THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM THE 1st MARCH, 1920, TO THE 6th AUGUST, 1920.

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

VOL. XVIII.

Editor:
Edward B. Brown, K.C.

1920:
CANADA LAW BOOK CO., LTD.
LAW BOOK PUBLISHERS
TORONTO

CASES 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. XVIII. TORONTO, MARCH 12, 1920. No. 1

HIGH COURT DIVISION.

LENNOX, J.

MARCH 1ST, 1920.

BELL TELEPHONE CO. OF CANADA v. OTTAWA ELECTRIC CO. AND CITY OF OTTAWA.

Negligence—Employee of Plaintiff Company Killed by Touching Live Wire—Payment by Plaintiff Company to Dependants under Workmen's Compensation Act—Liability of Defendants to Reimburse Plaintiff—Electric Company—City Corporation—Responsibility for Leaving Wire Hanging—Evidence—Finding of Fact of Trial Judge—Costs.

The plaintiff company alleged that on the 22nd August, 1918, one of its employees, Eugene Gourgon, while acting in the course of his employment, in the city of Ottawa, came in contact with a wire negligently left hanging by the defendant company or the defendant city corporation or both, and was instantly killed; that the plaintiff company had been unable to ascertain what was the arrangement between the two defendants; that, by reason of this negligence and the consequent death of Gourgon, the plaintiff company had been compelled to pay Gourgon's dependants $5,427.07, under the provisions of the Workmen's Compensation Act; and the plaintiff company claimed to be repaid this sum by the defendants or one of them.

The action was tried without a jury at Ottawa.

W. L. Scott, for the plaintiff company.

G. F. Henderson, K.C., for the defendant the Ottawa Electric Company.

F. B. Proctor, for the defendant Corporation of the City of Ottawa.

LENNOX, J., in a written judgment, after setting out the facts, said that, upon the evidence, oral, documentary, and intrinsic,

he found it impossible to come to the conclusion that the two defendants were jointly liable. He was definitely of opinion that the defendant company, and it alone, was liable.

The learned Judge referred to a number of cases, and especially to McCartan v. Belfast Harbour Commissioners, [1911] 2 I.R. 143.

He directed judgment to be entered for the plaintiff company against the defendant the Ottawa Electric Company for $5,427.07 with costs, and dismissing the action as against the defendant the Corporation of the City of Ottawa without costs.

ROSE, J. MARCH 3RD, 1920.

GARSON v. EMPIRE MANUFACTURING CO. LIMITED.

Sale of Goods—Shipment in Car-loads—Shortage in Quantities Received—Contracts—Absence of Notice of Shipment and of Opportunity for Inspection—Acceptance and Payment—Right to Recover Damages—"Terms" of Contract—Presence of Solder upon Brass Sockets — Condition — Implication — Defect in Material Discoverable on Inspection—Shipment of Material not Called for by Contract—Loss on Shipment—Right to Recover—Counterclaim—Refusal to Accept Part of Goods—Damages for —Costs—Set-off.

The plaintiff agreed to buy and the defendants agreed to sell a quantity of scrap-brass—190 tons of turnings, i.e., the shavings taken off in the process from turning, from sockets and fuse parts of sheets, and 30 to 40 tons of scrap-bodies, rings, and sockets. Several car-loads were delivered and paid for. In this action the plaintiff claimed $355.82 on account of short weight in the "turnings" paid for, and $4,500 as damages for delivery as "bodies, rings, and sockets" certain materials which, as it was alleged, did not answer the description of the goods contracted for. The defendants counterclaimed $1,031.03 as damages for the refusal of the plaintiff to accept 54,265 lbs. of "turnings," part of the 190 tons.

The action and counterclaim were tried without a jury at a Toronto sittings.

George Wilkie, for the plaintiff.

J. M. McEvoy, for the defendants.

ROSE, J., in a written judgment, first referred to and disallowed two minor claims made by the plaintiff. The claims which required further consideration, he said, were: (1) 468 lbs. shortage of turnings in car 40087; (2) 417 lbs. shortage of turnings in car 538097; and (3) that the contents of car 11972, shipped as 49,895 lbs. of bodies, rings, and sockets, were not what the contract called for.

Cars 40087 and 538097 were never seen either by the plaintiff or the defendants. The plaintiff lived in Montreal; the defendants' office was in London, Ontario. Car 40087 was loaded in Renfrew, and car 538097 in Toronto, with material which the defendants had bought from others for shipment as part of the brass which they had sold to the plaintiff. Both cars went, on the plaintiff's instructions, to customers of his in Waterbury, Connecticut. The weights given in the defendants' invoices to the plaintiff were the weights with which the defendants were charged by the shippers. The contract in respect of which the load in car 40087 was shipped from Renfrew was for the sale of turnings at a price named, "f.o.b. shipping point, from any point in Canada." Payment was to be made upon presentation of the shipping bills and certificates of weight, to a bank in London. The plaintiff agreed to send a man to the defendants' works or to the shipping point to check weights and inspect the material. The contract under which the load in car 538097 was shipped was, for the purposes of this case, the same.

There was no evidence that the plaintiff was notified when the defendants were about to ship either of those cars, or that he was called upon or given an opportunity to have his man make an inspection. When the car-loads were shipped, the defendants took the invoices and shipping receipts to the plaintiff's bank in London; and the bank paid the sums called for by the invoices. In such circumstances, the plaintiff was not without remedy if in fact the quantity of brass paid for exceeded the quantity shipped. Upon the evidence it did; and the plaintiff was entitled, in respect of the two items for shortages, to recover the price of 885 lbs. at $17.65 per cwt.—$156.20.

The contract with reference to the bodies, rings, and sockets was set forth in a telegram sent by the defendants to the plaintiff on the day after the contracts for turnings were made: "Accept your price nineteen forty for thirty to forty tons scrap body rings and sockets terms as other agreement delivery within two weeks." The plaintiff sent Jacobs, his representative, to London to take delivery. There were two complaints about this car-load, that rods and tubes were included, and that there was solder on the tubes and on some of the sockets. The contracts for the turnings provided that the material should be free from solder, and the

"terms" of those contracts were incorporated (by the telegram) in this one. But the proviso as to solder was not one of the "terms"—there was no express term or condition that the bodies, rings, and sockets should be free from solder. The presence of solder on the brass shipped would not make the article shipped something different from the article contracted for: a socket with the solder on it is still a socket, even if a defective one. Also there could be no implication of a condition that the bodies, rings, and sockets should be free from solder. The presence of solder —if it was present—constituted at most a defect in the material.

The learned Judge found, upon the evidence, that so many pieces of the brass had solder upon them that the car-load as a whole must be considered defective. The solder was visible on inspection, and did not need an analysis to disclose it.

The car-load was delivered to the plaintiff at London; he, through Jacobs, took possession of it there, and sent it to Waterbury; he had ample opportunity to inspect at London, and Jacobs did inspect. Therefore, the plaintiff was without remedy in respect of defects discoverable upon inspection.

But, while the plaintiff was bound by the acceptance of the defective bodies, rings, and sockets, there was no suggestion that Jacobs had authority to make a contract for tubes and rods, or to bind the plaintiff by an acceptance of tubes and rods instead of bodies, rings, and sockets. The plaintiff did sustain a loss by reason of the fact that the defendants delivered, and got the plaintiff's money for, things which they had no right to deliver. The loss was about 6½ cents per lb. on the whole shipment—so that the loss due to the inclusion of the tubes was $238.29.

The judgment in Hepworth Brick Co. v. Laberge Lumber Co. (1920), noted in 17 O.W.N. 414, is in accord with what is now decided. Damages were there awarded, not for a defect which could have been discovered upon a proper inspection at the place of delivery, but as arising from the delivery of goods which did not answer the description of the goods sold.

Reference also to 35 Cyc. 241; Gorham v. Dallas etc. R.R. Co. (1907), 106 S.W. Repr. 930.

There should be judgment for the plaintiff for the two sums of $156.20 and $238.29, in all $394.49.

The defendants should have judgment upon their counterclaim for $1,031.03.

There should be no order as to costs.

There should be a set-off of the amounts of the respective judgments, the result of which should be a judgment for the defendants against the plaintiff for $634.54.

ROSE, J. MARCH 4TH, 1920.

McDOUGALL v. WILLIAM RENNIE CO. LIMITED.

Sale of Goods—Two Contracts to Furnish Seed-corn—Evidence—Bulk Delivered Different from Thing Contracted for in first Contract—Failure of Claim for Price—Acceptance of Corn Shipped under second Contract—Shipment of Quantity Greater in one Case and Less in the other than Contracted for—Effect of—Demurrage and Freight Paid by Purchaser—Deduction from Price of Corn Accepted—Costs.

Action for the price of seed-corn sold and delivered.

The action was tried without a jury at Chatham.
O. L. Lewis, K.C., for the plaintiff.
R. McKay, K.C., for the defendants.

ROSE, J., in a written judgment, said that in the autumn of 1918 the defendants' buyer, Graham, was at the plaintiff's farm, when the plaintiff offered to sell "Bailey" and "White Flint" seed-corn. The White Flint corn, on the ear, was then in the crib; the Bailey was still in the field. No contract was made on that day; but, on a later day, after the Bailey corn had been put into the crib, Graham returned, and, after he had looked at the corn, entered into two contracts, in the name of the defendants: one was, to buy "125 bushels of Bailey corn, said corn to be thoroughly cured and to germinate 90% or over and fit for seed, to be shelled and thoroughly screened, bagged and delivered at Blenheim, April 1, in 2 or 2½ bushel bags, when desired next spring, price $2 per bushel;" the other contract, in the same form, was for 200 bushels of White Flint corn at $3 per bushel.

Much of the White Flint corn in the crib was "innoculated" with some kind of yellow corn—pollen from yellow corn had been carried by the wind to the growing White Flint corn, with the result that many of the ears of the latter were not pure white, but had a greater or lesser number of yellow grains mixed with the white. These yellow grains, if sown and germinating, produce a yellow corn.

Subject to objection by the defendants, evidence to the effect that the corn intended to be covered by the contract for White Flint was all the corn in the crib, was admitted.

Upon the evidence, it seemed to be clear that in the bags delivered the percentage of yellow grains was so large as to make the bulk something different from the thing contracted for.

At the end of March, 1919, the plaintiff informed the defendants

that the corn was ready for them. He was told that bags would be sent to him, and he was instructed to fill them and to ship the corn from Blenheim to London. He did ship 114 bushels of Bailey corn and about 242 bushels of the mixture which, the learned Judge finds, is not White Flint corn.

The corn arrived in London, and the plaintiff went to London at the defendants' request. The corn was then examined by the defendants, and that which had been shipped as White Flint was rejected because of the admixture of yellow grains. As a result of further discussion—in order to save demurrage—the corn was taken into the defendants' warehouse; but there was no acceptance of the White Flint. There was an objection that the Bailey corn had not been thoroughly screened; but there was an agreement that the defendants should re-screen it and pay for it, and that amounted to an acceptance of it by the defendants. Payment was not made by the defendants.

There was no reason why the bargain as to the Bailey should not be carried out. If there had not been such a bargain, the plaintiff might have been in difficulty by shipping only 114 bushels instead of 125. As to this, however, see Shipton Anderson & Co. v. Weil Brothers & Co., [1912] 1 K.B. 574.

The plaintiff should have judgment on this branch for $228.

As to the White Flint corn, the case was the simple one of the seller having failed to deliver the thing sold, and having, therefore, no right to demand payment of the price. The claim in respect of the White Flint corn failed.

This claim failed also upon the ground that, the contract being for 200 bushels, the plaintiff could not, by shipping 242, compel the defendants either to accept and pay for nearly 25 per cent. more than they had ordered, or to pick out 200 bushels from the 242 and pay for the 200 so selected.

As a result of the plaintiff's breach of contract, in shipping something more than the thing sold, the defendants were put to expense, in that they were compelled to pay demurrage on the car while the corn remained in it, pending the arrangement for taking it into the defendants' warehouse, and that they had to pay freight on the 242 bushels. The amount of the demurrage was $25. The total amount paid for freight was $21.12, and of that $14.35 may be considered to have been paid in respect of the corn shipped as White Flint.

The defendants were entitled to judgment for these two sums, amounting to $39.35, which should be set off against the $228 awarded to the plaintiff, leaving the plaintiff entitled to judgment for $188.65.

There should be no order as to costs. There was divided success and divided blame for bringing the question as to the Bailey corn into the controversy.

MASTEN, J. MARCH 5TH, 1920.

RE GOODHUE TRUSTS.

Settlement—Trust-deed—Construction—Power of Appointment—Exercise by Will—Construction of Will—Rule against Perpetuities—Validity of Exercise of Power—Distribution among Appointees upon Death of Life-tenant.

An application, on originating notice, by the trustees under a deed of settlement, dated the 8th December, 1869, made between George Jervis Goodhue (settlor) and others, for an order determining certain questions arising under the settlement.

The application was heard in the Weekly Court, Toronto.

F. P. Betts, K.C., for the applicants.

J. A. Worrell, K.C., for the trustees under the Lockhart marriage settlement.

J. H. Moss, K.C., for the executors of and trustees under the will of Mrs. Harriet Amelia Thomas.

M. C. Cameron, for the children of Francis Wolferstan Goodhue Thomas, deceased.

F. W. Harcourt, K.C., Official Guardian, for unborn infants and others.

MASTEN, J., in a written judgment, said that by the trust-deed in question the settlor vested in trustees for his daughter Harriet Amelia Thomas a sum of $30,000, the income of which she was to enjoy during her life. After her death, the trustees were to "hold the said trust estate and premises and the income thereof in trust for all or any such one or more of the issue of the said Harriet Amelia Thomas in such manner and form in every respect as she shall by deed or will appoint, and, in default of any such appointment and so far as the same shall not extend, in trust for all the children or any the child of the said Harriet Amelia Thomas . . . who shall attain the age of 21 years or marry whichever event shall first happen, and if more than one in equal shares: provided always that no child who or whose issue shall take any part of the said trust premises under any such appointment as aforesaid shall in default of appointment to the contrary be entitled to any share of that part of which no such appointment shall have been made of the said premises without bringing the share appointed to him or her or his or her issue into hotchpot."

Harriet Amelia Thomas received the income of the trust-fund during her life and died in the Province of Quebec on the 21st

June, 1918, leaving a will by which she purported to dispose of the fund.

The learned Judge said that the main question was, whether the appointment purported to be made by the will was void in whole or in part by reason of the rule against perpetuities or otherwise, and as to what action, if any, ought now to be taken by the trustees of the original settlement with respect to the trust-estate.

After a review of many cases and statements of text-writers, the learned Judge said that, in his opinion, there was an appointment of the settled fund, vesting it equally in the four living children of Harriet Amelia Thomas, subject to certain temporary limitations as to its enjoyment, not warranted by the power, but with a power ultimately of full disposition of the corpus by will exercisable by the appointees, and that the words appointing the corpus in favour of the four living children are distinctly severable from the subsequent limitations of income in favour of persons who are not objects of the power and to whom a gift would be contrary to the rule respecting perpetuities.

The learned Judge was led to this conclusion by the following among other considerations:—

(1) There is in the will an expressed intention to exercise the power of appointment.

(2) There is an expressed intention to divide the fund among the four living children and to exclude the fifth branch of the family.

(3) There is an absolute appointment of the corpus of the fund to the four living children by the words, "The whole residue of my estate I give and bequeath to my four living children equally." Those words, however, were immediately followed by the words, "to be disposed of by them respectively by last will but not otherwise and subject to the payment of the revenues, interest, and income as hereinafter mentioned," etc., setting forth the trusts. By the terms of the original settlement, the power was to appoint only among the children of the donee of the power. The appointment is, by the preceding words, effectively made subject to an invalid limitation or modification restraining alienation except by will; and nowhere else in the will is there any attempt to modify or vary this disposition of the corpus, the modifications which are attempted relating solely to income. No doubt the testatrix intended to modify the control and power of alienation exercisable by her children over the shares appointed to them, but she did not intend to take them away, for she gave the children power to appoint the corpus by will, and the subsequent special directions relate to income only.

(4) The testatrix is dealing with the settled fund along with and as part of her general estate, and the special provisions which she

makes permitting gifts to charities and otherwise infringing on her general scheme of preservation may be entirely valid with regard to that part of her estate other than the settled fund.

The result is, that the four living children are entitled presently to receive from the trustees of the marriage settlement their respective shares of the settled fund free from any conditions or limitations.

Order declaring accordingly; costs of all parties out of the trust-fund.

ORDE, J. MARCH 6TH, 1920.

RE SIMONTON.

Will—Construction—Power of Appointment Vested in two Persons—Exercise by Survivor.

Motion by the Toronto General Trusts Corporation, as trustees, for an order construing the wills of the late William Simonton and of the late William Henry Simonton, and for advice upon certain questions.

The motion was heard in the Weekly Court, Toronto.

J. M. Pike, K.C., for the Toronto General Trusts Corporation.

Shirley Denison, K.C., for Sarah Sterch and others, representing the interest of James Simonton.

W. S. MacBrayne, for James Wesley Simonton, the executor of the will of William Henry Simonton.

E. C. Cattanach, for the executor of the alleged will of William Henry Simonton.

ORDE, J., in a written judgment, said that William Simonton died on the 19th December, 1888, having made a will dated the 10th March, 1886, which was duly proved in the Surrogate Court of Kent on the 12th January, 1889. After directing his executors to convert his estate into money and thereout to pay his debts and funeral and testamentary expenses, the testator bequeathed to certain named blood relations and others a large number of pecuniary legacies, including legacies to each of certain named children of his brother Hugh. These legacies to Hugh's children were all absolute in form, except as to William Henry Simonton and Christy Simonton. As to them the will contained the following clause:—

"To pay to Ebenezer W. Scane . . . $4,000, which I hereby bequeath to him in trust to invest the same . . . and

to pay the interest thereof yearly to William Henry Simonton, son of my said brother Hugh, and Christy Simonton, daughter of my said brother Hugh, in equal parts during the lifetime of said William and Christy Simonton and the survivor of them, and after the death of said William and Christy Simonton then to the use of such person or persons as the said William Simonton and Christy Simonton may by will appoint and nominate."

One-third of the residue was given for life to Christina Simonton, wife of the testator's brother Henry, and after her death to whomsoever she by will might direct and appoint, and "the remainder of the estate and moneys" is given to his brothers James and John in equal shares.

Christy Simonton, the daughter of Hugh, died intestate on the 12th April, 1892, and William Henry Simonton died on the 17th September, 1918, having made a will, which was proved by James Wesley Simonton, the executor therein named. This will contained a clause which, after reciting the bequest of $4,000 to E. W. Scane in trust, contained in William Simonton's will, and the power of appointment given to William Henry and Christy, and the fact that Christy had died intestate without having exercised the power, proceeded to exercise the power "to the extent to which I am entitled as such survivor" and to dispose of the fund to certain relations.

At the time of the making of William Henry Simonton's will, the Toronto General Trusts Corporation were the trustees of the fund.

Counsel for the executor of William Henry took the ground that the gift constituted William Henry and Christy joint tenants of the whole fund, capital as well as income, and that William Henry as survivor was absolutely entitled to the capital, and cited certain authorities referred to in Jarman on Wills, 6th ed., p. 1186, and in Theobald on Wills, 7th ed., pp. 480, 481, among them Weale v. Ollive (1863), 32 Beav. 421; but it was quite clear from this and the other cases that they only established the principle that a gift of income *simplicitor* carries with it the corpus, and that an added power to appoint by will cannot add to, and does not detract from, that absolute gift.

The same counsel contended that the gift of the power of appointment in the present case was ineffective, but that argument was upon the theory that the gift of income was unlimited. The gift of income was limited to the joint lives of William Henry and Christy and to the life of the survivor.

The sole question to be determined is whether or not a bare power by will given to two named persons is effectively executed by the will of one, the other having died intestate.

Section 27 of the Trustee Act, R.S.O. 1914 ch. 121, applies only to cases of powers vested in trustees as such, and for that reason cannot apply to the present case. See Lewin, 12th ed., p. 765.

A bare power given to two or more by name cannot be executed by the survivor: Farwell on Powers, 3rd ed., p. 512; Sugden on Powers, 8th ed., p. 126; Lane v. Debenham (1853), 11 Hare 188, 192; In re Bacon, [1907] 1 Ch. 475. There seems to be no distinction in this regard between a power to appoint by deed and a power to appoint by will.

The attempt by William Henry to execute the power of appointment alone must, therefore, be held to be ineffective, and the corpus of the fund falls into the residue and becomes distributable as to one-third under the clause relating to Christina Simonton, the wife of the testator's brother Henry, and as to each of the other two-thirds to the legal personal representatives of the testator's brothers John and James respectively.

As the result of this interpretation was in favour of Christina Simonton, there seemed to be no reason for any order as to representation of her interest upon this motion.

The costs of all parties who appeared should be paid out of the fund, those of the Toronto General Trusts Corporation as between solicitor and client.

SUTHERLAND, J. MARCH 6TH, 1920.

JOHNSTON v. JOHNSTON.

Deed—Conveyance of Land by Mother to Son—Consideration—Covenant of Son to Pay off Mortgage—Performance of—Covenant to Maintain Mother upon Land—Part Performance—Action by Administrator of Mother's Estate to Set aside Deed—Improvidence—Duress—Evidence—Claim for Damages for Breach of Covenant to Maintain—Personal Claim—"Actio Personalis Moritur cum Personâ"—Claim by Virtue of Possession—Limitations Act.

Action by James Johnston, one of the sons of Charlotte Johnston, deceased, and administrator of her estate, against John Johnston, another son of the deceased, for a declaration that a certain deed executed by the deceased on the 27th July, 1900, whereby she conveyed to the defendant a house and lot in London, was void and should be delivered up to be cancelled, upon the grounds of improvidence and duress, and for $1,500 damages, or,

in the alternative, for a declaration that the defendant's title had been extinguished by virtue of the Limitations Act.

The defendant counterclaimed for possession of the land and compensation for use and occupation by the plaintiff.

The action and counterclaim were tried without a jury at London.

W. R. Meredith, for the plaintiff.

J. M. Donahue, for the defendant.

SUTHERLAND, J., in a written judgment, said that the conveyance was subject to a mortgage upon the land, which the defendant covenanted to pay and to indemnify the deceased against, and contained a further covenant by the defendant to provide his mother, the grantor, for the rest of her natural life, with a comfortable home on the land conveyed and suitable maintenance, including food, fuel, clothing, medicine, medical attendance, and nursing.

No evidence of duress or undue influence on the part of the defendant in procuring the deed was offered at the trial.

In view of the terms of the deed, the proper legal presumption was that the mother's possession, after it was executed, was pursuant to the deed. She continued to occupy the house and lot until her death on the 12th March, 1919. The mother's possession could not be deemed adverse to the defendant's title under the deed, and was not such as could ripen into a title by possession in her as against him.

While the defendant paid the taxes and the interest on the mortgage, and ultimately the principal, and while at times he supplied her with meat and vegetables, and while he allowed her to have the entire use of the house and premises as a home, which might be said to be referable to the covenant contained in the deed, and in part performance thereof, he did not otherwise or in any strict sense carry out the covenant to provide her with suitable maintenance. He asserted that she did not ask for it, and that he was in reality not expected to provide it while she was allowed to remain in possession and keep boarders.

It was argued that the deed was an improvident one. It was a deed of all her realty, and she was apparently possessed of very little else. The absence of a revocation clause might also, in some circumstances, have had a prejudicial effect. But the deed was made for good consideration—the protection of the grantor against the mortgage—and thus the preservation of the home; and the grantee had discharged this part of the obligation.

The mother not having seen fit to attack the deed in her lifetime, it was not, in the circumstances, now open to the plaintiff to do so: Empey v. Fick (1907), 15 O.L.R. 19, 22.

But it was contended that, even though the mother did not see fit in her lifetime to call upon the defendant to furnish maintenance for her, and even though it might be presumed from the circumstances that she was not disposed to do so, it was open now to the administrator of her estate to claim from the defendant damages for breach of his covenant to maintain his mother from the date of the deed to the time of her death, or at all events for 10 years prior thereto. It was suggested that the maxim "actio personalis moritur cum personâ" had application to such a claim, it being founded on contract and not on tort.

Reference to Chamberlain v. Williamson (1814), 2 M. & S. 408, 416; Finlay v. Chirney (1888), 20 Q.B.D. 494, 498, 499.

Here, while the obligation to maintain arose out of the contract in the deed of the property and the covenant therein contained, it was not one which in reality affected property—the claim based upon it was a personal one, and died with the mother. The plaintiff was, therefore, not entitled to recover damages.

The action should be dismissed with costs.

The counterclaim of the defendant was not pressed at the trial, and should be dismissed without costs.

PASTORIUS v. DANTO & CO.—KELLY, J.—MARCH 6.

Sale of Goods—Action for Price—Quality of Fish Delivered—Deduction for Shortage—Findings of Trial Judge.]—Action for the price of fish sold and delivered to the defendants. The action was tried without a jury at Sandwich. KELLY, J., in a written judgment, said that an analysis of the evidence made by him since the trial, had confirmed the view he entertained at the close of the trial, that the plaintiff was entitled to succeed on the main part of his claim. The fish delivered substantially answered, at the time and place of delivery, the quality which the plaintiff agreed to sell; and the conditions of which the defendants complained at or after the fish arrived in Detroit were not due to any act or neglect of the plaintiff. The defendants claimed the right to deduct $7 for shortage in weight of a shipment of the 21st November, 1918. Danto's evidence was positive that, on the arrival of the goods in Detroit, there was a shortage to that extent. The plaintiff's evidence was not definite on that point, and the deduction should be allowed. There should be judgment for the plaintiff for $866.15 with interest from the 15th December, 1918, and costs. E. S. Wigle, K.C., for the plaintiff. F. C. Kerby, for the defendants.

RE FLEET—KELLY, J.—MARCH 6.

Infant—Custody—Child of Tender Years in Custody of Mother Living apart from her Husband—Application by Father for Custody —Issue—Determination in Favour of Father—Welfare of Infant.]—Issue directed by an order of LENNOX, J., to whom an application was made by Howard Blake Fleet, the father of Walter Fleet, an infant of two years of age, for the custody and control of the child, who was in the possession of his mother, Myrtle Jane Fleet, who lived with her parents in Hamilton, and who denied the right of her husband to such custody and control. The issue was directed for the purpose of determining which of the parents was entitled to the custody and control. The issue was tried without a jury at Hamilton. KELLY, J., in a written judgment, set out the facts at length and stated his conclusion that the husband could, better than the wife, under present conditions, give the child, commensurate with his own means and position, the standing and advantages to which the child was entitled. A good arrangement had been made by the father with a competent woman for the care and nurture of the child. The learned Judge particularly referred to Re Mathieu (1898), 29 O.R. 546, and Re Scarth (1916), 35 O.L.R. 312, and the cases cited in the reports of those cases. Judgment declaring the father entitled to the custody and control of his child, and for delivery up of the child by his mother at the office of the Sheriff of Wentworth, upon appointment and notice. There should be no costs. If the mother desires the privilege of access to her child at intervals, the learned Judge may be spoken to. N. R. Kay, for the father. R. Sloan, for the mother.