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C.A.

BALFOUR v. TORONTO R. W. CO.

Street Railways—Negligence—Car Running Backwards—Jury—Answers to Questions.

The plaintiff was injured by a waggon in which he was being driven being struck by an electric car of the defendants which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed.

J. Bicknell, K.C., for the appellants.

John MacGregor and H. M. East, for the respondent.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A.) held that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question.

Per ARMOUR, C.J.O.—Questions to the jury must be in writing.

Per OSLER, J.A.—While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course.

Judgment of FALCONBRIDGE, C.J., affirmed.

JULY 14TH, 1903.

JUDICIAL COMMITTEE.

RE LORD'S DAY ACT OF ONTARIO.

Constitutional Law—Powers of Provincial Legislature—Act to Prevent Profanation of Lord's Day —Criminal Law — Reservation to Dominion Parliament.

Appeal by the Attorney-General for Ontario and cross-appeal by the Attorney-General for Canada from the judgment of the Court of Appeal for Ontario (1 O. W. R. 312) upon questions submitted to that Court by the Lieutenant-Governor in Council, pursuant to R. S. O. 1897 ch. 84.

The questions submitted are set out in the former report.

J. A. Paterson, K.C., for the Attorney-General for Ontario.

E. L. Newcombe, K.C., and H. W. Loehnis, for the Attorney-General for Canada.

H. S. Osler, K.C., and Lauriston Battem, for the Grand Trunk R. W. Co.

A. B. Aylesworth, K.C., for the Metropolitan R. W. Co.

A. E. O'Meara, for the Lord's Day Alliance of Ontario.

The judgment of the board (Lord Halsbury, L.C., Lords Macnaghten, Shand, Davey, Robertson, and Lindley), was delivered by

LORD HALSBURY, L.C., who said that their Lordships had considered this case, and, speaking without reference to the last question, with which their Lordships would deal separately, which had been suggested for their consideration, they were of opinion that the Act of Parliament, treating it as a whole, was beyond the competency of the Ontario Legislature to enact, and they were prepared to answer that question, therefore, by saying that the Act itself as a whole was invalid. The question turned upon a very simple consideration. The reservation of the criminal law for the Dominion was given in language which their Lordships considered to be very plain, ordinary, and intelligible words, and to be construed according to their natural signification. Those words seemed to their Lordships to require—and, indeed, admitted of—no plainer exposition than the language itself. What was reserved was "the criminal law except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters." It was, therefore, as had been once said before in that Court, the criminal law in the widest sense; and it was impossible, notwithstanding the very protracted argument to which their Lordships had listened, to doubt that an infraction of the Act which was in operation at the time of Confederation was an offence against the crimi-

nal law. Their Lordships would humbly advise His Majesty that that was the state of the law.

The fact that an exception was taken from the criminal law generally, and that it was expounded as being the constitution of courts of criminal jurisdiction, but including procedure in criminal matters, rendered it more clear (if anything were necessary to render it more clear) that, with that exception, which obviously did not include what had been contended for there, the criminal law, in its widest sense, was that which was reserved for the Dominion Parliament to enact.

With regard to the other questions which it had been suggested should be reserved for further argument, their Lordships were of opinion that it would be inexpedient and undesirable and contrary to the precedents which from time to time had been pointed to in the questions arising before that board, to attempt to give any judicial opinion upon them. They were questions which arose only when properly considered in concrete cases; and any opinion expressed upon the operation of those clauses and the extent to which they were applicable would be worthless for many reasons—they would be worthless as being speculative opinions as to what might arise in the event of particular facts occurring, bringing such and such facts within the operation of those sections. It would be absolutely contrary to principle and very inconvenient and inexpedient that opinions should be given upon these questions at all—they were questions which, when they arose, must arise in concrete cases, in which the rights of private individuals were involved; and it was extremely unwise beforehand for any judicial tribunal to attempt to exhaust all the possible cases and facts which might occur to qualify, cut down, and override the operation of particular words, when the concrete case was not before them. For those reasons their Lordships would decline to answer those questions. The main and substantial question was that on which their Lordships had already expressed their opinion—that this Ontario Act was beyond the jurisdiction of the Ontario Legislature. No order would be made as to costs.

FALCONBRIDGE, C.J. JULY 20TH, 1903.

TRIAL.

ROGERS v. ROGERS.

Contract—Setting aside—Improvidence—Absence of Independent Advice.

Action to set aside an agreement tried at Stratford.

F. H. Thompson, Mitchell, for plaintiff.

J. P. Mabee, K.C., for defendant.

FALCONBRIDGE, C.J., found that the plaintiff was illiterate and incapable of transacting any business of a complicated nature. He did not understand the nature of the agreement or the transaction which it purported to embody, and he had no professional or other independent advice. The agreement was in the highest degree improvident, and was voluntary and without valuable consideration, and therefore could not stand. Judgment for plaintiff as prayed, with six years' interest. No costs.

HOLMESTED, OFFICIAL REFEREE. JULY 22ND, 1903.

CHAMBERS.

DOMINION SYNDICATE v. OSHAWA CANNING CO.

Judgment—Consent to, Obtained by Misrepresentations—Motion to Stay Proceedings—Motion to Vacate Judgment—Forum.

Motion by defendants to stay proceedings upon a consent judgment on the ground that the consent was induced by misrepresentations.

R. W. Eyre, for defendants.

H. E. Rose, for plaintiffs.

MR. HOLMESTED:—Where a suitor asserts that his consent to a judgment has been obtained by a misrepresentation of fact on the part of the opposite party or his counsel, he must move promptly to vacate the judgment obtained under such circumstances, and a stay of proceedings can only be granted as an incident of such a motion and until the Court or Judge can dispose of it. The application in such a case would seem to be properly made to the Judge who pronounced the judgment complained of, but, if he should be inaccessible, the motion could no doubt be made to the Judge taking vacation business. Motion dismissed, without prejudice to any application that may be made elsewhere, with costs fixed at $5.

BRITTON, J. JULY 22ND, 1903.

TRIAL.

MYERS v. RUPERT.

Limitation of Actions—Real Property Limitation Act—Acquiring Title by Possession to Undivided Half of Lot—Oral Admissions of Title—Conveyance—Acknowledgement—Exclusive Possession—Partition.

Action for partition of land, tried at Cornwall.

D. B. Maclennan, K.C., and F. G. Maclennan, Cornwall, for plaintiff.

James Leitch, K.C., for defendant Rupert.

G. I. Gogo, Cornwall, for defendant Newman.

BRITTON, J.:—The plaintiff claims to be the owner of an undivided half of the north half of the south-west quarter of lot 31 in the 9th concession of Cornwall, and with a view to partition brings this action to establish his title, acquired, as he says, by possession. He admits that the other undivided half is owned by the defendant Beaque Rupert, of which other undivided half the defendant Newman is mortgagee. One Lachlan McDonald owned the whole west half of this lot, and on the 7th March, 1871, conveyed it to Levi Rupert and John L. Rupert as tenants in common.

Levi Rupert was the father of John L. Rupert, and on the 23rd October, 1871, Levi conveyed his interest in this south-west quarter to another son, Adam. The two brothers, John L. Rupert and Adam Rupert, thus became and were the owners of the south-west quarter of lot 31.

Adam, being the owner of an undivided half of the south-west quarter, and in possession of all the south-west quarter, made his will on the 26th March, 1872, giving all his real estate to his wife Caroline for life. He made no disposition of the estate in remainder. On the 30th March, 1872, he died, leaving no issue. His father Levi survived, and so became entitled to Adam's share, subject to the life estate in Adam's widow.

On the 4th March, 1873, Adam's widow, being in possession, married the plaintiff, and he came upon the property and resided upon it, with his wife, from that time until her death, which occurred on 3rd March, 1903. Levi, the father of Adam, died in December, 1885, having first made his will devising his interest in this property to his son, the defendant Beaque Rupert. Upon the death of the wife of the plaintiff (Adam's widow) the defendant Beaque Rupert became entitled to this undivided half, and as to this there is no dispute.

As stated above, the other undivided half was in 1871 owned by John L. Rupert, and on the 1st March, 1872, John L. Rupert conveyed all his interest in the west half to defendant Beaque Rupert.

Plaintiff and wife were in possession of all of the south-west quarter until the 24th December, 1887. Up to that time the defendant Beaque Rupert did not in any way assert his right or title to an undivided half, but apparently acted as if he had supposed his sister-in-law, the widow of Adam,

was entitled to the whole for her life, and that he was entitled to the whole after the widow's death. On the 24th December, 1887, Beaque Rupert bought the right of the wife of plaintiff to the south half of the south-west quarter, paying her $150 for the same. The plaintiff joined in that conveyance, which contained a recital to which I will refer later. The defendant Beaque Rupert then went into possession of the part so purchased, and the plaintiff and his wife continued in possession of the north half of the south-west quarter, the part now in question, until the death of plaintiff's wife, and plaintiff is still in possession.

What was the position of the matter on 24th December, 1887? The plaintiff was in actual visible possession of it all. Upon the evidence I think he was occupying, supposing his wife had a life interest in all. However it came about, I think plaintiff and his wife and the defendant Beaque were all under the mistaken notion that Beaque had no right to possession until after the death of the wife of plaintiff. Could the plaintiff under such circumstances acquire a title by possession to the undivided half of the defendant? I think he could. I must find upon the facts that the possession was without any express license or authority from the defendant, and that nothing was done to amount to an entry by Beaque Rupert as one of the tenants in common.

It is a fair inference from the evidence that Caroline Myers never intended to hold any more than her husband owned of the land in question—and for her life only, under the will of her husband. The plaintiff, her husband, never until shortly before the commencement of the present proceedings, intended to hold more than his wife held, and only for her life—but they were both in possession, using all, as their own, for all the years from 1873, the plaintiff exercising control, having the property assessed to him, paying taxes upon it, and holding it to the exclusion of the defendant.

As the doctorine of adverse possession is put an end to by the statute, and as sec. 11 makes the Act applicable in favour of one tenant in common in possession, against another who is out of possession, I must find that Caroline Myers, if she had not married but had remained alone upon this land, would before the 24th December, 1887, have acquired a title by possession as against the defendant to the one undivided half. If Caroline Myers, had she remained single, would have acquired title by possession, it follows, I think, that the plaintiff, being in actual visible possession and control from 1873 to 1887, acquired title: see Darby & Bosanquet on the Statute of Limitations, pp. 275, 353, 357; and Cully v. Tay-

lor, 11 A. & E. 527. The defendant remaining out of possession of this undivided half, when he had a right to it—the discontinuing possession by those under whom defendant claims, and by the defendant, results in an extinguishment of the defendant's claim: see sec. 15 of ch. 133, R. S. O.

It was shewn that the plaintiff attended and bid at the sale of this property under a mortgage given by the defendant, and it was contended that he thereby admitted defendant's title to this property, subject to the life estate of plaintiff's wife. These were only oral admissions, if admissions at all, and are of no avail to the defendant; and the plaintiff contends that in attending the sale he did so knowing that the wife had for life only the one undivided half.

On the 24th December, 1887, the defendant Beaque Rupert bought the interest of the wife of the plaintiff in the south half of the south-west quarter. The plaintiff joined in the conveyance. Beaque Rupert subsequently gave a mortgage upon the property, always describing it as the south-west quarter, although he occupied only the south half of the south-west quarter. On the same day that Beaque Rupert obtained the conveyance from the plaintiff and wife, he mortgaged to one McMillan, but there is no evidence that either plaintiff or wife knew at that time of that mortgage, nor did plaintiff know of the mortgage to defendant Newman. Although the fact is that plaintiff did not, beyond what appeared from his possession, assert any title, on the other hand he did not represent to Newman or to any one on Newman's behalf, that he had no claim except in right of his wife. So I think there is no estoppel against the plaintiff and in favour of Newman's mortgage.

It is contended that this conveyance defeats plaintiff's claim, (1) as an acknowledgment in writing of defendant's title; and (2) as shewing that the possession was not of right as owner, or in such a way as to acquire a title under the statute.

It is certainly an acknowledgment in writing, but it has been held that such is not sufficient after the title of the former owner has been extinguished. When that admission was made, the title of plaintiff to the one undivided half had been perfected, and the title of Beaque Rupert to that undivided half had been lost. Doe d. Perry v. Henderson, 3 U. C. R. 486, is authority for plaintiff that acknowledgment in writing after expiration of statutory term would not have the effect of revesting title. This case is important as to oral admissions. Also see Armour on titles, 3rd ed., p. 299, and cases there cited.

I would not have been sorry had I been able to apply the principle laid down in Sanders v. Sanders, 19 Ch. D. 373.

. . .

I have considered whether in this case the admission made in this deed might not raise the presumption that, notwithstanding the outward visible possession, it was a possession not intended to be, and which was not in fact, to the exclusion of the true owner, but I am afraid I cannot so apply it. The difficulty arises as to the two distinct undivided halves of this lot.

As a matter of law they must be dealt with as if defendant had never acquired the undivided half from his father, Levi; as if that still remained with Levi, or some other grantee of Levi, clearly Levi's right would be barred.

If on the 24th December, 1887, the plaintiff and his wife had executed the deed with the recital that Levi was the owner of one half, and that the defendant was the owner of the other, could Levi have claimed? If the defendant, after the expiry of the time required by the Statute of Limitations, and before the death of plaintiff's wife, had attempted to re-enter into possession of his undivided half, he could not have done so, he would have been barred. As to the other undivided half, the wife simply claimed under the will of her husband an estate for life. The defendant could not be barred as to that, unless possession long enough after death of wife.

While not free from doubt, I think the plaintiff entitled to succeed as to the undivided half, and that there must be the division as asked, and judgment for partition, with the usual reference.

The plaintiff must get costs of this trial, to be paid by defendants.

Costs of partition proceedings to be determined and apportioned in the usual way.

BRITTON, J. JULY 22ND, 1903.

TRIAL.

EVANS v. JAFFRAY.

Partnership—Agreement—Termination—Breach of Contract—Malicious Procuring—Conspiracy—Formation of Company—Purchase of Businesses.

Plaintiff claimed an account of the partnership dealings between him and defendant Jaffray and damages for alleged breach of contract, and damages against the other defendants for the malicious procuring of the breach of contract by defendant Jaffray and for conspiracy. Plaintiff also sought

to recover from defendants other than Jaffray $25,000, being one-half of the sum which it was alleged these defendants agreed to pay to Jaffray, or one-half of such sum as upon a reference it might be ascertained was the value of what was obtained from defendant Jaffray by his co-defendants.

On the 28th February, 1899, an agreement in writing was entered into between plaintiff and defendant Jaffray as follows:—"Whereas the parties have agreed to undertake the promotion of a company to purchase existing bicycle plants in Canada and to carry on the manufacture of bicycles and parts thereof and to divide equally the profits accruing from such promotion: it is hereby agreed that the said Robert M. Jaffray is to employ himself to procure offers from existing manufacturers and treat for the purchase of plants and business and aid in the formation of a company for the purposes aforesaid; and the said Frederick G. Evans is to assist generally in such purchases and promotion. After payment of all expenses, the profits are to be divided equally, and any loss arising is to be borne in the same proportion."

The plaintiff resided at Windsor, and was a shareholder in and manager of the Canadian Typograph Co. The defendant Jaffray resided at Chicago.

F. A. Anglin, K.C., W. M. Douglas, K.C., and J. E. O'Connor, Windsor, for plaintiff.

S. H. Blake, K.C., and C. W. Kerr, for defendants Ryckman, Cox, and Soper.

G. H. Watson, K.C., and S. C. Smoke, for defendants Jones and the estate of W. E. H. Massey.

R. McKay, for defendant Jaffray.

BRITTON, J.:—The plaintiff had correspondence with the late Senator Sanford, and had interviews with him and Mr. Wm. Hendrie, of Hamilton, which resulted in these gentlemen giving defendant Jaffray a letter dated 13th March, 1899, stating that "if the manufacturers are prepared to consolidate their interests on the basis as proposed in the prospectus submitted . . . we will be prepared to become provisional directors and stockholders in the company to the extent of $100,000 jointly. . . ." Armed with this letter defendant Jaffray got options or offers from certain companies . . . and as a result and for the purpose of seeing what could be done a meeting was held at . . . Toronto, on the 11th April, 1899. . . The meeting . . resulted in nothing. There was nothing before the meeting regarded by the capitalists present as a business proposition. . . .

The fair inference from the written agreement between

plaintiff and Jaffray is, that it was for a short time, and that plaintiff had in view persons whom he could interest and from whom capital could be obtained. . . . The only suggestion as to any aid plaintiff could give was by interesting Senator Sanford and his friends to such an extent as to get their financial support. Senator Sanford was a stockholder in the company of which plaintiff was manager, and plaintiff knew him well. It appears to me that it was well understood between plaintiff and Jaffray that if Jaffray could get offers or options, and if plaintiff could get the capital, there might be a purchase of some of the existing concerns on such terms as would give a profit, which plaintiff and Jaffray could divide, and that is the whole meaning of the written document, hastily drawn and scantily expressed. Underlying this vague and indefinite agreement, and in some way a part of what was to be accomplished, the plaintiff hoped that the company of which he was manager would be taken over, and that he would become the manager for the company or syndicate that would purchase. . . . When this meeting ended, all ended as to any joint work or joint venture between plaintiff and Jaffray. It was not pretended that plaintiff was to look to other persons than those at that meeting for the necessary capital, nor was it agreed that Jaffray from that time on, as between him and the plaintiff, was to procure offers from existing manufacturers or treat for purchase of plant, etc. . . .

Afterwards defendant Ryckman took hold of the matter, having the information from Jaffray, and entered into negotiations with the manufacturers on the one side and the capitalists on the other, with the result that the Canada Cycle and Motor Co. was formed, and certain companies were purchased. Defendants Ryckman, Cox, Jones, Massey, and Soper paid defendant Jaffray for what he did or said or furnished in connection with the matter. . . . The partnership, if it can be called a partnership, was only to continue while both were working together for a common purpose, viz., that Jaffray should get offers to sell, and that plaintiff or plaintiff and Jaffray should find purchasers or capital. When the attempt failed, the contract was at an end, or, if not so understood by plaintiff, Jaffray was justified in believing it to be so, and there was in fact no further action by plaintiff or Jaffray in this joint venture. . . .

Upon the evidence I must hold that the agreement and the relations between the parties created by it, came to an end on the 11th April, 1899; that there is no evidence to sustain the claim against defendants

or any of them for the malicious procuring of the breach by Jaffray of his contract with plaintiff; . . . that there is no evidence of conspiracy; that defendant Jaffray is not liable to account nor for damages for breach of the agreement. The evidence does not shew that plaintiff could with the aid of defendant Jaffray have brought about the formation of a purchasing company so that he could have made anything out of it. There is no equity to compel Jaffray to account for profits: see Dean v. McDowell, 8 Ch. D. 345. This is not at all like the case of one partner continuing to carry on the business in the same way after the expiration of the term without paying off the capital or settling with the other: Parsons v. Hayward, 4 De G. F. & J. 474. The case is not within the rule that information obtained in partnership business must not be used for any purpose that would compete with partnership business. Here there was no continuing business with which Jaffray as an individual was competing. Action dismissed with costs.

OSLER, J.A. JULY 22ND, 1903.

TRIAL.

GARDNER v. PERRY.

Trusts and Trustees—Will—Action by New Trustees against Representatives of Former Trustee—Limitation of Actions—Trustee Act, sec. 32, sub-sec. 1 (b)—Bar—Counterclaim—Lease by Tenant for Life—Value of Straw and Manure on Demised Premises—Covenant—Emblements

Action by the newly appointed trustees of the estate of Robert Gardner, deceased, against the executors of the will of Marietta Gardner, one of the executors named in the will of Robert Gardner, to compel defendants to make good losses occasioned, as alleged, by the negligence of Marietta Gardner in permitting one Thomas Holtby, a co-executor and trustee, to misappropriate large sums of money belonging to the estate of Robert Gardner, a wealthy farmer, who died in November, 1870, leaving a will, probate of which was granted on the 22nd December, 1870, to the executors and executrix named therein, viz., Thomas Holtby, Joseph Gardner (testator's brother), and Marietta Gardner (widow of testator). By the will the testator gave the income of his estate to the widow for her life, and, subject to certain legacies and bequests, devised the residue to be equally divided at her death between the children of his brothers and sisters. The executors and executrix were "to carry this my last will into effect," and power was conferred upon them "to dispose of the property if they think proper." Joseph Gardner, appar-

ently with the consent of his co-executors, assumed and retained the management and administration of the estate up to the time of his death in December, 1885, by which date some of the real property had been disposed of and the proceeds invested. After this the whole management fell to Thomas Holtby, who was then of good business credit and reputation and an intimate and trusted friend of the widow. She was then about 75 years of age, and, though described as a person of more than ordinary strength of character and mental qualities, was entirely unaccustomed to business, and left to Holtby not only the sole administration of the trust estate, but also entrusted to him or left in his hands the management of the income derivable by her therefrom, and of her financial affairs generally. In November, 1895, an action was brought against Holtby by Marietta Gardner for an account, and the result was that he was charged with a balance of $4,173.27 of principal moneys belonging to the estate in his hands at the date of the Master's report of the 27th June, 1896, which sum with interest he was ordered to pay to the receiver in the action. Marietta Gardner's costs ($469.50) were ordered to be paid to her out of the estate, "reserving to the residuary legatees leave to recover back the same if so entitled by way of damages from the plaintiff (Marietta) for alleged breach of wrongdoing in respect of the estate, should it be established in any action to be brought by them against plaintiff for that purpose." On the judgment so recovered against Holtby, no more than $203.57 was realized, and the rest remained unpaid, as also his defalcation in respect of the widow's own estate, amounting to upwards of $2,200. Marietta Gardner died at the age of 92 in January, 1902. Holtby, the surviving executor of Robert Gardner's will, was removed by order and plaintiffs appointed trustees of the will and of the estate. They brought this action on the 31st May, 1903. All the alleged acts of negligence or breaches of trust charged against Marietta Gardner, including her delay after notice in taking proceedings against Holtby, occurred more than six years before action, and her representatives pleaded sec. 32, sub-sec. 1 (b), of the Trustee Act, R. S. O. 1897, ch. 129, as making the lapse of that time a bar to an action at the suit of the trustees. They also pleaded the provisions of the Trustee Relief Act, 1899, 62 Vict. (2) ch. 15, sec. 1.

E. E. A. DuVernet, for plaintiffs.

G. F. Shepley, K.C., for defendants.

OSLER, J.A.:—The present action being brought by the new trustees of the Robert Gardner estate against the repre-

sentatives of—those claiming under—one of the former trustees, Re Bowden, Andrew v. Cooper, 45 Ch. D. 447, is a clear decision that, upon the facts set forth, sec. 32, sub-sec. 1 (b), of the Trustee Act operates as a bar to the demand and a defence to the action. The application of sub-sec. 1 (b) is left untouched by the decision of the Court of Appeal in How v. Earl Winterton, [1896] 2 Ch. 626. The case is not brought within any of the exceptions in sub-sec. 1, and the result is, that, although the beneficiaries under the will whose interests become interests in possession on the death of Mrs. Gardner, the tenant for life, may not be barred, an action at the suit of the trustees, whose duties came to an end at her death, is barred. Re Cross, Harston v. Tenison, 20 Ch. D. 109, distinguished. Lewin on Trusts, 10th ed., pp. 1084, 1085, 1086, and Re Swain, [1891] 2 Ch. 233, referred to.

During Marietta Gardner's lifetime two of the farms belonging to the estate were demised by her for five years and six months, "provided the lessor, who is tenant for life, shall so long live." The lessees covenanted to cultivate in a husbandlike manner, and to "spread, use, and employ in a proper husbandlike manner all the straw and manure which shall grow, arise, renew, or be made thereupon, and will not remove or permit to be removed from the premises any straw of any kind, manure, wood, or stone, and will carefully stack the straw in the last year of the said term, turn all the manure therein into a pile so that it may thoroughly heat and not so as to kill and destroy any foul seeds which may be therein, and will thereafter and not before spread the same on the land." The demises came to an end on Marietta Gardner's death, and her executors, the defendants, counterclaimed for the value of the straw and manure on the demised premises. . . . In my opinion, defendants are not entitled to this property as emblements, their testatrix not having been the actual occupier or cultivator of the lands on which it was produced: Woodfall, 15th ed., 790, 793; Williams on Executors, 9th ed., 623; Wharton's Law Lexicon, 265; Black's Law Dictionary, 656; Bradley v. Bradley, 56 Conn. 374. But for the lessee's covenants they would have been entitled to the straw as an emblement, and also to the manure, which had been collected and piled into heaps. The covenants, however, preclude the lessee from making any claim. The covenant may be construed or held to operate as a reservation of the straw and manure to the lessor: Heald v. Builders Ins. Co., 111 Mass. 38: to be expended and dealt with in the stipulated manner. The lessees' right or power and obligation so to expend it came to an end with the death

of the lessor, and the property passed to her representatives unrestricted thereby: Hindle v. Pollitt, 6 M. & W. 629; Elliott v. Elliott, 20 O. R. 134; Snetsinger v. Leitch, 32 O. R. 440; Leigh v. Lillie, 6 H. & N. 165.

Action dismissed with costs. Judgment for defendants on counterclaim for $96 with costs.

FERGUSON, J. ——— JULY 23RD, 1903.

TRIAL.

GODERICH ELEVATOR CO. v. DOMINION ELEVATOR CO.

Principal and Agent—Contract Made by Agent—Scope of Authority—Principal not Bound.

Action to recover $2,250, the price of certain storage space in plaintiff's elevator at Goderich alleged to have been contracted for but not used by defendants.

FERGUSON, J., held, upon the correspondence and evidence, that there was not a completed contract for the space in plaintiff's elevator at the rates of storage charged by plaintiffs; that one Cavanagh, with whom plaintiffs corresponded, was not a general agent of defendants, but only a special agent having no authority by implication, but only such authority as was directly given him by defendants; and that defendants were not bound by Cavanagh's acceptance of plaintiffs' rates, and would not have been bound even if his conduct had been free and voluntary and not induced by the promise of plaintiffs to protect him if he accepted. Lest it should be considered of importance hereafter, the learned Judge found upon the evidence that plaintiffs did reserve space for 150,000 bushels in their elevator, and that this space remained unoccupied during the period for which plaintiffs sought to recover, although plaintiffs made reasonable efforts to relet it to others.

Action dismissed with costs.

FERGUSON, J. JULY 23RD, 1903.

TRIAL.

CHARLTON v. BROOKS.

Gift—Donatio Mortis Causa—Evidence—Cash and Notes—Delivery of Key of Box—Counterclaim—Costs.

Action by the administrators of the estate of the late William Charlton to recover certain moneys and notes from the defendant, the daughter of the deceased. She claimed them as the subject of a donatio mortis causa.

J. M. Glenn, K.C., and C. St. Clair Leitch, Dutton, for plaintiffs.

Talbot Macbeth, K.C., for defendant.

FERGUSON, J.:—The intestate was at the time of his death in his 99th year, but retained all his faculties till his last illness, which lasted only two weeks. He was taken ill on the 5th January, 1903, and died on the 19th of the same month. He was living at the time with defendant. On the morning of the 5th January he became ill and went to his room, where his daughter followed him. He had three keys in a wallet in his pocket. He had a foreboding that this would be his last illness. He took the keys from his pocket and handed them to defendant, saying, "All the money and notes I have got are yours." One key was that of his trunk which was in the room: another was the key of a cash box, which was in the trunk; and the third was the key of a chest of drawers. Defendant took the keys and examined them, and kept them. In the cash box were the promissory notes and cash in question. Defendant took possession of these and retained possession. The evidence of defendant was corroborated by that of her son, who was present at the time. There was no question as to the intestate having died of the illness that was upon him at the time of the alleged gift. There was evidence that he intended to give what property he might have to defendant. In my opinion a good donatio mortis causa is established. Mustapha v. Wedlake, 8 Times L. R. 160, followed. McDonald v. McDonald, 33 S. C. R. 145, referred to. Defendant counterclaimed for $67.50, the amount of doctors' bills and funeral expenses paid by her. Judgment dismissing action with costs against plaintiffs in their representative character. Judgment for defendant for the amount of her counterclaim against plaintiffs, also in their representative character. No order as to costs of counterclaim. Plaintiffs may reasonably charge their costs against the estate in their hands or to come into their hands as administrators.

MEREDITH, C.J. JULY 23RD, 1903.

TRIAL.

O'BRIEN v. ELLIS.

Seduction—Right of Action—Death of Father after Cause of Action Complete—Action Brought by Mother—Failure to Establish Loss of Service—Application to Amend and Proceed as Administratrix of Father's Estate—Statute of Limitations—Trustee Act—Bar.

Action for seduction brought by the mother, who based her right to recover on the alleged existence of the relation of master and servant between her and the seduced daughter. The action was begun on the 24th September, 1902, and the

statement of claim was delivered on the 10th January, 1903. By the statement of defence, delivered on the 20th of the same month, defendant, besides making a general denial, challenged plaintiff's right to maintain the action, setting up that the father of the girl was living at the time of the alleged seduction (June, 1900), and did not die until 15th June, 1902. On 11th February, 1903, plaintiff replied asserting her right under R. S. O. ch. 69 to maintain the action, and alleging that she had sustained loss of service. At the trial plaintiff's counsel asked for leave to amend by setting up a further claim by plaintiff as the personal representative of the father, the plaintiff having obtained letters of administration to his estate on 4th March, 1902. The case was allowed to go to the jury, the question of amendment being reserved. The jury found the seduction proved, and that the daughter was not the servant of plaintiff, and they assessed the damages at $500.

W. B. Craig, Renfrew, for plaintiff.

W. H. Stafford, Almonte, for defendant.

MEREDITH, C.J., held that the amendment should not be allowed to enable plaintiff to set up a new cause of action barred by the Statute of Limitations (sec. 10 of the Trustee Act, R. S. O. ch. 129, more than a year having elapsed since the death of the father), at the time the application to amend is made: Darby & Bosanquet, 2nd ed., p. 561, and cases there cited; Hudson v. Fernyhaugh, 61 L. T. R. 722; Lancaster v. Moss, 15 T. L. R. 476; Bugbee v. Clergue, 27 A. R. 96. Plaintiff maintained down to the trial that the cause of action for which she was suing was her own, and not that of her husband sued for by her in her representative capacity as the administratrix of his estate, and even at the trial she sought, not to withdraw entirely from that position, but to continue the action in her own right, and to add a further claim in right of her husband and in her representative capacity. The two causes of action are separate and distinct, and none the less so because they are asserted by the same person. Had someone else been the administrator, and an action had not been begun by him in time, the defendant would have been freed from all liability to him. Defendant is freed from the claim of plaintiff in her own right because she has failed to establish it against him, and from that of her husband's estate because no action in respect of it was begun within the prescribed period.

Action dismissed, but without costs.

MEREDITH, C.J. JULY 23RD, 1903.

TRIAL.

JOHNSTON v. VILLAGE OF POINT EDWARD.

Way—Injury to Traveller—Liability of Municipality—Negligence—Diversion of Road—Removal of Bridge—Neglect to Warn or Bar—Contributory Negligence.

Plaintiff, who was driving in a buggy drawn by a single horse from Point Edward to Sarnia along the main travelled road, on the night of 22nd November, 1902, a dark night, drove into a canal which crossed the road at right angles, and he sued defendants to recover damages for the injuries he sustained, which he alleged were caused by the negligence of defendants in removing a bridge which had existed for many years over the canal in the line of the road, without providing and maintaining any sufficient guard or barrier to prevent persons using the road from driving into the canal.

A. Weir, Sarnia, for plaintiff.

A. B. Aylesworth, K.C., and J. Cowan, K.C., for defendants.

MEREDITH, C.J., held that the evidence was sufficient to establish that the *locus in quo* was part of a highway called "the diverted road" under the jurisdiction and control of defendants, which it was their duty to keep in repair. In August, 1902, the corporation of the town of Sarnia, with the consent of defendants, made a change in the line of the "diverted road," the effect of which was to move the travelled way from its then position a short distance to the east of it, and to carry the roadway across the canal by means of a covered sewer pipe culvert, and to discontinue the use of the former travelled way from a point near the north end of the diverted way to a point a little distance east of the bridge which was removed. No barrier or other guard was placed across the former travelled way at the point where the change in alignment began at the north end, but one was erected across it, about opposite the park gate, extending from the new culvert to within about ten feet of the park fence. This barrier was spoken of as a temporary one, and was insufficient for the purposes for which it was intended. There was a conflict of evidence as to whether it had been kept standing from the time it was put up until the time of the accident. . . . The evidence given by plaintiff was to be preferred, and it shewed that the barrier was often, in part at least, overthrown, and that for at least two days before the accident it was down in part so

as to be quite insufficient to prevent persons driving along the old roadway in the dark from driving into the canal. Defendants were guilty of negligence in not providing a sufficient barrier or guard, and they were also negligent, knowing, or having the means of knowing, if they had taken any reasonable care, that the barrier which had been erected was often overthrown, in not either being more vigilant in watching as to its condition, or not, as they after the accident did, replacing it by a sufficient fence. Plaintiff was not chargeable with negligence, for, although he had driven over the culvert in going to Point Edward on the same evening, he said he did not notice that the bridge had been removed, or that any change had been made in the road; when he was returning, the night was dark, and it was the most natural thing that his horse should follow the old way, there being nothing at the point of divergence to prevent persons from continuing.

Judgment for plaintiff for $400 with costs.

JULY 23RD, 1903.

DIVISIONAL COURT.

WASON v. DOUGLAS.

Deed—Description—Boundary—Medium Filum Aquæ—Ascertainment of Centre Line.

Appeal by defendant from judgment of LOUNT, J. (1 O. W. R. 552), in favour of plaintiff in an action for trespass to land, an island in Blind Creek. The action was first tried by a jury, who found in favour of plaintiff. A Divisional Court (21 C. L. T. Occ. N. 521) directed a new trial for the purpose of ascertaining the true boundary between plaintiff's and defendant's land, holding that the description in the conveyence to defendant entitled him to the medium filum aquæ as his boundary, and the position of the centre line of the stream was the matter to be determined; that the centre line of whichever channel was the main channel in 1883 would be the centre line of the stream, and the jury should be asked to find, if there were two channels, which was the main channel in 1883. The case was then tried without a jury, but the trial Judge did not make a finding upon the point indicated by the Court.

E. B. Edwards, K.C., for defendant.

G. H. Watson, K.C., and G. Edmison, K.C., for plaintiff.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J.) found that the northerly channel was originally, and at the time

of the conveyance to defendant, the main channel of Blind Creek, and that the boundary line between plaintiff and defendant is the centre line of this northerly channel. Appeal allowed with costs and action dismissed with costs.

MEREDITH, C.J. JULY 24TH, 1903.

CHAMBERS.

RE McMICHAEL AND DOIDGE.

Will — Devise — Construction — Condition — "Die without Lawful Issue"—Lifetime of Testator.

Application under Vendors and Purchasers Act, R. S. O. ch. 112, in respect of objection to title raised by the purchaser. The vendor derived title under the will of his mother, Calista Traux McMichael, dated 18th July, 1884:— "I will, devise, and bequeath all real and personal property . . as follows: 1. To my son, Isaac Luther McMichael, I will, devise, and give all the above mentioned absolutely and forever in fee simple. 2. But should the said Isaac Luther McMichael die without any lawful issue of his body, then all and whatsoever he would have and taken under and by virtue of this will shall be equally divided among my five brothers. . . ."

J. G. Gauld, Hamilton, for vendor.

M. G. V. Gould, Hamilton, for purchaser.

MEREDITH, C.J., held that the words "die without lawful issue of his body" are explained by the words "then all and whatsoever he would have and taken under and by virtue of this will," which precede the executory devise, and shew that the testatrix was providing for the death of her son in her lifetime, and, as he survived her, the gift to him became absolute. Order declaring accordingly. If the parties have not agreed as to the disposition of costs, each party will bear his own costs of the application.

MEREDITH, C.J. JULY 24TH, 1903.

CHAMBERS.

RE MACKEY.

Will—Legacies—Specific or Demonstrative—Succession Duty.

Motion for summary determination of certain questions arising on the will of William Mackey and the codicils to it. The only questions reserved related to the legacies to Alice and Agnes Cassidy, bequeathed by the codicil of 22nd September, 1902. By paragraphs 1 and 2 the testator bequeathed to each of five named persons one debenture of the

city of Ottawa for $1,000, bearing interest at 4 per cent. By paragraph 3 he bequeathed to Alice Cassidy one debenture similarly described, and by paragraph 4 the same to Agnes Cassidy. By paragraph 5 he provided that "if I should deliver over any of the said debentures in my lifetime to any of the above named legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." At the time the codicil was executed and at the time of his death, the testator was possessed of a considerable number of such debentures, each bearing interest at 4 per cent.

M. J. Gorman, K.C., for the executors.

W. D. Hogg, K.C., for the residuary legatees.

D'Arcy Scott, Ottawa, for Alice and Agnes Cassidy.

R. G. Code, Ottawa, for certain legatees.

J. C. Grant, Ottawa, for Henry Mackey.

MEREDITH, C.J., held, that the legacies were not specific. As to what is a specific legacy, see Purse v. Snapling, 1 Atk. 417; Bothamley v. Sherson, L. R. 20 Eq., 304; Re Ovey, 20 Ch. D. 664; Robertson v. Broadbent, 8 App. Cas. at p. 82; Williams on Executors, 9th ed., 1019; Am. and Eng. Encyc. of Law, 2nd ed., vol. 18, p. 714. The most recent English authority, Re Nottage, Palmer v. Jones, [1895] 2 Ch. 657, supports the conclusion that these are not specific. The legacies not being specific, the legatees are not entitled to receive them free from succession duties. But, even if the legacies were specific, they would have been subject to duty. The succession duties fall, according to R. S. O. ch. 24, upon the property of the testator in the hands of his personal representatives, and by sec. 14 it is made their duty to deduct the succession duty from any estate, legacy, or property subject to the duty which they have in charge or trust, or to collect the duty thereon upon the appraised value thereof from the person entitled to the property, and they are forbidden to deliver any property subject to the duty to any person until they have collected the duty on it. This language applies to a specific legacy, and there is no ground for the contention that the succession duties on legacies should be paid out of the residue: Kennedy v. Protestant Orphans Home, 25 O. R. 235; Manning v. Robinson, 29 O. R. 480. See also Re Maryon Wilson, [1900] 1 Ch. 565. Order accordingly. Costs of all parties out of the estate, those of the executors between solicitor and client.

MEREDITH, C.J. JULY 24TH, 1903.

TRIAL.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO.

Patent of Invention—License—Royalties—Assignment of License by Licensees—Formation of Company—Inference of Contract to Pay Royalties—Statute of Frauds—Executed Consideration.

Action to recover royalties alleged to be due to plaintiff by defendant company, or the added defendants, Seybold and Gibson, in respect of the manufacture of office files, for an improvement in which he had obtained letters patent for Canada, and which he alleged defendants manufactured under a license from him by the terms of which the royalties sued for became payable from them to him. The defence was confined to a denial of any contractual or other obligation to pay the royalties. An exclusive license for Canada was granted by plaintiff on 1st June, 1892, to Gottwals & Co., a firm composed of G. W. Orme and W. O. Gottwals. This license contained a provision that it should not be transferable without plaintiff's consent. On 10th February, 1893, Orme, with plaintiff's consent, assigned his interest in the license to defendants Seybold and Gibson, and on the same day articles of co-partnership were entered into between them and Gottwals for the manufacture of files, cabinets, and office furniture. By the terms of these articles, the assets and business of Gottwals & Co., including their interest in the license, half of which belonged to Gottwals and half to the added defendants, became part of the assets of the new firm, which was called the Eclipse Office Furniture Co. No formal consent was given by plaintiff to this transfer of the license. On 24th April, 1893, an agreement in writing was entered into between the added defendants, Gottwals, C. B. Powell, and F. P. Bronson, by which the latter two became partners in the Eclipse Office Furniture Co., and it was agreed that a joint stock company should be formed to acquire and carry on the business of the partnership. By an agreement of 5th June, 1893, made between the members of the partnership, certain changes were made, and Gottwals agreed to assign to W. G. Bronson a part of his share. On 28th June, 1893, the proposed company was incorporated under the name of the Eclipse Office Furniture Co. of Ottawa, Limited. On 12th July, 1893, E. H. Bronson, to whom the business and assets of the partnership had been transferred in trust for the company about to be formed, and the members of the partnership, conveyed to the company the business of the partnership and all the

goods, chattels, patents of invention, goodwill, book debts, and other assets of the business, subject to any outstanding liabalities "due" in respect of the business. No formal consent was given by plaintiff to any of these transactions. The company continued the business, paying royalties to plaintiff down to the end of 1895, when they ceased to pay. On 29th March, 1894, the defendant company endeavoured to induce plaintiff to enter into an agreement with them reducing the minimum royalty and providing that the agreement might be put an end to on notice, but plaintiff declined to agree to what was proposed.

W. D. Hogg, K.C., and F. A. Magee, Ottawa, for plaintiff.

A. W. Fraser, K.C., and H. A. Burbidge, Ottawa, for defendant company.

Glyn Osler, Ottawa, for defendants Seybold and Gibson.

MEREDITH, C.J., held that a new contract ought to be inferred: Howard v. Patent Ivory Mfg. Co., 38 Ch. D. 156. Bagot Pneumatic Tire Co. v. Clipper Pneumatic Tire Co., [1901] 1 Ch. 196, [1902] 1 Ch. 146, distinguished. The inference ought to be drawn from all the facts and circumstances that defendant company contracted directly with plaintiff to pay to him the same royalties as Gottwals & Co. had agreed to pay. The Statute of Frauds affords no answer, for sec 4 does not apply where the consideration is executed, as it was in this case by the permission given by plaintiff to manufacture and sell the invention, or where the contract is wholly executed or intended to be so by one of the parties to it within the year, although there are acts to be done by the other party beyond the prescribed period. But, even if the statute were applicable, defendant company would be liable to pay a reasonable royalty, having had the benefit of the agreement for the whole period it had to run, and upon a quantum meriut the compensation should be assessed at the rate which was agreed upon: Boydell v. Drummond, 11 East 154.

Judgment for plaintiff against defendant company for $1,134 with costs, but without interest. Action dismissed as against added defendants without costs.

JULY 24TH, 1903.

DIVISIONAL COURT.

ARMSTRONG v. ANNETT.

Fences—Boundary Fence between Farms—"Snake Fence"—Relaying —Encroachment—True Boundary.

Appeal by defendant from judgment of Judge of County Court of Lambton in favour of plaintiff in an action in that

Court to recover possession of a strip of land in the township of Brooke. The difficulty arose out of the alleged removal by defendant of a part of the line fence between his land and that of plaintiff.

I. F. Hellmuth, K.C., for defendant.

G. F. Shepley, K.C., for plaintiff.

The judgment of the Court (FERGUSON, J., MACMAHON, J.) was delivered by

FERGUSON, J.:—Plaintiff is the owner of the east half of lot 20 in the 11th concession, and defendant of the west half of lot 21 in the same concession. Many years ago a surveyor ran a line as the dividing line between these properties, and a fence was put, or supposed to be put, on this line. Part of it was to be maintained and repaired by plaintiff and part of it by the predecessor in title of defendant. The fence remained in the place where it was first erected for a long series of years, without any objection. At the place where the subject of this contention is located, the fence was a "snake fence," and at this place fell to the lot of defendant to maintain and repair. The fence at this place having become dilapidated, the defendant, without notice to plaintiff, began the repair and relaying thereof. Plaintiff complained that defendant, in relaying the fence, so laid it as to take in part of plaintiff's farm. The quantity of land claimed by plaintiff is small, valued at about 17 cents, but in one of the corners or angles of the old fence and on the plaintiff's side, stands an oak tree valued at about $20, and defendant in laying the new fence so managed the matter that this oak tree is standing in or near an angle of the new fence, but on defendant's side. Defendant contends that he so laid the new fence that the centre line of it coincides with what was the centre line of the old fence. Plaintiff called a surveyor, one Code, and defendant called another surveyor, one Jones. The evidence, surveys, and plans of these two do not agree. The trial Judge preferred the survey of Code. In our opinion the trial Judge was right, and according to the survey of Code the defendant's contention must fail. There is a strip of land which, according to the old fence, belonged to plaintiff, which is now on defendant's side of the new fence. The centre lines of the old and new fences do not coincide or nearly so, and there is a difference to the disadvantage of plaintiff. The oak tree stands at present on the wrong side of the rails of the fence. Appeal dismissed with costs.

MEREDITH, C.J. JULY 27TH, 1903.

CHAMBERS.

McINTYRE v. MUNN.

Summary Judgment—Rule 603—Debt or Liquidated Demand—Contract—Claim for Money Advanced after Deduction for Timber Supplied—Absence of Ascertainment.

Appeal by defendant from order of one of the local Judges at Walkerton allowing plaintiff to sign judgment under Rule 603 for $500. Action to recover the balance of certain moneys which were advanced by plaintiff to defendant on account of the price of timber, which, by an agreement dated 2nd October, 1902, defendant contracted to manufacture for and deliver to plaintiff, after deducting from the amount of the advances what defendant was entitled, according to plaintiff's contention, to be paid for the timber which he had delivered. The agreement provided for payment of the price of the timber upon delivery. No adjustment of the accounts between the parties appeared to have taken place, and there was no ascertainment of the amount which defendant was entitled to be paid for timber delivered.

G. H. Kilmer, for defendant.

M. H. Ludwig, for plaintiff.

MEREDITH, C.J., held that the claim was not one to recover a debt or liquidated demand in money upon a contract, express or implied, within the meaning of Rule 603. There never was any contract to repay the advances as such, but only an implied contract to repay on completion of the contract what, if anything, after crediting upon the advances what defendant should be entitled to be paid for the timber which he had delivered, it should be found that he had been overpaid. Such a claim—the amount of the credit not having been ascertained by the facts of the party—is neither a debt nor liquidated demand in money. Appeal allowed with costs here and below to defendant in any event.

MEREDITH, C.J. JULY 27TH, 1903.

CHAMBERS.

HOWARD v. QUIGLEY.

Will—Construction—"Land Property"—Absence of Residuary Devise—Inferential Bequest of Personalty—Parties—Next of Kin—Intestacy.

Motion by Eliza Howard (plaintiff) for payment out to her of the moneys in Court to the credit of this action.

The action was to recover possession of a farm in the county of Renfrew and for mesne profits. Defendant counterclaimed for specific performance of an agreement alleged to have been made between him and plaintiff's deceased husband, George Howard, under whose will plaintiff claimed, for the sale to defendant of the farm, and the plaintiff and her infant son were made defendants by counterclaim. Specific performance was adjudged, and the residue remaining due of the purchase money (after making certain deductions), $1,141.52, was paid into Court subject to further order, and plaintiff asked to have it paid out to her. George Howard's will contained the following provision: "I give, devise, and bequeath all the land property of which I hold deeds together with all the farm stock, farm implements, and machinery, and all my other personal belongings, to my wife Eliza until my son Lloyd Carson Howard comes to the age of 21 years. Then, on payment by him of the sum of $1,500 to my wife Eliza, the above named land property, stock, and machinery becomes the property of my son Lloyd Carson Howard." The will did not contain any effective disposition of the residue, a blank having been left in a clause apparently intended to provide for the disposition of the residue, for the name of the beneficiary. The will made no disposition of testator's personal estate except that contained in the clause quoted, though the provisions for the disposition of the testator's property were preceded by the words, "I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say," and they were followed by bequests of five pecuniary legacies, and these by the clause quoted.

J. H. Moss, for plaintiff.

F. W. Harcourt, for infant.

MEREDITH, C.J.:—It was argued that plaintiff was entitled, subject to the payment of debts, funeral and testamentary expenses, and legacies, to the whole of the personal estate absolutely. In my opinion there is no ground for this contention, as the enjoyment by the wife of everything given to her except the $1,500 is limited to the minority of her son. It was further argued that the whole of the personal estate was included in the gift to the wife, and that she was entitled to the use and enjoyment of it during her son's minority. . . . The word "land" in the clause quoted is descriptive of the kind of property, that is, landed property, and is not to be read as a separate noun—"land" and "property." It was then argued that the words "and all my other personal belongings" passed all

the general personal estate except that specially mentioned. I think the words are the equivalent of "and all my other personal property," and all the general estate of testator passed to plaintiff until her son is of age. But, there being no residuary clause, the next of kin should be before the Court, as they are entitled to be heard in support of the contention that the general personal estate did not pass by the will, and was therefore undisposed of and passed to them. Motion refused with costs, unless plaintiff chooses to bring the next of kin before the Court, in which case the application will stand for further argument, and the costs will be reserved to be then dealt with.

BRITTON, J. JULY 27TH, 1903.

TRIAL.

AHERN v. BOOTH.

Water and Watercourses—Dam—Obstruction to Flow of Stream—Rights of Riparian Owner—Interference with power—Evidence.

Action for an injunction to restrain defendant from erecting or maintaining a dam or wall which, it was alleged, obstructed the flow of the water of the Ottawa river to the damage of plaintiff as the owner of lands higher up on the river. Plaintiff was the owner of the land and of an undeveloped or unutilized water power in the Province of Quebec, on the shore of the river Ottawa, at or near the upper or little Chaudiere fall, said to be about 4,000 feet distant up the river from the lower or big Chaudiere fall. Defendant was the owner of mills and of water power at the big Chaudiere fall. Defendant had built upon his property an addition to his pier, called a "dam," "a wing-dam," a "wall," projected westward into the stream, which is said to lessen the width of the outlet of the river over the lower Chaudiere fall. The plaintiff complained that this dam or wall will at certain seasons of the year pen and force back the water of the river so that it will be hindered and prevented from flowing by and away from the lands of plaintiff as it ought to do, and will thereby seriously injure the water power owned by and the rights of plaintiff at the little Chaudiere fall.

A. B. Aylesworth, K.C., and N. A. Belcourt, K.C., for plaintiff.

G. F. Shepley, K.C., and J. Christie, Ottawa, for defendant.

BRITTON, J.:—To entitle plaintiff to succeed in this action he must establish that the dam or wall complained of

will so materially obstruct the flow of the river as to interfere with plaintiff's water power, that is to say, that such back water will be occasioned as to reduce the head or fall of the water at the place where plaintiff proposes to utilize it. It was conceded that if any damage should result, it would be only in times of high water. After the most careful consideration of the evidence, and with the aid of the plans and photographs produced and explained, and after a view of the premises, I am of opinion that plaintiff has failed to establish that this dam or wall of defendant will injure the water power or rights of plaintiff at the little Chaudiere fall. Upon the evidence it will not injure plaintiff's water power to any extent. Action dismissed with costs.

MEREDITH, C.J. JULY 27TH, 1903.

TRIAL.

SAUNDERS v. BRADLEY.

Will—Trusts—Power to Appoint New Trustee—Persons to Exercise Power—Time for Exercising—Death of Trustee after Death of Testator—"Surviving Brothers and Sisters"—"Then"—Action—Parties—Cestuis que Trust.

Plaintiff, claiming to be a co-trustee with defendant under the provisions of the will of Richard I. Bradley, deceased, brought this action to compel defendant to permit him to assist in the management and control of the estate and of the trusts of the will, and for a declaration that plaintiff was a trustee under the will. By paragraph 3 of his will the testator appointed his brothers, William J. Bradley (the defendant) and Edward Bradley, executors of, and trustees of the trusts created by, the will, and made provision for the appointment of new trustees in these words: "In the event of the death or the inability or refusal to act of either of said trustees, then my surviving brothers and sisters, or a majority of them, shall by an instrument in writing, executed in the manner in which conveyances of real property are required to be executed in the said Province of Ontario, Canada, appoint a new trustee to act in the place of such trustee," etc. The testator died 27th March, 1899. His will was proved by his two executors, and letters probate issued to them on the 19th May, 1899. Edward Bradley died on the 28th July, 1899. The brothers and sisters of the testator who survived him were seven, all of whom were living except Edward and John, who died 19th August, 1899. Of the then surviving five, three, viz., Mary Jane Saunders, Maggie M. Palmer, and Eliza Ann

Campbell, executed an instrument on the 31st July, 1900, by which they purported to appoint plaintiff to be a trustee in the place of Edward.

A. B. Aylesworth, K.C., and F. W. Kittermaster, Sarnia, for plaintiff.

W. R. Riddell, K.C., and H. J. Dawson, Petrolia, for defendant, contended that the power of appointment never became operative, because both of the trustees appointed by the will survived the testator, and the power applied, in the case of death, only to death in the testator's lifetime.

MEREDITH, C.J., held that such a power is exercisable whether the event happens in the lifetime of the testator or after his death: Re Hadley. 5 DeG. & Sm. 67; Nicholson v. Wright, 26 L. J. N. S. Ch. 312; S. C. sub nom. Nicholson v. Smith, 3 Jur. N. S. 313; Noble v. Meymott, 14 Beav. 477; 23 & 24 Vict. ch. 145, sec. 27 (Imp.); 56 & 57 Vict. ch. 53, sec. 10 (Imp.); R. S. O. ch. 129, sec. 4, sub-sec. 2; Lewin on Trusts, 10th ed., p. 778; Perry on Trusts, 5th ed., sec. 291. Also, having regard to the object of the provision in question, viz., that there should be two trustees acting in the execution of the trusts of the will, the survivors at the time of exercising the power, or a majority of them, is what is meant; and the reasons which led to the adoption of the rules for determining at what period survivors are to be ascertained for the purpose of determining who are entitled to take real or personal property under the provisions of a will, are not applicable. The word "then" used by the testator, does not refer to time, but is the equivalent of "in that case." No case has been found in which the precise question has been raised and determined. Had the words been "my brothers and sisters," omitting the word "surviving," the weight of authority is in favour of the view that those who answer the description at the time it is desired to exercise the power, may properly exercise it: Sohier v. Williams, 1 Curtis C. C. 479; Perry on Trusts, 5th ed., sec. 294; Sugden on Powers, 8th ed., p. 128; Lewin on Trusts, 10th ed., p. 718; Brassey v. Chambers, 4 DeG. M. & G. 528; Jeffreys v. Marshall, 19 W. R. 95. Sykes v. Sheard, 2 DeG. J. & S. 6, is opposed to this view. The power of appointment was, therefore, exercisable by a majority of the brothers and sisters who were living at the time the instrument was executed, but no formal judgment now pronounced, because none of the cestuis que trust except defendant is before the Court, and it is at least doubtful whether any judgment should be pronounced in their absence. The case is to stand over for argument on this point unless it can be arranged that some

of the cestuis que trust be made defendants. In that case, if the added defendants desire to be heard, the case must be reargued.

MEREDITH, C.J. —— JULY 27TH, 1903.

TRIAL.

CROSSETT v. HAYCOCK.

Dower—Action for—Bar by Deed Executed by Married Woman during Infancy—Purchaser for Value—R. S. O. ch. 169, s. 5—Family Arrangement.

Action to recover dower in certain lands of which the deceased husband of plaintiff was the owner in fee simple during the existence of the marriage, and which he, after his marriage with plaintiff, conveyed to defendant, his son, in 1895, for the expressed consideration of $3.200. The plaintiff joined in the deed and thereby barred her dower, but she was an infant, and now set up that the bar was not binding on her.

W. R. Riddell, K.C., and V. Sinclair, Tilsonburg, for plaintiff.

G. F. Mahon, Woodstock, for defendant.

MEREDITH, C.J.:—Defendant's father was desirous that defendant should remain at home with him, and in order to induce him to do so, promised that if he remained at home he would make him a deed of the lands in question, and it was finally arranged in March, 1895, that they should work the land together for the following season, and that the father should then convey the land to defendant, and it was in pursuance of this agreement, fully performed on defendant's part, that the deed was executed on the 4th May, 1895. In my opinion, this was sufficient to make defendant a purchaser for value within the meaning of sec. 5 of the Married Woman's Real Estate Act, R. S. O. ch. 169, which provides that "any married woman, under 21 years of age, of sound mind, might on and since the 5th day of May, 1894, and hereafter may, bar her dower in any land by joining with her husband in a deed or conveyance thereof to a purchaser for value.

Action dismissed with costs.

MEREDITH, C.J. JULY 27TH, 1903.

TRIAL.

UNION BANK OF CANADA v. BRIGHAM.

Equitable Execution—Reaching Share of Judgment Debtor in Estate—Indebtedness of Debtor to Estate—Formation of Company—Assignment of Debtor's Interest — Priority over Claims of Creditors.

The plaintiffs, as judgment creditors of defendant Isaac Reginald Brigham, sought to have it declared that he was en-

titled to a 35 per cent. share or interest in the lands of Charles James Smith, deceased, and that this share or interest was subject to the payment of the debts of defendant Isaac Reginald Brigham; and to have it also declared that he was not indebted to the testator, and in any event that he was not indebted to defendant company; to have set aside as fraudulent against creditors an assignment dated 4th June 1901, by Isaac Reginald Brigham to defendant Thomas George Brigham of any interest he might have in the estate of the testator, and an assignment of the like kind to defendants the C. J. Smith Co. (Ltd.), dated 2nd October, 1901, or to have those assignments set aside as fraudulent preferences; and to have sold the interest of defendant Isaac Reginald Brigham in the lands and other property of the testator for payment of plaintiff's claim; and further relief.

A. B. Aylesworth, K.C., and Travers Lewis, Ottawa, for plaintiffs.

W. Wyld, Ottawa, and Glyn Osler, Ottawa, for defendants.

MEREDITH, C.J., held that the case wholly failed. There was not a tittle of evidence that the formation of the company by the residuary legatees under the will of Charles James Smith and the transfer to the company of the lands of the estate of the surviving executor and trustee, by the direction of the residuary legatees, was a devise for preventing, hindering, or delaying plaintiffs or the other creditors of the judgment debtor from obtaining payment of their debts, or that it was anything else than what it purported to be, a bona fide arrangement for the purpose of realizing the residue of the estate to the best advantage. The result of what was done was to vest absolutely in the company the property which was conveyed, and to make the residuary legatees owners of the shares in the company for which they subscribed, in lieu of being owners of the property conveyed. It was not intended that the judgment debtor should be entitled to the shares in the company which represented his interest in the estate, except subject to what, if anything, remained to be deducted from his share in respect of his indebtedness to the estate of the testator. The utmost relief to which the plaintiffs, on a properly framed record, and suing on behalf of themselves and all the others creditors of the judgment debtor, would be entitled, is a judgment setting aside the impeached assignments and declaring that his shares in defendant company, subject to a lien and charge thereon in favour of the other residuary legatees for their proper proportions of what, if anything, remains owing by

him to the estate of the testator, after crediting what was paid on account of his indebtedness at the time of the partial division, is liable to be sold for the satisfaction of the claims of plaintiffs and his other creditors, and the usual provisions consequent on such a declaration and judgment. If plaintiffs so elect and make the necessary amendments on or before 15th September next, there will be judgment for the relief indicated, and there will be no costs to any of the parties up to and inclusive of the trial. If the plaintiffs do not so elect, the action will be dismissed with costs.

MEREDITH, C.J. JULY 27TH, 1903.

TRIAL.

BOURQUE v. CITY OF OTTAWA.

Municipal Corporations—Contract for Municipel Work—Construction of Contract—Compensation to Contractor for Damage during Progress of Work by Municipal Sewers.

Action for the contract price of certain work done by plaintiff and for damages arising thereout. Two questions remained to be disposed of, all the others having been dealt with during the progress of the trial: (1) The claim of plaintiff for payment of $18,447.56 alleged to remain unpaid on the contract price of the work. (2) The claim for damages occasioned by the contents of certain city sewers which existed in the streets in which plaintiff was required to build the sewers which he contracted to construct, and the existence of which was not known to and not disclosed to him, flowing into the trenches dug by him and impeding and delaying him in the work and causing him additional expense in the doing of it.

N. A. Belcourt, K.C., for plaintiff.

T. McVeity, Ottawa, for defendants.

MEREDITH, C.J.:—The first claim was based on the proposition that the contract was one for the doing of the whole work, including the rock excavation, for a lump sum of $127,225, whether the quantity of the excavation turned out to be greater or less than 5,700 cubic yards. In my opinion, such was not the meaning of the contract, but it was a contract to do the whole of the work contracted for except the rock excavation for $112,975, and the rock excavation, which was estimated at 5,700 cubic yards, for $2.50 per cubic yard, for the quantity actually taken out.

As to the second claim, the sewers were not private drains, but municipal sewers belonging to defendants, into which

the property owners were required to drain their houses and property, and which carried the drainage of the streets also. It would be most unjust if defendants were permitted to discharge the contents of these sewers into the trenches which plaintiff was required to dig, to his loss and damage, without being liable to make compensation to him for it. Plaintiff is entitled to recover from defendants $2,810.50, which was the loss he sustained by the acts complained of, as estimated by defendants' own engineer.

MEREDITH, C.J. JULY 27TH, 1903.

TRIAL.

FARMERS' LOAN AND SAVINGS CO. v. PATCHETT.

Covenant—Assignment of Mortgage—Covenant by Assignor for Payment by Mortgagor—Release of Part of Mortgaged Premises without Consent of Covenantor—Discharge—Inquiry as to Value of Part Released.

Action, as against defendant Coleman, on a covenant entered into by him with plaintiffs on the assignment by him to them of an indenture of mortgage, dated 3rd June, 1889, from defendant Patchett to defendant Coleman, securing payment of $400 and interest at 7 per cent. per annum, on lot 18 on the west side of Fairview avenue, in the town of Toronto Junction.

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

W. H. Irving, for defendant Coleman.

MEREDITH, C.J.:—The assignment was dated 28th June, 1889, and the covenant was that the mortgagor will sell and truly pay the mortgage moneys. The mortgagor sold and conveyed the land in separate parcels to one Mills and one Wellwood, subject to the mortgage, which, as each conveyance stated, to the extent of one-half of the mortgage money and interest, formed part of the consideration money for the conveyance. On 27th January, 1891, plaintiffs, without obtaining the consent of defendant Coleman, discharged the south half of the lot from their mortgage, in consideration of the payment of one-half of the principal money and the interest on the one-half of it. This was an alteration of the contract which defendant Coleman had guaranteed, and not an unsubstantial one. It is not open to the Court to enter upon an inquiry as to the value of the part released. Action dismissed with costs.

TEETZEL, J. JULY 28TH, 1903.

TRIAL.

MORANG v. HOPKINS.

Contract—Preparation of Literary Work—Employment of Editor by Publisher—Right to Literary Materials Collected by Editor.

The plaintiffs were a publishing company, and defendant, J. Castell Hopkins, a professional writer and author. During 1900 defendant and George N. Morang, the plaintiffs' managing director, entered into negotiations for the publication of an "Annual Register of Canadian Affairs," to begin with the first year of the new century, the defendant to be compiler and editor, and plaintiffs the publishers. The idea of the publication was a conception of the defendant, who had spent some time in collecting the necessary literature and statistical matter, and had prepared a draft or skeleton of the first volume. The defendant was also a large subscriber to magazines, and had arranged with the Mail and Empire Publishing Company, on his own account and at his own expense, to get the benefit of all their exchanges for the purpose of the proposed work. The negotiations resulted in an agreement whereby plaintiffs were to pay defendant $25 per week for his services in compiling and editing the 1901 publication, and plaintiffs were to do the printing, binding, and publishing. The plaintiffs alleged that while the volume for 1901 was going through the press during the first six months of 1902, and while defendant was in their employ, he continued to collect or to have furnished to him by plaintiffs a large number of books, papers, and documents similar to those used in the preparation of the 1901 volume, and that such material was collected by defendant as an employee of plaintiffs, and that they were entitled to the benefit of such material, and that not being able to arrange terms with defendant for the further preparation of the 1902 volume, defendant took possession and appropriated to his own use and threatened to use the same material in the preparation and publication of a rival register; and plaintiffs claimed an injunction and damages. Plaintiffs claimed as their property whatever was collected by defendant during his employment by plaintiffs and intended for use in preparation of the Annual Register for 1902.

J. H. Moss and C. A. Moss, for plaintiffs.

A. J. Russell Snow, for defendant.

TEETZEL, J.:—Upon the evidence, defendant was justified in concluding that plaintiffs did not intend to publish

a 1902 edition, and defendant was free to collect material necessary for him as an editor to prepare the volume for that year, and the fact that defendant was in the employment of plaintiffs from 1st January, 1901, to 27th June, 1902, engaged in completing the 1901 register, did not disentitle defendant during that time to collect such material on his own account and to store it temporarily on plaintiffs' premises, and to take it away with him at the end of his engagement, provided he did not take away any material belonging to plaintiffs. I find that before action defendant returned to plaintiffs all material to which they were entitled, and defendant was at liberty to make a contract with another publisher for the publication of a register for 1902, and to use in connection therewith any material collected by him for that year except the material already returned to plaintiffs. If defendant had been employed to make even preliminary preparations for the 1902 edition, and had in pursuance thereof collected the material, defendant could be restrained from using such material to his own advantage or against the interest of his former employer: Lamb v. Evans, [1893] 1 Ch. 218 but, in view of the facts found, that case is not applicable here; and defendant was free to equip himself as an editor to prepare for publication of the 1902 edition, either in anticipation of a possible new arrangement with plaintiffs or with a view of exploiting the project with another publisher.

Action dismissed with costs.

TEETZEL, J. JULY 28TH, 1903.

TRIAL.

MANLEY v. ROGERS.

Ship—Vessels Moored to Dock—Negligent Fastening—Damage by One to Another—Inevitable Accident.

Plaintiffs were the owners of the tug "Mizpah," and defendants were the owners of a steam dredge with scows, etc. On 27th October, 1902, plaintiffs had their tug anchored, and also moored to the east dock, in the harbour at Meaford, where defendants were operating their plant; defendants had also moored to the same dock, a short distance to the north of plaintiffs' tug, one of their scows, and to this, along its outer side, another scow of defendants was fastened. During the early hours of the morning of the 28th, the force of the wind and sea parted the bow lines of these scows, and caused them to swing around westerly in the direction of plaintiffs' tug. Plaintiffs alleged that defendants so negligently and carelessly moored and fastened their scows that the lines broke, allowing the scows to swing around and strike the tug, forc-

ing it with such violence against the dock as to cause it to spring a leak and sink, causing damage to the tug, its equipment, etc.; and sought to recover damages therefor.

R. C. Clute, K.C., and J. S. Wilson, Meaford, for plaintiffs.

W. M. German, K.C., and G. H. Petit, Welland, for defendants.

TEETZEL, J: — The evidence as to the position of the scows when they were first seen after they broke away, and what happened when getting them in place, together with the marks on the dock and tug, satisfy me that the tug was sunk as a result of being violently struck by the scows, or one of them, causing her bow lines to break, and allowing her to swing around and bump her stern against the dock. I find that the tug was well moored in a place of safety, and no fault whatever could be attributed to plaintiffs; that the scows were moored between the tug and the mouth of the harbour in such a situation that in the event of their breaking away they would, in view of their great weight, be likely to do serious injury to the tug or other craft in the upper part of the harbour; that, while the scows were safely moored, as against ordinary contingencies in mild weather, the threatening storm with high wind on the 27th, blowing over a wide stretch of open water directly into the harbour, and from a quarter which bore most heavily upon the scows, which stood several feet above the water (all of which defendants' captain in charge had notice), made it necessary to strengthen the moorings, and, while the captain gave directions to have this done, it was not done, and the scows were not properly fastened, and by reason thereof broke away and caused the damage complained of; that the injury was not caused by sudden, unforseen, and uncontrollable circumstances, or inevitable accident; and that the occurrence could have been prevented by the exercise of ordinary care, caution, and maritime skill by defendants. In a case of this kind, to constitute inevitable accident, it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by the exercise of ordinary care, &c.: see The Marapesia, L. R. 4 P. C. 212; Marsden's Law of Collisions at Sea, pp. 7 and 8, and cases there cited. Judgment for plaintiffs for $600 with costs.

MEREDITH, C.J. JULY 29TH, 1903.

TRIAL.

ROBB v. SAMIS.

Vendor and Purchaser—Action by Purchaser for Rescission of Sale of Land—Misrepresentations—Knowledge of Purchaser—Evidence as to Falsity of Statements—Statements Made in Good Faith—Deceit—Damages.

Action to set aside the purchase alleged to have been made by plaintiff from defendants of an oil property in the county of Lambton for $14,000, and to recover the purchase money paid, on the ground that plaintiff was induced to make the purchase by untrue representations of defendants as to the nature and condition of the property and the quantity of oil which it had produced and was then producing, or to recover damages for false and fraudulent representations. The agreement for the purchase was in writing, and was dated the 1st October, 1902. The purchasers named in it were plaintiff and G. A. McGillivray & Co. The purchase was completed about the 23rd October, 1902, by a conveyance to plaintiff "in trust." The representations which plaintiff alleged were untrue were contained in the following letter:—"Sarnia, Ont., Aug. 25th, 1902. G. A. McGillivray, Esq., Petrolia. Dear Sir: Replying to yours of 23rd, re Marthaville property; this property consists of 103 acres and about 60 wells, averaging about 160 barrels per month. The pumping rig and equipment throughout are among the best in the territory and installed by us with a view of developing the whole place, as there is room for double the number of wells. But Mr. Mackenzie's death, necessitating the winding-up of his estate, has deterred us from developing. The extensive gravel deposit on the lot is a considerable factor in the earnings of the property; also pasturage brings in about $100 per season, as there is abundance of water there all the year round. The property is inexpensive to run, as there is gas connection from the wells to the furnace, supplying about half of the fuel, also pipe connections to the Tanking Co., avoiding all teaming of oil. The production holds very steady, having reached the fixed minimum. Our price for the property, including horse and tools and casing, pumps, etc., on the place, is $15,000 net, and open only for immediate acceptance, as other buyers are inquiring about it. Yours truly, C. Mackenzie & Co., per Geo. S. Samis." The alleged misrepresentations of which plaintiff complained were: (1) That the wells averaged about 160 barrels per month; (2) that the equipment of the property was in a good state of repair; (3) that the gas supply furnished one-half the fuel consumed on the property; (4) that the production of

oil had reached a fixed minimum; (5) that the production held very steady.

W. R. Riddell, K.C., and I. Greenizen, Petrolia, for plaintiff.

A. B. Aylesworth, K.C., and W. R. P. Parker, for defendants.

MEREDITH, C.J.:—In dealing with the case it must not be treated as one in which the purchaser was ignorant of the nature of the property for the purchase of which he was negotiating. McGillivray, who was associated with plaintiff in the purchase, was well acquainted with the business of producing oil and with oil lands, and knew the property about which he and plaintiff were negotiating. The statement that the property consisted of 103 acres and about 60 wells averaging about 160 barrels per month, does not mean that the actual production in each month had been about that quantity; the statement was not untrue if the wells were capable of producing a quantity of oil averaging about 160 barrels per month, but, owing to leaks and shutting down for repairs or other causes, that quantity had not been or was not then being produced. The actual production for the twelve months preceding that in which the letter was written was at the rate of almost 152 barrels per month, and if the period were carried back three months further, the average per month would be within a small fraction of 160 barrels per month. The statement as to the average production was, therefore, not untrue in fact, but if it was, it was honestly made and without any intent to deceive, and not recklessly, and it would, therefore, form no ground for an action of deceit, nor is there ground for recission, as plaintiff, after knowledge of the untruth, and with his eyes open, went on and completed the purchase. Statements (4) and (5) also were not untrue in the sense in which they were made and understood by plaintiff and McGillivray. The untruth of the statement as to the condition of the equipment, if such a statement in respect of it as is alleged had been made, which is not proved, is not supported by the evidence, and, even if it had not been in a good state of repair, plaintiff saw the condition in which it was, before making his bargain. Statement (3) was made by defendants in good faith and under the belief that it was true, and not recklessly, and plaintiff has not satisfactorily shewn that it was untrue in fact. It is not what the condition of things has been since the purchase that is to be looked at. The question is, did the letter correctly state the condition as it existed at the date thereof? The fact that since plaintiff has been in possession the gas

supply has furnished but a comparatively small part of the fuel consumed is a circumstance to be considered, but no more. Action dismissed with costs.

BRITTON, J. JULY 30TH, 1903.

TRIAL.

McDONALD v. McDONALD.

Deed—Action to Set Aside Conveyance of Land—Dispute as to Execution by Person since Deceased—Conflicting Evidence.

Action to set aside and remove from the registry an alleged conveyance of 42 acres of the north half of the west half of lot 21 on the east side of Point Ann lane, in the township of Thurlow. The instrument impeached bore date 18th July, 1902, and purported to have been made by George McDonald in consideration of natural love and affection and one dollar, to his son Donald McDonald, defendant. George McDonald made his will on 13th February, 1903, devising this land to his daughter Jane for life, with remainder to all his children equally. He died on the 24th February, 1903. At the time he made his will he appeared to have thought himself the owner of this land. It was not shewn that he had lost his memory or that he was not capable of doing business. The duplicate of the impeached conveyance, produced from the registry office, had no seal upon it, and its appearance indicated that it never had a seal. The original, when produced in court by defendant, had a mark indicating that a small seal had some time or other been attached, but not opposite to where deceased's name was written. Defendant and his solicitor both swore to the existence of seals upon both documents at the time of execution. The execution purported to be by deceased as a marksman, his name being written by defendant's solicitor. The evidence as to deceased being at the solicitor's office in Belleville on the day sworn to by defendant, was conflicting.

A. B. Aylesworth, K.C., for plaintiffs.

E. G. Porter, Belleville, for defendant.

BRITTON, J., held, that, as the solicitor and the defendant had given their evidence in the most positive way as to the due execution of the deed by the deceased on the day of its date, they could not be mistaken, and the deed must be affirmed unless the Court could find the solicitor and the defendant guilty of conspiracy, forgery, and perjury, whereas the witnesses for plaintiffs who spoke of the occurrences of the 18th July might possibly be mistaken. Action dismissed without costs.

JULY 30TH, 1903.

DIVISIONAL COURT.

ROGERS v. TOWN OF PETROLIA.

Way—Bridge Across Ditch—Defective Condition—Misfeasance—Nuisance—Injury to Person Using Highway.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., dismissing an action brought by husband and wife to recover damages for personal injuries to the wife on the 4th January, 1901, by reason of alleged negligence of defendants in regard to the condition of North street, in the town, near the intersection of Sadie street. Along the northerly side of North street there was a ditch and a small bridge or means of crossing it. It was charged that this bridge or crossing was provided by defendants, and that it was so negligently constructed and so out of repair that it broke down when the wife stepped upon it, and that she fell and sustained severe injuries. Plaintiffs thus placed the claim upon the neglect of defendants to keep the street in proper repair pursuant to the statutory obligation. It appeared, however, at the trial, that the notice required by statute to be given to defendants had not been given, and that the action had not been brought within three months after the accident, as required by statute. The statement of claim also charged that defendants made large excavations and ditches at the place where the accident happened, and the said excavations and ditches were so negligently made and improperly protected, and the bridge or crossing was so negligently and insufficiently constructed and kept in repair by defendants, that the wife, by reason of the said acts and negligence of defendants, fell through the bridge or crossing, when lawfully using the same, into the ditch, and sustained severe injuries, etc.—thus charging defendants with having constructed the drain and neglected to provide a proper bridge or crossing over it for the safety and convenience of the public, and permitting the same to be so out of repair that it constituted a nuisance on the highway and was dangerous to the public.

The appeal was heard by MEREDITH, C.J., and FERGUSON, J.

A. B. Aylesworth, K.C., for plaintiffs.

G. F. Shepley, K.C., for defendants.

FERGUSON, J.:—If plaintiffs were right in making this charge against defendants and should prove their allegations, they could succeed in the action, notwithstanding the

statutory provisions requiring notice and limiting the time for bringing the action: Bathurst v. McPherson, 4 App. Cas. 256; Sydney v. Bourke, [1895] A. C. 403. There was evidence that it was not defendants, but plaintiffs' predecessor in the occupation of their dwelling, who put the bridge over the ditch. The bridge consisted of a couple of inch boards laid upon and nailed to a scantling on each side of the ditch, which was 2½ or 3 feet deep. There was evidence that employees of defendants cleaned out the ditch at the proper season of the year more than once, and while so engaged took up and relaid the little bridge. There was no evidence that defendants actually excavated or dug the ditch. It cannot be found on the evidence that defendants by their acts created a nuisance on the street and neglected to take proper care of it. No act of misfeasance was shewn for which defendants can be held responsible.

MEREDITH, C.J., agreed with the opinion of Ferguson, J., and was also of opinion that the defective condition of the bridge, and not the ditch, was the proximate cause of the injury. It was unnecessary to determine whether the limitation provision of sec. 606 (1) of the Municipal Act is applicable to a liability arising from misfeasance of defendants. See McGregor v. Harwich, 29 S. C. R. at p. 144; Rowe v. Leeds and Grenville, 13 C. P. 515.

Appeal dismissed with costs.

MEREDITH, J. JULY 31ST, 1903.

CHAMBERS.

REX. v. GILMORE.

Criminal Law—Prosecution for Crime—Right of Private Prosecutor to Take Part in Proceedings.

W. H. Bartram, London, for the private prosecutor, moved ex parte for a certiorari.

MEREDITH, J.:—The accused was charged with the crime of perjury. The private prosecutor was anxious to conduct, or that counsel retained by her should aid in the conduct of, the prosecution. Neither party desired or was willing that this should be done. The proper Crown officer undertook, for the King, the prosecution, and, as the applicant alleged, refused to allow other counsel to conduct, or take part in the conduct of, the prosecution. This motion was launched for the purpose of having the prosecutor's wishes given effect to.

Although it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, nor, indeed, bound by any judgment that may be made in it. He may, with the consent of the proper authorities, proceed in the name of the Sovereign; but against the will of both parties he has no power over, or voice in, the proceedings. For these reasons, apart from any others, the motion is dismissed.

MEREDITH, J. JULY 31ST, 1903

CHAMBERS.

RE BRAY.

Will—Legacies—Mortmain and Charitable Uses Act.

Motion by executors under Rule 938 for an order declaring the construction of a will.

MEREDITH, J.:—The sole question was whether two legacies were made void by the mortmain and charitable uses enactments. They were not made void, but were removed from the effect of such laws by the Mortmain and Charitable Uses Act, R. S. O. 1897 ch. 12—see sec. 8—to which enactment the restrictions of part 2 of the Mortmain and Charitable Uses Act, 1902, 2 Edw. VII. ch. 2 (O.), and R. S. O. 1897 ch. 333, are expressly made subject—see sec. 7. The legatees are entitled to the legacies. Costs out of the fund in the usual way.

MEREDITH, J. JULY 31ST, 1903.

CHAMBERS.

RE BRADLEY.

Devolution of Estates Act—Sale of Lands by Administrator—Inaccessibility of Heirs-at-Law—Consent of Official Guardian—Inquiries.

Motion under Rule 972 for a direction to the official guardian to approve of a sale of certain lands made by the applicant as administrator of his deceased brother's estate.

T. G. Meredith, K.C., for the applicant.

F. W. Harcourt, official guardian.

MEREDITH, J.:—The heirs-at law are the brothers and sisters and nephews and nieces, and none of them is under any disability, but some of them are not easily accessible. The sale was made for the purpose of distributing the

estate. There are practically no debts. . . . The approval is required by sec. 16 of the Devolution of Estates Act, as amended by 63 Vict. ch. 17, sec. 17 (O.) . . . Where there are heirs or devisees not competent to concur, or competent to concur but who do not, the approval must be had. . . . This is a case in which the concurrence of all has not yet been sought, because of the delay and expense which that would cause. . . . On the facts of this particular case the proper course to be now pursued is for the official guardian to make the usual inquiries, and if no good reasons are advanced or discovered for withholding his approval, it should be given. Costs out of estate.

MEREDITH, J. JULY 31ST, 1903.

WEEKLY COURT.

RE CANADIAN PACIFIC R. W. CO. AND ASSELIN.

Receiver—Equitable Execution—Property Sought to be Reached—Business Debts—Shares in Foreign Corporation—Life Insurance Policy.

Motion by Oscar Asselin, claimant in a carriers' interpleader, under sec. 58, sub-sec. 9, of the O. J. Act, for an order appointing him receiver of the estate of one Cleghorn, against whom he had recovered judgment in the interpleader proceedings, for the purpose of realizing his debt.

W. J. Elliott, for the applicant.

W. N. Tilley, for the judgment debtor.

MEREDITH, J.:—The applicant's claim is, in effect, that he be appointed a sort of general assignee, for his own benefit only, of substantially all his debtor's property and earnings, and that the debtor be obliged to carry on business so that the applicant may have the earnings until his debt is satisfied. . . . The provision of the Judicature Act that a receiver may be appointed in all cases in which it shall appear to the Court to be just and convenient that such an order should be made, was intended, so far as it applies to such a case as this, merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had before the fusion of law and equity been exercised by the Court of Chancery alone. See Harris v. Beauchamp, [1894] 1 Q. B.

801; O'Donnell v. Faulkner, 1 O. L. R. 21; Central Bank v. Ellis, 27 O. R. 583; In re Harrison and Bottomley, [1899] 1 Ch. 465.

Of the three classes of property specially aimed at by this application, none can be reached by that mode of enforcing debts. What is sought as to debts due and that may become due to the debtor is virtually an assignment of them to the creditor for his own use until his debt shall be paid. The enactment gives no such right. The debt sought to be reached must be a specific one, and if one which can be reached by attachment, the ordinary remedy must be adopted. See Harris v. Beauchamp, supra.

Nor can capital stock in a foreign corporation be so reached; there is no means by which a sale and transfer of it could be enforced.

As to the life assurance contract, the weight of argument and of judicial opinion is also against the applicant. It is not a fully paid up policy. No means of meeting the premiums is suggested. It is not shewn that the underwriters would or could be compelled to accept the premiums from the applicant if he were willing to pay them. To give effect to the application might be but to avoid the policy. It can hardly be convenient or just that that should be done or risked. See Alleyne v. Davey, 5 Ir. Ch. 56; Re Sargeant's Trusts, 7 L. R. Ir. 66; Canadian Mutual L. and I. Co. v. Nisbet, 31 O. R. 562; Weeks v. Frawley, 23 O. R. 235.

The Court will not appoint a receiver where the effect may be merely the loss of the property or right; nor will a receiver be appointed unless it be reasonably clear that benefit will be derived from the appointment. See Hamilton v. Brogden, [1891] W. N. 36, 33 Sol. J. 206: O'Donovan v. Goggin, 30 L. R. Ir. 579; I v. K. W. N. 1884, p. 63; Manchester v. Parkinson, 22 Q. B. D. 173. The policy cannot be considered to come within the meaning of the words "any money or bank notes . . . and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money," contained in sec. 18 of the Execution Act. It is not of the same nature as those mentioned, even if it can in any sense be deemed a security for money.

Application refused, with costs to be set off against the judgment.

TEETZEL, J. JULY 31ST, 1903.

TRIAL.

HOEFFLER v. IRWIN.

Partnership—Oral Contract—Purchase and Sale of Timber Limits—Interest in Land—Statute of Frauds—Part Performance—Finding of Jury.

Plaintiff, alleging that he was a partner of defendant, sued for one-half of a one-third interest in the profits realized by defendant in the purchase and sale of certain timber limits in the township of Meritt. Plaintiff alleged an oral agreement. Defendant denied the agreement, and pleaded the Statute of Frauds. Before action defendant realized a profit on the sale of the limits, and if plaintiff were entitled to share therein the amount would be $2,392.35. The question whether the oral agreement was made was submitted to the jury, who found in favour of plaintiff's contention.

W. H. Hearst, Sault Ste. Marie, for defendant, asked for a nonsuit, contending that the agreement was one respecting an interest in land, citing Handy v. Carruthers, 25 O. R. 279; McNeil v. Haines, 17 O. R. 479.

J. H. Clary, Sudbury, for plaintiff, cited Archibald v. McNerhanie, 29 S. C. R. 564.

TEETZEL, J., without deciding whether the agreement in this case was governed by either of the authorities cited, held that, the jury having found the agreement as contended for by plaintiff, there was such a part performance on the part of plaintiff as would entitle him to compel defendants to carry out the agreement on his part. Judgment for plaintiff for $2,392.85 with costs.

TEETZEL, J. JULY 31ST, 1903.

TRIAL.

TAYLOR v. CONLON.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Defects in Machinery of Mill—Contributory Negligence.

Action under the Workmen's Compensation for Injuries Act for damages for injuries sustained by plaintiff while in the employment of defendants in their saw mill in the district of Manitoulin.

A. J. Keeler, for plaintiff.

A. G. Murray, Gore Bay, for defendants.

TEETZEL, J.:—Plaintiff was employed as a general labourer, with the particular duty of keeping the boiler supplied with fuel. Among the machinery in the mill was a circular rip saw fixed in a table. This saw was operated by a belt connecting a mandrill on the saw-shaft with a pulley on a counter-shaft, and on the counter-shaft was a split pulley, one-half slack and the other fixed, and this was connected by a belt with a pulley on the main shaft. On 6th June, 1901, while plaintiff was attempting to rip a strip off a piece of board about six inches wide by two and a-half feet long, his left hand came in contact with the saw, resulting in the loss of two fingers. The plaintiff alleged as defects in the machinery, the absence of a guard or hood over the saw; that the belt connecting the counter-shaft with the main shaft did not fit properly; and the absence of a guide to prevent the belt slipping from the tight to the loose pulley and vice versa. . . . A guard or hood enclosing the upper part of the saw was not practicable without great inconvenience and delay in operating the saw. The guide described in the evidence as a "strap guide" was not a necessary and reasonable device that defendants were bound to attach. . . . The slipping of the belt did not endanger the operator, assuming that he possessed ordinary knowledge and skill in using the saw, and it did not in fact induce plaintiff's injury.

But, even if these defects were proved, plaintiff must fail on the ground of contributory negligence. He was not employed to operate the saw and was not experienced at that work; his attempt to operate it on this occasion was purely voluntary, though he had not been forbidden to use it; he should have used the guide or fence, instead of attempting to guide the board with his left hand; trying to saw a short and narrow piece of board without the guide was an unskillful and careless act, and was the proximate cause of his misfortune, which could have been avoided by the exercise of ordinary care on his part.

Action dismissed with costs.

TEETZEL, J. —— JULY 31ST, 1903.

TRIAL.

LAFAVE v. LAKE SUPERIOR POWER CO.

Landlord and Tenant—Mining Lease—Reservation of Rents—Royalties—Implied Condition as to Commencement of Mining Operations—Costs

Action to recover rents under a mining lease from plaintiffs to defendants. The lease was dated 16th August, 1902, and made in pursuance of the Act respecting short

forms of leases. By it plaintiffs granted and demised to defendants the lands therein described for five years, with exclusive and very full powers to carry on mining operations. Defendants covenanted to pay plaintiffs for the use of the lands, by way of rent therefor, certain specified sums per ton as royalty according to the grade of ore taken from the lands. The defendants also covenanted that the combined royalties should amount to at least $60 per month for the first four months of the lease, and at least $75 per month ever after during the currency of the lease or any renewal thereof, and agreed to pay the lessors the said sum per month, whether or not the royalties on the ore mined should amount to so much, provided, however, that if in any month or months the royalties should be deficient and not amount to the payment reserved, and in the succeeding month or months the royalties should be in excess of the reserved payment, such excess and so much thereof as should be necessary to make good such deficiency might be retained by the lessees until such deficiency should be reimbursed to the lessees in full. No mining whatever had been done upon the lands.

J. H. Clary, Sudbury, for plaintiffs.

J. E. Irving, Sault Ste. Marie, for defendants, contended that they were not liable to pay rent or royalty unless mining operations were actually carried on upon the premises.

TEETZEL, J. :—Such a condition is not to be inferred. The covenants entered into by defendants as to payment of the minimum rent each month are plain and unequivocal, and not subject to any condition express or implied. Palmer v. Wallbridge, 15 S. C. R. 650, applied and followed. The amount in question being within the jurisdiction of the District Court, and all rents accrued having been paid after action brought, the costs should be limited. Judgment for plaintiffs for $40 costs without any right of set-off.

MEREDITH, J. JULY 31ST, 1903.

TRIAL.

BRADLEY v. GANANOQUE, ETC., CO.

Water and Watercourses—Injury to Lands by Overflow of Water—Dam—Flood Gates—Negligence—Cause of Injury.

Each of the numerous plaintiffs sued in respect of an entirely separate and independant cause of action, but all of them alleged that each cause of action arose from the one wrong of defendants. The claims were for damages for injury to growing crops by backing flood waters over plaintiffs' land. These lands were naturally low lying, and so

situated that they must be more or less affected by flood waters at certain seasons. Defendants right to maintain their dam at its present height was not disputed Plaintiffs rested their case upon a judgment in a former action by which it was considered, in effect, that defendants had the right to so maintain it except during freshets and periods of overflow of the dam, and that at such periods it was the duty of defendants, by means of proper waste gates, to lower the water to the level of the dam with reasonable expedition. There was no complaint that the height of the dam exceeded that provided for in the judgment. What was complained of was, that defendants did not during the spring freshet of 1901, by means of proper flood gates, lower the water to the level of the dam with reasonable expedition. The only questions were: (1) Have defendants been guilty of a breach of their duty in this respect—have they been guilty of negligence? (2) Was such negligence the cause of plaintiffs' injury?

R. T. Walkem, K. C., and G. F. Shepley, K.C., for plaintiffs.

G. H. Watson, K.C., and W. B. Carrol, Gananoque, for defendants.

MEREDITH, J.:—The onus of proof is on plaintiffs, and they fail in both branches.

There is no contention that at the time in question defendants failed to take usual care, the usual means for expeditiously lowering the water; there is no evidence in support of such a contention, if made. Then ever since the judgment, now 16 years, with no greater care taken, there has never but once before been any complaint such as that now in question. Upon that other occasion the defendants paid some comparatively small amount, saying, as plaintiffs now assert, that they had that year employed a new caretaker, and that possibly through his inexperience some injury might have been caused, but, as defendants now assert, merely to buy peace. When for fourteen years the like course has been pursued without injury, without complaint, it can hardly be said that defendants were negligent in following in the old footsteps.

After extraordinary efforts to make a case against defendants, the most that the expert witnesses for plaintiffs have been able to say was that, in their opinion, if another flood gate were made in the dam, and if the gates were open for a greater length of time before floods, plaintiffs would have been saved some of the flooding from which their low lying lands suffered.

Against that opinion an equal, if not greater, array of professional gentlemen, with more positiveness, asserted that such means would be useless, and any more gates a source of great danger to the structure.

In these circumstances, how can anyone say that defendants were guilty of negligence? . . .

Upon the whole evidence, my finding, if necessary, is that the precautions suggested by plaintiffs' witnesses would not have saved plaintiffs from the losses they sustained to any appreciable extent. But, if it could be found that the weight of opinion or argument was with plaintiffs, how can it be said that defendants were guilty of negligence in not discovering and adopting such expedients, in a case where for so many years their own plan worked satisfactorily?

There seems to me to be no doubt, upon the whole evidence, that plaintiffs' losses in the year in question are not appreciably attributable to defendants, but were caused by heavy and repeated or long continued floods, and the exceedingly wet weather following them: and this is borne out by the fact that like losses were sustained by other farmers whose lands were not so low lying and are situated so that they would not have been effected by the defendants' dam.

A lesser branch of plaintiffs' claim is the complaint that defendants put a temporary dam across the stream above the dam in question, to enable them to repair the latter, and that they left part of the temporary structure there, and that it had to some extent caused the plaintiffs damage by holding the water back too long upon their lands.

There is really nothing substantial in this claim. The plaintiffs' witness who knew most about the matter, because he had worked on the temporary dam and helped in its removal when the work of repair was finished, long before the flood which injured plaintiffs, said that there was a small quantity of brush and some loose gravel that was not or may not have been removed. But it is very plain that that would not pen back any great body of water, but would be swept away, if any real obstruction, at the first rush of the flood. So that it was no matter of surprise to hear the testimony of the witnesses for the defence that after a very careful search they were unable to find any such obstructions or any part of the temporary structure now remaining.

The plaintiffs' case wholly fails, and must be dismissed, and dismissed with costs, if defendant asks costs.