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HON. MR. JUSTICE KELLY. MAY 26TH, 1913.

RE FRANCIS COOPER ESTATE.

4 O. W. N. 1360.

Will—Construction—"Cash in Bank"—Moneys on Deposit in Loan Company—Inclusion of—Gift to Enumerated Class—Wrongful Enumeration—Disregard of—Suggested Mistake of Testator as to Description of Class.

KELLY, J., *held*, that a gift by a testator to a legatee of "all my cash in bank" passed certain moneys on deposit in the Canada Permanent Mortgage Corporation as well as other moneys in deposit in two chartered banks.

That a gift to the three nieces and five nephews of B. S. C., the brother of the testator, where B. S. C. had three daughters and five sons and several nephews and nieces (but not eight precisely) was a gift to the latter class and not to the children of B. S. C., the wrongful enumeration being disregarded.

Re Stephenson, Donaldson v. *Bamber*, [1897] 1 Ch. 75, followed.

Application to have it determined, first, whether under the direction by a testator, Francis Cooper, to his executors to pay to his brother Barry S. Cooper "all my cash in bank," Barry S. Cooper was entitled to moneys of deceased deposited in the Canada Permanent Mortgage Corporation; and, secondly, who were entitled to the residue of the testator's estate.

(1) The provision in the will disposing of cash in bank was as follows: "My said executors are also directed to pay to my brother Barry S. Cooper of St. Louis, Mo., all my cash in bank, provided, however, that my trustees are at liberty to pay my funeral expenses out of said moneys in the bank as aforesaid; but my brother, Barry Cooper, is to be recouped out of the residue for any such advance for burial as aforesaid."

At the time of his death, the testator had moneys on deposit in the Dominion Bank, in the Home Bank of Canada, and in the Canada Permanent Mortgage Corporation.

J. R. Code, for executors.

H. T. Beck, for Barry S. Cooper and his adult children.

J. Tytler, K.C., for Margaret J. Fulton, Annie Fulton and James B. Fulton.

J. R. Meredith, for infant, Annie K. Cooper.

HON. MR. JUSTICE KELLY:—My opinion is that he intended the money in the last named institution as well as the moneys in the other two places of deposit to go to his brother Barry S. Cooper.

(2) The residuary clause in the will is in these words: "All the rest and residue of my estate not heretofore disposed of for payment of necessary expenses, I direct my executors and trustees to divide equally between three nieces and five nephews of Barry S. Cooper, share and share alike."

The testator died in Toronto on June 14h, 1912, and probate of his will, which bears date May 20th, 1912, was issued on August 14th, 1912, to his executors Rev. Robert James Moore and William Payne.

Testator was a bachelor and he left surviving him two brothers, Barry S. Cooper and William F. S. Cooper, and several nephews and nieces, children of his deceased brothers and sisters, as well as eight other nephews and nieces, the children of his brother Barry S. Cooper.

So far as it is shewn William F. S. Cooper was then a bachelor. Barry S. Cooper's nephews and nieces then numbered more than eight; it is not made clear what was their exact number. The executors appear to have doubts as to who is entitled to the residue.

Dealing first with the contention that the three daughters and five sons of Barry S. Cooper are the persons intended by the testator to be benefited, to adopt that view it would be necessary to read into the will a word or words not used by the testator. For instance, the insertion of the word 'children' after the words 'five nephews' would aid in arriving at that result, but in doing so the meaning of the will as made by the testator would be altered, and a meaning given to it altogether different from that which the language used by him conveys. The chief ground for urging this view is that the number of Barry S. Cooper's children (three daughters and five sons) corresponds with the number of nephews and nieces of Barry S. Cooper mentioned by the testator. Except that it is (or may be) in error in stating

the number composing the class to be benefited, the language of the will is clear as to where the residue is to go. The effect of so changing or adding to the language so used by the testator would be to divert the residue from one class named by him and give it to another class. That would be making a will for the testator, and not declaring what his will means. What the Court has to do is to determine from the language used by the testator what was his intention. The expressed intention in this will is to give the residue to the nephews and nieces of Barry S. Cooper. Perhaps the testator had in mind a different intention, perhaps he meant to say 'children of Barry S. Cooper,' but he did not say that or express such different intention, perhaps he was wrong in stating the number of Barry S. Cooper's nephews and nieces—that is the number composing the class intended to be benefited—he does, however clearly indicate the class. The fact that the number of nephews and nieces he mentions corresponds with the number of Barry S. Cooper's children is not in itself sufficient to shew he meant the children of Barry S. Cooper, or a justification for importing into the will, in order to give it that meaning, a word or words not used by the testator.

Nor do I think the residuary clause is void for uncertainty as has been suggested. The testator shewed an intention of benefiting a certain class, and where the Court as a matter of construction, arrives at the conclusion that a particular class of persons is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the Court will reject the enumeration. *Re Stephenson, Donaldson* v. *Bamber,* [1897] 1 Ch. 75 (at p. 81), Lord Russell, C.J.

Lindley, L.J., in his judgment in the same case, at p. 83, puts it this way: "If the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court should not and will not defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration."

A. L. Smith, L.J. (at p. 84), states the same conclusion, and then goes on to draw a distinction between the cases in which something is struck out from the will, and those

cases where the Courts are asked not to strike out something from, but to add something to the will.

Jarman, 6th ed. vol. 2 (at p. 1706), in dealing with the same question, says: "It often happens, that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases, it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included. Such, accordingly, is the established construction, the numerical restriction being wholly disregarded. Indeed unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator." And at p. 1708: "The ground on which the Court has proceeded is that it is a mere slip in expression, and the circumstance that the testator knows the true number of children is not a sufficient reason for departing from the rule."

The testator may have been aware of the number of the children of his brother Barry S. Cooper; it is not clear that he knew the number of this brother's nephews and nieces. Barry S. Cooper himself, from his affidavit filed, seems to have some doubt of the exact number of his nephews and nieces.

My conclusion is, therefore, that on the true reading and construction of this will, the residue is to go to the nephews and nieces of Barry S. Cooper, living at the time of the testator's death, irrespective of the fact that the number named by the testator, namely, three nieces and five nephews, may be more or less than the real number at that time.

Costs of the parties out of the estate, those of the executors as between solicitor and client.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 4TH, 1913.

WILSON v. TAYLOR.

4 O. W. N. 1376.

Mortgage—Sale—Alleged Improvidence—Sale en bloc instead of in Parcels—Delegation of Matter to Careful Solicitor by Mortgagee —Local Conditions—Printers' Error in Advertisement—Duties of Mortgagees Discussed—No Evidence of mala fides.

Action for damages alleged to have been sustained by a mortgagor by reason of the alleged improvident sale of the mortgaged premises by the mortgagor, under his power of sale. The chief complaint was that the property had been sold *en bloc* instead of in parcels, against the expressed wishes of plaintiff, and the evidence went to shew that in all probability more could have been obtained for a sale in parcels. Defendant had been too old to look after the matter himself, and had put the whole business in the hands of a competent solicitor.

BOYD, C., *held*, 23 O. W. R. 359; 4 O. W. N. 253, that "if a mortgagee exercises his power of sale *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless, indeed, the price is so low as to be in itself evidence of fraud."

Haddington Island Quarry Co. v. *Huson*, [1911] A. C. 729, and other cases as to liabilities of mortgagee selling, reviewed.

Aldrich v. *Can. Perm. Loan Co.*, 24 A. R. 193, distinguished. Action dismissed without costs.

SUP. CT. ONT. (1st App. Div.) dismissed appeal with costs.

Appeal by the plaintiff from the judgment of the Chancellor, dated 7th November, 1912, after trial before him sitting without a jury at Brockville on 31st October of that year.

The facts are fully stated in the reasons for judgment of the learned Chancellor, which are reported in 23 O. W. R. 359.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

J. E. Hutcheson, K.C., for appellant.

J. L. Whiting, K.C., and J. A. Jackson, for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—In the view of the Chancellor the mortgagor had been damaged to the extent of at least $1,800 as the effect of the sale of the mortgaged property *en bloc* instead of in parcels.

I should not have reached that conclusion upon the evidence. As the Chancellor points out, the property was a difficult one to dispose of in any way, and there was little or no market for land in Gananoque, where the mortgaged property is situate, or for such a sized house as was on it.

The main part of the property consisted of a brick yard which was not being operated, and had not been since 1910; and the valuation of it as a going concern, such as that made by the witness Bechtel, forms no adequate guide as to its value in its then condition. As has been said, the house was too large for the property, and it was, therefore, difficult if not impossible to find a purchaser for it at anything like what it cost to build it. The village lots had been laid down on a registered plan, with streets running through the subdivision. No one suggested that the lots could have been sold separately; and the value placed upon them was based upon their being used as one parcel for grazing purposes—which could not be done unless these streets were closed.

The mortgage was for $4,000, and was made on the 20th of November, 1908. The principal was payable in annual instalments of $500, and interest at the rate of six per cent. was payable annually.

Nothing has been paid on account of the principal, and of the interest only that for the first year. The appellant was unable to raise money to pay off the mortgage; his efforts to sell the mortgaged property had resulted in failure; and even after the sale under the power, the purchaser was willing and offered to let the appellant have the property back at what he had bought it for, but neither the appellant nor his creditors availed themselves of the offer.

These latter facts, in my view, afford more cogent evidence against the contention of the appellant than the opinions, more or less speculative, as to the value of the mortgaged properties expressed by the witnesses called on his behalf.

Even if the Chancellor's view as to the loss sustained by not selling in parcels is to be accepted, I agree in his conclusion that in the circumstances of the case the respondent is not chargeable with the loss.

Aldrich v. *Canada Permanent* (1897), 24 A. R. 193, is not an authority for holding that in the circumstances of this case it was the duty of the respondent to sell in parcels; and that for the reason mentioned by the Chancellor at the conclusion of his judgment. The mortgaged property in

that case consisted of a farm of forty acres with two dwelling houses and other farm buildings on it, and of a village property with two stores on it situate half a mile or more from the farm.

Even in that case Maclennan, J.A., said: "I do not say that in no case like the present would a sale in one lot be proper."

The facts were very different from those of the present case. The evidence shewed that the mortgagees had acted recklessly in selling in one lot. Bell, their agent in the locality in which the property was situate, was not consulted as to the best way of selling it, and testified at the trial that as a prudent owner he would not think of selling the two properties together and expect to get the best price for them. Indeed, no inquiry whatever was made by the mortgagees for the purposes of ascertaining what was the most advantageous way of selling the property.

In the case at bar, the properties are contiguous to one another and were occupied and used by the mortgagor as one property. The dwelling house was built for his own use, and was manifestly so situated that it was not a desirable place of residence for any one except the owner of the brickyard. The lots were grazing land, and were conveniently situated for use in connection with the brick business; indeed, some of them were used for obtaining clay for the manufacture of the bricks.

The conclusion to sell *en bloc* was reached by the respondent's solicitor after he had considered the question of selling in that way or in parcels; and there is no reason for thinking that he or the respondent had any other desire than to sell to the best advantage. It is not at all clear, I think, that had the property been sold in parcels the result would not have been that an unsaleable brickyard would have been left on the respondent's hands; and I very much doubt whether the other property would have realized anything like the value put upon it by the witnesses called on the appellant's behalf.

Baker, the autioneer employed at the sale, had a long experience, and his testimony was that in his opinion the best price would be got for the property by putting it up for sale *en bloc*.

As said by Lindley, L.J., in *Kennedy* v. *DeTrafford* [1906] 1 Ch. 762, 772, "a mortgagee is not a trustee of a

power of sale for a mortgagor at all: his right is to look after his own interests first, but he is not at liberty to look after his own interests alone; and it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor, that is all.

The conduct of the respondent has been judged by the learned Chancellor according to that standard, and he has found that the respondent neither fraudulently nor wilfully, nor recklessly sacrificed the property of the appellant. With that conclusion I entirely agree.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS, agreed.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 4TH, 1913.

FALCONER v. JONES.

4 O. W. N. 1373.

Negligence—Fatal Accidents Act—Death of Employee—Unexplained Accident—Varying Theories—Nonsuit—Contributory Negligence —Findings of Jury.

Action for damages for the death of one, W. F., while engaged at defendant's factory, operating a machine, through the alleged negligence of defendants. The belt supplying power to the machine at which deceased was working, had parted, and deceased was in the act of assisting the foreman in replacing it upon the pulley, when something struck him violently in the chest, instantly killing him. The evidence went to shew that it was, probably, a piece of wood which struck deceased, but as to its source, different theories were advanced. The jury found negligence on the part of defendants, and negatived contributory negligence on the part of the deceased.

MIDDLETON, J., *held*, 24 O. W. R. 18; 4 O. W. N. 709, that the jury's findings as to negligence were warranted by the evidence, though their theory of the accident was not, and entered judgment for the plaintiffs for $1,650 and costs.

SUP. CT. ONT. (1st App. Div.) dismissed defendant's appeal with costs.

Appeal by defendants from the judgment of MIDDLETON, J. (24 O. W. R. 18; 4 O. W. N. 709), based upon the answers of a jury finding them and their millwright guilty of negligence, which caused the death of plaintiff's husband through the starting of a shaft and pulleys when they ought not to have moved.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

H. H. Dewart, K.C., and B. H. Ardagh, for defendants (appellants).

John Jennings, for plaintiff (respondent).

HON. MR. JUSTICE MACLAREN:—The defendants claim that the accident was caused by the negligence of the deceased in interfering with the belt upon the shaft in question in disobedience of the orders of the millwright.

The belt in question conveyed power from the main shaft in the basement of the factory through a small opening in the floor to a counter-shaft about two feet above the ground floor which drove the shaper at which the deceased was working. This counter-shaft and the pulleys upon it were protected by a box covering which could be removed when necessary. The belt had lossened and been unlaced, and the deceased appears to have removed the box, taken up the belt and carried it to the room occupied by the millwright whose duty it was to repair it. After being repaired, the latter took it to its proper place, and put one end over a loose pulley upon the countershaft and through an instrument called a "shifter," and had the deceased drop one end through the hole in the floor while he went down and put the belt around the main shaft and up through the hole and then came up and laced it up. He went down to the basement to put the belt upon the proper pulley, a large one, 36 to 40 inches in diameter, upon the main shaft. He says that as he was leaving "I told Falconer (the deceased) to keep away, that I am going down to throw the belt on." He went down, and by means of a stick threw the belt on this large pulley, which was making three hundred revolutions a minute. This should merely have set the belt and the loose nine-inch pulley on the counter-shaft in motion without affecting the counter-shaft itself. Instead of this, the jerk down below threw the belt from the loose pulley over on the fixed pulley alongside of it, which was slightly larger, and was bevelled to facilitate the transference when it was desired to set the counter-shaft and the shaper in motion. The millwright came upstairs at once and found the deceased lying on the floor not far from the rapidly revolving counter-

shaft and pulley, having received a blow which drove his ribs into his heart. There was no eye-witness of the accident.

There were two theories regarding it. One put forward by the defence and accepted by the trial Judge, that the deceased, seeing the belt going, tried to keep it in its place with a stick which was found broken near where he was lying. The other, suggested by plaintiff's counsel, that a piece of wood from a band-saw, not far off, had flown against the revolving pulley which drove it violently against the deceased. This theory was adopted by the jury.

In my opinion it is quite immaterial which of these two theories is correct, or whether they are both wrong. I believe the case can be determined without deciding this question at all, it being common ground that the direct cause of the accident was the fact of the counter-shaft and pulley being suddenly put in motion, whatever the instrument or substance which actually struck the fatal blow.

The jury found the defendants negligent in that the "shifter" was insufficiently locked and allowed the belt to travel on the fixed pulley, suddenly putting the counter-shaft in motion at high speed, and that the engine should have been slowed down during the operation, also that the millwright was negligent in putting the belt on the wrong side of the large drive wheel, and in not slowing down the engine, and in leaving the cover off the counter-shaft while the shafting was in motion. They also found that the deceased was not guilty of contributory negligence or disobedience to orders, and that he did not voluntarily incur the risk of what he did at the time of the accident.

There was evidence on which the jury might properly find that it was an improper thing to throw this belt upon a wheel which was making 300 revolutions a minute; and that there was danger from the smaller wheel, which was making 1,200 revolutions a minute, and the belt travelling more than half a mile a minute, and both of them unprotected.

It was urged on behalf of the defence that the deceased himself removed the box covering from the counter-shaft, but that would appear to have been necessary in order to remove the injured belt. Once the belt was repaired and was being replaced, the millwright was the person superintending the operation, and the deceased was merely assist-

ing him, and was subject to his orders, and the superintendence of the millwright had not ceased when the accident happened. If the covering had been replaced, it would have been impossible for the accident to happen, whether it was done by the stick in question or by something else.

The fact of the belt having been put on the wrong side of the large wheel or pulley by the millwright, only came out during his evidence, and the statement of claim was amended accordingly. Instead of putting the belt around the main shaft on the same side of the large pulley as the loose pulley above was with regard to the fixed pulley alongside, it was put on the opposite side. This gave the belt a diagonal bearing instead of a perpendicular direction, and when the millwright with his stick threw the belt over the lower pulley, the jerk drew the belt towards and upon the upper fixed pulley and set the counter-shaft in rapid motion, without which on either or any theory, the accident would not have happened.

The jury found the deceased was not guilty of contributory negligence. In support of defendant's claim that he was so guilty, was urged the fact of his removal of the box covering which has already been dealt with; also that he had disobeyed the order of the millwright to "keep away." To this there may be several answers. In the first place the instruction was very vague. How far was he to keep away? Did it necessarily mean any more than that he was not to come near enough to the loose pulley or the belt to be injured by them when the power was turned on? There is no evidence that the deceased heard it, or as to what he understood it to refer, and it was for the jury to pass upon its value and effect, and they have done so.

In my opinion the appeal should be dismissed.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE HODGINS, and HON. MR. JUSTICE MAGEE agreed.

MIDDLESEX COUNTY.

1ST DIVISIONAL COURT. MAY, 1913.

MOODY v. KETTLE.

4 O. W. N. 1410.

Principal and Agent—Commission on Sale of Land—Introduction of Purchaser by Agent—Purchase of Other Property not Listed with Agent—Agent's Right to Commission.

Defendant listed a coal yard with plaintiff, a real estate agent, for sale on commission. Plaintiff introduced a prospective purchaser to defendant, but after examination of the property he would not purchase, but later he purchased another coal yard from defendant. Plaintiff brought action to recover a commission on the sale of the unlisted yard.

MACBETH, Co.C.J., dismissed the action.

Starr v. *Royal, etc.*, 30 S. C. R. 384, followed.

The defendant agreed to pay the plaintiff, a real estate broker, a commission, if the plaintiff sold for defendant a coal-yard on Maitland street owned and occupied by defendant.

The plaintiff introduced one Mathews as a prospective purchaser of this coal-yard, but after examining the property in the defendant's presence, Mathews declined to buy it. The defendant then offered to sell a smaller yard on Hill street which had been leased to a tenant, but was then vacant.

About six weeks afterwards Mathews in partnership with a former tenant of defendant took from the defendant a lease of the Hill street yard with an option of purchase, and in January, 1913, bought the property for $1,925.

Plaintiff then brought this action to recover a commission on the purchase money of the Hill street yard.

G. S. Gibbons, for plaintiff.

T. H. Luscombe, for defendant, cited *Cronk* v. *Carman*, 19 O. W. R. 145, as to the necessity for a contractual relationship.

HIS HONOUR JUDGE MACBETH:—I find as a fact that defendant did not at any time engage the plaintiff to sell the Hill street yard and it seems to be a complete answer to plaintiff's claim to shew that he was not at any time employed to sell the Hill street yard.

Starr v. *Royal, Etc.*, 30 S. C. R. 384, is somewhat like the present case. There the plaintiffs, who were agents for the sale of electrical machinery, having in view a prospective customer for an electric light plant, were authorised by defendants to offer a certain specifically described plant for four thousand five hundred dollars; the customer refused to buy this plant but subsequently purchased from defendant a much smaller plant for one thousand eight hundred dollars. Held, that plaintiffs were not entitled to a commission on the sale of the smaller plant. Mr. Justice Sedgewick, at p. 386, says: "The right of the applicants to a commission depended solely upon whether they had sold the specific machine described in the telegram," i.e., the plant priced at four thousand five hundred dollars.

I think there must be judgment for defendant.

Annotation by Editor.

See *Deneau* v. *Lemieux*, 4 E. L. R. 93, where Curran, J., found as a fact that plaintiff, a real estate agent, had no contract with defendant vendor, but as plaintiff had rendered a service to defendant the latter was bound to pay plaintiff a fair remuneration. The rule that no one can enrich himself at the expense of the other, applied.

HON. MR. JUSTICE MIDDLETON. MAY 12TH, 1913.

BUTLER v. BUTLER.

4 O. W. N. 1308.

Bills of Exchange and Promissory Notes—Action on Note—Agreement to Renew—Not Valid as Defence—Money Paid on Account of Defendant—Payment into Court—Costs.

MIDDLETON, J., gave judgment in favour of plaintiff in an action for moneys paid on account of defendant and also in an action on a promissory note.

Action to recover $436.56 and interest, being moneys paid by plaintiff for defendant to a bank upon a guaranty, and another action between the same parties on a promissory note.

J. G. Wallace, K.C., for plaintiff.

W. R. Smyth, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—In this action temper seems to have prevailed over wisdom. In the action on the note the whole issue is as to an alleged agreement to renew the note. I do not think this agreement is proved, and if proved, I do not think it would constitute a defence in law. In the action for the amount paid the bank the defendant admits the debt and has paid it into Court—and the only question is one of costs. I can see no reason why the defendant should not pay them. As the plaintiff might have contented himself with one suit, I give no costs up to the appearance, but give costs subsequent thereto, as they were occasioned by defendant's improper attitude.

HON. MR. JUSTICE MIDDLETON. JUNE 5TH, 1913.

RE MACKENZIE ESTATE.

4 O. W. N. 1392.

Will—Construction — After Acquired Lands—"Money and Securities"—Date of Construction—Annuity—Direction of Payment out of Certain Funds—Insufficiency of Funds—Right to Resort to other Assets—Arrears of Annuity—Statute of Limitations not Applicable to—Trust.

MIDDLETON, J., *held*, that land purchased after the making of a will could not be properly comprehended under the description "money or securities," the will speaking from the date of the death. *Re Dods*, 1 O. L. R. 7 and *Re Clowes*, [1893] 1 Ch. 215, followed.

That where there is a gift of a specific annuity to an annuitant a subsequent direction as to where the funds are to be found to pay the same does not limit the annuity to the income of such funds.

Kimball v. *Cooney*, 27 A. R. 453, followed.

Motion argued on 28th May for determination of certain questions arising in the administration of the estate of Daniel Macleod Mackenzie, who died on the 30th October, 1889.

Elliott, K.C., for executors.

Bell, K.C., for the Ruddys and others in the same interest.

Clement, K.C., for the estate of the deceased widow.

HON. MR. JUSTICE MIDDLETON:—The testator left him surviving a widow; no children. By the fourth clause of his will he gave to his wife an annuity of two hundred dollars

payable half-yearly during her life. By the fifth clause he directs his executors to invest the moneys and securities of which he shall die possessed, and out of the interest to pay the annuity of his wife and the residue, if any, to his sister; and if his sister survives his wife to pay her the whole interest during the term of her life.

By an earlier clause of the will the wife had been given a life estate in the testator's residence. Subject to this life estate, by the sixth clause it is given to trustees, with power to sell, and after the death of the wife proceeds are to be divided among the testator's nephews and nieces. By the seventh clause the moneys and securities for money are to be also divided among the nephews and nieces upon the death of the testator's wife and sister.

The testator, after the date of his will—23rd June, 1884—purchased for $2,200 a property known as the gallery property in Milton. This property was subject to a mortgage for one thousand dollars, the assumption of which formed part of the purchase price. After the death of the testator his executors paid off this mortgage out of the personal estate. The income derived from the personal estate was insufficient to pay the widow's annuity in full. The executors have paid to the widow the income derived from the gallery property; but even this is not sufficient to give her the $200 a year. There was no residuary clause in the will.

It is argued that the testator, having taken money in the bank and invested it in the gallery property, this ought to be treated as forming part of "the moneys and securities" which are directed to be held.

By the Wills Act, as to property mentioned therein the will is, in the absence of a contrary intention therein expressed, to be taken as speaking from the death of the testator. At the death of this testator this land could not be regarded as money or security. The principle is not unlike that applied in *Re Dods* (1901), 1 O. L. R. 7, and in *Re Clowes*, [1893] 1 Ch. 215. These cases are in one sense the converse of this. The testator there owned land at the date of his will but sold it before his death, taking back a mortgage to secure a portion of the purchase money. It was held that the devisee of the land did not take the mortgage, as it was personalty. *A fortiori*, after-acquired land cannot pass under a gift of personalty. There is therefore

no escape from holding that there was an intestacy as to this land.

The next question is as to the widow's rights. As she elected under the Devolution of Estates Act to take her third in this land descended in lieu of dower, the remaining two-thirds would form part of the assets of the estate. As the land was subject to the mortgage, her one-third would be subject to one-third of the mortgage.

The mortgage having been paid out of the testator's personalty, it must be treated as being an investment of so much of the personal estate, and as a subsisting charge upon the land, for the purpose of accounting.

The next question relates to the rights of the widow as an annuitant. Is her right limited to the income? I think that *Kimball* v. *Cooney*, 27 A. R. 453, is in point; shewing that here there is a gift of the annuity and that the subsequent clause is a mere direction to the executors and does not cut down the annuitant's right by reason of the failure of the income. See also *Carmichael* v. *Gee*, 5 A. C. 588.

The widow is therefore entitled to receive the balance of her annuity; and, if it is material, resort should first be had to the proceeds of the land descended.

As there is a trust, I do not think that the arrears of annuity should be limited to six years, as suggested upon the argument.

The questions submitted may be answered in accordance with this opinion; and costs will come out of the estate.

HON. MR. JUSTICE LENNOX. JUNE 4TH, 1913.

VOGLER v. CAMPBELL.

4 O. W. N. 1389.

Conveyance—Action to Set Aside — Accounting—Bank Account—Moneys in Joint Names—Testamentary Intention—Costs.

LENNOX, J., *held*, that upon the facts of the case certain moneys standing in the joint names of one John L. Campbell, deceased, and the defendant, were moneys of the former intended by him only as a testamentary gift to defendant and defendant was liable to account for same.

Hill v. *Hill*, 8 O. L. R. 710, referred to.

Action to set aside a deed from John L. Campbell to defendant and for an accounting, etc.

O. L. Lewis, K.C., and H. D. Smith, for plaintiff.

Matthew Wilson, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—I stated my conclusion as to the deed at the trial.

As to the money in the Traders Bank, $2,029.35, standing in the names of the deceased John L. Campbell and the defendant, it is impossible to distinguish it from the money on deposit in *Hill* v. *Hill* (1904), 8 O. L. R. 710, and the result must be the same. Here, as in that case, the plaintiff's own evidence and depositions, and a great deal of other evidence in the case, the purpose of the deceased in associating the defendant's name with his own in the bank account was, by this means, to make a gift to the defendant, in its nature testamentary. The money continued to be the money of the deceased, it was drawn upon by him only, and whatever was the form of the instrument, upon the understanding with the banker, and in the understanding of the parties, the defendant could not touch the money in the lifetime of the deceased. The evidence of the bank officials, the practice pursued, and above all the conditions attending the signing of the final cheque for $500, shew this. When the $500 was withdrawn on this cheque it was distinctly for the personal use of the deceased, the defendant took it as an agent or trustee, it was not used, and it must be accounted for. This $500 and the $1,529.35 carried to the credit of the defendant's account on the 2nd April, 1912, making a total of $2,029.35, I find and declare to be money of and belonging to the deceased John L. Campbell, and undisposed of by will or otherwise at the time of his death. The defendant has appropriated this money to her own use. She is or has been the administratrix of the deceased and must account for the money to the estate with interest at five per centum per annum from the 25th of February, 1913, the date when the accounts were passed by the Surrogate Court. I am not sure that I should charge the defendant with interest from the time the money was carried to the credit of her account.

The action, so far as it relates to setting aside the deed from John L. Campbell to the defendant is concerned, will be dismissed.

But the plaintiff was justified in having this matter investigated, and the manner in which deceased dealt with his property has been a very direct cause of litigation.

The plaintiff has succeeded as to her other claims.

It is a case for costs of both parties out of the estate or the equivalent of this, but if I were making the order I would feel that defendant who, including the farm, gets two-thirds of all her father had, should contribute in some such proportion. I think it will be just, then, and avoid complication, if I direct that the plaintiff shall have her costs of the action as between solicitor and client out of the estate, and that the defendant shall pay her own costs.

The defendant having paid, advanced or loaned to her brother John Campbell a sum greater than his share on the bank money, the defendant will not be called upon to actually hand over or pay out this share and she will be taken to have accounted for this part of the moneys of the estate by applying and endorsing the same upon the $800 promissory note which she holds against John Campbell.

HON. MR. JUSTICE MIDDLETON. JUNE 5TH, 1913.

RE FILLINGHAM.

4 O. W. N. 1391.

Will—Construction — Insurance Moneys—Disposition of—Earlier and Later Clauses—Derogation — Identification of Policy.

MIDDLETON, J., *held*, that where an earlier clause of a will directed that certain insurance moneys should be divided equally amongst the testator's children and a later clause charged them with the payment of certain legacies, that the two clauses should be read together and both given effect.

Motion for construction of a will.

G. A. Radenhurst, for the executors and now appointed to represent the infant Herbert E. Fillingham, owing to the conflict of interest.

J. R. Meredith, for the infants' interests.

HON. MR. JUSTICE MIDDLETON:—The testator died on the 21st August, 1909, leaving him surviving five infant children; his wife having predeceased him.

The insured had a policy in the Independent Order of Foresters for one thousand dollars. This had been made

payable to his wife, and was not otherwise dealt with save by the provisions contained in his will. By his will he gave his homestead to his son Herbert Edward, charged with the payment of certain legacies in favour of his brothers and sisters. This farm had come to the testator from his father, charged with the payment of an annuity in favour of his mother and some legacies in favour of the testator's brothers and sisters. The deceased then directed that the insurance money over which he had control by reason of his wife having predeceased him should be divided between his sons and daughters, share and share alike. He then provides that if enough money is not realised from the sale of his interest in another parcel of land, and the money to his credit in the bank, and upon a note (which was paid off in his lifetime) to pay his brothers' and sisters' legacies, "the balance to come out of the insurance money I have in the Independent Order of Foresters."

The contention made on behalf of the son is that the insurance money must under the terms of the will be applied in discharge of these legacies and that this provision found in the later clause derogates from the gift contained in the earlier clause. The contention on behalf of the other infants is that the earlier clause in the will amounts to an instrument operative under the Insurance Act, and that the later clause is nugatory.

I do not think this is so. I think that the two clauses in the will can be read together, and that the effect is to give the insurance money to the children, subject to payment thereout of the money necessary to discharge the legacies due to the testator's brothers and sisters.

The principle applicable is that acted upon by Mr. Justice Anglin in *Re Wrighton*, 8 O. L. R. 630: "the very instrument conferring title . . . makes that title subject to the payment" of the legacies.

Mr. Meredith argues that the insurance policy is sufficiently identified in the earlier clause, but insufficiently identified in the later. I think the two clauses must be read together and that possibly neither clause under the statute (as it was at the date of the will and at the date of the death) sufficiently identifies. But if the identification is sufficient, then I think that the two clauses must be read together.

This may be so declared. Costs out of the estate.

HON. MR. JUSTICE LENNOX. JUNE 2ND, 1913.

STURGEON v. CANADA IRON CORPORATION LTD.

4 O. W. N. 1386.

Negligence—Master and Servant—Personal Injuries to Brakesman —Contributory Negligence—Damages.

LENNOX, J., *held*, that plaintiff was entitled to $1,800 damages in an action brought in respect of personal injuries sustained by him while a brakesman in the employ of defendants.

Action by Joseph F. Sturgeon, an employee of defendants, for $5,000 damages at common law or $2,500 under the Workmen's Compensation Act for injuries received on Nov. 19th, 1912, while acting as brakesman on one of defendants' trains.

A. E. H. Creswicke, K.C., for plaintiff.

W. Finlayson, for defendants.

HON. MR. JUSTICE LENNOX:—I cannot accept the evidence of Frederick Brennan. I cannot believe that the plaintiff was paid for riding up and down the trestle for three days in order that Brennan should tell him when to throw the switch and where to put the cars; and this at a time when no change in the plaintiff's employment was contemplated; and even if I believed Brennan his evidence would fall far short of shewing that the plaintiff was instructed or warned as he should have been, in fact there is no suggestion that he had any notice or warning, whatever, of the dangers to be encountered.

It was not, and it cannot be, denied that the trestle presents exceptional dangers. The plaintiff was a green hand as regards this work. In the absence of specific instructions his experience in the yard, on solid ground, would count against his chances of safety, rather than otherwise. The fact that he was set to work at night, to grope for experience in the dark, multiplied the risks for the plaintiff, and accentuated the duty of the defendants to take special care.

In the absence of notice or warning the plaintiff in attempting to alight as he did near the switch as the cars stopped had the right to expect and believe that he would find some platform, walk or structure upon which he could

land and proceed with safety to the switch. In face of abundant uncontradicted evidence of the practice of landing upon and running along the walls, and evidence too that the method the plaintiff was attempting was sometimes pursued, it is idle to argue that the defendants expected or intended that the plaintiff should remain upon the car until the switch platform was reached—Brennan was with the plaintiff the first night he worked upon the trestle until midnight, but they were not working near the switch or track in question, and in fact the accident occurred upon the very first occasion upon which the plaintiff was called upon to turn the left switch. The plaintiff could not by the exercise of reasonable care have avoided the injuries he sustained. The defendants are liable as well at common law as under the statute, but I need not separately assess the damages as the statute is broad enough to cover the amount which I think the plaintiff is fairly entitled to recover. There will be judgment for $1,800 with costs.

MASTER-IN-CHAMBERS. JUNE 5TH, 1913.

LLOYD & CO. v. SCULLY.

4 O. W. N. 1404.

Action—Style of Cause — Individual Carrying on Business under Firm Name—Amendment Ordered— Terms—Costs.

MASTER-IN-CHAMBERS ordered that where an action was brought in the name of Samuel Lloyd & Co. as plaintiffs and it appeared that the sole member of the firm was Theresa Lloyd, the style of cause should be amended accordingly.

Lang v. *Thompson*, 16 P. R. 516, and *Mason* v. *Mogridge*, 8 T. L. R. 805, followed.

Motion by defendants to stay an action brought by "Samuel Lloyd & Company" as plaintiffs, as improperly brought under Con. Rules 222 and 231, it appearing on an application under Con. Rule 222 for the names of the members of the firm, that "the sole member of the firm of S. Lloyd & Co. was Theresa Lloyd."

J. F. Boland, for motion.

F. Aylesworth, contra.

CARTWRIGHT, K.C., MASTER:—In its terms Con. Rule 222 is not applicable to a case like the present so as to enable a single person doing business under another name

and not being an incorporated company to sue in the firm name.

It seems clear from the decision of Osler, J.A., in *Lang* v. *Thompson*, 16 P. R. 516, as well as that in *Mason* v. *Mogridge*, 8 Times L. R. 805, that the action should have been brought by "Theresa Lloyd, carrying on business under the name, style and firm of Samuel Lloyd & Co." or so under some such wording. In the *Lang Case* it was pointed out that the style of the cause should be amended in cases like the present on proper terms. It is said by the plaintiffs' solicitor that the effect of the present motion if granted will be to throw the trial over the sittings at Owen Sound fixed for the 12th inst. In view of this I was asked on the argument to direct the defendants to plead forthwith and to take short notice of trial. But no such terms can be imposed when, as here, there is no irregularity or default on the part of the defendants.

The notes sued on were long overdue. The action which was begun on 22nd April apparently did not even then proceed with the despatch allowed by the Rules. If for any reason the plaintiff thinks it best, she could move to change the trial to Toronto or move for judgment under Con. Rule 603, if there is no real defence.

As the case now stands the plaintiff should amend and the costs of this motion will be to the defendants only in the cause.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 4TH, 1913.

WILSON v. SANDERSON-HAROLD CO. LTD.

4 O. W. N. 1403.

Master and Servant — Contract of Hiring—Action for Wrongful Dismissal—Sufficient Cause—Acquiescence—Estoppel—Costs.

FALCONBRIDGE, C.J.K.B., dismissed without costs an action for wrongful dismissal, finding good cause therefor and an acquiescence by plaintiff therein.

Action by plaintiff, late manager for defendant company, to recover $750 alleged to be due for six months' salary from August 21st, 1913, and an account of profits and for $500 damages for wrongful dismissal.

W. S. Brewster, K.C., and J. R. Layton, for plaintiff.

F. Smoke, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—There was abundant evidence supplied by Miller and by plaintiff's own admissions to justify a charge, if not of active disloyalty, certainly of a feeling of unrest and dissatisfaction which would not be consonant with the discharge of plaintiff's highest duty to his employers and which would reasonably lead Harold to the belief that plaintiff's usefulness was gone or seriously impaired.

It seems to me further that plaintiff acquiesced in his own dismissal. He made no protest at the time (August, 1912), and he went on and asked for and was paid his bonus of $120 by cheque enclosed in a letter of 18th September from Harold to "Dear Billy."

On 9th October plaintiff writes to Harold about some stock held by plaintiff in defendant company (which stock had been allotted to him by them on 1st April, 1912, as a bonus for past services) and there is no hint in this letter of any further claim.

Then in a letter of 18th November he puts forward this claim.

There are, however, circumstances in the case which lead me not to impose the penalty of costs on plaintiff.

Action dismissed without costs. Thirty days' stay.

HON. MR. JUSTICE LATCHFORD. JUNE 2ND, 1913.

TUCKER v. TITUS.

4 O. W. N. 1402.

Contract—Rescission of—Conduct Affirming — Action of Deceit—Amendment Refused.

LATCHFORD, J., dismissed an action claiming the rescission of certain agreements upon the ground of fraud and misrepresentation, holding that plaintiff with full knowledge of the facts, had acted so as to affirm the contracts.

Stocks v. *Boulter*, 22 O. W. R. 464; 47 S. C. R. 440, referred to.

Action for the rescission of certain contracts on the ground that they were induced by fraud and misrepresentation.

E. G. Porter, K.C., and W. Carnew, for plaintiff.

A. Abbott, for defendant.

HON. MR. JUSTICE LATCHFORD:—From the plaintiff's own evidence it appeared that with full knowledge of all that he now alleges and proves, he had by disposing of part of the property acquired from the defendant put himself in such a position that he had in law affirmed what he seeks in this action to set aside. See *Stocks* v. *Boulter* (1912), 22 O. W. R. 464, and *Boulter* v. *Stocks* (1913), 47 S. C. R. 440.

It may be that had the action been for deceit, the defendant would have to meet the claim by calling evidence. But as no case has been made for rescission I am—in the absence of an amendment which I refused to make changing the whole form of the action—obliged to grant the defendant's motion for a non-suit and dismiss the action with costs, but without prejudice to the right of the plaintiff, if so advised, to bring an action for damages for deceit. Stay of thirty days.

MASTER-IN-CHAMBERS. MAY 31ST, 1913.

BRUCE v. NATIONAL TRUST.

4 O. W. N. 1372.

Mechanics' Liens—Statement of Claim—Lack of Affidavit—Time for Filing Expired—Jurisdiction of Court—Vacation of Lien.

MASTER-IN-CHAMBERS *held*, that he had no power to do other than set aside a statement of claim in a mechanics' lien action filed upon the last day for filing the same without the required affidavit attached.

Canada Sand Lime v. *Ottaway*, 10 O. W. R. 686, 788, referred to.

Motion in a proceeding under the Mechanics' Lien Act by defendants to set aside the statement of claim filed 1st February, 1913, but without any affidavit attached.

S. G. Crowell, for motion.

C. M. Garvey, for plaintiff.

CARTWRIGHT, K.C., MASTER:—It appears that the statement of claim was filed on the very last day permissible. It was said on the argument that the plaintiff was out of

reach of his solicitor at the time and it was suggested that sec. 19 of the present Act, 10 Edw. VII. ch. 69, might be applied. This, however, is confined in its terms to secs. 17 and 18 and while it was held in *Crerar* v. *C. P. R.*, 5 O. L. R. 383, that the necessary affidavit might be made by the solicitor as agent (as might well have been done in this case), it would be judicial legislation to say that no affidavit was necessary. The nature of the procedure under this Act was considered in *Canada Sand Lime Co.* v. *Ottaway*, 10 O. W. R. 686, 788, and *Canada Sand Lime Co.* v. *Poole*, 10 O. W. R. 1041.

The statement of claim must be set aside and the certificate of lien and *lis pendens* vacated with costs. Happily in this case there is no danger of plaintiff failing to recover anything he may be found entitled to from the defendants in another proceeding.

HON. MR. JUSTICE LENNOX. JUNE 2ND, 1913.

REX v. STAIR.

4 O. W. N. 1402.

Forum—Weekly Court—Criminal Law—Jurisdiction.

Motion by defendant for an order that the trial of this case be had before the Court of General Sessions.

T. H. Lennox, K.C., for defendant.

R. H. Greer, for Crown.

HON. MR. JUSTICE LENNOX:—Sitting in Weekly Court, I have no jurisdiction in criminal cases. I therefore make no order.

HON. SIR G. FALCONBRIDGE, C.J.K.B. APRIL 23RD, 1913.

McPHERSON v. UNITED STATES FIDELITY.

4 O. W. N. 1182.

Judgment—Speedy Judgment—Action on Bond—Con. Rule 603—Good Defence on Merits Alleged.

MASTER-IN-CHAMBERS, 24 O. W. R. 482; 4 O. W. N. 1140, refused to make an order for judgment under Con. Rule. 603 in an action upon a bond given as security in an interpleader issue where a good defence upon the merits was alleged. *Smyth* v. *Bandel*, 23 O. W. R. 798, followed.

FALCONBRIDGE, C.J.K.B., affirmed above order.

An appeal by the plaintiff from an order of the Master-in-Chambers, 24 O. W. R. 482; 4 O. W. N. 1140.

W. Laidlaw, K.C., for plaintiff.

G. H. Kilmer, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—This case presents some unusual features, but, nevertheless I cannot disregard the long line of modern decisions gradually restricting the plaintiff's right to get judgment under Con. Rule 603. I think the Master is right, and there is nothing to add to his reasons. I do not see my way to make any special order or condition as to payment of money into Court. The appeal is, therefore, dismissed, with costs to the defendant in any event.

HON. MR. JUSTICE MIDDLETON. JUNE 5TH, 1913.

RE FREDERICK KENNA.

4 O. W. N. 1395.

Parent and Child—Custody of Child—Abandonment by Father of Paternal Rights—Adoption in Good Home—Right of Father to Insist on his Religion—8 Edw. VII. c. 59, s. 30—Welfare of Child.

MIDDLETON, J., *held*, that where a Catholic father had surrendered and abandoned his paternal rights to a child and the latter had been adopted into a good Protestant home where his future was assured, the father had no right to insist that the child should be handed over to him to be placed in much worse surroundings or to be placed in a Catholic orphanage where he would be assured of being reared in the Catholic religion.

In re Faulds 12 O. L. R. 245, distinguished.

Motion made on 29th May, 1913, for delivery of one Frederick Kenna, a child aged four, to the custody of the father or his nominees, upon the return of a writ of *habeas*

corpus, heard partly upon oral evidence and partly upon affidavit evidence.

T. L. Monahan, for father.

H. M. Mowat, K.C., for foster parents.

HON. MR. JUSTICE MIDDLETON:—Phillip Kenna, the applicant, is of English origin, and a Catholic. He was married some ten years ago, at Manchester, to Lucinda Dolores de Phillips, a Protestant. In April, 1904, Kenna came to Canada and settled temporarily at Montreal. His wife followed him in the spring of 1906, and they lived there until June, 1909. The infant was born on the 22nd of June, 1908; and on the 26th of July, 1908, it was baptized in the Catholic Church.

A year later, in June, 1909, Kenna came to Toronto, his wife following some time afterwards. From this time on the relations of the husband and wife have been most unsatisfactory. The husband charges his wife with infidelity and with living in open adultery with a man at Niagara Falls for sometime, and with another man in Toronto at other times. The wife charges her husband with various offences and with being a man with whom no woman could live. Into these charges and recriminations I do not think I need go in detail.

On July 16th, 1910, Kenna executed a document as follows: "I, Phillip Kenna, hereby authorize Mrs. M. Jones of 51 Peter street, Toronto, to give up Frederick Kenna to my wife Lucy Kenna unconditionally. Yours Resp. Phillip Kenna. Witness Joseph Jones."

The parties differ as to circumstances under which this document was given. The wife claims that it was an unconditional abandonment of the child to her. The husband contends that it was for the purpose of enabling her to receive the child from the place where Kenna then had it boarding, for the purpose of founding again a united household. On the face of it this seems improbable.

In May, 1911, Kenna sought the aid of the St. Vincent de Paul Society; and Mr. Patrick Hynes, its agent, at his instance laid an information before the police magistrate under the statute, charging that the wife was allowing the child "to grow up without salutary parental control, and

in circumstances exposing him to an idle and dissolute life." The police magistrate heard the charge on the 1st of June, and, after hearing the husband's evidence, in which he accused the wife of adultery, the magistrate dismissed the charge. As the child was only three years of age, it is probable that the magistrate thought it should not be taken from its mother.

Kenna then went to the United States, and did not return to Canada for nine months, when he went to Montreal, where he has since been employed, earning one dollar and a half per day. In the intervals prior to this there seem to have been repeated quarrels and reconciliations between the husband and wife; followed by charges of adultery and other quarrels.

While the husband was away in New York, the Children's Aid Society of Toronto (Protestant), finding the child in the custody of its mother, who claimed to be a Protestant, and deeming her entirely unfit to have custody of the child, took proceedings before Commissioner Starr; resulting in an order on the 1st of April, 1912, for the delivery of the child to the Children's Aid Society. The mother was apparently concurring in these proceedings, and the Commissioner acted upon her evidence.

She stated that the child had been given into her custody by the order of the Police Court above referred to. In her deposition she states that "the father Phillip Kenna was a Catholic and wanted the child brought up as a Catholic. This resulted in the matter being brought to Court and decided as above, since which time the father has deserted his wife and child. The mother is now unable to support the child and desires it to be made a ward of the Children's Aid Society, and adopted in some good home."

This evidence was untrue, as far as the records appear. No notice was given to the father of these proceedings; but, upon the faith of this evidence, the Commissioner determined that the child was a dependent and neglected child within the meaning of the statute, his father having deserted him, and his mother being unable to support him, and that he was a Canadian by birth and a Protestant by religion. The Commissioner directed the child to be delivered to the Children's Aid Society, to be there kept until placed in an approved foster home, pursuant to the provisions of the statute.

Thereafter the Children's Aid Society placed the child with Albert Breckon and his wife Ellen Breckon, under formal articles of adoption, dated the 17th April, 1912.

Mr. Breckon and his wife, it is conceded, are ideal foster parents; and since the child has been in their custody it has received every kindness and attention. They are well off; Mr. Breckon stating that he is worth between $30,000 and $40,000. They have no children of their own, and are bringing up this child as theirs.

The father now asserts his right to the custody of the child, because he claims that as its father he has the right to determine that it shall be brought up in the Catholic faith; and his desire is to take the child to Montreal and there place it with Honisdoes Charlebois and his wife, the godfather and godmother of the child, to whom he has agreed to pay three dollars and a half a week for its maintenance. These people have a family of their own, and are in very humble circumstances; and it is manifest that they are not in a position to care for the child in a way which would be at all comparable with the ability of the foster parents.

In the alternative the father desires to take the child from the foster parents and have it placed with the St. Vincent de Paul Children's Aid Society for adoption with Catholic foster parents.

If the case be determined, as I think it must be, upon my idea as to the welfare of the child, the situation is plain, and my duty is to leave the child with its foster parents. With them it has a careful upbringing and training, and its future prosperity is as certain as anything of this kind can be. With the godparents the opposite is the case. The father is only able to earn $9 a week; and, in view of his past history, is very unlikely to continue the payment promised, $3.50 a week. Even if he does, the lot of the child would be unfortunate and precarious in the extreme.

The one point of difficulty in the case is the father's right to determine the child's religion. The statute, 8 Edw. VII., ch. 59, sec. 30, provides that no Protestant child shall be committed to the care of a Roman Catholic Children's Aid Society, nor shall a Roman Catholic child be committed to a Protestant society, nor shall any Protestant child be placed in any Roman Catholic family as its foster home nor shall a

Catholic child be placed in any Protestant family as its foster home.

It is said that this child is a Catholic, because its father was a Catholic, and desires it to be brought up in the Catholic Church, and that this is an absolute prohibition against the child being placed with Protestants as its foster parents.

The principle emphasied in *Re Faulds*, 12 O. L. R. 245, of the supremacy of the father's right to determine the religious education of his children, is of great importance; but the father's right, as I read the cases, though not lightly to be interfered with, is not absolute. Indeed, its limitation is affirmed in the case in question. It is there said that the father's wishes may be disregarded if there is strong reason or if the Court is satisfied that there has been an abandonment or abdication of the paternal right.

I do not think that abandonment and abdication are the only grounds upon which the Court may refuse to give effect to the father's wishes; and where, as here, there is not only an abdication of the paternal right, but where I am convinced that the assertion of the father's right is really against the welfare of the child, in the broadest sense of that term—including not only its temporal, but its moral welfare—then I have no hesitation in refusing to give effect to his desires.

It is to be borne in mind that I am not now discussing the propriety of handing the child over in the first instance, but am determining an application to take the child from its present custodians; and while most anxious to give effect not only to the letter, but to the spirit of the wise provision of the statute which I have quoted, I do not think that I am compelled, either by the letter or the spirit of the statute, to sacrifice this child's future.

The child will, therefore, be remanded to the custody of its foster parents, who are entitled to their costs as against the father if they care to demand them.

HON. MR. JUSTICE BRITTON. JUNE 7TH, 1913.

SEGUIN v. HAWKESBURY.

4 O. W. N. 1409.

Municipal Corporations—Closing of Street—Illegal By-law—Liability for—Order of Dom. Ry. Board—Work Done by Railway—Liability of Town—Closing or "Deviation"—Damages—Permanent Injury—Costs.

BRITTON, J., *held*, that an order of the Dominion Railway Board did not justify the closing of a public street and where a town co-operated with the railway and passed an illegal by-law for such closing in pursuance of which the work was done they were liable in damages to those injured by such work, despite the fact that the actual work was done by the railway company.

Action by Arsene Seguin, tried with three other actions brought by Raoul Seguin, Joseph Seguin, and Albert Treaud, in respect of the same cause of action at L'Orignal without a jury. The actions were brought in respect of an alleged illegal closing of a certain highway in the town of Hawkesbury, with the defendants' authority or consent, which caused injury to plaintiff's lands. (See 23 O. W. R. 257, 857).

Auguste Lemieux, for plaintiff.

H. W. Lawlor and Geo. Macdonald, for defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff, Arsene Seguin, is the owner of lands in the town of Hawkesbury, 1st part of lot 38, block 1, as marked on Exhibit No. 3. This parcel contains about 6¼ acres, and is upon an island, and for convenience I will call it simply, his island property.

The plaintiff does not reside upon this land, but cultivates it and brings some part or all of his crop to the residence part of the town.

2nd. Plaintiff also owns lots 8 and 9, on the northerly side of St. David street to the west of, and not far from the right of way of the Canadian Northern Quebec Railway Company line.

The defendants' council on the 27th day of September, 1911, passed by-law No. 179, for closing a portion of St. David street.

That by-law, upon the application of Arsene Seguin, the plaintiff in the first of the four actions, was quashed. See 4 O. W. N. p. 521.

The judgment of the Divisional Court gave to the defendants the option of providing for compensation to the applicant for damages, if any, sustained by him; the amount to be ascertained by arbitration, or of having the by-law quashed.

The defendants would do nothing.

The plaintiff's solicitor gave to the defendants notice of action in each case; but the defendants would take no steps towards arriving at a settlement.

After the passing of the by-law, and before it was quashed, the railway company proceeded with the work and actually closed the street for its whole width at the place of crossing.

These actions were commenced on the 8th of March, 1913, and they are brought under secs. 468 and 629 of Con. Mun. Act, 1903, the plaintiffs having done all that they could to have their claims settled by the defendants, or by arbitration.

The defendants seek to escape liability because: 1st. there was no work actually done by the municipality. The work was done by the railway company.

2nd. The railway company was authorised by an order of the Dominion Railway Board to close the street; and

3rd. By a further order of the Railway Board, the railway company was authorized to cause a deviation in St. David street, and the work, as it is alleged, was not, in fact, an actual stopping up of St. David street, but was only deviation, as any of the public desiring to do so, can, notwithstanding what was done, go south from St. David street on the westerly side of the railway, upon a roadway constructed by the railway company to Union street, then easterly to a lane and then northerly along the lane to St. David street, but reaching that street at a point considerably east of the line of railway.

The closing of the street intended to be done under the by-law, was never authorized, and neither the defendants nor the railway company can justify under that by-law.

The by-law recites an agreement between the town and the railway company for the purposes of the line, through the

town . . . and that that part of St. David street (describing it) *should be closed.*

Then the by-law enacts that it is subject to the railway company opening and conveying to the town a street 30 feet wide across 23 and 24, and a similar street on the west side of the railway, traversing lot 1 in block 1 C. in the town.

The by-law also provides that the railway company shall pay the costs of carrying that by-law into effect.

In short, all that was done was with the consent and aid of the corporation, and without that aid and consent, the street would not have been, in fact, closed; so the defendants are liable to the plaintiff for anything in connection with the closing done by the railway company with the consent of the defendants.

The defendants intended to authorize by by-law, just what the railway company did, and they did stand by and sanction the doing of what was done.

The Dominion Railway Board has, in my opinion, no authority to close any street within a municipality.

This must be done by the municipality; and such closing or consent to closing must be in the manner prescribed by the Municipal Act.

I find as a fact that this is not a case of "deviation" as contended for by the defendants' counsel, and so within the jurisdiction of the Dominion Railway Board.

In the agreement recited there is no pretence that there was to be a deviation.

The agreement was that "that portion of St. David street (describing it fully) should be closed."

That is what was done. The contention that it was only deviation cannot prevail. It was not deviation within the fair meaning of that term.

St. David Street runs east and west. The line of railway is north and south. The line of railway was carried on trestles northerly to St. David street, and on, further, northerly, beyond that street.

At St. David street the rails were at a considerable height, say 40 feet above the street.

The closing of the street was by filling in, principally with sand, making a solid roadbed across what had been the street.

The railway company constructed, as I have stated, a road 30 feet in width from St. David street, southerly, along the westerly side of their embankment, to Union street.

By the agreement, the company was to construct another 30-ft. road to the east of the railway, and across lots 23 and 24, on the north side of Main Street.

The evidence did not disclose whether that had been constructed or not, but for the purposes of this action it makes no difference.

If constructed it is only another way for certain persons according to their positions on Main or Union streets, to get to St. David street east of the railway crossing.

That is simply a substituted road and can be of comparatively very little use to anyone to the plaintiffs.

The defendants are liable for damages if plaintiffs have sustained any by reason of the closing up of this street.

The plaintiffs are all of one family—the father, two sons and son-in-law—and have attempted to greatly magnify their damages.

Their complaint was, annoyance and inconvenience from sand driven by wind to their property.

A difficulty at once arises in determining where the sand complained about, came from.

If it came from that part of the company's right of way other than where the illegal work was being carried on, the plaintiffs would require to prove more than they have proved.

The interference with the plaintiffs' right to use the street, they seemed to feel keenly although it was not attended with any great pecuniary loss.

The plaintiffs all pretty well agree as to the statement of the amount of damages, but it was difficult to get from them or their witnesses anything definite.

St. David street is a short one. Its eastern end is at its junction with Saras alley. The street is said to be stony —not very safe to travel upon.

The photographs shew the condition of the street to be very bad, not a desirable street at present upon which to reside.

The alley is not well kept.

There are only 5 lots on each side of the street to the west of the railway crossing, and only 7 lots on each side of the street to the east of the crossing.

There may be the ordinary visiting, but comparatively little business and but few business transactions.

There is really very little inconvenience, but there is some, that plaintiffs have suffered.

A person desiring to go from St. David street on one side of the railway crossing, to St. David street on the other, would require to go, at most, a distance made greater by the closing, of less than 400 feet.

Those damages are recoverable by reason of the defendants being wrong-doers, the work being an unauthorised and illegal work.

It is clear enough that when what is complained of is a work properly authorised, the claim must be for damages to an interest in land injuriously affected by the work.

In that case there must be damage, not temporary but permanent, affecting the house or land itself—a mere temporary inconvenience will not be sufficient to warrant recovery.

I am of opinion that there has been a small amount of damage recoverable because the work was unauthorised; and I am also of opinion that the plaintiffs are not wholly limited to these; but are entitled to damages even if work legally authorised.

The property on St. David street was injuriously affected by the closing of that street.

That street, such as it was, from end to end, was to those living upon it, an open street, a natural outlet.

The houses of the plaintiffs, now shut in, are of less value than before.

These lands are "physically deteriorated"—using these words for want of better—by reason of the complete closing of the street.

It is a case, differing only in degree, similar to that of raising or lowering the grade of the street without entering upon the adjacent property.

This is not the case of temporary inconvenience by temporary obstruction; but it is a case of blocking in the property by a permanent high embankment, so close to it that the property on the street of any one of the plaintiffs is of less saleable value than before the closing of the street.

The property, to my mind, is unquestionably injuriously affected by what has been done.

The 30-foot street constructed by the railway company on the west side of the right of way is of advantage to the plaintiffs; that is to say, with St. David street closed they are better with the 30 feet north and south street, than without it, but it does not compensate them for their damage in having St. David street closed.

The plaintiff Arsene has not any right of way over any land to or from his island property.

It is difficult to see how that property is injuriously affected by the act complained of.

This property is assessed at only $100.

That is not the test of value but it is something. He paid $281 for it.

The suggested speculative value of dividing the property into town lots, and guessing at the difference between what these lots would sell for with St. David street closed and if not closed, does not appeal to me.

Before he can sell at all a street must be obtained, the branch of the river must be bridged, and many other circumstances must be considered.

The plaintiff is entitled, in my opinion, to $250 in all for St. David street property and that will include any damage for personal inconvenience.

I assess the damages of Joseph Sequin at $100.

Raoul does not reside upon his property, and has not, up to this time, suffered any personal inconvenience. I assess his damages at $75.

Albert Treand put down foundations of a house three years ago, but did not build.

He made an agreement with his father-in-law to purchase the land at a comparatively small sum. I assess his damages at $75.

Judgment accordingly, with County Court costs and without any set-off of costs.

As the actions were all tried together the costs of trial will be as of one action.

Thirty days' stay.

HON. MR. JUSTICE LENNOX. JUNE 7TH, 1913.

RE BROWN.

4 O. W. N. 1401.

Will—Construction—Vesting — Postponement of Enjoyment—Life Interest.

LENNOX, J., *held*, that where a testator provided as follows: "I will and bequeath unto my wife, S. A. B., all and every of my personal estate whatsoever and wheresoever for and during her natural life and at her death I give and bequeath all and every of my personal estate to my six daughters, E. A.; S. J.; E.; M.; A. and M. share and share alike to be paid to them within three months after my said wife's death," the daughters so named took vested interests.

Packham v. *Gregory*, 4 Hare 339, and other cases referred to.

Application is for construction of the will of the said Thomas Brown, deceased, and a declaration as to the persons entitled to share in his estate and the proportions in which they are respectively entitled.

W. M. Douglas, K.C., for petitioners.

F. W. Harcourt, K.C., Official Guardian, for James Thomas Hamilton an infant and George P. Leith.

Mr. H. G. Tucker, Col., for Sarah Jane Brown, Elen Henry, Alice Truax, W. J. Brown and Thomas Brown.

HON. MR. JUSTICE LENNOX:—With the exception of James Hamilton, the father of the infant Thomas James Hamilton, and who was the husband of Mary Brown deceased, a daughter of the testator, all proper parties have been served and were represented in Court. As the interest of James Hamilton is the same as the interest of his infant daughter he is sufficiently represented and I dispense with service upon him.

The will of the said Thomas Brown deceased, contained the following provision, namely, "I will and bequeath unto my wife Sarah Ann Brown all and every of my personal estate, whatsoever and wheresoever for and during her natural life, and at her death I give and bequeath all and every of my personal estate to my six daughters Elizabeth Ann, Sarah Jane, Ellen, Maria, Alice and Mary, share and share alike, to be paid to them within three months after my said wife's death."

The petitioners are the executors of Thomas Brown's executor. W. J. Brown and Thomas Brown are sons of the testator and brothers of the six daughters designated as legatees in the will. Two of these daughters, who had married, died during the lifetime of the widow Sarah Ann Brown, namely: Elizabeth Ann, who died without issue on the 26th of April, 1911, and intestated and leaving her surviving her husband the said George P. Leith; and Mary who died intestate on the 3rd day of February, 1897, and leaving her husband said James Hamilton and her infant son said James Thomas Hamilton her surviving. Sarah Ann Brown died on the 17th of October, 1912.

The distribution to be made then depends upon whether or not the shares of the deceased daughters vested at the time of the testator's death. I am clearly of opinion that these shares became vested at that time. This is a case in which the enjoyment of the gift by the six daughters "is only postponed to let in some other interest" as was said in *Packham* v. *Gregory*, 4 Hare 339, and the gift vests at once. *Vide* decisions in *Leeming* v. *Sherratt*, 2 Hare 14; *Mory* v. *Wood*, 3 Bro. C. C. 473, and *Rogers* v. *Carmichael*, 21 O. R. 658. This point being decided the distribution of these two shares presents no peculiar difficulty. If, however, it is desired that I should direct the actual distribution in detail, counsel for the executors may file a schedule for my approval and to be incorporated in the order.

The costs of all the parties will be paid out of the estate —the executors' costs as between solicitor and client.

MASTER-IN-CHAMBERS. JUNE 6TH, 1913.

GROCOCK v. ALLEN & CO. LIMITED.

4 O. W. N. 1406.

Trial—Postponement of—Reasons for—Terms.

MASTER-IN-CHAMBERS granted a postponement of a trial at request of defendants where plaintiff had been dilatory in bringing the action to trial and defendants shewed that they required to procure certain necessary witnesses from England.

Motion by defendants to postpone trial "and if necessary for an order for commission to take evidence in England" of five of the directors of the defendant company or of some of them.

H. E. Rose, K.C., for motion.

W. N. Tilley, contra.

CARTWRIGHT, K.C., MASTER:—The facts of this case appear in the previous report in 22 O. W. R. 219. As that judgment was dated over a year ago it is plain that the action has not proceeded with any great expedition. According to the affidavit filed in support of the motion and not contradicted the particulars then ordered were not given until the end of October.

The plaintiff has been examined very fully for discovery. The examination was held on 13th, 14th, 23rd, and 25th of January, and concluded on 26th of May, extending over 240 pages. On 6th May, plaintiff served notice of setting down. The present notice of motion was served on 29th May.

The statement of claim puts the plaintiff's damages at $15,000. So that the matter is one of considerable importance. A more serious aspect is that if not the whole claim, at least a very large part of it, is based on alleged representations made to the plaintiff by the directors of the defendant company at their offices in Sheffield, which are said to have been untrue to their knowledge or not to have been fulfilled.

The plaintiff's depositions have been forwarded to the defendant company to see if they are prepared to accept the plaintiff's story or if they wish to give evidence to the contrary either by coming to the trial or by a commission.

It was strongly contended that the delay on the part of the defendants was inexcusable, and that the plaintiff in his present unfortunate condition should not be debarred from a trial at these sittings.

No doubt it is desirable in all cases to have a speedy trial. This is not only in the public interest according to the well known maxim, but also in that of the parties, so that evidence may not be lost nor the memory of witnesses become blurred nor the successful party be deprived of the fruits of victory. But this principle is to be applied subject to that other principle that "a fair trial is above all other considerations." This was in effect the principle followed in regard to commissions in *Ferguson* v. *Millican*, 11 O. L. R. 35—that defendants ought not to be deprived of "reasonable facilities for making out their defence." It applies

here at least as strongly as to the *Ferguson Case*. In view of the fact that the alleged breach was committed nearly two years ago and the action thereunder began on 8th March, 1912, and was not at issue until the month of December through delay in giving particulars of the statement of claim—it seems reasonable to let the case stand off the peremptory list at least until the 16th inst. to see what answer is sent by the directors.

No order need issue meantime. And the matter can be spoken to again on the 13th inst, or earlier if defendants have been heard from before that date.