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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MARCH 19th, 1918.

*MILTON PRESSED BRICK CO. v. WHALLEY.

Mechanics' Liens—Lien of Material-men—Materials Delivered to the Contractor but not upon the Land Sought to be Affected—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, secs. 6, 16—Lien upon Goods—Proximity to Land—Damages Suffered by Owner by Non-completion—Inclusion in Judgment—Sec. 37 (3).

Appeal by Hepburn & Disher Limited (material-men) from the judgment of the Local Judge at Welland declaring the appellants not entitled to enforce a lien under the Mechanics and Wage-Earners Lien Act.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. Proudfoot, K.C., for the appellants.

G. H. Pettit, for the owners and mortgagees Whalley and Toyn, respondents.

The assignee of the company was not represented.

The judgment of the Court was read by HODGINS, J.A., who said that, while the Act gives extensive protection to material-men who supply materials "to be used," the lien so declared is upon the land and erection which it is intended to benefit. In the case of materials supplied it is given upon the land "upon which such materials are placed or furnished to be used" (sec. 6).

The extent of this protection is discussed in Larkin v. Larkin (1900), 32 O.R. 80; Ludlam-Ainslie Lumber Co. v. Fallis (1909), 19 O.L.R. 419; and Kalbfleisch v. Hurley (1915), 34 O.L.R. 268.

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

But here a lien was also claimed by the appellants on their own goods. These had been sold to the contractors, who had since failed. They were delivered in the street, in front of the building and land in question, but never actually reached the latter.

The appellants asked for whatever lien they were entitled to. But no case had yet decided that a lien under the Act, either on the land or on the material itself, existed by mere appropriation of goods to a contract or on delivery to the owner or contractor, unless they were placed upon or reached the land to be affected. The difficulties in the way of any other method of establishing a lien were many. With regard to the lien upon the materials themselves, the statute is explicit in creating it only when they have reached the land to which it is intended to attach them, and from which they cannot be removed (sec. 16 (2)) to the prejudice of any lien.

The general lien under sec. 6, and the special one in the nature of a vendor's lien upon the material itself (sec. 16 (2)), depend upon the same condition, i.e., the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must be on it, so that either in fact or in contemplation of law the value of the land itself is enhanced by its presence.

The damages suffered by an owner owing to non-completion, while not available to him as a set-off against claims for wages, nor to diminish the statutory percentage required to be retained by him, may be and in some cases must be gone into before the Master or Judge trying a case under the Act. To ascertain the sum justly due from the owner to the contractor necessitates an inquiry, where a case is made for it, as to the value of the work done under the contract as well as the damages suffered, and to be set off or deducted, for work undone or improperly done or for delay.

If this inquiry is proper, then the provisions of sec. 37, sub-sec. 3, of the Act seem wide enough to allow the result to be put in the judgment directed to be pronounced by the Master or Judge trying the action.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. MARCH 18th, 1918.

*RE MONKMAN AND CANADIAN ORDER OF CHOSEN FRIENDS.

Insurance (Life)—Change of Beneficiary—Declaration in Writing—Sufficiency—Insurance Act, R.S.O. 1914 ch. 183, sec. 171 (5)—Will—Intention of Testator—"Personal Estate"—Inclusion of Insurance Moneys.

Motion by Ellen M. Monkman, widow of John Wesley Monkman, deceased, for an order for payment out of Court of a sum paid in by the Canadian Order of Chosen Friends, representing an insurance upon the life of the deceased.

The motion was heard in the Weekly Court, Toronto.

A. R. Hassard, for the applicant.

J. M. Godfrey, for the mother, father, and a brother of the deceased.

F. W. Harcourt, K.C., Official Guardian, for an infant and for one Orr Monkman.

MEREDITH, C.J.C.P., in a written judgment, said that the mother, father, and brother were the beneficiaries named in the policy. The applicant relied on a will executed by the deceased as effecting a change. The deceased was a soldier on active service. The deceased did not in the will identify the policy, and did not in fact refer to a policy or to insurance moneys at all, but he did say in it, "My personal estate I bequeath to my wife." The will was on a printed form; and, immediately under the signature of the testator, were printed, not in the margin, but in the body of the form, the words: "N.B. Personal estate includes pay, effects, money in bank, insurance policy, in fact everything except real estate."

The learned Chief Justice was of opinion that the words contained in the will constituted a sufficient declaration under sec. 171 (5) of the Insurance Act, R.S.O. 1914 ch. 183, so as to substitute the widow as sole beneficiary of the insurance money for the beneficiaries named in the policy.

Reference to In re Cochrane (1908), 16 O.L.R. 328; In re Jansen (1906), 12 O.L.R. 63; and Re Baeder and Canadian Order of Chosen Friends (1916), 36 O.L.R. 30.

If the widow had to rely upon the will as a testamentary document to support her claim to the money, she should succeed. The nota bene clause was not part of the will, because it was not intended to be an integral part of it; but it was not to be ignored altogether. It was printed for a purpose which it performed; common sense required that it be taken into account; and, if the words "personal estate" were capable of comprising all that was set out in the explanatory clause, they should be held to include it.

Order made for payment out of the money in Court to the applicant. No order as to costs, except that the applicant pay the costs of the Official Guardian.

RIDDELL, J., IN CHAMBERS. MARCH 20th, 1918.

*INGERSOLL PACKING CO. LIMITED v. NEW YORK CENTRAL AND HUDSON RIVER R.R. CO. AND CUNARD STEAMSHIP CO. LIMITED.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—No Reason to Doubt Correctness of Decision—Writ of Summons—Service on Foreign Corporation-defendant by Serving Agent in Ontario.

Motion by the defendant the Cunard Steamship Company Limited for leave, under Rule 507, to appeal from the order of MASTEN, J., 13 O.W.N. 481.

J. H. Moss, K.C., for the applicant company.
H. S. White, for the plaintiff company.

RIDDELL, J., in a written judgment, said that he had in several cases—the most recent being Goderich Manufacturing Company v. St. Paul Fire and Marine Insurance Co. (1918), 13 O.W.N. 443—pointed out the prerequisites for such a motion as this to succeed. One of them was that there should appear to the Judge applied to for leave good ground to doubt the correctness of the decision from which it is sought to appeal.

In the present instance, he entirely agreed with the very careful judgment of Masten, J.; and, consequently, however important the matter might be, the motion must fail.

Motion dismissed with costs to the plaintiff company in any event of the action.

MIDDLETON, J. MARCH 20th, 1918.

*RE McCONKEY ARBITRATION.

Landlord and Tenant—Ground Lease—Buildings of Tenant—Covenants and Provisoes in Lease—Determination by Arbitration of Value of "Buildings and Improvements" at Expiry of Lease—Construction of Lease—Laxity in Language Used—"Buldings Fixtures or Things"—"Buildings Erections or Improvements"—Mode of Valuation—"Abstractedly"—Use and Value of "Improvements" to Landlord—"Fixtures" Forming Integral Part of Premises—Case Stated by Arbitrators—Forum—Single Judge in Court—Judicature Act, sec. 43.

Stated case submitted by arbitrators upon an arbitration to determine the value of buildings upon demised premises.

See Re Toronto General Trusts Corporation and McConkey (1917), 13 O.W.N. 281.

The motion was heard in the Weekly Court, Toronto.

E. T. Malone, K.C., for the landlord.

M. H. Ludwig, K.C., and A. W. Ballantyne, for the tenant.

MIDDLETON, J., in a written judgment, said that a preliminary objection was made to the case being heard by a single Judge in Court: Re Geddes and Cochrane (1901), 2 O.L.R. 145. But, when that case was determined, sec. 67 (1) (*a*) of the Judicature Act, R.S.O. 1897 ch. 51, governed; it provided that, when a proceeding was directed to be taken before the Court in which the decision of the Court was final, it should be heard by a Divisional Court of the High Court. Sec. 67 (1) (*a*) having been repealed, the only statutory provision applicable is sec. 43 of the present Judicature Act, R.S.O. 1914 ch. 56, which requires all proceedings in the High Court Division to be disposed of by a Judge, who shall constitute the Court.

The arbitration was under a lease dated the 1st November, 1896, made by Richardson to Wilson, containing a covenant by the lessor to pay, after the expiration of the term, "the just and proper value at that time . . . of such buildings and improvements as may then be erected and standing on the said hereby demised premises"—such value to be determined by arbitration—or to grant a new lease, at a rental to be determined by arbitration.

The arbitration was to fix the value of the buildings.

There was a proviso in the lease that "in determining the value of any buildings erections or improvements standing and being on the said demised premises at the end of any 21 years

the said arbitrators are to judge of such buildings erections and improvements abstractedly and without reference to site or renewal value but are only to consider the cost of erection and deducting for age decay wear and tear and damages sustained."

By a provision in the lease, the tenant might refuse to renew, and in that case the lessor should pay two-thirds of the value of the buildings and improvements upon the demised premises, to be determined in the same way.

The expression used in the covenants to pay in the alternative events was the same—to pay the value (or two-thirds of the value) of "such buildings and improvements" as might be upon the premises at the expiry of the term.

There was a covenant to keep and maintain on the demised premises one or more stores or houses, to be composed of good brick, stone, or iron, and other substantial material, of the value of not less that $4,000; and, in the same clause, a covenant to insure the store and houses now erected and "all future erections."

There was then the covenant to pay (already quoted), and a proviso for arbitration whenever there was any question touching the value "of any buildings fixtures or things now or hereafter to be erected or being on the demised premises."

And then the proviso (quoted) as to the way in which the value of "any buildings erections or improvements" is to be determined.

The use of these varying expressions was not to be regarded as modifying or controlling the words of the main covenants—the words actually used in these covenants were not to be read as modified or controlled by the expressions in the other parts of the lease. The covenant was to pay for "buildings and improvements"—these were the words to be interpreted, and not "buildings fixtures and things" or "buildings erections and improvements." Nor should the words used in the covenants to pay be cut down from their natural meaning so as to exclude all that might be more aptly described as "fixtures and things" or as "erections," because these words are found in other parts of the lease, and not in the covenants to pay. The texture of the whole document is too lax for that.

The first question submitted by the arbitrators related to the proviso as to the mode of valuation.

The main covenant afforded the key. The landlord was to pay "the just and proper value at that time," i.e., at the expiry of the lease; and this value was to be determined in accordance with the proviso. This required the worth or value of the buildings to be determined (a) "abstractedly," (b) without reference to site or renewal value, (c) on the basis of "cost of erection,"

less depreciation. The proviso was intended to exclude from the consideration of the arbitrator the element of suitability for the particular site and the "renewal value" of the buildings—the value is to be judged in the abstract apart from the local situs or particular use, and upon the basis of cost only.

Second, the element of use and value to the landlord or any new tenant of the buildings and improvements erected and standing on the demised premises is not a factor in the valuation.

Third, according to West v. Blakeway (1841), 2 M. & G. 729, "improvements" is a word of large significance; and when it is used in a lease it is intended to have a wider and less technical operation than "fixtures." "Improvements" would not cover purely chattel property; but due weight must be given to the other words used, "erected and standing upon the demised premises," and all that, in any fair sense, falls within the description, if in good faith brought upon the demised premises, and forming an integral part thereof, must be paid for by the landlord.

Order declaring accordingly. No order as to costs.

LATCHFORD, J., IN CHAMBERS. MARCH 21ST, 1918.

BAILEY COBALT MINES LIMITED v. BENSON.

Costs—Security for—Scope of Præcipe Order—Costs of Motion to Allow Foreign Company to Intervene—"And Proceedings thereof in this Action"—Costs Resulting from Intervention—Additional Security for Costs—Application for—Money Paid into Court as Security—Payment out.

Motion by the plaintiffs for an order for payment to them of $115 out of a sum of $200 paid into Court by the defendant the Profit-Sharing Construction Company of New York, under a præcipe order directing the said defendant company to give security for costs; and also for additional security for costs.

W. Laidlaw, K.C., for the plaintiffs.
R. S. Robertson, for the defendant company.

LATCHFORD, J., in a written judgment, said that, as in Apollinaris Co. v. Wilson (1886), 31 Ch. D. 632, the defendant company had come into Court to enforce a right, and therefore stood in the position of a plaintiff. The præcipe order was properly made. It provided that the security was to answer the plaintiffs'

costs of a motion for an order allowing the company to defend "and proceedings thereof in this action."

After the company was added as a party, it became the active defendant. It appealed to the Court from a ruling of the Master upon a reference directed at the trial; and that appeal was dismissed with costs. The company then applied for leave to appeal to the Appellate Division, and that application was also dismissed with costs. In both instances, it was ordered that the costs should be paid to the plaintiffs by the defendant company forthwith after taxation. These costs were taxed at $115.

The defendant company contended that, under the terms of the præcipe order, the money in Court was available only for the costs of the motion to allow the company to defend and the proceedings upon such motion. That was too narrow a construction. The $200 was clearly intended to be security not only for the costs of the motion to allow the company to intervene, but also for the costs consequent upon the intervention.

There were no other assets of the company available out of which the plaintiffs' taxed costs could be made; and it would be manifestly inequitable not to allow the fund to be applied in satisfaction of the costs incurred by the plaintiffs owing to the defence set up by the company.

The plaintiffs' application for payment out of Court of the $115 should be allowed.

It was contended also that the company should be ordered to give additional security for costs, owing to the fact that costs, as yet untaxed, resulting from the protracted defence of the company, amounted now to upwards of $1,000; but this contention failed. Since the interim report of the Master (22nd December, 1917), the defendant company had taken no new step. Until it did, an application to increase the security could not properly be made.

Wightwick v. Pope, [1902] 2 K.B. 99, and Stow v. Currie (1910), 20 O.L.R. 353, distinguished.

Should the defendant company take any further steps in the case, an order for additional security would undoubtedly be made.

As the plaintiffs had succeeded on the main point of their application, they were entitled to the costs of the motion, which, upon taxation, might be added to the costs previously taxed, and paid out of the fund in Court.

MIDDLETON, J. MARCH 21ST, 1918.

*TEMISKAMING TELEPHONE CO. LIMITED v. TOWN OF COBALT.

Telephone Company—Right to Maintain Poles and Wires in Streets of Town—Company Incorporated in 1905 by Charter Issued under Ontario Companies Act—Seal of Province—Charter Preceding Incorporation of Town—Crown Domain—Rights under Charter—Act to Prevent Trespasses to Public Lands, R.S.O. 1897 ch. 33, sec. 1—Contract with Town Corporation—Permission to Use Streets—Monopoly for Five Years—Municipal Act, 1903, sec. 331—Powers of Company—Municipal Franchises Act.

Action for declaration of the plaintiffs' right to maintain and operate their telephone system in the town of Cobalt, for an injunction restraining the defendants, the Municipal Corporation of the Town of Cobalt, from interfering with the plaintiffs' poles and wires, and for damages.

The action was tried without a jury in Toronto.

I. F. Hellmuth, K.C., M. H. Ludwig, K.C., and F. L. Smiley, for the plaintiffs.

H. H. Dewart, K.C., and W. N. Tilley, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the defendants claimed the right to prevent the plaintiffs from using the streets of the town for their pole-lines and to require the plaintiffs to remove their poles and wires.

On the 5th April, 1905, the plaintiffs were incorporated by letters patent issued under the seal of the Province, by virtue of the Ontario Companies Act, with power "to carry on within the district of Nipissing the general business of a telephone company, and for that purpose to construct, maintain, and operate a line or lines of telephone along the sides of or across or under any public highways, roads, streets, bridges . . . or other places, subject, however, to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated and to such terms, for such times, and at such rates and charges as by such councils shall be granted, limited, and fixed for such purposes respectively."

The incorporation of the Town of Cobalt was 7 months later than the plaintiffs' charter, and the Township of Coleman was not organised until April, 1906.

On the 2nd April, 1910, an agreement was made between the plaintiffs and defendants that the defendants should have the use of the plaintiffs' poles, but it was provided that the agreement should not be construed as an admission of the plaintiffs' right to erect poles or string wires in the streets of Cobalt.

On the 19th June, 1912, an agreement was made between the parties and authorised by a by-law of the town. By this agreement, the defendants consented to the plaintiffs using the streets for operating their system, subject to certain conditions and restrictions; and the defendants agreed that they would not, during the period of 5 years from the date of the agreement, give a license or permission to any other company to use the streets for a telephone business.

The defendants considered that the plaintiffs' rights expired at the end of the 5-year period, and proceeded to cut down the plaintiffs' poles and wires; whereupon this action was brought.

The learned Judge, after stating the contentions of the parties, setting out the statutory provisions relating to the matters in issue, and referring to British Columbia Electric R.W. Co. Limited v. Stewart, [1913] A.C. 816, 824, said that until a date subsequent to the making of the agreement in question the municipality had no power beyond that conferred by sec. 331 of the Municipal Act, 1903; and under that section the right to operate as a monopoly for 5 years was all that could be given.

The charter of the plaintiffs, issued under the Companies Act, was not the action of the Legislature; nor could it be regarded as a grant of Crown property. Any such grant must be, not under the seal of the Province, but under the hand and seal of the Lieutenant-Governor: sec. 1 of an Act to Prevent Trespasses to Public Lands, R.S.O. 1897 ch. 33.

The charter is the creator of the artificial person—the company—and the provisions of the charter must be regarded subjectively. They confer upon it the powers of a natural person so far as such powers are enumerated. A natural person has the power to own and operate a telephone line, but has not that right unless and until he acquires it. The plaintiffs had the power under their charter, but had no right to exercise that power until they acquired it in accordance with the general law of the land. The whole scheme of the Companies Act is to confer power upon the companies chartered; and it gives no right to those issuing the charter to deal with the rights of the public upon highways or to interfere with the public domain.

Since the granting of the plaintiffs' charter, sections have been added to the Companies Act, now R.S.O. 1914 ch. 178, relating

to the incorporation and powers of companies intended to operate and control a public or municipal franchise; and this statute, read with the Telephone Act and the Municipal Franchises Act and other statutory provisions, makes a consistent and compact body of legislation. But this has been the result of growth. The difficulty has arisen from the fact that this company had its charter and the contract before the law had assumed its present form.

The provisions of the Municipal Franchises Act do not apply to a telephone company.

Action dismissed with costs.

MASTEN, J. MARCH 21ST, 1918.

*RE BRENZEL AND RABINOVITCH.

Vendor and Purchaser—Agreement for Sale of Land—Title—Requisitions—Description in Deeds—Admissibility of Parol Evidence to Identify Lands Described with Lands Occupied by Vendor, Subject of Agreement—Finding upon Evidence—Good Paper Title Shewn.

An appeal by Brenzel, the purchaser, from the certificate of George S. Holmested, K.C., an Official Referee, of his findings upon a reference as to title made to him by an order of a Judge upon an application under the Vendors and Purchasers Act.

Rabinovitch agreed to sell and Brenzel to buy "house and premises number 115 Wolseley street, Toronto, with appurtenances and vacant lot adjoining to the west (up to the east wall of house number 119 Wolseley street), having a frontage of at least 51 feet by an even width of at least 110 feet to Willis street in the rear; the said premises having a frontage on Wolseley and Willis streets."

The agreement contained a proviso that "the title is good and free from all incumbrances save as aforesaid, and is not altogether or in part a title by possession."

The Referee found that the vendor could sufficiently answer the 11th and 12th requisitions on title delivered by the solicitors for the purchaser, as follows:—

"11. Required production and registration of a proper grant from all parties interested in these lands so as to give our client a clear title to lands having a frontage of 53 feet 4 inches by a depth of 117 feet 11 inches.

"12. Required evidence that the lands known as 115 Wolseley street and the vacant lot adjoining are the same as lots 3 and 4 referred to in your deed"—that is, the conveyance to the vendor.

The appeal was heard in the Weekly Court, Toronto.
Joseph Singer, for the purchaser.
H. Howard Shaver and D. C. Ross, for the vendor.

MASTEN, J., in a written judgment, after stating the facts at length, referred to Waterpark v. Fennell (1859), 7 H.L.C. 650, 678; Lyle v. Richards (1866), L.R. 1 H.L. 222, 229; Van Diemen's Land Co. v. Marine Board of Table Cape, [1906] A.C. 92; and said that these cases established that parol evidence, in the circumstances stated by him as existing, was admissible to shew that "lots 3 and 4" was the name of the whole parcel occupied by the vendor and his predecessor in title and described in the agreement for sale, and that the acts of the parties might be given in evidence to interpret the description in the conveyance.

The evidence of the witnesses Johnson and Rabinovitch established that for upwards of 29 years the lands described in the agreement of sale, from the westerly limit of house 113 to the easterly limit of house 119, were occupied by the Johnsons, father and son, as tenants of the Bell estate, or as owners; that the block was wholly enclosed either by buildings or walls; and that the lands were occupied by the Johnsons and their successors as of supposed right, and not as trespassers or intruders.

With some hesitation, the learned Judge finds, on the rather sketchy evidence adduced, that the lands have been occupied during these years "as and for lots 3 and 4."

The strip described by the Referee as forming part of lot 2 does not in fact form any portion of lot 2; but the whole of the lands described in the agreement of sale are, upon the evidence, lands to which the vendor has a paper title under the conveyance to him of lots 3 and 4.

Appeal dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MARCH 22ND, 1918.

McLAREN v. PEUCHEN.

Judgment—Motion for Summary Judgment under Rule 56—Action on Promissory Note—Defence—Part Failure of Consideration—Vague Statements in Affidavit—Unascertained and Indefinite Claim—Leave to Defend Refused—Right of Action on Cross-claim Reserved.

An appeal by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion for summary judgment under Rule 56.

D. L McCarthy, K.C., for the plaintiff.
J. W. Bain, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the action was on a promissory note for $141,000, dated the 11th August, 1914, payable 6 months after date, with interest at 10 per cent. Payments had been made on account amounting to $9,000, and the balance with interest was $158,385.45.

The defendant, in the affidavit filed with his appearance, said that he bought property in 1911; that the price was $461,300; that certain payments were made; and "the note sued upon in this action is the bal nce of the amount due under the terms of the said agreement." He then stated that he had claims against the plaintiff for some shortages and deficiencies and for charges against the property conveyed which he had to pay, and also because of defect in title.

The defendant's right to a trial in the ordinary way must substantially depend upon his own affidavit. The affidavit was most vague and unsatisfactory; and, in the opinion of the learned Judge, did not disclose any defence. All that was hinted at was a part failure of consideration. This did not afford any defence, but might be the basis of a counterclaim.

Partial failure of consideration is a defence pro tanto against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise: Chalmers on Bills of Exchange, 6th ed., p. 99; Halsbury's Laws of England, vol. 2, p. 497; Day v. Nix (1824), 9 Moore (C. P.) 159.

Appeal allowed; judgment to be entered for the plaintiff for the amount claimed and costs; reserving to the defendant the right to sue for any claim he may be advised to assert against the plaintiff.

MIDDLETON, J. MARCH 22ND, 1918.

*RE RUTHERFORD.

Will—Construction—Devise of "House and Premises"—Addition to Premises after Date of Will—Whole Passing by Devise—Will Speaking from Death—"Contrary Intention"—Wills Act, sec. 27.

Motion by the widow and residuary legatee under the will of Arthur Rutherford, deceased, for an order determining a question as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.

C. W. Livingston, for the applicant.

A. C. Heighington, for the children of the testator's first wife (adults).

F. W. Harcourt, K.C., for infants in same interest.

MIDDLETON, J., in a written judgment, said that the testator died on the 15th February, 1912, having made a will dated the 28th March, 1907. At the date of the will, the testator owned a house in Merton street, suppsoed to be built on 20 feet of land, but a back porch and a walk leading to it and to the rear of the house were partly upon the land lying immediately to the west. On the 18th October, 1910, the testator bought 55 feet to the west of his house; and this land had ever since been enclosed with the original 20 feet, and had been used as a garden, and a chicken-house was erected upon it.

By his will the testator gave his "house and premises on Merton street" to his widow for life, and on her death or remarriage to his children then living. The residue of his estate was given the widow absolutely.

The widow contended that the words "house and premises on Merton street" did not cover the 55 feet acquired after the will, and so the latter was hers absolutely under the residuary devise.

In Re Ingram (1918), 13 O.W.N. 418, the learned Judge recently had to consider the cases upon sec. 27 of the Wills Act, and to refer to what he thought was the established rule of construction. The section in effect provides that, unless from the will itself you can see that the testator did not intend after-acquired property to pass, it must be read as though he had executed it immediately before his death. In many cases this must result in imputing to the testator an intention which in fact he never had;

but, on the other hand, the opposite rule would even more frequently result in defeating his intention.

Two things have been frequently found in wills which the Courts have taken as an indication of a contrary intention. When a testator speaks of that which he gives as that which he owns at the date of the will, clearly that and that alone is given, for the provision is not that the will must in all respects be regarded as made immediately before the death.

Then when the will speaks of a specific thing and is not general in its provisions, the thing given must be determined by the language used by the testator. Nothing else passes, for nothing else is given. It has always been held that, when the thing given remains and has been added to between the date of the will and the date of death, the whole property answering the description at the latter date will pass.

Reference to In re Willis, [1911] 2 Ch. 563; In re Champion, [1893] 1 Ch. 101; In re Portal and Lamb (1885), 30 Ch. D. 50; Morrison v. Morrison (1885), 10 O.R. 303; Hatton v. Bertram (1887), 13 O.R. 766.

The whole property "on Merton street" passed under the devise of the "house and premises on Merton street."

Costs of all parties out of the residuary estate, if any, of the testator. If there is no residuary estate, no costs.

MEREDITH, C.J.C.P., IN CHAMBERS. MARCH 23RD, 1918.

McFARLANE v. PRICE.

Vexatious Proceedings—Action for Account and Redemption—Judgment for Foreclosure in Previous Action—Attempt to Open up—Refusal to Dismiss Action as Frivolous or Vexatious.

Motion by the defendants for an order dismissing the action as vexatious or frivolous.

Parker, for the defendants.
J. H. Hoffman, for the plaintiff.

MEREDITH, C.J.C.P., in a written judgment, said that the defendants' contention was that this action was really brought for the purpose of opening a foreclosure decreed in another action, recently in this Court; and that that was an improper mode of

proceeding—that an applicaton should be made in the other action.

But that was not the plaintiff's way of stating her claims; and it was she, not the defendants, who had the right to make them.

Informally stated, her claims seemed to be: an arrangement with the defendant Price and his solicitors, of which the other defendants had notice, that she was to be allowed to redeem at any time; or, in the event of a sale, she was to be paid the surplus purchase-money; and that it would be a fraud upon her to deny her right to redeem, and in any case she was entitled to an account and payment of the surplus of the purchase-money; also that the defendants were guilty of trespass to her goods and chattels.

She had a right to take such causes of action, properly pleaded, down to trial—with any other she might be advised she had.

Motion dismissed; costs to the plaintiff in the action in any event.

MEREDITH, C.J.C.P. MARCH 23RD, 1918.

*DUELL v. OXFORD KNITTING CO.

Discovery—Examination of Plaintiff Residing Abroad—Place for Examination—Rule 328—"Just and Convenient."

Appeal by the plaintiff Warfield from an order of the Master in Chambers requiring the appellant to attend at Toronto for examination for discovery at the instance of the defendants. The appellant's place of residence was in New York, where he practised as an attorney and counsellor at law.

P. E. F. Smily, for the appellant.
J. W. Payne, for the defendants.

MEREDITH, C.J.C.P., in a written judgment, said that the authority for making such an order against a party out of Ontario is contained in Rule 328, which provides for an examination taking place "at such place and in such manner as may seem just and convenient."

Fairness and convenience were against the order which had been made and in favour of an examination in New York.

A plaintiff is not bound to come into Ontario to be examined for discovery because he has brought his action in Ontario.

In ordinary circumstances, fairness and convenience require that, when one person is required to testify at the instance of another, the examination should take place where the person to be examined resides. This is emphasised by Rules 227, 228, 337, 345, 347, 580.

No special circumstances were suggested in this case: no reason was given for putting the plaintiff to the inconvenience and loss to which the order in appeal would subject him, without any substantial benefit to the defendants.

The appeal should be allowed, and the order be amended so as to provide for the examination taking place in New York; costs to the plaintiffs in the action in any event.

MEREDITH, C.J.C.P., IN CHAMBERS. MARCH 23RD, 1918.

*RE IDEAL FOUNDRY AND HARDWARE CO.

Company — Winding-up — Custody of Goods in Possession of Sheriff under Execution—Right of Liquidator—Claims of Alleged Purchasers—Winding-up Act, secs. 33, 84, 133.

Appeals by one Arnold and one Winterjoiner, claimants, from an order of J. A. C. CAMERON, Official Referee, appointed Referee under an order for the winding-up of the company, for the interim preservation of the chattel property of the company by placing it in the custody of the liquidator pending an inquiry into the validity of the claims of the appellants, who alleged that they had bought the property.

A. C. Heighington, for Arnold.
A. E. Knox, for Winterjoiner.
M. L. Gordon, for the liquidator.

MEREDITH, C.J.C.P., in a written judgment, said that the substantial question involved was: whether the appellants or the liquidator of the company should have possession of the goods in question, which goods were admittedly at one time the property of the company, and, at the time when the winding-up order was made, were in the custody of the sheriff, in the building which had been in the occupation of the company and in which its business had been carried on, under a writ of execution against the goods and lands of the company. And the answer to that question

seemed plainly to be: the liquidator. He was, upon his appointment, to take into his custody, or under his control, all property to which the company was, or appeared to be, entitled: Winding-up Act, sec. 33.

No lien or privilege existed by reason of the sheriff's levy under execution, except, in certain circumstances, for costs: ib., sec. 84.

And all remedies for enforcing any claim for, among other things, a right of property in any property in the custody of the liquidator is to be obtained in the winding-up proceedings: ib., sec. 133; see also Re J. McCarthy & Sons Co. of Prescott Limited (1916), 38 O.L.R. 3.

When the winding-up order was made, the goods were in the custody of the sheriff, as the goods of the company; and the winding-up order superseded the execution: so that the possession of them should have passed, as it in fact did, from the one officer of the law to the other: but without in any way impairing any claims which the appellants could have made, and could now make, respecting them.

Upon an application, for that purpose, it could, speedily, be settled in what manner the several conflicting claims in respect of the goods should be tried and determined; meanwhile they were in safe custody: see In re Plas-Yn-Mhowys Coal Co. (1867), L.R. 4 Eq. 689; In re Hille India Rubber Co. (No. 2), [1897] W.N. 20; and Palmer's Company Precedents, vol. 2, pp. 408 et seq.

Appeals dismissed with costs, to be paid to the liquidator, in any event, when the appellants' claims to the goods are finally disposed of, or abandoned, if abandoned.

MIDDLETON, J., IN CHAMBERS. MARCH 23RD, 1918.

*RE CITY OF TORONTO AND TORONTO R.W. CO.

Costs—Taxation—Motion to Stay Execution upon an Order not Made in an Action—Motion upon Originating Notice, not Interlocutory Motion—Rule 2.

Appeal by the Toronto Railway Company from a ruling of the Senior Taxing Officer that the costs of the Corporation of the City of Toronto of the appellants' motion (13 O.W.N. 414), which was dismissed with costs, should be taxed as costs of an originating notice and not as of an interlocutory motion.

D. L. McCarthy, K.C., for the appellants.
C. M. Colquhoun, for the city corporation.

MIDDLETON, J., in a written judgment, said that the motion was not an interlocutory motion in an action, and perhaps was not an ordinary motion upon originating notice. It was an attempt to purge the records of the Court from what was regarded as an interloping judgment, which had been placed upon the record without sufficient warrant, as it was thought.

While difficult to classify—having regard to the provisions of Rule 2—the motion referred to may not have been strictly a motion upon originating notice, but had such "analogy thereto" as to justify the taxation.

Appeal dismissed with $10 costs; the present motion, by way of appeal from a taxation, was interlocutory.

MIDDLETON, J., IN CHAMBERS. MARCH 23RD, 1918.

*GOUGH v. TORONTO AND YORK RADIAL R.W. CO.

Costs—Taxation—Injury to Vehicle Insured by Insurance Company—Negligence of Street Railway Company—Loss Paid by Insurance Company to Owner of Vehicle—Action Brought by Insurance Company in Name of Owner against Railway Company—Recovery of Judgment for Damages and Costs—Right of Insurance Company to Tax Costs of Action against Railway Company—Indemnity.

Appeal by the plaintiff from a ruling of the Senior Taxing Officer that the plaintiff was not entitled to tax any costs of the action, though he recovered judgment therein against the defendants with costs.

J. P. Walsh, for the plaintiff.
W. Lawr, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff's automobile was injured by the negligence of the defendants' employees, and this action was brought, and there was judgment for the plaintiff for $600 and costs.

Before the Taxing Officer it was shewn that the plaintiff was insured by an insurance company against an injury by such an

accident as that which occurred; that the insurance company had adjusted and paid his loss; and that the action was brought by the insurance company in the plaintiff's name.

The Taxing Officer had refused to allow costs because the litigation was the litigation of the insurance company, and not of the plaintiff—the action being carried on at the risk and expense of the company, and not of the plaintiff.

It has been decided in many cases that costs are an indemnity, and an indemnity only. Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12, affords only an instance of the application of the general principle.

The costs awarded were the costs of the insurance company, though awarded in the name of the assured.

James Nelson & Sons Limited v. Nelson Line (Liverpool) Limited, [1906] 2 K.B. 217, distinguished.

The appeal should be allowed, and it should be referred to the Taxing Officer to tax the costs on the basis of the insurance company being the real litigant and the plaintiff's name being a name which the law authorised the company to use to sue. The costs of this appeal should be added to those costs.

BROWN v. TOUKS—LENNOX, J.—MARCH 20.

Land—Action to Recover Possession—Evidence—Onus—Boundaries—Possession, Use, and Occupation—Dismissal of Action and of Counterclaim for Damages.]—An action for the recovery of a narrow strip of land, covered with concrete, of about 15 or 20 inches in width, extending easterly from the lane in the rear of the plaintiffs' and defendant's premises, in possession of the defendant, and for damages, an injunction, and other relief. The action was tried without a jury at Sandwich. LENNOX, J., in a written judgment, after reviewing the evidence, said that the onus was upon the plaintiffs to make out their case. There was no satisfactory evidence as to the original boundary; and it would be of no avail if the defendant had occupied in the way she said she had. As to use and occupation and possession, not only had the plaintiffs failed to turn the scale in their favour, but the evidence preponderated in favour of the defendant. The action should be dismissed with costs. The defendant counterclaimed for damages, but had sustained no serious damage. H. L. Barnes, for the plaintiffs. T. Mercer Morton, for the defendant.

O'NEIL v. GRAND TRUNK R.W. CO.—MIDDLETON, J.—MARCH 20.

Master and Servant—Death of Servant—Electric Shock—Workman Employed in Repairing Electric Motors—Regulations of Employers—Evidence—Negligence of Employers—Action under Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146, and at Common Law—Negligence of Deceased—Dismissal of Action—Jury.]—An action under the Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146, to recover damages for the death of one O'Neil, who was employed in the yard of the defendants at Sarnia, in connection with the electric motors used for the purpose of taking trains through the Sarnia tunnel. The death occurred on the 1st October, 1914—before the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.), was applicable. The action was tried with a jury at Sarnia on the 18th March, 1918. The jury made findings in favour of the plaintiff. MIDDLETON, J., now, in a written judgment, considered the question (having reserved judgment upon a motion for a nonsuit before leaving the case to the jury) whether there was any evidence which ought to have been submitted to the jury. He explained the circumstances in which the death occurred, and quoted the company's regulations. On the day of the occurrence, a locomotive was in the defendants' "electric bay" for the purpose of being overhauled, and more particularly for the purpose of having a pneumatic bell on top of the car adjusted. The switch was opened, and O'Neil was instructed by Green, the foreman in the bay, to go on top of the car and adjust the bell. It was then discovered that the bell could not be satisfactorily adjusted until the air-reservoir was filled. O'Neil came down from the top of the car and closed the switch. The pantograph was then raised so as to make contact, and the air-pump was operated for 10 minutes. O'Neil then said that he would go on the top of the car to adjust the bell, which was at the extreme west end of the car. He ascended to the top of the car by a movable step-ladder placed at the east end. This made it necessary for him to pass close by the pantograph. Had he placed the ladder at the west end, he would have been safe. When going up; he did not either open the switch or see that the pantograph was pulled down. The result was that he was electrocuted. Damages were claimed both under the Workmen's Compensation for Injuries Act and at common law. Every conceivable precaution seemed to have been taken by the defendants to secure the safety of their workmen; and O'Neil, who had been almost 3 years working in the bay, and had been very many times on top of cars, was thoroughly familiar with

what the defendants required. In the learned Judge's view, the accident was caused by the negligence of O'Neil himself, in disregarding the plain instructions given him by the regulations to cut off the dangerous current before he went to the dangerous place; and there was no evidence which justified a jury in attributing the accident to any other cause. Action dismissed. A. Weir and A. I. McKinley, for the plaintiff. S. F. Washington, K.C., and J. T. Pratt, for the defendants.

OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK—CLUTE, J.—MARCH 22.

Judgment—Settlement of Minutes—Liability of Bank and of Commissioners Appointed by Lieutenant-Governor.]—Motion by the plaintiffs to vary the minutes of the judgment as settled. The reasons for the judgment are noted in 13 O.W.N. 369. The motion was heard as in Court. CLUTE, J., in a written judgment, said that the plaintiffs objected to the Quebec Bank being included with the Commissioners in para. 2 of the minutes as settled, in respect of the liability to the plaintiffs therein mentioned. After the evidence was in, the case was adjourned for argument; and on the 22nd October, 1917, counsel for the plaintiffs opened by asking leave to amend the pleadings and to claim as against the Commissioners the full amount claimed against all, including the claim against the Quebec Bank. In the reasons for judgment, and in the minutes as settled, effect was given to this application; and in para 2 the Quebec Bank and the other defendants there named were adjudged liable for the amount there mentioned, less the sums properly paid by the Commissioners for teachers' salaries and the conduct of the school etc., as therein set forth. The plaintiffs now stated that they did not propose to amend the pleadings so as to claim from the Commissioners the amount claimed from the Quebec Bank, and desired to take judgment against the Quebec Bank alone in respect of the items mentioned in para. 2. The learned Judge said that the minutes should not now be amended as asked; such an amendment might prejudice the Quebec Bank in that regard, in settling the amount to which the plaintiffs were actually entitled under the terms of the judgment. Motion dismissed; costs in the cause. J. H. Fraser, for the plaintiffs. McGregor Young, K.C., for the Quebec Bank and other defendants. H. S. White, for the Bank of Ottawa.