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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 21ST, 1916.

BEATTIE v. BEATTIE.

Judgment—Motion to Vary Minutes—Will—Undue Influence —Secret Trust—Will Established Subject to Attack upon Legacy by Fresh Action.

Motion by the plaintiff to vary the minutes of the judgment of this Court pronounced on the 17th April, 1916.

The motion was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

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

W. R. Meredith, for the defendant C. H. Beattie, the appellant.

Sir George Gibbons, K.C., for the defendants Agnes and T. B. Oliver.

P. H. Bartlett, for the defendant Louise Burwell.

W. Lawr, for the other defendants.

GARROW, J. A., read the judgment of the Court. He said that the minutes as settled were in exact accordance with the judgment as pronounced. What was really required by the motion was either a different judgment or a re-argument of the question of undue influence.

[The action was brought to establish the will of Thomas Beattie, deceased. The judgment at the trial upheld the will, and the judgment of this Court upon appeal was that the appeal should be dismissed, subject to the right of the appellant, by a fresh action, to attack the plaintiff's legacy as having been obtained by undue influence, and subject also to a question as to the existence of a secret trust.]

The deliberate opinion of the Court upon the hearing was, that, if the question of secret trust was to remain open, it was no hardship upon any one that the question as to undue influence should

also be open. The evidence to be given upon the one branch must largely cover both. The Court remained of that opinion.

The motion should be dismissed; costs of all parties to be costs in the cause.

HIGH COURT DIVISION.

MIDDLETON, J. JUNE 19TH, 1916.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R. W. CO.

Trial—Order for Separate Trial of Preliminary Issues of Law—Constitutional Law—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140—Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Power to Confer upon Referee Jurisdiction to Try Action—Scope of Proceeding under Act—Questions of Account.

Motion by the defendant railway company for an order under Rule 122 directing that the issue as to the right of the plaintiffs to claim a lien against a railway company incorporated by the Dominion and subject to the provisions of the Dominion Railway Act, and also a subsidiary issue, should be separately tried before the trial of the other issues.

The motion was heard in the Weekly Court at Toronto.

W. N. Tilley, K.C., for the defendant railway company.

A. C. McMaster, for the plaintiff company.

H. S. White, for the defendants Foley Welch & Stewart.

MIDDLETON, J., read a judgment in which he said that the plaintiffs were sub-contractors under the defendants Foley Welch & Stewart, contractors with the defendant railway company, for the construction of a railway line. The plaintiffs sought to recover: (1) $250,000, the balance due upon their sub-contract; (2) $19,000, a force account, for which they claimed direct liability on the part of both defendants; and (3) $47,000 for extra cost of contract work occasioned by delay in the preparation of the site etc., and for this they sought also to hold both defendants liable on contract. For the first item, and possibly the last, the plaintiffs could have no claim against the railway company save by virtue of the Mechanics and Wage-Earners Lien Act. The expense of a reference to take the accounts would be very great; and the case was one of those in which the preliminary question ought to be authoritatively determined before the incuring of that expense.

If there was a contract by the railway company in respect of

the force account, they would be liable; but, if the Act had no application, probably the account could not be taken in this proceeding—which was a summary one under the Act.

The question whether the Provincial Legislature has jurisdiction to create a lien effective as against a Dominion railway was determined adversely to the plaintiff in Crawford v. Tilden (1907), 14 O.L.R. 572; but the plaintiffs in this action intended to take it to the Supreme Court of Canada, seeking to have that decision overruled.

The question of the constitutionality of the Act ought also to be disposed of as a preliminary issue if, as the plaintiffs contended, all questions between the parties may be determined under the Act, even though in the ultimate finding there is not any valid lien. In Kendler v. Bernstock (1915), 33 O.L.R. 351, the constitutional aspect of legislation which conferred upon a Referee jurisdiction which would ordinarily belong to a Judge, was not considered.

These matters might be disposed of entirely as questions of law; but counsel for the plaintiffs thought that light might be thrown on them by evidence; and he should not be precluded from attempting to convince a trial Judge.

Order made directing that the two issues be separately tried before a Judge of the High Court Division, at a sittings for the trial of actions, and not before a Referee. Costs in the cause unless otherwise directed by the Judge at the trial.

MIDDLETON, J., IN CHAMBERS. JUNE 19TH, 1916.

RE SUTHERLAND v. BEEMER.

County Courts—Jurisdiction—Action for Refund of Money Paid for Article not Found to be as Represented—Refusal to Accept—Action in Contract or Tort—County Courts Act, sec. 22—Motion for Transfer of Action from County Court to Supreme Court of Ontario.

Motion by the defendant to transfer the action from the County Court of the County of Oxford to the Supreme Court of Ontario—upon the theory that the action was beyond the jurisdiction of the County Court.

Joseph Montgomery, for the defendant.
T. H. Peine, for the plaintiff.

MIDDLETON, J., in a written opinion, said that the defendant sold a second-hand automobile to the plaintiff for $775, which

sum was paid to the defendant; the sale being made upon the representation that the car had not been run 1,000 miles. This statement was alleged by the plaintiff to be untrue, and he refused to accept delivery of the automobile; and now sued to recover the $775 paid.

If this was an action arising out of contract, express or implied, the County Court had jurisdiction: County Courts Act, R.S.O. 1914 ch. 59, sec. 22 (1). When the purchaser paid for the automobile, there was, no doubt, an express contract to deliver the automobile in accordance with the stipulations of the contract, and there was an implied contract that if, when delivery was tendered, the automobile was not found to be as contracted for, the vendor would refund the price. The purchaser was not driven to an action based on misrepresentation nor to an action to rescind the contract by reason of a misrepresentation.

No doubt, the plaintiff might, if he had so chosen, have brought an action *ex delicto*, but he had also a right of action founded upon contract. His claim was that he bought a certain thing and paid for it, but did not get it. The test laid down in similar cases is, that, where it is essential to allege a contract, the action is founded upon a contract; where it is essential to allege a tort, then the action is founded upon a tort. See Taylor v. Manchester Sheffield and Lincolnshire R. W. Co., [1895] 1 Q.B. 134, and Kelly v. Metropolitan R. W. Co., [1895] 1 Q.B. 944.

Motion dismissed with costs to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS. JUNE 19TH, 1916.

*REX v. GRAND TRUNK R. W. CO.

Municipal Corporations—Convictions for Offences against Municipal By-law—Railway—Emission of Smoke from Locomotive Engine in Round-house through Ventilating Flue—Municipal Act, R.S.O. 1914 ch. 192, sec. 400 (45)—"Flue, Stack or Chimney"—Offences against Regulation of Dominion Board of Railway Commissioners—Amendment Refused—One Offence not Committed by Defendant Railway Company—Quashing Convictions—Costs.

Motion by the defendant company to quash its conviction by the Police Magistrate for the City of Windsor for that the

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

defendant company "did on the 20th May, 1916, being the owner or manager of a locomotive steam engine in the Grand Trunk Railway round-house, in which a fire was burning, cause or permit the emission to the atmosphere from said fire of opaque or dense smoke for a period of more than six minutes," contrary to the provisions of a by-law of the city corporation; and to quash a similar conviction for a like offence said to have been committed on the 26th April.

D. L. McCarthy, K.C., for the defendant company.
F. D. Davis, for the informant.

MIDDLETON, J., in a written opinion, said that it appeared that the smoke complained of was emitted by locomotives while standing in the railway round-house. This smoke would pass up the ventilating flue or chimney of the round-house. The magistrate took the view that, so long as the smoke ultimately was emitted from the chimney or flue of the round-house, it made no difference that it was actually generated in a locomotive. On the 20th May, the smoke was emitted by an engine of the Wabash Railroad Company—a company which had running rights on the Grand Trunk Railway—but this, in the view of the magistrate, made no difference, for the smoke came from the round-house. On this ground, the magistrate distinguished Rex v. Grand Trunk R. W. Co. (1914-5), 7 O.W.N. 568, 8 O.W.N. 60, 33 O.L.R. 248.

Following what was decided in that case by a Divisional Court, the learned Judge was of opinion that the ventilating flue of a round-house, constructed for the purpose of carrying away smoke or fumes from the round-house and conducting them to a place where they would be less objectionable, was not "a flue, stack or chimney" within the meaning of sec. 400 (45) of the Municipal Act, R.S.O. 1914, ch. 192, under which the city by-law was passed.

It would not be right to amend the convictions in order to uphold them as for offences against the regulations of the Dominion Board of Railway Commissioners, under a totally different statute.

The offence, if any, for which one of the convictions was made was committed by the Wabash company; and, it not being shewn that what was done was in any way authorised by the defendant company, the latter could not be made criminally liable for the acts of the former, merely because that company had a running right over the Grand Trunk Railway.

Order made quashing the convictions with costs to be paid to the defendant company by the informant, and with the usual protection to the convicting magistrate and other acting under the convictions.

MIDDLETON, J. JUNE 19th, 1916.

RE HALE.

Distribution of Estates—Estate of Intestate—No Relatives Nearer than First Cousins—Rights of Children of Deceased First Cousins—Representation—Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 30.

Motion by the administrator of the estate of Mary Hale, deceased, for the advice and direction of the Court as to the proper distribution of the estate—Mary Hale having died, intestate and unmarried, in 1906.

The motion was heard in the Weekly Court at Toronto.

C. Kappele, for the applicant.

MIDDLETON, J., in a written opinion, said that the intestate's father predeceased her, leaving no other relative; and, in addition to this, the estate came ex parte materna. The mother died in 1886. She had three brothers: John, who died in 1837, unmarried; Humphrey, who predeceased the intestate, leaving children, all of whom also predeceased the intestate, without issue; and Richard, who died in 1887, leaving him surviving two children, James and Ann, and the issue of two other children, John and William.

James and Ann, as cousins of the intestate, undoubtedly took. The doubt suggested was as to the right of the children of the deceased cousins.

The situation, however, was perfectly clear. At one time doubt was suggested, but it was held in Crowther v. Cawthra (1882), 1 O.R. 128, that children of a deceased nephew do not take, for the proviso in the Statute of Distribution "that there be no representation admitted among collaterals after brothers' and sisters' children" precluded them. See also Re McEachern (1905), 10 O.L.R. 499.

The statutory provision is now found in the Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 30, which provides for distribution "equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them . . . but there shall be no representation admitted among collaterals after brothers' and sisters' children."

Upon the hearing of the motion, no notice had been given to any one of the class whose right was sought to be affected; if the

administrator did not care to take the responsibility of distributing without an order from the Court, an order might be issued, after notice had been given by registered mail or otherwise to some of those opposed in interest to the applicant. If he desired protection, he could obtain it only after notice.

BOYD, C. JUNE 20TH, 1916

*BARBER v. WADE.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim of Mortgagee-creditor to Rank on Estate — Valuing Security—Action for Foreclosure Begun and Prosecuted to Judgment—No Actual Redemption or Foreclosure—Contestation of Claim by Assignee—Action for Declaration of Right—Creditor not Barred—Terms of Relief—Judgment—Costs—Assignments and Preferences Act, R.S.O. 1914 ch. 134, secs. 25 (4), 27.

Motion by the plaintiff for judgment on the pleadings in an action by a mortgage-creditor of one Steen, who made an assignment for the benefit of creditors, under the Assignments and Preferences Act, R.S.O. 1914 ch. 134, for a declaration of the plaintiff's right to rank upon the estate of Steen in the hands of the defendant, as assignee, for the amount of a claim filed by the plaintiff against the estate.

The motion was heard by BOYD, C., in the Weekly Court at Toronto.

J. A. Paterson, K.C., for the plaintiff.

Frank Denton, K.C., for the defendant.

THE CHANCELLOR, in a written opinion, setting forth the facts, said that the plaintiff had brought an action against Steen, the mortgagor, his wife, and the defendant and his predecessor as assignee, upon the mortgage, for payment or foreclosure, and had obtained judgment by default; the actual redemption or foreclosure had not yet taken place; time being current under the Master's report. The plaintiff, when he filed his claim with the defendant, placed it at $14,266, and valued his security at $13,200. The defendant served notice of contestation of the claim; and this action was brought by the plaintiff, claiming to rank on the estate for $1,066, the amount of his claim over and above the value placed on the security.

The question which arose was a novel one—whether the bringing and the prosecution so far of the foreclosure action was an irrevocable election so to enforce or realise the mortgage security.

Reference to secs. 25 (4) and 27 of the Assignments and Preferences Act.

The fact of an action to foreclose having being begun and prosecuted is not *per se* sufficient to debar the mortgagee from bringing in the property and dealing with it under the Act, for thereby the position of affairs as to the assets will be the same as if no action had been begun. All that is now claimed is what is due under the mortgage, with interest and taxes, and the tendency of the action may be regarded as negligible.

As a term of relief, the mortgage action should be dismissed as against the assignees, but without costs. The judgment should declare that the plaintiff is entitled to rank upon the estate in the defendant's hands, and that his claim is to be dealt with by the defendant having regard to the provisions of the Act, sec. 25 (4).

The plaintiff should be paid his costs of the action by the defendant, but without prejudice to the amount thereof being recouped and the defendant's own costs being paid out of the assets: Grant v. West (1896), 23 A.R. 533, 540.

In re Hurst (1871), 31 U.C.R. 116, referred to.

SUTHERLAND, J. JUNE 20TH, 1916.

RE ELLIOTT.

Will—Construction—Bequest of Farm Stock, Implements, and Household Furniture for Life—Not Articles quæ ipso Usu Consumuntur—Life Estate—Proceeds of Sale of Farm—Division among Relatives—Residuary Clause—Money Deposited in Bank—Joint Account—Survivorship.

Motion by the executors of Forbes Elliott, deceased, for an order determining certain questions arising on the will of the deceased.

The motion was heard in the Weekly Court at Toronto.

J. Gilchrist, for the executors.

J. H. Moss, K.C., for Mary A. G. Brown.

M. H. Ludwig, K.C., for James C. Rutherford and others.

M. Malone, for Mrs. Andrew Watson.

SUTHERLAND, J., in a written opinion, set out the provisions of the will. The testator gave to his "sisters Sarah Jane and Mary Ann and to his niece Katie, for their use as a long as they live, the farm stock, implements, household furniture, farm and its produce or the proceeds from the same, if they think suitable to sell them. The farm is to be sold after their decease in one year's time, and to my adopted niece Mary Alice Georgina Brown I bequeath $1,000. The rest is to be equally divided among my five nephews and eight nieces" (naming them). "All the residue of my estate not herein before disposed of I give . . . unto Sarah Jane, my sister."

The will was dated the 18th July, 1914, and the testator died on the 27th March, 1915.

The estate consisted of a farm valued at $19,000; a mortgage for $2,100; the farm produce, implements, and stock, worth $3,300.

There was on deposit in a bank the sum of $2,391.02, subject to a memorandum dated the 18th July, 1914, signed by the testator and his sister Sarah Jane, to the effect that the moneys on deposit were the joint property of the two, "but they may be withdrawn by cheques made by either of us or the survivor of us."

The farm and chattels were not sold by the two sisters and the niece Katie; all three survived the testator, but soon died, and were all dead at the date of this application. One of the nieces also died in October, 1915.

Farm stock and implements do not come under the class of things quæ ipso usu consumuntur, and a gift of them for life does not confer on the legatee for life the absolute interest in them; so also as to the household furniture: Theobald on Wills, 7th ed. (1908), p. 647, and cases cited. The two sisters and the niece Katie took a life estate in these chattels.

The clause dealing with the sale of the farm, the payment to one niece of $1,000, and the division of the "rest," is a distinct clause of the will, and refers only to the farm. The nephews and nieces took only the proceeds of the sale of the farm, after payment to Mary A. G. Brown of $1,000; and the remainder of the estate passed to Sarah Jane under the residuary clause.

The money in the bank went to the survivor, Sarah Jane: Re Ryan (1900), 32 O.R. 224; Schwent v. Roetter (1910), 21 O.L.R. 112; Everly v. Dunkley (1912), 27 O.L.R. 414, 423, 429; and now belonged to her estate.

Order declaring accordingly; costs of all parties out of the estate.

BOYD, C., IN CHAMBERS. JUNE 21ST, 1916.

FLEXLUME SIGN CO. v. GLOBE SECURITIES CO.

Practice—Consolidation of Actions—Several Actions by Same Plaintiff against Different Defendants—Trial of one Action and Appeal from Judgment at Trial—Stay of other Actions until Determination of Appeal—Costs—Notice of Motion for Stay—One Notice for all Actions or Separate Notice in each.

Appeal by the plaintiff company from an order of the Master in Chambers dismissing the plaintiff company's application to stay the above and eight other actions, brought by the same plaintiff company against nine different defendants, until the appeal in the action of Flexlume Sign Co. v. Macey shall have been heard and disposed of by a Divisional Court of the Appellate Division.

J. H. Fraser, for the plaintiff company.
Frank Arnoldi, K.C., for the defendants.

THE CHANCELLOR, in a written opinion, said that the plaintiff company conceded that its success in all the actions depended on the validity of a patent alleged to have been violated by each of the defendants in various ways; and the plaintiff company undertook that, if the case in appeal should be determined against the plaintiff company on any ground, it would allow judgment to be entered against it, with costs in all the actions. The defendants accepted this undertaking; and, therefore, all the proceedings in all the actions, except that in appeal, should remain in abeyance or be stayed till the result is known. See Lee v. Arthur (1908), 100 L.T.R. 61. If the plaintiff company succeeds, the other actions are to go to trial. The costs of the motion and appeal should be costs in the cause.

It was not necessary to determine the question whether the application should have been upon separate notices to each of the defendants, or by one notice to all the defendants. See Amos v. Chadwick (1877-8), 4 Ch. D. 869, 9 Ch. D. 459; Bennett v. Lord Bury (1880), 5 C.P.D. 339; Chitty's Forms, 14th ed. (1912), p. 239, Form 2. The question should be left open on the ultimate taxation in case the defendants succeed.

BOYD, C., IN CHAMBERS. JUNE 21ST, 1916.

*RE HUNTER.

Lunatic—Committee—Trust Company—Investment of Moneys of Estate—Payment into Court—Lunacy Act, R.S.O. 1914 ch. 68, sec. 11(d).

Motion by the National Trust Company, committee of the estate of a lunatic, for an order confirming the report of a Local Master.

G. M. Willoughby, for the applicant-company.
K. W. Wright, for the Inspector of Prisons and Public Charities.

THE CHANCELLOR, in a written opinion, said that the applicant-company, as trustee of an estate, had money and assets in its hands payable or to be payable to the lunatic; and there were also other items of personal property belonging to the lunatic. The Master submitted a scheme for the management of the estate and maintenance of the lunatic, viz., that the committee should get in all the property, convert it into money, and invest and reinvest the same in proper securities, and thereout pay the interest, and, if necessary, part of the principal, in satisfaction of the annual charge of $312 for the maintenance of the lunatic in an asylum, a sum of $300 for past maintenance, and $75 a year for clothing etc. The report was wrong in directing that the money realised should be administered and invested by the committee. The committee—a trust company in this case—had power by statute to act without security; but this does not enlarge its powers in dealing with the fund of the lunatic. The fund should go into Court: sec. 11 (*d*) of the Lunacy Act, R.S.O. 1914 ch. 68; Re Norris and Re Drope (1902), 5 O.L.R. 99, 101; Re Rourke (1915), 33 O.L.R. 519.

Judicial officers of the Court, and solicitors, who are also officers of the Court, should keep this rule in view.

The report should be modified as indicated, and confirmed as modified; but no costs should be allowed of this motion or of any evidence which induced the error now corrected.

HODGINS, J.A. JUNE 21ST, 1916.

*DRUMBOLUS v. HOME INSURANCE CO.

Insurance—Fire Insurance—Arbitration—Quantum of Loss—"Direct Loss or Damage by Fire"—Damage Caused by Freezing because of Disconnecting Furnace Pipe to Check Spread of Fire—"Property Owned by any other Person"—Vendor of Article Injured by Fire—Price Paid in Part only—Property not Passing—Ownership of Purchaser—Recovery to Extent of Cash Interest—Order for Payment of Portion of Insurance Money to Stranger—Right of Assured to Sue for—Protection of Rights of Vendor and Holder of Order—Paymen into Court.

Action upon a fire insurance policy, tried without a jury at Port Arthur.

J. C. Ross, for the plaintiffs.
F. Babe, for the defendants.

HODGINS, J.A., in a written opinion, said that many issues were raised by the pleadings, but only three were presented in argument.

The first was, whether the amount of the loss had been ascertained by arbitration under statutory condition 21. As to this, the learned Judge found that no binding arbitration had been proved.

The second issue was as to the actual quantum of the plaintiffs' loss. The learned Judge estimated it at $902.

The fire occurred under the plaintiffs' ice-cream parlour in Port Arthur. The damage to the plaintiffs' fountain and accessories and to the carbonator and motor was within the terms of the policy. The fire did not spread above the floor of the parlour; but, in order to confine it below, the pipe of the furnace and the door were taken off. The result was, that the water froze in the pipes and plumbing fixtures of the fountain and carbonator. This was the immediate consequence of the fire and the method adopted in dealing with it, and so might be recovered for as "direct loss or damage by fire:" Stanley v. Western Insurance Co. (1868), L.R. 3 Ex. 71; Lewis v. Springfield Fire and Marine Insurance Co. (1857), 10 Gray (Mass.) 159; Inglis v. Stock (1885), 10 App. Cas. 263; Thompson v. Montreal Insurance Co. (1849), 6 U.C.R. 319; McLaren v. Commercial Union Insurance Co. (1885), 12 A.R. 279.

The third question was as to the effect of the McLaughlin agreement and the Murray order. The policy insured the soda-water fountain and attachments, "the property of the assured." Statutory condition 6 (a) provides that an insurance company is not liable for the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy." The fountain was sold to the plaintiffs under the McLaughlin agreement, and the ownership and title were to remain in the vendors until the price was paid; the property was to be at the risk of the purchaser; the property was to be insured by the purchaser, "with loss payable to the vendors as their interest may appear."

The learned Judge was of opinion that the plaintiffs could maintain their claim for the loss upon the fountain and accessories. They were the plaintiffs' property in the popular sense though the legal title was in the McLaughlins. Out of $1,890, the plaintiffs had paid all but $730 and interest. The McLaughlins were not really "owners;" their contract recognised an interest in the purchasers. Upon the wording of the condition itself, the term "owner," was not synonymous with "holder of an exclusive title."

Reference to Hopkins v. Provincial Insurance Co. (1868), 18 U.C.C.P. 74; J. Gainor & Co. v. Anchor Fire and Marine Insurance Co. (1913), 24 W.L.R. 656; Ryan v. Agricultural Insurance Co. (1905), 188 Mass. 11; Keefer v. Phœnix Insurance Co. of Hartford (1901), 31 S.C.R. 144.

The fountain and accessories were not "property owned by any other person than the assured:" Davidson v. Waterloo Mutual Fire Insurance Co. (1905), 9 O.L.R. 394. The amount allowed was not in excess of the plaintiffs' cash interest in the fountain etc.

The order given in favour of Murray was merely a direction to pay him $550 out of the moneys due under the policy. Whether it was an assignment in law of that amount so as to vest the right to sue for it in Murray, and to divest the plaintiffs' right, could not be decided in the absence of Murray. So far as appeared at the trial, the plaintiffs still had the right to sue for the amount due on the policy.

Judgment for the plaintiffs for $902, with interest from the date of the writ and costs; the $750 in Court to remain there, and the balance of $152 to be paid into Court. No part of either amount is to be paid out except on notice to McLaughlin & Co. and Murray. Any party interested may apply, on notice, in Chambers, for payment out.

KELLY, J. JUNE 23RD, 1916.

*GRAND TRUNK R. W. CO. v. SARNIA STREET R. W. CO.

Railway—Crossing by Street Railway—Order of Board of Railway Commissioners—Construction of Diamond by Street Railway Company—Liability for Maintenance—Evidence—Derailment of Train—Flaw in Rail Forming Part of Diamond—Failure to Prove Negligence—Limitation of Actions—"Construction or Operation of the Railway"—Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 265 (1)—Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 306.

Action to recover the cost of clearing the wreck of a train of the plaintiffs and repairing the damage to their tracks and rolling stock, alleged to have been caused by the negligence of the defendants in not maintaining the tracks at a crossing of the plaintiffs' lines by the defendants' lines, near Blackwell, in good working order, by reason of which the train was derailed.

The action was tried without a jury at Sarnia.

W. C. Chisholm, K.C., for the plaintiffs.

A. Weir and A. I. McKinley, for the defendants.

KELLY, J., in a written opinion, said that the plaintiffs' road was the senior at the point of crossing referred to. On the 17th June, 1904, the Board of Railway Commissioners for Canada granted an application of the defendants for authority to cross at grade the plaintiffs' lines at this point, and directed that the diamond required for the crossing, together with all other applicances to be placed on the plaintiffs' railway strip, should be procured and provided on the ground by and at the expense of the defendants. The diamond was, in the same month, placed in position under competent supervision; it was carefully and efficiently built.

The plaintiffs' contention was, that the cause of the derailment and the wreck was the defective condition of the diamond. The only defect disclosed by the evidence was a flaw in one of the rails of the plaintiffs forming part of the diamond.

The plaintiffs contended that the defendants were under obligation to maintain the diamond, relying on Guelph and Goderich R. W. Co. v. Guelph Radial R. W. Co. (1906), 5 Can. Ry. Cas. 180. But in that case there was an express provision for maintenance. Grand Trunk R. W. Co. v. United Counties R. W. Co. (1908), 7 Can. Ry. Cas. 294, also distinguished; and Edmonton Street R. W. Co. v. Grand Trunk Pacific R. W. Co. (1912), 7 D. L. R. 888, referred to.

It was sufficiently established that the flaw in the rail, which had not come to the knowledge of the defendants or any person representing them before the accident, would not have caused the derailment if the fish-plates were in proper order and tightly bolted, which they were not a short time before the accident, and there was no evidence that their condition was otherwise at the time of the accident.

The accident was not shewn to have been the result of want of maintenance or of negligence on the part of the defendants. The accident might have resulted from any one or more of several conditions for which the defendants were not responsible.

Upon another ground also the plaintiffs failed. The action was not brought within one year from the time when the supposed damage was sustained—the claim was for injury sustained by reason of the construction or operation of the railway: Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 265 (1), and Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 306. Canadian Northern R. W. Co. v. Robinson, [1911] A.C. 739, 745, distinguished.

Action dismissed with costs.

BOYD, C., IN CHAMBERS. JUNE 24TH, 1916.

WARDLAW v. WEST RYDAL LIMITED.
PEARSON v. WEST RYDAL LIMITED.

Discovery—Production of Documents—Accounting for Documents which have Passed out of Possession of Party—Documents in Hands of Party Seeking Production—Irrelevancy—Plans and other Documents.

Appeal by the plaintiffs from an order of the Master in Chambers dismissing applications for better affidavits on production of documents by the defendants.

D. J. Coffey, for the plaintiffs.
Grayson Smith, for the defendants.

THE CHANCELLOR, in a written opinion, referred to Evans v. Jaffray (1902), 3 O.L.R. 327, 341, where it was decided that documents material for the plaintiff's case which have been in the possession of the defendant, but have passed out of his hands or have been lost, should be accounted for in the affidavit of documents

made by the defendant. The whole object of the affidavit is to put the plaintiff in the way of seeing and examining the documents required as material or of being put in the way of finding out where they are. The absent documents were not in the hands of the plaintiff in Evans v. Jaffray, and were not accounted for.

The notes for purchase-money in these cases which the plaintiffs paid were in their hands—they were once held by the defendants, but were given up on being paid. It seemed utterly irrelevant to introduce these in the affidavits on production as having been once in the possession of the defendants, when the plaintiffs have now actual possession of them.

As to the plan on which the sales were made, the plaintiffs shew in their pleadings that it was delivered to them contemporaneously. It appeared from the examination of the defendants that other plans were used on negotiations for sale—one of the city of Winnipeg and the other of West Rydal and Tuxedo—three in all; the plaintiffs have one; the other two should be accounted for if not in the hands of the defendants, and should be mentioned in their affidavits on production.

The list of names of vendees of other lots was part of a letter received from a certain business firm, and is accounted for sufficiently in the affidavits as having passed out of the defendants' possession.

This was not a meritorious application; no real good could result from the amendment directed in the affidavit on production.

Success being divided, there should be no costs of the application.

BOYD, C. JUNE 24TH, 1916.

*RE DARTNELL.

Will—Distribution of Estate—Domicile—Foreign Law—Letters of Administration with Will Annexed Granted in Ontario—Property, Real and Personal, in Ontario and in Foreign Country—Wills Act, R.S.O. 1914 ch. 120, sec. 20 (3)—Change of Domicile—Question of Fact—Administration of Estate in Ontario according to Laws of Foreign Country if Domicile Changed.

Application by the Toronto General Trusts Corporation, administrators with the will annexed of Florence Dartnell, deceased, under Rule 600, for an order directing the applicants to distribute the estate in accordance with the will or for such other order as might seem just.

The application was heard in the Weekly Court at Toronto.
R. L. Defries, for the applicants.
H. J. Scott, K.C., for the beneficiaries under the will.
G. W. Mason, for a half-sister of the deceased.

BOYD, C., in a written opinion, said that the will was made in Ontario in 1880, the testatrix being then a British subject resident in Ontario; at her death, in January, 1915, she was resident in the State of New Jersey. At the time of her death she owned real and personal property both in Ontario and New Jersey.

The beneficiaries under the will named the applicants as administrators, and they applied to the Surrogate Court of the County of York for letters of administration with the will annexed; the grant was opposed by the half-sister of the testatrix, who alleged that the testatrix was, at the time of her death, domiciled in New Jersey, and that all proceedings relating to the administration of her estate should be governed by the laws of her last domicile, and that the will was not properly made or attested according to the laws of Ontario. Upon this contestation, the Surrogate Court Judge found that the will had been duly made and executed according to the law of Ontario; that, at the date of the execution of the will, the testatrix was a British subject within Ontario; and he ruled that the question of her domicile at the date of her death was not a matter that affected the granting of probate in this jurisdiction. That judgment, of the 2nd October, 1915, was not appealed from, was in force, and upon it letters of administration had been granted to the applicants.

The Surrogate Court Judge intimated that, under sec. 20 (3) of the Wills Act, R.S.O. 1914 ch. 120, he had power to grant letters irrespective of the question of domicile, and that was a correct conclusion.

Reference to Flood on Wills (1877), p. 245; Craigie v. Lewin (1843), 3 Curt. Ecc. R. 435; Inperial Act 24 & 25 Vict. ch. 114, secs. 1 and 2;

Neither the English nor the Ontario legislation was intended to displace the general law recognised in all civilised nations—*mobilia sequuntur personam.*

Reference to Freke v. Lord Carbery (1873), L.R. 16 Eq. 461, 466; In re Grassi, [1905] 1 Ch. 584, 592; Ewing v. Orr Ewing (1885), 10 App. Cas. 453, 502; In re Trufort (1887), 36 Ch. D. 600, 610; Enohin v. Wylie (1862), 10 H.L.C. 1, 13; In re Bonnefoi, [1912] P. 233, 237; Dicey on Domicile, 2nd ed. (1908), p. 678.

The letters of administration should, as regards form, be conclusive in the Courts of another jurisdiction; the will might still

be attacked on the ground of testamentary incapacity or duress or as containing provisions contravening the law of the domicile of the testatrix—but nothing of the kind was alleged.

Whether the domicile was changed after the making of the will was mainly a question upon the facts—a question too difficult and important to be decided on a mere motion: Thornton v. Curling (1824), 8 Sim. 310, 315.

The question of the succession to Mowables in New Jersey was one of law; and the administrators might, by expert opinion, ascertain the law and act upon it: In re Moses, [1908] 2 Ch. 235.

There must be aucillary letters of administration as to the personal property in New Jersey (if the value makes it worth while).

Order declaring that the estate, real and personal, of the testatrix is vested in the applicants as trustees, to be administered having regard to the rules of succession in New Jersey, if it appears that the testatrix had a domicile there at the time of her death. Costs out of the estate.

MIDDLETON, J. JUNE 24TH, 1916.

*COCKBURN v. TRUSTS AND GUARANTEE CO.

Guaranty—Salary of Sales-manager of Commercial Company—Insolvency of Company—Damages Recoverable under Guaranty for Unexpired Portion of Term of Employment—Mitigation according to Chances of Employment—Profits of Business Venture.

Action upon a guaranty. The plaintiff was employed under a written agreement of the 20th December, 1910, by the Dominion Linen Manufacturing Company Limited, as their general sales-manager, for the period of five years from the 1st January, 1911, at an annual salary of $5,000. The payment of the salary was guaranteed by Christian Kloepfer, now deceased, and another. The company went into liquidation at the end of December, 1913, while the contract had yet two years to run. The action was against the administrators of the estate of Kloepfer. The plaintiff's right to recover was not disputed; the only question was, what damages, if any, he was entitled to recover.

The action was tried without a jury at Toronto.

Hamilton Cassels, K.C., for the plaintiff.

Sir George Gibbons, K.C., for the defendants.

MIDDLETON, J., in a written opinion, said that it was contended by the defendants that the plaintiff was not entitled to recover damages because the profits made upon a certain business venture, in less than three months, brought him a sum in excess of the salary he would receive during the two years yet to run of his contract; and further that, not having sought employment, but having entered into business on his own account, he had precluded himself from recovering.

Reference to Labatt on Master and Servant, 2nd ed., p. 1181; Macdonell on Master and Servant, 2nd ed., p. 157 et seq.; Reid v. Explosives Co. Limited (1878), 19 Q.B.D. 264; Brace v. Calder, [1895] 2 Q.B. 253; Beckham v. Drake (1849), 2 H.L.C. 579, 606, 607; Hartland v. General Exchange Bank (1866), 14 L.T.R. 863; Sowdon v. Mills (1861), 30 L.J.Q.B. 175; McKeen v. Crowley (1863), 7 L.T.R. 828.

Where the servant does not seek new employment, his failure to do so does not deprive him of his rights, but the Court must mitigate the damages by estimating his chance of having obtained employment if he had sought it; and the same principle applies where the servant does not choose to remain in idleness, but undertakes an entirely different occupation, or enters upon business for himself.

Applying this principle to the case in hand, it would not have been easy, and perhaps it would have been impossible, for the plaintiff to obtain as good a position as that which he lost. He was a specialist in the selling of linens. The only other linen factory in Ontario was a comparatively small institution. The employment he entered into, like his speculation, was something entirely different from that which he was called upon to undertake to mitigate the damages.

There would have been considerable delay before he could expect to obtain such a position as he was called upon to accept, and I am satisfied that he would not have been able to obtain a position where he would be called upon to perform services that could fairly be compared with services that he had to render under the contract in question, at anything like the same salary.

Having regard to all the considerations that the cases cited and others indicate, the damages should be assessed at $4,000.

CONSTRUCTION AND PAVING CO. LIMITED v. CITY OF TORONTO—BRITTON, J.—JUNE 19.

Contract—Action for Price of Work and Materials—Non-Payment by Contractors of Wages of Workmen—Special Clauses of Contract with Municipal Corporation—Counterclaim—Recovery of Wages Unpaid—Condition Precedent—Payment.]—Action to recover $1,043.63 for repair work and materials provided upon certain city streets. The defendants admitted the amount claimed as correct; but counterclaimed for an equal amount, relying upon the provisions of a contract between them and the plaintiffs. The action and counterclaim were tried without a jury at Toronto. BRITTON, J., in a written opinion, set out the provisions of the contract relied upon by the defendants. In disposing of the case, he confined himself to the defendants' right under the contract to counterclaim for the short payment of wages by the plaintiffs, before the defendants had themselves made up to the men the deficiency alleged. He was forced to the conclusion that payment by the defendants was a condition precedent to their recovering. The contract practically was that upon payment by the defendants they might charge against the plaintiffs (the contractors) the amount so paid. Judgment for the plaintiffs for $1,043.63 with costs; and counterclaim dismissed with costs, but without prejudice to the defendants, after payment, recovering from the plaintiffs, if so entitled, and without prejudice to the plaintiffs resisting a claim upon any ground open to them other than what is now decided. W. G. Thurston, K.C., for the plaintiffs. Irving S. Fairty, for the defendants.

BRADY v. RANNEY—SUTHERLAND, J.—JUNE 19.

Husband and Wife—Agency of Husband for Wife—Findings of Master on Reference—Variation—Costs.]—Motion by the plaintiff for judgment on further directions and costs. The plaintiff asked for judgment against both defendants (husband and wife) for $724, a balance found due by the report of a Local Master, with interest from the date of the report and costs of the action and references. Upon this motion, pursuant to leave reserved, the defendant Bertha Ranney raised the question of her liability. The motion was heard in the Weekly Court at Toronto. SUTHERLAND, J., in a written opinion, said that the evidence justified the finding of the Master that the husband was the licensee of his wife

The Master had not found that the husband was the wife's agent; and no evidence was referred to which would have warranted his so finding. Without such a finding the Master could not properly make the wife liable for the claim of the plaintiff against her husband. The report should be varied so as to relieve the wife from liability; in other respects the report should be confirmed. The plaintiff should have the costs of the action and of the first reference except in so far as the costs were increased by the defence of the defendant Bertha Ranney; for her costs of that defence she should have judgment against the plaintiff. The costs of the second reference should be to the defendant Sullivan P. Ranney against the plaintiff to the extent that the said defendant succeeded before the Master; other costs of that reference, if any, to be paid by that defendant to the plaintiff. The plaintiff to have the costs of this motion against the defendant Sullivan P. Ranney; and the defendant Bertha Ranney her costs of resisting the motion against the plaintiff. J. H. Moss, K.C., for the plaintiff. C. J. Holman, K.C., for the defendant Bertha Ranney.

WILLIAMS & CO. v. SPARKS—LENNOX, J.—JUNE 20.

Contract—Shipments of Hay—Agents or Brokers—Sale on Commission—Correctness of Returns—Refund of Money Overpaid—Findings of Fact of Trial Judge—Account—Reference.]—Action for a refund of part of the money paid by the plaintiffs in taking up bills of exchange drawn by the defendants, in Ontario, upon the plaintiffs, in England, in payment for hay shipped by the defendants to the plaintiffs, to be sold, as the plaintiffs alleged, upon commission. The plaintiffs asserted that the defendants had been overpaid according to the prices realised. The defendants alleged that the plaintiffs were the purchasers of the hay at fixed prices. The action was tried without a jury at Toronto. The learned Judge, for reasons given in writing, found in favour of the plaintiffs, saying that they undertook to handle the hay as agents or brokers, and there was no ground for believing that the plaintiffs' reports or statements were untrue, or that they realised higher prices or higher net sums than they set forth in their returns. The defendants also maintained that the plaintiffs' account was incorrect. The plaintiffs desired leave to amend by adding a small sum to their claim; but this was refused. Judgment for the plaintiffs for $2,578.08, with interest upon so much thereof as is principal money from the 8th April, 1914, and costs. Should the defendants desire a reference to take the accounts, they may ap-

ply to the learned Judge, but must do so promptly. If a reference is directed, it will be at the peril of costs. A. Bicknell and B. H. L. Symmes, for the plaintiffs. J. E. Jones and V. H. Hatlin, for the defendants.

JESSOP v. CADWELL SAND AND GRAVEL CO.—KELLY, J.—JUNE 21.

Land—Injury to by Operations on Neighbouring Land—Water Lots—Assessment of Damages.]—Action by a fisherman, the owner of a lot on the Detroit river in the town of Sandwich, for an injunction and damages in respect of injury to the plaintiff by the defendants' operations upon neighbouring lots. The action was tried without a jury at Sandwich. The learned Judge read a judgment in which he set out the facts with great care. He said that the plaintiff was entitled to succeed on the principle of Rylands v. Fletcher (1868), L.R. 3 H.L. 330. His damages, including amongst other things the loss of benefit for two years from a small ice harvest, and other matters consequent upon the disturbance of his business by the acts complained of, should be assessed at $725. This includes $320, the estimated expense of removing from the surface of his land, which was under the water, the deposit of earth and other material which had improperly been allowed to escape from the defendant's land. This last item is subject to the right of the defendants to have a reference as to the amount; on such reference both parties to be entitled to offer evidence. Judgment for the plaintiff for $725 damages and for the injunction asked, with costs, except costs of the reference referred to, if such reference be required by the defendant. Further directions and costs of the reference reserved. T. Mercer Morton, for the plaintiff. J. H. Rodd, for the defendants.

DAVISON v. FORBES—LENNOX, J., IN CHAMBERS—JUNE 22.

Appeal—Leave to Appeal from Order of Judge in Chambers—Importance of Questions Involved—Doubt as to Correctness of Order—Rule 507 (3) (b).]—Motion by the defendant Forbes, under Rule 507, for leave to appeal to a Divisional Court from the order of SUTHERLAND, J., ante 358, dismissing the said defendant's application to stay proceedings upon the reference directed by the judgment of KELLY, J., 9 O.W.N. 22, affirmed by a Divisional Court, 9 O.W.N. 319, pending an appeal by the said defendant to the Supreme Court of Canada. LENNOX, J., set out the facts

and discussed the position of the case in a written opinion. He then referred to the provisions of Rule 507, and said that he was not aware of any conflicting decisions. He could not take a condition under (a) and combine it with a condition under (b) of clause (3) of the Rule, as a foundation for an order. The order must be made, if at all, under (b). He was not convinced of the correctness of the order made, having regard to the circumstances of the case. He had no hesitation in saying that the proposed appeal involved matters of great importance. Reference to Stavert v. Campbell (1912), 3 O.W.N. 641, 21 O.W.R. 172, and Re Sovereign Bank of Canada, Clark's Case (1915), 35 O.L.R. 448, 454. He had come to the conclusion, not without hesitation, that he should grant leave to appeal. The question involved was at least clearly arguable; the application was not vexatious; substantial interests of the defendant Forbes appeared to be imperilled; and it was not unreasonable to think that he might obtain relief of some kind from an appellate Court. Leave granted, and proceedings upon the reference stayed until the 27th June, 1916, or the hearing of the appeal, in the meantime. Costs in the cause unless otherwise ordered by the appellate Court. J. W. Bain, K.C., for the defendant Forbes. Harcourt Ferguson, for the plaintiff.

STIRTON v. DYER—LENNOX, J.—JUNE 22.

Partnership—Accounts—Reference—Appeals from Report—Findings of Fact—Costs.]—Appeal by the defendant Dyer and cross appeal by the plaintiff from the report of the Local Master at London in a partnership action; heard at the London Weekly Court. The appeal and cross-appeal were upon questions of fact. The plaintiff's appeal as to what was called "the Savannah account" was dismissed with costs to the defendant Coles, fixed at $25. As to an item of $1,800 credited in the accounts of the partnership to the defendant Dyer, there was nothing to justify its being charged back against that defendant; and his appeal as to that should be allowed. His appeal as to the interest upon a sum of $1,000 should also be allowed, and the interest reduced to $202.10. In all other respects, the appeals were dismissed. Report amended accordingly; no costs of the appeals to the plaintiff or the defendant Dyer. T. G. Meredith, K.C., for the plaintiff. Sir George Gibbons, K.C., and E. W. M. Flock, for the defendant Dyer. C. H. Ivey, for the defendant Coles.

BANK OF OTTAWA v. SMITH—LENNOX, J.—JUNE 23.

Guaranty—Bank Overdraft—Amount of—Action against Guarantors—Defences—Execution of Guaranty on Understanding as to Execution by Others—Dealings with Co-sureties—Release—State of Accounts between and among Sureties—Pleading—Third Party Procedure—Rule 170.]—Action to recover $894.05, the amount of an overdraft upon the account of the Great Western Coal Company of Canada, guaranteed by the defendants other than the liquidator of the company, to the extent of an ultimate balance not exceeding $4,000. The action was tried without a jury at Kenora. LENNOX, J., dealt with the facts in a written opinion. He found that the amount claimed was the true balance of the account against the company. The defendant Draper set up two grounds of defence: (1) that the guaranty was not executed according to his understanding as to the persons who would execute it, at the time it was executed by him—liability never attached; (2) if he became liable, he was released by the subsequent action of the bank manager in dealing with his co-sureties. The learned Judge found against the defendant Draper on both these objecions. Judgment for the plaintiffs against all the defendants. for $894.05 and interest from the 11th August, 1915, with costs. —The learned Judge thought that he had no power to direct a reference to ascertain the state of accounts between and among the defendants. There was no counterclaim, and a counterclaim is not admissible between defendants unless the plaintiff is also interested in it. A defendant must seek relief against his co-defendant by third party procedure under Rule 170: Cope v. Crichton (1899), 18 P.R. 462; Gregson v. Henderson Roller Bearing Co. (1910), 20 O.L.R. 584. As to this, further argument will be heard, if the defendants desire it, before the judgment is entered; and for that purpose proceedings are stayed for one week. J. F. McGillivray, K.C., for the plaintiffs. J. S. Allan, for the defendants Smith, Kelly, and Mather. J. A. Kinney, for the defendant Kennedy. W. H. Curle, for the defendant Draper.

NEW YORK AND PENNSYLVANIA CO. v. HOLGEVAC—SUTHERLAND, J.—JUNE 24.

Contract—Sale of Pulpwood—Breach—Recovery of Moneys Advanced—Damages—Counterclaim—Costs.]—Action for an injunction restraining the defendants from selling, shipping, moving,

or otherwise dealing with certain pulpwood, for damages for conversion, and for damages against the defendant Holgevac for breach of contract. The defendant Holgevac counterclaimed damages for breach of contract. The contract was dated the 9th January, 1915, and by it the defendant Holgevac agreed to sell and deliver to the plaintiffs certain pulpwood, at specified prices, subject to inspection, approval, and measurement. The action and counterclaim were tried without a jury at North Bay. The learned Judge set out the facts in a written opinion, and made findings thereon favourable to the plaintiffs. Judgment for the plaintiffs against the defendant Holgevac for the total sums advanced by them under the contract, amounting, less a sum deducted, to $1,069, and against the defendant Cadwell for $250 damages, in each case with costs on the Supreme Court scale. Counterclaim dismissed with costs. A. G. Slaght, for the plaintiffs. J. E. Cook, for the defendant Holgevac. W. A. Gordon, for the defendant Cadwell.