THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM AUGUST, 1916, TO THE END OF FEBRUARY, 1917.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

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CASES REPORTED AND NOTED.

(Cases marked (*) are reported or to be reported in the Ontario Law Reports).

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CASES CITED

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The
Ontario Weekly Notes

VOL. XI. TORONTO, SEPTEMBER 15, 1916. No. 1

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

AUGUST 1ST, 1916.

*CITY OF TORONTO v. CONSUMERS GAS CO.

Municipal Corporations—Construction of Sewer in Highway—Necessary Lowering of Gas-pipes—Expense Incurred—Liability for—Rights of Gas Company in Soil—11 Vict. ch. 14—Injurious Affection of Land—Right to Compensation—Municipal Act, R.S.O. 1914 ch. 192, secs, 321, 325 (1)—"Land."

Appeal by the Corporation of the City of Toronto, the plaintiffs, from the judgment of the First Divisional Court of the Appellate Division, 32 O.L.R. 21.

The appeal was heard by LORD BUCKMASTER, L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

Sir Robert Finlay, K.C., and G. R. Geary, K.C., for the appellants.

I. F. Hellmuth, K.C., and W. B. Milliken, for the defendants, respondents.

The judgment of the Board was delivered by LORD SHAW, who, after stating the facts, referred to the defendants' Act of incorporation, 11 Vict. ch. 14, secs. 1, 13, 15; Metropolitan R. W. Co. v. Fowler, [1893] A.C. 425; 4 Wm. IV. ch. 23, sec. 22; 12 Vict. ch. 80, sec. 31; 22 Vict. ch. 99; the Municipal Act, 1913, secs. 321, 325 (1); and said that the space occupied by the gas mains and the gas mains themselves were of the nature of "land" in the ordinary sense of that word; and that, in any view, the definition

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

of land in sec. 321 (*b*) of the Act of 1913 unquestionably included them; for it could hardly be denied that the words "a right or interest in and an easement over land" would embrace the right of the respondents to have their pipes remain, and to have the interest and use of them and the space occupied by them undisturbed; nor could it be doubted that the respondents fell within the definition of "owner" in sec. 321 (*c*). It thus appeared plain that the taking, without the consent of the owner, of this right or interest, became subject to the provisions of sec. 325 (1).

One of these provisions was that compensation was to be made where the land (thus including a right or interest in the land) was injuriously affected by the exercise of such powers. The appellants were accordingly liable in respect of such injurious affection. All that was asked in the present case was, that the displacement and replacement of the pipes should be paid for. Without compensation, the appellants would not be empowered to make such displacement, and the measure of injurious affection, namely, the cost of the operation, would seem to be fully covered accordingly by the terms of the statute.

The appeal should be dismissed with costs.

HIGH COURT DIVISION.

SUTHERLAND, J. AUGUST 4TH, 1916.

*CLARKSON v. DOMINION BANK.

Banks and Banking—Securities Taken by Bank from Manufacturing Company—Bank Act, R.S.C. 1906 ch. 29, sec. 74 and Form C.—Insolvency of Company—Validity of Securities—Goods Manufactured by Company—Goods Sold in Jobbing Business—Description of Goods—Sufficiency—Land Mortgages—Reference.

Action by the liquidator of Thomas Brothers Limited, an insolvent company (incorporated), being wound up under the Dominion Act, and by the National Match Company, suing on behalf of themselves and all other creditors of the insolvent company, for a declaration that certain securities and mortgages taken by the defendants from the insolvent company were in-

valid, for an account of the assets, goods, wares, and merchandise of the insolvent company held by the defendants and of the proceeds of the sale of any part thereof sold, and for delivery of the securities to the plaintiff liquidator.

The action was tried without a jury at St. Thomas.

Sir George Gibbons, K.C., and J. B. Davidson, for the plaintiffs.

D. L. McCarthy, K.C., and A. W. Langmuir, for the defendants.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that it was held in Bank of Hamilton v. Halstead (1897), 28 S.C.R. 235, that an assignment made in form C. in the appendix to the Bank Act, R.S.C. 1906 ch. 29, as security for a bill or note given in renewal of a past due bill or note was not valid as a security under sec. 74—the bills or notes may be renewed, but not the security; the Act does not authorise the substitution of one assignment for another (p. 241). It was contended for the plaintiffs that there was in reality the same course of dealing between the defendants and their customer in this case as was held to be invalid in the Halstead case. It seemed to the learned Judge, however, that the defendants were from time to time making advances and taking security under sec. 88 on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in. A separate note and security were taken for each advance. A general security was also taken referring to all outstanding notes as to each of which a previous individual security had been taken.

This could not be called a substitution, but rather a consolidation. With some difficulty and doubt in the matter, the learned Judge's conclusion was that, subject to the qualification about to be referred to, the securities taken by the defendants under sec. 88 must be held to be valid as against the plaintiffs. In the case of a manufacturer, the defendants had a right, on the strength of written requests, to make advances on the goods, wares, and merchandise, raw, manufactured, and in process of manufacture, of their customer, and take security thereon in the form C. provided in the Act. There was no authority, however, therein for the defendants taking the like security on goods purchased by them from other manufacturers with which to carry on as a side line of their business, a jobbing business. To the extent that the securities previously taken and held by the defendants at

the time that the winding-up petition was filed covered goods so purchased, they were invalid; and the goods so held, or the proceeds of any since sold, by the defendants, belonged to the liquidator, to be utilised by him for the purpose of the liquidation of the company.

These securities were also attacked on the ground that the descriptions therein, at all events prior to the 29th January, 1914, were not definite or specific enough. It seemed to the learned Judge, however, that where particular warehouses were mentioned in which the goods were said to be, and the description covered all the goods, this was sufficient under the authorities.

As to the real estate securities, the learned Judge was of opinion that there was nothing improper or illegal in the defendants, at a subsequent date and pursuant to a previous arrangement, insisting upon and obtaining them; the attack upon these securities failed; they were valid securities in the hands of the bank as against the plaintiffs.

There was some slight evidence that certain goods of the company in Toronto had been sold by the defendants since the liquidation proceedings began. It was not made clear whether these were or were not covered or asserted to be covered by the defendants' securities. It did not appear that any question as to these goods was specifically raised in this action.

A reference as to the jobbing goods might be a difficult and intricate one. It seemed possible that the plaintiffs and defendants might be able to agree upon a sum which the defendants could pay to the liquidator to represent these goods; otherwise there should be a reference to ascertain the value of the goods or the disposition made by the defendants of such portion as had been sold by them.

Further directions and costs should be reserved.

Reference to Falconbridge on Banking, 2nd ed. (1913), pp. 251, 261; Ontario Bank v. O'Reilly (1906), 12 O.L.R. 420; Toronto Cream and Butter Co. Limited v. Crown Bank of Canada (1908), 16 O.L.R. 400; Townsend v. Northern Crown Bank (1912-13), 27 O.L.R. 479, 28 O.L.R. 521.

KELLY, J. AUGUST 5TH, 1916.

RE FLAMBOROUGH WEST UNION SCHOOL SECTION.

Public Schools—Formation of Union School Section—Award—Appeal—Order of County Court Judge—Jurisdiction—Time-limit—Public Schools Act, R.S.O. 1914 ch. 266, secs. 20, 21, 22, 30.

Appeal by the trustees of Public School Section Seven in the Township of Beverly from an order of the Junior Judge of the County Court of the County of Wentworth directing that the arbitrators appointed by the county council should "consider and adjust the claims and equities arising between Union School Section A and various other sections, parts of which were detached and given to the Union Section, as a consequence of the severance of the lands necessary for the formation of the said Union Station."

The motion was heard in the Weekly Court at Toronto.

J. H. Spence, for the appellants.

A. L. Shaver, for the trustees of Union School Section A.

KELLY, J., in a written judgment, set forth the important facts. Under the Public Schools Act, R.S.O. 1914 ch. 266, sec. 21, it was proposed that a union school section should be formed of parts of the townships of Beverly and West Flamborough, whereupon arbitrators were appointed by the township councils and an award was made. This was appealed against under sec. 22 (1) to the county council; and, under sec. 22 (2), three arbitrators were appointed by the county council, and an award was made on the 20th July, 1915. On the 13th September, 1915, a by-law was passed by the Beverly township council confirming the award and enacting that Union School Section A should consist of the parts of the lands mentioned in the award (in so far as it related to Beverly). No motion was made against the by-law or the award until April, 1916, when the Junior County Court Judge made the order now appealed against. Leave to appeal was granted by RIDDELL, J., on the 6th May, 1916: 10 O.W.N. 228.

As to the right to appeal against the award of the arbitrators appointed by the county council, the learned Judge referred to secs. 20 (3) and 22 (2) of the Act, and pointed out that they ap-

peared to be in conflict. The complaint of the trustees of the Union Section was, that the arbitrators neglected to perform the part of their duties imposed upon them by sec. 21 (14). But, whatever may have been the intention of the Legislature on the question of finality, the limitation of time (one month) imposed by sec. 30 was a bar to those seeking to attack the by-law or the award. Assuming that there was otherwise a right to appeal, any loss or hardship resulting from a refusal at this stage to direct the award to be opened up could have been avoided by diligence in bringing the proceedings within the prescribed time.

The appeal should be allowed with costs and the order of the County Court Judge set aside.

KELLY, J. AUGUST 22nd, 1916.

RE WALMSLEY.

Will — Construction — Devise — Habendum — "Lawfully Begotten Heirs for ever"—Estate Tail—Lands Included in Devise—Lands otherwise Acquired by Devisee—Lands Forming Part of Original Road Allowance—Municipal By-law Closing up Road Allowance—Municipal Act, R.S.O. 1877 ch. 174, secs. 486, 487, 488, 525—Residuary Devisees—Inclusion of Tenant in Tail—Beneficiaries under Will of Devisee also Entitled under Will of Devisor—Election—Dower—Assignment of—Distribution of Estate—Costs.

Motion by the executors of the will of Thomas Walmsley, deceased, for an order determining certain questions of construction arising upon the will of John Walmsley, deceased, and the will of Thomas Walmsley also.

The motion was heard in the Weekly Court at Toronto.

H. S. White and G. W. Mason, for the applicants.

J. B. Clarke, K.C., for those entitled under the residuary devise in John Walmsley's will.

KELLY, J., read a judgment in which he said that the main question to be determined was, whether in the specific devise of land made by the will of John Walmsley to his son Thomas there was created a fee tail. The devise to Thomas was "to have

and to hold to him and to his lawfully begotten heirs for ever." The same or similar words were used in other parts of the will in the devises to other sons, but where he gave lands to his daughters, the testator devised to them and their heirs and assigns. There was no doubt that the interest acquired by Thomas Walmsley in the lands devised to him was an estate tail. Theobald on Wills, 7th ed., p. 409.

There was doubt as to what amount of land was covered by the devise to Thomas. The learned Judge said that the devise did not include any part of "John street" as shewn on a plan produced; and whatever title Thomas Walmsley had at the time of his death to portions of John street, he acquired by other means. As against the other parties to the present motion, the title of Thomas Walmsley's estate to the parts of "John street" of which he was in possession should prevail.

A further question was, whether Thomas Walmsley was entitled, and in what capacity, to a part of the original allowance for road lying between the easterly limit of lot 21 and the westerly limit of lot 19 in the 3rd concession of the township of York. In July, 1882, the township council passed a by-law stopping up and closing a part of the allowance which included the part in question, and that by-law was confirmed by a by-law of the county council passed on the 1st February, 1883: Municipal Act, R.S.O. 1877 ch. 174, secs. 486, 487, 488, and 525. The municipality had the right to close up and dispose of this road allowance; Thomas Walmsley obtained no conveyance from the municipality of any part of the allowance; but for more than ten years prior to his death he was in exclusive and undisturbed possession of the parts of the original allowance now in question. Whatever title he thereby acquired was independent of his ownership of or interest in the adjoining property, and so enured to his own benefit without obligation to hold it under title similar in character to that which he had in the adjoining property. No significance was to be attached to the conveyance made to the trustees of his estate by the township council.

The will of John Walmsley contained a residuary provision to the effect that, after his son James attained the age of 21 "the whole of the residue of my real and personal property and effects not otherwise given" be divided equally amongst "all my children," share and share alike. The learned Judge was of opinion that Thomas Walmsley was included amongst the residuary devisees under his father's will; and, the estate tail having come to an end, his estate was entitled to share in such residue.

James Walmsley, Elizabeth Kirvan, Annie Loft, and Richard George Loft took benefits under Thomas Walmsley's will; they also were amongst those entitled to share in the residuary estate of John Walmsley, and thus to share in that part of "Walmsley villa" included in the entailed lands. Thomas Walmsley in his will assumed to dispose of that over which he had no power of disposition; as to their interest in that part, the four persons named were put to their election between their interests under Thomas Walmsley's will and their respective interests in that part of "Walmsley villa" over which Thomas had not a disposing power.

Reference to Theobald on Wills, 5th ed., p. 96; *ib.*, 7th ed., p. 103; Farwell on Powers, 2nd ed., p. 384; Rogers v. Jones (1876), 3 Ch.D. 688; In re Fowler's Trust (1859), 27 Beav. 362, 365; Box v. Barrett (1866), L.R. 3 Eq. 244; Halsbury's Laws of England, vol. 13, p. 116, para. 132; Cooper v. Cooper (1870-4), L.R. 6 Ch. 15, L.R. 7 H.L. 53.

The widow of Thomas Walmsley was entitled to dower in the entailed lands; for a consideration provided from the estate she had assigned to the trustees her dower interest. The residuary devisees under John Walmsley's will were entitled to the entailed lands, subject to the dower interest.

There should be a reference to the Master in Ordinary to ascertain the value of the dower interest, and also the relative values of the part of the lands in question declared to have been the property of Thomas and of the parts declared to have been held by him in fee tail, and also the relative value of that part of the entailed property included in the devise for the widow's life of "Walmsley Villa" and the remaining part of the entailed land.

By agreement of all parties, the proceeds of the sales by the trustees of the lands are to be taken and treated in lieu of the lands themselves. On ascertainment of the matters referred to the Master, distribution can be made accordingly.

For the purposes of the present proceedings, all parties interested under Thomas Walmsley's will, and not interested in contending that under John Walmsley's will Thomas acquired an estate tail, are sufficiently represented by the trustees: declaration to that effect.

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

FALCONBRIDGE, C.J.K.B. AUGUST 30TH, 1916.

BENDER v. TORONTO GENERAL TRUSTS CORPORATION.

Evidence—Action against Executors of Deceased Mortgagee—Attempt to Establish Payment Made on Account of Mortgage—Corroboration—Evidence Act, R.S.O. 1914 ch. 76, sec. 12.

Action by Hiram Bender and wife against the executors and trustees under the will of James A. Lowell, deceased, to recover $1,000 alleged to have been overpaid to the deceased upon a mortgage made by the plaintiff Hiram Bender and his brother to the deceased, covering lands the title to which is now in the plaintiff the wife of Hiram.

The action was tried without a jury at St. Catharines.

D. B. White, for the plaintiffs.

A. C. Kingstone, for the defendants.

FALCONBRIDGE, C.J.K.B., in a considered judgment, said that the case was a curious one. The plaintiffs alleged that the mortgage was made in July, 1889; that the amount was $4,000; that in September, 1895, the deceased Lowell requested the plaintiff Hiram to pay $1,000 on account of the mortgage; that a promissory note was made by Hiram, dated the 19th September, 1895, and payable, three months after date, to the order of Lowell; that the note was paid by Hiram on or about the 23rd December, 1895; that Lowell died about the 5th April, 1900, having failed to make any credit entry in his books in respect of the alleged payment. On the 29th April, 1915, the defendants were paid a large sum of money in full of the claim under the mortgage. No allowance was made on account of the alleged payment, the defendants desiring that it should be proved.

The learned Chief Justice said that at the trial he entertained an opinion favourable to Hiram Bender as to the honesty of his claim, but reserved judgment principally to see if there was any corroboration, as required by sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76. The case illustrated the wisdom of the provision requiring corroboration, in view of the long neglect of the plaintiff Hiram to see that he got credit for the $1,000 payment in the lifetime of the testator. The fact that Lowell had several thousand dollars invested in promissory notes, representing money lent,

indicated that the giving of the note in question (which was produced) was quite as consistent with a specific loan made by Lowell to Hiram as it was with payment on the mortgage. The plaintiffs' counsel had not pointed out specifically what he relied upon as corroboration; and the learned Chief Justice failed to find any such corroboration as the statute requires, either by the evidence of a witness or by the force of circumstances.

Action dismissed, and with costs, if exacted.

BARRETT BROTHERS v. BANK OF TORONTO—CLUTE, J.—AUG. 22.

Principal and Agent—Sum Lodged with Bank to be Paid over upon Instructions—Authority of Agent—Payment—Ratification—Estoppel.]—Action to recover $7,000 and interest. The plaintiffs alleged that the $7,000 was paid by them to the defendants, as the plaintiffs' agents, to be expended for a specific purpose, and that the authority so to expend it was cancelled before it was expended. The action was tried without a jury at Ottawa and Toronto. The plaintiffs were (as members of a syndicate) interested in the purchase of a lease of or interest in oil-lands in the Province of Alberta. The plaintiffs paid $7,000 into a branch bank of the defendants, to be transferred to their Calgary branch and paid out in accordance with instructions. The plaintiffs alleged that their instructions to the defendants were specific to pay over the money upon the receipt of an assignment of the oil-lease which they were negotiating for; and that the payment made by the defendants was unauthorised, an assignment of the lease not having been obtained. CLUTE, J., reviewed the evidence in a written judgment, and said that, irrespective of the merits, the action was defective for want of parties—all the members of the syndicate should be before the Court. Apart from the question of parties, the position of the plaintiffs was not sustainable. One Cullen was their agent to close the transaction. He did not get a formal lease, as was probably expected by the plaintiffs when they entered into the transaction; but the plaintiffs had knowledge, before the transaction was closed, that application had been made for certain lands; and what was done subsequently in the way of organising a company, transferring the property, issuing a prospectus, and allotting shares, was a ratification of all that Cullen had done; and the plaintiffs were estopped by their acts from repudiating the transaction which

they, will full knowledge of the facts, helped to consummate. Action dismissed with costs. T. A. Beament, for the plaintiffs. H. E. Rose, K.C., for the defendants.

BRITTON, J., IN CHAMBERS. SEPTEMBER 5TH, 1916.

CLIFTON v. TOWERS.

Judgment—Correction of, after Settlement and Entry—Personal Liability of Assignee for Benefit of Creditors—Chattel Mortgage —Conversion.

Motion by the widow and administratrix of the estate of the plaintiff—the plaintiff having died since the trial of the action—to vary the judgment as settled and entered.

The action was brought by a chattel mortgagee, against the assignee for the benefit of creditors of the chattel mortgagors, to recover, out of the proceeds of goods sold by the defendant, the amount of the plaintiff's claim upon the chattel mortgage.

The action was tried by Britton, J., without a jury, and judgment was given for the plaintiff for $621.92 and interest, with costs—the debt payable out of the estate of the chattel mortgagors, and the costs payable by the defendant personally: see Clifton v. Towers (1916), 10 O.W.N. 224.

The motion was to vary the judgment so as to make the debt, as well as the costs, payable by the defendant personally, with liberty to reimburse himself out of the estate of the mortgagors.

J. D. Bissett and T. H. Peine, for the applicant.
W. S. Brewster, K.C., for the defendant.

BRITTON, J., in a written judgment, said, after stating the facts, that the motion should prevail. The plaintiff was entitled to have a judgment against the defendant personally. There was a mistake in the judgment as entered which should be rectified. The judgment as issued did not carry out the intention of the learned Judge in giving judgment for the plaintiff; and it was not too late to correct the mistake. The contest in the action was as to the validity of the chattel mortgage. The finding was in favour of the mortgage for the original plaintiff, and the administratrix was entitled to what followed from success in the

action in reference to that property. It was the defendant's act that deprived the plaintiff of his property. The conversion was by the defendant, and he should not escape liability by reason of any mistake in acting upon the supposition that there were assets sufficient to pay the judgment.

Reference to Quebec Jacques Cartier Electric Co. v. The King (1915), 51 S.C.R. 594.

Order made correcting the judgment as asked. No costs of the motion.

MIDDLETON, J. SEPTEMBER 6TH, 1916.

*HEROLD v. BUDDING.

Execution—Enforcement against Company-shares Beneficially Owned by Debtor—Company with Head Office out of Ontario—Receivership—Interim Order—Notice to Debtor—Charging Order—Judicature Act, secs. 140, 141—"Public Company in Ontario"—Execution Act, secs. 12, 13, 17—Equitable Execution—Powers of Receiver—Right to Sell—Application to Amend Receiving Order.

Motion by a judgment creditor, ex parte, for an order amending an order made by MIDDLETON, J., on the 26th June, 1916.

The plaintiff, having an unsatisfied judgment against the defendant for the recovery of a sum of money, and learning that the defendant was the beneficial owner of certain shares in the Canadian Pacific Railway Company, a company having its head office at Montreal, moved for a receiver in aid of execution, the shares standing in the names of brokers, who held the certificates.

Upon that motion, MIDDLETON, J., made the order now sought to be varied, appointing a sheriff receiver. The learned Judge's intention was, that the order should be merely an interim order, to be followed by a final order, on notice to the debtor, but the order was issued as a final order.

The variation sought was the addition of a direction to the receiver to sell the shares.

The application was heard in the Weekly Court at Toronto.

J. M. Ferguson, for the applicant.

MIDDLETON, J., in a written judgment, said that the omission of a direction to sell was not a clerical error or oversight. Shares

in a company were first rendered available to a judgment creditor of the shareholder by the Imperial statute 1 & 2 Vict. ch. 110, sec. 14, afterwards enacted in this Province, and now found in sec. 140 *et seq.* of the Judicature Act, R.S.O. 1914 ch. 56. These sections enable the shares to be charged with the payment of the judgment-debt, and a charging order "shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made by the judgment debtor; but no proceedings shall be taken to have the benefit of such charge until after the expiration of six months from the date of such order" (sec. 140). The charging order is to be obtained after an order nisi has been served upon the debtor—the interim order precluding any transfer in the meantime to the prejudice of the judgment creditor (sec. 141). The statutory provisions apply not only when the stock stands in the name of the debtor, but also when it stands "in the name of any person in trust for him" (sec. 141 (1)).

Assuming that the shares now in question are those of "a public company in Ontario" (sec. 140), then the judgment creditor must follow the statutory provisions and obtain first the order nisi and finally the charging order.

A receivership as ancillary to this is quite proper, but the order issued should be regarded as an interim order, and there should be a motion made, at the same time as the charging order is moved for, to continue the receivership till the charge is at an end. The receiver will be useful to obtain the income pending sale and also to obtain the documents of title to the shares.

When the charging order has been obtained, it cannot, under the terms of the statute, be enforced for six months, and then only in a new action: Leggott v. Western (1884), 12 Q.B.D. 287; Kolchmann v. Meurice, [1903] 1 K.B. 534.

If the Canadian Pacific Railway Company is not "a public company in Ontario," the judgment creditor may find himself without remedy, unless aided by the Execution Act, R.S.O. 1914 ch. 80. By sec. 12 of that Act, "shares . . . in an incorporated . . . company . . . shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property."

By sec. 13 (2), "seizure may be made and notice given by the sheriff where the . . . company has within his bailiwick a place at which service of process may be made." By sec. 17, the procedure is made to apply to any equitable right in the shares seized.

In view of the serious doubt as to the shares falling under the provisions of the Judicature Act first cited, the judgment creditor might well be advised to proceed under the Execution Act.

Equitable execution is not a means of reaching assets which in their nature are not exigible, but a means of freeing exigible assets from impediments in the way of execution and reaching them when such impediments prevent them from being taken in ordinary course: Holmes v. Millage, [1893] 1 Q.B. 551; and clearly cannot be made the means of reaching assets not in the Province.

A receiver by way of equitable execution cannot sell; his function is to receive and hold; and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the shares, unless the case can be brought within the provisions of the Judicature Act first cited: Flegg v. Prentis, [1892] 2 Ch. 428.

The proposed amendment of the order should not be made; the applicant must work out the situation for himself as best he can, after notice to the debtor.

MENZIES v. MCLEOD—LENNOX, J.—SEPT. 6.

Will—Testamentary Capacity—Undue Influence—Evidence—Findings of Fact of Trial Judge—Costs.]—Action by the executor named in a testamentary writing to establish it as the last will and testament of Margaret Menzies, deceased, a widow, who died at the age of 84, on the 18th February, 1915, leaving an estate of about $57,000. The plaintiff was a nephew of the husband of the deceased and sole executor of the alleged will and residuary legatee and devisee thereunder. The action was tried without a jury at Sandwich. The learned Judge reviewed the evidence in a written judgment, dealt with the questions raised as to the testamentary capacity of the deceased and the influence exercised upon her by the plaintiff, and stated his conclusion that the document propounded was not the valid last will and testament of the deceased. Action dismissed, with costs, including costs of and incidental to the commission to Daytona, to be paid by the plaintiff, with leave to the defendants to apply to have their costs paid out of the estate if they cannot be recovered from the plaintiff. J. H. Rodd, for the plaintiff. A. G. F. Lawrence, for the defendants Hedley. A. R. Bartlet, for the other defendants.

WILLOX v. MICHIGAN CENTRAL R. R. CO.—FALCONBRIDGE, C.J.K.B.—SEPT. 9.

Railway—Fire Caused by Sparks from Engine—Negligence—Evidence—Finding of Fact of Trial Judge.]—Action for damages for destruction of timber on the plaintiff's land by fire alleged to have originated in sparks from a locomotive engine of the defendants. The action was tried without a jury at St. Catharines. The learned Chief Justice, in a brief written judgment, said that the plaintiff had failed to prove that the damage to his property was caused by a fire started by a railway locomotive of which the defendants were making use. This conclusion did not turn upon the demeanour of witnesses, and it was open to an appellate tribunal to take a different view of the evidence, as in Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502. Action dismissed with costs. Gideon Grant and H. F. Upper, for the plaintiff. S. S. Mills, for the defendants.

STIRTON v. DYER—MIDDLETON, J.—SEPT. 9.

Costs—Partnership Action—Incidence of Costs—Contribution—Interlocutory Costs—Trustee—Misconduct—Parties.]—Motion by the plaintiff for judgment on a Master's report in a partnership action. See Stirton v. Dyer (1916), 10 O.W.N. 393. The motion was heard in the Weekly Court at Toronto. MIDDLETON, J., in a brief written judgment, said that, having regard to the nature of the action and the result of the litigation and the issues involved, he did not think he should make a general award of costs in the plaintiff's favour, nor direct contribution. Any principle of apportionment by the taxing officer would be difficult to work out. Judgment should be entered in the plaintiff's favour, for the amount agreed upon, as against the defendant Dyer, with costs fixed at $350. If, as was said in an affidavit filed, Dyer had any costs payable to him under any interlocutory order, such costs should be deducted from the amount fixed or credited on the judgment when taxed. As to the defendant Coles, misconduct as a trustee in refusing to account before action had been found by the Master. That defendant should not receive costs, nor should costs be awarded against him. Had he accounted before action, he could have paid the money in his hands into Court, and he need not have been a party to the controversy between Stirton and Dyer. R. G. Fisher, for the plaintiff. Sir George Gibbons, K.C., for the defendant Dyer. E. C. Cattanach, for the defendant Coles.

COUNTY COURT OF THE COUNTY OF SIMCOE.

VANCE, Co.C.J. JULY 31ST, 1916.

RE LAKE SIMCOE HOTEL CO. AND TOWN OF BARRIE.

RE TUCK AND TOWN OF BARRIE.

Assessment and Taxes—Assessment Act, R.S.O. 1914 ch. 195, sec. 69 (16)—Value of Lands for Assessment Purposes—Uniformity in Assessment.

Appeals by the hotel company and A. J. Tuck from decisions of the Court of Revision of the Town of Barrie confirming the respective assessments of the appellants in respect of adjoining properties in the town.

D. Stewart, for the appellants.
W. A. Boys, K.C., for the town corporation.

VANCE, Co.C.J., in a written judgment, pointed out the difficulty of arriving at the value of lands for assessment purposes. The proper guide, he said, was to be found in sec. 69 (16) of the Assessment Act, R.S.O. 1914 ch. 195, providing that "the Court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed." In this case the lands were assessed at $100 a foot frontage; there had been no sale of similar lands in Barrie; the assessment of the hotel property was at $13,200 and that of the Tuck property at $2,200. Value alone is to be considered, as urged by the appellants' counsel, but the assessment should be equitable and fair, and there should be uniformity. Looking at the values put on the different properties on each side of the street in the block of which the two properties form part, the assessments made and confirmed were equitable and fair, and the appeals should be dismissed.