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COURT OF APPEAL.

JANUARY 31ST, 1910.

RE WILLIAM HAMILTON MANUFACTURING CO.

Company—Winding-up—Claim of Bank on Securities Assigned by Company — Notice of Assignment to Persons Liable on Securities — Absence of — Status of Liquidator to Object.

An appeal by the liquidator from the order of MEREDITH, C.J.C.P., ante 61, dismissing an appeal from the certificate of the local Master at Peterborough, allowing the claim of the Ontario Bank.

The company, being indebted to the bank, assigned certain securities to the bank, which, after the insolvency of the company, were sold by the liquidator in the winding-up proceedings, with the approval of the bank, and, as alleged by the bank, upon the understanding that the purchase price thereof was to be held by the liquidator and to stand in the place of the assets so transferred, and that the rights of the bank in respect of the securities were not to be prejudiced by such sale. The local Master found in favour of the claimants as preferred or secured creditors for $79,715.06, and as ordinary or unsecured creditors for $134,815.48.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

W. D. McPherson, K.C., for the appellant.

J. H. Moss, K.C., and L. M. Hayes, K.C., for the bank.

At the close of the argument the judgment of the Court was delivered by MOSS, C.J.O. (viva voce):—We do not deem it necessary to reserve our decision. The case has been fully discussed. The points involved are not new or unfamiliar to us. It does not

appear to us the transactions in question are open to the objections urged by Mr. McPherson. It is beyond doubt—indeed it is admitted—that the advances were made by the bank. The amounts were placed to the company's credit and were used by it. Upon each occasion of an advance an agreement purporting to assign certain contracts, which were assets or property of the company, was given to the bank. These contracts were property which could be transferred under the Bank Act as security for advances. So that, unless want of notice to the debtors under the contracts affected the question, the assets were vested in the bank as security for advances made at the time. It is said that notice to the creditors was essential to protect the bank's position. But the question here is not between the bank and the debtor or between the bank and another assignee. The liquidator is, in this respect, in no higher position than the insolvent. He is an assignee by operation of law and is not a subsequent assignee as that term is applied in cases of this kind. As regards these transactions the liquidator stands in the company's shoes, and the cases shew that in order to complete the title as between assignor and assignee notice to the debtor is not necessary. In our opinion the learned Chief Justice was right, and the appeal must be dismissed.

HIGH COURT OF JUSTICE.

CLUTE, J., IN CHAMBERS. JANUARY 28TH, 1910.

OAKLEY v. SILVER.

Parties—Third Party—Action against Vendor to Set aside Sale of Mining Location—Third Party Notice Served on Person Interested with Vendor in Location.

Appeal by C. H. Bunker from two orders of the Master in Chambers, the first dated the 30th November, 1909, allowing the defendant to serve the appellant with a third party notice, and the second dated the 10th January, 1910, refusing to set aside the first order and giving directions for the trial of the issues raised.

Bunker entered into an agreement with the defendant on the 15th October, 1908, the effect of which was that the defendant should forthwith proceed to Montreal River for the purpose of locating and acquiring mining claims, and $300 was deposited to the credit of the defendant in a bank at Cobalt, to be used by him for his expenses, etc. It was provided that, should any claim be located by the defendant or his employees, it should belong half

to the defendant and half to Bunker, and "in the event of Silver finding anything of sufficient value for Mr. Bunker to finance or acquire by purchase or otherwise, Mr. Bunker agrees to give Silver a 25 per cent. interest clear as his share in this agreement."

A claim was located, and the defendant entered into negotiation for the sale of it to the plaintiffs, and on the same day he entered into a further agreement with Bunker as follows:—

"Toronto, Dec. 4th, 1908. Whereas L. P. Silver and C. H. Bunker entered into a certain agreement dated October 15th, 1908, at Cobalt, Ont., and whereas certain claims were located, described as Nos. 1629 and 1630 in Gowganda district: now this agreement . . . witnesseth that said C. H. Bunker has sold to said L. P. Silver his interest in said claims, and said Silver has bought the interest of said Bunker for the agreed sum of $4,000. $1,000 has been paid by Silver to Bunker, receipt whereof is hereby acknowledged by Bunker; and Silver agrees to deposit to the credit of Bunker at the Traders Bank of Canada, Toronto, within 30 days from the date hereof, the balance of $3,000. This payment to be made at earlier date if sale is made by Silver, otherwise not binding on said Silver. This last clause refers to the fact that Silver has made agreement this date to sell three-fourths interest in the property. No obligation is on Silver to complete payment to Bunker, unless said sale goes through and payments are made to Silver, in which event the $1,000 paid is forfeited and no contract exists for sale by Bunker to Silver. C. H. Bunker. L. P. Silver."

The sale was then completed with the plaintiffs. By this action the plaintiffs sought to cancel that sale, on the ground of fraud and misrepresentation. The defendant, Silver, sought to bring Bunker before the Court as a third party, alleging that he was a partner. The plaintiffs did not pretend that Bunker made any misrepresentation or had anything to do with the sale to them, nor did it appear that they even knew him in the transaction.

W. H. McGuire, for Bunker, the appellant.

E. P. Brown, for the defendant.

CLUTE, J. (after setting out the facts as above):—Whatever the relation between Silver and Bunker was prior to the 4th December, 1908, I think it clear that no partnership existed between them after the execution of the agreement above set forth. It is a sale of Bunker's interest in the claim, and nothing more. Why he should be made a party to an action charging fraud as against Silver, I cannot understand. Silver was the one man who had knowledge of the facts; Bunker knew nothing about the

claim except what Silver told him. If Silver saw fit to purchase Bunker's interest and sell the same under a fraudulent misrepresentation, I think it clear that Bunker, having no interest and being no party to such misrepresentation, ought not to be affected by it.

It is true that in the memorandum following the agreement the payment to Bunker depended upon the sale by Silver. . . . This, I think, further clearly indicates that it was a sale by Silver, and not a partnership transaction. The $1,000 is forfeited; but, as a matter of fact, the sale did go through, and the payment was made by Silver, as the receipt of the 4th January shews. . . .

[Reference to McLaren v. Marks, 10 P. R. 451, distinguishing it.]

In the present case, on the facts so far as disclosed by the defendant, no right of action is claimed on the part of the plaintiffs against Bunker. He is not known in the transaction. Upon the document produced, there was, in my judgment, a sale by Bunker to Silver, and at the time the sale to the plaintiffs was made no partnership existed between Silver and Bunker.

I can see no ground for bringing Bunker in as a third party. See Thomas v. Atherton, 10 Ch. D. 185; Merryweather v. Nixan, 8 T. R. 186; Johnson v. Wild, 44 Ch. D. 146; Payne v. Coughell, 17 P. R. 39; Windsor Fair Grounds and Driving Park Association v. Highland Park Club, 19 P. R. 130; Miller v. Sarnia Gas and Electric Co., 2 O. L. R. 546.

The appeal should be allowed and the orders of the Master set aside with costs here and below.

LATCHFORD, J. JANUARY 31ST, 1910.

RE BECKSTED.

Will—Construction—Devise—Vested or Contingent Estate.

Application by Martha Isadora Becksted, the widow and one of the executors of Elijah Becksted, for an order determining her interest and the interest, if any, of the next of kin of the deceased, in part of lot 15 in the 7th concession of Williamsburgh.

D. B. Maclennan, K.C., for the executors.

J. A. Hutcheson, K.C., for Elizabeth McKnight, one of the next of kin.

LATCHFORD, J.:—Elijah Becksted died on the 25th October, 1895. His will was made a short time previously. It was proved

on the 28th November, 1895, and the executors took upon themselves the administration of his estate.

The will, after providing for the payment of debts, including a mortgage on the lands in question, proceeded:—

"I will and direct that my executors shall control and manage my real estate . . . and also my household furniture and my farm stock and implements, subject to the support and maintenance of my wife and children until the mortgage now on said real estate is paid off. . . . If there be any surplus after paying said mortgage they (the executors) shall invest the surplus and accumulate interest until my son Philip Beckstead reaches the age of twenty-one years.

"After the said mortgage shall be paid, my wife shall have the control and management of the said real estate . . . for her own benefit, but subject to the support and maintenance of my children until my said son attains the age of twenty-one years, providing she remains my widow. If, however, she should cease to live on and conduct the farm, my executors shall take possession of and sell the furniture, farm-stock, and implements, and invest the proceeds and apply the same as above mentioned; but my wife may rent the farm and receive the rent for the support of herself and the children. In case of my wife marrying again before my said son reaches the age of twenty-one years, the said real estate and personal property shall revert to my executors, who shall pay her the sum of $500 in lieu of all her claim for dower or otherwise . . . which sum they shall have power to raise by sale of any personal property or by mortgage on the real estate as they may think best, and my executors shall then manage the farm until my son is twenty-one years of age . . . or may rent the farm until then if they see fit . . .

"When my said son reaches the age of twenty-one years, I will, devise, and bequeath the said farm and personal property to him, and my executors shall pay him all moneys then in their hands belonging to my estate, but will and direct that he shall support and maintain his mother so long as she lives . . . and also pay my daughter the sum of $800."

The provisions for the testator's wife and daughter are made a charge upon the land.

The will finally provides: "If my said son should die before attaining the age of twenty-one years without leaving children, whatever is given to him in this my last will shall go to my said daughter, and my wife or my executors as the case may be shall retain the said real estate or moneys until she reaches the age

of twenty-one years. If he should die under that age leaving children what is willed to him shall go to them."

The executors paid off the mortgage as directed. In December, 1895, the daughter Ena died in infancy. The son survived his sister but died in May, 1909, an infant and unmarried. The testator's widow has remained a widow. Her interest and the interest of the testator's next of kin—a brother and two sisters—depend on whether there was or was not a vesting of the land in the son, notwithstanding his death before attaining the age of twenty-one. If there was not such a vesting, there is clearly an intestacy as to the estate in remainder in the lands after the death or upon the marriage of the widow.

There is no general residuary devise, but, in view of the terms of the will, such a devise was unnecessary. The testator had specifically disposed of his real and personal estate, with power to lease it, until the mortgage was paid off. That having been accomplished, the testator's widow was to have "the control and management" of the lands during the minority of her son, provided she remained unmarried. If she married, the real estate was "to revert" to the executors, who were to manage the farm until the son became of age "when . . . I will . . . the said farm to him." If the son died an infant, "whatever is given to him by this my will shall go to them." The intention of the testator was manifestly to dispose of all he possessed.

I regard the devise to the son as vesting in him the real estate, subject to be divested in favour of his sister in the event of his death in her lifetime before he attained full age, and further subject to the interests carved out of the estate in favour of the executors or the widow, or the testator's daughter, as the case might be. The devise to the son—"when my son reaches the age of twenty-one"—standing alone might be regarded as contingent; but when followed, as it is, by a limitation over to the daughter in the event of the son's death under twenty-one, it manifests an intention that the son's interest should be vested immediately upon the death of the testator and not be contingent upon his attaining full age. In a case almost identical with this, Doe d. Hunt v. Moore, 14 East 601, Lord Ellenborough said, at p. 604: "A devise to A when he attains twenty-one . . . and if he does not attain twenty-one then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him, but the dying under twenty-one is a condition subsequent on which the estate is to be divested . . . The estate vests immediately whether any particular interest is carved out of it to take effect in possession in the meantime or not."

The devise to the son does not stand alone. It is preceded by the intermediate interests of the executors and the widow and affected by the devise to the daughter had she survived her brother: see Francis v. Francis, [1905] 2 Ch., where the authorities are collected and discussed.

I therefore regard the devise to the son as vested and not contingent. Upon his death—his sister having predeceased him—his mother, as his sole heir, became entitled to his interest. There will be judgment accordingly.

The costs of this application are to be paid by the estate.

BOYD, C. FEBRUARY 1ST, 1910

RE BUCKLEY.

Will—Devise to Two as Tenants in Common in Fee—Restriction upon Incumbering during Lives—Validity—Restriction upon Alienation except the One to the Other—Invalidity.

Appeal by Nicholas Buckley, petitioner, from the refusal of the Referee of Titles under the Quieting Titles Act to give the petitioner a certificate of title in fee to certain land under a will, free from the restrictions imposed by the will.

M. Lockhart Gordon, for the appellant.

J. R. Meredith, for infants and all persons interested in opposing the petition.

BOYD, C.:—The testator gives land to two grandchildren, John and Nicholas, "to have and to hold unto them, their heirs and assigns, as tenants in common forever;" "without power to incumber the same during the lifetime of said John and Nicholas," but with the "power of disposing of the right, title, and interest of the one to the other, but to no other person whomsoever."

Nicholas has bought John's share, and now seeks to quiet the title. The clause forbidding incumbering during the lifetime of John and Nicholas is valid as a competent restriction, and will apply to the land when in the sole ownership of Nicholas.

The other clause forbidding disposing of the land except from the one to the other appears to be legally inoperative. "Dispose" is the largest possible term as to dealing with the land, covering sale, lease, mortgage, or testamentary disposition. According to

Attwater v. Attwater, 18 Beav. 330, 336, if the testator intends to impose this fetter—that, if the brother will not buy, the devisee is not to be at liberty to sell the property to any one—such a condition is void and repugnant to the nature of the estate conveyed. On this point Attwater v. Attwater has not been impeached. See In re Macleay, L. R. 20 Eq. 186, at p. 192. The validity of the restriction is sought to be supported by reading the will as if the clause "during the lifetime of John and Nicholas" controlled all the clauses of the restriction. But, even so, it appears to me that the authorities are against regarding this as a permissible qualification of the restraint. In Attwater v. Attwater, though not so expressed, it is obvious that the extent of the fetter was during the lifetime of the devisee and the brother—their joint lives.

When it was submitted from the text books in In re Dugdale, 38 Ch. D. 176, 179 (1888), that a total restriction of alienation for a limited time may be good, the comment of Kay, J., was, "There is no decision to this effect."

On the other hand, in In re Parry and Daggs, 31 Ch. D. 130, 134, Fry, L.J., said: "The Courts have always leant against any device to render an estate inalienable;" and when the form of the devise was to fetter the power of alienation during the lifetime of the testator's son, to whom the land was given, the Court held it was an illegal device (1885).

In re Rosher, Rosher v. Rosher, 26 Ch. D. 801, decides that a condition in restraint of alienation annexed to a devise in fee, even though limited to the life of another living person, is void as being repugnant to the nature of a fee simple. And this was followed by MacMahon, J., in Heddlestone v. Heddlestone, 15 O. R. 280.

Earls v. McAlpine, 6 A. R. 145, to the contrary, was discussed adversely in McRae v. McRae, 30 O. R. 54, and was overruled by the Supreme Court in the Blackburn case, afterwards cited.

Legally and practically the effect of forbidding disposing of property to all the world except one individual is a general restraint, which is invalid, and, that being so, it is decided in Blackburn v. McCallum that any limitation as to time does not make it valid: 33 S. C. R. 65 (1902).

The restraint as to mortgaging in the life of the devisees is valid as to Nicholas; the other restraint as to disposal of the land is void. Costs to the guardian of the infants, to be paid by the petitioner.

BRITTON, J. FEBRUARY 2ND, 1910.

WILSON v. HICKS.

Life Insurance—Assignment of Policy to Stranger—Absence of Delivery—Gift—Intention—Revocation—Insurance Act.

The plaintiff in 1888 effected an endowment insurance on his life in the Mutual Life Insurance Company for $5,000, and, by a subsequent writing, executed what purported to be an assignment to the defendant, Emma Hicks, of the policy. Afterwards he desired to appoint his niece, Helen Louisa Young, his beneficiary, but was told that the policy was already assigned, and that he was not at liberty to change. The policy matured on the 28th December, 1908, and the defendant claimed the amount, $6,799.30. Neither the policy nor the assignment was delivered to the defendant, but the assignment was lodged with the insurance company.

The plaintiff asked for a declaration that he was entitled to be paid the moneys, and that the assignment to the defendant had been effectually revoked.

The money was paid into Court by the company.

W. E. Middleton, K.C., and J. M. Best, for the plaintiff.

W. Proudfoot, K.C., and F. Holmested, for the defendant.

BRITTON, J., after stating the facts, said that it must be taken that there was no consideraion for the assignment; if it holds as such, it must be as a gift inter vivos. . . .

. . [Reference to Weaver v. Weaver, 182 Ill. 287; In re Trough's Estate, 75 Pa. St. 114.]

The policy being the thing given, there ought, in addition to the assignment evidencing the gift, to be an actual handing over of the thing itself or something equivalent to it, or some reason to the contrary, to comply with the rule of law, "To perfect a gift, the delivery must be, so far as the thing is capable of it, an actual delivery."

My conclusions are:—

(1) That there was no intention on the part of the plaintiff to give absolutely and irrevocably to the defendant the policy in question. It was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before such death or maturity.

(2) That the transaction was not such that the plaintiff transmitted the title to this policy and the money it represents to the defendant as donee.

(3) That there was no delivery, constructive or otherwise, of the assignment of the policy to the defendant. . . .

My decision has been quite irrespective of the Insurance Act.

Apart from the form of the assignment in question, the plaintiff relies upon the Insurance Act, R. S. O. 1897 ch. 203, sec. 151, sub-secs. 3, 4, 5, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-secs. 5, 6, 7.

The assignment lodged with the company did designate the defendant as a beneficiary. She was not of the preferred class, and not a beneficiary for value, so the plaintiff had the right to change, as he has done.

The assignment was executed on the 22nd December, 1896, prior to the enactment of sec. 159 of the Insurance Act; but, if "declaration" means or includes "declaration designating a beneficiary," as I think it does, then sub-sec. 4 of sec. 151 of R. S. O. 1897 ch. 203 makes it applicable to any contract of insurance or declaration made before the passing of the Act.

The judgment will be for a declaration that the plaintiff, subject to payment of the defendant's costs, is entitled to be paid the money due and payable under the policy in question, and that the paper called the assignment has been effectually revoked.

Owing to the special facts and circumstances of this case, it is not one for costs to the plaintiff, but is one where the costs of the defendant should be paid out of the money in Court. The residue of the money will be paid out to the plaintiff.

DIVISIONAL COURT. FEBRUARY 2ND, 1910.

BRENNAN v. CAMERON.

Foreign Judgment—Action on—Defence—Foreign Court not having Jurisdiction over Defendants — Domicile — Judgment of Court of another Province of Canada.

Appeal by the defendants from the judgment of TEETZEL, J., in favour of the plaintiff in an action upon a judgment recovered by the plaintiff in the Supreme Court of British Columbia, on the 9th June, 1908, against the defendants for $1,014.19 debt and $45.63 costs.

The defendant D. H. Cameron was a person of unsound mind, and the defendant O'Heir was duly appointed his committee, and as such defended this action.

The defence relied upon was that the Supreme Court of British Columbia had no jurisdiction in respect of the subject matter of the action in which the judgment was obtained, as the defendants were not at any time in the course of the action subjects of or resident or domiciled in the province of British Columbia, and they did not appear or consent to jurisdiction; that the cause of action, if any, did not arise in British Columbia; and that the cause of action, if any, upon which the judgment was recovered, was marred by the Statute of Limitations in force in Ontario, where the defendants resided.

The judgment was proved by an exemplification, and, with the formal judgment, all the papers, including writ, order for substitutional service, etc., were before the Court.

It was admitted that the defendants had resided in Ontario for 10 years.

The trial Judge found in favour of the plaintiff for the amount of the British Columbia judgment and costs.

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

A. O'Heir, for the defendants.

H. Arrell, for the plaintiff.

The judgment of the Court was delivered by BRITTON, J., who, after stating the facts as above, referred to Manning v. Scott, 17 C. P. 606; North v. Fisher, 6 O. R. 206, and proceeded:—

In addition to what is disclosed by the papers in the action in British Columbia, the plaintiff gave evidence that his judgment was for $500, money lent. It was the same $500 for which the first judgment was recovered in British Columbia.

The authorities, I think, clearly establish that this plaintiff, in bringing his action in Ontario now, is in no better position bringing it upon the judgment recovered on the 9th June, 1908, than he would be if he brought it upon his judgment recovered on the 2nd August, 1889, or if he brought it upon his original cause of action, viz., for money lent. . . .

[Reference to Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670; Emanuel v. Symon, [1908] 1 Q. B. 302; Vézina v. Will H. Newsome Co., 14 O. L. R. 658.]

In this case it may be said, as it was in the Vézina case, at p. 664, that "the binding effect of the judgemnt sued on must, therefore, depend upon the rules of international law;" and, the appellants here not having been domiciled or resident in British

Columbia when served with the writ of summons, the judgment must be treated in the Courts of this province as a nullity.

Appeal allowed with costs and action dismissed with costs.

RE MCKAY v. CLARE.

Division Courts—Jurisdiction—Splitting Cause of Action—Money Lent—Separate Loans—R. S. O. 1897 ch. 60, sec. 79.

Motion by the defendant for prohibition to the 7th Division Court in the county of Essex.

On the 3rd September, 1909, the plaintiff lent $20 to the defendant at Fort Erie on a promise to repay it in a short time. On the 16th September the defendant wrote from Montreal asking a further loan from the plaintiff, and this was responded to by sending a cheque for $50. On the 25th September the parties met in Toronto, and another loan of $50 was made to the defendant. The defendant made another application from Hamilton to the plaintiff, who lived in Toronto, in consequence of which a cheque for $25 was given to the defendant. On the 2nd October they met in Hamilton and another loan of $25 followed.

The plaintiff brought two actions in the Division Court, one for the first two sums lent, amounting to $70; the other for the remaining $100.

The cases went to trial, and the evidence of the plaintiff was that each of the amounts advanced was a separate and distinct loan, without any reference to any further advance or loan of any kind, and upon the defendant's promise to pay in each instance, and with an offer to give his several promissory notes for each sum if desired.

The defendant objected to the jurisdiction, on the ground that the whole was one transaction, suable as one cause of action for money lent, and could not be split into two actions: Division Courts Act, R. S. O. 1897 ch. 60, sec. 79.

The objection was overruled, and judgment entered for the plaintiff in both cases.

The motion for prohibition was on the same ground.

Frank McCarthy, for the defendant.

J. T. White, for the plaintiff.

THE CHANCELLOR referred to Re Gordon v. O'Brien, 11 P. R. 287, 294; Re Clark v. Barber, 26 O. R. 47; Re McDonald v. Dowdall, 28 O. R. 212; Re Real Estate Loan Co. v. Guardhouse,

29 O. R. 602; Re Bell v. Bell, 26 O. R. 123, 601; and said that the present case stood clearly apart from those cited, which were decisions on causes of action arising out of one controlling contract. The same idea of connection or continuity exists where liabilities are incurred in a series of dealings which are linked together, in this sense that each dealing is not intended to terminate with itself but to be continuous, so that one item shall go with the next item and so form one entire demand. * * * But such is not the case here, according to the evidence and finding of the Judge. These claims, while similar in character, are yet for moneys lent as distinct loans at different times and places, but pursuant to no course of dealing, and not necessarily to be massed en bloc for the purpose of litigation.

The present case is within the authority of Rex v. Herefordshire, 1 B. & Ad. 672. * * * See Harvey v. McPherson, 6 O. L. R. 60.

Application refused with costs.

KEMERER v. WATTERSON—MASTER IN CHAMBERS—JAN. 28.

Writ of Summons—Service out of the Jurisdiction.]—Motion by the defendant to set aside an order under Con. Rule 162 and all proceedings thereunder. Held that the order was made on insufficient material and was liable to be set aside; but, as an affidavit was now filed, in answer to the motion, shewing sufficient grounds for making an order in the first instance, the motion should be dismissed, with leave to the defendant to enter a conditional appearance within 10 days, and with costs to the defendant in any event. Reference to Perkins v. Mississippi and Dominion S. S. Co., 10 P. R. 198, and cases there cited; Armstrong v. Proctor, 14 O. W. R. 767; Lovell v. Taylor, 5 O. W. R. 525; Canadian Radiator Co. v. Cuthbertson, 9 O. L. R. 126; Great Australian Co. v. Martin, 5 Ch. D. 1. E. P. Brown, for the defendant. W. R. Smyth, K.C., for the plaintiff.

LAMBERT v. DILLON—FALCONBRIDGE, C.J.K.B.—JAN. 29.

Execution—Fi. Fa. Lands—Issue to Determine Ownership.]—Interpleader issue for the purpose of determining whether certain lands in Gainsborough held in execution by the sheriff of Lincoln under a writ of fi. fa. dated the 19th February, 1909, were, at the time of the placing of the writ in the sheriff's hands, the property

of the plaintiff as against the defendant, the execution creditor. The plaintiff was the son of the execution debtor; the land was conveyed to the plaintiff on the 8th November, 1909, and the conveyance was registered on the same day. The Chief Justice reviews the evidence and finds the issue in favour of the defendant, with costs, if he has any disposing power over the costs. W. M. German, K.C., and H. R. Morwood, for the plaintiff. A. W. Marquis, for the defendant.

ROBERTSON v. CITY OF TORONTO—MASTER IN CHAMBERS—JAN. 31.

Costs—Summary Disposal of.]—Motion by the plaintiff for a summary order disposing of the costs, the action having become unnecessary. The motion came before the Master by consent, following the practice laid down in Knickerbocker Co. v. Ratz, 16 P. R. 191, and subsequent cases. This action was the first of two brought to set aside the sale of a part of Ashbridge's bay by the defendants, the city corporation. The ground on which the sale was first attacked was that the property was assumed to be only 22 acres, whereas it was in fact 26½ acres; and the price was increased accordingly, on the completion of the transaction, after this action had ben commenced. The change of base rendered this action unnecessary; and a second action was brought attacking the sale on the ground of inadequacy of price. That action was dismissed with costs: ante 259. The Master held that the plaintiff was entitled to his costs of this action, as he was substantially successful, and ordered the defendants to pay such costs. F. R. MacKelcan, for the plaintiff. H. Howitt, for the defendants.

WOODS v. ALFORD—MASTER IN CHAMBERS—FEB. 1.

Mortgage—Covenant—Judgment — Amendment — Costs.]—In an action for foreclosure and other remedies, brought against the defendant Alford as mortgagor and the other defendants as owners of the equity of redemption, the defendant Brennand was served by the defendant Alford with an order under Rule 215, and admitted his liability. In June, 1909, on the plaintiffs' application, judgment was granted against Alford on his covenant, and in Alford's favour against Brennand and also in favour of the plaintiffs against Brennand. Brennand was served with notice of the application for judgment, but did not appear thereon; and, upon

the plaintiffs attempting to enforce the part of the judgment in their favour directly against him, he moved to set aside that part of the judgment. The Master ordered that the judgment should be amended to meet Brennand's objection, following Cousins v. Cronk, 17 P. R. 348, but ordered the defendant Brennand to pay the costs of the application and all proceedings properly taken under the judgment. A. R. Hassard, for the defendant Brennand. F. E. Hodgins, K.C., for the plaintiffs.

PARROTT v. MCLEAN—DIVISIONAL COURT—FEB. 1.

Promissory Note — Liability—Partnership.]—Appeal by the plaintiff from the judgment of the District Court of Rainy River dismissing an action brought to recover from the defendants McLean and Gordon and the F. C. Brewer Boat Manufacturing Co. the amount of a promissory note for $1,500 made on the 3rd September, 1907, payable 30 days after date. The plaintiff sought to make these defendants liable as individual makers of the note, and also, together with Johnston Douglas and R. R. Scott, as members of a firm or company or partnership. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.), agreed with the findings of the District Court Judge upon the facts and the construction of an agreement under which the plaintiff sought to establish the liability of the defendants, and dismissed the appeal with costs. G. R. Geary, K.C., for the plaintiff. W. E. Middleton, K.C., for the defendants.

CICCHETTO v. CITY OF GUELPH—MASTER IN CHAMBERS—FEB. 3.

Security for Costs — Plaintiff Leaving Jurisdiction — Foreign Commission.]—Motion by the plaintiff for a commission to Italy to take evidence in support of the plaintiff's case; and motion by the defendants for security for costs, on the ground that the plaintiff resides out of the jurisdiction. The action was by the administrator of the estate of one Fantin, deceased, to recover damages for his death, he having been killed while working for the defendants in a sewer. The evidence sought was as to the support given by the deceased to his relatives in Italy. The plaintiff was in Ontario when the action was brought, and, being cross-examined on his affidavit in support of the motion for a commis-

sion, said that he was about to leave for Italy. He did leave next day. He said he did not know when he would come back, probably in a year or two years. The Master refused to make the order for security, referring to Moffatt v. Leonard, 6 O. L. R. 383, and Sharp v. Grand Trunk R. W. Co., 1 O. L. R. 200. The order for a commission was granted. R. R. Waddell, for the plaintiff. Featherston Aylesworth, for the defendants.

SELBY YOULDEN CO. v. JOHNSTON—SUTHERLAND, J.—FEB. 3.

Contract—Making Specific Article—Action for Price.]—Action to recover the balance due for work done by the plaintiffs in building for the defendant a boiler and engine, under a contract in writing. The learned Judge held that the plaintiffs were entitled to succeed. What was contracted for here was a definite and defined article, and what was contracted for was supplied: Jones v. Just, L. R. 3 Q. B. 197, 202, and cases cited. Judgment for the plaintiffs for $375, with interest and costs. A. B. Cunningham, for the plaintiffs. W. B. Northrup, K.C., for the defendant.

SCHULER v. MCINTOSH—SUTHERLAND, J.—FEB. 3.

Contract—Oral Promise—Evidence—Consideration.] — Action to recover the sum of $3,000, upon an alleged promise by the defendant to pay that sum to the plaintiff. The plaintiff had given her son property of the value of $3,000, and he had transferred this to the defendant in part payment for a share in a business carried on by a partnership of which the defendant was a member. The business not being successful, an agreement was entered into between the defendant and the plaintiff's son and put in writing, by which, upon the latter giving up his share in the business, certain promissory notes made by him and indorsed by the plaintiff were to be cancelled. The plaintiff alleged that the defendant, by a verbal promise, made before the execution of the written agreement, agreed to repay to her the $3,000 mentioned, in consideration of her inducing her son to execute the agreement. The learned Judge finds as a fact that the defendant made no such promise or agreement. Action dismissed with costs. F. H. Keefer, K.C., for the plaintiff. H. Cassels, K.C., for the defendant.