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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 6TH, 1920.

*RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

Public Health—Compulsory Vaccination—Vaccination Act, R.S.O. 1914 ch. 219, sec. 12—City Council Notified by Provincial Board of Health to Order Vaccination of Citizens—Failure of Council so to Order—Motion by Board for Mandamus to Council—Discretion of Council—Discretion of Court—Status of Board—Corporation—Legal Entity—Parties—Public Health Act, R.S.O. 1914 ch. 218, secs. 6, 7, 83 (2).

An appeal by the Provincial Board of Health from the order of SUTHERLAND, J., in Chambers, ante 304.

The appeal was heard by RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

H. M. Mowat, K.C., for the appellants.

G. R. Geary, K.C., and C. M. Colquhoun, for the city corporation and council, respondents.

RIDDELL, J., read a judgment in which he said that the fact that smallpox existed in the city of Toronto alone made it the duty of the council of the municipality to make an order under sec. 12 of the Vaccination Act, R.S.O. 1914 ch. 219. The council is not given a discretion.

There can be no doubt of the power of the Court to grant a mandamus requiring the council to do its statutory duty. The Court has a discretion, but will not as a rule overlook the breach of a plainly imperative duty imposed by the Legislature.

Reference to Rex v. Bishop of Sarum, [1916] 1 K.B. 466; Rex v. Lords Commissioners of His Majesty's Treasury, [1909] 2 K.B. 183.

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

But the Court does not act proprio motu; in giving a mandamus the Court acts only upon the application of some person, natural or artificial, who is entitled to ask the Court for an order.

Two distinct questions were involved: (1) as to the right, i.e., the legal power, of the applicant to apply to the Court at all; (2) as to the right of the applicant to the relief sought.

As to the first question: while the Provincial Board of Health is not made a corporation by the Public Health Act, it is made a legal entity, wholly distinct from its individual members; it has duties to perform as a Board, and in the performance of these duties it may require the assistance of the Court. Indeed the Board, as a Board, is given the power specifically to apply to the Court in certain circumstances: sec. 83 (2) of the Public Health Act, R.S.O. 1914 ch. 218. The Board is not both a legal entity and not a legal entity; it has a right to be heard in Court. If there be anything in Sellars v. Village of Dutton (1904), 7 O.L.R. 646, inconsistent with this, it is not to be followed.

In Metallic Roofing Co. v. Local Union No. 30 (1903), 5 O.L.R. 424, the appellants were held not to be a legal entity. Re City of Ottawa and Provincial Board of Health (1914), 33 O.L.R. 1, was well decided; and there is no difference between "status to subject to motion for mandamus" and "status to entitle to come into Court and ask for a mandamus."

As to the second question: assuming the entity of the Board and its power of applying to the Court, it has no right to the order asked for.

Under the law a mandamus is not granted unless the applicant can "shew that he has a clear legal specific right to ask for the intervention of the Court": Regina v. Guardians of Lewisham Union, [1897] 1 Q.B. 498, 501. No such right is given to the Board specifically or by implication.

Very extensive powers of investigation are given the Board by secs. 6 and 7 of the Public Health Act, but there is nothing to indicate any duty or power of supervision over the conduct of municipal councils in vaccination matters any more than in other matters.

The Local Board of Health (Toronto) had (since the hearing) refused to join in the application; and (semble) if that Board was willing to be added as an applicant, the case would not be advanced by the addition.

The Provincial Board having applied in good faith and in the public interest, it was not a case for costs.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

LENNOX, J., agreed in the result.

Appeal dismissed without costs.

HIGH COURT DIVISION.

SUTHERLAND, J. JANUARY 5TH, 1920.

KENNING v. WALSH.

Vendor and Purchaser—Agreements for Sale of Land—Description—Inclusion of Water-lot to which Vendors had no Title—Provision in Agreements as to Effect of not Making Objections to Title within Limited Time—Estoppel—Abatement in Price—Determination by Court—Right of Purchaser to Cease Paying Instalments of Purchase-money on Title not being Shewn——Recovery of Purchase-money Subject to Abatement—Interest—Costs—Reference.

Action by the trustees of a syndicate to recover the balance of principal and interest due under two contracts entered into by the defendant for the purchase of portions of the land owned by the syndicate. The defendant counterclaimed for damages for the plaintiffs' failure to make improvements which they had agreed to make, as the defendant alleged, and for the failure to procure a patent for the land, and for rectification of the contracts.

The action and counterclaim were tried without a jury at Sandwich.

E. A. Cleary, for the plaintiffs.

A. St. George Ellis, for the defendant.

SUTHERLAND, J., in a written judgment, said that there was no express statement in either contract with respect to the water-lot in front of the land, nor to a Crown patent. In the agreement of the 19th August, 1914, had it not been for the words contained in the description, "and thence northerly to channel bank," the description would have been perfectly accurate. The description being an adequate, particular, and sufficient one of what was no doubt intended to pass, it was argued on behalf of the plaintiffs that the words quoted were an erroneous addition and should be discarded. Reference to Cowen v. Truefitt Limited, [1899] 2 Ch. 309; Mellor v. Walmesley, [1904] 2 Ch. 525; Jarman on Wills, 6th ed., vol. 2, pp. 1265, 1266. But here the addition to the description of the land which the plaintiffs owned and intended to convey, namely, lot A, was in the nature of something definitely described and intimately associated with that lot—probably affecting its value in the mind of a purchaser.

Under the contracts it was incumbent upon the purchaser to search the title to the lands he was purchasing within 30 days and

give written notice to his vendors of particulars of objection thereto; if he failed to do so, he was to be deemed to accept and be bound by such title as the vendors had.

The plaintiffs contended that this provision had the effect of estoppel, in so far as any claim put forward in the action with respect to the water-lot patent was concerned. The cases, however, seemed to shew that a condition which enables a vendor to cancel a sale if a purchaser should make any objection to his title with which he is unwilling to comply, does not enable the vendor to rescind when he has no title whatever: Want v. Stallibrass (1873), L.R. 8 Ex. 175; Brown v. Pears (1888), 12 P.R. 396; and other cases.

Where, as here, the plaintiffs had in fact no title to the water-lot, i.e., the land covered with water extending from the water's edge in front of lot A to the channel bank, the provision referred to would not preclude the defendant from insisting that the description in the agreements executed by the plaintiffs covered that land, and that the plaintiffs must make an abatement in the price.

The amounts in respect of which the defendant was in default under the contracts were definitely known, apart from the matter of abatement in price.

Where a vendor contracts to sell land to part of which he can shew no title, the purchaser may sue for damages for non-performance: Bowman v. Hyland (1878), 8 Ch. D. 588, and other cases; and further, in such a case as this, the purchaser cannot be compelled to continue making payments under the contracts without the plaintiffs agreeing either to make an abatement in the price in respect of the land they contracted to sell and to which they cannot make title, or giving a satisfactory undertaking that they can and will put themselves in a position to procure a title thereto and convey it to the defendant, or, in default of their doing either, submit to have the extent of the abatement determined by the Court.

The learned Judge said that he had come to the conclusion that he should allow the defendant $1,600 as an abatement in price with respect to lot A and the failure of the plaintiffs to make title to the channel bank, and the sum of $200 each with respect to lots 1 and 2 for any damage by way of abatement on account of there being no patent to the water lot in front of the 30-feet right of way.

The evidence was not sufficient to determine a question which was raised by the defendant as to sums which he had paid for local improvements. If the parties could not agree upon an adjustment, and the defendant desired a reference, he might have one on this point, at his own risk as to costs.

The plaintiffs should have judgment for the instalments proper-

ly payable under the contracts since the defendant ceased to pay, with suitable interest.

The defendant should have judgment for $2,000 with costs of the action, as he was entitled to refuse to pay until the question of damages for abatement was adjusted or determined.

In the event of a reference, it will be to the Local Master at Sandwich, and further directions and subsequent costs will be reserved until after report.

In taking the account of the amount due to the plaintiffs, all interest paid in respect of so much of the purchase-price as equals the sums allowed by way of compensation are to be treated as payments on account of principal.

ROSE, J. JANUARY 7TH, 1920.

SHEPPARD v. BERRY.

Trusts and Trustees—Settlement—Money Deposited in Bank in Names of Agents of Settlor—Direction as to Disposition by Agents—Attempt at Making Testamentary Disposition—Executed Trust—Validity—Duty of Trustees to Dispose of Residue of Fund after Death of Settlor—Action by Person Claiming Estate of Settlor under Will—Dismissal—Costs.

The plaintiff, as administratrix (with the will annexed) of the estate of Catherine Wilson, deceased, sued for an account of the defendant's dealings with a sum of $929.58, drawn out of Catherine Wilson's bank, on her own cheque, and deposited to the credit of the defendant and Margaret Wilson, about a month before the death of Catherine Wilson.

The action was tried without a jury at Brockville.

H. A. Stewart, K.C., for the plaintiff.

A. E. Fripp, K.C., for the defendant.

ROSE, J., in a written judgment, said that Alexander Wilson, husband of Catherine Wilson, died in 1902, leaving a will, which was never admitted to probate, by which he left the residue of his estate to Catherine Wilson, to have, use, enjoy, and control during her widowhood, directing that whatever part of his personal estate should remain at the death or re-marriage of Catherine Wilson should go to his three daughters by a former wife.

It seemed to be reasonably clear that what money Catherine Wilson had at her credit in the bank at the time of the transaction in question, on the 3rd April, 1918, had been derived wholly or in

great part from the sale of chattels which had formed part of her husband's estate. The bank-account had stood in the joint names of herself and C. Sheppard, the plaintiff's husband. She seemed to have decided that she would end Sheppard's control over the fund, and she gave a cheque to the defendant, who was named in her husband's will as one of the executors, and told him to draw the money from the bank at Kemptville; and, when he had done that, she told him to deposit it in the joint names of himself and her half-sister Margaret Wilson, and to pay thereout the bills of her physician and nurses, her funeral expenses, and the cost of a head-stone, and to deal with the balance as directed in her husband's will.

By payments manifestly proper the account had been reduced, by the 30th November, 1919, when the pass-book was written up by the bank, to $620.87; and the question was, whether that sum was to go to the plaintiff's half-sisters in accordance with the will of Alexander Wilson and the direction of Catherine Wilson, or whether it formed part of the estate of Catherine Wilson and was to go to the plaintiff under a will made in 1906.

The plaintiff's point was that there was here an attempt at a testamentary disposition, and that such disposition was invalid because not made in the way in which wills must be made: she said that Catherine Wilson retained in herself the right to dispose of the money in her lifetime; and she relied upon Hill v. Hill (1904), 8 O.L.R. 710, and Smith v. Gosnell (1918), 43 O.L.R. 123.

The learned Judge said that he was not at all sure that Mrs. Wilson did retain any legal right to withdraw the money from the settlement, or any power to do more than compel the defendant and Margaret Wilson to apply it for the purposes mentioned; but, even if she did retain the power to revoke the trust, the case was exactly like Re Bellemare (1919), 16 O.W.N. 24, and was governed by Tompson v. Browne (1835), 3 My. & K. 32, therein referred to: there was an executed trust which was not rendered invalid by the fact that one of the duties of the trustees was to dispose of the residue of the fund after the death of the settlor. The plaintiff's claim, therefore, failed.

There was some justification for the plaintiff insisting upon an investigation of the circumstances under which the money came into the hands of the defendant, and she ought not to be ordered to pay costs; but she should not be awarded her costs out of the fund. The action should be dismissed without costs.

ROSE, J. JANUARY 7TH, 1919.

HAIGHT & DICKSON LUMBER CO. LIMITED v. McPHERSON.

Contract—Sale of Timber-rights—Evidence—Letters—Right of Vendor to Repudiate—Agent of Vendor Claiming as Purchaser—Failure to Disclose Intention to Purchase—Voidable Contract—Right to Rescind—Fraudulent Misrepresentation—Pleading—Defence—Amendment.

Action for damages for breach of an alleged contract on the part of the defendant to sell to the plaintiffs the defendant's rights to the timber (other than the white pine) on three berths, parts of the townships of Parkin, Hutton, and Creelman.

The action was tried without a jury at Sudbury.

G. E. Buchanan, for the plaintiffs.

M. B. Tudhope, for the defendant.

ROSE, J., in a written judgment, said, after stating the facts, that, in his opinion, the defendant had a clear right to repudiate any agreement that might be found in the words of the letters that passed between him and the plaintiffs.

The statement made by the plaintiffs in their letter of the 13th June, "We have lately run on to a party who, we think, we can interest in this proposition . . . and think we can induce him to pay $6,000 cash which you asked," their request for an option, and their inquiry as to the payment of a commission, meant, and were evidently understood by the defendant to mean, that the plaintiffs, as agents for the defendant, would endeavour to make a sale to the purchaser whom they professed to have found. It was not true that they had found a purchaser. Apparently they were trying to arrange that the Canadian Copper Company should buy from them the cord-wood to be cut on the berths described, and should pay them for it as much as they would have to pay the defendant for the berths; but there was no intention on the part of the plaintiffs of turning over to the Canadian Copper Company everything that they bought from the defendant. This being so, the plaintiffs were in one of two positions, in neither of which could they successfully maintain this action. Either the correspondence made them the defendant's agents to effect a sale, in which case a purchase for themselves, without full disclosure to the defendant, was voidable at the defendant's option when he learned the facts—and he had not learned them at the time when he attempted to rescind the contract for other

reasons: see Taylor v. Wallbridge (1879), 2 Can. S.C.R. 616, 654; McGuire v. Graham (1908), 16 O.L.R. 431; or, if that was not the effect of the correspondence, and if the defendant's letter of the 17th June was to be construed as an offer to sell to the plaintiffs for $5,900 instead of for the $6,000 which he had theretofore demanded, such offer was procured by a fraudulent misrepresentation, and the contract formed by its acceptance by the plaintiffs was likewise voidable at the defendant's option.

The ground of defence thus given effect to was not pleaded, but the evidence to support it was given, and it was fully discussed in argument: the defendant should have leave to amend so as to raise it now.

Action dismissed with costs.

ROSE, J. JANUARY 7TH, 1919.

*MONTREAL TRUST CO. v. RICHARDSON.

Contract—Undertaking to Underwrite Shares of Company Pledged to Trust Company as Security for Advances—Power to Hypothecate—"Banking Institution"—Executor of Underwriter Sued by Trust Company upon Undertaking—Defence—Misrepresentations Made by Agent of Pledgor to Underwriter—Whether Open as against Pledgee—Intention that Pledge should be Free from Equities—Assignment of Chose in Action—Omission to File Prospectus of Company—Agreement to Purchase Shares—"Subscribe for"—Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 97—Notice of Assignment—Rule 85—Parties to Action.

Action against the executor of George T. Richardson, deceased, to recover $9,500 and interest upon what was alleged to be an underwriting agreement made by the deceased, in respect of the shares of a company called "Canadian Jewellers Limited."

The action was tried without a jury at Kingston.

J. L. Whiting, K.C., and J.B. Walkem, K.C., for the plaintiffs.

A. B. Cunningham, for the defendant.

ROSE, J., in a written judgment, said, after setting out the facts, that it was strongly urged on behalf of the defendant that his testator's signature to the agreement was obtained by fraudulent misrepresentation and by concealment of the fact that

Timmis, who was the promoter of the merger of certain manufacturing and importing wholesale jewellery businesses, from which the company referred to was formed, was making a profit on the transfer of the businesses to the new company. No importance, however, attached to the alleged concealment. Timmis was not obliged to disclose to a proposed underwriter the fact that he expected to make a profit, and it must have been apparent to the testator, if he considered the matter at all, that some profit was in contemplation. Some of the misrepresentations alleged were not material; but in a letter written by Timmis there was one most material statement, which appeared to have been absolutely untrue, viz., the statement that the money to be derived from the sale of the surplus assets of the amalgamating concerns, together with $150,000 to be raised by the sale of shares to clients of J. A. Mackay & Co. Limited, would give the company ample cash capital, so that there was little chance of it becoming necessary to call upon the underwriters. The agreement, in the hands of J. A. Mackay & Co. Limited, would have been affected by this misrepresentation made by Timmis, and they could not have succeeded in an action based upon the agreement. The agreement was given upon the express condition that it might be pledged to any "banking institution" as security for advances. It was pledged to the plaintiffs as security for advances; and the plaintiffs are a "banking institution," though not a bank: the general effect of the Quebec statutes relating to the plaintiffs—52 Vict. ch. 72, 59 Vict. ch. 70, 63 Vict. ch. 77, and 9 Edw. VII. ch. 115—is such that the plaintiffs must be considered one of the institutions to which the testator, by the use of the words quoted, authorised J. A. Mackay & Co. Limited to hypothecate the agreement sued upon.

Soon after the deposit of the agreement, the plaintiffs made an advance of $2,000 to J. A. Mackay & Co. Limited, and later on Mackay & Co. acquired more shares from the Canadian Jewellers Limited, and paid for them with money borrowed from the plaintiffs. Presumably, the $2,000 and the later sums were advanced partly upon the faith of the validity of the testator's underwriting and of the other collateral securities held by the plaintiffs. The defendant was not entitled to set up the misrepresentation as against the plaintiffs, for the reason that "it appears from the terms of the contract that it must have been intended to be assignable free from and unaffected by" any equities existing between the testator and the Mackay company—otherwise the words, "this underwriting may be pledged or hypothecated as security for advances," had no meaning; and it followed that the rule that a chose in action assignable only in equity must be assigned subject to the equities existing between

the original parties to the contract must give way: see In re Agra and Masterman's Bank, Ex p. Asiatic Banking Corporation (1867), L.R. 2 Ch. 391, at p. 397; Dickson v. Swansea Vale R.W. Co. (1868), L.R. 4 Q.B. 44; In re Natal Investment Co. (1868), L.R. 3 Ch. 355; In re Blakely Ordnance Co., Ex p. New Zealand Banking Corporation (1867), L.R. 3 Ch. 154.

Another defence discussed was the omission to file a prospectus; but it was admitted that the statute in force at the time of the transaction, the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, sec. 97, could not be invoked if the testator's contract was really a contract to purchase shares from the Mackay company. Notwithstanding the use of "subscribe for" in the expression "subscribe for and agree to purchase from J. A. Mackay & Co. Limited . . . ," the agreement, read as a whole, could not be construed as anything but an agreement to buy from the Mackay company.

It was objected that, as no express notice in writing of the assignment of the agreement to the plaintiffs was given before action, the plaintiffs could not maintain the action in their own name. This objection was completely met by the provisions of Rule 85, as explained in Graham v. Crouchman (1917), 41 O.L.R. 22—even if the correspondence did not amount to the express notice required by sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, which the learned Judge did not decide.

There should be judgment for the plaintiffs for $9,500, with interest at the legal rate from the 15th January, 1913, and costs.

SUTHERLAND, J., IN CHAMBERS. JANUARY 8TH, 1920.

RE SCOTT.

Infant—Custody—Right of Parents—Welfare of Child—Adoption Agreement—Rights of Foster-parents—Infants Act, R.S.O. 1914 ch. 153, sec. 3.

Motion by the parents of John L. Scott, a boy of about 7 years of age, for an order directing the return of the boy to the applicants' custody and control.

Erichsen Brown, for the parents.
H. S. White, for the foster-parents.

SUTHERLAND, J., in a written judgment, said that in 1916 the parents were not in good circumstances and the health of the

mother was bad. In September of that year, a written agreement under seal was entered into between the parents, of the one part, and the boy's uncle and aunt, of the other part, by which it was agreed that the boy should be permitted to live with and be under the care of the uncle and aunt and be educated and brought up by them at their expense, and by which the parents granted and assigned to the "adopting parties," the right to the possession, custody, control, and care of the boy until he should attain his majority, and appointed them guardians of his person until that time. The parents also agreed not to revoke the appointment. The "adopting parties" agreed to adopt the boy until he should attain the age of 21, and to maintain, board, lodge, clothe, and educate him and provide him with all necessaries, and indemnify the parents against all actions, claims, and demands in respect thereof. There were other provisions, including one for the right of access by the parents to the boy.

The "adopting parties" admittedly were caring for, educating, and maintaining the boy in a comfortable home and in a satisfactory manner.

Notwithstanding the agreement, the parents now desired to regain possession and control of the boy and to have him live with them and their two other children. The parents now had a reasonably suitable home in which to receive the boy and the father had steady employment.

Ordinarily it is better for a child to live with and be brought up by his parents, and better that the family should be kept together. The wishes of the parents should, as far as possible, be given effect to, and they appeared to be earnestly desirous of having the boy restored to their home. He was too young to make his preference—which would probably be to remain where he was—a determining factor in this case.

It was suggested that sec. 3 of the Infants Act, 1 Geo. V. ch. 35 (now R.S.O. 1914 ch. 153) applied, and that the parents were precluded by the agreement from asserting their right to the custody of the boy. A different opinion had been expressed in Re Hutchinson (1913), 28 O.L.R. 114; see also Re Clarke (1916), 36 O.L.R. 498, 500, 501.

Upon the whole, with some hesitation, the learned Judge had come to the conclusion that he could not refuse to accede to the wishes and superior claims of the parents.

There should be an order granting to the parents the custody of the boy, and there should be no order as to costs.

SUTHERLAND, J., IN CHAMBERS. JANUARY 8TH, 1920.

McGLADE v. PASHNITZKY.

Third Parties—Motion to Set aside Third Party Notice—Proper Case for Indemnity or Relief over—Rule 165—Injury to Building—License or Authority Granted by Third Parties—Landlord and Tenant.

Appeal by Frank Pashnitzky, Rotenbergs Limited, and Louis Rotenberg, made third parties by a notice served by the defendants the Macey Sign Company Limited, from an order of the Master in Chambers dismissing the appellants' motion to set aside the third party notice.

G. W. Adams, for the appellants.

Frank Arnoldi, K.C., for the defendants the Macey Sign Company Limited.

T. J. Agar, for the plaintiff.

SUTHERLAND, J., in a written judgment, said that the plaintiff claimed to be the owner of a parcel of land in the ci y of Toronto, on which was erected a 2-storey building. The defendant Frank Pashnitzky claimed to have a lease thereof. The plaintiff alleged that the defendants the Macey Sign Company Limited unlawfully entered upon the roof and other parts of the building, cut away parts, cut openings in the roof, and erected a large sign thereon; and in this action the plaintiff sought a mandatory order to compel the removal of the sign and the repair of the building, and damages.

The defendant sign company, in their third party notice, alleged that they did nothing upon the premises except with the instructions, directions, and license of the third parties, and upon their representations that they had title, right, and authority to permit the sign company to erect the sign upon the premises.

It appeared that Pashnitzky had entered into an agreement with Rotenbergs Limited under which he leased to them all available space over the roof of the building for erecting signs for advertising purposes, and that Rotenbergs Limited had assigned the agreement to the Macey company.

The appellants contended that the Master erred in finding that there was a right or claim for contribution or indemnity or for relief over by the Macey company against them and in holding that the cause of action set up in the third party notice was a right or claim for contribution or indemnity or relief over within the meaning of the Rules and especially Rule 165.

A preliminary objection was taken by the Macey company that, as the third parties had entered an appearance, they could not move against the notice: Windsor Fair Grounds and Driving Park Assn. v. Highland Park Club (1900), 19 P.R. 130. In answer to this, reference was made to Rule 505 (3).

The learned Judge was not prepared to say that the Master was not justified in making the order he did on the grounds stated. At any rate, the learned Judge thought he should not decide otherwise upon a summary application made upon affidavits: Swale v. Canadian Pacific R.W. Co. (1912), 25 O.L.R. 492.

The appeal should be dismissed with costs to the defendants the Macey Sign Company Limited and the plaintiff, unless the trial Judge should otherwise order.

LENNOX, J., IN CHAMBERS. JANUARY 8TH, 1920.

MOOREHOUSE v. CONNELL.

Discovery—Examination of Defendants—Defendants Awaiting Trial on Criminal Charge Arising out of same Transaction—Fraud Charged in both—Protection of Defendants as to Answers on Discovery—Canada Evidence Act, sec. 5—Ontario Evidence Act, sec. 7—Defendants Required to Submit to Examination—Priority of Trial of Criminal Charge.

Motion by the plaintiff to strike out the defence of the defendants the Connells for failure to attend for examination for discovery.

C. F. Ritchie, for the plaintiff.
John Callahan, for the defendants the Connells.

LENNOX, J., in a written judgment, said that the plaintiff instituted criminal proceedings against the defendants the Connells, and afterwards brought action against them and others for recovery of some $2,500, the foundation of both being practically the same, namely, fraud and misrepresentation inducing the plaintiff to part with the $2,500 above mentioned.

The defendants failed to appear to be examined for discovery, their counsel appearing and alleging that they should not be compelled to answer pending the trial of the criminal charge; and this position he still took. The civil action was ready for trial. A true bill had been found on the criminal indictment. It was said to be the practice at the Sessions to delay in such cases until the civil action had been disposed of.

The learned Judge said that he had already expressed the opinion that where both criminal and civil proceedings were pending, the criminal proceedings should be expedited, and if possible the criminal charge disposed of, before trial of the civil action; and he had since ascertained that that was the opinion of many of his brother Judges at Osgoode Hall.

The motion was to strike out the defence of these defendants. The practice was, of course, to give them another opportunity to answer.

One of the important purposes served by examinations for discovery is to enable the opposite party to prepare for trial, and this reason was urged here. It was also pointed out that an early trial of the civil action was vital to the plaintiff, to enable him to continue his business. Section 5 of the Canada Evidence Act, R.S.C. 1906 ch. 145, and sec. 7 of the Ontario Evidence Act, R.S.O. 1914 ch. 76, were intended to meet a case of this kind, and appeared to afford fairly ample protection for persons situated as the defendants were. In fact, it would be worth while to consider whether the Legislature, in providing in sec. 7 that "the answers so given shall not be used or receivable in evidence against him in any civil proceeding," accomplished just what was aimed at, or had in mind the almost universal practice of putting in answers on discovery as evidence per se. At all events it would appear to be prudent for counsel, if possible, to obtain a repetition of the answers relied on, by examination or cross-examination of the party at the trial. Subject to any directions that the Court may give, these two sections are intended to cover all the protection that the party being examined is to have; and, if the defendants here take their objections at the proper time, have them noted and swear to their belief in them, there can be no prejudicial result that can fairly be complained of.

Under sec. 5 of the Dominion Act, the answers are not only "not receivable" but they "shall not be used" at the criminal trial, and I apprehend, although of course I make no suggestion, that the learned presiding Judge in the Criminal Court will not allow any question based upon the examination, as, for instance, "Have you ever stated so and so?" in case the defendants give evidence, or in fact any allusion to the examination for discovery in any way.

The defendants must attend and submit themselves for examination at their own expense, upon one clear day's notice of an appointment being served upon their solicitor; and the costs of this application should be costs in the cause, payable by them in any event. The plaintiff should be afforded a reasonable time to get ready for trial after discovery; and, subject to this, the examination should be deferred in order to allow of the criminal charge being disposed of in the meantime.

MIDDLETON, J. JANUARY 8TH, 1920.

CARMICHAEL v. CARSCALLEN.

Partnership—Accounts—Adjustment—Sum Paid to one Partner to Equalise Drawings—Assets Vested in other Partner—Evidence—Claim of Executor of Deceased Partner—Continuation of Business—Services of Surviving Partner—Compensation for—Items of Account—Reference—Appeal from Report—Costs.

Appeal by the defendant from the report of the Local Master at Napanee upon taking the partnership accounts.

The appeal was heard in the Weekly Court, Toronto.

R. S. Robertson, for the defendant.

H. S. White, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that two brothers entered into partnership in an undertaking business in 1888. After 21 years there was an adjustment of accounts down to the end of 1909, and T. G. Carscallen in 1910 paid J. C. Carscallen $2,000; or, more accurately, that sum was paid by the partnership to J. C. The business continued till the death of T. G. in 1917, and was carried on by the surviving brother till after this action was brought against him, by the executors of the deceased brother, for a winding-up.

There was a reference to take accounts, and on the accounting a question was raised as to the nature and effect of the adjustment made in 1910. The surviving brother gave evidence before the Master going to shew that the $2,000 was paid to equalise the drawings of the parties, and that from then on the accounts must be taken in the ordinary way.

The plaintiffs contended that the effect of the agreement was to vest in T. G. Carscallen the sum of about $1,000, then in the bank to the credit of the firm, and all accounts due to the firm by customers. They admitted that the other assets of the firm remained partnership assets. The Master accepted this view; but the learned Judge was not able to agree. He said that this was not a case depending upon the evidence of one party against the estate of a deceased person—a case in which his evidence would need corroboration. It was an attempt on the part of the estate to establish a claim to partnership assets without any evidence to justify the claim.

In no view of the evidence, could the Master's finding be upheld. The one outstanding idea was that the business was to continue; and the payment made, admittedly as some kind of

an adjustment, was prima facie to bring about a condition of equality, and not to vest assets in either member of the firm.

Some minor matters were also discussed:—

(1) The learned Judge thought that the proper inference of fact was, that the $100 cheque and $50 cash received from Young made up the $150 which was charged by J. C. Carscallen to himself.

(2) The $15.83 should not be charged against J. C. He received the amount only after deducting the set-off due by the firm.

(3) Some compensation should be allowed for the services rendered in carrying on the business.

If the parties cannot adjust the accounts with these variations, the learned Judge may be spoken to—be desired to avoid the expense of a reference back.

There should be no costs of this appeal, as the lax way of doing business made litigation inevitable.

MIDDLETON, J. JANUARY 8TH, 1920.

RE MCGREGOR.

Will—Construction—Bequests to Churches and other Bodies—Declarations Identifying Objects of Testator's Bounty—Vague Designation—Bequest to Executors—Value Rendered—Costs of Interpretation.

Motion by the executors of the will of Dougald McGregor, deceased, for an order declaring the meaning and effect of parts of the will in relation to bequests made to various bodies and persons.

The motion was heard in the Weekly Court, Toronto.

G. W. Adams, for the executors.

W. Lawr, for two weak Scottish Presbyterian Churches.

W. H. Lockhart Gordon, for two other Scottish Presbyterian Churches.

Hamilton Cassels, K.C., for the Presbyterian Church in Canada.

K. W. Wright, for the Public Trustee.

C. M. Garvey, for the Soldiers' Aid Commission.

MIDDLETON, J., in a written judgment, said that the declarations should be as follows:—

(1) "The Home Missions in Canada" meant the Presbyterian Home Missions—the Home Mission schemes of the testator's

church. This bequest should go to the Presbyterian Church in Canada for the purposes of its Home Mission Board

(2) The bequest "for the care of the homeless children of Canada who have lost their parents in the war with Germany" will go to the Soldiers' Aid Commission to be used for their orphanage.

(3) The bequest to the "missionaries in Africa" was too vague and uncertain—it failed.

(4) The bequest to "assist the weaker Churches of the Presbyterian Faith in the Highlands of Scotland" might be divided between the "Free Presbyterian Church" and the "Free Church" —these bodies having agreed to this, and the other Churches disclaiming.

(5) The residuary gift to the executors, being for value rendered, ought not to be cut down by the costs of this motion, which might be paid out of the fund rendered free by the 3rd declaration.

LENNOX, J. JANUARY 8TH, 1919.

RE McNAUGHT.

Will—Construction—Inartistic Draftsmanship—Clause Providing for Disposition of Estate in Event of Predecease of Life-tenant—Disposition Declared Applicable upon Death of Life-tenant—Intention of Testatrix to Dispose of whole Estate.

Motion by the executors and legatees under the will of Frances McNaught, deceased, for an order determining certain questions as to the proper construction, meaning, and effect of the will.

The motion was heard in the Weekly Court, Toronto.

Frank Arnoldi, K.C., for the applicants.

M. H. Ludwig, K.C., for the next of kin.

F. W. Harcourt, K.C., Official Guardian, for the infants.

LENNOX, J., in a written judgment, said, after setting out most of the provisions of the will, under which the testator's sister, Margaret Young, one of the applicants, was the principal beneficiary, that, although the draftsman, whether professional or otherwise, had not succeeded in expressing the intention of the testatrix in as orderly a method or as distinctly and definitely as he might have done, yet, reading the whole will, the purpose and intention of the testatrix were not left in doubt. Reference to Hellem v. Severs (1876), 24 Gr. 320, 326.

The doubt suggested and argued as to the effect of the will was, whether all that followed para. 5 was contingent upon Margaret Young dying in the lifetime of the testatrix, a contingency which did not occur. Paragraph 5 was: "In the event of my sister Margaret Young predeceasing me, then I direct that all my estate both real and personal shall be converted into money as soon as possible after my decease and divided as follows." It was argued that all the provisions following this paragraph failed to take effect, inasmuch as Margaret Young did not die in the lifetime of the testatrix.

Reference to Halsbury's Laws of England, vol. 28, p. 651, para. 1257.

The purpose of the testatrix was to exercise all powers of appointment vested in her and dispose of the whole of her estate and effects down to the minutest detail. That there were verbal inaccuracies was not owing to a lack of final purpose or definite intention.

The will, as read by the learned Judge, shewed a well thought out scheme for the disposal of the whole estate of the testatrix; and, although it was not in every respect accurately expressed, taken as a whole it shewed that the testatrix intended para. 5 and its lettered sub-paragraphs and all that followed to take effect and confer the benefits in this part of the will specified, whether her sister predeceased or survived her; and it should be so declared. It matters not whether it is by transposing, supplying, changing, or rejecting a few words, or many words, where the context or general scheme evidences the intention of the testator, the Court has power and is bound to effectuate the intention: Halsbury, vol. 28, p. 675, para. 1291, and notes; pp. 845, 846, para. 1504, and cases referred to.

The testatrix had two main purposes in her mind: (1) that during such time as her sister survived her the whole income of the estate, with such additions from the principal money as might be necessary for her support and welfare, should be paid to her sister, and that nothing should interfere with the corpus, and therefore no impairment of the income should occur during her sister's life; (2) that, subject to this, she intended her whole estate to be divided in the manner provided in para. 5 and sub-paragraphs and subsequent provisions of the will.

The will should be interpreted and read as disposing of all the estate of the testatrix.

The costs of all parties should be paid out of the income of the estate, the costs of the executors and of the Official Guardian to be on a solicitor and client basis.

LENNOX, J. JANUARY 8TH, 1920.

RE WILSON.

Will—Construction—Bequest to "Children"—Illegitimate Children Included—Gift to Class—Children of Child Predeceasing Testator not Taking Parent's Share—Wills Act, sec. 37—Share of Deceased Child Distributed among Surviving Children—Costs.

Motion by the executors of the will of John Wilson, deceased, for an order determining questions as to the distribution of the estate of the deceased, involving the construction of the will.

The motion was heard in the Weekly Court, Toronto.
A. M. Fulton, for the executors.
R. J. McLaughlin, K.C., for the second family.
Grayson Smith, for the first family.
F. W. Harcourt, K.C., Official Guardian, for the infants.

LENNOX, J., in a written judgment, said that in November, 1878, the testator went through the ceremony of marriage with Mary Hannah Nichols, and thereafter until the testator's death they lived together as man and wife. A large family was born of this alliance, and there was satisfactory evidence that the testator constantly spoke of them as his children and of their mother as his wife. Nevertheless, some time before 1878, Sarah Green became the lawful wife of the testator, and was alive when he purported to marry Mary Hannah, and was still alive when this application was made. There was lawful issue born of the testator's marriage with Sarah, namely, two sons—Charles Wilson, who died leaving issue still surviving, and William Wilson, one of the claimants. The testator recognised Charles and William as his children, and he also recognised the children of Mary Hannah, who were illegitimate, as his children.

By his will he devised land "to my son Johnston Wilson, my wife Mary H. to have the benefit of the said land during the remainder of her natural life;" he devised other land "to my son Howard Wilson," with the same benefit to "my wife Mary H.;" he bequeathed all his personal estate "to my wife Mary H. for her use and benefit;" and directed that certain other land should be sold "and after paying my just debts and funeral expenses I bequeath the money remaining to be divided equally between my children, share and share alike."

The learned Judge reviewed the authorities, referring particularly to Hill v. Crook (1873), L.R. 6 H.L. 265; Dorin v. Dorin (1875), L.R. 7 H.L. 568; and In re Pearce, [1914] 1 Ch. 254.

The decisions are uniform that "children" in a will prima facie means legitimate children only; and, if there is nothing on the face of the will to shew that the testator used the words in a broader sense, and there are (as here) legitimate and illegitimate children, only the legitimate children can take.

In the opinion of the learned Judge, the will contained a dictionary of the meaning of the words used by the testator; and, reading the language of the will as he understood and used it, it must be found that he intended to include illegitimate children.

Legitimate children were of course to be included, and, therefore, William Wilson, who was still alive, but not the children of Charles Wilson, who died in 1917, after the making of the will and before the death of the testator—the children of Charles did not take the share to which their father, if living, would be entitled.

The gift here was, legally speaking, "a gift to a class," and the children of Charles Wilson could not share, notwithstanding the provisions of sec. 37 of the Wills Act, R.S.O. 1914 ch. 120.

The law is settled by Re Williams (1903), 5 O.L.R. 345; In re Sinclair (1901), 2 O.L.R. 349, 352; In re Clark (1904), 8 O.L.R. 599; and Re Moir (1907), 14 O.L.R. 541.

The Moir case, too, is authority for saying that the share that would have gone to Charles, had he survived the testator, does not go to the next of kin, but to increase the share of each of the surviving children—the net proceeds of the farm will be distributed equally among the children of the testator, whether legitimate or illegitimate.

Order accordingly; costs of all parties, including the Official Guardian, to be paid out of this fund; all costs to be as between party and party.

LENNOX, J. JANUARY 8TH, 1920.

RE FERGUSON.

Trusts and Trustees—Property Vested in Trust Company by Voluntary Settlement—Subsequent Appointment by Settlor of another Trust Company as Trustee of same Property—Application by New Trustee upon Originating Notice for Confirmation of Appointment and Direction to First Trustee to Transfer Trust-property—Settlor not Joining in Application—Trustee Act, R.S.O. 1914 ch. 121—Rules 600, 601—Jurisdiction of Court.

Motion on behalf of the London and Western Trusts Company Limited for an order confirming the appointment of that company

as trustees of certain property of one John Ferguson, who was still alive, this property having previously been vested in the Fidelity Trust Company by John Ferguson, under two agreements or declarations of trust, and the property being now in the possession and under the control of the Fidelity Trust Company; and for a direction that the Fidelity Trust Company shall assign the securities and deliver all the moneys and properties to the applicants.

The motion was heard in the Weekly Court, London.

F. F. Harper, for the applicants.

F. P. Betts, K.C., for the Fidelity Trust Company.

LENNOX, J., in a written judgment, said that the motion was made under the Trustee Act, R.S.O. 1914 ch. 121, and Rules 600 and 601; but he could find no authority in the Act or Rules, or anywhere, which supported the motion. It might be enough to say that John Ferguson, the settlor, did not join in the application, but the matter went deeper. The Court had no jurisdiction, upon an originating notice, to deal with the complicated issues revealed, involving undoubtedly difficult questions of fact. John Ferguson did not even make an affidavit, and there was fair ground for the inference that, by reason of mental infirmity or lack of interest, he was kept in the background. There was no allegation that the Fidelity Trust Company had not lived up to the terms of their agreement, and the instruments under which they became possessed of the fund gave the transaction quite as much the character of a loan, at a stipulated rate of interest, as of a trust in the ordinary sense.

Counsel supporting the motion argued that the agreements entered into with the Fidelity Trust Company were ultra vires of that company. If that were so, the agreement that the Court was now asked to confirm was ultra vires of the applicants. If the agreements were ultra vires, the settlor was not bound by them, and required no assistance from the Court. If they were not ultra vires, he must get rid of them by action, and would succeed only on alleging and proving facts entitling him to relief.

The matters actually in question could not be judicially determined upon a summary application such as this: Re Martin (1904), 8 O.L.R. 638; Re McDougall (1904), ib. 640; In re Williams (1895), 22 A.R. 196; Lewis v. Green, [1905] 2 Ch. 340; Re Mathers (1897), 18 P.R. 13.

This is simply and only an attempt of one business organisation to wrest from the control of another business organisation a property committed to the latter by a settlor who, although still living, did not appear or complain; and to do so by a method of

procedure at once unauthorised, inappropriate, and necessarily unsatisfactory and inefficient.

The motion should be dismissed, and there should be no order as to costs, except that the Fidelity Trust Company should be at liberty to charge their costs against the income of the trust fund and deduct it from the next payment.

LENNOX, J. JANUARY 8TH, 1920.

RE MASURET & CO. AND RODGER.

Partnership—Mortgages Made and Assigned to Members of Trading Copartnership in Firm Name—Agreement for Sale of Land by Partners Deriving Title under Mortgages—Objection to Title—Right of Individual Partners to Convey Land as Owners—Form of Conveyance—Recital of Facts—Declaration Proving Facts—Application under Vendors and Purchasers Act.

Motion by the vendors, members of the firm of Masuret & Co., for an order, under the Vendors and Purchasers Act, declaring that the purchaser's objection to the vendor's title to land, the subject of an agreement of sale and purchase, was invalid, and that the vendors could make a good title.

The motion was heard in the Weekly Court, London.

F. F. Harper, for the vendors.

C. G. Jarvis, for the purchaser.

LENNOX, J., in a written judgment, said that the vendors, members of a partnership firm, proposed to make title to the land they had agreed to sell, under and through three mortgages, one made direct to "M. Masuret & Co.," which was the firm name of the vendors, and the other two assigned to them under the same name. The several securities were taken to secure debts owing to the firm, a trading copartnership.

The purchaser refused to complete his purchase although the vendors had offered to join in a conveyance, reciting the facts with regard to the partnership and the mortgage and assignments, and to verify the facts by statutory declaration. Counsel for the purchaser argued that the vendors took nothing by the mortgage and assignments and had nothing to convey—that a conveyance to a firm had no effect.

The learned Judge said that the conveyancing was faulty, but that did not militate against the title—it affected only the proof.

The vendors did not take the securities in their individual names, with a description of them as "trading under the name, style, and firm of M. Masuret & Company;" nevertheless, the conveyances were to the persons constituting the firm, by a collective or class name which they were entitled to use and by which they were known. A man may use any name he likes and change it as often as he likes, no fraud being shewn: Davies v. Lowndes (1835), 2 Scott 71, 103, 1 Bing. N.C. 597, 618. If a person is described in a deed and executes it in a name by which he usually passes, which is not his correct name, the deed will be upheld upon evidence of identity: Addis v. Power (1831), 7 Bing. 455; Williams v. Bryant (1839), 5 M. & W. 447. Where a firm is made a party to a deed, evidence is admissible to shew who in fact constituted the firm at the time: Lindley on Partnership, 4th ed., p. 208.

Many more authorities were cited by the learned Judge.

He was of opinion that the vendors could make a good title and conveyance to the land, and made an order declaring accordingly. There should be no costs, as the declaration offered was not as full and precise as it should have been. The declaration should shew that the three vendors, at the time of the taking over of the mortgages under which they took proceedings, were, and still were, the only members of the firm to which the mortgage and assignments were made. The conveyance to the purchaser should recite the facts, should be from the three partners, carrying on business as (naming the firm), and executed by all of them. If the parties should not agree as to the forms of the deed and declaration, the Master at London must settle the forms.

FALCONBRIDGE, C.J.K.B. JANUARY 8TH, 1920.

DUGAS v. CITY OF ST. CATHARINES.

Highway—Nonrepair—Negligence of City Corporation—Defective Condition of Grating Covering Area under Sidewalk—Notice to Corporation by Long Continuance—Injury to Pedestrian—Damages—Married Woman—Expense and Loss Sustained by Husband—Grating Put in by Owner of House Abutting on Sidewalk—Absence of City By-law Authorising Use of Area and Opening—Municipal Act, secs. 464, 483 (3)—Liability of Owner to City Corporation—Liability of Tenant to Owner—Duty to Repair—Monthly Tenant.

Action by a man and his wife against the Corporation of the City of St. Catharines to recover damages for personal injury to

the wife by a fall in passing over a grating covering an area in a sidewalk upon a public street in the city of St. Catharines, owing to want of repair and defective condition of the grating, and for loss sustained by the husband on account of the wife's injury.

The defendants brought in as a third party one Nihan, the owner of the premises in connection with which the area was used; and Nihan, in turn, brought in his tenant, Gander, alleging that Gander was in duty bound to repair.

The action and third party issues were tried without a jury at St. Catharines.

H. H. Collier, K.C., and T. McCarron, for the plaintiffs.

A. C. Kingstone, for the defendants.

G. B. Burson, for Nihan.

G. F. Peterson, for Gander.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the long continuance of the want of repair and defective condition of the grating covering an area in the sidewalk was sufficient to answer the defence of want of notice, and the defendants were guilty of negligence causing the accident, and answerable in damages.

The wife-plaintiff's knowledge of the condition of the sidewalk did not per se constitute negligence on her part: Gordon v. City of Belleville (1887), 15 O.R. 26, and cases following it; and she was not guilty of negligence or contributory negligence.

In regard to damages, the evidence as to the floating kidney and condition of the ear being the result of this injury to the woman-plaintiff was not sufficiently convincing. But she was laid up and more or less incapacitated for a long time, and she suffered much pain. A fair amount to award to her would be $1,000 and to her husband $250, and there should be judgment accordingly against the defendants with costs.

The area under the grating was probably originally used in connection with the cellar under the building which was constructed many years ago and before Nihan acquired the property—for there was a door or window between the cellar and the area. The cellar had never been used by the present tenant.

There was no by-law of the city permitting owners of land to make, maintain, or use areas under and openings to them in highways and sidewalks, under sec. 483 (3) of the Municipal Act.

The owner, Nihan, was liable to the city corporation, under sec. 464, for the damages and costs recovered against the corporation and for the costs of and incidental to the third party notice.

In Macpherson v. City of Vancouver (1912), 2 D.L.R. 283, the city corporation had taken up the old wooden sidewalk and replaced

it by cement, and, instead of covering the space with a new and suitable grating, utilised the old wooden grating, which had been in use for 5 years.

There was nothing of that kind here. Nihan put in this grating 17 or 18 years ago "for the looks of the thing."

Then as to the position of the tenant, Gander. He had a lease up to about 4 years ago. Now he was a monthly tenant. He swore that the landlord made the repairs. Nihan said that the tenant did the repairs; and his bookkeeper or secretary, Miss Reilly, said that the last lease, for one year from the 15th August, 1914, to the 15th August, 1915, contained a covenant by the lessee to repair, because all Nihan's leases contained that covenant.

At this lady's urgent request, Nihan did some repairs in the spring of 1919 to the roof and gutter of the house, complaining that Gander should do it.

But it would be quite unreasonable that such a term should be held applicable to a monthly tenancy following a prior lease.

Gander was, therefore, absolved, and Nihan must pay his costs.

SUTHERLAND, J., IN CHAMBERS. JANUARY 9TH, 1920.

RE SMITH.

Originating Notice—Rule 600—Scope of—Application to Compel Payment of Money Found by Surrogate Court to be Due to Executor—Refusal to Entertain.

An application, by way of orignating notice, by Stephen W. Burns, "for an order that the applicant be awarded judgment herein"—that is, in the matter of the estate of James Smith, deceased, "for the amount found due from Jessie Sweet, the respondent, to the applicant, by the order and report of His Honour Judge Morgan, Judge of the Surrogate Court of the County of York, dated the 16th June, 1916, in the matter of the said estate, with certain costs therein mentioned as payable to Thurston & Co., and duly assigned to the applicant, together with interest . . . and for payment of said moneys into this Court," i.e., the Supreme Court of Ontario.

The motion was made in Chambers.

The applicant appeared in person.

The respondent did not appear.

SUTHERLAND, J., in a written judgment, said that the applicant and respondent were the executors named in the will of James

Smith, deceased, and the respondent was the residuary legatee under the will.

The accounts of the estate were passed before the Surrogate Court, and the applicant was found entitled to be paid by the respondent a balance of $4,650.62 in respect of commission, together with certain costs amounting to $108.94, in all $4,759.56. Certain other costs amounting to $249 were also ordered to be paid to Thurston & Co., whose claim was assigned to the applicant. The respondent paid $2,000 into Court, which the applicant took out; and there remained due to him a balance of $3,008.56, which he was now claiming from her, with interest from the 26th June, 1916, with certain costs amounting to $81.96.

The motion was made under Rule 600.

The learned Judge said that that Rule was not intended to cover and did not cover any such application as this, and that the applicant did not bring himself within any of its clauses. He must bring his action in the ordinary way.

No order, and no costs.

MIDDLETON, J. JANUARY 9TH, 1920.

RE DICKINSON.

Will—Construction—Life-estate—Upon Death of Life-tenant, Estate to Go to Children of Brother—In Event of Children Dying without Issue, Gift over—Absolute Estate of Children or Estate Subject to Executory Devise over—Period of Distribution—Death of Life-tenant.

Motion by the executors of the will of Thomas Dickinson, deceased, for an order declaring the true construction of the will.

The testator died on the 2nd January, 1914.

The motion was heard in the Weekly Court, Toronto.

H. S. White, for the executors.

W. J. Beaton, for Edna McKercher and Harold Spencely.

J. H. Moss, K.C., for Pearl Lonie and J. E. Dickinson.

E. C. Cattanach, for the Official Guardian, representing the infants.

MIDDLETON, J., in a written judgment, said that by his will the testator gave his estate to his wife for life, and upon her death, after payment of a small legacy, he gave "the residue of my estate unto the children of my brother John Dickinson share and share alike their and each of their heirs executors administrators and assigns but in the event of the said children of my brother John

Dickinson dying without issue then I will and direct that the said residue of my estate shall be divided into two equal parts one of which parts I devise and bequeath unto the children of my cousin Elizabeth Spencely and the other of such equal parts I devise unto the children of my cousin Mary Ann Worden."

The widow died on the 3rd November, 1918. At the date of the will, John Dickinson had two children, Pearl and John Ernest, who, having survived the widow, now claimed to be entitled absolutely to the estate. The children of the two cousins contended that Pearl and John Ernest did not take absolutely but subject to an executory devise over in the event of their dying without leaving issue them surviving.

This contention was based upon Re Coté (1919), 46 O.L.R. 4, where the actual words of that which was there found to be an executory devise were very similar to the words here used; but that was the only point of similarity. The question upon the Coté will was, whether the gift over was to take place upon the death of the children without issue in the life of the testator only, or also upon the death of the children without issue at any time.

In the present case the direction was one relating to the state of affairs on the death of the life-tenant. When she dies, the estate is to go absolutely to the nephew and niece if they are then living. If both are dead and have left no issue, the children of the cousins come in. There was no intention on the part of the testator to tie up the property—there was merely an intention to provide for its distribution on the death of the wife.

Reference to O'Mahoney v. Burdett (1874), L.R. 7 H.L. 388.

This gift over is operative only if both the nephew and niece die without issue. The fund is to be distributed among the children of John who survive the widow. If only one survived and the other died without issue, the survivor would take the whole. If neither survived, there must be a gift over so as to avoid intestacy. This is a sensible and a probable testamentary disposition. On the other hand, if there was an executory devise, and one died without issue after the estate had vested in possession, there would be no gift over unless and until the other died also without issue; and in the meantime the devisee of the deceased would be in possession, there being no provision that, on the death of either without issue, his or her share should go to the survivor—an intention that no one would impute to a sane testator.

Reference to Olivant v. Wright (1875), 1 Ch.D. 346, and In re Roberts, [1916] 2 Ch. 42.

The facts that the provision relates to personal property as well as real estate and that there are no trustees are also important. The whole clause, in short, seems clearly to relate to the period of distribution.

Order declaring accordingly; costs out of the estate.

MIDDLETON, J. JANUARY 9TH, 1920.

RE BROWN AND HOLMES.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Conveyance Made in 1890 to Trustees—Recital of Instrument of Even Date—Instrument not Produced—Constructive Notice—Registry Act—Mortgage Made by Trustees—Foreclosure—Title Made under—Breach of Trust—Statute of Limitations—Lapse of Time—Acquiescence—Application under Vendors and Purchasers Act.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring the purchaser's objections to the title of the vendor invalid and that the title should be accepted.

The motion was heard in the Weekly Court, Toronto.

W. B. Cowan, for the vendor.

F. M. Gray, for the purchaser.

MIDDLETON, J., in a written judgment, said that on the 16th January, 1890, Kate Campbell, the then owner of the land now in question, conveyed it to A. A. Scott and two others as trustees, as security for certain promissory notes made by her husband, pursuant to an instrument of even date, probably a composition or extension agreement. The deed provided that, upon default of payment of the notes, the trustees might sell the land and pay the notes, and, if the notes were paid, the land, or such portion as might remain, was to be reconveyed to the grantor.

On the 3rd December, 1890, the trustees mortgaged the land to one Vansickle, the mortgage reciting that the existing mortgages were in default and the mortgagees were proceeding to foreclose, and this mortgage was for the purpose of paying off the existing mortgages.

These mortgages were discharged, but it turned out to be a mere postponement of the evil day, for the Vansickle mortgage fell into arrear, and Vansickle obtained a judgment and final order of foreclosure, under which the vendor-applicant made title.

Two objections were taken: (1) The production of the deed referred to in the recitals of the trust-deed was asked. (2) It was said that there was no power to mortgage—the Vansickle mortgage was a breach of trust.

The deed referred to could not be found. The objection was not well taken. Title was not made through this instrument, and, as there was only constructive notice, the Registry Act protected against any equity which might arise from anything

in the unseen instrument: Re McKinley and McCullough (1919), ante 265.

The second objection ought not to prevail. The Limitations Act would protect the mortgagee against any attack. See Taylor v. Davies, in the Privy Council, not yet reported. As the property had passed through several hands, the Registry Act would afford protection against unregistered equities.

It was by no means certain that, in any aspect of the case, there was any breach of trust. The action of the trustees in attempting to preserve the subject of the trust might well be regarded as authorised by implication. They represented the holders of the notes, and it was not contemplated that they should be compelled to stand by and see the trust estate disappear by the foreclosure, when a respite might be obtained by the raising of the necessary money upon a new mortgage. The long lapse of time without attack would indicate that those concerned had acquiesced in what was done.

It should be declared that a good title could be made as against the objections taken.

ROSE, J. JANUARY 9TH, 1920

RE GOODERHAM.

Will—Construction—Codicil—Annuity to Widow of Son Dying without Issue Surviving—"Out of my Residuary Estate"—Time at which Direction to Pay Annuity to Become Operative—Time Expired before Death of Son.

Application by Mary Gooderham, widow of Henry Gooderham, upon originating notice, for an order declaring that the effect of a codicil to the will of William Gooderham, the father of Henry, was to entitle her to an annuity of $1,000 for life, to be paid out of the estate of William Gooderham.

The application was heard in the Weekly Court, Toronto.

A. C. McMaster, for the applicant.

T. P. Galt, K.C., for trustees under the will of William Gooderham.

R. S. Robertson, for A. D. Gooderham and the executors of the will of Henry Gooderham.

F. A. A. Campbell, for the estate of C. H. Gooderham.

ROSE, J., in a written judgment, said that the testator, by his will, made in 1870, directed his trustees, after paying certain

annuities and legacies, to divide all the residue of his estate into seven equal shares and to give half of a share to each of his sons William, James, George, Henry, Alfred, Robert, and Horace, if such son had attained or as such son should attain the age of 25 years, and the other half of a share to each such son as had attained or as such son should attain the age of 35 years; he also disposed of the incomes to be derived from the respective shares pending the payment over of the corpus; and then he said:—

"And if any of my said sons shall die under the respective ages of 25 or 35 years unmarried and without issue living at his death then the half share or shares to which such son had not then become entitled in possession and the interest accrued thereon shall be divided equally among his said brothers him surviving. The children of any son who may die in my life shall stand in the place of their father."

And, by a codicil expressed to be executed at the same time and place and before the same witnesses as the will, he said:—

"In the event of any of my sons being married and dying without issue I direct that my trustees shall pay out of my residuary estate to the wife of such son $1,000 per annum for her life."

The testator died in 1881. His son Henry acted as one of the trustees of the will until his death in 1916; and he duly received his share of the residuary estate. He left a widow but no children him surviving. The widow now sought a declaration that the effect of the codicil was to entitle her to an annuity of $1,000 for life.

The time at which the direction to pay contained in the codicil was to become operative was clearly some time earlier than the time at which, according to the will, the distribution of the residue was to be completed. Looking at the will, it was plainly to be seen what that time was. The codicil should be read as a direction to the trustees to pay an annuity to the widow of any son who died in the lifetime of the testator or under the age of 25 or under the age of 35, leaving no issue him surviving. By this reading all apparent inconsistencies were removed, and effect was given to the testator's real intention.

It was argued for the applicant that, the codicil being the later expression of the testator's wishes, effect must be given to its provisions. That would be so if the will and the codicil could not be reconciled; but, where there is no irreconcilable conflict between the two provisions, but only an apparent inconsistency, the rule invoked has no application: see Halsbury's Laws of England, vol. 28, p. 677.

And, if due regard is paid to the words "out of my residuary estate," used in the codicil, there is not even an apparent incon-

sistency. See Abbott v. Middleton (1855), 21 Beav. 143 and (1858) 7 H.L.C. 68.

There should be a declaration that the applicant is not entitled to be paid an annuity out of the residuary estate; and she should pay the costs of the motion.

LA FRANCE v. NATIONAL BEN FRANKLIN INSURANCE CO.—KELLY, J., IN CHAMBERS—JAN. 5.

Trial—Jury Notice—Irregularity—Unnecessary Joinder of Issue—Notice of Trial—Non-jury List—Rules 118, 120.]—Motion by the defendants to strike out the joinder and jury notice filed and served by the plaintiff and to transfer the case to the non-jury list for trial. KELLY, J., in a written judgment, said that the time for reply expired on the 30th November (Rule 118), and the pleadings were then deemed to be closed (Rule 120). The formal joinder of issue served after that date was unnecessary and irregular, and should be struck out. The jury notice was not served within the time provided by the Rules, and no apparent reason had been shewn for allowing it to stand: it should therefore also be struck out. The action being one triable at the sittings for which notice of trial had been given, that notice should stand for the coming sittings at Hamilton; the case to be placed on the non-jury part of the list; costs of the motion to be disposed of at the trial. R. S. Cassels, K.C., for the defendants. T. N. Phelan, for the plaintiff.

SYLVESTER v. SYLVESTER—KELLY, J., IN CHAMBERS—JAN. 7.

Husband and Wife—Alimony—Interim Order—Suspension of—Particulars of Statement of Defence—Adultery.]—Appeal by the plaintiff from an order of the Master in Chambers suspending an order for payment of interim alimony, and confining the particulars ordered to be delivered by the defendant to the defence of adultery. KELLY, J., in a written judgment, said that the appeal from the part of the order which suspended the payment of interim alimony from the 19th December, 1919, to the 19th January, 1920, and after that date until the trial or other disposition of the action, should be allowed, but without prejudice to the defendant making further application after the last mentioned date to suspend interim alimony if circumstances arise in the meantime on which he may be advised to make such application. The appeal from the part of the order which confined the particulars as above, should be dismissed. No costs of the appeal unless ordered by the trial Judge. W. R. Smyth, K.C., for the plaintiff. R. S. Robertson, for the defendant.

BUCK v. BUCK—KELLY, J.—JAN. 7.

Husband and Wife—Alimony—Evidence—Quantum of Allowance—Costs.]—An action for alimony, tried without a jury at Chatham. KELLY, J., in a written judgment, said that at the opening of the trial and after unsuccessful attempts had been made by counsel to effect a settlement, it was agreed by both parties that some alimony should be allowed, although each party insisted that there was fault on the other side. The only matter submitted for decision was the amount to be allowed. After recounting the circumstances of the parties, the learned Judge said that he did not think that, on the merits, the allowance for alimony should be large, and did not think that a large amount, if granted, could be paid. He fixed the allowance at $100 a year, payable in quarterly instalments. This, with the plaintiff's own means, would make her position more comfortable than the defendant's. Her costs against the defendant he fixed at $60 plus actual and necessary disbursements. Judgment accordingly. O. L. Lewis, K.C., for the plaintiff. R. L. Brackin, for the defendant.

TORONTO HOCKEY CLUB LIMITED v. ARENA GARDENS LIMITED—TORONTO HOCKEY CLUB LIMITED v. ARENA GARDENS LIMITED *et al.*—FALCONBRIDGE, C.J.K.B.—JAN. 7.

Contract—Agreements between Associations for Commercialised Games—Enforcement—Reformation—Evidence—Corroboration—Damages—Services of Players—Loss of—Delivery up of Contracts—Injunction—Reference—Costs.]—The first action was brought to recover $20,093.54 and interest, and for delivery over to the plaintiffs of certain contracts of players leased by the plaintiffs to the defendants. The second action was brought to recover damages for the plaintiffs' loss of the services of the seven individual defendants, for an injunction, and for delivery over of contracts. The two actions were tried together, without a jury, at a Toronto sittings. FALCONBRIDGE, C.J.K.B., in a written judgment, said as to the first action that he found all the issues joined, both of fact and law, in favour of the plaintiffs. He gave full credence to the evidence of Mr. Boland, corroborated as it was by the circumstances and by the contemporaneous statements, verbal and written, of Mr. Claxton. The written agreement should be, if necessary, reformed so as to express the true intent and understanding of the parties at the time it was entered into. There should be judgment for the plaintiffs for $20,093.54, with interest from the 1st April, 1918, and costs. Either party might elect,

within 15 days, to take a reference as to this at its own risk. There should also be an order directing the delivery over by the defendants to the plaintiffs of contracts of players leased by the plaintiffs to the defendants and retained by the defendants—and, in default thereof, a reference to the Master to fix damages.—The second action arose out of the first and turned on the construction of the agreement as to the return or reversion of the players. In this action also the learned Chief Justice accepted Mr. Boland's evidence throughout, and especially as to what took place at the King Edward Hotel on the 5th December, and agreed with the plaintiffs' contention. He found also as a fact that the arrangement with Vearnecombe set up by the defendants was merely colourable for the purpose of enabling the defendants to evade fulfilment of their obligations. There should be judgment for the plaintiffs with costs, and a reference to the Master to ascertain the damages. No damages were sought or awarded as against the defendant players, viz., Denneray, Noble, Cameron, Meeking, Randall, Skinner, and Adams. Further directions and subsequent costs should be reserved until after report. The claim for an injunction was, owing to the lapse of time before trial, abandoned. There should also be judgment for the plaintiffs in terms of para. (*d*) of the prayer of the statement of claim. W. R. Smyth, K.C., for the plaintiffs. A. C. McMaster, for the defendants the Arena Gardens Limited. R. T. Harding, for the individual defendants in the second action.

GREEN v. BANK OF TORONTO—LENNOX, J.—JAN. 8.

Mortgage—Bank—Mortgages Made as Security for Amount Secured by Overdue Promissory Notes—Action to Set aside Mortgages—Res Judicata—Claim for Injunction and Account—Frivolous Action—Dismissal—Costs.]—Action to set aside mortgages made to the defendants by one McCormick upon lands conveyed by the plaintiff to McCormick as security in respect of the endorsement by McCormick of certain promissory notes upon which money was advanced to the plaintiff by the defendants, and for an injunction restraining the defendants from selling the lands, and for an account. The mortgages were made after the notes had matured and were unpaid. The action was tried without a jury at an Ottawa sittings. LENNOX, J., in a written judgment, set out the facts at length, and said that the claim to set aside the mortgages was res judicata—they had been unsuccessfully attacked in a former action brought by the plaintiff against McCormick and the bank. The whole action was without merit, frivolous, and vexatious, and should be dismissed with costs. If, however, the litigation ends without an appeal the

dismissal will be without costs: if there is an appeal, the dismissal will be with costs. Taylor McVeity, for the plaintiff. H. Fisher, for the defendants.

HARDY v. SHAW—SUTHERLAND, J.—JAN. 8.

Account—Business Profits—Securities—Lien—Sale—Reference—Costs.]—Action by George H. Hardy against Robert W. Shaw and the Vulcan Company Limited for an account of business profits and for other relief. The defendants asked for an account of moneys received by the plaintiff and for the realisation thereof upon securities transferred by the plaintiff. The action was tried without a jury at London. SUTHERLAND, J., in a written judgment, said, after stating the facts, that the only reasonable and possible conclusion to come to, on the evidence as a whole, was that the agreement made with the plaintiff in 1912 was put an end to in October, 1913; that thereafter the plaintiff became an employee of the defendant company, and so continued until he resigned or was dismissed in January, 1919. If the plaintiff desired an accounting, the only one that he was entitled to was one covering the period of the defendant company's business from September, 1912, to October, 1913; and this would apparently be useless, as for that period the business shewed a loss. While the defendant company's business was, so far as the defendant Shaw and the other shareholders were concerned, somewhat negligently looked after from October, 1913, till January, 1919, and the plaintiff given too free a hand in the management and conduct thereof, resulting in his apparently withdrawing moneys to which he was not entitled, the amount thereof could not be said to have been definitely ascertained as yet. On the evidence as it stood, the plaintiff would appear to have realised that he was indebted, or he would not have offered and furnished security. The plaintiff should, if he so desired, have, at his own risk as to costs, a reference as to the profits during the period from September, 1912, to October, 1913. Unless the parties could agree upon an amount, the defendant company might have a reference to the Local Master to ascertain what amounts, if any, the plaintiff withdrew from the company's business in excess of the salary which he was authorised to receive during the period from October, 1913, to January, 1919. If an amount should be agreed upon, the defendants would have a lien upon the securities until that amount should be paid; and, in default of payment within a reasonable time, a right to realise the amount by sale. Further directions and costs should be reserved. J. M. McEvoy, for the plaintiff. T. G. Meredith, K.C., for the defendant Shaw. R. G. Fisher, for the defendant company.

MORLEY v. FIDELITY TRUST CO.—SUTHERLAND, J.—JAN. 9.

Deed—Conveyance of Interest in Land—Deed Said to be Subject to Oral Agreement—Failure to Prove—Conveyance to Trust Company—Validity—Administration of Estate.]—Action by John A. Morley against the trust company, executors of the will of the plaintiff's deceased mother, Mary Morley, and against the plaintiff's two brothers Frederick and James Morley, for a declaration that the plaintiff, as one of the heirs at law of his father, was entitled to an undivided share or interest in a certain parcel of land owned by his father, who died in October, 1897, and in the remainder of his father's estate, and to set aside as fraudulent and void a conveyance of the land by Mary Morley to the trust company, and for an account of rents and profits, and for administration of his father's estate. The action was tried without a jury at London. SUTHERLAND, J., in a written judgment, found as a fact that the plaintiff, in 1898, signed, sealed, and executed a deed which conveyed all his interest in the parcel of land referred to, to his mother, and that the deed was delivered to her as his grantee. The mother did not take the deed subject to an agreement such as the plaintiff alleged. The deed operated as an absolute conveyance to her of the interest of the plaintiff in the land. The deed from the mother to the trust company was valid to convey the land to it for the purposes of carrying out the trusts contained in her will. The real contest in this action was as to the real estate. Any personal estate left by the father was apparently of small value. It was said that the mother paid the father's funeral expenses. In the circumstances of the case and upon the evidence, there was no ground for making an order for the administration of the estate. The action should be dismissed with costs. J. A. E. Braden, for the plaintiff. J. W. G. Winnett, for the defendants Frederick and James Morley. J. B. McKillop, for the defendant company.

RE HUNTER—KELLY, J.—JAN. 9.

Will—Construction—Gift Contained in Direction to Pay—Postponement of Enjoyment—Assignment by Children of Shares of Corpus to Widow—Immediate Payment to Widow.]—Application by the executors of the will of William Henry Hunter for the opinion and advice of the Court upon a question arising in the administration of the testator's estate. The motion was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that it was shewn that there were four children of the testator by his wife Rebecca, three of thom were over 21 years of age. It was also said that each of these three adult children had assigned to his mother

all his interest in a sum of $10,000. The executors asked the opinion of the Court as to whether they were justified in paying over now to the widow three-quarters of this $10,000, or whether they must wait until her death before making a distribution of it. The revenue derived from this $10,000 was to be paid to the widow from the date when his son W. H. Earl Hunter should attain the age of 18 until her death; and, subject to this provision in her favour, the corpus was to vest equally in the testator's children by his said wife; the receipt and enjoyment of their shares thereof being merely postponed to permit of her receiving the income for the time specified. The case came within Re Douglas (1892), 22 O.R. 553. Assuming that the three adult children had assigned their shares to their mother, there was no reason why those shares should not now be paid over to her. Order declaring accordingly; costs out of this fund—those of the executors as between solicitor and client. C. R. McKeown, K.C., for the executors. F. W. Harcourt, K.C., Official Guardian, for the infant.

CORRECTION.

In BEST v. BEATTY, CALVERT v. BEATTY, ante 327, at p. 328, insert after the word "assignment," in line 7 from the top, the words "in a case of this kind."