THE

ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM THE 1st MARCH, 1919, TO THE 2nd AUGUST, 1919.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

9235

VOL. XVI.

Editor:

Edward B. Brown, K.C.

1919:
CANADA LAW BOOK CO., LTD.
LAW BOOK PUBLISHERS
TORONTO

JUL 14 1920

97504

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The
Ontario Weekly Notes

Vol. XVI. TORONTO, MARCH 14, 1919. No. 1

APPELLATE DIVISION.

Second Divisional Court. February 20th, 1919.

SIMM v. CITY OF HAMILTON.

Municipal Corporations—Injury to Land by Flooding Caused in Part by Unauthorised Act of Corporation in Making Ditch on Private Property—Bringing Water on Highways—Overflow on Neighbouring Land—Remedy—Compensation under Arbitration Clauses of Municipal Act—Settlement of Claim in Former Action—Highways Vested in Corporation.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Wentworth, in favour of the plaintiff, for the recovery of $200 and costs, in an action for damages for injury to the plaintiff's lands by flooding caused by the negligence of the defendants, as the plaintiff alleged.

The appeal was heard by Meredith, C.J.C.P., Britton, Riddell, Latchford, and Middleton, JJ.

F. R. Waddell, K.C., for the appellants.

S. F. Washington, K.C., for the plaintiff, respondent.

Meredith, C.J.C.P., delivering the judgment of the Court at the conclusion of the hearing, said that the only question of law raised by the defendants was, whether the plaintiff's remedy was confined to compensation fixed under the arbitration clauses of the Municipal Act.

Where that which is done by a municipality is something authorised by law, and in doing it without negligence injury is inflicted, the remedy is so confined.

But where the injury is inflicted in doing an act not so authorised, or by negligence in doing an authorised act, there is no such restriction.

The trial Judge found, and the evidence supported that finding, that the injury of which the plaintiff complained was caused in part by the quite unauthorised act of the defendants in making a ditch on private property, including the plaintiff's lands, and thereby bringing water down to the plaintiff's lands in such quantities as to flood them: and by bringing water down upon the highways to such an extent that it also overflowed and flooded the plaintiff's land.

To the first claim of the plaintiff the defendants made two answers: (1) that the ditch after construction was filled in so that no water came down in that way; the weight of evidence and the finding of the trial Judge were that it did, though less in quantity than when the ditch was wholly open: and (2) that in a former action the plaintiff was paid for all the injury caused by the opening of the ditch; but that was not proved; on the contrary, as the evidence now stood, it rather appeared that the settlement made was in satisfaction of damages sustained up to the time of that settlement only.

And, as to the second claim, whilst a land-owner may protect himself against flood-water not flowing in any defined channel, and a municipality may improve and must repair its highways, neither may in any manner collect vagrant waters and discharge them on the lands of others; and that, according to the evidence, had been and was being done, to the plaintiff's injury. Such waters were collected at the side of the highways and to some extent discharged on the plaintiff's land; and it was no defence to say that these roads were not made in the first place by these defendants: they were now vested in and under the control of the defendants, who were answerable for any nuisance they might continue to create.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 5TH, 1919.

*RE SUN LIFE ASSURANCE CO. OF CANADA AND McLEAN.

Insurance (Life)—Endowment Policy—Insurance Moneys Payable to Assured at End of Fixed Period—Appropriation of Policy by Assured for Benefit of Wife—Policy in Force and Assured Living at End of Period—Assured Entitled to Optional Benefits—Revocation of First Appropriation—New Appropriation in Favour of Mother after End of Period—Subsisting Policy—Right of Assured to Select Benefit other than Payment in Cash—Motion for Leave to Pay into Court Amount of Cash Benefit—Dismissal—Declaration of Right—Appeal—Costs.

Appeal by Adèle Caroline McLean from the order of ROSE, J., 15 O.W.N. 393.

The order, as issued, declared that "whatever rights Adèle Caroline McLean had in the . . . policy have passed to Ophelia McLean and that . . . Adèle Caroline McLean has no further interest in the said policy;" and dismissed the motion of the company.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, SUTHERLAND, and MIDDLETON, JJ.

J. F. Holliss, for the appellant.

L. Macaulay, for the company, respondents.

J. W. Payne, for the assured and Ophelia McLean, respondents.

THE COURT affirmed the order in so far as it dismissed the application, but varied the order by striking out the declaration; and ordered that there should be no costs to or against any party of the motion or of the appeal.

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

SECOND DIVISIONAL COURT. MARCH 7TH, 1919.

REYNOLDS v. HAMILTON AND DUNDAS STREET R.W. CO.

Water—Wrongful Diversion of Water and Ice from Stream into Canal—Interference with Natural Course—Injury to Boat-house on Bank of Canal—Cause of Injury—Finding of Trial Judge—Appeal.

Appeal by the defendant railway company from the judgment of MASTEN, J., in favour of the plaintiff, in an action for damages for injury to the plaintiff's property by reason of wrongful acts of the defendants, as the plaintiff alleged. The action was brought against the railway company, and the Corporation of the Town of Dundas was added as a defendant at the trial. The trial Judge gave judgment for the plaintiff against the railway company for $500 and costs; and dismissed the action as against the town corporation.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

S. F. Washington, K.C., and A. Hope Gibson, for the appellants.

M. J. O'Reilly, K.C., for the plaintiff, respondent.

J. W. Lawrason, for the Corporation of the Town of Dundas.

MEREDITH, C.J.C.P., in a written judgment, said that the case depended on the simple question of fact, whether the wrong which the street railway company did caused the injury for which the damages were awarded to the plaintiff. Unquestionably the loss for which the damages were awarded was caused by the diversion of water and floating ice from the natural and proper course into the basin of a canal, on which the plaintiff's boat-house was, a considerable distance to the north of the stream. Heavy rains in February caused a freshet in the stream. The ice in the stream below the point of diversion caused the rising waters to overflow the banks and run into the company's property and upon their car-tracks, and the "lay of the land" caused it to flow northerly, almost at right angles to the stream, into the canal-basin and the canal.

If the railway company had not interfered with this natural action, no one would assert that they were answerable in damages for anything caused by that state of affairs; but they did interfere and interfered for their own benefit. The ice and the water accumulating upon their property would have prevented the run-

ning of their cars until nature unaided relieved the situation, which it must have done at most within a few days.

The interference of the company was of a two-fold character: (1) they cut trenches through the snow and ice on their property, which had the effect of letting the water and ice out of the natural course across their property and on towards the canal; and (2) for 4 or 5 days they kept 3 or 4 men shoving the broken ice, which had floated down to the spot, across their property and into and upon the property of their neighbours, thence to float on and to be discharged in the canal, where it must have lodged until the ice was broken up and carried down into the bay.

In shoving the ice from their property down upon the property of others, the company were clearly guilty of a wrong and liable in damages to any one upon whose property the ice lodged. And there was no difficulty in finding that the ice which came down the stream, and was unlawfully assisted by the company in reaching the canal, did cause the injury for which the damages had been awarded.

The appeal should be dismissed.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD, J., agreed in the result.

MIDDLETON, J., also agreed in the result, for reasons stated in writing.

RIDDELL, J., read a dissenting judgment.

Appeal dismissed (RIDDELL, J., *dissenting*).

SECOND DIVISIONAL COURT. MARCH 7TH, 1919.

*HOPKINSON v. WESTERMAN.

Fraudulent Conveyance—13 Eliz. ch. 5—Conveyance by Husband to Wife of all his Property—Insolvency—Intention to Defeat Impending Judgment in Action for Tort—Knowledge of Grantee—Status of Plaintiff with Claim ex Delicto—Small Claim upon Contract not Sufficient to Found Execution against Land.

Appeal by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing with costs an action brought to set aside as

voluntary and fraudulent a conveyance of land made by one defendant to the other—the defendants being husband and wife.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. P. MacGregor, for the appellant.

J. G. O'Donoghue, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that it was plain that the conveyance of land impeached in this action was made for the purpose of defeating the expected and impending execution in the then pending action for criminal conversation. The grantee, the wife of the grantor—the grantor was the defendant in that action—knew that it was pending, knew all the facts upon which it depended, and knew that the wrong done was done so openly that a substantial verdict in it against her husband was certain; and, as she also knew, he had no other property out of which the amount of the judgment could be realised. And the effect of the deed was merely to transfer the ownership from husband to wife, the family having substantially the same benefit of it as if it had remained in the husband and he had not made himself insolvent. The case against the man was so plain that, soon after the deed was made, judgment was entered up against him in the action for criminal conversation, for $1,100, upon his consent.

The feeble efforts of the wife to shew that she had an interest in the land before the making of the deed, because she was saving in the money she received from her husband for housekeeping purposes, and because she sometimes went out working, really only made plainer the purpose of defeating the claim in the other action. The fraudulent purpose was plain.

But it was contended that this action must fail because the plaintiff was not a creditor of the fraudulent grantor when it was commenced—that he must bring a new action to enforce his rights; that any one who had a sufficient claim arising out of contract may bring such an action as this before he has recovered a judgment upon his claim; but that no one whose claims arise out of a wrong can bring such an action until he has recovered judgment upon his claim. That was not now and never was the law; and there was no reason why it should be, no reason why claims ex delicto and claims ex contractu should not be upon precisely the same plane in this respect; though, upon the question of intent, the character of the claim and the prospects of success in it may be of consequence: Ex p. Mercer (1886), 17 Q.B.D. 290.

Reference to 20 Cyc. 430; 13 Eliz. ch. 5.

The plaintiff sought also to support the action upon a claim for $20 arising out of a contract; but judgment for such an amount

would not give any right to execution against lands, and so the deed could not stand in the plaintiff's way.

The appeal should be allowed and judgment entered for the plaintiff in the usual form: see Reese River Silver Mining Co. v. Atwell (1869), L.R. 7 Eq. 347.

Britton, J., agreed with Meredith, C.J.C.P.

Riddell and Latchford, JJ., agreed in the result.

Middleton, J., also agreed in the result, for reasons stated in writing.

Appeal allowed.

Second Divisional Court. March 7th, 1919.

*HENDERSON v. STRANG.

Company—Action by Shareholder for Declaration as to Effect of Agreement between Company and Nominal Shareholder—Plan Adopted for Vesting Control of Company in Nominal Shareholder—Allotment of Shares—Nothing Paid on Shares—Illegality as Regards Future Shareholders and Creditors—Companies Act, R.S.C. 1906 ch. 79, secs. 58 et seq.—Dismissal of Action.

Appeal by the defendants from the judgment of Masten, J., 43 O.L.R. 617, 15 O.W.N. 78.

TheL appeal was heard by Meredith, C.J.C.P., Britton, Riddell, and Latchford, JJ.

D. L McCarthy, K.C., and A. W. Langmuir, for the appellants.

I. F. Hellmuth, K.C., and S. J. Birnbaum, for the plaintiff, respondent.

Meredith, C.J.C.P., read a judgment in which he said that the plan devised and carried into effect by the two persons most substantially concerned—with the concurrence of every one else having an interest in the company, and to which no objection was made by any one until recently, though it had been in force and constant operation for upwards of 8 years, and to which objection was now made really only because of matters personal to the plaintiff's husband, one of the substantial owners of the concern—seemed to have been a plan well suited to the purposes of the

business of the company and of all present or past shareholders; though as to possible future shareholders and creditors it might be very different.

The main feature of the plan, so far as the disposition of this appeal was affected, was, that the defendant William Strang should have a controlling interest in the company as if the holder of more than one half of its capital stock, and as if that stock were fully paid-up, though in reality nothing was actually paid by him for the stock. The cheque sent in payment was never, and was never intended to be, cashed by any one.

Though it was the scheme of every one concerned in this action and acted upon for upwards of 8 years, and though beneficial to them during all that time, and likely to be as beneficial in the future if the plaintiff's husband would perform his part of it, it could not stand if it were ultra vires the company—a company incorporated under the Companies Act of Canada. The rights and interests of present shareholders were not alone concerned—those of possible future shareholders and creditors must equally be considered.

The plan was one which the company could not lawfully act upon. The Act (R.S.C. 1906 ch. 79, secs. 58 et seq.) requires payment for stock, payment with interest at 6 per cent. per annum upon all arrears (sec. 60), and there was not, nor was there intended to be, any kind of payment in this scheme: the defendant Strang was to have the position or power of a paid-up stockholder without having paid anything in any real way for the stock; but there was nothing fraudulent or morally wrong in that, because he was not to be paid dividends, nor was he to obtain any other money advantage through such nominal ownership.

The plan being ultra vires, the defendant Strang could not retain the position of a paid-up stockholder; nor, on the other hand, could the company put him in the position of holder of stock upon which nothing had been paid, for the stock was not so taken—it was taken only as a part of the whole plan: neither the company nor the Court had any power to make or enforce against him a new and different contract; if the plan should fall to the ground, it must fall altogether. There was no contract to take any but fully paid-up shares; the contract is altered if the subscriber is fixed with unpaid shares.

The appeal should be allowed with costs and the action dismissed with costs.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

RIDDELL and LATCHFORD, JJ., agreed in the result, for reasons stated by each of them in writing.

Appeal allowed.

HIGH COURT DIVISION.

SUTHERLAND, J., IN CHAMBERS. MARCH 1ST, 1919.

*REX v. SPENCE.

Criminal Law—Indictment—Nolle Prosequi—Criminal Code, sec. 962—Entry of Stay of Proceedings—New Information for same Cause—Defendant not Placed in Jeopardy under Indictment—Fresh Prosecution not Barred.

Motion by the defendant for an order prohibiting one of the Police Magistrates for the City of Toronto from taking any further proceedings under a certain information, on the ground that the charge therein was for the same matter as that in respect of which the defendant was indicted and thereafter discharged, after an entry of a stay of proceedings thereunder, by the direction of the trial Judge at a sittings in Toronto—the direction having been given at the instance of the Attorney-General for Ontario, with the approval of the Minister of Justice for Canada.

W. E. Raney, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

SUTHERLAND, J., in a written judgment, said that the defendant was indicted for having in his possession or publishing objectionable matter, to wit, a book with the title "The Parasite," contrary to a Dominion order in council made under the War Measures Act, 1914. When the defendant came before the Court (Masten, J.) for trial, on the 15th November, 1918, counsel for the Crown, under instructions from the Attorney-General, asked to have an entry made on the record that proceedings were stayed by direction of the Attorney-General, under sec. 962 of the Criminal Code. An entry was made accordingly and signed by Masten, J.

In the month of December, 1918, a new information was laid against the accused for "publishing a book called 'The Parasite' containing objectionable matter." It was admitted by the Crown that this was in substance the same charge as that contained in the prior indictment.

The defendant appearing before the Police Magistrate to answer the new charge, the Crown desired to proceed, and the magistrate directed that a plea of "not guilty" be entered; whereupon the motion for prohibition was made.

After refering to a number of authorities—among others, Goddard v. Smith (1705), 6 Mod. 231, 232; Archbold's Criminal Pleading and Evidence, 24th ed., p. 146; 12 Cyc. 231, 374; 26

Cyc. 60; Halsbury's Laws of England, vol. 9, para. 350—the learned Judge said that, while the stay entered precluded further action upon the original indictment—in fact permanently stayed any such action—it did not preclude the laying of a further information. In what was done when the stay was authorised and made effective the accused was not put in jeopardy.

Motion dismissed; no order as to costs.

Rose, J. March 5th, 1919.

*SPARKS v. CONMEE.

Promissory Notes—Action against Executors of Maker—Notes Payable at Particular Place—Non-presentation—Bills of Exchange Act, sec. 183—Effect as against Maker—Claim against Third Party — Promise — Consideration — Limitations Act — Bar to Claim—Absence of Third Party from Ontario—"Return" to Ontario—Sec. 52—Extension of Time—Accrual of Cause of Action—Interest.

Action against the executors of James Conmee, deceased, upon two promissory notes, each dated the 17th February, 1906, and each for $1,000, one payable 12 months and the other 2 years after date, made by Conmee in favour of Hurley & Co. and endorsed by Hurley & Co.

The defendants brought in F. H. Clergue as a third party and made a claim over against him upon an undertaking in writing given by him to Conmee, dated the 13th February, 1906, to pay the notes when due.

The action and third party issue were tried at a non-jury sittings in Toronto.

Shirley Denison, K.C., and W. J. Beaton, for the plaintiffs.

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

R. McKay, K.C., and P. E. F. Smily, for the third party.

Rose, J., in a written judgment, said (after stating the facts) that this action was begun against Conmee in June, 1908. Conmee died in 1913 or 1914, and in May, 1914, the plaintiffs took out an order of revivor continuing the action against the executors. The third party notice was issued on the 13th October, 1917.

Many defences were pleaded to the plaintiffs' claim against the defendants, but none was established by the evidence.

A defence not pleaded, but strenuously urged, was based upon sec. 183 of the Bills of Exchange Act, R.S.C. 1906 ch. 119. The notes were, in the body of them, made payable at a particular place in Philadelphia. Some of them were presented there at maturity, and were protested for non-payment; but one of the notes now in question was not so presented or protested. Counsel for the plaintiffs took the position that, as this defence was not pleaded, it ought not to be considered. It was not necessary to rule upon this objection, because the learned Judge was bound by authority to hold that the effect of sub-sec. 2 of sec. 183 was that non-presentation was no answer to an action against the maker. What was said upon this point in Freeman v. Canadian Guardian Life Insurance Co. (1908) 17 O.L.R. 296, 302, 303, was part of the ratio decidendi.

There was no defence to the plaintiffs' claim against the defendants.

The first defence urged by the third party to the claim against him was want of consideration for the promise. The promise was not a guaranty to a creditor that a debtor would pay his debt—it was a promise by Clergue to Conmee that, if Conmee gave certain notes to Hurley & Co., Clergue would pay them. Conmee did give them upon the faith of the promise. The signing of the notes was consideration to support Clergue's promise. See Means v. Whitney (1904), 24 C.L.T. Occ. N. 93, 237. This defence failed.

The third party also pleaded the Limitations Act. What Clergue undertook was to pay the notes when due. The last of those sued upon fell due in February, 1908, and the third party proceedings were not begun until the 13th October, 1917, more than 9 years thereafter. It was said that time was given to Clergue conditioned upon his paying in instalments, and that he continued to make payments for some time after the maturity of the note which fell due in February, 1908; and that, therefore, Conmee's right of action did not accrue; but, even if that were so, it must have accrued at the end of 1910, when the payments ceased; and, if the latter starting point were taken, the proceedings were still too late to save the statute.

Counsel for the defendants relied upon sec. 52 of the Limitations Act, R.S.O. 1914 ch. 75, as extending the time for commencing the third party proceedings. Clergue gave up his residence at Sault Ste. Marie, Ontario, in 1910, and moved to New York; some two years later he moved from New York to Montreal, where he had since lived, and now lived; so that, if the cause of action did not accrue until the cessation of the payments on account, he was resident out of, and perhaps actually absent from, Ontario when it did accrue; but he retained his commercial interests in Ontario

and held land in Ontario, and in every month of 1911 he spent some days in the Province. He thus "returned" to Ontario, within the meaning of the words of sec. 52; and, even if the time for the commencement of the period of limitation had been suspended, the suspension ceased more than 6 years before the proceedings against Clergue were initiated: Moore v. Balch (1902), 1 O.W.R. 824. See also Boulton v. Langmuir (1897), 24 A.R. 618.

The defendants' claim against the third party failed.

Interest ought to be allowed upon the notes which were not presented as well as upon those which were: Freeman case, supra.

Judgment for the plaintiffs against the defendants for $2,866.40 with costs.

The defendants' claim against the third party dismissed with costs.

ROSE, J., IN CHAMBERS. MARCH 5TH, 1919.

DOMINION PERMANENT LOAN CO. v. HOLLAND.

Pleading—Statement of Claim—Action by Liquidator on Behalf of Company in Liquidation—Position of Liquidator—Assertion of Cause of Action by Liquidator as Representing Shareholders and Debenture-holders.

Motion by the defendants to vary the minutes of the order made by ROSE, J., on the 19th February, 1919 (15 O.W.N. 446).

Grayson Smith, W. W. Vickers, and Christopher C. Robinson, for the several defendants.

M. L. Gordon, for the liquidator of the plaintiff company.

ROSE, J., in a written judgment, said that his attention had been drawn to the fact that, while he had directed the elimination from the statement of claim of certain words which were apparently intended as an assertion of a cause of action by the liquidator as representing "the public," he did not deal specifically with certain other words which were apparently intended to be an assertion of a similar cause of action by the liquidator as representing certain shareholders and debenture-holders.

In the learned Judge's opinion, the liquidator's concern was with wrongs done to the company: he was entitled to sue for damages in respect of such wrongs: if he succeeded he might

benefit the shareholders and the debenture-holders, and, in that sense, but in that sense only, he represented the shareholders and the debenture-holders—he was not entitled to maintain an action in respect of wrongs done to them by the directors or by the company acting through the directors. Paragraphs 17, 18, and 19, and clause 4 of the prayer, must, therefore, be so amended as to make it clear that the liquidator was not attempting to assert any cause of action which the company could not itself assert if it was still capable of suing without the intervention of a liquidator.

CLUTE, J. MARCH 7TH, 1919.

DANDY v. DANDY.

Will—Claim of Wife against Estate of Testator for Money Lent to him—Direction to Executors to Pay Named Sum Borrowed from Wife—Conveyance of Property after Date of Will—Evidence—Ademption—Satisfaction—Set-off.

Action by the widow of Samuel R. Dandy, deceased, to recover from his estate $7,258.43, being the aggregate amount of certain advances made by her to her husband during his lifetime; he died on the 10th November, 1916.

The action was tried without a jury at a Toronto sittings.

James Haverson, K.C., for the plaintiff.

R. H. Greer, for the defendant Charles Dandy.

William Proudfoot, K.C., for the defendants Sarah Dandy, Frederick Dandy, and Laura Dandy.

E. C. Cattanach, for the defendant Jospeh Dandy, an infant.

CLUTE, J., in a written judgment, said that it was admitted that the advances had been made by the plaintiff to her husband, as alleged by her, and that they had not been repaid.

The defendant Charles Dandy set up that the deceased Samuel R. Dandy, by his will, made the following provision for the plaintiff, in addition to an interest in his residuary estate: "I direct them" (the executors) "to pay to my wife the sum of $6,000 in cash which I borrowed from her for the purchase of the house I live in and also to give my wife all the household effects of my home including the furniture of every kind;" and that, subsequent to the execution of the will, the deceased conveyed to himself and his wife as joint tenants the house referred to in the will, of which at his death she (as survivor) became the owner;

and submitted that the house, which was worth more than $6,000 and more than $7,258.43, was given to the plaintiff in full satisfaction of her claim as a creditor and of the legacy of $6,000. This defendant also asserted a set-off of $2,165.05.

The other adult defendants made the same submission upon the facts; and the infant defendant submitted his rights to the Court.

The learned Judge found as a fact that the house was not purchased by the deceased for himself and his wife but for himself personally. The conveyance of it was made upon his own motion.

The advances made by the plaintiff were not intended to be gifts but loans. The plaintiff did not seek to recover the amount as a legacy under the will, but as a debt due to her, and she did not ask to be paid the debt and the legacy, but only the debt.

There could be no ademption, because no facts were disclosed upon which ademption could take place. It was said that the conveyance of a half interest in the house satisfied the debt due from the husband. But there was nothing to justify such a presumption; the evidence from the documents was all the other way; and the plaintiff swore (her statement was accepted) that the conveyance was never intended to be a payment of the debt due to her; that he had never asked her to accept it as such, and that it never was so accepted. The debt, therefore, remained. There was no question of satisfaction of a legacy—the plaintiff was not suing for a legacy; the so-called legacy was a direction to pay the debt due to her—no part of it had been paid.

The cases cited for the defendants had no application: In re Pollock (1885), 28 Ch.D. 552; In re Fletcher (1888), 38 Ch.D. 573; Tuckett-Lawry v. Lamoureaux (1902), 3 O.L.R. 577.

Judgment for the plaintiff for the sum claimed, less the set-off, agreed upon at $1,853.43, with interest; all costs out of the estate.

Rose, J. March 8th, 1919.

LONG v. GAGE.

Sale of Goods—Action for Price—Question of Fact—To whom Sale Made and Credit Given—Evidence—Finding of Referee—Agent —Election—Assignment of Claim—Action by Assignee—Absence of Notice of Assignment—Addition of Assignor as Party Plaintiff—Costs—Items of Account—Appeal from Report.

Appeal by the defendant from the report of Snider, Co. C.J., to whom the action was referred for trial; and motion by the plaintiffs for confirmation of the report.

The appeal and motion were heard in the Weekly Court, Toronto.

Peter White, K.C., and W. T. Evans, for the defendant.

H. A. Burbidge, for the plaintiffs.

ROSE, J., in a written judgment, said that the action was to recover the balance of the price of lumber alleged to have been sold by the plaintiffs to the defendant and the balance of the price of certain other lumber alleged to have been sold by the Consumers' Lumber Company Limited to the defendant, the lumber company's claim having been assigned to the plaintiffs. The defence to the whole claim was that the goods were not sold to the defendant but to one Bryers, who resold to the defendant; and to various items of the claim there were additional defences, such as that the goods were not delivered to the defendant.

As to the claim in respect of the goods sold by the lumber company, there was also the defence, apparently raised for the first time upon the hearing of the appeal, that there was not, before action, any written notice of the assignment, and that the plaintiffs, therefore, could not sue in their own name without making the assignor a party: McMillan v. Orillia Export Lumber Co. (1903), 6 O.L.R. 126.

The learned Judge gave leave to add the lumber company as a party plaintiff upon its consent being filed.

The question whether the goods were sold to the defendant or to Bryers was a pure question of fact. The plaintiffs' books and invoices shewed Bryers as the purchaser; but there was abundant evidence to support the finding of the referee that the bargain between the parties was that the purchase should take the form of a sale to Bryers, but that the person to pay should be the defendant. That finding of fact standing, there was no room for the application of the cases cited by counsel for the defendant in support of the proposition that the plaintiffs, by the entries in their books and by the invoices etc., elected to give credit to the agent, Bryers, rather than to the principal, the defendant; there was no right to look to Bryers, and there could not be a valid election to make him liable.

Upon the evidence, the findings of the referee as to the various items in dispute upon the appeal should be affirmed.

The appeal should be dismissed with costs, and the motion to confirm the report allowed with costs; the order should not issue until the lumber company has been made a party, and nothing done in making the company a party is to increase the costs payable to the defendant.

SHAVER V. YOUNG—SUTHERLAND, J.—MARCH 3.

Mortgage—Action on Personal Covenant for Payment by Mortgagor Described as "Trustee"—Descriptive Word not Limiting Personal Liability—Mortgage Made as Part of Transaction concerning an Exchange of Properties—Defence Based on Alleged Misrepresentations—Failure to Prove.]—Action upon a mortgage. The action arose out of an exchange of lands, the mortgage sued upon having been made by the defendant as part of the transaction, and having been assigned to the plaintiff by the mortgagee, Gertrude Pasternack. The exchange was made by and between Gertrude Pasternack, the owner of vacant lots in or near the town of Bassano, Alberta, and the Glen Eden Securities Company Limited, the owner of two parcels of land in the city of Toronto. In the exchange, there was a difference in the values placed upon the properties, after deducting the incumbrances, in favour of Gertrude Pasternack, and a mortgage in her favour was executed by the defendant, acting for the company, upon the Bassano lots, for $3,650 and interest. This was the mortgage assigned to the plaintiff and now sued upon. The defendant was described therein as "physician, trustee," and he denied personal liability; but the learned Judge held that, having regard to the terms of the mortgage, and to the fact that no provision was made therein to protect the defendant from the personal covenant for payment therein contained, the word "trustee" must be regarded as merely descriptive, and not as limiting the personal liability of the defendant. The defendant also alleged that representations made by Gertrude Pasternack and her agents as to the value of the Bassano lots were untrue, and that the agreement was made by him on the faith of those representations. The learned Judge finds against the defendant on the defence of misrepresentations. Judgment for the plaintiff for the amount claimed with costs. R. McKay, K.C., for the plaintiff. W. E. Raney, K.C., for the defendant.