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SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 21ST, 1914.

RECHNITZER v. EMPLOYERS' LIABILITY.

6 O. W. N. 248.

Insurance—Guarantee — Honesty of Employer — Defalcation—Evidence—Technical Defence—Reference.

BOYD, C., 24 O. W. R. 157; 4 O. W. N. 875, gave plaintiff judgment for $2,000 and costs in an action upon a policy of insurance under which defendant company insured plaintiff from loss by reason of the defalcations of defendant Mumme, the employer and agent of plaintiff. Reference to Local Master if desired.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Held, that it is not incumbent upon insured to volunteer information not asked for, and that such non-disclosure does not void a policy.

Hamilton, v. *Watson*, 12 Cl. & F. 109; *Seaton* v. *Burnand*, [1900] A. C. 135; *McTaggart* v. *Watson*, 3 Cl. & F. 525; *Creighton* v. *Rankin*, 7 Cl. & F. 325, followed.

Appeal by the defendants from a judgment of HON. SIR JOHN BOYD, C., at trial, awarding plaintiff $2,000.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

I. F. Hellmuth, K.C., for the appellant corporation.

Sir George C. Gibbons, K.C. and G. S. Gibbons, for the plaintiff, respondent.

HON. MR. JUSTICE MACLAREN:—Counsel for the respondent at the opening of the argument asked leave to produce evidence discovered since the trial, with a view of shewing that the appellant was fully aware of the relation of Mumme to the respondent before the issue of the policy and that it was intended to secure respondent against loss in that relation. After some discussion counsel for the appellant company stated that he did not intend to press

technical objections to the form of action and was content to treat the question of indemnity as if the relation of the parties were the same as that of employer and employee.

The action was brought upon a fidelity guarantee policy issued by the defendant corporation, whereby it agreed to reimburse the Dominion Dressed Casing Company of London, Ontario, to the amount of $5,000 for the pecuniary loss, amounting to embezzlement or larceny, that it might sustain by the fraud or dishonesty of Martin Mumme, its manager at Hamburg, Germany.

The Casing Company was composed of the plaintiff and said Mumme, the latter being the agent for the sale of sausage casings shipped to him from London. The policy was issued on an application form of the defendant corporation prepared for employees and containing the usual questions, which were answered and signed by Mumme. Among these questions and answers were the following:—

"2. Employment for which this guarantee is required? A. Representative Dominion Dressed Casing Co., London, Canada.

3. Full name, address and business of employer for whom this guarantee is required? A. Dominion Dressed Casing Co., London Canada.

4. Salary and full particulars of other remuneration from this appointment? A. Salary, and commission on sales, and participation in profits.

Reason for leaving former employment? A. To become partner of the Dominion Dressed Casing Co., London, Ont."

The defendant corporation sent to the Casing Company a letter with the usual questions to be answered by an employer, with the statement that the replies would form the basis of the contract. Among these questions and answers were the following:

"(a) In what capacity or office will the applicant be engaged, and where? A. As representative in Hamburg, Germany.

(e) How often will you require him to render an account of cash received and pay the same to you? A. Monthly or oftener if necessary.

(g) How often will you balance his cash accounts, and how will you check their accuracy· A. Account sales rendered weekly, balance sheet monthly.

(1) Will he at any time hold power of attorney on behalf of the employer? A. He is part owner of the business.

Q. What salary will he be paid, and how will it be paid, and if subject to any deduction? A. Paid salary and commission on sales and participation in profits."

From the questions and answers contained in these two documents it is quite clear that what was asked for was a policy guaranteeing the honesty and fidelity of Mumme to his partner in the part of the business to be conducted by him at Hamburg. The use of forms which had manifestly been prepared for and were better adapted to the ordinary relation of employer and employee would have raised some technical difficulties as to form of the action, but we are relieved from considering these by the admissions made by the counsel for the defendants above referred to. Even without these admissions, however, I would probably have come to the same conclusion as did the learned Chancellor, who tried the case, as to what was the intention of all the parties to the contract, although some of the words used are inapt to the real relations existing between them.

The appellant claimed before us that the appeal should be allowed on the ground that a full disclosure was not made as to the indebtedness of Mumme at the time of the application, and that the policy was voided by the plaintiff not fulfilling the promises contained in the answers, but changing the salary and position of Mumme without notice to the defendant, and not disclosing but concealing his defalcations.

The first of these complaints is that it was not disclosed that Mumme had not contributed his share towards the capital of the firm and that the firm was indebted to the Canadian Packing Co. of London, of which the plaintiff was a member. As to this, it is a sufficient answer to say that neither in the questions put to Mumme nor in those put to the Dominion Dressed Casing Company was there any question that would require or suggest the necessity of such an answer. In both papers the answers disclosed and were based upon the fact that Mumme was a member of the firm and was to share in the profits, but no inquiry was made at any time as to his contribution to the capital or whether he was to contribute anything toward it.

As a matter of fact, although the articles of partnership provided that the two partners should contribute

equally to the capital of the firm, they are entirely silent at to amount, and the evidence discloses the reason given by Mumme why he did not contribute, in which his partner acquiesced. The defendant company, however, did not ask any question on this point, so that it would appear that they did not consider it material or relevant. In the absence of any question on the point I do not think it was incumbent on the plaintiff to volunteer the information. The case of *Hamilton* v. *Watson,* 12 Cl. & F. 109, clearly shews that such non-disclosure would not void the policy in a case like the present. See also *Seaton* v. *Burnand,* [1900] A. C. 135.

Complaint is also made of the non-disclosure of the indebtedness of the Casing Co., to the Canadian Packing Co., and the Hamburg branch to the head office at London. All that has been said above applies with even greater force to both these claims. In addition, the alleged indebtedness of the Hamburg branch was only the ordinary method of bookkeeping, that the branch was charged with all the goods that were shipped to it, and the amount was in no sense a debt, and the matter was wholly irrelevant. Another point raised is that plaintiff did not exact from Mumme the monthly cash account and balance sheets and the weekly account sales promised in the answers. The evidence shews that sales were not made every week, but it also shews that the plaintiff did all that he reasonably could to obtain such statements from Mumme. Sometimes they were furnished regularly; at other times he was dilatory in forwarding them. Plaintiff appears, however, to have done his full duty in urging Mumme to send them regularly. His only promise was that he would require Mumme to render his accounts monthly or oftener, and this he did. It was not through any fault or delinquency of his that they were not always forthcoming. Besides, there was no promise in his answers nor any condition in the policy that the defendant company should be notified of any dilatoriness of Mumme in this regard. This ground also should be disallowed: see *McTaggart* v. *Watson,* 3 Cl. & F. 525, and *Creighton v. Rankin,* 7 Cl. & F. 325.

Another ground urged is that plaintiff reduced the salary of Mumme and altered his position without notifying the defendant. The partnership was formed for three years from the first of February, 1907. The complaint is made respecting an agreement of September 23rd, 1909, whereby

the parties agreed to wind up the Hamburg branch of the business, which was found to be unprofitable; Mumme to draw his regular salary during the three months allowed for the winding up. His salary was not reduced and he continued to draw it until the beginning of March, as the winding up was not completed as expected, although the term fixed for the partnership ended February 1st, 1910. All the information given to the defendants in the answers was that Mumme was to be paid a salary, commission on sales, and a share of the profits. No amounts were mentioned either as to salary or commission, and defendants did not enquire further; so that their complaints on this score are quite unfounded.

Their chief ground of complaint, however, is that they were not advised promptly of the embezzlement and dishonesty of Mumme. This evidence shews that when returns were not cominig in as rapidly as expected the plaintiff sent his agent Hay, who organized the Hamburg business on a new basis and endeavoured to have the terms of credit shortened. In his examination he stated that he was fully satisfied of Mumme's honesty, and so advised the plaintiff. Matters not improving, plaintiff himself went to Hamburg in March, 1910, and states that then for the first time he became aware of the dishonesty of Mumme. He at once advised his London house which promptly notified the defendants. In my opinion the requirements of the policy were fully complied with in this respect.

Defendants sent their auditor to London, who spent a part of two days examining the books and papers of plaintiff and questioning him and his staff. A lengthy paper was drawn up by him purporting to give a summary of the dealinigs between plaintiff and Mumme. This document he induced the plaintiff to sign, and stress has been laid upon certain admissions and statements made by plaintiff therein. The circumstances connected with the obtaining of plaintiff's signature detract from the value of any admissions, and in my opinion the trial Judge was quite justified in not attaching much importance to it.

Reliance was also placed upon a clause inserted in the policy that it did not cover loss of stock, but only such moneys as it could be proved that Mumme had received. This refers to the fact that when the plaintiff went to Hamburg in March, 1910, and examined the stock in hand he found that the barrels and tierces supposed to contain cas-

ings contained only a layer of these on top, the lower part of the packages being filled with stones. The presumption would be that Mumme had sold the abstracted casings; but it is not proved that he was paid for the whole of them. The defendants under the policy would only be liable for the money he actually received. The exact amount can be ascertained on the reference.

The amount of the policy was $5,000. The plaintiff swore that the defalcation amounted to $7,102.01. The Chancellor gave judgment for $2,000, subject to variation at the instance of either party by reference to the Master at London.

In my opinion there is ample evidence to sustain this judgment, and the appeal should be dismissed.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS:—We agree.

HON. MR. JUSTICE BRITTON. APRIL 20TH, 1914.

KENNEDY v. SUYDAM REALTY CO.

6 O. W. N. 263.

Injunction — Interim — Restraining Sale of Lands—Decision of Master of Titles.

BRITTON, J., refused leave to appeal from decision of Master of Titles refusing to register a caution—Parties should get to trial as speedily as possible—Motion adjourned till trial.

Motion for injunction to restrain defendants in this action and each of them from selling or attempting to sell the lands or any of them, which are the subject of this action, or for an order granting to the plaintiff leave to appeal from an order of the Master of Titles at Toronto, made on 5th February, 1914, refusing an application to register a caution relating to said lands.

W. N. Tilley, for plaintiff.

E. D. Armour, K.C., for defendants.

Hon. Mr. Justice Britton:—Having regard to the litigation antecedent to the present motion, and in deference to what has been decided, I must dismiss this motion.

What has been decided is set out in the reasons given by the Master of Titles in his reasons for judgment, given on 6th February last, and filed on this motion.

At this stage, and upon the present application, I should not give leave to appeal as asked, but should leave the parties to get to trial as speedily as possible and make the fight, which one may hope to be final, on what is the subject-matter of this action. The motion will be adjourned until the trial and costs will be costs in the cause, unless otherwise ordered by the trial Judge.

Hon. Mr. Justice Britton. April 17th, 1914.

BELL v. ROGERS.

6 O. W. N. 243.

Debtor and Creditor—Judgment Debtor—Examination of—Refusal to be Sworn or Examined—Motion to Commit for Contempt—Dismissed by Britton, J. — Order for Further Examination on Payment of Conduct-money.

Motion by the plaintiff to commit the defendant for contempt in refusing to be sworn and refusing to answer lawful questions to be put to him upon his examination.

J. P. MacGregor, for the plaintiff.

M. Lockhart Gordon, for the defendant.

Hon. Mr. Justice Britton:—Upon the papers filed and what was stated upon the argument, it is clear that a case has not been made for an attachment, and the motion will be dismissed, but under the circumstances without costs.

It is equally clear that the plaintiff is entitled to have a further examination of the defendant as judgment debtor, and the plaintiff should not be put to the additional expense of making a special application for an order for such further examination. As Judge in Chambers I order that upon an appointment being taken out and served upon him, and upon being paid his conduct money, the defendant do attend pursuant to such appointment and that he answer all such lawful questions as may be put to him upon such examination as a judgment debtor.

HON. MR. JUSTICE BRITTON. APRIL 17TH, 1914.

RE JOHN ROSS, AN INFANT.

6 O. W. N. 242.

Infant—Custody—Right of Father—Welfare of Child.

BRITTON, J., refused to give mother the custody of an infant, holding that it was for his welfare that he be retained by the Children's Aid Society.

Motion by the father of John Ross, an infant, upon the return to a habeas corpus, for an order for the delivery of the child to the applicant.

A. R. Hassard, for the applicant.

W. B. Raymond, for the respondents.

HON. MR. JUSTICE BRITTON:—I have given this matter anxious consideration and, having regard for the true welfare of the boy, and at the same time not forgetting the affection of his mother and the natural desire on her part to have her son with her, my conclusion is that the custody of the boy should not be given to the mother, but that he should be returned to, and be retained by, the Children's Aid Society of Toronto. The boy has been well clothed and cared for. He is now learning how to do useful work—is willing to do it and likes the work of the farm and country life. At the boy's present age living in the city with no other boys of his own household to associate with would be a constant trial and temptation to which under all the circumstances the boy should not be subjected.

No costs.

HON. MR. JUSTICE MIDDLETON. APRIL 24TH, 1914.

SASKATCHEWAN LAND AND HOMESTEAD CO v. MOORE.

6 O. W. N. 262.

Appeal—Supreme Court of Canada — From Supreme Court of Ontario—Reference Ordered by Trial Judge.

MIDDLETON, J., refused to stay a reference ordered by Kelly, J., 25 O. W. R. 126, affirmed by SUP. CT. ONT., 26 O. W. R. 100.

Motion by defendant for an order staying reference directed by HON. MR. JUSTICE KELLY, 25 O. W. R. 125, affirmed with a variation by judgment of Supreme Court of Ontario, 26 O. W. R. 160, pending an appeal by the defendant to the Supreme Court of Canada. Argued 21st April, 1914, in Weekly Court.

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

A. B. Cunningham, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The judgment of the learned trial Judge directs payments by defendant of an amount to be ascertained by the Master-in-Ordinary. Most of the items going into the account are determined. The reference is as to minor matters only.

The Supreme Court of Ontario varied this judgment in some respects, and possibly the decision of the Supreme Court of Canada may restore the original judgment or further vary it; but the matters that were argued before the Supreme Court of Ontario are not the sole matters nor indeed the important matters so far as the reference is concerned.

In cases such as *Monro* v. *Toronto Rw. Co.,* 5 O. L. R. 15, where the question in issue upon the appeal was the plaintiff's right to have partition, it is quite plain that the partition proceedings ought not to be allowed to proceed until this question has been determined. That is widely different from the situation here.

I have not attempted to deal with this matter upon the construction of the rules, for it does not appear to me to be material whether the onus is upon the plaintiff to obtain leave to proceed or upon the defendant to stay the reference. The main question is whether under the circumstances the refer-

ence ought to go on or to be stayed; and the balance of convenience in this case clearly indicates that the reference ought to proceed.

Sharpe v. *White,* 20 O. L. R. 575, shews that the granting of a stay or of an order to proceed, whichever is necessary, is discretionary.

I have spoken to the Chief Justice, who has heard the appeals and is therefore familiar with the questions involved, and he agrees with the view that I now express.

The motion will therefore be refused.

Costs to the plaintiff in any event.

HON. MR. JUSTICE SUTHERLAND. APRIL 28TH, 1914.

HOWARD v. CANADIAN AUTOMATIC TRANSPORTATION CO., & WEAVER.

6 O. W. N. 285.

Company—Prospectus—Misrepresentation as to Existence of Patent—Purchase of Shares—Rescission—Fraudulent Misrepresentation by Agent as to Business of Company—Materiality—Reliance on—Inducement to Purchase — Evidence—Prompt Repudiation after Discovery of Falsity of Statements.

An action to rescind sales of two blocks of shares of the capital stock of the defendant company to the plaintiff, on the ground that the plaintiff was induced to purchase by false and fraudulent misrepresentations, and for repayment of the moneys paid by the plaintiff.

SUTHERLAND, J., *held,* that misrepresentation as to existence of letters patent at time of issue of prospectus is material and under Ont. Co. Act (1907) c. 34, s. 97 (2) renders void contract for sale of shares.

That defendant Weaver was agent of defendant company and his misrepresentation that the company's business was so great as to render a second factory necessary was material and misled and induced purchase of shares.

Lloyd v. *Grace Smith Co.,* [1913] A. C. 716, followed. Order for rescission of sales and return of money paid.

An action to rescind sales of shares of stock in defendant company on the ground of alleged false and fraudulent msrepresentations and for repayment of money paid therefor.

T. A. Beament, for plaintiff.

G. M. Macdonell, K.C., for defendant company.

Gordon S. Henderson, for defendant Weaver.

Hon. Mr. Justice Sutherland:—Two companies had been incorporated under the laws of the Province of Ontario, one "The Automatic Electric Limited" and the other the defendant company incorporated later on the 13th February, 1909.

These companies entered into a written agreement dated the 9th March, 1909, wherein the Automatic Electric Limited is called the licensor, and the defendant company the licensee. It recites as follows:—

"Whereas the licensor is the owner of certain letters patent of the Dominion of Canada, dated the 24th day of December, A. D. 1907, granting a patent under No. 109300, for automatic transportation devices (mail car) issued originally to one William C. Carr of Fort Erie, in the Province of Ontario.

And whereas the licensor is the owner of all rights in and to certain other patents for which applications have been made by the said Carr to the Government of the Dominion of Canada, namely, &c.

And whereas the licensor is also the owner of the rights for the Dominion of Canada in and to certain other valuable inventions made or to be made by the said William C. Carr in connection with Automatic Transportation systems, &c.

And whereas the licensor has agreed to grant to the licensee an exclusive license within the Province of Ontario to use, manufacture, sell and lease the said inventions, the subject of the said letters patent, &c.

And whereas the licensee immediately before the execution of these presents shall allot to the licensor, or the trustee or trustees appointed by the licensor, 80,000 shares of fully paid up and non-assessable shares of the capitial stock of the licensee company (the capital stock of which said company consists of 100,000 shares of $10. each) such allotment being part of the consideration for the grant of this license.

It is therefore agreed as follows:—

1. The licensor hereby grants unto the licensee, its successors and assigns, for, throughout and within the limits of the Province of Ontario, license and authority to make, use, sell, ... all and every of the said patented articles.

2. The licensee shall during the continuance of this license hereby granted to the licensor at the expiration of

each and every six months' royalties on the earnings of the licensee company during the preceding six months, calculated as follows:—

8. The licensor shall pay all government fees and renewal fees in connection with the said letters patent, or any of them as may be necessary to maintain and keep on foot the said letters patent, or any of them."

In March, 1910, the defendant company passed a resolution authorizing its secretary and treasurer, Charles H. Craigie, "to sell 10,000 shares of the treasury stock of the company on the best terms possible, but not less than par or commission greater than 25 per cent. as provided in the charter."

W. C. Carr, the president, said at the trial that this stock was to be sold for the purpose of getting working capital for the company, and at page 11 of the prospectus hereinafter referred to appears also the following statement: "The Canadian Automatic Transportation Company has decided to place a portion of its stock on the market for public subscription at par for the purpose of vigorously developing its system, &c."

It is alleged on behalf of the defendant company that Craigie placed the said shares in the hands of one Reynolds, who lived in Toronto where the head office of the company is, to sell, and that it was he who employed the defendant Weaver as his agent to sell a part of the stock.

It is common ground that Weaver opened an office in the City of Ottawa, where he lived, on the window of which he placed the name of the defendant company. The company, through Craigie or Reynolds, furnished a model, to demonstrate the working of the patented contrivance, which was placed in said office. At one time Reynolds was in Ottawa at the office and assisted in demonstrating the contrivance by the use of the model. The president and Craigie, the secretary, were also at different times at Ottawa and in the office.

Weaver says that Reynolds represented himself as the general stock sales agent of the defendant company, and that Carr, the president, knew, and Craigie also, that he, Weaver, was the agent under Reynolds and was selling the stock. Weaver used letter heads on which he was described as the agent of the company, which letter heads Reynolds had prepared. He also in letters sent by him to Reynolds and to the defendant company represented himself as its

agent. He issued to purchasers of stock interim certificates which he signed as agent of the company and which went into and were produced from the possession of the defendant company.

The applications for stock that he received he forwarded in the first instance to Reynolds and received from time to time moneys on account of the sale of stock and forwarded the same to Reynolds. When the stock was fully paid for, he forwarded the interim certificates to Reynolds who apparently passed them on to the defendant company, and in due course stock certificates were sent back to him through Reynolds. He says that he learned from Reynolds how to demonstrate the model and did demonstrate it to prospective purchasers of stock. He also says that he had at his office in Ottawa copies of the prospectus and other literature of the defendant company.

Under these circumstances, in November, 1910, the plaintiff went into Weaver's office (or the office of the defendant company) in Ottawa. He alleges in his statement of claim that Weaver, acting as the agent for the defendant company, and to induce him to buy 50 shares of stock therein, falsely and fraudulently represented to him that the defendant campany was the holder of patents for Canada for a certain automatic truck and for a carrier system, whereas the defendant campany had only a limited right to operate under said alleged patents in the Province of Ontario; and that he falsely and fraudulently represented "that the defendant company had purchased the patents for the Dominion of Canada for the said inventions, by issuing to the patentees thereof 25,000 fully paid shares of the capital stock of the defendant company, whereas . . . there had been paid by the defendant company for the said patent rights for the Province of Ontario . . . 80,000 shares of the capital stock of the defendant company and that in addition to the issue of such shares the defendant company was liable to pay cash royalties to the patentees."

He further says that in January, 1912, the defendant Weaver, as agent for the defendant company and to induce him to buy a further 50 shares of its stock, falsely and fraudulently represented "that the said defendant company had at that time received a sufficient number of orders for the automatic baggage trucks to overtax the capacity of the company's factory and to necessitate the immediate erection by the defendant company of a second factory, and that

the said defendant company were then offering for sale shares of the company, the purchase price of which was to be used in the immediate erection of such second factory, whereas the said defendant company and the said Weaver well knew that no orders whatever had been received for any of the said baggage trucks nor was the said company then offering shares for sale the proceeds of which were to be used by the defendant company in the erection of a second factory."

He says he was induced to buy said 100 shares and pay for them in consequence of said representations and found them subsequently to be worthless or worth much less than the price paid.

The plaintiff was a railway conductor with some knowledge of machinery and had had some previous experience in the purchase of shares of stock in companies. He admits that he made a personal examination of the model and its working and relied on his own judgment as to the mechanical utility of the contrivance. He says on the other hand that as to the business part of the matter, as he calls it, he inquired of Weaver and relied on what he was told by him. He says he did not receive a prospectus of the company when buying the stock. The defendant Weaver cannot say positively that he did.

There is evidence that copies of the prospectus and other portions of the company's literature were in Weaver's office and that the plaintiff received some of these. On cross-examination at the trial he admitted that a considerable part of what appears in the prospectus he had seen in the literature he had obtained. In each case the application for the purchase of shares signed by the plaintiff states on its face that he had obtained a copy of the prospectus. I think, therefore, upon the whole evidence, I should find that he did receive a copy of the prospectus at or before the time when he signed the applications for stock. I find also on the evidence and documents that the defendant Weaver was an agent of the company. The evidence is conflicting as to what representations were really made by him. The plaintiff at the trial, when asked what he meant by the "business part of the matter" testified as follows:

"He (Weaver) told me that the company was capitalized at one million dollars and that we had the patents for the Dominion of Canada, for which we paid in stock $250,000 worth of stock. It was at that time that I subscribed for the fifty shares and paid in full for them."

The defendant company was capitalized at one million dollars. The defendant Weaver denies that he stated to the plaintiff that the defendant company had paid $250,000 for Canadian patents. He admits that amount was mentioned by him when speaking to the plaintiff, but states that what he did say was as follows: "I understood it to be the holding company for Canada, and as you will notice on page 23 of the prospectus, it says the Automatic Electric purchased the Canadian rights from W. C. Carr, and I always understood it myself that those were Canadian rights; that $250,000 he was in error on that; that had nothing to do with the Canadian Transportation whatever. At page 23 of the prospectus it said those patents were the Canadian patents and purchased from W. C. Carr leading you to infer it was for the whole of Canada. I honestly made the representation and believed it to be true."

While on the whole I prefer the evidence of the plaintiff to that of the defendant Weaver where they differ, I am, on this question, unable to give entire effect to the plaintiff's version. Believing as I do that he must be held to have received a copy of the prospectus he would, if he read it, as he must also, I think, be assumed to have done, see therein, at page 22, the following: "(d) 80,000 fully paid up shares were issued by the company to the Automatic Electric Limited, holders of the Canadian patent, in consideration of the sale and transfer of rights to this company, together with royalties which were agreed to be paid. It was for this consideration that license and privileges now held by the company were obtained. No amount beyond such being payable for good-will. The contract bears the date the 9th day of March, 1909, and may be inspected during office hours at any reasonable time at the office of the company." The stock being worth $10 a share, this would plainly indicate to him that not $250,-000, but $800,000 had been paid in shares to the Automatic Electric Limited, and if he had asked to see the agreement he would find a similar statement therein.

I am of opinion therefore that he cannot be considered to have been deceived in the way he alleges on this point and that it cannot be found that any fraudulent representation was made to him in connection therewith. Nor do I think he can succeed in setting aside the sale of this first block of stock on the ground on which he bases his claim in paragraph three of the original statement of claim. In

that paragraph he says that the defendant company "through their agent the defendant, M. E. Weaver, falsely and fraudulently represented to him that the defendant company was the holder of patents for Canada for a certain automatic truck and for a carrier system, whereas the said company and the said Weaver well knew that the defendant company had only a limited right to operate under said alleged patents in the Province of Ontario."

I think a persual of the agreement and prospectus shews that it was only with respect to rights in Ontario under alleged patents that any representations can be held or be said to have been made to the plaintiff. It is plain, however, that the sale of the stock was made on the basis of there being existing patents for Canada as to which the defendant company had acquired rights in Ontario.

Weaver admits that he thought the Canadian patents were purchased and being dealt with. I have already referred to one extract from the prospectus which speaks of the Automatic Limited as "holders of the Canadian patent" under the alleged sale and transfer of rights thereunder to the defendant company for the Province of Ontario.

At page 3 of the prospectus there is this statement: "The Canadian Automatic Transportation Co. Limited, has been formed for the purpose of manufacturing, building and operating, in the Province of Ontario, under the valuable patents of the W. C. Carr system of transportation, and leasing rights in connection therewith to subsidiary companies."

At p. 23, there is this reference: "The Automatic Electric Limited, was formed to hold the W. C. Carr Canadian patents, and obtain any subsequent patents without expense to this Company, as is usual in companies of this kind."

In the extract quoted from page 23 of the prospectus, reference is made to the agreement dated 9th of March, 1909, and in the extract already quoted therefrom, there appears the statement in the first recital that the Automatic Electric Limited, the licensor, "is the owner of certain letters patent of the Dominion of Canada, dated the 24th day of December, 1907, granting a patent under No. 109300, &c."

When the prospectus was issued on the 1st of April, 1910, what was the fact about said Canadian patent which

seems to have been the only one in existence at the date of the said agreement?

It was proved at the trial that no extension of the time for manufacture within two years from the date of the patent, as required by sec. 38 of the Patent Act, R. S. C. ch. 69, had been obtained, nor had advantage been taken of the conditions which may be substituted under sec. 44 of that Act. The patent was therefore void at the end of two years from its date. It had no legal existence when the prospectus was put forth by the defendant company on the 1st of April, 1910, and the references in the prospectus and the agreement therein referring to the patent as an existing one were false and misleading.

Under the Ontario Companies Act (1907), 7 Edw. VII., ch. 34, sec. 97, sub-sec. 2; "all purchases, subscriptions or other acquisitions of shares . . . shall be deemed as against the company . . . to be induced by such prospectus, and any terms, proviso, or condition of such prospectus to the contrary shall be void."

An amendment was made to the original statement of claim permitting the plaintiff to set up misrepresentations in the prospectus.

I am of opinion that the misrepresentation as to the existence of the patent was a material one and that under the section of the Companies Act referred to, the contract of sale for the first block of shares is void.

I am also of opinion that the defendant Weaver did falsely and fraudulently represent to the plaintiff in connection with the sale of the second block of 50 shares of the capital stock that the business of the company was so great as to render it necessary to erect a second factory. I find that this was a material misrepresentation made by the agent of the company to the plaintiff on which he relied and by which he was misled and induced to purchase the stock: *Lloyd* v. *Grace Smith & Co.*, [1913] A. C. 716. The sale of the second block of stock must also be set aside.

I have come to this conclusion on the evidence of the plaintiff and Weaver alone, giving credence to the testimony of the plaintiff as against that of Weaver. I have not taken into consideration the evidence of other witnesses called by the plaintiff to shew that Weaver had made similar representations to those persons when inducing them

to also buy stock in the defendant company. The evidence was taken at the trial subject to objection and I do not think it material or necessary to pass upon its admissibility.

It appears that the plaintiff did not learn that the representations which had been made to him were untrue until at a meeting of the defendant company held in Welland in February, 1913. Thereupon he promptly made the claim which he is seeking to enforce in this action, and it being resisted issued his writ on the 26th of May, 1913.

There will therefore be judgment against the defendant company rescinding the subscriptions for the said shares, rectifying the stock register by removing the name of the plaintiff as a shareholder therefrom, and for repayment of the sum of $500, paid by the plaintiff for the first block of stock, with interest from the dates when he paid therefor; and judgment also against the defendant company and the defendant Weaver for $500 paid by the plaintiff for the second block of stock, with interest in the same way.

The plaintiff will have his costs of suit as against both defendants.

HON. MR. JUSTICE SUTHERLAND. APRIL 28TH, 1914.

ELMER v. CROTHERS AND CORPORATION OF CITY OF KINGSTON.

6 O. W. N. 288.

Action—Settlement—Release Signed by Woman—Undue Pressure—Influence.

Where a woman accustomed to business agreed to accept $150 in settlement of an action for damages for personal injuries

SUTHERLAND, J., *held*, that the fact that her injuries turned out to be more serious than she thought was no ground for setting aside the settlement which in the circumstances and at the time the amount offered did not appear unreasonable.

North British Rw. Co. v. *Wood* (1891), 18 Ct. Sess. (4th series) 27, and *Gissing* v. *Eaton* (1911), 25 O. L. R. 50, followed.

G. M. Macdonnell, K.C., for plaintiff.

J. L. Whiting, K.C., for defendant Crothers.

D. A. Givens, for defendant corporation.

Hon. Mr. Justice Sutherland:—The defendant Crothers owns property situate on the south-east corner of Clergy and Earl streets in the City of Kingston. His house stands back from the street line, and the land is not fenced along the street limits.

From the north-west corner of the house he had built a barbed wire fence to the north-west angle of his lot and beyond on the boulevard of the street almost to the point where the concrete walks on said streets intersect.

On the night of February 1st, 1913, at about 10 o'clock, the plaintiff, accompanied by her daughter, was walking in a westerly direction along the sidewalk on the southerly side of Clergy street and opposite the defendant Crothers' property, when she suddenly noticed a runaway team coming easterly along Clergy street beyond Earl street, at, as she says, "a terrific rate" and heading directly towards her. In her fright she ran southerly from the walk, across the boulevard ten feet wide, and upon the defendant Crothers' lawn.

While there were electric lights in the vicinity she says she did not see the fence and ran into it at a point ten feet from the southerly limit of the boulevard or street line, and about midway between the corner of the house and the corner of the defendant Crothers' lot. She got entangled in the wire, fell down heavily and dislocated her shoulder and cut her face. As a result she was confined to bed for about a week and under the doctor's care for two weeks.

The result of the injury was to leave the arm somewhat stiff and difficult to raise above the shoulder.

After some weeks the physician in charge seemed to think, and the plaintiff herself, that she was making satisfactory progress to recovery. She is a milliner and testified that before the accident she was making $10 per week.

The writ herein was issued on the 18th April, 1913. On the evening of May 1st, following, the plaintiff received a call from the Rev. Mr. Neal, who told her he came on behalf of the defendant Crothers "to see about making a settlement for the injuries." After some conversation he offered $100 in settlement, which she refused. He left and soon returned with the defendant Crothers when there was a further discussion as to settlement, those present being the plaintiff and her daughter, Mr. Neal and the defendant, Crothers. The latter increased the offer to $120, or $125,

based on $10 a week for twelve weeks. Thereupon the plaintiff mentioned that the doctor's bill was $30, and Crothers said he would pay that also, increasing his offer to $150. The plaintiff accepted this and signed a receipt written by her daughter, as follows: "May 1-13,—I hereby agree to accept from W. J. Crothers, one hundred and fifty dollars, in full settlement of my claim made for injuries received February 1st, 1913, at the corner of Clergy and Earl streets. I to pay doctor's bill and all other expenses involved.

(Signed) Annie Elmer.

Witnesses: Lena Elmer.
T. W. Neal."

Mr. Neal and the defendant Crothers then left and the latter sent the plaintiff that evening or next day a cheque, dated May 2nd, 1913, for $150, to the order of the plaintiff, and having written across the face, "In settlement in full for your claim."

On the 14th May the plaintiff's solicitor wrote to the defendant's solicitor a letter, marked without prejudice, but which was agreed to be read at the trial, as follows:

"ELMER v. CROTHERS.

"In this case we have been informed that certain negotiations have taken place between the parties themselves without the intervention of their solicitors, and a cheque for a certain amount has been given by the defendant to the plaintiff, which she is still holding, being somewhat uncertain as to what her position in the matter is. We do not want to unnecessarily interfere in the negotiations, notwithstanding their irregularity, but we understand that no provision was made as to the plaintiff's costs. Those we would fix at $20 and upon receiving a cheque for that amount, we have no doubt the settlement will be carried out."

No reply was apparently sent to this, and on the 10th October, 1913, a statement of claim was filed in which the plaintiff charged that the barbed wire obstruction was wrongfully and unlawfully maintained by the defendants on the boulevard and highway, and that the plaintiff whilst lawfully passing along the "highway as aforesaid struck against it and received serious bodily injuries."

The defendant Crothers, in his statement of defence, pleaded the settlement already referred to and the defendant corporation denied that it had unlawfully maintained the

barbed wire obstruction on the boulevard and highway and claimed a remedy over and against the defendant Crothers. The plaintiff filed a reply in which she alleged that Mr. Neal had induced her by his representations of the facts and circumstances to withdraw the conduct of the action on her behalf from her solicitors and to place the settlement thereof in his hands, "and he thereupon endeavoured to persuade her to accept the settlement offered her by the defendant Crothers, and for that purpose procured her to sign some paper," and further that she was induced to sign and did sign the same under "the undue pressure and undue influence and representations of the defendant Crothers and the said minister."

The cheque already referred to was retained by the plaintiff without being endorsed and was produced by her at the trial.

The accident undoubtedly occurred on the property of the defendant Crothers, and it is clear, I think, that there is no liability on the part of the defendant corporation. Indeed, it was not seriously contended at the trial that there was. The plaintiff says that her ability to earn has been impaired and that her arm is still stiff and may never be completely well or as useful as before. A medical man called by her said she was all right except for an impaired function or use of the arm for anything above the shoulder and that he did not think there would be much change. A physician called for the defendant Crothers did not differ much in his evidence but said that for ordinary domestic or dressmaking purposes the arm was "quite all right."

There was a city by-law in force at the time of the accident, from which I quote:

"37. To prevent persons crossing boulevards on foot at the corners of streets or lanes and injuring the same, the owner or occupant of any premises situated at the intersection of streets or lanes may (having first obtained permission from the City Engineer) erect and maintain a suitable fence or hedge or railing approved by the said City Engineer, from such premises to the inner edge of the sidewalk.

62. From and after the passing of this by-law no person shall erect or continue along any public street or place in the city any barbed wire fence or any fence constructed partly of barbed wire, within one foot of any such street or place, without at the same time masking or covering with wooden slats or laths of sufficient thickness and breadth the wires

on the side of the fence next such street or place, the said slats or laths to be renewed as often as may be necessary."

In so far as the defendant Crothers erected a barbed wire fence along a portion of the street, it may be that he was doing an illegal thing, but the by-law has no application to that part of the fence which was constructed on his own property and not "along any public street or place in the city," and the accident having occurred at a point ten feet away from "any such street or place" the plaintiff cannot make the defendant Crothers liable in any way under the by-law.

Neither the defendant Crothers nor Mr. Neal was called at the trial, although a portion of the former's examination for discovery was read on behalf of the plaintiff. Upon her own shewing, however, I am unable to come to the conclusion that there was any undue influence exerted or representation made by either the defendant Crothers or Mr. Neal to bring about the settlement or on account of which I could properly set it aside.

At the trial she said: "I spoke of the doctor's bill and he (Crothers) said he would pay it. I said I would accept $150; the agreement was drawn up and I signed it." She also testified that her solicitor knew of the settlement soon after it was made. She testified that there was talk on the part of Neal or Crothers to the effect that if she went to trial she might get less and that even if she got a larger amount she might have to pay costs out of it and in the end receive not more than the proposed settlement. Her daughter testified that she asked Mr. Crothers to leave the matter over until the morning until they could talk it over, but he said that she would see her lawyer and they might not then accept the proposed settlement; that thereupon her mother said she had better take it than go to Court and get less. The daughter also said that before the paper was signed Mr. Neal had stated to her mother that he wanted her to be perfectly satisfied and if she were not he would not sign the document; that thereupon she said she was satisfied.

It is plain that at that time she supposed her arm was likely to get completely well. Indeed, in her examination for discovery she stated that the only reason she declined to stand by the agreement was owing to the fact that the injury had turned out to be more serious than she thought. She is a woman accustomed to business and apparently decided to accept a certainty rather than run chances.

In the circumstances and at the time, the amount offered did not appear to be an unreasonable settlement. I think in view of her solicitor's letter that if the $20 for costs therein had been mentioned nothing more would have been heard of the case and this was after the settlement and apparently after a conference with her solicitor about it.

I think the action fails, therefore, on the ground that the plaintiff agreed to accept $150 in settlement thereof and is bound thereby; *North British Rw. Co.* v. *Wood* (1891), 18 Ct. of Sess. Cas. (4th series) 27; *Gissing* v. *T. Eaton Co.* (1911), 25 O. L. R. 50.

But even if I had not come to this conclusion I would be obliged to dismiss the action as against the defendant Crothers also on the ground that the fence at the point where the accident occurred not being substantially adjoining the highway there could be no liability.

Counsel for the defendant relied on *Coupland* v. *Hardingham* (1818), 3 Camp. 397. There is, of course, a duty upon those whose property abuts on a street not to permit an excavation to exist or a barbed wire fence to be erected so adjacent to it as that those lawfully using it may by some "sudden start of a horse" or "making a false step or being affected with sudden giddiness" or perhaps being suddenly started by a runaway horse, fall into the excavation or come in contact with the barbed wire and injury result. Beaven on Negligence, 3rd ed., pp. 364, 428, 429, and 435.

But the test as to liability is whether the excavation or fence is so near the highway as to interfere with the ordinary use of the same by the public.

In the present case the. fence in question at the point where the plaintiff came in contact with it was 20 feet distant from the sidewalk on which the plaintiff was walking and 10 feet back from the street line on the defendant's property.

It would, I think, be out of question to impose a liability on the defendant in such a case: *Hardcastle* v. *South Yorkshire Rw. & River Dun Co.* (1860), 4 H. & N. 67; *Binks* v. *South Yorkshire Rw. & River Dun Co.*, 3 B. & S. 342; *Latham* v. *R. Johnson & Nephew Ltd.*, [1913] 1 K. B. 398; *Pedlar* v. *Toronto Power Co.* (1913), 29 O. L. R. 527.

The action will, therefore, be dismissed as against both defendants, with costs, if asked.

HON. MR. JUSTICE SUTHERLAND. APRIL 28TH, 1914.

FAUQUIER v. KING.

6 O. W. N. 310.

Contract—Railway Construction — Material Supplied and Services Rendered—Claim for Balance of Contract Price—Counterclaim.

SUTHERLAND, J., gave plaintiff judgment for $5,315.24 and costs and dismissed defendant's counterclaim, in an action to recover $6,475.84 as balance alleged due on account of services rendered and material supplied by plaintiff to defendant and money paid by plaintiff for defendant in connection with the construction of the Transcontinental Railway under an agreement.

F. H. Chrysler, K.C., and C. J. R. Bethune, for plaintiffs.

J. F. Smellie, for defendant.

HON. MR. JUSTICE SUTHERLAND: — In this action the plaintiffs, who had a contract from the National Transcontinental Railway Commission for the construction of about 100 miles of the Transcontinental Railway, from a point near Cochrane station westerly, with the exception of the stations and steel bridges, and who had so far performed it as that the rails had been laid and the ballasting was being completed, and who in connection with their own work operated trains along the line of railway covering their district, entered into a contract, in the month of December, 1911, with the defendant, who also had a contract from the Commission to erect the stations on the plaintiffs' section.

The initial arrangement was made between the defendant and one Chamberlain, as general manager of construction for the plaintiffs, at a place on their section, known as Grond Hog river, about 50 miles west of Cochrane. Chamberlain said that the arrangement was as follows: "King asked me for a rate on his freight for the contract that I was manager of. I said I would give him the same rate that we were charging our sub-contractors, which was $1 per car per mile for full carloads. He said he did not wish a rate on less than carload lots as his material would all come in full carload lots."

"Q. To what class of freight did you refer? A. Well, it was material for stations, like lumber, brick, etc., anything that went to make up a station outside of the foundation.

Q. Was anything said about what rate you would give Mr. King for passengers? A. Yes sir. He asked me about our passenger rates and I told him that they were 5 cents per mile, but on account of his being a sub-contractor, that in addition that I would give him an annual pass for himself, or a time pass we call it, to enable him to go over the work and inspect it, but that his men would have to pay the regular rate that we charged our own sub-contractors, which was 5 cents per mile.

Q. Did you have any conversation as to what you would charge Mr. King for transporting gravel? A. Yes sir, he asked me for a rate on gravel.

Q. Please give the substance of that conversation as fully as possible? A. I told Mr. King we would furnish him an engine and engine crew and a train crew for $10 per hour, for a minimum period of 10 hours; that we would charge him $1 per day for flat cars to load his gravel. He asked me if we could not let him have Hart cars, but I told him we were using all the Hart cars for our own purposes.

Q. And Hart cars? A. Hart cars if we could furnish them, for $3 a day, but I did not agree to furnish them.

Q. Was there anything said by Mr. King as to where he expected to get his gravel? A. No sir.

Q. Did you agree to furnish Mr. King with the gravel? A. I did not.

Q. Was there anyone else present in the room at the time the conversation occurred? A. Mr. Holland and J. B. O'Brien.

Q. Have you ever received any communication of any kind from Mr. King since that time? A. I have not.

Q. Did you ever in the conversation with Mr. King say to him that you would haul his freight for 2 cents per ton per mile? A. I did not.

Q. Did you ever have any conversation with Mr. King of any character about a rate per ton per mile for hauling his freight? A. I did not.

Q. Did Mr. King raise any contention or discussion about the rates that you gave him? A. He did not; he expressed himself as being absolutely satisfied."

The defendant says that at the interview in question he asked Chamberlain what the plaintiffs would supply him with gravel for, over their division, and that Chamberlain replied that he would charge $10 per hour to load the gravel and

unload, and that the time should be estimated from the time they started to load at the pit until the train came back to the pit, that the loading was to be done with a steam shovel, and the unloading with a ledgerwood, and that such charge was to include the train crew. Then he says that he further asked Chamberlain what he would haul his material for, and that the reply given was 2 cents per ton per mile with a minimum of $5 per car.

Two other witnesses testified that they were present at the interview and substantially corroborate the evidence of Chamberlain as to what was said.

It appears that in October following, Chamberlain met with an accident and left the employment of the plaintiffs. Soon after the conversation between Chamberlain and the defendant on the 9th of September, 1911, the defendant bgan to ship freight in cars which were received by the plaintiffs at Cochrane from the T. & N. O. Railway and placed for the defendant along the plaintiffs' section where indicated by him, and moved from time to time from one place to another as directed by him.

The plaintiffs were the owners of certain gravel pits along the line of their section and furnished from these pits gravel for the defendant to use in connection with the construction of the stations under his contract with the Commission. Matters ran along until December 9th, 1911, the plaintiffs in the meantime having rendered accounts to the defendant on the basis of their understanding of the contract as reported to them by Chamberlain. On this date the plaintiffs wrote to the defendant a letter in the following terms: "We wish to advise you that our understanding of the arrangement for freight as arranged by Mr. Farquier with the Commissioners of the Transcontinental, is that we are to charge two cents (2c.) per ton per mile, with the minimum charge of five dollars ($5) per carload, and that the understanding is that a minimum carload will be sixty thousand pounds (60,000 lbs).

This cancels all previous arrangements for freight or notifications in that regard," to which letter the defendant replied on the 15th December as follows:

"I have your favour of the 9th inst. regarding the rate of freight to be charged; I have also been advised by the Commissioners and thank you for your confirmation."

It appears that in the meantime the defendant had been interviewing the Commissioners on the question of the rates to be charged. Notwithstanding his last mentioned letter the defendant was still apparently not satisfied and particularly with the "minimum of 60,000 pounds per carload," and a correspondence ensued between the plaintiffs and him over the matter. Accounts were sent in by the plaintiffs and payment requested until on the 29th of May, 1912, the plaintiffs wrote to the defendant as follows: "We enclose herewith a statement of your account shewing the freight charges against yourselves and your sub-contractors, and demurrage, supplies and other accounts, and also shewing the two cheques we have received from you on account, and we would say that unless we receive your cheque for this account by return mail will be obliged to draw on you at sight for the amount as we must have it closed up and not have it running on indefinitely."

The defendant was resisting payment and claiming that the charges should be on the basis of his alleged understanding of the contract, and finally a temporary arrangement was made through the instrumentality of the Commissioners. When the plaintiffs had performed all the services and supplied all the materials for which they claim in this action, there were five items of account in respect to which they claim is preferred.

In their original statement of claim there was first an item for freight at $5,529.70. It was admitted during the course of the trial that this should in any event be reduced to $5,456.50 There was a claim for demurrage as to cars put in at first at $1,911, that is to say, a dollar a day for detention of cars through the action, as it was alleged, of the defendant. It was admitted that this should be reduced in any event to $1,820. There was a claim for gravel for 930 yards at $1.25 per yard, amounting to $1,162.50; a claim for $54 for passenger fares for men of the defendant travelling over plaintiffs' section, and a claim for sundries of $176.50, included in which was an item of $65, which it was stated at the trial should be reduced by $40, thus making the claim as to this item $136.50.

Upon the question as to what the contract was at the beginning upon the weight of the testimony it is impossible for me to do otherwise than come to the conclusion that ia was as stated by Chamberlain and not as stated by the de-

fendant. The oral testimony and the documents bear out in a fairly satisfactory manner the charge for freight, and I have come to the conclusion that it should be allowed at the item already mentioned, namely, $5,456.50.

As to the item of demurrage, the evidence is not so satisfactory as to enable me to reach the conclusion that the defendant should be charged for so large a number of days as 1820. It is difficult to know just what is a fair and reasonable allowance in this connection, but in the circumstances I have come to the conclusion that 1,000 days would be reasonable, and that a proper allowance for this item of the plaintiffs' claim would be $1,000.

I have had much difficulty to know what disposition to make of the plaintiffs' claim for gravel. The defendant says he was to get the gravel; Chamberlain said there was no bargain that the plaintiffs were to supply it, only an arrangement as to the terms on which they would haul it. Nowhere I think, do the plaintiffs shew when it was arranged or upon what terms that the plaintiff should sell gravel to the defendant. The gravel obtained by him came from pits which one of the plaintiffs testified belonged to them. It is clear that the amount of gravel claimed for was received by the defendant and that the prices charged are reasonable. Under these circumstances, and with some doubt, I allow the item at $1,152.50.

I do not think that the evidence as to the fares is such as to justify me in charging the defendant therewith, and this item of the plaintiffs' claim of $54 is disallowed.

There are items also in the claim of sundries, as for example the rent of a car the evidence as to which is not very satisfactory. I think a reasonable sum to be allowed to the plaintiffs under this head would be $75. The sums thus allowed aggregate $7,673.10.

The defendant has already paid on account $2,357.86, which would leave a balance due to the plaintiffs of $5,315.24.

The defendant has counterclaimed for the sum of $3,039.04, but I am unable to see that the evidence and documents would warrant me in allowing any part thereof.

There will therefore be judgment for the plaintiff for $5,315.24, with costs, and dismissing the counterclaim with costs.

MASTER-IN-CHAMBERS. APRIL 29TH, 1914.

GUELPH CARPET MILLS CO. v. TRUST AND GUARANTEE CO. LTD.

6 O. W. N. 311.

Parties—Third—Action by Company against Executors of Deceased Director for Breach of Trust—Third Party Claiming against Co-Director—Contribution or Indemnity.

Executors of one director were sued for breach of trust and they issued a third party notice claiming contribution or indemnity from another director, who moved to set aside notice on ground that there is no right to contribution between joint tort-feasors.

MASTER-IN-CHAMBERS, *held*, that when in pursuance of a judgment, a director has paid to the company the amount found due upon breach of trust, he is entitled to contribution from other directors or persons who were parties to the breach, therefore the third party notice should stand, and directed trial of issue between defendants and third party.

Ramskill v. *Edwards*, 31 Ch. D. 100.
Re Sharpe, [1892] 1 Ch. 154.
Ashurst v. *Mason*, L. R. 20 Eq. 225, followed.

Motion on behalf of the defendants for direction as to trial in third party procedure.

F. Aylesworth, for plaintiffs.

W. J. Boland, for defendants.

H. S. White, for third party.

CAMERON, MASTER:—On return of the motion counsel for third party and for plaintiffs moved to set aside third party notice on the ground that it was not a case covered by the rules entitling the defendants to contribution, indemnity or other relief over against the third party on the well known principle of law that there is no contribution between joint tort-feasors.

This action was brought by the plaintiffs against the defendants to recover $18,894.32, of which amount $12,674.52 is claimed against the defendants on the ground that the late Christian Kleopfer was a director of the plaintiff company and a trustee for the company and as such was responsible for advances, to the extent of $12,674.52 and interest, made by the plaintiffs to the Dominion Linen Manufacturing Company, Limited. A third party notice was issued by the defendants claiming to be indemnified by R. Dodds, a director of the plaintiff company, for any liability arising in

respect of the moneys claimed to have been advanced by the plaintiffs to the Dominion Linen Manufacturing Company, Limited.

It was contended on behalf of the defendants in support of the third party notice that the liability of directors to contribute is governed by sec. 108 of the Companies Act, which is as follows:

"Every person who by reason of his being a director or named as a director, or as having agreed to become a director, or as having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract from any other person, who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of a fraudulent misrepresentation."

The English provision as to liability of the directors to contribute is contained in The Directors' Liability Act (1890) sec. 5, which is substantially the same as sec. 108 above referred to with the exception that the English Act does not contain the words: "unless the person who has become so liable was, and that other person was not, guilty of a fraudulent misrepresentation."

Section 5 of the Directors' Liability Act (1890), was construed in *Shepheard* v. *Bray* (1906), 2 L. R. Ch. D. 235, where it was held that the right of contribution in as much as under the statute it arose as if from contractural relations between the parties can be enforced against the estate of deceased directors, and that the defendants must pay with interest their share.

I think that if the third party notice can be upheld, it must be upheld on a different ground than that contained in the provisions of the Companies Act.

This action is brought against the defendants for breach of trust committed by the late Christian Kleopfer as a director of the plaintiff company.

I think that the action is properly brought as the liability of a director for breach of trust can be enforced by action against his estate after his death. It is clear that the death of a director does not take away the right of the company arising in respect to his breaches of trust, and his

legal personal representatives are liable therefor to the extent of the estate of the testator.

A director who has in pursuance of a judgment paid to the company an amount found due under breach of trust is entitled to contribution from the other directors or persons who were parties thereto.

Pearson, J., in *Ramskill* v. *Edwards,* 31 Ch. D. p. 100, says: "The principle established in the case of *Dering* v. *Earl Wincheslea* is universal."

The principle of the doctrine of contribution between sureties was thus stated my Lord Redesdale: "The principle established in the case of *Dering* v. *Earl Wincheslea* is universal that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract. If several parties are indebted and one makes the payment, the creditor is bond in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. It would be against equity for a creditor to exact or receive payment from one, or to permit or by his conduct to cause the other debtors to be exempt from payment. He is bound seldom by contract but always in conscience so far as he is able to put the party paying the debt on the same footing with those who are equally bound.

See also *Re Sharpe,* [1892] 1 Ch. 154, also *Ashurst* v. *Mason,* 20 Eq. 225 where it was held that directors were liable for contribution.

It is submitted that the only way to bind a person who is liable to make contribution is for the defendant to issue a third party notice and serve it upon him.

I think, therefore, that the third party notice should stand and I make the usual order for directions as to trial of the issues between defendants and third party. The costs of the application will be costs to the plaintiff in any event of the cause; as between the defendants and third party, costs as between them in third party proceedings.

HON. MR. JUSTICE MIDDLETON. APRIL 29TH, 1914.

COX v. RENNIE.

6 O. W. N. 293.

Trade Name—Right to Use Partnership Name—After Dissolution—Similarity to Firm Name of Plaintiffs—Evidence—Action for Injunction.

Where partners engaged in business under a firm name composed of their individual names and one partner sold out his interest to the other,

MIDDLETON, J., *held*, that the purchasing partner had the right to continue business under the firm name, without the consent of the other.

Burchall v. *Wilde*, [1900] 1 Ch. 551 and

Smith v. *Greer*, 7 O. L. R. 332, followed.

That the sole right to restrain anybody from using any name he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, i.e., he must not use a name fictitious or real, or a description, whether true or false which is intended to represent to the public that it is the business of another and thus deprive him of the profits of the business which would otherwise come to him.

That the Court will not interfere to prevent the world outside from being misled into anything. If there is any misleading, it is a matter for the Criminal Courts or the Attorney-General to take notice of, but an individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name.

Levy v. *Walker*, 10 Ch. D. 436 at 447, approved.

Action tried at Toronto, 24th April, 1914.

W. R. Smith, for plaintiff.

W. H. Ford, for defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiffs had carried on business under the firm name of Cox & Andrew, as sign painters and decorators, for about ten years. They seek an injunction restraining William J. Rennie and Edward Charles Hartnell from carrying on a similar business under the firm name of Cox & Rennie.

Rennie had been employed by the plaintiffs in their business. In April, 1913, he entered into a partnership with one Herbert H. Cox, in the sign painting business, under the name of Cox & Rennie. This partnership continued until early in September of the same year, when it was dissolved; Cox selling out his interest to Rennie for a small sum. Cox and Rennie both went to a solicitor's office, and the dissolution was evidenced by a memorandum drawn up by the

solicitor, acknowledging receipt of this sum by Cox "in full of all interest I have had to date in the business of Cox and Rennie." In consideration of this and of the assumption of liabilities Cox assigned to Rennie "all interest I have in the said business of Cox & Rennie."

Rennie then continued business in his own name for a few days, when, realizing that he was placing himself at a disadvantage by reason of all lack of continuity, he reassumed the name of Cox & Rennie. Finally he sought out Hartnell, an employee of the plaintiffs, and entered into a partnership with him. In order to fortify his position he procured one W. G. Cox, a caretaker in an office building, to sign a memorandum authorizing Rennie and Hartnell to use his name in styling their business Cox & Rennie. This good natured individal received no benefit from his participation in this somewhat questionable transaction, except the promise of ten per cent. on all business which he might bring to the new firm. So far this has resulted in nothing.

Cox & Andrews, who had endured what they thought was the grievance they suffered, so long as there was a real firm of Cox and Rennie, thought this called for action. They therefore brought this suit against Rennie.

At the trial I pointed out the difficulty of dealing with the matter in the absence of Hartnell. He was present, and consented to be added as a party defendant and that the defence already on the record for the original defendant should stand as his defence.

Counsel for the defendants did not seriously contend that the machinations with W. G. Cox afford any real right, but he contended most strenuously that upon the dissolution of the firm of Cox & Rennie, Rennie had the right to continue to trade under that name, and that its similarity to the plaintiffs' name gave the plaintiffs no right of action.

The plaintiff called Herbert H. Cox as a witness, and he contends that upon the dissolution of the firm it was expressly understood that Rennie should not continue to use his name, but that he should thereafter carry on business in his own name.

I do not think that the plaintiffs' right in this action depends in any way upon the rights as between Herbert Cox and Rennie. The principle governing the case is well set out

in the judgment of Lord Justice James, in *Levy* v. *Walker*, 10 C. D. 436, at p. 447.

"It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say, a man has a right to say, 'you must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me." That is the principle, and the sole principle, on which this Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything. If there is any misleading, that may be for the Criminal Courts of the country to take notice of, or for the Attorney-General to interfere with, but an individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name."

The underlying principle thus being based upon passing off or the fraudulent representation of the identity of the business carried on by the plaintiff and defendant, the case must be determined upon the evidence as to passing off. In this case I am unable to find any evidence which would enable me to find for the plaintiffs. There is some evidence that similarity of the names has caused confusion, but there is no evidence that the defendants did anything either to bring about that confusion or to profit improperly by it. On the other hand I think the adoption by the present defendants of the name of Cox & Rennie was for the purpose of insuring continuity of the business which had been carried on by H. C. Cox and Rennie. H. C. Cox and Rennie I think had the right to carry on business in their own names, and in the firm name of Cox & Rennie, and such confusion as has resulted, so far as has been shewn, has only arisen from the similarity of the two firm names.

If the case is to be determined upon the right of Rennie to use the name of Cox & Rennie, then I think he has the

right. On the dissolution of the firm Rennie bought out Cox, and I should find on the evidence against there being any agreement prohibiting the use of Cox's name. It may well be that Cox thought that the right to use his name came to an end on the dissolution of the partnership. If so, he was in error. *Burchall* v. *Wilde,* [1900] 1 Ch. 551; *Smith* v. *Greer,* 7 O. L. R. 332.

The action fails and must be dismissed; but as I think the defendants' conduct in their dealing with W. G. Cox and endeavouring to bolster up the right to use the name "Cox" by the agreement made with him, is reprehensible, I give them no costs.

HON. MR. JUSTICE MIDDLETON. APRIL 29TH, 1914.

WALL v. OTTAWA.

COUILLARD v. OTTAWA.

6 O. W. N. 291.

Elections—Municipal — License Reduction—Voting on—Form of Ballot—Order Quashing By-law.

In voting on license reduction by-laws the Municipal Act form 20 requires the voter to mark his ballot "for the by-law" or "against the by-law."

MIDDLETON, J., *held*, that a ballot asking "are you in favour of limiting the number of licenses, etc., requiring the voter to mark his ballot "Yes" or "No" was an entire different form of ballot from that prescribed by the legislature and could not be upheld.

Re Milne & Thorold, 25 O. L. R. 420, followed.

Re Hickey & Orillia, 17 O. L. R. 317, referred to.

Motions attacking two by-laws of the City of Ottawa for the reduction of the number of shop licenses and tavern licenses respectively.

James Haverson, K.C., for motion in each case.

W. E. Raney, K.C., for city.

HON. MR. JUSTICE MIDDLETON: — The by-laws were passed under the Act, 1 Geo. V. ch. 54, sec. 21, now found as sec. 16 of the Liquor License Act, R. S. O. 1914, ch. 215. Under this section the council of a city is compelled to submit to the electorate a by-law limiting the number of tavern or shop licenses. Under sec. 28 the council of a town, village or township may itself limit the number of licenses.

The voting upon the by-law is regulated by the provisions of the Municipal Act, which provides a form of ballot paper,

number 20, upon which the voter is required to mark his ballot "for the by-law" or "against the by-law."

The first objection taken to this by-law is that the council departed from this explicit direction of the statute, and apparently assumed that the voting was not upon the by-law, but upon a plebiscite or a question submitted under sec. 398 (10) for the opinion of the electors.

The ballots are headed "plebiscite re tavern licenses" and "plebiscite re shop licenses" respectively; and instead of voting upon a by-law the voters are asked to vote upon a question "are you in favour of limiting the number of shop licenses in the City of Ottawa to ten for the ensuing license year beginning 1st May, 1914, and for all future license years thereafter until the by-law is altered or repealed?" (the by-law in the case of the tavern licenses being precisely similar, except that the word "tavern" is substituted for "shop" and "36" for "10." The voter was required to mark his ballot "yes" or "no."

This is, I think, the substitution of an eitirely different form of ballot from that prescribed by the legislature; and the case of *Milne* v. *Thorold,* 25 O. L. R. 420, must be taken to determine that where the legislature has prescribed a particular form, the by-law cannot be upheld if the voting is upon an entirely different form of ballot. This is not a mistake in the use of the form, nor is it an immaterial variation from a prescribed form. It is the substitution of a totally different form, which may well have misled the voter into thinking that his opinion only was desired, and may have failed to bring home to his mind the fact that legislative action must follow inevitably upon the result of the voting.

I regret exceedingly to be driven to prevent effect being given to the expressed will of the electorate. There is a heavy responsibility upon those charged with the conduct of the elections; and where the result of the carelessness, stupidity, or worse of those charged with this responsibility results in a miscarriage such as this, it should be understood that the responsibility is theirs for the Court has no duty save to see that that which the legislature has required is complied with. There is much force in the view stated in the case which I follow, that those whose property rights are being taken away from them by the will of a bare majority have the right to insist that this shall only be done in the manner in which the law permits it to be done.

This renders it unnecessary to consider the other objection taken to the motion. There is much to indicate that the same laxity which induced the Court to quash the by-law in *Hickey* v. *Orillia,* 17 O. L. R. 317, existed here.

I think the by-laws must be quashed, and I can see no reason why costs should not follow the event.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MAY 1ST, 1914.

RE REBECCA BARRETT.

6 O. W. N. 270.

Will—Construction — Gift to Daughters—"Out of" Rentals—Increased Rentals—No Increase in Gift—"Issue"—Limitation to Children—Estate Tail Negatived—Residuary Estate—Tenancy in Common.

A testatrix provided *inter alia,* "I give—out of the rents—of land on King St. the annual sum of £654. The £600 to be divided equally between my daughters, the £54 to Edith Emily for life." This was followed by a proviso that upon the expiry of the present lease, if the rent is increased, Edith Emily's share is to be $600 per year for life.

MIDDLETON, J., 25 O. W. R. 710; 5 O. W. N. 807, *held,* that this was a gift to the daughters of $600 and no more and that they did not take any increased rental after deducting the allowance to Edith Emily.

Re Morgan, [1893] 3 Ch. 222, and other cases referred to.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by Helena A. Mossom, the married daughter of the testator, from an order of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 710, dated 27th January, 1914, made on an originating motion for the construction of the will of Rebecca Barrett.

The reasons for judgment as reported contain a full statement of the provisions of the will which are in question and of the contentions of the parties as to the meaning of them.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

F. Arnoldi, K.C., for appellants.

W. N. Tilley, for unmarried daughters.

I. F. Hellmuth, K.C., for sons.

H. S. White, for executors.

Their lordships' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—I agree with my brother Middleton that there is no gift to the daughters of the rents and profits of the Bostwick property, and that the effect of the will is to give annuities payable out of these rents and profits.

It is unquestionable that unless a contrary intention appears by the will a devise of the rents and profits of land carries the land itself and by force of the Wills Act the fee simple or other estate of the testator in the land, and in *Goring* v. *Hanlon* (1869), 4 Ir. C. L. 144, it was sought to extend this rule of construction to bequests of specific annual sums out of land, but it was held that it was not applicable even though the specific sums happened to be the whole of the rent which at the time the land produced.

Some support for the proposition that a devise of an aliquot part of the rents and profits of land passes a like part of the land itself, is to be found in *Bent* v. *Cullen* (1871), 6 Ch. 233, but that case cannot in the light of subsequent cases be treated as authority for the proposition, and it is stated in Theobald on Wills, 7th ed., 503, that it "must be considered overruled." The case is discussed in *Re Morgan,* [1893] 3 Ch. 222, and it was there said by Lindley, L.J., p. 228, that he could "not help thinking that in *Bent* v. *Cullen* the Lord Chancellor, Lord Hatherley, did for a moment fail to observe the difference between giving a person a portion of the income of a fund and something payable out of it."

In *Re Morgan* the testator gave and bequeathed the whole of his property, real and personal, to his executors and trustees "upon trust to pay out of the interest and rents arising from the same the following sums of money; I give to my wife Elizabeth Morgan £250 per annum . . . I give to Captain H. H. Morgan or to his descendants £250 per year, also to Mr. Percy Morgan or his descendants £250 per year. To Mrs. Annie Augusta Hardie or her descendants £250 per year. To Mrs. Susan Pratton £50 per year. To Mrs. Susan S. Seller ten shillings per week. To each of the children of the late Mr. Wm. Addis a legacy of £10;" and after a bequest of the contents of his dwelling house, the will provided that "with regard to the residue of the interest and rents after the above payments have been made" it should

be divided in named proportions between certain charitable institutions.

It was contended on behalf of Captain Morgan and Mr. Percy Morgan that they were each entitled to a capital sum which, if invested, would produce £250 per year. In stating his conclusion adverse to this contention, Lindley, L.J., after pointing out, pp. 225-6, that the testator gave the whole of his property, real and personal, and that the passage in the will containing that gift was the only place where he mentioned the corpus of the property apart from the income of it except as regards some sums of £10 each and some furniture, went on to say:

"Having given all his property real and personal to the trustees he says that the gift is 'upon trust to pay out of the interest and rents arising from the same the following sums of money.' Now why does he put in the words 'out of the interest and rents?' He puts them in, as it appears to me, to exclude the idea that he is dealing with the corpus of his property."

The conclusion of the Lord Justice was that applying his mind to the will, which was the first thing to look at without being troubled with cases, he could not find apparent in the will any intention "to give these persons anything more than an annuity." He could not see any sign of an intention to give them a portion of the corpus of the testator's property; on the contrary he thought the indications were that he did not intend anybody to have the corpus, not even the charitable institutions; that his own notion was that they should have the income; that he never thought anything about the corpus at all but was giving what he said was an annuity.

The conclusion of Lopes, L.J., was that the payments were charges upon a particular fund and not gifts of a portion of that particular fund.

Although in the case at bar the gift is a direct gift of £654 "out of the rents and profits payable" from the property and not as in *In re Morgan* a gift of the property to trustees to pay the annuities out of the interest and profits of the property, but that circumstance is not for the purpose of the present inquiry of any importance.

It was contended by counsel for the appellant and for the 3 unmarried daughters, that the language of the testatrix indicates that she intended that the gift should extend to the whole of the rents and profits of the property, and it was

said that the increase to $600 of the annuity to the granddaughter provided for in case upon renewal of the lease the rentals should be increased, upon the construction adopted by my brother Middleton, would result in the annuities to the daughters being correspondingly reduced and that that could not have been the intention of the testatrix. I am unable to agree with that contention, and think that the increase in the granddaughter's annuity is to be made only if and so far as the increased rental will permit of its being made after providing for the annuities to the daughters. In other words, that the daughters are to have their annuities of £150 each, and that if the increased rental should permit that being done, the granddaughter's annuity should be increased to the same amount.

It is quite impossible for me to conceive that the testatrix, who contemplated that there would be an increase in the rentals when the renewal took place, if she had intended to give the whole of the rents and profits of the property to the daughters and the granddaughter would not have said so instead of creating and disposing of a fund of £654 payable out of the rents and profits, and it is a strong circumstance making against the contention of the appellant that although the testatrix, as I have said, contemplated an increase in the rental when the renewal of the lease should come to be made the only increase in the annuitis for which she provides is an increase in the annuity of the granddaughter.

It is to be observed, also, that in *In re Morgan* the result of the decision was that the corpus of the fund was undisposed of, while in the case at bar there will be no such result because of the residuary gift to all the sons and daughters of the testatrix.

It was also contended that in any case the annuities were not as my brother Middleton held, annuities for the lives of the annuitants, but were perpetual. Practically all the previous cases bearing on this branch of the enquiry, and they are numerous, were discussed by Monroe, J., in *Re Forster* (1889), 23 Ir L. R. Ch. 269, and the result of them as well as of that case and the subsequent cases of *Re Morgan*; *Ward* v. *Ward,* [1903] 1 Ir. 211; and *Re Smith's Estate,* [1905] 1 Ir. 453, is that there is nothing in the will in question to take the case out of the ordinary rule, that where annuities are created *de novo,* the annuitants take only for life, al-

though the gift of them is limited to several persons successively for life and then to their children.

On this branch of the case I agree with the judgment of my brother Middleton.

The result is that in my opinion the appeal fails and should be dismissed, and that the costs of all parties of the appeal, those of the executors between solicitors and client, should be paid out of the estate.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS agreed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MAY 1ST, 1914.

RE ROBERT G. BARRETT.

6 O. W. N. 267.

Will—Construction—Gift to Daughter—Moneys in Bank for Household Expenses—Large Sum in Bank at Death—Trust—Surplus—Resulting Trust—Sale of Devised Lands—Mortgages—Personalty—Claim of Devises Disallowed — Mortgage on Wife's Property—Assumption of—Charge on Real Estate.

MIDDLETON, J., 25 O. W. R. 735; 5 O. W. N. 805, *held*, that a gift to the daughter of a testator of "whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping," where there was only a small sum in the bank at the date of the will but $17,200 at the time of the death of the testator, created a trust for the purpose expressed and all moneys not needed for that purpose belonged to the estate as a resulting trust.

Re West, [1901] 1 Ch. 84, referred to.

That where specific houses were afterwards sold and mortgages taken back, the devisees had no right of title to such mortgages.

Re Dods, 1 O. L. R. 7, followed.

SUP. CT. ONT. (1st App. Div.) *held*, that while it was very probable that the testator would have made a different provision as to the disposition of the legacy had he known at the time he made his will that so large a sum would be at his credit at the time of his decease, yet the Court could not place a different construction on the language of the testator from that which would be placed upon it if the fund had been only $500.

Hart v. *Tribe*, 18 Beav. 215, followed.

Above order varied by declaring that the daughter took the $17,200 absolutely.

(See *Re Beckingham*, 25 O. W. R. 564.—Ed.]

Appeal by the three unmarried daughters of the testator from an order of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 735, dated 27th January, 1914, made upon an originating notice for the construction of the will of the testator.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

Tilley, for appellants.

Hellmuth, K.C., for testator's sons.

Arnoldi, K.C., for testator's married daughter.

White, for the executors.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—The questions raised and the provisions of the will upon which they have arisen are stated in the reasons for judgment of my learned brother; 25 O. W. R. 735.

As to the first question, i.e., the devises contained in paragraphs 12, 13, and 14 of the will, we are of opinion that we should follow the decision of the Court of Appeal in *Re Clowes,* [1893] 1 Ch. 214, and being of that opinion the first ground of appeal fails.

The second and remaining question is as to the effect of paragraph 26 of the will which reads as follows:—

"I hereby give to my daughter, Sarah Frances Barrett, whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping."

No question would probably have arisen as to the meaning of this provision but for the fact that the testator had at the time of his death at his credit in his bank the large sum of $17,200.

It is very probable that if the testator had contemplated when he made his will that so large a sum as $17,200 would be at his credit in his bank at the time of his decease he would have made a different provision as to the disposition of it from that contained in par. 26, but that, in my opinion, affords no reason for putting a construction on the language of the testator different from that which would be placed upon it if the fund amounted to no more than $500.

My learned brother's view was that the legatee is not entitled to the fund absolutely, but that a trust is created, and

that all money not needed for the purpose which the testator mentioned "belongs to the estate as a resulting trust."

I am with respect unable to agree with this view and am of opinion that the clear words of gift to the daughter are not cut down or controlled by the statement of the testator as to purpose or object of the gift.

Such a provision in favour of a wife is spoken of by Kay, J., in *Coward* v. *Larkman* (1887), 56 L. T. 278-280, as "the usual provision for a wife after her husband's death."

The bequest in that case was £100 to the wife "for her present wants and for house-keeping expenses," and it was not suggested that any trust was created or that the wife was not entitled to the £100 absolutely, but the contrary was taken for granted in all the Courts before which the case came; (1887) 57 L. T. 285, (1889) 60 L. T. 1.

In *Hart* v. *Tribe* (1854), 18 Beav. 215, one of the questions was as to the effect of a provision of a will in these words:—

"I also request my sister to give her, the said Maria, my wife, the sum of £100 out of any money which may be in the house, or at my banker's at the time of my decease, for her present expenses of herself and the children," and it was held that this was an absolute gift to the wife of the £100.

In delivering judgment the Master of the Rolls said, p. 216:—

"With respect to the first legacy of £100, I entertain no doubt. It was intended by the testator to be paid to the widow, immediately upon his death, and for her current expenses. That being so, I think that it was a proper payment to be made; and the Court will not inquire into the mode in which she has administered that money, provided the infants have really been supported, which it is not disputed they have been. If one was taken away, a few days after the death of the testator or at any subsequent time, I think the Court cannot inquire whether more or less was expended on him, or make her refund. I think she was entitled to receive that £100, and that I cannot now take it away from her."

I am unable to see how, if the wife in that case was entitled to the £100 absolutely, on what principle it can properly be held that the legatee in the case at bar is not

entitled to receive the whole of the fund bequeathed to her or that she can be called upon to account for the mode in which she may have expended it.

While it may probably have been intended by the testator that the legatee should temporarily keep up the house in which he was living at the time of his death, and that his other unmarried daughter should continue to live with her in it, there is nothing in the language of the paragraph in question to create a duty on the part of the legatee to keep up the house or to maintain it as a residence for herself and her sisters, or to indicate that anything but a benefit personal to the legatee was intended.

What the paragraph means, I think, is that whatever money there should be at the time of the testator's death in the places mentioned, whether it should be more or less, should belong to the legatee to enable her to meet the immediate current expenses in connection with housekeeping; and to treat the provision as meaning that a fund was created out of which the legatee was to pay the testator's household debts and "all that could fairly be regarded as falling within that designation during a reasonable time after his death, pending the family reorganization" is to read into the will something which, with great respect for the contrary opinion of my brother Middleton, the testator has not said, and which the language he has used to express his intention does not import.

I would vary the order appealed from by substituting for the declaration contained in its third paragraph a declaration that Sarah Frances Barrett is entitled under the provisions of the 26th paragraph of the will to receive absolutely all money which the deceased, at the time of his death, had at his credit in any bank or upon his person or in his domicile, and with that variation I would affirm the order.

The costs of all parties of the appeal, those of the executors between solicitor and client, should be paid out of the fund.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS agreed.