in as good a position as the trial Judge to draw the correct inferences from an admitted or proved set of facts, and is free to do so.

From the plaintiff's evidence the inference is, I think, irresistible that the horse was struck by the passenger train (above referred to), and this inference has not been rebutted by the evidence for the defence. The learned trial Judge, however, seems to have misapprehended the evidence of the engineer and fireman, for he says: "No one saw the train strike the horse, and the engineer and fireman both testify that this did not happen."

A careful perusal of the evidence of these two witnesses fails to satisfy me that they so testified. It is clear from a perusal of the engineer's evidence that he saw nothing of any occurrences at the left side of the track; and, as the plaintiff's evidence leads to the conclusion that the horse was struck by the left side of the train, the engineer's evidence is irrelevant and valueless; nor can any weight be attached to the fireman's evidence. He was, it is true, on the left side of the cab; but, when asked by the defendants' counsel if he could have seen a horse if he had struck it, he said he "thought so," and explained, evidently in justification of his doubt, that it was quite dark, but he could see the front of the engine. When further pressed by the defendants' counsel, he said that he would certainly have seen it if the engine had struck a horse; and finally he said he was positive. Both of these witnesses, however, testify only to the

engine not having struck the horse; but the accident might have been occasioned by another part of the train; as at times happens where an animal standing alongside of a passing train turns away and in turning comes in contact with the train. Such an occurrence here is reconcilable with the whole evidence; and, with all respect to the finding of the trial Judge, I think the proper inference to draw from the evidence is that the horse was injured by some part of the defendants' train, not necessarily the engine; and this seems to have been the view of the trial Judge, who says in his judgment, "It might be possible to have the train hit a horse without their (the engineer and fireman) knowing it."

But it is argued that the plaintiff was guilty of negligence, and, therefore, is not entitled to recover.

Sub-section 4 of sec. 294 of the Railway Act, R.S.C. 1906 ch. 37, as enacted by 9 & 10 Edw. VII. ch. 50, sec. 8, repealing the former sub-sec. 4, is as follows: "When any horses . . . at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action . . . unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent," etc.

This section, like sec. 237 of the Railway Act, and the repealed sub-sec. 4 of sec. 294, shifts the onus and renders the company liable unless it establishes that the animal got at large through the negligence or wilful act or omission, etc., of the owner, etc. Thus the company, in order to succeed, must establish two things: (a) that the animal got at large; (b) that it got at large through the owner's negligence or wilful act or omission, etc. Failing to establish both of these conditions, the company's defence fails.

Of what negligence or wilful act or omission has the plaintiff been guilty? This is aquestion of fact. The horse is not shewn to have been elsewhere than on the plaintiff's land, and on the defendant company's right of way. It was the duty of the defendant company, not of the plaintiff, to maintain a fence between the plaintiff's land and the company's right of way. This the defendants omitted to do, but such omission could not deprive the plaintiff of the right to use his land; and, as such owner, he was within his legal rights in allowing the horse to

pasture there; and, therefore, was guilty of no negligence. The company having thus failed to established any defence to the primâ facie cause of action conferred upon the plaintiff by the statute, he is entitled to maintain this action; and this appeal should be allowed.

The plaintiff in his statement of claim stated the value of the horse to be $275. At the trial he said that he would not have sold it for less than $300. This is not saying that it was worth $300. Another witness for the plaintiff spoke of the horse as worth about $300. In the face of this rather indefinite evidence, I think the amount of the judgment should be limited to that claimed in the statement of claim, viz., $275; and judgment should be entered for that amount, and costs below and here.

SUTHERLAND, J.:—I agree.

LEITCH, J.:—I agree.

RIDDELL, J., agreed in the result, for reasons stated by him in writing. He referred, upon the question of reversing the finding of fact, to Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury, [1908] A.C. 323, 326; Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, 506; and, after setting out the facts of this case, said:—

I think that we are entitled to hold, and should hold, that the plaintiff has proved that his horse was injured by the defendants' train.

The defendants, however, contend before us that the claim of the plaintiff cannot succeed by reason of the provisions of sec. 294(4) of the Railway Act. If effect were to be given to this contention, the result would be startling. It is argued that the act of the plaintiff in putting his horse out of the stable, although on his own land, was a putting at large by his wilful act, within the meaning of sec. 294 (4) of R.S.C. 1906 ch. 37. The result would be that all a railway company need do would be to neglect their statutory duty to fence (sec. 254), and the unfortunate farmer along the line must not allow his animals out in the farm, but must keep them in stable or closed field. This would, no doubt, be a happy result for the law-breaking railway company; but, before such an extraordinary effect be given to the section, it must be clear that such is its necessary meaning.

I do not think that the section applies at all to the present case. It is sec. 295 which refers to the duties of adjoining owners quoad their own land, and sec. 254 to their rights. "At

large" in sec. 294 refers to animals elsewhere than upon the land of their owner. This, I think, is apparent from a reading of the statute, and authority is not wanting. . . .

[Reference to McLeod v. Canadian Northern R.W. Co. (1908), 9 Can. Ry. Cas. 39, 12 O.W.R. 1279, 1283; Higgins v. Canadian Pacific R.W. Co. (1908), 9 Can. Ry. Cas. 34, 18 O.L.R. 12.]

The cases previous to these are cited by the Chancellor in the McLeod case, and it is unnecessary to refer further to them.

The learned District Court Judge has found against negligence on the part of the plaintiff, and rightly so on the facts—even if negligence by the plaintiff could avail in an action based upon neglect by the railway company of a statutory duty; as to which see Davis v. Canadian Pacific R.W. Co. (1886), 12 A.R. 724.

The appeal should be allowed. The trial Judge did not find the value, as he might have done, and, no doubt, would have done, had the evidence been conflicting. The only evidence of value is that of the plaintiff and his witness Isaac Karila, who both place the value at $300.

Judgment should, in my view, be entered for the plaintiff for $300, with costs here and below; but, as my learned brethren think the amount should be $275, I do not dissent.

Appeal allowed.

OCTOBER 27TH, 1913.

BATES v. LITTLE.

Contract—Sale of Goods — Misrepresentations — Agreement to Assign Lease—Breach—Waiver—Bill of Exchange—Action on—Defence.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Kent dismissing the action, which was brought to recover $450, the amount of a bill of exchange or cheque drawn by the defendant, and interest, and directing the return to the defendant of the instrument in question and two others.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. G. Kerr, for the plaintiff.

O. L. Lewis, K.C., and S. B. Arnold, for the defendant.

The judgment of the Court was delivered by SUTHERLAND, J.: —This action arises out of a sale by the plaintiff to the defendant of certain chattel property in the "Temple Theatre," in the city of Chatham, used in connection with a moving picture show. . . On the night of the 2nd November, 1912, Baxter, acting for the plaintiff, made a sale to the defendant, and it is said that a brief memorandum was made and executed that night, but it was not produced at the trial. The defendant testified that he thought that he was dealing only with Baxter, as the owner, but admits that the plaintiff's name was mentioned. Baxter says that he explained to the defendant that he (Baxter) had sold to the plaintiff, who was selling to the defendant; and the solicitor, Mr. Gundy, who prepared the papers on the following Monday, says that the defendant, Baxter, and the plaintiff all came to his office for that purpose, and it was explained to him (the solicitor), before he drew them, that a sale had been made by Baxter to the plaintiff, and that the plaintiff had resold to the defendant.

No formal bill of sale had been made by Baxter to the plaintiff; and the bill of sale drawn on Monday the 4th November was from Baxter directly to the defendant, and covered the chattel property in question, together with the goodwill of the business in the theatre; and the price which had been agreed upon, namely, $1,500, was inserted therein. It was duly executed by Baxter and delivered to the defendant. . . . At the same time the defendant executed . . . a cheque in favour of Baxter for $50, a bill of exchange or cheque for $450 in favour of the plaintiff—the instrument sued upon—and two lien-notes, each for $500, in each of which the defendant promised to pay . . . Baxter . . . the sum of $500, without interest. . . .

It is quite clear, I think, that the defendant promptly rued his bargain, thinking probably that he had paid too much for the property. . . .

If an assignment of the lease were in fact a term of the contract of sale from the plaintiff to the defendant—and the evidence does not in a satisfactory way make this out—he clearly waived this, retained the documents evidencing his title to the chattels, and dealt with them as their owner. I think that he must be held to have ratified the agreement after the alleged breach, and to have converted the goods to his own use. But it is clear that, having repented of his bargain with the plaintiff, and concluded that he could deal more advantageously with the landlord, he did not want to have the contract with the plaintiff, as entered into, carried out, and did not want to obtain, through

it, an assignment of the lease; but, on the contrary, while pretending this and putting it forward as an objection, secretly induced the landlord to withhold her consent.

The failure of the plaintiff to secure an assignment of the lease to the defendant, and to carry out his contract, is what is pleaded by the latter in his statement of defence as the ground on which he is relieved from liability in respect of the cheque in question. But the judgment of the County Court Judge does not, apparently, deal with this aspect of the case. This judgment is very short, as follows: "I am of opinion that the transaction by which defendant, Little, was induced to become the owner of the picture show was brought about by fraudulent representations of Baxter and others, acting for Bates, and that he was justified in repudiating his liability on the negotiable documents signed by him. I dismiss the action with costs; I direct the $450 cheque and two notes referred to in the counterclaim to be returned by the clerk to the plaintiff."

It was not set up in the statement of defence that the contract was brought about by fraudulent representations. When, at the trial, evidence of this character was offered on behalf of the defendant, objection was taken on behalf of the plaintiff. . . Some evidence was admitted as to Baxter's representations as to the weekly profits, etc.

I am of opinion that the sale by the plaintiff to the defendant of the chattels in question must be held to be binding upon the latter, the appeal allowed, and judgment in the action entered for the plaintiff for the amount of the cheque, namely, $450, with appropriate interest and costs, together with the costs of this appeal.

OCTOBER 29TH, 1913.

WILSON v. SUBURBAN ESTATES CO.

Fraud and Misrepresentation—Sale of Land—Action for Damages for Deceit—Failure of Proof.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 4 O.W.N. 1488, dismissing the action without costs.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. P. MacGregor, for the plaintiffs.

Grayson Smith, for the defendants.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

KELLY, J. OCTOBER 25TH, 1913.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Company—Managing Director—Transactions with—Claims and Cross-claims—Account—Mortgage—Indebtedness of Managing Director to Company—Credits Given in Books of Company at Instance of Managing Director—Commission—By-laws of Company—Salary—Transfer of Assets—Powers of Board of Directors—Delegation to Committee—Moneys Owing by Allottees of Land—Cancellation of Transfers—Interest—Statute of Limitations — Trustee — Trust Property—Recovery of—Sales of Land—Commission on—Compensation for Endorsing Commercial Paper—Directors' Fees—Special Services—Particulars.

The plaintiffs sued to recover the amount of several money claims arising out of the transactions of the defendant while he was managing director of the plaintiffs, an incorporated company. The defendant disputed these claims, and counterclaimed $25,000 for commission on sales of the plaintiffs' lands, expenses, disbursements, compensation for endorsing notes and other negotiable paper for the plaintiffs and procuring the same to be discounted, fees as director, salary as managing director, and for special services.

See Saskatchewan Land and Homestead Co. v. Leadlay, 10 O.W.R. 501, 14 O.W.R. 745, 1 O.W.N. 228, 2 O.W.N. 1.

The action was tried before KELLY, J., without a jury.

J. L. Whiting, K.C., and A. B. Cunningham, for the plaintiffs.

A. J. Russell Snow, K.C., for the defendant.

KELLY, J. (after setting out the facts):—The defendant resists the claim for payment of $4,600 . . . on the ground that an arrangement existed between him and Edward Leadlay —one of the mortgagees in a mortgage from the plaintiffs—by which the latter was to assume this indebtedness personally and credit the amount on the mortgage and so reduce the plaintiffs' mortgage indebtedness. The defendant admits owing this sum to the plaintiffs at the time of the alleged arrangement. The final result of the taking of the mortgage accounts in the former

action was that the plaintiffs were not allowed this credit, and so have not been paid its amount. . . . I am not disposed to disagree with the conclusion then arrived at. . . . Apart from whatever may have been the defendant's right as between him and Leadlay, I fail to see that the arrangement between them, to which the plaintiffs were not parties, had the effect of finding the plaintiffs to relieve the defendant from that indebtedness—particularly as the plaintiffs have not been allowed it as a credit on the mortgage.

Much the same may be said if the item of $3,279.22 . . . which, the defendant contends, was to have been credited upon the Leadlay mortgage at a time when the mortgagees released certain lands from the mortgage, and when the defendant made a promissory note in respect of this sum to Mr. Leadlay. The evidence and the records do not substantiate that defence. . . . The defendant is not entitled to the credit which he claims against the company . . . not having paid his note given for this sum, he is liable therefor to the plaintiffs.

The next item is a claim for $8,166.66 . . . credited in the plaintiffs' books to the defendant for special services and paid to him by the plaintiffs. . . . This transaction was of such an unusual character as to have required the special attention of the plaintiffs, if it was their intention to give or sanction the credit; . . . and it is but reasonable to expect that, if the plaintiffs had taken any action thereon, it would have been evidenced by some by-law or resolution or other express act, clearly shewing its nature and effect. The entry of this credit to the defendant, in 1893, was made by . . . a clerk . . . at the defendant's dictation. . . . In view of all the circumstances, I do not think that this credit taken by the defendant can be upheld against the plaintiffs; the latter, having paid the amount, are entitled to recover it.

The next item of claim is based on the allegation that the defendant unlawfully credited his account with items of commission and interest to the extent of about $3,000, and that such credits were paid him by the plaintiffs. . . .

It is quite clear that, under the terms of the plaintiffs' by-law No. 26, what the defendant was entitled to was $5,000 per annum from the beginning of his services, and that he was not entitled to any other commissions or allowances in addition . . . If, therefore, on a proper taking of his salary account, it be shewn that he has received for the term commencing with the beginning of his services and down to the end of the time

covered by by-law 22, any sum or sums as salary or compensation as managing director or for commission, in excess of $5,000 per year, he should account therefor to the plaintiffs; and, if the parties cannot agree . . . there will be a reference to the Master in Ordinary to take an account thereof.

The remaining items of the claim arise from the defendant having received and applied to his own use certain assets of the company at or after the time of the release of the equity of redemption in the mortgaged lands to the Leadlay estate. The defendant does not deny the receipt of these sums, but contends that the plaintiffs authorised the transfer thereof to him in full satisfaction of all his claims and demands as managing director or otherwise. His warrant for this contention is based on the action of the board of directors at their meeting on the 2nd March, 1900, where, on the report of what was known as the "finance committee," it was recommended that it (the committee) be authorised to deal with the situation . . . which recommendation was adopted in its entirety at that meeting. . . . Was there authority in the directors to delegate to a committee the performance of the important duties which it assumed to turn over to the defendant? I have not been able to discover from the records of the company any authority given to the directors so to delegate; and I am of opinion that . . . In re Leeds Banking Co., Howard's Case, L.R. 1 Ch. 561, is applicable under such circumstances as exist here, and that the directors had no right or authority to delegate their powers and duties. But, apart altogether from such want of authority, the procedure adopted in the disposal of these assets was not such as should have been followed in order to give binding effect to the transaction. . . . Before finally disposing of the balance of assets en bloc, there should have been what is equivalent to an accounting, both as to the assets and the liabilities.

That not having been done, my opinion is that the plaintiffs are now entitled to payment by the defendant of the following amounts included in the plaintiffs' claim and admitted by him to have been received: $646.87, $365, $365, and $730, referred to in paragraph 23 of the statement of claim; and $364.05 received from George W. Greene, and interest on these sums from the respective dates upon which they were so received; also an account in respect of the interest which the plaintiffs had in the lands known as "Blackfalds." . . . I am unable to find that there existed any authority in the defendant to give consent to the division of these lands, or that he can take or retain the

benefit of the lands so acquired without accounting therefor to the plaintiffs. . . .

Prior to March, 1900, certain shareholders of the plaintiffs had applied for allotments of land in exchange for their holdings of stock in the company (this mode of settlement having been sanctioned by the Government), and allotments of land were made to them and their stock surrendered; but, on the adjustment, certain balances of cash were due by the allottees to the plaintiffs; and, in consequence, the plaintiffs held, undelivered until payment should be made, the transfers of the lands which had been executed to the allottees. In March, 1900, when, the defendant alleges, the plaintiffs authorised him to receive and retain the balance of the plaintiffs' assets in settlement of his claims, balances were still due to the plaintiffs by certain of those allottees, and the transfers . . . remained in the plaintiffs' hands. These balances not having been paid, the defendant, according to his own evidence, later on issued notices to the delinquents that unless payment was made within three months the transfers would be cancelled. Some of the delinquents not having paid within the time specified, the defendant, of his own accord and without the knowledge or authorisation of the plaintiffs, cancelled the transfers, and in the plaintiffs' name made new transfers . . . to his wife, Annie A. Moore. What the defendant sets up is that he (or Mrs. Moore) took these lands instead of the balances due by the allottees to the company. . . . The plaintiffs claim the value of these lands.

The form of agreement with and transfer to the allottees is not produced; but the evidence of the defendant is that the plaintiffs did not therein reserve any right to cancel the transfers on non-payment of the balances due by the allottees. That being so, the remedy would not have been to retake the lands, but to recover from the allottees the balances so due. . . . What the plaintiffs are entitled to is, not the lands or their value, but the balances which were due by the allottees whose transfers the defendant assumed to cancel, with interest; and there will be a reference to the Master in Ordinary to ascertain these amounts. . . . The plaintiffs are entitled to interest on sums payable to them from the time the same, or the benefit thereof, were received by the defendant. The rule as to the charging of interest as laid down in such cases as Small v. Eccles, 12 Gr. 37, is, I think, applicable here.

A defence set up by the defendant is that the plaintiffs' claims are barred by statute. I cannot accept this view. The

liability of a director, who is a trustee, of a company, and has its property in his hands and under his control, to account to the company for all such property, is undoubted. His right to plead the Statute of Limitations does not exist "where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained by him or previously received by him and converted to his own use:" Halsbury's Laws of England, vol. 5, p. 235, sec. 377. . . . See, also, vol. 19, pp. 165-6.

The defendant has counterclaimed in respect of several matters with which I shall deal separately. The first is for commission on sales of the plaintiffs' lands. . . . If any sales of lands were made from the time by-law 30 came into effect until the 30th March, 1900, on which the defendant has not been paid the commission provided by by-laws 30 and 32, he is entitled to the commission thereon; and the reference to the Master in Ordinary will include an inquiry into this. . . . He is not, however, entitled to have taken into account the value of the company's lands for the taking over of which, he says, he had negotiations with the Government. . . .

The defendant contends, too, that he is entitled to commission on sales of lands which he made for the Leadlays. That claim is not sustainable even on the ground that the lands afterwards were dealt with as the company's lands. Moreover, in the taking of the accounts in the former action, substantial allowances were made to the defendant in connection with making sales after the 30th March, 1900; and these allowances were included in the redemption moneys payable by the plaintiffs. As I understand it, the amount so allowed was in excess of the commissions provided by the . . . by-laws. I cannot adopt the position taken by the defendant, that the sales made in such circumstances were made for the plaintiffs, or in such a way as to entitle him to the commission provided by the by-laws.

By-law 31 made provision for compensation to the directors for endorsing commercial paper for the plaintiffs, and the defendant is entitled to compensation in the terms of the by-law. The reference to the Master in Ordinary will include also an inquiry if, in addition to what the defendant has already received for making such endorsements, there be anything further due on this . . . also an inquiry to ascertain if anything is due to the defendant for director's fees as allowed by the company's by-laws.

The claim for unpaid salary as managing director can only apply to the time subsequent to the 30th March, 1900, as his salary, exclusive of any commissions under by-laws 30 and 32, was on his own admission, paid down to that date. From that time he did not, as managing director, assume to perform any services for the plaintiffs—unless it can be contended that the getting into his possession the company's remaining balance of assets, in settlement of what he alleges were his claims against the company, were services within the purview of the managing director's duties. . . . That claim is dismissed.

No satisfactory evidence has been adduced of special services rendered by the defendant to the plaintiffs in respect of which he sets up a claim; and that claim also fails.

Although no particulars are produced of the claim for expenses and disbursements made by the defendant for and on behalf of the plaintiffs, outside of the matters I have already disposed of, the defendant may have an opportunity of producing such a statement before the Master in Ordinary, to be inquired into on the reference.

There will be judgment in accordance with the above findings. Further directions and costs are reserved until the Master makes his report.

LATCHFORD, J. OCTOBER 27TH, 1913.

RE MCDONALD.

Will—Construction—Devise of Land—Life Estate—Remainder—Condition—Fulfilment—Birth of Issue—Estate in Fee Simple—Executors.

Petition by executors for advice.

The petition was heard at the London Weekly Court.

G. N. Weekes, for the petitioners.

J. M. McEvoy, for the Corporation of the County of Middlesex.

J. C. Elliott, for the Corporation of the Township of Lobo.

LATCHFORD, J.:—Application by the executors of Donald McDonald, late of the township of Enniskillen, in the county of Lambton, for the advice of the Court as to whether, upon the

true construction of the will of the deceased, it was the duty of the executors, after the death of the testator's sister Christiann Bolls, to convey certain lands in fee to her daughter Mary Bell Bolls (now Mary Bell Beaton), or to hold such lands until the death of Mrs. Beaton, in order to ascertain to whom such lands should then be conveyed.

The will of the testator, a retired farmer, was made on the 2nd July, 1881. He signed it by his mark in the presence of two witnesses, one described as a farmer, the other as a gentleman. There is no direct evidence of the circumstances attending the making of the will. McDonald died on the 24th November, 1881, and probate was duly granted to the executors named in the will on the 3rd December, 1881.

The will devised the lands in question to the executors "in trust to be managed or rented by them as best they may," and the net proceeds were to be paid yearly and every year to the testator's sister Christiann Bolls during her natural life. The will then proceeds: "After the death of my sister the surplus . . . from said farm to be paid yearly by my executors to my sister's daughter Mary Bell Bolls, if alive, during the term of her natural life, or if she has family legally begotten then the said farm to be given by my executors to the said Mary Bell, but provided she, the said Mary Bell, dies without having any lawful heirs, then my executors to give up the management of said farm to the Township Council of the Township of Lobo and their successors in office to be managed or sold, and if sold the proceeds to be invested and the interest or rent to be applied for the benefit of the poor in the County of Middlesex's House of Refuge or House of Industry near the town of Strathroy."

At the date of the testator's death, as at the date of the will, Mary Bell Bolls was unmarried. It was obviously present to the mind of the testator that, upon the death of the life-tenant, her daughter might be (1) living and unmarried, (2) dead without lawful issue, (3) living and having lawful issue. Only in the second event could the Township of Lobo claim. The third contingency provided for actually occurred. At the death of Mrs. Bolls in 1908, her daughter, Mrs. Beaton, was alive and had lawful issue living. The executors are, in my opinion, bound to convey the farm to her in fee.

Costs of all parties out of the estate—those of the executors as between solicitor and client.

HODGINS, J.A., OCTOBER 27TH, 1913

RE MCKEON.

Will—Construction—Gift to Niece—Trust—Discretion of Trustee—Expenditure for Education of Beneficiary—Right of Beneficiary to Receive Portion Unexpended.

Motion by the trustee under the will of Albert McKeon, deceased, upon originating notice, for an order determining a question arising upon the construction of the will as to the disposition of the estate.

The motion was heard in the London Weekly Court.

T. J. Murphy, for Mary A. Crotty, the trustee.

J. B. McKillop, for the next of kin.

J. F. Faulds and P. H. Bartlett, for Angela Crotty.

HODGINS, J.A.:—The words of the will in question are as follows: "The balance of my estate . . . he" (the executor) "shall sell and hand over the proceeds to Mary A. Crotty, of St. Columban, to be held by her in trust, and to be expended by her for the education and support of my niece Angela Crotty now attending the Ursuline Academy in Chatham."

Angela Crotty at the death of the testator was a minor. She is now of age, and contends that she is entitled to have the balance of the estate which the will deals with, handed over to her. It is said that the trustee received about $5,000, and has expended about $800 or $900 for Angela's education and support; that part is in the bank, and that the balance is invested in the security of a promissory note.

I think that this case falls within the line of decisions which hold that where an entire fund is given, and a purpose, such as education and support, is assigned as the motive of the gift, the beneficiary takes the whole fund absolutely. See Hanson v. Graham, 6 Ves. 249; Re Sanderson's Trusts, 3 K. & J. 497; Younghusband v. Gisborne, 1 Coll. 400; In re Stanger, 60 L.J. Ch. 326.

In the latter case Chitty, J., observes, on the terms of the gift (p. 327): "It is material to observe that it is not framed so as to make it the duty of the trustees to apply the whole of the income or corpus for R. Tate's benefit. Had this been so, I should have been prepared to hold that he took a vested interest in the whole fund."

I think the principle to be applied in dealing with this will is at one with that stated by the learned Chancellor in Re Hamilton, 27 O.L.R. at p. 447, and that the right of the beneficiary can only be defeated by "making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary." In this he follows In re Johnston, [1894] 3 Ch. 204.

Where it has been held that the fund does not go to the beneficiary, it is because the destination of the fund is controlled in one or other of those ways. See Re Nelson, 12 O.W.R. 760; Re Rispin, 25 O.L.R. 633, 46 S.C.R. 649; Re Hamilton, 27 O.L.R. 445, 28 O.L.R. 534; Re Collins, 4 O.W.N. 206.

In no case that I have been able to find has the mere interposition of a trustee to hold and to expend the moneys been held to defeat the vesting of the gift where otherwise no controlling discretion is vested in him.

There should be a direction that the trustee should pay over the balance of the fund to Angela Crotty, after payment of any moneys properly expended by her thereout and of her commission and the costs of this motion; the account to be taken by the Master at London.

Costs of all parties out of the fund; those of the trustee as between solicitor and client. This motion was properly made in Court.

BRITTON, J. OCTOBER 31ST, 1913.

RE OUDERKIRK.

Will—Construction — Provision for Widow—Dower — Election between—Lien on Whole Estate for Annuity—Deficiency of Income to be Made up out of Corpus—Maintenance of Infant—Duty of Executors.

Application by the executors of the will of John Ouderkirk, deceased, upon originating notice, for an order determining certain questions arising upon the construction of the will in relation to the administration of the estate and for the opinion and advice of the Court upon certain matters connected with the estate.

The will was dated the 26th November, 1910; and the testator died on the 18th February, 1911, leaving an estate of the value of about $6,500.

His widow, Jessie Ouderkirk, was forty-two years of age at the date of the application; she was the second wife of the testator.

The youngest child, Mildred, was the only child of the widow, and was an invalid and had been so from her birth.

The testator, by the will aforesaid, first directed payment of his debts and funeral and testamentary expenses, and then proceeded:—

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say:—

"To my wife Jessie Ouderkirk my house and lot in the village of of Berwick so long as she remains my widow also the sum of $200 per annum payable every six months so long as she remains my widow. Said sum of $200 shall be a lien on the value of my estate."

He then gave the sum of $1,000 to each of three named sons absolutely, and proceeded:—

"To my daughter Mildred Ouderkirk if living at my death the sum of $3,000 and in the event of my wife Jessie Ouderkirk getting married again my daughter Mildred shall have my house and lot in Berwick.

"And I give my executors hereinafter appointed the right to dispose of any real estate or other property of which I may die possessed of for the purpose of paying the bequests hereby made and of investing the funds in a chartered bank or in first class securities. Interest on said trust fund to be used for paying the annual payments to my wife Jessie Ouderkirk as long as she remains my widow."

He then gave two small legacies, and continued:—

"The devise and bequest of my daughter Mildred Ouderkirk is expressly subject to the unfettered discretion of my executors. If my executors deem it advisable to preserve the portion of my estate hereby willed to my said daughter Mildred Ouderkirk they should control manage and invest this portion of my estate in them for the purpose of supporting and sustaining my said daughter Mildred Ouderkirk.

"In the event of my daughter Mildred dying the property hereby devised to her shall be divided as follows:—"

Then followed a division among his sons and daughters by his first marriage; a residuary devise and bequest to three of his sons; and the appointment of executors.

The questions presented were as follows:—

1. Is the widow entitled to dower out of the lands of the deceased, in addition to the provision made for her in the will?

2. Is the widow entitled to a lien upon the whole estate of the testator to secure to her the annuity of $200?

3. In the event of the income from the testator's property being insufficient to pay the widow's annuity, is she entitled to look to the corpus to make up any deficiency?

4. Can the executors apply any part of the income for the benefit or support or maintenance of the infant mentioned?

The motion was heard by BRITTON, J., at Cornwall.

R. Smith, K.C., for the executors.

D. B. Maclennan, K.C., for the widow.

A. L. Smith, for the Official Guardian, representing the infant Mildred Ouderkirk.

BRITTON, J. (after setting out the will and the facts):—As to the first question, the strongest case that I have been able to find in favour of the widow's contention is Re Hurst, 11 O.L.R. 6. Unless this case can be distinguished from Re Hurst, the widow will be entitled to dower in all the lands except the house and lot in Berwick. I think this case is distinguishable. The test seems to be: "Is there such reasonable provision made by the testator for his widow as warrants the inference that such provision was intended to be in lieu of dower?" The inference need not be beyond possible doubt, but it must be so strong as to be beyond reasonable doubt. That is to say, the inference must be so strong as fully to authorise its being acted upon in a contest between the parties claiming under the same will.

To adopt the reasoning in Re Hurst—"Am I able to find in this will, or gather from its provisions, that it was the intention of the testator to dispose of the lands other than" (the lot at Berwick) "in a manner inconsistent with the wife's right to dower in these lands? Do the provisions of the will shew clearly and beyond reasonable doubt that it was the positive intention of the testator, either clearly expressed or clearly to be implied, to exclude his wife from dower?"

The debts and funeral and testamentary expenses were to be paid. There was not sufficient personalty to pay these. These executors were given the power to sell both real and personal estate for the purpose of paying the bequests and to invest the funds in a chartered bank or in first class securities—interest

on the said funds to be used for making annual payments to his wife.

It seems quite incredible to me that such safe and careful provision should be made for the widow unless the testator intended that this provision should be in lieu of dower.

A claim for dower must necessarily tie up the property and prevent that being divided.

The whole estate will not be sufficient to pay all the debts and legacies if the widow is entitled to dower.

1. In my opinion, the widow must be put to her election. She is not entitled to dower out of lands of the deceased in addition to the provision made for her by the will.

2. The widow is entitled to a lien upon the whole estate of the testator to secure her the annuity of $200.

It will be noticed that the lien is upon the whole value of the estate. As the annuity is only during the widowhood of Jessie, it is difficult to plan an investment safe for the widow and not onerous for the others entitled.

With the assistance of the Official Guardian acting for the infant, some equitable settlement can probably be arrived at.

3. The widow is entitled to look to the corpus to make up a deficiency if the income is not sufficient.

4. Having regard to the special provision which the testator made for his daughter Mildred, a full answer to the 4th question had better be deferred until after the widow has made her election, and after the executors have sold, if they intend to sell, the real estate.

If the daughter Mildred is maintained by the widow, the widow will be entitled to interest upon the $3,000 for such maintenance; but, to get that, the widow's lien for the annuity should not be enforced in such a way as to interfere with its investment.

No doubt the parties—as to income—can agree, when it is known what that will be. If not, the executors can again apply for a further direction and answer to the question.

Costs of all parties out of the estate; the Official Guardian's costs fixed at $25.

RE ORR AND CASH—BRITTON, J.—OCT. 25.

Vendor and Purchaser—Contract for Sale of Land—Objections to Title—Reference to Master.]—Motion by the purchaser, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objections to the vendor's title to land agreed to be sold, had not been answered, and that the vendor could not make a good title. BRITTON, J., directed that the questions as to title raised and set out in the notice of motion be referred to the Master in Ordinary, to be determined by him. G. T. Walsh, for the purchaser. A. J. Keeler, for the vendor.

STEWART v. BATTERY LIGHT CO.—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—OCT. 30.

Evidence—Motion for Foreign Commission—Examination of Plaintiffs Abroad—Nature of Action—Refusal of Motion—Examination of Witness not a Party—Allowance of.]—This was an action to set aside certain subscriptions for stock in the defendant company, and to recover payments made in respect thereof, on the ground that such subscriptions and payments were procured by the fraud and misrepresentations of the defendants Wilson and Schabel. The plaintiffs applied for a commission to take at Vancouver the evidence of one Smith and of two of the plaintiffs, residing in Vancouver, and of another plaintiff, residing in Seattle. The application was resisted, as far as the evidence of the plaintiffs was concerned, by the defendants, on the ground that they could not properly instruct counsel in Vancouver to cross-examine the plaintiffs, and that for the proper cross-examination of the plaintiffs, both the defendants Wilson and Schabel ought to be present. The learned Registrar said that, having regard to the nature of the case and the fact that it must inevitably turn on the measure of credibility which the Court might give to the evidence of the plaintiffs and defendants respectively, it seemed of first importance and in the interest of justice that all parties should be present and give their evidence in open Court. Although, as the learned Master in Chambers had observed, it is almost of right that a commission should issue, yet it is not absolutely so. That there is a discretion to grant or refuse it is undeniable, and this appeared to be a case in which justice would be best served

by refusing it, so far as the plaintiffs' evidence was concerned. With regard to Smith, the commission might issue, as proposed, to take his evidence. Coyne (Watson & Co.), for the plaintiffs. W. G. Thurston, K.C., for the defendants.

BIANCO v. MCMILLAN—LENNOX, J., IN CHAMBERS—OCT. 31.

Dismissal of Action—Default of Plaintiff—Security for Costs—Order Dismissing—Appeal—Relief from Order as Indulgence—Terms.]—Motion by the plaintiff by way of appeal from or to set aside an order made by George M. LEE, one of the Registrars, sitting for the Master in Chambers, dismissing the action for the plaintiff's default in giving security for costs. LENNOX, J., said that he could see no ground for the plaintiff's application, treated as an appeal from the order of the Registrar in Chambers. The order dismissing the action was properly made. But the plaintiff was a poor man, and, whether he had a cause of action or not, appeared to be acting in good faith; and a Judge had jurisdiction to grant him what he asked as a matter of indulgence. Order that, upon payment of the costs of the defendant of and incidental to the order dismissing the action and the defendant's costs of this application, and giving the security ordered in this action, the plaintiff is to be at liberty to proceed with the action. J. J. Gray, for the plaintiff. A. G. Ross, for the defendant.