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HIGH COURT OF JUSTICE.

FALCONBRIDGE, C.J.K.B. NOVEMBER 4TH, 1912.

RE CAMPBELL.

Will—Construction—Devise—Joint Tenancy — Survivorship — Jus Accrescendi.

Motion by John W. Campbell, a devisee under the will of Anne Campbell, deceased, upon the return of an originating notice, for an order determining a question arising upon the terms of the will.

W. S. Hall, for John W. Campbell.

R. A. Pringle, K.C., for the administrators of the estate of Martha S. Campbell.

Donald W. Fraser, surviving executor of Anne Campbell, though duly notified, did not appear on the motion.

FALCONBRIDGE, C.J.:—The question to be decided arises under the will of Anne Campbell, wherein, after certain specific bequests, the following paragraph appears:—

"I hereby bequeath unto my nephew John Campbell and my sister Martha Campbell jointly a piece of land situate west side of the south part of lot number 5 in the ninth concession of East Hawkesbury containing twenty acres of land more or less, and they are to pay my nephew George Campbell the sum of two hundred dollars within three years after my decease and the residue of my estate I give and bequeath to my sister Martha Campbell."

At the time of the death of the testatrix, and for some years previous thereto, John W. Campbell resided with his aunt,

Martha S. Campbell, who is the person referred to in the will as Martha Campbell; and John W. continued to reside with his said aunt until her death (which occurred on or about the 17th August, 1910), on an adjoining farm, which she owned. The said parcel of 20 acres was cultivated in the ordinary course of the farming operations which Martha and John were then carrying on, and John says that the said Martha and he were thus in joint possession of the said parcel of 20 acres from the date of Anne's death until Martha's death.

The parcel of land mentioned is the only land of which Anne Campbell was possessed at the time of her death.

Neither Martha nor John ever conveyed away or incumbered or otherwise disposed of their interest in the said parcel of twenty acres.

The sum of $200 directed by the will to be paid to George Campbell, the nephew, was duly paid to him.

John W. Campbell now contends that, under the devise set forth above, Martha and he became joint tenants of the said parcel, and that he, as the survivor, is now entitled to the whole.

I have outlined the situation of affairs as above, because, while declarations by the testator of what he intended by his will will not be received, yet extrinsic evidence of surrounding circumstances to shew what he probably intended is admissible: Davidson v. Boomer (1868), 17 Gr. 218. It would be entirely reasonable to confer a joint tenancy on a young man and his maiden aunt working and living upon the adjoining farm.

And I think, apart from circumstances, that the use of the word "jointly" in the will creates a joint tenancy, especially when it is coupled with the direction that "they are to pay my nephew George Campbell the sum of $200;" not that each of them is to pay the sum of $100 to George Campbell.

I find two cases in different States of the Union where the law is practically the same as R.S.O. 1897 ch. 119, sec. 11. In Case v. Owen (1894), 139 Ind. 22, it was held that the word "jointly" in the addendum of the deed creates in the grantees a joint tenancy. Coffey, J., says, at p. 24: "As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles, the word "jointly" can find no place in describing an estate to be held by them." See also Davis v. Smith, 4 Harrington (Del.) 68.

The four unities which are the requisites of joint tenancy all here exist.

The judgment, therefore, will be that, on the true construction of the will, Martha S. and John W. Campbell became joint tenants, and that he is now solely entitled by jus accrescendi.

Costs to all parties out of the estate.

Counsel referred also to the following authorities: Encyc. of the Laws of England, vol. 7, p. 513; Jarman, 6th ed., p. 1783 et seq.; Re Gamble, 13 O.L.R. 299; Wharton, 7th ed., p. 392; Kew v. Rouse (1685), 1 Vern. 353; Am. & Eng. Encyc. of Law, 2nd ed., vol. 17, p. 658; Richardson v. Richardson, 14 Sim. 526.

RIDDELL, J. NOVEMBER 4TH, 1912.

SMYTH v. HARRIS.

Settlement of Action—Application for Order of Court—Nature of Order to be Made—Order Confirming Settlement—Taxation of Costs.

Motion by the plaintiffs for an order in terms of a settlement made by the parties. See the note of the decisions upon a motion and an appeal in the same case, ante 168.

H. E. Rose, K.C., for the plaintiffs.

E. F. B. Johnston, K.C., for the defendants.

RIDDELL, J.:—In this case the parties have come to a settlement. The defendants agree to do certain things and to pay certain costs. If the acts are not done by the 1st February, the plaintiffs may "give notice of an application to" myself "to fix a day for trial." "Pleadings to be considered as now closed, and no steps except taxation of costs to be taken in action from execution of this consent until service of notice of application . . . to proceed." "(5) Application to be made by the parties to" myself "for an order confirming this settlement."

The parties now attend; and the plaintiffs submit a formal order, as of the Court, directing the defendants to do the acts, etc., which they agreed to do; the defendants say: "That is not the bargain; non hæc in fœdera veni." And I think they are right.

So far as I am concerned, all I am to do under the agreement is to make an order confirming the settlement, which I do. The parties have not agreed that I am to determine what the settlement means. Very experienced counsel have drawn up the settlement; they, no doubt, know what it means; at all events, they have not agreed that I shall tell them.

Then there is no provision (as is most usual) that an order of the Court is to be made to carry the settlement into effect. The

parties are of full age; presumably they knew what they wanted, and told their counsel what it was; and presumably counsel inserted in the agreement what they intended. It seems from the document itself that the parties were content to rely each upon the promise of the other, not accompanied by an order of the Court to implement the promise. No steps are to be taken in the action from execution of the consent, it is said—that also shews that no order of the Court was in contemplation.

If it be necessary, a direction will be made to the Taxing Officer to tax the costs—but nothing else further than "an order confirming this settlement."

No costs.

RIDDELL, J. NOVEMBER 4TH, 1912.

COWIE v. COWIE.

Husband and Wife—Alimony—Judgment for—Order for Sale of Husband's Lands to Satisfy Arrears—Conduct of Husband Damping Sale—Contempt of Court—Application of Wife to Dispossess Husband—Order Directing Land to be again Offered for Sale—Leave to Wife to Bid—Costs.

Motion by the plaintiff in an alimony action, after judgment in her favour (1 O.W.N. 635), for an order for possession of the defendant's land.

J. W. McCullough, for the plaintiff.
The defendant, in person.

RIDDELL, J.:—In this case, judgment was finally given for the plaintiff by the Court of Appeal for alimony. She registered her judgment, but the defendant did not pay. On the 24th June, 1912, an application was made before me for an order that the lands of the defendant be sold to pay the alimony: he then appeared in person and stated that he could not pay the amount. He claimed also that the judgment had been obtained by perjury. I could not entertain this last plea: on the first and the representation of the plaintiff, I, following the case of Abbott v. Abbott (1912), 3 O.W.N. 683, made an order "for sale of the north half of lot No. 27 in the 7th concession of Pickering . . . or a competent part thereof . . . for the satisfaction of the arrears of alimony . . . with the approbation of the Master in Ordinary. . . ."

The Master settled the advertisement; but the defendant attended the sale, and stated that he never had a title to the said lands, and title could not be given, etc., etc. The auctioneer did not succeed in getting any reasonable bids—and the land was not sold. After the abortive sale, two prospective buyers came to the solicitor conducting the sale and said that they wished to buy, but that, under the circumstances, they were afraid of trouble in getting or retaining possession; if the defendant were dispossessed, they were prepared to offer a reasonable sum for the land, but would not buy while he was in possession. The solicitor swears that, in his opinion, it is very improbable that a fair price can be realised for the land so long as the defendant is allowed to retain possession.

The plaintiff now asks for an order "directing the defendant to deliver up possession of the land to the plaintiff or to whom she may appoint," and for an order directing him to vacate possession. The defendant attended in person on the return of the motion, and again urged that the judgment had been obtained by perjury.

I asked for authority for an order such as is asked for, but none has been furnished, and it is said by the plaintiff's counsel that none can be found.

The arm of the law will probably be found long enough to meet such a case as this by extreme measures, if necessary. At present, however, I do not think the order asked for should be made. I shall make an order that the land be again offered for sale and that the plaintiff be at liberty to bid; the amount of past due alimony and costs to be allowed as part payment; the remainder to be paid into Court payable out to her according as the alimony becomes payable, etc.

The plaintiff is to be at liberty also to serve a notice of motion for an order to commit the defendant for contempt, in case of any further interference with the sale. The defendant must be made to understand that no interference with a sale under direction of the Court will be tolerated. His ignorance thus far may excuse him, but his misconduct must cease.

Costs of this application to be considered in all respects costs in the alimony proceedings.

SUTHERLAND, J. NOVEMBER 4TH, 1912.

BAECHLER v. BAECHLER.

Executors—Application for Advice under Trustee Act and Con. Rule 938—Legacy—Deduction of Amount Due from Legatee to Testator—Pending Action—Adjournment of Motion before Trial Judge.

Motion by the defendants, the executors of Xavier Baechler the elder, deceased, under Con. Rule 938 and the Trustee Act, 1 Geo. V. ch. 26, sec. 75, by way of summary application to the Court, for an order authorising and permitting the applicants to deduct the sum of $754.56 from the amount of a legacy claimed by the plaintiff.

J. D. Montgomery, for the defendants.
C. Garrow, for the plaintiff.
J. R. Meredith, for the infants.

SUTHERLAND, J.:—Xavier Baechler the elder, by his last will, dated the 1st February, 1906, bequeathed to his son Xavier Baechler the younger the sum of $1,000. The latter died on the 27th September, 1906; and the plaintiff is his widow and the administratrix of his estate. The father, died on the 12th March, 1907; and the defendants are the executors under his will, and letters probate have been duly issued out of the Surrogate Court of the County of Lambton, dated the 30th March, 1907.

The plaintiff on the 18th September, 1912, by writ of summons, commenced an action for the amount of the said legacy, and in her statement of claim alleges that the defendants have refused to pay it in whole or in part.

The defendants plead that the estate of Xavier Baechler the younger was insolvent at the time of his death, and that, for the purpose of protecting it, Xavier Baechler the elder advanced moneys to the First National Exchange Bank of Port Huron, Michigan, and obtained an assignment of certain notes and a chattel mortgage. They further plead that they proved the claim of the father against the estate of the son before the Probate Court of the County of St. Clair in the State of Michigan, that being the Court administering the estate of the son, and received a dividend out of the son's estate which left a balance of $754.56 unpaid.

In their statement of defence they also plead that the said balance is now owing by the son's estate with interest, and that they are entitled to apply the legacy in payment of the indebtedness of the son's estate to that of the father. They also say that they have been ready and willing to adjust the accounts between the two estates, but the plaintiff has refused to do this.

This action is coming on for trial at Goderich on the 11th inst.

The defendants are moving under Con. Rule 938 and the Trustee Act, 1 Geo. V. ch. 26, sec. 75, by way of summary application to the Court, for an order authorising and permitting them to deduct from the legacy the said sum of $754.56.

In answer to the motion an affidavit is filed by the plaintiff in which she states that she has recently learned of facts which lead her to believe that there came into the hands of the father certain assets of the son which he did not account for, and that she will be able to prove that there is no such sum as $754.56 owing by the estate of her husband to his father's estate.

I am not at all sure that a question of this kind can properly be determined on an application for advice in this way. See Re Rally, 25 O.L.R. 112; Re Turner, 3 O.W.N. 1438. Any disposition, however, which I would make of the motion would not necessarily put an end to the action.

The defendants in their statement of defence did not expressly say that they were willing to pay the balance of the legacy after giving credit for the debt. It is true that upon the motion they have now proposed to do this. The plaintiff is disputing that there is any such sum owing by the son's estate to the father as is alleged by the defendants. Under these circumstances, I think the proper course for me to take is to enlarge this motion to be disposed of by the presiding Judge at the trial of the action. He will also dispose of the costs incidental thereto.

RIDDELL, J. NOVEMBER 4TH, 1912.

SCARBOROUGH SECURITIES CO. v. LOCKE.

Landlord and Tenant—Continuance of Tenancy after Expiry of Term—Recognition of Continuance—Acceptance of Rent by Beneficial Owners—Act Binding on Agent and Trustee—Estoppel—Limitation to Date up to which Rent Accepted.

Action to recover possession of land.

D. L. McCarthy, K.C., for the plaintiffs.
L. F. Heyd, K.C., for the defendant.

RIDDELL, J.:—The defendant became the tenant of the Toronto Park Company of certain premises, No. 2301 Queen street east, in the city of Toronto. There was no written lease, but it was agreed that he should be tenant at $200 per annum until the property should be sold. A further term, which he asserts, viz., that he was to have the first chance to purchase, I do not find established by the evidence which I accept. The Toronto Park Company were in low water, and went into liquidation. A sale of the property of the company was made to the Scarborough Securities Company, the plaintiffs, and approved by the Court on the 11th February, 1911. The Scarborough Securities Company were acting simply as agents (and trustees) for the Toronto Railway Company in this purchase.

The sale was made effective by the order of the Court of the 11th February, 1911; and I think the tenancy of Locke then ceased, unless there was something done by the new owners of the property recognising a continuing tenancy. The defendant, on the 15th June, 1911, sent a cheque addressed to the Toronto Park Company (or successors) for $50, marked "Rent to September 15-11," payable to the Toronto Park Company (or successors); the Toronto Railway Company cashed this cheque, endorsing it in their own name.

They were the real owners of the land, though nominally it was the property of the Scarborough Securities Company; they could, therefore, estop themselves and their agents-trustees, the Scarborough Securities Company; and I think they have in fact recognised the defendant as a tenant. But, as there is nothing else alleged to bind them or their agents, I think the estoppel cannot be extended beyond the date up to which the rent was accepted, viz., 15th September, 1911.

The plaintiffs are accordingly entitled to possession, their action not being brought till May, 1912.

Judgment will go for possession with costs. If mesne profits or damages be sought, I may be spoken to again. I do not think any case is made for compensation—the defendant knew what his tenancy was.

RIDDELL, J. NOVEMBER 4TH, 1912.

LONG v. SMILEY.

Brokers—Dealings with Customers—Purchase and Sale of Shares in Mining Companies—Connected Dealings by two Customers with Brokers—Agency—Transfer of Shares to one—Sufficient Compliance with Duty of Brokers—Contract—Keeping Speculative Shares Ready for Sale—Allotment of Particular Certificates in Brokers' Books—Sale by Brokers without Regard to Allotment—Conversion—Accounting for Moneys Intrusted to Brokers for Investment.

Three actions, two in a County Court, and one in the High Court, brought respectively by two sisters against a firm of brokers, to recover moneys intrusted to the defendants for investment in mining stocks.

The actions were (by consent) tried together before RIDDELL, J., without a jury.

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

T. N. Phelan, for the defendants.

RIDDELL, J.:—Two sisters, Georgina and Kate Long, the former a nurse and the latter a saleswoman, lived together, except when the nurse was in employment. Hearing much of money made by speculating in mining stocks, they determined to try their luck. They knew McCausland, a member of the defendants' firm of brokers, and intrusted him and his firm with their business.

Not being satisfied with the outcome, Kate brought an action in the County Court of the County of York against McCausland for $192.50, alleging that she had intrusted him with this sum for investment in mining stocks, and he had failed so to invest for her. She also brought an action in the same Court against the firm for two sums, $152.50 and $132.50, on a like claim.

Georgina brought an action in the High Court on a similar claim, but claiming four sums, $192.50, $466.50, $96.25, and $180.50: $935.75 in all.

The High Court case came on for trial before me at the non-jury sitting at Toronto; at that trial it appeared that the transactions referred to in the three actions were inextricably mixed together; and, accordingly, all parties agreed—most sensibly and properly—that I should try all the actions together. At the request and with the consent of all parties, I did so.

There was much confusion in the evidence of the plaintiffs, the two sisters, and it is impossible to place full reliance on their evidence. I do not think that they wilfully misstated what they thought they recalled as facts; but, intelligent as they probably are in their businesses of nurse and saleswoman, they seem not to have applied their minds much to any other phase of their dealing in mining stock than the anticipated profits. On one matter they so far disagree as that the one contends that a considerable sum of money handed her by her sister was in repayment of a debt, while the other contends that it was a loan (or a contribution to a joint enterprise).

From a consideration of all the evidence, I have come to the conclusion that when any stock was ordered to be bought, it was intended to be left in the hands of the brokers in a convenient form for immediate sale, and that both plaintiffs quite understood this and assented to it. Stocks which were paying dividends were, of course, to be transferred into the name of the purchaser, but not others. When dividend-paying stock was bought, it was so transferred; and I shall pay no more attention to this. All the complaint is as regards the non-dividend paying stock—purely speculative stock.

When this kind of stock was bought for either plaintiff, a sufficient amount of scrip was placed, probably with other of the same mine, in an envelope; sufficient of the scrip was always held on hand to give every customer the amount held by him. When stock was bought, generally, if not always, in the books of the defendants, certificates of a particular number or particular numbers were entered with the name of a purchaser adjoining. This was mere book-keeping; the customer was not notified; and no attention was paid to keeping the particular certificate or certificates for the particular customer or any customer. When the time came, if it ever came, for the customer to get his stock, it would be by the merest chance that the particular certificate which had been entered near to his name in the books went out to him. It is admitted by the defendants that they did not keep any particular certificate for the plain-

tiffs, but sold those which had been first designated with their names in the books.

The plaintiffs contend that this dealing was a conversion; but I do not think so. They quite understood that the stock had to be in such a shape as that it could be delivered on a sale at a moment's notice; they did not know that any particular certificate had been allotted to them; they made no request for any particular certificate—and until something more was done than was done, I do not think that any particular certificate was theirs, even though they had paid out and out for some stock: Le Croy v. Eastman, 10 Mod. 499; Dos Passos, 2nd ed., pp. 255 et seq.

With some hesitation, I think I must hold, also, that the dealings of the two sisters were of such a character that transferring stock certificates to one of them, Kate, in such a form as that they could be easily divided between the two sisters, was a sufficient compliance with the duty of the brokers. The trouble has arisen from the fact that stocks bought for them went down in price. The evidence of the plaintiffs, while I do not think it perjured, is not to be relied on at any point.

Taking now the several actions:—

(1) Kate Long v. McCausland, in the County Court, for $192.50. This sum went, with a sum of $192.50 contributed by Georgina, to buy 500 Otisse and 500 Gifford, which were delivered to Kate on the 1st September, 1911. This action must be dismissed.

(2) Kate Long v. Smiley & Co., in the County Court. The sum of $152.50 went for 500 Gifford, delivered to her in August, 1911. The sum of $132.50 went, with $466.50 of Georgina's, to buy 1,000 Peterson Lake and 100 Temiskaming. The Temiskaming was delivered to Georgina and put in her name, as it was a producing and dividend-paying mine. The Peterson Lake was, with 200 ordered by Georgina in January, 1909, in all 1,200, delivered to Kate on the 15th August, 1911. Kate cannot complain—and this action must also be dismissed.

(3) The High Court action, Georgina Long v. Smiley & Co. The first item, $192.50, was for her share of the 500 Otisse and 500 Gifford delivered to Kate. The second, for the 1,000 Peterson Lake and 100 Temiskaming. The Temiskaming she got: the Peterson Lake was delivered to Kate for her. The third, $96.25, was for 500 Rochester: she says wholly her own speculation; Kate does not agree. On the whole, I think it was her own. The stock was delivered to Kate for her on the 15th August, 1911. The fourth and last, $180.50, was for 200 Peterson Lake and 500 Rochester, which were delivered to Kate for her

on the 15th August, 1911. All this stock was delivered as soon as it was really asked for; and I think the defendants are not liable. If they did make a mistake in looking upon Kate as an agent for her sister, the sister is not damnified.

I think all the actions must be dismissed; but I shall, if so desired, make a declaration as to the ownership of the stock as between Georgina and Kate.

There will be no costs.

DIVISIONAL COURT. NOVEMBER 5TH, 1912.

JARVIS v. HALL.

Landlord and Tenant—Seizure for Rent—Illegal Distress—Acceleration Clause—Valuation of Goods Seized—Special Damages for Injury to Tenant's Business—Credibility of Witness not Subjected to Cross-examination.

Appeal by the defendant from the judgment of MULOCK, C.J, Ex.D., in an action for illegal distress, tried before him with a jury.

The appeal was heard by RIDDELL, KELLY, and LENNOX, JJ.

W. T. J. Lee, for the defendant.

J. Fraser, for the plaintiff.

RIDDELL, J.:—The trial of this case took a very long time: but many of the matters in controversy were eliminated, and before us the argument was not complicated by much contention as to the facts.

It will be sufficient to set out the facts now material.

The plaintiff was a tenant of the defendant under a written lease not too skilfully drawn—it contains a clause: "Provided . . . that if . . . any of the goods . . . of the said lessee shall be at any time during said term seized and taken in execution . . . by any creditor of the said lessee . . . the then current and next ensuing year's rent . . . shall immediately become due. . . ."

Rent becoming in arrear, a seizure was made for rent: but this resulted in no damage to the plaintiff, and, irregular as it was, need not be further considered.

There was a judgment against the plaintiff brought by transcript to the Division Court of the plaintiff's district from

Burke's Falls, the previous residence of the plaintiff—this was done by one Hutton acting for and on the instructions of the defendant. Hutton was instructed by the defendant to find out if there was such a judgment; and, "if there was such a judgment, I was to have an execution or transcript issued, the execution issued and then issue a warrant," he says. He did this and had the goods of the plaintiff seized accordingly, as the defendant contends. The plaintiff says that there was no taking in execution, that the Division Court bailiff accepted a payment on account, and went away without seizure. The landlord then issued his warrant to his bailiff for the current year's rent, which he claimed to be due by virtue of the acceleration clause, under which the goods of the plaintiff were seized and sold.

The tenant sued, and the action came on for trial before the Chief Justice of the Exchequer Division and a jury at Brampton.

Cases of this kind in recent years have almost invariably been tried by a Judge without a jury; but, as no motion was made to have the jury dispensed with, the learned Chief Justice indulged the parties in their apparent desire to have a jury pass upon the questions in issue.

The jury found answers to a great many questions submitted to them, most of which are not now in controversy. On the question of damages the jury ultimately found $522 in respect of goods, $20 for board of one Smith, and $600 because of interruption to the plaintiff's farming business. They found the defendant, however, entitled to a counterclaim of $378, and judgment was accordingly directed to be entered for the difference . . . $764 and costs.

There can be no doubt that the landlord cannot give himself any rights under the acceleration clause in a lease by procuring the seizure of the tenant's goods either by an execution of his own or that of another. It is consequently quite immaterial whether there was or was not an actual seizure by the Division Court bailiff before the warrant of the landlord: in any case, the seizure by the landlord was illegal. But I see no sufficient ground for saying that the jury were wrong in finding, as they did, that the landlord's seizure was first.

No rent being due otherwise, it is plain that the seizure was wholly illegal.

In addition to the $20 for board, the plaintiff has been found entitled to the value of the goods and also to special damages. The findings on both these heads are disputed: and it becomes necessary to examine the evidence.

First, as to the value of the goods—it cannot be contended

that the plaintiff is not entitled to their value. The goods seized on the first occasion were valued by the plaintiff at $825. Of these the following do not seem to have been seized on the second occasion—

Buckwheat $150.00
Wheat 98.35
$248.35

Balance $576.65

But the following, not seized on the first occasion, were seized on the second (I give the values as fixed by the bailiff)—

3 loads buckwheat in stook, $15 .....$591.65

This amount should be also diminished (as only 150 bushels of oats were seized instead of 200) by ¼ of $78...$19.50

Valuation $572.15

Upon that evidence, the jury were justified in finding the value $522. No doubt, the "fair value to the tenant" would be much more; and that is the value to be allowed according to Parke, J., in Knott v. Corley (1832), 5 C. & P. 322.

There is no complaint as to the $20 allowed for Smith's board.

In an action of this kind special damage may be recovered in addition to the value of the goods: Bodley v. Reynolds, 8 Q.B. 779; Reilly v. McMinn (1874), 15 N.B.R. 370.

The latter case says: "In trespass for seizing and selling tools under an illegal distress, the plaintiff may recover not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby he is thrown out of employment, and in estimating the damages, the jury have a right to take into consideration the circumstances in which the plaintiff was placed and the difficulty of obtaining employment . . . without tools."

The plaintiff at the trial claimed $300 for damages in addition to the amount he claimed for the value of his goods.

This is how he puts it in answer to his own counsel:—

"A. I claim $825 all told, besides the $300 damages.

"Q. Besides the $300 damages? A. Yes.

"Q. What is $300 damages for? A. Well, they put me out of business and I have been out of business ever since; I have never been able to do anything. I couldn't go on with my work because they seized everything and sold it. I have nothing to work with, and my son was out of work until Christmas time.

"Q. Was your son farming with you? A. Yes. And we were both out of work from the time of the seizure until Christmas time, and I have been out of work ever since.

"Q. Have you work now? A. I am out of work yet.

"Q. Are you in a position to buy other goods, and go farming again? A. No, because I have got nothing to farm with."

He was cross-examined at great length (some 56 pages of the notes are taken up), but this particular matter of damages was left untouched—and no one else says anything about it.

In New Hamburg Manufacturing Co. v. Webb (1911), 23 O.L.R. 44, at p. 55, the Court pointed out that a party to an action need not complain if a statement made by his opponent or his opponent's witness is taken as accurate if he allows it to go without cross-examination or contradiction at the trial. The judgment of the House of Lords in Bowne v. Dunn (1893), 6 R. 67, may be referred to as cited in the New Hamburg case.

There is evidence then which would justify the jury in finding a verdict for $300 damages on this head—but no more. I can find nothing to support the extra amount.

If then the plaintiff will accept a reduction of his judgment to $464 and costs on the High Court scale, he may have it. In that event, there being partial success only, he should have only half the costs of the appeal. If the plaintiff declines this, I think there must be a new trial. All the matters in controversy being now removed, but the simple question of damages, these should be determined by the Master—and if the plaintiff is to have the privilege of increasing his special damages above what the evidence justifies, the defendant should have an opportunity of diminishing the damages on the head of the value of the goods seized.

If this alternative be preferred by the plaintiff, the judgment will be set aside and the matter referred to the Master to assess the damages: (1) the value of the goods seized; (2) board of Smith, about which there is no dispute, and which the Master will assess at $20; and (3) special damages. Upon the Master's report becoming absolute, the costs of the former trial, appeal, report, etc., may be disposed of by one of us in Chambers.

KELLY and LENNOX, JJ., delivered written judgments in which they agreed with the disposition of the appeal made by RIDDELL, J.

DIVISIONAL COURT. NOVEMBER 6TH, 1912.

*SMITH v. BARFF.

Principal and Agent—Agent's Commission on Sale of Land—Cheque for Deposit Unpaid—Refusal of Purchaser to Complete—"Selling the Property"—Meaning of.

Appeal by the plaintiff from the judgment of one of the Junior Judges of the County Court of the County of York in an action to recover commission on the sale of the defendant's house.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

L. C. Smith, for the plaintiff.

D. Inglis Grant, for the defendant.

RIDDELL, J.:—The plaintiff is a foreigner, who seems to act as real estate agent: the defendant was the owner of certain lots, three in number, in Toronto—at least they are in his name. He seems to have been desirous of selling the lots—and about the middle of March, 1911, the plaintiff and one Herman came to his house and asked Mrs. Barff if she wanted to sell—Barff seems to have been away from home during the daytime and Mrs. Barff to have transacted business in connection with the lots. She said: "We wanted to sell: of course if we got our price we would sell." It is apparently clear that at that time she said: "If you bring me a purchaser I will sell it." So Smith swears, and she does not contradict him—and she mentioned the price she wanted.

About two months thereafter the two men came to her house with one Heller, and he made an offer of $2,500 for each of the lots: she wanted $2,800. "I said, I would not accept it: that I knew Mr. Barff would not accept; we wanted $2,800 or none at all." Then Heller offered $2,600 for each lot, and she said, "I know Mr. Barff will not accept that;" and then Heller asked for pen and paper, and getting them wrote out an agreement of purchase and also a cheque for $200 as a deposit—leaving the cheque, according to one story, taking it with them, according to another, the three went away: in the evening the two agents returned and saw Mr. Barff and "after a lot of talk" (to use his own words) "we decided that I would accept the agreement as made out and the $200 cheque as a deposit. . . . Then I signed the agreement." Then the plaintiff produced an agreement which had been written or perhaps was then written out

*To be reported in the Ontario Law Reports.

by Herman, and Barff signed that. It reads: "I, Mr. Thomas Barff, agree with L. Smith to pay The yussel comition 2½% for selling my property 6-8-10 Stanley Ave. in the City of Toronto. April 3rd, 1911. Thomas Barff."

The cheque was either handed over to or simply left with the defendant as the deposit—as I have said, there is a conflict as to whether it had been taken away after the day interview.

There is a difference of recollection as to what was said about the cheque; but, like the other conflict, it is, in my view, quite immaterial. The plaintiff's story is: "I said, 'Mr. Barff, would you like to pay me my commission right away?' I said, 'My commission is $195, and you sign that cheque and I will give you cheque for $5,' and I went down to the bank and bank refused to pay." The defendant's account is: "I had the cheque in my hand, and Mr. Smith said, 'You can give me that and I will get it cashed for you.' He said, 'You can give me that and I will get it cashed for you.' Q. Is 'cashed' the last word he said? A. Yes, and with that they took it away."

The defendant's counsel before us contended that this was an agreement on the plaintiff's part to accept the cheque endorsed by the defendant as payment of his commission. If the plaintiff agrees, we should let him accept the cheque as in payment of commission, amend his pleadings now, sue upon the cheque, and be awarded the amount with County Court costs of action and appeal—that is, if the defendant does not object.

Notwithstanding the argument of the defendant's counsel, I do not see that there was such an accord and satisfaction as is contended for. The whole transaction is, I think, clearly nothing more than the plaintiff being anxious to get his commission, saying to the defendant, "Give me the cheque: I shall get it cashed, pay myself out of the proceeds and pay you the balance"—it is at least clear that any offer on his part to accept the cheque as payment of his commission and to give his cheque for $5 was not accepted.

Heller seems to have changed his mind almost at once, thought he had paid too much for the property—the day after the cheque was handed to Smith, he went to the bank—the bank said "call around later on and the cheque will be all right," but later on payment was refused, as they had been instructed not to pay it.

Smith brought back the cheque and appears to have given it to Mrs. Barff.

At the time of the contract for sale the defendant had given the purchaser the name of his solicitor, but Mrs. Barff wanted to make a change, and went down town early to prevent the

purchaser from going to the solicitor named. She saw Herman and then Smith, had the board taken off the houses, as "they were sold"—and was introduced by these two to Mr. H. as a solicitor whom they had found very good. She delivered the deed to Mr. H. to have the sale carried out, Mr. H. to act for the vendor. She was then (apparently) told that the cheque was stopped. Mr. H.'s advice was asked, and he advised suit in the name of the defendant. An action was brought and judgment obtained, which was set aside on some ground not disclosed. She told her husband that the suit was to be brought in his name, and no objection was made so far as appears—none is suggested.

A respectable firm of solicitors acted for the purchaser, requisitions of title passed between the solicitors—the trial on the cheque was adjourned from time to time—and the Judge at length said that he would not try the question pending the disposition of the requisitions of title—and Mrs. Barff then "refused to go any further, there being so much trouble and annoyance about it that they would not be bothered any more with it;" "it reached a stage that an action had to be brought in some form or another to compel Heller to carry it out—and the conclusion was . . . that they made up their minds not to have anything more to do with it."

It seems quite clear that Heller is a man of substance, and that there was no ground for failing to carry out his purchase, but that he thought he was paying too much.

An action was brought in the County Court of the County of York. His Honour Judge Denton dismissed the action on the ground that, "as the defendant only agreed to pay a commission to the plaintiff for *selling the property*, and as the property was not sold, he is not liable to pay the commission."

The plaintiff now appeals.

In this case we must determine what the parties meant by "selling the property"—and that, under the facts, I cannot think at all doubtful. Mrs. Barff had told the plaintiff, "If you bring me a purchaser I will sell it"—the purchaser was brought, and Barff (if not Mrs. Barff) did sell the property in the usual sense of the word—so much so that the boards were taken off the houses because they were "sold." There was nothing more for the agent to do; and I am of opinion that what both parties meant by "selling the property" was the successful effort of Smith to procure a purchaser acceptable to the vendor, this purchaser signing a contract acceptable to the vendor.

There is no case forbidding us to place this interpretation upon these words. . . .

[Reference to Peacock v. Freeman (1888), 4 Times L.R. 541;

Regina v. Wyndham (1862), 1 H. & C. 563, 574; Robinson v. Reynolds (1912), 3 O.W.N. 1262; Donovan v. Hogan (1887), 15 A.R. 432; Sutherland v. Sutherland (1912), 3 O.W.N. 1368; Mackenzie v. Champion (1885), 12 S.C.R. 649, 656, 659, 661.]

It is wholly unnecessary, in my view, to cite cases to shew that the meaning I have set out can be given to the language of the contract—and, under all the circumstances of the case, I think it should be.

The appeal should be allowed with costs and judgment entered for the plaintiff for $195, interest and costs, all on the County Court scale.

FALCONBRIDGE, C.J.K.B., agreed in the result arrived at in the judgment of RIDDELL, J.

BRITTON, J., dissented from the opinion of the majority of the Court, in a written judgment in which he agreed with the decision of the learned County Court Judge.

MIDDLETON, J. NOVEMBER 7TH, 1912.

RE SEGUIN AND VILLAGE OF HAWKESBURY.

Highway—Municipal By-law Closing Street—Motion to Quash—Dominion Railway Act, sec. 238—Jurisdiction of Board of Railway Commissioners—Unnecessary By-law—Discretion.

Motion to quash by-law No. 179 of the Corporation of the Village of Hawkesbury, closing up a part of St. David street.

A. Lemieux, K.C., for the applicant.
H. W. Lawlor and A. J. Reid, for the corporation.

MIDDLETON, J.:—Under the Railway Act, sec. 238 (see amendment of 1909) the Board has authority to order that a highway may be permanently diverted. No authority is given to close a highway. In October, 1911, the Canadian Northern Railway Company, desiring to make some changes in its line through Hawkesbury, made an application to the Board which involved the closing of St. David street. Some negotiation took place looking to the closing of the street at the intersection by the municipality and the sale of this portion to the railway. With this in view, notices were given which led up to the by-law in question.

When the matter came before the Board, an order was made, quite in conformity with the statute, by which St. David street was diverted at each side of the railway allowance so as to turn at right angles and so connect with Union street; the portion of the original road allowance crossing the railway allowance being closed and an embankment constructed thereon.

Owing to the greater facility given by these diversions to those driving upon St. David street and desiring to reach Main street, the change may be beneficial. Those who desire to make a continuous passage along St. David street are put to some inconvenience, as they must go 178 feet from St. David street to Union street and after passing under the railway bridge must return the same distance.

With this I am in no way concerned, as the whole matter was entirely within the jurisdiction of the Board.

The municipal proceedings were initiated under some misapprehension as to the true situation; but there is no ground whatever for the suggestion that there was any abuse of the municipal power or anything other than an endeavour to come to some satisfactory arrangement with the railway.

The by-law was unnecessary, and was not acted on so far as any conveyance is concerned. It affords no answer to any claim the applicant might have. The order of the Board is a conclusive and final answer to his claims. This motion is an entirely unnecessary and useless piece of litigation, and I think I have discretion to refuse the order sought, even if there is some irregularity in the proceedings.

I do not think the by-law should be regarded as a by-law under the section of the Municipal Act relating to the closing of streets, but rather as an expression of the municipality's assent to the arrangement for the diversion of the street under the Railway Act. So regarded, it is free from all objection.

The motion must be dismissed with costs.

MIDDLETON, J. NOVEMBER 6TH, 1912.

RE ALLEN.

Will—Construction—Devise to Wife durante Viduitate—Devolution of Estates Act—Election—Right to Dower.

Originating notice to determine a question arising upon the construction of the will and in the administration of the estate of the late H. B. Allen, who died on the 16th January, 1910.

A. A. Miller, for the widow.
E. C. Cattanach, for the infants.

MIDDLETON, J.:—By his will the deceased gives all his real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not re-marry. Save for the appointment of executors, this constitutes the whole will. The property consists largely of real estate.

It was admitted that the will gave the widow an estate in the lands during widowhood, and that save as to this estate the testator died intestate as to his realty. It was also admitted that the personalty would go to the widow absolutely.

The widow claims that the will does not put her to her election, and that she is entitled to an estate during widowhood in the testator's lands, and is also entitled in her own right to her dower interest in the same lands. She now seeks, under the Devolution of Estates Act, to elect to take a one-third interest in her husband's undisposed of real estate; i.e., in all his real estate subject to her estate during widowhood, in lieu of her dower.

I think I am concluded by authority, and that, as put by Boyd, C., in Marriott v. McKay, 22 O.R. 320, "a devise of all the lands to the widow durante viduitate puts her to elect. That devise gave her the freehold, and as tenant of the freehold she could not have dower assigned to her while she held that estate."

This is based upon the earlier decision in Westacott v. Cockerline, 13 Gr. 80, where Vankoughnet, C., upon the same reasoning, reaches the same conclusion.

The widow is, therefore, put to her election. If she elects against the will, she may then make the further election under the statute to take one-third of the land. If she elects to take her estate during widowhood, her dower right is gone, and she cannot then elect under the statute, because the right given to her by the statute is to take the third interest in the undisposed of lands "in lieu of" her dower.

Costs out of the estate.

RIDDELL, J., IN CHAMBERS. NOVEMBER 8TH, 1912.

LAND OWNERS LIMITED v. BOLAND.

Preliminary Accounts and Inquiries—Con. Rule 645—Corresponding English Rule—Non-Production of Writ—Filing Documents Used on Motions.

Motion by the plaintiffs "for an order that the defendants account to the plaintiffs forthwith for all moneys received by the defendants for the plaintiffs in connection with the sale of lots in Bay View Heights, Port McNicoll, subdivision." It was explained on the motion that this meant an order under Con. Rule 645.

J. J. Gray, for the plaintiffs.
Grayson Smith, for the defendants.

RIDDELL, J.:—The Court of Appeal in England have said: "Under that Rule only those accounts can be directed which are necessarily involved in the relief sought by the writ of summons:" In re Gyhon, Allen v. Taylor (1885), 29 Ch. D. 834, at p. 837,, per Cotton, L.J.

The writ of summons is not brought before me; no affidavit is filed as to the manner in which the writ was endorsed. I told counsel definitely and specially that all papers must be put in which were relied upon—it must be taken then that the plaintiffs could not shew that the writ claimed any such relief as is now sought—de non apparentibus et non existentibus eadem est ratio—and I must take it that the writ was not so endorsed. We have not here, as in some cases, an admission on the part of the defendants which could help the plaintiffs over the difficulty.

The motion must be dismissed; costs to the defendants in any event of the action.

As, notwithstanding what was said at the argument and what is said in Welsh v. Harrison (1912), ante 139, at p. 140, as "to the necessity of filing all the papers which are to be used on motions—it is too much to expect the Court to act the solicitor's clerk and hunt up the missing documents," it may possibly be that the plaintiffs have in fact a writ endorsed as required, this dismissal will be without prejudice to any other application for an order such as is now sought or any other order.

BRITTON, J. NOVEMBER 8TH, 1912.

RE LANE AND BEACHAM.

Vendor and Purchaser—Title to Land—Restraint on Alienation—Sale Permitted to "Heirs" only—Vested Interest not Taken by Devisees—Settled Estates Act.

Application by the vendors, under the Vendors and Purchasers Act, for a declaration that the vendors can make a good title to the lands in question.

J. C. Hegler, K.C., for the vendors.
M. D. Fraser, for the purchaser.

BRITTON, J.:—This property was owned by the late Henry Johnston, who died on the 1st day of December, 1886, and whose will was made on the 21st June of that year.

The executors and beneficiaries under the will have entered into an agreement with John Beacham for the sale to him of the land in question.

There was personal property sufficient for payment of all debts of the deceased, and all such debts have been paid. An only daughter was left a legacy of $1,500, payment of which by the sons was directed by testator, although the testator did not in terms leave to the sons property out of which payment was to be made. This legacy has been paid. The widow and all the children of the testator are living. The widow has not married—the children are all of age, and all are anxious that the sale be carried out, as none of the family now reside upon the property.

The purchaser objects that, under the will, the vendors are not able to make a good title. One specific objection is, that by clause 5 a valid restraint on alienation is created. I will deal with that objection, as if no other, and as if the three sons of the testator took an estate, a vested remainder, the widow having an estate for her life.

Clause 5 is as follows: "Furthermore, I do not allow my executors hereinafter mentioned to let any of my lands be sold only to my own heirs—they may buy or sell to each other." It seems to me clear, from reading the whole will, that the attempted restraint aimed at was to meet a situation that the testator in 1886 thought might exist in the, then, near future. He attempted to provide for the case of his children having the farm divided by the assessor as he mentioned or in some other way, and each one of his sons living upon his part. In that case, if one should

desire to sell, he should sell to a brother, or a member of his family, and not to a stranger. It was not intended to apply, and, in my opinion, does not apply, to the case of all those interested selling. No possible objection could come from any one now living.

The clause attempting restraint on alienation may well be interpreted as meaning that any of the testator's sons holding under the division any part of this land, shall not sell that part to one not an "heir." This objection by the purchaser is not valid.

A further objection is raised under clause 6 of the will.

The testator disposed of all his property by clause 2. The widow took it all for her life unless she should marry again. Should the widow marry, two-thirds of all the property should go to the testator's sons living at the time of the marriage of their mother.

In the event of the widow not marrying, she holds the property for her life, and then the property will go to the testator's sons living at the time of the death of their mother. Then the testator desired to provide for the case of his widow marrying before the youngest son, Fred Meredith Johnston, became of age —that is not material now, as the widow did not marry and Fred attained his majority many years ago. Then the testator added, as part of clause 6, the following: "And should any of the boys marry and have heirs, and should die before this property is divided, the heirs shall claim their parents' share." My interpretation of this clause is that the word "heirs" means children; that the division of the property means the division provided for by the will, viz., division upon marriage of their mother, should she marry, or upon her death, when that takes place.

The effect of this clause last mentioned is to add to clause 2, from the end of it, these words: "And should any of the boys die leaving children, before the property is divided, the children shall claim their parents' share:" and to add to clause 3, after the words, "my boys that may be alive at my wife's death," the words: "And should any of my boys die leaving children before this property is divided, the children shall claim their parents' share."

Under this will I am of opinion that the sons do not take any present interest in the estate of the testator. The interest of such of the sons as may be alive at the marriage or death of their mother, does not vest until such marriage or death. If any one of the testator's sons dies before division, and leaves children, then these children will take under this will the share their father

would have taken were he alive. I must hold the latter objection of the purchaser valid.

Were it not for the clause bringing in the children, if any, of any deceased son of the testator, there would be no difficulty in making a perfect title, the executors, the widow, and all the children of the testator joining in the conveyance.

As all the parties are anxious to have the sale carried out, such a sale apparently being in the interest of all, it would seem to be a proper case for sale under the Settled Estates Act.

No costs.

BRITTON, J. NOVEMBER 8TH, 1912.

MILLER v. HAND.

Principal and Agent—Sale of Land by Agent to his own Representative—Secret Profit Made by Agent on Resale—Measure of Damages.

Action for an account of profits received by the defendant in respect of certain lands of the plaintiff sold by the defendant.

G. H. Kilmer, K.C., for the plaintiff.
J. E. Irving, for the defendant.

BRITTON, J.:—The plaintiff was the registered owner of the west half of original lot 35 on the north side of Queen street in the city of Sault Ste. Marie, having a frontage on Queen street of 55 feet. The defendant was well known to the plaintiff as a dealer in real estate and as an agent for the purchase and sale of real estate in the city of Sault Ste. Marie. The plaintiff employed the defendant to act for him in the sale of the above lot.

The defendant accepted such employment, and in due course represented to the plaintiff that he had found a purchaser for the said lot, namely, one Neil McDougall, who, as the defendant said, was willing to purchase and pay at the price of $100 per foot frontage. The sale was carried out with McDougall at that price, viz., $5,500—and the usual commission for such a sale at Sault Ste. Marie was

5% on 1st $1,000.....	$ 50.00
2½% on balance of $4,500.....	112.50
in all the sum of.....	$162.50

This amount was demanded by the defendant—and was paid to the defendant by the plaintiff's solicitor in this transaction.

The agreement for sale between the plaintiff and McDougall, made at the instance and upon the representation of the defendant, acting, as the plaintiff supposed, as agent for the plaintiff, was made on the 6th day of December, 1910. On the 8th day of December, 1910, the plaintiff's solicitor paid to the defendant, by cheque on the Traders Bank of Canada, the sum of $162.50, commission above-mentioned.

This cheque is made payable to the defendant as the "commission on Miller sale;" and there was no other transaction between the parties to which the money received upon that cheque was or could be applied. On or about the 29th day of June, 1911, the defendant again sold the said land to one Edwin Stubbs for the price of $160 a foot. This sale was carried out in the name of Neil McDougall as vendor—but at the request and for the advantage of the defendant.

As a matter of fact and beyond all question, the defendant represented to the plaintiff, and at the time of the sale to McDougall the plaintiff believed, that McDougall was a real purchaser for himself, and that the defendant was not as a purchaser interested in the property. It was not until after the sale to Stubbs that the plaintiff found out otherwise. I find that the defendant purchased this lot for himself—that McDougall merely acted at the defendant's request, and that, although a conveyance was accepted by McDougall and a mortgage given by him for part of the purchase-money—all was at the instance of the defendant and for his supposed benefit. The sale by McDougall to Stubbs was at the request of the defendant and for his benefit. The defendant made all the profit. Mr. McDougall did not make any or claim any benefit from this transaction.

McDougall merely represented the defendant, and acted at the defendant's request. . . .

[Reference to the evidence as to the defendant's conduct.]

I find that the allegations in the statement of claim have been established; and the only thing remaining is as to the plaintiff's remedy.

The plaintiff asks that an account be taken of the profit realised by the defendant out of the sale of the plaintiff's land, nominally to McDougall, but really taken by the defendant himself for his own profit.

This was a fraud upon the plaintiff. Had the plaintiff known the facts before the sale to Stubbs, he, the plaintiff, could have had the sale to McDougall rescinded.

So far as appears, so far as known to the plaintiff and as represented by the defendant, Stubbs is an innocent purchaser—a purchaser for value and in good faith.

The plaintiff simply asks that the defendant pay the profit money received by him and which belongs to the plaintiff as principal. There is no dispute about the amount, and there is no need of a reference. . . .

It was argued that in an action of this kind the measure of damages is not the difference between what the plaintiff got from McDougall and what the defendant got from Stubbs, but the difference between the real value on the date of the sale to McDougall and the price paid by the defendant for the McDougall transaction.

The cases cited by counsel for the defendant are, I think, distinguishable—but it is not unfair to the defendant to say that the real value, even at the time of McDougall's deed, was about the sum that Stubbs paid. I would rather accept a real transaction such as the sale to Stubbs than the opinion evidence of real estate agents as to the real value. The defendant did not give evidence on his own behalf. It may well be that the defendant knew that the real value at the time of the McDougall deed was practically what Stubbs paid a little later on.

In any event, the defendant should not complain if asked to pay only what he received.

The defendant's profit was $60 a foot for 55 feet—$3,300. As against the small cost of carrying this property from December, 1910, to the 29th June, 1911, the defendant may be allowed the 2½% commission. If sold in ordinary course by an agent, the owner would have to pay that. This would amount to $82.50, and would leave $3,217.50.

It appeared upon the trial that the plaintiff was pecuniarily interested only to the extent of an undivided half of the part of lot 35 in question. Then Mr. Hearst was in equity the owner of and entitled to the other half. Mr. Hearst was a witness at the trial on behalf of the plaintiff. No application was made to join Mr. Hearst as a party plaintiff, or to add him as a party defendant, and no claim was put forward by Mr. Hearst for damages.

As the matter stands, the plaintiff is personally entitled to only one-half of the above amount, namely, $1,608.75, with interest at 5 per cent. from the 1st July, 1911. There will be judgment for the plaintiff for that amount with costs and without prejudice to any claim Mr. Hearst may make or to any action he may bring by reason of any interest he has in the land in question.

POLLINGTON v. CHEESEMAN—SUTHERLAND, J., IN CHAMBERS—NOV. 4.

Parties — Third Parties — Motion to Set aside Third Party Notice—Time for Moving—Employers' Liability Assurance—Terms of Policy—Action for Damages for Death of Employee.] —An appeal by the Travellers Insurance Company of Hartford, Connecticut, from an order of the Master in Chambers, ante 92, refusing to set aside a third party notice served upon that company by the defendant. SUTHERLAND, J., said that, having carefully read and considered the very full reasons given by the Master for making the order appealed against and the authorities referred to, he thought the order should stand; and he could add nothing of value to what had been so well stated by the learned Master. Appeal dismissed with costs. T. N. Phelan, for the company. Frank McCarthy, for the defendant.

CARTWRIGHT v. WHARTON—RIDDELL, J.—NOV. 4.

Damages—Infringement of Copyright—Finding of Master—Quantum of Damages — Appeal.] — Appeal by the defendant from the report of the Master in Ordinary of his finding that the plaintiff was entitled to $1,400 damages for infringement of a copyright. See the reasons for judgment of the trial Judge, 25 O.L.R. 357, 3 O.W.N. 499. RIDDELL, J., said that he had read all the evidence and had the advantage of the Master's reasons for his decision; and, on the whole, while the damages might be somewhat higher than he should himself have been induced to award, he could not say that the Master was wrong. Appeal dismissed with costs. D. T. Symons, K.C., for the defendant. J. H. Moss, K.C., for the plaintiff.

NIAGARA AND ONTARIO CONSTRUCTION CO. v. WYSE AND UNITED STATES FIDELITY AND GUARANTY CO.—MASTER IN CHAMBERS—NOV. 5.

Third Party Proceeding—Closing Pleadings against Third Party—Motion by Plaintiff—Con. Rule 3—Particulars in Action on Guaranty.]—Motion by the plaintiff company to have the defendant company ordered to close pleadings between it and a third party; and by the defendant company at the same time

for particulars of alleged damage sought to be recovered by the plaintiff. The Master said that, although the plaintiff cannot intermeddle with the third party proceedings, yet where, as in this case, the third party has not appeared nor moved to have the notice set aside, there can be no objection to the defendant noting the third party in default and closing the pleadings as against him. This, though not expressly provided in the Rules, comes within the provisions of Con. Rule 3, which says: "As to all matters not provided for in these Rules, the practice, as far as may be, shall be regulated by analogy thereto." The defendant company, being only a guarantor for the defendant Wyse, is entitled to definite particulars of the way in which the plaintiff's claim to recover the full penalty of the bond for $10,000 is made up. The plaintiff's officer examined for discovery was not able to give any satisfactory information as to this. The plaintiff alleges that it has suffered damage by reason of some default on Wyse's part of almost $20,000, and that for this it is entitled to be indemnified by the guaranty company up to $10,000. It is apparently admitted that Wyse completed the work but did not pay for the labour and material supplied, but the officer examined could not give the items. It may be that the only issue determined at the trial will be whether the guaranty company is liable to indemnify the plaintiff against any default on Wyse's part, and that, if it is so decided, the damages could be assessed on a reference, as is usually done in actions on bonds; and, if that course could be arranged between the parties, there would be no necessity for particulars as yet. If, however, this question of amount is to be gone into at the trial, the plaintiff must furnish particulars as definite as would be required in an action for goods sold and delivered. The costs of the motions to be in the cause. C. F. Ritchie, for the plaintiff. W. B. Milliken, for the guaranty company.

BURROWS v. CAMPBELL—FALCONBRIDGE, C.J.K.B.—NOV. 6.

Tax Sale and Deed—Action to Set aside—Irregularities in Sale—Plaintiff Tenant of Defendant.]—Action to set aside a tax sale and tax deed. The learned Chief Justice expressed the opinion that the action was an unconscionable one; and found that, while there were gross irregularities and omissions in the proceedings prescribed by law to be taken before the sale, the plaintiff had not in fact been prejudiced by any of these, and was not, as tenant of the defendant and her predecessor in title, at

liberty to deny his landlord's title: Woodfall, 18th ed., p. 243; Smith v. Modeland, 11 C.P. 387. Action dismissed with costs. L. C. Raymond, K.C., and H. W. Macoomb, for the plaintiff. W. M. German, K.C., for the defendant.

MUNN v. KEYES—BRITTON, J.—NOV. 6.

Action by Administrator—Cheque Signed in Blank by Deceased—Alleged Gift—Trust for Creditors.]—Action by the plaintiff, as administrator of the estate of his late brother Charles William Munn, to recover $530.95, amount put to the credit of the defendants in the Bowmanville branch of the Bank of Montreal on the 5th October, 1911, which was asserted by the plaintiff to be the property of his deceased brother. The money was prior to that date placed to the joint credit of the plaintiff and the deceased, but could be drawn by either party, and it was arranged that the deceased, who was in very poor health, was to be cared for by his sister, the defendant Mrs. Keyes, for which she was to be paid $1 per day. Evidence was given to the effect that the deceased became desirous that the money should be transferred to Mrs. Keyes on the ground that she had been looking after him and had a great deal of trouble with him, and the defendant Hillyer was called in to advise as to the manner in which this was to be done. The defendants state that the intention of the deceased was that the money was to pay debts, and after they were paid the balance of the money was to go to Mrs. Keyes. It appeared, however, that the deceased signed a cheque in blank, apparently because he did not know the exact amount to his credit, and told Hillyer to take it to the bank, get the amount filled in, and place the money to the credit of himself and Mrs. Keyes. The bank manager subsequently, at Hillyer's request, filled in the date, 3rd October, 1911, made the cheque payable to the defendants or bearer, filled in the proper amount, adding interest, and a new account was opened in the names of the defendants, starting with the credit of $530.95 as of the date 5th October, 1911. Charles Munn died on the 8th October, 1911. The learned Judge, after stating the facts, came to the conclusion, upon the evidence, that a gift to the defendant Mrs. Keyes had not been established, either inter vivos or mortis causa. He further stated that he had some difficulty in coming to a conclusion as to whether or not an irrevocable trust had been created in favour of the creditors of the deceased, and of the surplus, if any, in favour of Mrs. Keyes. His opinion was, how-

ever, that "what the deceased desired to do was not to part with the control of his money absolutely during his life, but to get it in the hands of the defendants for safe-keeping. In the event of his wanting any of the money during his life, he was to have it. In the event of his death, he desired that his funeral expenses and his debts be paid out of this money, and that his sister should get the balance, if any. This arrangement was testamentary in its character. The deceased thought it could be done, without the necessity of a will. This case cannot be put higher . . . than the case of where a donor delivers property to a third person for the donee. The money was delivered to a third person—if to Dr. Hillyer, to him as trustee—if to both defendants, to them as trustees—for the payment of the donor's debts. Until the authority of Dr. Hillyer was exercised, he was the agent or trustee of the donor—and until the authority was exercised the donor could revoke it; and, not being exercised before the death of the donor, it was revoked by such death. Declaration that the money on deposit in the Bank of Montreal at Bowmanville to the credit of the defendants is the property of the estate of the late Charles W. Munn. Judgment for the plaintiff for $530.95 with interest at rate allowed by the Bank of Montreal on deposits at Bowmanville, from the 5th October, 1911. It was directed, however, that upon all the facts, and as the defendants had acted in good faith, although mistaken as to their rights, the judgment should be without costs. The judgment to be without prejudice to any claim the defendants or either of them may have against the estate of the late Charles W. Munn. F. L. Webb, for the plaintiff. D. B. Simpson, K.C., for the defendant Keyes. E. V. McLean, for the defendant Hillyer.

RE HEITNER AND MANUFACTURERS LIFE INSURANCE CO.—MASTER IN CHAMBERS—NOV. 6.

Life Insurance—Application by Company for Leave to Pay Insurance Moneys into Court—Principle on which such Orders Made.]—Application by the company for leave to pay into Court $1,000, amount of a policy on the life of David Heitner, deceased. The policy was made through the Winnipeg agency. It was payable to his wife, Robie Heitner, when issued, less than three years ago, but on the 7th February, 1912, the assured revoked this designation in favour of the Orthodox Jewish Home for the Aged at Chicago. Both of these parties claimed the pro-

ceeds. The Master, after referring to the Manitoba statutes on which the parties relied, expressed the opinion that any consideration of these questions is at present unnecessary, as the facts of this case do not seem distinguishable from those in Re Confederation Life Association and Cordingley, 19 P.R. 89, where an order was made such as is asked for here. He referred to the judgment of Osler, J.A., at p. 91 et seq., as containing a full discussion of the principle on which such orders are made, and of the effects of the same on the company and the respective claimants. The order to go as asked, with costs to the company fixed at $30 unless a taxation is preferred. M. R. Gooderham, for the applicants.

NOKES v. KENT—DIVISIONAL COURT—NOV. 8.

New Trial Granted on Terms.]—Appeal by the defendants from the judgment of BOYD, C., of the 2nd October, 1912. The appeal was heard by CLUTE, SUTHERLAND, and KELLY, JJ. The judgment of the Court was delivered by CLUTE, J., who stated that, in their opinion, the learned Chancellor, who tried the case, was right in his refusal to put off the trial upon the material then before him; but that it would be in the interests of justice, under all the circumstances, that a new trial should be granted, upon condition that the defendants pay the costs of the former trial and of this appeal within thirty days and pay $3,000 into Court to the credit of this cause, or give security therefor to the satisfaction of the Registrar within 30 days; otherwise this appeal should be dismissed with costs. H. H. Dewart, K.C., for the defendants. Shirley Denison, K.C., and H. W. A. Foster, for the plaintiff.