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HIGH COURT OF JUSTICE.

MIDDLETON, J. FEBRUARY 9TH, 1912.

DURYEA v. KAUFMAN.

Patents for Invention—Starch Products—Agreement — Construction—Infringement — Injunction — Damages — License—Royalties—Disclosure of Secret Methods—Costs.

This action was brought against Kaufman and the Edwardsburg Starch Company in respect of a written agreement made between the parties in January, 1906, and subsequent oral agreements. The first agreement recited that the plaintiff had made valuable discoveries in respect of the business carried on by the defendant company, for which he had secured patents both in the United States and Canada. These the defendants were to be allowed to use, on certain conditions, fully set out in the agreement. The plaintiff alleged that he had performed all that he was bound to do under the agreement, and that the defendants had taken advantage of his discoveries, but refused to carry out the obligations consequent thereon; and he claimed damages for the breaches of the contract, an account of profits, an injunction against infringing the patents, royalties, and a declaration that the defendants were not entitled to make use of his inventions.

N. W. Rowell, K.C., and Casey Wood, for the plaintiff.

D. L. McCarthy, K.C., and Frank McCarthy, for the defendants.

MIDDLETON, J. (after summarising the first agreement and describing the mode of manufacture of starch products):—On the 31st December, 1901, the plaintiff obtained his patent for the manufacture of "thin boiling or modified starch," by the "in suspension" process.

This term "modified" had not then been applied to starch. Duryea says that he was the first to use it, and no trace of its earlier use has been found. While the term is convenient and scientific, it cannot be said to have any real meaning as applied to starch before this patent.

"Modify," according to Murray, may mean "to make partial changes in, to change (an object) in respect of some of its qualities, to alter or vary without radical transformation"—and, no doubt, this is the sense in which the term is used.

There has been much discussion as to the exact meaning of the expressions "modified starch" and "thin boiling starch," the plaintiff contending that starch that is in any degree changed has become "modified," and that, if the change has resulted in reducing the viscosity to any extent below the viscosity of the crude green starch, this has made the starch a "thin boiling" starch. The defendants, on the other hand, contend that these terms are synonymous, and both indicate a starch of such fluidity as to be known to the laundry trade as "thin boiling," *i.e.*, having what has been called a degree of viscosity of 40 or less.

The true view can, I think, best be determined after a consideration of the patents in question.

The plaintiff originally claimed an injunction restraining the infringement of this patent by the defendants, and the defendants in answer set up a license or agreement to license, and, in the alternative, that the patent was invalid. The plaintiff denied that the agreement to license was binding, and alleged that any right to manufacture had been lost by the defendants' defaults. An order was made by the Master in Chambers permitting the plaintiff to amend by withdrawing his claim to an injunction based on the allegation of infringement, without imposing any terms as to admission of the invalidity of the patent; and the plaintiff then contented himself with a claim for a declaration that there is no license subsisting entitling the defendants to use the patented process. I think this order was improvidently made, and that the Master ought not to have permitted this claim, once made, to be withdrawn, save upon terms amounting to its abandonment—but, as it is, this claim can now be raised in a substantive action. On motion made at the trial, I was compelled to strike out the defendants' counterclaim asking a declaration of the invalidity of the patent, as this Court has no jurisdiction to declare a patent invalid save as an incident to a defence in an action for infringement. . . .

Leaving out of consideration for the present any complication arising from Kaufman's position, the situation is this.

Duryea established the necessary plant, machinery, etc., to manufacture starch according to his in suspension process, and demonstrated, to the satisfaction of the defendant company, its commercial value, and starch has been and still is manufactured under this process and sold as "Diamond D."

Under sec. I., clause 3, the company, desiring to use this process, so notified Duryea, and on the 1st October, 1908, reimbursed him the cost of his outlay by the payment of $1,000. This gave the company the right, at the expiration of the agreement, to an assignment of the Canadian starch patent or a license to manufacture under sec. VIII., clause 1, subject to payment of royalty. Two questions arise upon this clause, the discussion of which can best be postponed—the form of the grant or license, and the amount of the royalty to be paid.

The plaintiff denied the right of the company to the license, because he alleged that the company had failed "to apply fair and energetic trade methods in marketing" this Diamond D. starch. It was well established that fair and energetic trade methods were used; and upon the argument it was admitted that this contention absolutely failed.

On the 25th March, 1911, a notice was served, purporting to cancel any rights under the agreement, by reason of the failure to pay royalties.

As the action was commenced on the 18th November, 1909, for the purpose, inter alia, of having it declared that the company had no right to a license, it is obvious that this notice cannot be relied on, for two reasons: (*a*) because the plaintiff's rights must be ascertained and declared as of the date of the writ, and at that time no royalty was due; (*b*) because the plaintiff had denied and by his action was denying the right to a license, and this excused the company from making any tender of the royalty.

The agreement for a license, upon the principle established in Walsh v. Lonsdale, 21 Ch. D. 9, was equivalent to a license; and the company were, therefore, entitled to manufacture and sell the modified starch.

In the manufacture of this modified starch, knowledge and skill, not to be acquired from the patent itself, are necessary in order to enable the company to obtain the best results. The nature of this special knowledge and skill was not disclosed upon the hearing, but it was said that it related to certain secret testing methods, necessary to enable any predetermined degree of modification to be readily and accurately obtained.

This is the very thing which Duryea agreed to give to the company. The agreement provides that he "shall disclose . . .

special processes . . . knowledge and skill for the benefit of the company." Duryea has not in any way carried out this obligation. Upon the hearing, or rather during the argument, his counsel said that he was ready to do so. If he, within a time to be limited, makes the necessary disclosure to the company, so that the patents may be successfully operated, then the only question will be the damage already sustained by the company. These I assess at the sum of $750, plus the loss of any royalty on this output. If he fails to make the disclosure, then he must answer in damages, and a substantial sum will be awarded. . . .

This clears the way for the consideration of the questions arising upon the agreement and patent in regard to glucose processes. . . .

As the result of Duryea's investigations, he determined to substitute modified starch for crude green starch in the glucose process, and in his patent of the 25th June, 1907, for a new and useful "process of manufacturing glucose," he describes his invention as "submitting a modified starch to the action of an acid to convert it into glucose and subsequently neutralising the acid and refining the product." . . .

It is quite clear that the only element of novelty, when this process is contrasted with the well-known mode of manufacture, is the use of a modified starch in the place of a crude green or mill starch.

There is no disclaimer of the neutralisation and refining as well-known processes, but I do not think this necessary; and, subject to what has to be said as to novelty and utility, this is a clear statement of what Mr. Duryea then intended to claim as his invention. The meaning of the term "a modified starch" will also have to be discussed.

This statement of invention is followed by a statement of the procedure in practice. Before considering this statement in detail, the claims should be referred to. They are : (1) "The process of manufacturing glucose, consisting in providing a purified thin boiling or modified starch, in a state of free flowing suspension in water, converting the mass by heating it with dilute acid under pressure neutralising the acid, and subsequently refining and concentrating the product." (2) "The process of manufacturing glucose, consisting in providing a thin boiling or modified starch, in a state of free flowing suspension in water, converting the mass by heating it with dilute acid under pressure neutralising the acid, and subsequently refining and concentrating the product so that, in the main, converting influences act concurrently and uniformly upon all the starch in any given conversion."

Each of these claims departs from the original statement of the invention.

Leaving out the statements as to conversion and subsequent treatment which are not novel, and the statement that the starch, when converted, was to be in a state of free flowing suspension in water, which is not novel, the first claim is reduced to the use of "a purified thin boiling or modified starch."

The second claim, treated in the same way, and leaving for subsequent consideration the words following "so that," is, for the use of "a thin boiling or modified starch."

I have come to the conclusion that in this patent the words "thin boiling" and "modified" are to be regarded as synonymous, and that in clause 1 the word "purified" must be regarded as qualifying "starch," and that this claim is for a starch which has been made thin boiling (or modified), and has then been purified.

I find nothing in the statement of the invention to justify any claim for a purified starch, as distinct from a modified starch. . . .

I have . . . come to the conclusion that there is no infringement, and I would so find even if I had come to the conclusion that the patent covered any degree of modification—because the processes are essentially different. The starch used by the defendants is not, in any aspect of the case, a "purified thin boiling or modified starch"—it is essentially a "purified starch."

I must now ascertain the rights of the parties upon the agreement and its oral supplement.

Both parties agree that what was done with reference to the glucose annex was under the oral agreement. Section III. was not regarded as adequate. . . .

There undoubtedly was a bargain that the new annex should be erected at the joint expense, under the supervision of Duryea.

I do not think there was any bargain made such as claimed by Duryea, that each was to have an equal interest in the building.

If the process was a success, then Benson (the president of the defendant company) was to refund Duryea his share of the cost. Failure was not contemplated, and there was no agreement as to what was to be then done. . . .

I fix $3,500 as the price to be now charged to Mr. Benson, and it will be declared that he is the owner of the whole. I do not think it was intended that Duryea should have no interest in the material which entered into the building if the process was a failure. He would have a half interest in any salvage.

I find that the process in question was not demonstrated to be and was not commercially advantageous over that in use by the company. The waste in the re-running of the modified starch was such as to prevent its commercial success.

The next matter to be considered is Duryea's right to a confidential assistant. I find that this formed no part of the oral agreement. . . . The failure to have the demonstration was occasioned by Duryea—and he cannot now complain.

During the two days in which the defendants demonstrated, they did use Duryea's process—they did infringe—(assuming that the patent was valid), but they were justified in making the experiment by reason of Duryea's failure.

In any event, there was no damage resulting from the temporary use of the process; and, under the circumstances, there was not anything in what was then done which would in any way justify this action.

Coming then to Maltose. The correspondence and evidence leave this matter in an unsatisfactory position. . . .In the end I think Duryea quite failed to give any satisfactory demonstration on a commercial scale of the supposed success of the result of his experiments. . . .

The corn products agreement never was made, and there never has been any adequate demonstration of the commercial value of maltose, and on either version of the oral agreement the company have not now any right in maltose. I cannot see my way clear to award any damages for Duryea's default, in view of all the circumstances, nor have I any power to order him to carry on any experiments or to make any demonstrations of his processes. From what appeared at the trial, so far as the demonstration had been made, Mr. Benson was not desirous of acquiring any rights in the maltose patent.

I think it should be declared that, in the events that have happened, the defendant company have not now any interest in the maltose patents or processes.

The question of the royalty payable may now conveniently be dealt with. . . .

I cannot find any agreement to pay royalty on modified starch, save that found in sec. VII., clause 3, giving the right to manufacture 500,000 free from royalty. The reason may be, as suggested by Mr. Benson, that he had a market for 500,000 of modified starch prepared by the old method, and it was on the excess that he was to pay. It was expected that Diamond D. would drive the "drying in" starch from the market and

greatly increase the demand. No starch has been manufactured in excess of this limit.

Then as to glucose. Section III., clause 6, provides that the royalty is to be paid on "all starch syrup products manufactured" under the patents. I cannot narrow this as Mr. Benson contends. This covers all manufactured products, and includes glucose that goes into table syrup, etc.

Then the form of the license. This is, I think, under sec. VIII., clause 1, to be "a grant and conveyance" or an assignment of the patents and not a mere license. No doubt, the parties can settle the document in the light of the above findings, and the provisions of the agreement. If not, there may be a reference or I may be spoken to.

I should add that the royalty upon modified starch is payable on the "annual sales," and so would not cover any modified starch, which may be used in the manufacture of glucose. The royalty would be payable on the glucose, in that case. The company, having the right to manufacture, would have the right to manufacture modified starch for glucose as well as for sale.

Kaufman was placed in a very unfortunate position. Duryea had bound himself to disclose to the company all his knowledge, skill, and secret processes. Kaufman was, as Duryea's assistant and employee, bound to respect his master's secrets. When Kaufman entered into Benson's employ, it was with Duryea's approval, and to some extent it was to his advantage. When the relations between Duryea and Kaufman became strained, and Duryea was contending that he was not bound to give to Benson the information he had contracted to give, he naturally became suspicious of his former employee.

I think Kaufman acted throughout with scrupulous honesty and did not in any way disclose any of Duryea's secret methods. He undoubtedly did use some of these methods in the manufacture of Diamond D. starch. If the use was in any way unauthorised, then there was no damage, because he was only doing what Benson was entitled to do, and in this way he cut down the damage Duryea would have had to pay.

The agreement between Duryea and Kaufman of the 1st June, 1906, provides that "the engagement is to be of a strictly confidential character." His employment is as a "personal confidential assistant."

Upon the renewal in May, 1907, it is provided that "this confidential restriction very particularly applies to all Charles B. Duryea's special technical manufacturing and testing processes, whether patented or not."

No doubt, one inducement to Kaufman in entering into the employment was the educational advantage he would receive by being trained by an expert chemist such as Mr. Duryea; and this provision cannot be so read as to prevent Kaufman from himself using the information he might acquire during his employment. He has in no way imparted this information; and, unless the manufacture of Diamond D. for Mr. Benson was a breach—and I do not think it was—he has not in any way used the methods either of manufacture or testing.

On ceasing to be employed by Mr. Benson and the company, Kaufman entered into a totally dissimilar employment, and has in no way sought to avail himself of the information acquired.

Yet what he did was in one sense a violation of his agreement.

I have had much difficulty in making up my mind as to the proper result so far as Kaufman is concerned; and, in the end, have come to the conclusion that I should award an injunction.

As to the laboratory equipment, save as to the maltose demonstration plant, I do not think there has been any conversion; and, if there has been a technical conversion, I think there is power to relieve from payment of damages, on the goods being returned.

The defendants agreed to consider again the taking over of certain articles, and will hand over the balance.

I think there was a conversion of the maltose plant; and I give the plaintiff the option of taking it now or charging the defendants with $150 as the damages for conversion of the cone filter, as Mr. Duryea has taken over the other articles.

Upon the evidence, I find, against the plaintiff, that there was no agreement such as he alleges to purchase the whole laboratory equipment.

When the figures are agreed upon, the balance can be carried into the general account.

There remains the question of costs. I do not think costs should be awarded against Kaufman. Between the defendant company and the plaintiff, the defendant company have succeeded upon the issues of greatest importance, and which have been most expensive to try. I do not think that I should impose upon the taxing officer the duty of apportioning costs. The matter is further complicated by reason of Kaufman and his co-defendants appearing by the same solicitor. I think I shall do what is right when I direct the plaintiff to pay to the defendant company half the total costs of the defence, exclusive of

any costs which relate to Kaufman solely. An apportionment of costs in the taxing office is to be avoided, as far as possible; and, owing to the artificial rules as to apportionment, cannot be regarded as satisfactory. . . .

SUMMARY.

Duryea receives salary	$6,000.00
Retaining fee	1,000.00
	7,000.00
Has received	6,296.08
Balance	703.92
Allowance for buildings	3,500.00
Allowance on laboratory	1,322.61
Allowance cone filter	150.00
	$5,676.53
Less damages for failure to disclose secret	750.00
Net balance due the plaintiff on above items	$4,926.53

If I have not carried all the amounts into the account, or if I have overlooked anything, counsel may speak to me before the record is indorsed.

Since writing the above, the disclosure has been made, and the terms agreed upon may be embodied in the judgment.

DIVISIONAL COURT. FEBRUARY 10TH, 1912.

SMITH v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Servant—Engine-driver—Negligence—Person in Charge—Conductor of Train—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Rules of Railway Company—Negligence of Engine-driver—Responsibility—Findings of Jury.

Reversed by Ct. of App. 4 O.W.N. 442.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 379.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. R. Logan, for the plaintiff.

W. E. Foster, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—

Upon the answers given by the jury, I would direct a verdict to be entered for the plaintiff for the damages assessed at $1,800.

The first answer declares that the engineer (represented by the plaintiff) lost his life by the negligence of the conductor of the train; and the details are given in the second answer, that the conductor should have signalled the engineer to back up the train again (*i.e.*, from the water-tank, to which point the engineer had taken the train) until the semaphore (which the engineer had passed) was lowered.

They next find that the engineer was guilty of contributory negligence because of his passing the semaphore without permission. But this last finding was clearly wrongly styled contributory negligence. It was a primary act of negligence which had expended itself when the fore part of the train reached and stopped at the water-tank. There came an interval of several minutes when the train was at a stand-still. Next and finally the train was set in motion by the engineer, in response to the conductor's signal to go ahead, when he saw that the semaphore was against him. The engineer had signalled the conductor that he was all ready (*i.e.*, that sufficient water had been taken), and thereupon came the conductor's signal to go ahead, which he obeyed to his own destruction. But the jury have exculpated him from blame in so going forward, and have put all the responsibility for that act on the conductor.

I think the learned Judge erred in applying the company's rule 22 as absolutely fixing equal responsibility on the two officers, conductor and engineer. This involves finding that the engineer should have seen the danger and refused to obey the signal to go: but, this aspect of the case was laid before the jury, and they have found that the engineer acted reasonably and with proper precaution when he saw the green lights of the bridge (which indicated all was right to go across), and then went ahead after the signal from the rear given by the conductor. The duty of the engineer is to obey the orders of the conductor; and this the jury find that the engineer rightly did at the critical moment, and thus in effect find that he did not violate the terms of the rule of the company. It cannot be said that this finding is contrary to the evidence; and, therefore, I do not think the strict letter of the rule can be invoked to neutralise the decision of the jury on the facts. The duty of the engineer is to obey the orders of the conductor; and this, the jury find, he rightly did.

The appeal should be allowed and judgment entered for $1,800 with costs of action and of appeal.

WIDDIFIELD, Co.C.J. FEBRUARY 12TH, 1912.

MOLSONS BANK v. HOWARD.

Promissory Note—Form of—Lien-note—Property in Goods Sold Passing to Vendee upon Payment—Unnegotiable Instrument.

An action in the Fourth Division Court in the county of Grey, to recover $25 and interest, upon the instrument set out below.

J. O. Dromgole, for the plaintiffs.
T. H. Dyre, for the defendant.

WIDDIFIELD, Co. C.J.:—The plaintiff sues upon a note in the words following:—

"$25.00. Toronto Junction, March 23, 1910.

"On or before the first day of March, 1911, for value received, I promise to pay to the Wilkinson Plough Co. Limited, or order, at their office in Toronto, the sum of twenty-five dollars, with interest at ten per cent. per annum after maturity till paid. I further agree to furnish security satisfactory to you at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my landed or personal property, you may then declare the whole price due and payable, and you may retake possession of the implement without process of law, and sell it to pay the unpaid balance of the price, whether due or not. Subject to the aforesaid provisions, I am to have possession and use of the implement at my own risk, but the title thereto is not to pass to me until full payment of the price, or any obligation given therefor. These conditions and agreements are to continue in full force until the full payment of the price is made."

It is admitted that the defendant is the maker of the note; that the plaintiffs became the holders thereof before maturity, for value, in good faith and without notice of any defect in title; that the defendant paid the note to the Wilkinson Plough Company, without any notice that the note had been assigned to the plaintiffs; and that the money was never paid to the plaintiffs. Upon these facts, if the document is a negotiable promissory note, the plaintiffs are entitled to judgment; if it is not a negotiable promissory note, the plaintiffs cannot recover.

The plaintiffs contend that the document is a negotiable promissory note, and that the case is not governed by the decision in Dominion Bank v. Wiggins, 21 A.R. 275.

In Dominion Bank v. Wiggins, the Court held that the following words, "The title and right to the possession of the property for which this note is given shall remain in Haggart Bros. Manufacturing Co. until this note is paid," added to the note there sued on, had the effect of rendering the document unnegotiable as a promissory note. The Court points out that, although the consideration for the note is the sale of the property, the maker has neither the title nor the right of possession thereto until the note is paid; and, unless the payee was in a position to deliver the possession of and title to the machine sold when the note matured, the purchaser was not compellable to pay, "and the payment to be made is therefore not an absolute unconditional payment at all events, such as is required to constitute a good promissory note."

In the present case, by the terms of the note, the defendant has the possession of the implement, and it is argued that, he having the possession and the right of possession, the title would pass to him automatically upon payment of the note, and that the hardship to which the maker is exposed in the Wiggins case could not happen here. Undoubtedly the Court laid considerable stress upon the fact that the defendant in the Wiggins case did not get either the title or possession, and that much of the reasoning proceeds upon that basis; and, if the absence of both title and right of possession was the determining factor, that is decisive as far as this case is concerned. I am, however, of the opinion that the right to possession of the machine for which the note was given remaining in the vendors, was not necessary to the decision in Dominion Bank v. Wiggins.

It is to be noted that, although the defendant in this case was "to have possession and use of the implement," such possession was not an absolute one, but might be revoked upon his failing to furnish security or on a sale of his property. In this respect the note is very like that in Third National Bank v. Armstrong, 25 Minn. 530, where the title to the implement for which the note was given remained in the vendors, and they had "the right to take possession of said property wherever it may be found, at any time they may deem themselves insecure, even before the maturity of this note." The judgment was on an appeal from the trial Judge; and, because it disposes, very briefly, of the questions raised in the plaintiffs' argument, will stand quoting in full:—

"It appears upon the face of the instrument that the defendant's obligation to the Williams Mower and Reaper Company, the assignor of the plaintiff, was upon the sole condition and consideration that the reaper therein mentioned as belonging to the company, the possession of which was conditionally delivered to him, should, by a proper transfer of title from the company, become his absolute property, whenever and as soon as the said obligation was fulfilled in accordance with the terms of the contract. It is also expressly provided that the title and ownership of the reaper should remain in the company until full payment of the so-called note and interest, and that the delivery of the property at the time was subject to this condition, and to the right of the company to retake possession at any time it might deem itself insecure. Defendant's promise, therefore, was not an absolute and unconditional one to be kept in any event; for it depended upon the contingency of an observance by the company of the sole condition on which it rested, that an absolute transfer of the property with good title would be made whenever the promise was performed. The promise of payment and the implied obligation to transfer the title were mutual; and, as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform one would excuse performance as to the other: Benjamin on Sale, pp. 451, 580. If, prior to any default on the part of the defendant, the company had retaken possession of the property and disposed of it, so that, upon the maturity of the defendant's obligation, an observance of the condition on its part had become impossible, there can be no doubt that, under such circumstances, no action could have been maintained against him upon his promise. An obligation of this character is altogether too uncertain to serve the purpose of commercial paper as the representative of money in business transactions. It carries into the hands of every holder notice of the existence of a condition that may result in defeating any recovery upon it, and, therefore, cannot have afforded to it the privileges attaching to that kind of paper."

This judgment is quoted and approved of by Hagarty, C.J.O., in Sawyer v. Pringle, 18 A.R. at p. 224, and by Maclennan, J.A., in Dominion Bank v. Wiggins, 21 A.R. at p. 278, and appears to me to be conclusive in the defendant's favour.

The action will be dismissed with costs.

DIVISIONAL COURT. FEBRUARY 12TH, 1912.

*SWALE v. CANADIAN PACIFIC R.W. CO.

Parties—Third Party Notice—Motion to Set aside—Con. Rule 209—Indemnity or Relief over—Warehousemen—Auctioneers.

Appeal by Suckling & Co., third parties, from the order of RIDDELL, J., ante 633.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. Laidlaw, K.C., for the third parties.

Shirley Denison, K.C., for the defendants.

W. M. Hall, for the plaintiff.

BOYD, C.:—The more important part of this case (if not the whole of it) will turn upon what was done with the goods after they reached the hands of the Canadian Pacific Railway Company at the end of their carriage to this country. The goods remained in the hands of the company till turned over to be sold by the auctioneer, Suckling, to whose custody and sale rooms the goods were transferred in bulk. The packages or cases were there opened, and the goods disposed of in a manner which is challenged by the plaintiff. As to this part of the controversy, which appears to be the substantial part, the Canadian Pacific Railway Company claim to be indemnified by or to have relief over against the proposed third party, Suckling. The wrongdoing of Suckling, if any, would be charged upon the railway company by the plaintiff, and the company should clearly have the right of resort to the wrongdoer. This may well be accomplished in one and the same action in which the plaintiff's claim is being prosecuted against the company. The same evidence that establishes the claim against the company will establish it against the auctioneer, on this part of the case; no delay or inconvenience can arise in dealing with the whole case so prosecuted with the addition of the third party; and the plaintiff makes no objection to the application. The liberal provisions of Rule 209 should be construed with a view to practical efficiency rather than to scientific accuracy; and I see no reason to disagree with the carefully considered judgment of my brother Riddell.

*To be reported in the Ontario Law Reports.

This to be affirmed with costs in the cause to the plaintiff and defendants the company as against the third party.

LATCHFORD, J., concurred.

MIDDLETON, J., also concurred, stating reasons in writing. He referred to Pettigrew v. Grand Trunk R.W. Co., 22 O.L.R. 23, as to the way in which applications to set aside third party notices should be dealt with.

Appeal dismissed.

RIDDELL, J. FEBRUARY 12TH, 1912.

RE ATKINS.

Will—Construction—Wills Act, sec. 26(1)—Will Speaking from Death—Legacies Payable out of Specific Fund—Destruction of Fund in Lifetime of Testator—Direction to Sell Land and Divide Proceeds among Persons Named—Sale of Land in Lifetime of Testator—Administration of Estate—Payment of Debts and Costs out of Particular Funds.

Motion by the executors of William E. Atkins, deceased, under Con. Rule 938, for an order determining certain questions as to the disposition of his estate, arising upon the construction of his will.

Grayson Smith, for the executors.

R. C. H. Cassels, for the legatees mentioned in the second clause of the will.

M. C. Cameron, for the legatees mentioned in the third clause.

A. G. MacKay, K.C., for the legatees mentioned in the fourth clause.

RIDDELL, J.:—The testator made his will on the 10th June, 1902, wherein, after appointing executors, he made the following dispositions:—

"(2) I leave Robert Ernest Seaman the sum of four hundred dollars to come from the amount deposited in the Molsons Bank. The balance in the Molsons Bank, after paying funeral expenses and a stone to mark my grave, not to cost over $20 dollars, to be divided equally between Martha Wright, Alice Weaver, and

Robert Neeland's four children. The expenses in connection with the payment of this part of the estate to come from the same, viz., that amount in the Molsons Bank account.

"(3) To my relatives in England I leave one thousand dollars in equal shares to the following persons, viz., Eli Atkins, my brother, Emma Bunce and William Atkins, eldest son of John Atkins, my deceased brother, and if Eli Atkins be not living then his share to go to the invalid daughter now living with Eli Atkins her father, these amounts to come from the Savings Bank account, together with any expenses in this connection with this division.

"(4) I direct that my Meaford real property be sold and divided (after the expenses of the sale be taken out and after a wise and judicious sale can be effected) equally between Tilly Short, wife of W. J. Short, Seymour Bumstead and William Edwin Bumstead, sons of Charles Bumstead, and Mrs. William Ufland. The time of the sale of this property to be in the discretion of the executors so as to effect an advantageous sale of the same. The expenses of selling and the division of this property to come out of this part of the estate."

It will be seen that there is no residuary clause.

At the time of making his will he had:—

1. In the Molsons Bank, Meaford.....$ 639.58
2. In the Post Office, savings bank department 1,103.19
3. A note of one R. C. T. and interest..... 100.00
4. Lots 61 and 62 W. side Bayfield street, Meaford

In June and July, 1905, the account in the post office savings bank was closed out, and apparently the money was deposited in the Molsons Bank account. No further sum was deposited in the post office savings bank.

On the 3rd October, 1903, the Meaford lots were sold for $925, and a mortgage taken in June, 1907, for $500, part of the purchase-money.

In March, 1907, the testator transferred into the joint names of himself and one of the persons he had named as executors the money then to his credit in the Molsons Bank. At the time of the death of the testator, in January, 1911, the whole of the testator's property was as follows:—

1. In Molsons Bank to the joint account spoken of $2,394.80
2. Mortgage, on which there was due and interest 367.10
3. Note of R.C.T. and interest..... 100.00

It seems, although it is not and perhaps cannot be proved,

that the proceeds of the Meaford lots, except so far as they are represented by the mortgage, were used by the testator for his support.

It is quite plain that the testator, when he made his will, intended that the $1,000 mentioned in clause 3 should be paid out of the $1,103.19 then to his credit in the post office savings bank —and that he did not intend any of the money then in the post office savings bank to go to the legatees named in clause 2. But he himself destroyed the fund in the post office savings bank, and deposited it in the Molsons Bank. It is contended, then, that those named in clause 2 should receive the benefit, and that all the money in the Molsons Bank should go to them. (There is no question as to Robert Ernest Seaman—he gets his $400— nor as to the expenses of this fund.)

The Wills Act, R.S.O. 1897 ch. 128, sec. 26 (1), provides: "Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will." There is nothing in this will indicating any such contrary intention— the testator retained the power of increasing or diminishing the amount on deposit, and must be taken to have understood that it was the fund so increased or diminished upon which this clause of his will would take effect. There is nothing to indicate that he did not, when he destroyed the fund, intend to play a sorry jest upon the persons named in this clause, if the destruction of the fund should have that effect.

And, in like manner, the Molsons Bank deposit he retained the power to increase or diminish, and there is nothing to indicate that he did not intend the fund so increased or diminished to be divided among those named in clause 2, or that these should not have the benefit of the increase actually made. Paraphrasing the words of the Master of the Rolls in Bothamley v. Sherson (1875), L.R. 20 Eq. 304, at pp. 312-3, "the balance in the Molsons Bank" does not mean "the balance in the Molsons Bank at the time of my making this will" but "the balance in the Molsons Bank at the time of my death:" Goodlad v. Burnett (1855), 1 K. & J. 341; In re Holden (1903), 5 O.L.R. 156; Re Dods (1901), 1 O.L.R. 7.

Then as to the land and clause 4 of the will. It was decided as long ago as 1784, by Lord Thurlow, L.C., in Arnald v. Arnald, 1 Bro. C.C. 401 (S.C., sub nom. Arnold v. Arnold, 2 Dick. 645), that, where a testatrix orders her estate to be sold, and the produce to be divided, and afterwards she sells the estate, this is a re-

vocation of the will. In that case the testatrix left a will whereby she devised a messuage in Lancashire to C. for life, and after C.'s death to C. H. and W. A. to sell the same and apply £200 to the use of M. C. A., one-third of the residue to the use of C. A., one-third to the use of W. A., and the interest of the other third to E. T. for life; remainder to E. T.'s children. The testatrix, after the making of the will, sold the estate for £2,500; a part of the purchase-money was left upon mortgage on the messuage, and the remainder invested in consol. annuities. The Lord Chancellor held that "the alteration is an ademption"—"there is an absolute disposition made by the will, and before that can take effect, another absolute disposition, inconsistent with it, is made by the testatrix herself:" 1 Bro. C.C. at p. 403. (The life tenant had apparently died during the lifetime of the testatrix; and the plaintiff was one of those entitled under the will to a part of the proceeds of the sale of the estate.) "It is clear that the money arising from the real estate devised by the testatrix, and afterwards sold by her, made part of her general personal estate:" 2 Dick. at p. 646. The same rule prevails even though the land be not conveyed during the life time of the testator, so long as a contract for sale exists: Farrar v. Winterton (1842), 5 Beav. 1; In re Bagot's Settlement (1862), 31 L.J. Ch. N.S. 772. And where, even on the day following the sale, the land is reconveyed to the testator by way of mortgage for securing part of the purchase-money: In re Clowes, [1893] 1 Ch. 214. Our own case of Re Dods, 1 O.L.R. 7, is also in point. The provisions, then, of clause 4 are wholly negatory.

The bequest in clause 3 is what is called in the civil law—and the terminology has been adopted by our Courts of Equity—a demonstrative legacy, *i.e.*, one which is a legacy of quantity in the nature of a specific legacy as of so much money, with reference to a particular fund for payment. In this case, if the fund be called in (as in the present case) or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets: Fowler v. Willoughby (1825), 2 Sim. & Stu. 354; Creed v. Creed (1844), 11 Cl. & F. 491, 509; Tempest v. Tempest (1857), 7 D.M. & G. 470, 473.

Therefore, the legatees in clause 3 are entitled to look to the assets other than the money in the Molsons Bank, and to receive so much as these assets can be made to realise.

The testator clearly was ignorant of the method of administering estates—an ignorance not uncommon amongst laymen. His intention, however, may be carried out by:—

1. Pay out of Molsons Bank fund the debts, and for the stone not more than $20.

2. Make a statement of all the costs of administration, including Surrogate Court costs, the costs of this motion, executors' commission, etc., etc.,

3. Divide this total pro rata between the balance of the Molsons Bank fund and the remainder of the estate.

Costs of all parties out of the estate, those of the executors between solicitor and client. I declined to dispose of the matter without hearing what could be urged by counsel for the beneficiaries under clause 4, and dispensed with his appearance in person, accepting a written statement in lieu of this. He frankly says that he cannot find authority for contending that his clients have any rights; but counsel who says as much assists the Court quite as much as one who advances arguments which are unsound. I think he may be allowed, upon taxation, a fee out of the estate.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 14TH, 1912.

REX v. LAWLESS.

Liquor License Act—Magistrate's Conviction for Selling without License—No Evidence of Sale—Executory Contract—Motion to Quash Conviction—Finding of Magistrate.

Motion by the defendant to quash a conviction made against him by a magistrate for selling intoxicating liquor without a license.

J. Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—I have read the evidence. The transaction seems simple, and there is nothing to discredit the evidence given.

A voluntary association, the Turtle Lake Hunt Club, contemplated a trip to the woods. Manning and Lawless were members of the association. Manning arranged with Lawless to purchase the whisky deemed necessary for this outing, and Lawless sent to Peterborough and bought the whisky there. He contemplated delivery to Manning, but it was taken, while in transit, by the police.

The conviction is based on the theory that all this is untrue, and that Lawless sold to Manning, instead of merely acting as purchasing agent for the club.

The only thing looking that way is the receipt—"Received from Sid Manning $18.75 for three cases rye whisky." This receipt is colourless. It is consistent with a sale; it is also consistent with the statement of Manning that he took it as a voucher. The whisky at Peterborough cost $18.75, and Lawless paid the livery-man who went for it $1.50, so that he was out of pocket. It is said that this would be taken into account when the expense of the trip came to be adjusted.

I do not think there was any evidence to warrant a conviction; and I have in mind the fact that all evidence upon an inquiry of this kind must be regarded with suspicion, and that the magistrate is the one to judge, and that this jurisdiction is not appellate, and that I must find that there was no evidence upon which a conviction can be based.

I quash the conviction, with costs against the informant, and with a protection order so far as the magistrate is concerned.

In this view of the case, I have not to consider the difficult question raised by Mr. Haverson, whether an executory contract —so long as it remains executory—is within the Liquor License Act.

BRITTON, J., IN CHAMBERS. FEBRUARY 14TH, 1912.

CLARKSON v. McNAUGHT AND SHAW. CLARKSON v. McNAUGHT AND McNAUGHT. CLARKSON v. SHAW. CLARKSON v. C. B. McNAUGHT.

Summary Judgment—Con. Rule 603—Actions on Promissory Notes—Defence—Indemnity—Agreement—Enforcement —. Leave to Proceed in Action.

Appeal by the plaintiff from the order of the Master in Chambers, ante 638, dismissing an application by the plaintiff, under Con. Rule 603, for summary judgment in actions on promissory notes.

F. R. MacKelcan, for the plaintiff.
F. Arnoldi, K.C., for the defendants.

BRITTON, J.:—Upon the best consideration I can give to all of the many facts in these cases, and to the argument of coun-

sel, I am of opinion, and for reasons stated by the learned Master, that the motion for speedy judgment should not prevail. It was hardly strenuously contended that, apart from the consent or agreement given to Mr. Stavert by Mr. Arnoldi and others, this was a case which properly came under the Rule. Apart from that agreement, there was apparently a defence which might or might not succeed, but which the defendants were entitled to set up and to have tried.

Then, assuming that this appeal could be treated as a motion to a Judge in Court to enforce the agreement, is it an agreement such as, after action brought, should be enforced in so summary a way? I do not think it is.

The agreement relied on is dated the 13th January, 1909. It is only in the form of a letter to Mr. Stavert, then trustee of the Sovereign Bank. By an instrument under seal and dated the 5th May, 1911, Mr. Stavert, for alleged valuable consideration, assigned to the plaintiff individually the full benefit of the alleged contract of the 13th January, 1909, and he authorised Mr. Clarkson to enforce the said contract and the undertakings therein contained, either in his (Stavert's) name or in the plaintiff's name, and to commence, institute, and prosecute all necessary proceedings for that purpose.

This action was commenced on the 26th October, 1911. The writ was specially indorsed. There is no reference in the writ to the enforcement of the contract of the 13th January, 1909. If the defendants, upon the facts, outside of the contract referred to, would be entitled to defend, they are not, in my opinion, precluded from doing so by reason of the contract. They may, if so advised, and if the facts warrant it, question the contract, its assignability, and the assignment of it.

The appeal should be dismissed with costs to the defendants in the cause.

The plaintiff asked that, in the event of this appeal being dismissed, and in view of the plaintiff appealing from my decision, that the plaintiff should be allowed to deliver a statement of claim, and that the defendants should plead thereto pending such further appeal and without prejudice to proceeding in appeal. I see no objection to the order dismissing the appeal so providing.

MIDDLETON, J. FEBRUARY 14TH, 1912.

RE JONES AND CUMMING.

Vendor and Purchaser—Petition under Vendors and Purchasers Act—Costs—Good Title Shewn before Petition.

Petition by the vendor under the Vendors and Purchasers Act for an order declaring that the vendor had shewn a good title and that the purchaser's objections had been answered.

Grayson Smith, for the vendor.
J. J. Drew, K.C., for the purchaser.

MIDDLETON, J., made an order as asked; and reserved the question of costs.

Subsequently, he gave judgment as follows:—

The procedure under the Vendors and Purchasers Act is substituted for an action for specific performance, when the contract is admitted, and the only question is as to the title.

Had this title been referred, the Master would have reported that a good title was shewn and was shewn before action. In such a case the vendor was always awarded costs on the motion upon further directions.

I, therefore, give the petitioner his costs, which I fix at $50, unless the purchaser desires a taxation, when he must pay the amount taxed.

See Dame v. Slater, 21 O.R. 375.

RIDDELL, J. FEBRUARY 14TH, 1912.

RE JONES.

Will—Construction—Direct Devises—Devises in Trust—Implication—Modification—Administration—Assignee for Creditors of Devisee—Costs.

Motion, under Con. Rule 938, by Richard Tew, assignee, for the benefit of the creditors of Charles Edward Jones, for an order determining certain questions as to the disposition of the estate of Henry Jones, deceased, arising upon the construction of his will, under which Charles Edward Jones was a beneficiary.

Henry Jones, the testator, died in 1909. His children all survived him.

The material parts of the will were as follows:—

1. Unto and to my son Charles Edward Jones I will and devise the following property, viz.: (a) my double house and lots . . . in the town of Uxbridge . . .; (b) my mill property in the township of Scott . . . . ; (c) my stable and lot on the west side of Bascom street . . . ; (d) my red grain warehouse . . . . These devises . . . I value at $6,800. (e) One-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . . This devise . . . I value at $55 per acre.

2. Unto and to my daughter Zella Jane Jones I will and devise the following property, viz.: (a) my present homestead and lots in connection therewith . . .; (b) . . . what is known as the Anderson lot . . . town of Uxbridge. These devises . . . I value at $2,900. (c) Unto and to my daughter Zella Jane Jones I will and bequeath all my household goods and furniture . . . . (d) Unto and to my daughter Zella Jane Jones I will and devise the east half of lot 6 . . . containing 100 acres; (e) the east 50 acres of the south half of lot 7 . . .; (f) lot 8 . . . the Stewart or Harper property; (g) the south-east quarter of lot 28 . . . . All of which said property I value at . . . $2,600.

3. Unto and to my executors and trustees . . . I will and devise in trust for my daughter Florence Henrietta Evans the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) the Dobson & Crosby store . . . which I value at $2,000; (b) one-quarter of my real estate . . . on east side of . . . Uxbridge . . . about 4 acres . . . . This devise I value at $55 per acre.

4. Unto and to my executors and trustees . . . I will and devise in trust for my daughter Eliza Sarah Amelia Jones the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) the Weldon farm . . . which I value at $800; (b) one-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . . I value the lot with the buildings on at $800 and the balance of the land at $55 per acre.

5. Unto and to my executors and trustees . . . I will and devise in trust for my son Robert Henry Jones the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) my hardware store and block . . . together with all of the fixtures and office furniture . . . .

This devise I value at . . . $7,000. (b) the north storehouse . . . which I value at $600. (c) One-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . . This devise . . . I value at $55 per acre.

6. (Describes the method of division of the land east of the town of Uxbridge, and provides that the devises are to be "subject to the terms and conditions set out in paragraph of this my last will and testament.")

7. All the residue of my estate, both real and personal, I direct my executors . . . to sell . . . and the proceeds thereof I will and bequeath as follows: (a) Unto and to my daughter Zella Jane Jones I will and bequeath . . . $2,000 over and above what the other children may receive . . . . (b) The residue then remaining to be so distributed that each of my five children will receive shares equal in value out of my estate after taking into consideration the values I have placed on the property willed to each of my said children, subject in the case of all of the children to the same terms and conditions as set out in paragraph 13 of this . . . will. . . .

8. In the distribution of my property my intention is that all my children should receive equal shares from my estate with the exception of the $2,000 which I have willed and bequeathed to my said daughter Zella. . . .

9. Unto and to my executors and trustees . . . I will and devise in trust for my estate and which shall form part of the money to be divided among my heirs when converted into money, my property in . . . the township of Sinclair . . . in trust to sell the same . . . and the proceeds to go into my estate for the benefit of my family, subject to the terms and conditions of paragraph 13.

10. I will and direct that any accounts which I have charged to any of my children shall be deducted from their share in the estate and to be considered as that amount paid on their shares.

11. I further will and direct that all manufactured lumber and wood . . . shall be sold . . . for the benefit of my estate.

12. Unto and to my executors and trustees . . . I will and devise in trust for my estate and which shall form part of the money to be divided among my heirs when converted into money, my property in New Ontario. . . .

13. The terms and conditions and limitations in the several devises and bequests to my executors and trustees in trust for

my children . . . are as follows: My said executors and trustees are to rent the real estate willed to each child . . . and invest the personal property . . . and apply the several incomes as they . . . may think fit for the maintenance of my said several children (their wives or husbands as the case may be) and children for and during the terms of the natural lives of my said several children, with this proviso that if my said children or any of them become insolvent or attempt to sell, mortgage, or anticipate in any way the said rents and profits of his or her share, then the one so attempting to sell, mortgage, or anticipate shall lose *if so facts* all right, title, and interest in the said rents and profits of his or her share, if my said executors and trustees see fit and deem it proper that he or she should so lose all right, title, and interest therein, and my said executors and trustees if they deem it advisable have full power and discretion in any event and under any circumstances to divert the share of any of my children from them or any of them to the benefit their or any of their wives (or husbands) and children for and during the lifetime of such child or children whose share or shares have been so diverted. On the death of any of my said sons or daughters or upon the termination of their interest in the said property, I will and devise the interest of such to their children if any survive their parent or are alive at the termination of their estate. If they or any of them should die without issue them surviving, or if they or any of them have no children alive at the termination of their estate, then I will and devise the shares of such to my then surviving children share and share alike upon the same terms and subject to the same conditions as their own shares are willed to them. . . . The executors and trustees may allow my children or any of them to occupy their respective lands. . . .

14. I would . . . suggest, L. T. Barclay of Whitby as solicitor.

15. Unto and to my sons Charles Edward Jones and Robert Henry Jones I will and devise the following property, viz.: To my son Charles Edward Jones I will and devise part of the frame store-house adjoining my brick hardware store as follows, he is to have the first and second flat extending from the north and south to within one foot north of the door leading from brick hardware store into said store-house and . . . all the land east of the brick store . . . for the consideration that he is to give me a free right of way three feet wide and extending south . . . . To my son Robert Henry Jones I will and devise the top flat and the right of way . . . and

the two bottom flats extending south. . . . For the consideration of the land east of the brick store C. E. Jones is to protect himself forever from anything falling from the brick store roof on to his at his own expense.

16. Appointment of executors and trustees.

R. S. Cassels, K.C., for Richard Tew.
C. A. Moss, for C. E. Jones and his wife.
H. P. Coke, for the executors of Henry Jones.
H. H. Davis, for all children of testator.
E. C. Cattanach, for the infant child of C. E. Jones.

RIDDELL, J.:—In November, 1910, Charles Edward Jones made an assignment, in the usual form, to Tew, for the benefit of his creditors; he has a wife and infant child, Dorothy.

At the time of the death, Charles E. was indebted to his father in the sum of $2,225.49, which was charged against him; and since the death the executors have from time to time lent him money, in all $530.49, on the agreement that the same was to be deducted from his share of the estate.

The devisees have been allowed to occupy the real estate devised to them, under cl. 13 of the will.

I have sent for and examined the original will; and it would seem quite plain that the testator did not write the will with his own hand, but the conveyancer (who writes a very plain hand) wrote the first ten pages, i.e., down to the suggestion to employ Mr. Barclay as solicitor, leaving blanks where now appears the word "thirteen" as the number of paragraph referred to. In cl. 13 the words "if so facts" are quite plainly written and are unmistakable. The remainder of the will is written with different pen and ink, but the same as the "thirteen," and also (which was not brought to my attention upon the argument, and which may not be material) an interlineation in cl. 5(a), where "eight" thousand is changed to "seven" thousand, with an apparent corresponding change in the figures following. The words at the end of cl. 10 "and to be considered as that amount paid on their shares" also appear in this pen and ink.

It would appear—though this is not certain—that it was not the same hand which wrote the two parts of the will.

1. The first question (raised by the assignee) is: "Are the devises to Charles Edward Jones contained in cl. 1 absolute, or are they subject to the provisions of cl. 13?' '

It is to be observed that the operation of cl. 13 is limited to

the "several devises and bequests to my executors and trustees in trust for my children Charles Edward Jones, Zella Jane Jones, Florence Henrietta Evans, Eliza Sarah Amelia Jones, and Robert Henry Jones."

The devises in cl. 1 are not to the executors in trust at all, but direct to C. E. Jones, and consequently these do not fall under the wording of cl. 13.

Nor do I think there is any application of cl. 13 by implication. The devises to Florence, Eliza, and Robert Henry are explicit to the executors, etc., in trust for them: clauses 3, 4, 5—those to C. E. Jones and Zella in clauses 1 and 2 are not. There is land which is to be converted into money (and therefore a bequest) left to the executors in trust for C. E. Jones and Zella (with others)—cl. 9—and that is specifically "subject to the terms and conditions of paragraph 13."

I can see no possible reason for holding that cl. 1 is subject to cl. 13, except that certain land in Uxbridge is left to the devisees without the intervention of executors or trustees by cl. 6; but there the testator clearly intended to have cl. 13 apply, although he omitted (no doubt by inadvertence) to fill in the number.

2. I cannot find authority which would induce me to believe that the specific devises to C. E. Jones are modified in any way by the expression of intention in cl. 8.

3. The provision "on the death of any of said sons or daughters or upon the termination of their interest in the said property" applies only to the property which comes under cl. 13.

The other questions submitted to me are matters of administration, and I do not think an answer should be given now. If the parties cannot agree, an order for administration may be applied for, when all the facts can be developed, the effect of interlineations, etc., considered, and so on.

The assignee will have his costs out of the estate coming to his hands of C. E. Jones—otherwise there will be no costs.

RIDDELL, J. FEBRUARY 14TH, 1912.

*RE DENTON.

Will—Construction—Legacy—Annuity — Legatee Predeceasing Testator—Failure of Gift—Bequest of Annuity during Lifetime of Widow—Death of Annuitant after Testator's Death, but before Widow's—Personal Representative Entitled—Specific Legacy—Vested Gift—Substitutionary Gift to Children of Legatee—Legatee Predeceasing Testator—Grandchildren of Legatees not Taking in Competition with Children.

Motion by Eleanor Bolland, Edna Bolland, and Isabella Bolland, infants, under Con. Rule 938, for an order determining certain questions arising upon the will of John M. Denton, deceased.

The testator died in March, 1898. The will was dated in June, 1889.

By the will, the testator devised and bequeathed all his real and personal property to his executors, upon the following trusts:—

1. To sell and dispose of my real estate . . . and to convert my personal property into cash . . . and until such sale to lease all or any portion of my real estate.

2. Out of the proceeds of my personal property to pay to the Protestant Orphans' Home of London, Ontario, the sum of $300.

3. Out of the remainder of the proceeds of my said personal property and of the proceeds derived from such sale and leasing of my real estate as aforesaid to pay to my nephew Edward A. Denton the sum of $300.

4. To pay to my sister Naomi Dickenson the sum of $100 per annum during the lifetime of my dear wife.

5. To pay to my sister Mary Bolland during the lifetime of my said wife the sum of $100 per annum.

6. After payment of the legacies before-mentioned and of my lawful debts, I desire my said trustees . . . to invest the remainder of my said estate . . . and to lease such portion of my property as shall not be sold and to pay the interest and proceeds derived therefrom to my dear wife by quarterly payments during her life.

7. After the death of my said wife, to sell and dispose of all my real estate and property then unconverted and to pay to my sister Naomi Dickenson and to Mary Bolland each the sum

*To be reported in the Ontario Law Reports.

of $500, to divide the remainder equally amongst all my brothers and sisters, including the said Naomi Dickenson and Mary Bolland, share and share alike.

8. Should any of my brothers or sisters die before the final division of my estate, leaving lawful issue . . . I desire that the share which such deceased brother or sister would have been entitled to if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his or their parent would have been entitled if living.

The widow died on the 23rd November, 1910. Naomi Dickenson died on the 17th July, 1892, leaving her surviving a number of children, eight of whom survived the testator, and seven were still living; others of her children died leaving children and other grandchildren. Mary Bolland survived the testator, but died before the widow. Some of her children died before her, leaving children, and some of these children died leaving children.

Samuel Denton and William Denton, brothers of the deceased, died after the testator, but before his widow; Samuel leaving a number of children, some of whom have died, leaving children; William leaving one child, who also died before the widow. Jethro Denton was still alive.

These were all the brothers and sisters of the testator, viz., (1) Naomi, (2) Mary, (3) Jethro, (4) Samuel, (5) William.

E. W. M. Flock, for the applicants.

M. D. Fraser, K.C., for all other beneficiaries.

J. P. Moore, for the executor.

RIDDELL, J.:— . . . 1. The first question is: "Has the annuity to Naomi Dickenson given by the 4th clause lapsed, she having predeceased the testator?"

Before the Wills Act, there can be no doubt that there was a lapse in such cases, and the Wills Act does not operate to prevent it in the present case; R.S.O. 1897, ch. 128, sec. 36, applies only when the intended beneficiary is a "child or other issue of the testator." This proposed gift, therefore, fails entirely. The fact that it is an annuity, and not a fixed sum, is immaterial: Smith v. Pybus, 9 Ves. 566, at p. 575, per Sir William Grant, M.R.

2. The second question is as to the $500 left to her specifically in clause 7; and this question must be answered in the same way and for the same reasons.

3. The third question is: "Mary Bolland having survived the

testator, and so having become entitled to the annuity under clause 5, but dying before the wife, what becomes of the annuity between the death of Mary Bolland and the widow?'' . . .

[Reference to Gifford v. Goldsey, 2 Vern. 35; Rawlinson v. Duchess of Montague, 2 Vern. 667; Lock v. Lock, 2 Vern. 666; I Rolle's Abr. 831, pl. 5; Savory v. Dyer, Dick. 162, 1 Ambl. 39; In re Ord, 9 Ch. D. 667, 671, 12 Ch. D. 22; Lewis v. Lewis, 16 Sim. 266; Attwood v. Attwood, L.R. 2 Eq. 479.]

The authorities are perfectly clear and are consistent in the one sense from the earliest times; and I am bound by them to hold that the personal representatives of Mary Bolland are entitled to the $100 a year from her death till the death of the widow.

4. ''Mary Bolland having survived the testator, but dying before the wife, what becomes of the $500 legacy to her contained in the 7th clause?''

That the rules of vesting applicable to bequests of personalty also apply to realty directed to be converted is quite clear: Theobald, Can. ed., p. 580, ad fin. One of these rules is: when the only gift is found in the direction to pay (as in this instance), and the postponement is merely on account of the property—as, for example, if there be a prior gift for life, the gift in remainder vests at once: In re Bennett's Trusts, 3 K. & J. 280; Strothers v. Dutton, 1 DeG. & J. 675; Parker v. Sowerby, 17 Jur. 752; Adams v. Robarts, 25 Beav. 658; but the vesting is postponed if the payment be deferred for reasons personal to the legatee: Hanson v. Graham, 6 Ves. 239; Locke v. Lambe, L.R. 4 Eq. 372.

Surell v. Dee, 2 Salk. 415, is an anomalous case, and has no bearing upon the present will.

I think that the legacy vested at the death of the testator, and the $500 is payable to the personal representatives of Mary Bolland.

5. ''Are the 'children' of Naomi Dickenson (who died as we have seen, before the testator) entitled to share, under the provisions of cl. 8, in the remainder of the fund formed under clause 7?''

It is to be observed that the gift to children is substitutionary and not substantive. The testator does not say, ''to my brothers and sisters then living and the children of those then dead,'' but the children are beneficiaries out of that which the parent would have received if living. . . .

[Reference to Ive v. King, 16 Beav. 46, 53; Coulthurst v. Carter, 15 Beav. 421; Peel v. Catlow, 2 My. & K. 41; Waugh

v. Waugh, 9 Sim. 372; Christopherson v. Naylor, 1 Mer. 320; Congreve v. Palmer, 16 Beav. 435; In re Potter's Trusts, L.R. 8 Eq. 52; In re Hotchkiss's Trusts, L.R. 8 Eq. 643; Thornhill v. Thornhill, 3 Madd. 377; In re Hannam, [1897] 2 Ch. 39; Smith v. Smith, 8 Sim. 357.]

I am bound by authority to hold that Naomi's descendants do not share in the fund bequeathed by clause 7.

6. . . . "Do the children of those children of the deceased brothers and sisters take in competition with their uncles and aunts?"

It is perfectly clear law that the word "children" does not include grandchildren: Radcliffe v. Buckley, 10 Ves. 195; Moir v. Raisbeck, 12 Sim. 123; Pride v. Tooks, 3 DeG. & J. 252; Higgins v. Dawson, [1902] A.C. 1; Re Williams, 5 O.L.R. 345; Re Clark, 8 O.L.R. 599; Paradis v. Campbell, 6 O.R. 632; Rogers v. Carmichael, 21 O.R. 658; Murray v. Macdonald, 22 O.R. 557: unless, indeed, the circumstances are such that, unless it does, it is meaningless: Berry v. Berry, 3 Giff. 134; Fenn v. Death, 23 Beav. 73; Loring v. Thomas, 1 Dr. & S. 497; In re Kirk, 52 L.T. 346; In re Smith, 35 Ch. D. 558; Morgan v. Thomas, 9 Q.B.D. at p. 646.

There is nothing in law or in philology to prevent grandchildren—or even more remote descendants—being called "children." . . . But this is done, in interpreting wills, only where it is reasonably necessary to give sense or consistency to the will. In the present instance there is no such necessity. . . .

We are able to give every word of the will its primary proper meaning by that interpretation, whereas that claimed for the grandchildren would require a wrench to be given to the meaning of both "children" and "parent."

The grandchildren do not take in competition with the children.

The same interpretation, I may add, has been put upon the word "children" in our Statute of Distributions: Crowther v. Cawthra, 1 O.R. 128; and in policies of insurance, etc.: Murray v. Macdonald, 22 O.R. 557.

There will be judgment accordingly. Costs of all parties out of the estate; the executor's between solicitor and client.

MASTER IN CHAMBERS. FEBRUARY 15TH, 1912.

FARMERS BANK OF CANADA v. HEATH.

Writ of Summons—Service out of the Jurisdiction—Cause of Action, where Arising—Place of Payment—Leave to Enter Conditional Appearance.

These were two actions on two policies of Lloyds, made on the 11th January, 1909, and 1910, respectively, insuring the plaintiffs against losses arising from the wrongful acts of their employees.

The plaintiffs obtained the usual orders for service on the forty or forty-one defendants in London, England; and these defendants now moved to have the orders and services made thereunder set aside, as having been allowed without sufficient grounds.

Shirley Denison, K.C., for the defendants.
M. L. Gordon, for the plaintiffs.

THE MASTER:—The first policy is for £5,145 sterling, the equivalent at $4.86 of $25,000, as noted on the margin of this 1909 policy, under or after the seal. The second is for £5,000 only. These policies were admittedly made in London and are similar in their terms, with one exception. In the 1910 policy there is an express provision that the loss, if any, is payable in Toronto. This, of course, at once disposes of the motion in that action, with costs to the plaintiffs in any event. It is only fair to state that Mr. Denison had been told by his clients that the policies were similar in all respects. As this second action must, therefore, be tried here, and all the evidence will be found here, it may be that the defendants will prefer to have both actions tried here and at the same time. In this way expense would be saved. But, in case they do not think it for their interest to take this course, then I think that the only disposition that is to be made of the motion in the 1909 case is to allow the defendants to enter a conditional appearance, in the form in which the same was allowed in the case of Burson v. German Union Insurance Co., 3 O.W.R. 230, 372. In the result, as shewn in 10 O.L.R. 238, the plaintiff failed to shew any cause of action arising within Ontario, and his action was, on that ground, dismissed with costs.

A similar course was approved of in Blackley v. Elite Cos-

tumes Co., 9 O.L.R. 382, and Nixon v. Jamieson, 18 O.L.R. 625. This latter case resembles the present, in that the contract was silent as to the place of payment, though there "the course of business had invariably been for the respondent (plaintiff) to draw on the appellants (defendants) at sight for his commission and for the appellants to accept and pay the drafts in Scotland:" per Meredith, C.J., at p. 627.

This was also the course adopted by the same learned Chief Justice in Kemerer v. Watterson, 20 O.L.R. 451, which is, I think, the latest case on the point. There the leave to enter a conditional appearance was granted because it was in doubt whether, if the contract was made in Quebec, payment was nevertheless to be made in Ontario. The decision of the Chancellor in Canadian Radiator Co. v. Cuthbertson, 9 O.L.R. 126, was expressly approved of by Meredith, C.J., in Kemerer's case, supra, at p. 454.

In view of the facts of this case and of the above authorities, I have not thought it useful or necessary to discuss the grounds urged in support of the motion by Mr. Denison, in his full and clear argument, which may hereafter enable him to get at least the same measure of success as the defendants secured in Burson v. German Union Insurance Co., supra.

The defendants may satisfy the Court, on a full consideration of the case at the trial, that payment was to be made in London under these policies, unless there is an express agreement to the contrary, as is found in the policy for 1910, which was only for £5,000, and not for £5,145, the amount secured by the one now in question. But this requires evidence which cannot be given or considered on an interlocutory application.

The motion is dismissed; costs in the cause.

MIDDLETON, J. FEBRUARY 15TH, 1912.

ABBOTT v. ABBOTT.

Husband and Wife—Alimony—Registered Judgment—Order for Enforcement by Sale of Land of Husband—Incumbrancers—Execution Creditors—Creditors' Relief Act—Inchoate Right of Dower—Costs.

Petition by the plaintiff for an order for the sale of the defendant's lands to satisfy the plaintiff's judgment against the defendant for alimony.

J. E. Jones, for the plaintiff.

G. H. Sedgewick, for the Bank of Toronto, execution creditors.

MIDDLETON, J.:—Judgment for payment of alimony was obtained in November, 1911; and no alimony has been paid.

The judgment was registered in due course, under sec. 35, O.J.A., and so had the statutory effect of "a charge by the defendant of a life annuity on his lands."

The charge may be enforced without separate action by a petition in the original cause.

The judgment or order should be in form similar to the judgment in an action to enforce a charge, and should provide for sale, subject to the claims of prior incumbrancers, unless such prior incumbrancers consent to a sale free from these claims. Subsequent incumbrancers must be notified and be allowed to prove their claims.

It is said that the incumbrances here are executions, some of which are prior and some subsequent to the plaintiff's charge. There may be some difficulty in adjusting the rights of these execution creditors, in view of the provisions of the Creditors' Relief Act for ratable distribution, and the intervening charge.

The applicant seeks to have the order provide for a sale free from her inchoate right of dower, and to provide for allowance to her of a lump sum in lieu of this right. I can find no warrant for this—and no indication that the point was considered in Forrester v. Forrester, cited in Mr. Holmested's book.

The Partition Act, R.S.O. 1897 ch. 123, sec. 49, has no application to this sale.

When the matter reaches the Master's office, if it appears that the executions exceed the value of the land, an arrangement may be made between the plaintiff and those concerned for the surrender of her dower right, but this must be a matter of arrangement.

Something was said upon the argument indicating that the plaintiff's counsel thought she would only take in competition with the creditors, ranking for the amount of past due alimony as an execution creditor. This view, if it exists, seems to me to require very careful reconsideration.

The plaintiff will have her costs of this motion and the sale out of the fund realised. Her costs up to judgment are an execution debt only.

*DE STRUVE v. MCGUIRE—DIVISIONAL COURT—FEB. 9.

Intoxicating Liquors—Excessive Drinking in Hotel—Death from Exposure to Cold—Liquor License Act, sec. 122—Proximate Cause of Death—"Caused by such Intoxication."]—Appeal by the defendants from the judgment of TEETZEL, J., 25 O.L.R. 87, ante 251. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal with costs. J. Haverson, K.C., for the defendants. G. H. Watson, K.C., for the plaintiff.

BRODIE v. PATTERSON—MASTER IN CHAMBERS—FEB. 9.

Mortgage—Redemption—Extension of Time for—Terms.]—Motion by the owner of the equity of redemption in certain islands in Lake Superior, valued by him at $50,000, to extend the time for redemption until the 9th March next, with a view to enable him to redeem by a fresh loan or a sale. By the report, $12,125.31 was found to be due. The Master said that a similar motion was successfully made, not only once but three times, in Imperial Trusts Co. v. New York Securities Co., 9 O.W.R. 45, 98, 730. So, too, in Mitchell v. Kowalsky, 14 O.W.R. 792. In the latter instance the time was extended until the 4th February, 1910, and again on that date to the 14th March. Then, as in the Imperial Trusts case, the mortgage was paid off. The mortgagees in each case got their money with all proper and just allowances and costs, and the mortgagors either received a substantial balance, as in the first case, or recovered the property, as in the other. The only question, therefore, was, on what terms should the reasonable request of the mortgagor be granted? Here the facts, as stated on the argument, were more favourable to the application than were those of the two reported cases. The mortgage here was not of such long standing as that of the Imperial Trusts Company, and it had been reduced by the liquidation of a collateral security. An order was, therefore, made extending the time as asked; interest to be paid at the rate of 5 per cent. upon the aggregate amount fixed in the report, which would be settled and inserted in the order. To this would be added the costs of this motion, fixed at $20—making a total of $12,200. J. B. Clarke, K.C., for the applicant. J. J. Maclennan, for the plaintiff.

*To be reported in the Ontario Law Reports.

WEBER v. BOWMAN—SUTHERLAND, J.—FEB. 10.

Water and Watercourses—Dam—Obstruction of Stream—Flooding Lands—Damages—Injunction—Costs.]—Action by a farmer against a miller for damages for the obstruction of the waters of a stream flowing through the plaintiff's land, and for an injunction. The learned Judge finds, upon the evidence, that the dam constructed by the defendant in 1911 is higher than either of the former dams existing at or near the locus of the defendant's dam. He also finds that the plaintiff's lands have, since the erection of the dam by the defendant, and in consequence of its being higher than the former dams, been subjected to a greater quantity of water than would naturally come there; and that, in consequence, the plaintiff has suffered damage. The damage was confined to 7 or 8 acres of land, worth about $6 an acre. Judgment for the plaintiff for an injunction restraining the defendant from obstructing the flow of the stream to such an extent as to overflow the land mentioned, and for damages assessed at $25, subject to a reference, if either party objects to that amount; in which case the costs of the reference will be in the discretion of the Master. The plaintiff to have his costs of the action on the County Court scale without any right of set-off to the defendant. A. B. McBride, for the plaintiff. W. M. Cram, for the defendant.

RICHARDS v. CARNEGIE—DIVISIONAL COURT—FEB. 12.

Trespass—Damages—Right to Possession of Land—Landlord and Tenant.]—An appeal by the plaintiff from the judgment of the County Court of the County of Bruce, dismissing an action for damages for trespass alleged to have been committed by the defendant upon lands demised to the plaintiff. The appeal was heard by BOYD, C., LATCHFORD, and MIDDLETON, JJ. The judgment of the Court was delivered by BOYD, C., who said that, having read the evidence, he thought the Judge made a right disposition of the case by dismissing it. The whole claim was of a trumpery kind, at most being for some possible damages that the plaintiff might have sustained by not engaging in gathering ashes to put in an ash-heap on the premises for thirteen days. There was no evidence that there were any ashes to be gathered during that time, or that the plaintiff could have got any ashes. Then the plaintiff's case failed as to his being legally in possession of the land. There was no evidence of a

yearly holding. Johnson, who let the plaintiff on at first, had no authority to act for the owner; but, being in charge of the place to make a sale of it, he allowed the plaintiff, out of compassion, to gather ashes on it for one year at $5. When this was told to the owner, he objected, and said that the plaintiff must be ordered to leave. This was in the summer of 1910, and after the expiry of the year. The plaintiff, however, kept on till the end of September, and then paid rent for the extra few months, and took a receipt on the 28th September, expressed to be for rent up to the 30th September, 1910. Carnegie, by his act in receiving the money, validated that extent of holding, no doubt; but what was done was against his wish, and could not be carried beyond the very letter of what was done. There was nothing to go to the jury at the close of the plaintiff's case, and it certainly was not strengthened by the defence. Appeal dismissed with costs. G. H. Kilmer, K.C., for the plaintiff. O. E. Klein, for the defendant.

ALLEN v. GRAND VALLEY R.W. CO.—MASTER IN CHAMBERS—FEB. 13.

Discovery—Motion for Examination of Foreign Defendant on Commission—Con. Rule 477*—Payment of Conduct-money to Bring Defendant to Ontario.*]—Motion by the plaintiff for a commission to examine the defendant Verner at New York, for discovery. It was contended, for the defendant Verner, that the Master had power, under Con. Rule 477, to order that this examination should take place in Toronto, and that the plaintiff should pay the necessary conduct-money. The Master said that there was no authority for such an order. It did not seem reasonable that a party exercising his undoubted right should be required to advance money to save expense and inconvenience to the opposite party and his legal advisers. The Rule admitted only of such orders as were made in Lick v. Rivers, 1 O.L.R. 57; Lefurgey v. Great West Land Co., 11 O.L.R. 617; and Cox v. Prior, 18 P.R. 492. It was stated on the argument that the defendant Verner would sooner attend at Toronto in any case. If so, the Master said, the defendant must do so at his own expense meantime. If this was agreed to, the motion would be dismissed; costs in the cause. Otherwise, the order must go, on the usual terms. G. H. Sedgewick, for the plaintiff. Grayson Smith, for the defendant Verner.

HARRISON v. KNOWLES—MASTER IN CHAMBERS—FEB. 13.

Security for Costs—Property in Jurisdiction—Onus.]—Motion by the plaintiff to set aside a præcipe order for security for costs. The motion was based on the ground that the plaintiff had adequate assets in the jurisdiction. It was supported only by the affidavit of the plaintiff's solicitor, which stated that the action was on promissory notes given for the purchase of an automatic lithographing press, said to be worth at least $1,000. The defendant by his affidavit admitted that the notes given in payment were overdue, but stated that they had not been paid because the machine was not complete and was not, and, in his opinion, never would be, able to do the work which it was warranted to do. It was also subject to the usual lien agreement, which the defendant conceded gave the right to the plaintiff to retake possession at any time and to remove out of the province. The Master said that the onus was on the applicant, and he did not think it was satisfied. A chattel of that kind, in such a doubtful state of efficiency, could not be held to satisfy the conditions in Bready v. Robertson, 14 P.R. 7; Feaster v. Cooney, 15 P.R. 290; Daniel v. Birkbeck Loan and Savings Co., 5 O.W.R. 757. Motion dismissed with costs to the defendant in the cause. O. H. King, for the plaintiff. S. G. Crowell, for the defendant.

BANK OF OTTAWA v. BRADFIELD—SUTHERLAND, J.—FEB. 13.

Promissory Notes — Accommodation Indorsement — Weak Mental Condition of Indorser—Inability to Appreciate Transaction—Knowledge of Holders of Notes—Fraud and Undue Influence of Maker of Notes—Counterclaim—Moneys Applied by Bank on Indebtedness of Maker—Evidence.]—Action for the balance due upon two promissory notes indorsed by the defendant for the accommodation of his son. The defendant was represented by a guardian ad litem appointed by the Court. In the statement of defence it was alleged that, if the defendant did at any time indorse the promissory notes sued on, he was, at the time he so indorsed, of unsound mind and incapable of making any contract or understanding the nature of what he was doing, as the plaintiffs well knew. The defendant counterclaimed for moneys deposited by him with the plaintiffs which he alleged was wrongfully applied by the plaintiffs towards the payment of notes made by his son. The learned Judge, after setting out the facts at length, and referring to portions of the

evidence, said that he had come to the conclusion, upon the evidence, that the defendant had been failing mentally for some years past, and had gradually become incapable of intelligently appreciating business matters. It was fairly well established that, at all events after the death of another son in 1908, the defendant was not competent to understand a business transaction; and the finding must be that anything the defendant did, in the way of signing or indorsing notes or renewals, consents or waivers, in connection with the notes in question, was done at times when his mental condition was such that he could not understand or appreciate what he was doing or the liability he was incurring. It was charged on behalf of the defendant that Graham, the plaintiffs' manager, induced the defendant to sign or indorse the renewal note dated the 29th July, 1909, for $2,437.45. The learned Judge said that he was satisfied from the evidence that Graham had had opportunity before this of learning and that he knew that the defendant was not in such a mental condition as to enable him to transact business or realise the liability he was incurring. And it was equally clear, from the evidence, that, when the note dated the 25th November, 1909, for $2,500, was indorsed by the defendant, he was not mentally fit to do business or understand the nature of the transaction. It was his son, H. H. Bradfield, who apparently induced him to indorse this note; and he did so knowing of his father's incapacity; and the defendant's indorsement of that note and his indorsement of its subsequent renewals down to the one now in question were obtained by the son by fraud and undue influence and in each case when the defendant was not competent to transact business or understand the liability he was incurring. Reference to Re James, 9 P.R. 88; Weinbach's Executor v. First National Bank of Easton, 21 Am. Law Reg. N.S. 29. Action dismissed with costs. As to the counterclaim, the learned Judge said that, in view of his determination of the plaintiffs' rights against the defendant in connection with the notes in question, they had no authority or right to appropriate the sum of $2,774.69, deposited with them by the defendant, and apply it on the notes; and the defendant was entitled to judgment for that amount and interest against the plaintiffs. The defendant was also entitled to recover from the plaintiffs two sums of $623.10 and $552.45 obtained by the plaintiffs from the assignee of the son's estate, with interest. The defendant also asked that a sum of $2,800 withdrawn by the plaintiffs from the defendant's account, without his authority, and applied in payment of a promissory note

of the son, on or about the 9th May, 1908, should be repaid to him. As to this, the learned Judge said that, while he was not at all certain that the defendant was not, even then, so unfit to transact business as to render it impossible for him, with any true appreciation of what he was doing, to consent to the withdrawal of his money to pay the note of another, the evidence was not so clear as to enable him to determine that satisfactorily. And so, as to this portion of the counterclaim, the defendant must fail. The defendant to have costs of the action and of the portions of the counterclaim upon which he succeeded; no costs to either party of the portion of the counterclaim upon which the defendant failed. D. B. Maclennan, K.C., for the plaintiffs. R. A. Pringle, K.C., for the defendant.

CANADIAN KNOWLES CO. v. LOVELL-MCCONNELL CO.—MASTER IN CHAMBERS—FEB. 14.

Discovery—Examination of Officer of Defendant Company—Scope of Examination—Production of Books—Evidence—Admissibility.]—The plaintiffs, having issued a commission to examine witnesses at New York, one of them being the manager of the defendant company, and proposing to ask certain questions and to ask for production of the books and records of the defendant company, moved for a direction as to their right to have such discovery. The plaintiffs, by the statement of claim, alleged an agreement with the assignor of the plaintiffs to appoint him sole selling agent of the defendants for Canada until the 1st April, 1911, and to deliver to him $10,000 worth of their products, and that this contract was broken by the defendants in both respects; and claimed $5,000 damages. The defendants, by their statement of defence, specifically denied these material allegations and put the plaintiffs to the proof thereof; and also alleged failure on the part of the plaintiffs to comply with the terms of the contract. The Master said that the matter came before him now, as he understood, as if the questions had been asked and the witness had refused to answer or make production. If the examination was by way of interrogatories, there would certainly be no power to limit them: see Toronto Industrial Exhibition Association v. Houston, 9 O.L.R. 527, and cases cited; and the same principle applied to the present case. The Master thought also that the plaintiffs were entitled to shew that their allegations which the defendants had denied were true, and to prove by the defendants' books (if it were the fact) that

sales were made in Canada prior to the 1st April, 1911, and subsequent thereto also—the latter inquiry being relevant to the damages, if the Court should hold the plaintiffs entitled to recover. It was said by the defendants' counsel that the plaintiffs should not be allowed to investigate the defendants' business and find out the names of their customers; but this objection could not prevail to defeat the plaintiffs' right to such discovery as might assist their case. The amount of sales made by the defendants and the prices obtained would be the best evidence as to the damages, if any, which the plaintiffs could recover. Such questions should be answered and information given, leaving it to the trial Judge to pass on the question of admissibility, as was said by Denman, C.J., in Small v. Nairne (1849), 13 Q.B. 840. M. L. Gordon, for the plaintiffs. W. Proudfoot, K.C., for the defendants.

CLARKE v. BARTRAM—MIDDLETON, J., IN CHAMBERS—FEB. 14.

Parties—Addition of Plaintiff—Assignment of Claim—Joinder of Parties and Causes of Action.]—An appeal by the plaintiff from an order of the Master in Chambers refusing to add Thomas Crawford as a co-plaintiff. MIDDLETON, J., said that Clark might have a cause of action or might not; it would be premature to discuss that question; but from what was said by Clarke during the examination of Crawford, it was clear that what was sought was to add Crawford so that he might in this action repudiate a release which, it was said, he gave Bartram of the personal claim against him. Crawford executed the assignment to Clarke, not for the purpose of enabling Clarke to attack Bartram upon any such ground, but to enable Clarke more effectually to assert his own claims; and Crawford did not now assert that he was in any way defrauded by Bartram; but, as Clarke said: "He does not know; when the facts come out it will shew he has a cause of action." The suggested cause of action is not one that can be properly joined with the main claim of Clarke. If the assignment from Crawford to Clarke was supposed to convey this cause of action, it, no doubt, failed to carry out this intention; and Clarke cannot successfully set up this claim; but he should not now be aided by the Court adding a plaintiff in an action brought by one without title—the plaintiff who alone can sue—particularly when this would result in an improper joinder. Appeal dismissed, with costs to the defendant in any event of the cause. J. Shilton, for the plaintiff. F. E. Hodgins, K.C., for the defendant.