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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 7TH, 1919.

*JARVIS v. LONDON STREET R.W. CO.

Street Railway—Injury to Passenger Alighting from Car—Invitation to Alight while Car Moving—Opening of Exit-door before Stopping Place Reached—Question whether Motion Perceptible—Question for Jury—Nonsuit—New Trial—Evidence—Statement of Conductor Made after Accident—Inadmissibility—Not Part of Res Gestæ.

Appeal by the plaintiff from the judgment of ROSE, J., at the trial, dismissing the action at the close of the plaintiff's case, on the ground that there was no evidence of negligence to go to the jury.

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

R. G. Fisher and W. G. R. Bartram, for the appellant.

J. M. McEvoy and R. H. G. Ivey, for the defendants, respondents.

MIDDLETON, J., in written reasons for judgment, said that the plaintiff was a passenger on a car of the defendants going eastward upon Dundas street. Nearing the place where he intended to alight, he signalled the conductor to stop the car. He complained that the exit-door of the car was opened before the car had actually stopped; and that, relying upon the opening of the door being, in the circumstances, an invitation to alight, he stepped on the pavement, and, owing to the motion of the car, was thrown down

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

and injured. The place where the plaintiff attempted to alight and fell was about 100 feet before the stopping place was reached.

The only evidence was the story of the plaintiff himself. After giving the signal, he said, he went to the back of the car, to the exit-door; he stood for a short time; the conductor then opened the door, and he (the plaintiff) immediately stepped out. He admitted that, if he had looked before stepping out, he probably would have noticed that the car was in motion; he did not look, but, upon the opening of the door, at once stepped out. From the way in which he fell, he thought that the car must have been travelling at about 5 miles per hour.

Gazey v. Toronto R.W. Co. (October, 1917), 40 O.L.R. 449, and Grand Trunk R.W. Co. v. Mayne (November, 1917), 56 Can. S.C.R. 95, considered and distinguished.

The door was opened when the car was not at a stopping place; and the question to be solved was, whether the car was moving so fast that the motion would be perceptible to any reasonably careful passenger. This apparent motion would negative the invitation to alight which might be implied from the opening of the door. This question was one for the jury. There might be a case where the motion was obviously so apparent that no reasonably careful passenger would think of alighting; but, in the circumstances here disclosed, there was a question of fact to be passed upon by the jury—one that could not be summarily dealt with by the Judge.

There should be a new trial, and the costs of the former trial and of this appeal should be costs to the plaintiff in the cause.

It was said that, immediately after the plaintiff had fallen, the conductor alighted and helped him to his feet, and that then a conversation took place in which the conductor said: "It was my fault; I should not have opened the door, but I thought the car had stopped." The conductor was not a person whose statement would bind the defendant company; he was not the agent of the company for the purpose of making any admissions. His statement, if admissible in evidence at all, should be received only on the ground that it formed part of the res gestæ; and it must be borne in mind that, if it could be received when tendered by the plaintiff, it would be equally admissible if tendered by the defendants. The statement said to have been made by the conductor formed, in truth, no part of the res gestæ—it was a mere narrative or discussion anent a thing then past. The principle upon which such evidence can be admitted is clearly stated in Garner v. Township of Stamford (1903), 7 O.L.R. 50. The trial Judge excluded evidence which the plaintiff proposed to give of the conductor's statement, and the ruling was right.

If the plaintiff really desired to rely upon the statement made by the conductor, the conductor could be called; and, if he did not admit having made the statement, evidence might be given attacking his veracity in that respect.

BRITTON and LATCHFORD, JJ., concurred.

RIDDELL, J., dissented, for reasons stated in writing.

New trial ordered (RIDDELL, J., *dissenting*).

FIRST DIVISIONAL COURT. FEBRUARY 10TH, 1919.

*RICHARDSON v. McCAFFREY.

Appeal—Order of Judge in Chambers Refusing to Stay Reference pending Appeal to Supreme Court of Canada—Supreme Court Act, R.S.C. 1906 ch. 139, sec. 76—Effect of—Interlocutory Order —Judicature Act, sec. 25—Leave to Appeal not Given—Rule 507 —Appeal Dismissed as Incompetent.

Appeal by the defendant from an order of MEREDITH, C.J.C.P., in Chambers, reversing an order of the Master in Chambers whereby the proceedings upon a reference were stayed pending an appeal by the defendant to the Supreme Court of Canada from the order of the Appellate Division affirming the judgment by which the reference was directed.

The action was for foreclosure, and the judgment was the usual foreclosure judgment.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. J. Scott, K.C., for the appellant.

A. C. Heighington, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the contention of the appellant was that the effect of sec. 76 of the Supreme Court Act, R.S.C. 1906 ch. 139, was automatically to stay proceedings in the action after security for costs had been allowed; and, if that was not the case, the Court, in the exercise of its discretion, ought to stay the proceedings until the appeal to the Supreme Court of Canada had been heard and determined.

The respondents objected that the appeal was not competent

because the order appealed from was interlocutory, and leave to appeal had not been obtained (Rule 507).

The Court was of opinion that the order was interlocutory within the meaning of sec. 25 of the Judicature Act, R.S.O. 1914 ch. 56: Holmested's Judicature Act, 4th ed., p. 117; Stewart v. Royds (1904), 118 L.T. Jour. 176; Gibson v. Hawes (1911), 24 O.L.R. 543.

If there were any doubt as to the order being interlocutory, the Court should determine that it was interlocutory: sec. 25 (2).

If the contention as to the effect of sec. 76 of the Supreme Court Act was well-founded, it was doubtful whether an order to stay was necessary—it might yet be open to the appellant to invoke the section upon the reference, and, if the referee decided to proceed with the reference, to apply for a direction to him to refrain from so doing until the appeal to the Supreme Court of Canada had been heard and determined. As to the effect of the section, see In re Weatherley, [1918] W.N. 366, 367. But no opinion is expressed as to the effect of the section; and it is suggested that, even if the contention of the appellant is right, the order appealed from, being unreversed, might be an answer to any such application as mentioned.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 10TH, 1919.

*WADE v. JAMES.

Assignments and Preferences—Assignment for Benefit of Creditors—Sale of Assets of Insolvent Estate by Assignee to Creditor—Inspector of Estate—Resale to Wives of Assignors—Fraud upon Estate—Judgment Directing Account of Profits—Right to Set up Illegality of Transaction as Defence to Action upon Promissory Notes Given for Part of Price upon Resale.

Appeal by the defendants from the order of MASTEN, J., ante 77, 43 O.L.R. 614, dismissing an appeal from the report of the Master in Ordinary made in pursuance of a reference directed by the judgment at the trial.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., for the appellants.

A. C. McMaster, for the plaintiff, respondent.

Meredith, C.J.O., read the judgment of the Court. He said that by the judgment at the trial it was referred to the Master to take an account "of the profits, if any, made or to be made by the defendants out of the purchase of the insolvent estate" of Krieger Brothers.

The real transaction was a fraud upon the estate, to which fraud the wives of the Kriegers were parties; and the position taken by the appellants was, that they could not, by reason of the illegality of the transaction, recover the balance remaining due on the promissory notes made by the wives of the Kriegers, and that therefore that balance was not profits made or to be made, within the meaning of the judgment. That position was well taken.

Although the general rule is, that a person cannot set up the illegality of a transaction to which he was a party, he may, on grounds of public policy, in a case such as this, set up the illegality of the transaction.

The question had not been determined adversely to the appellants by the judgment of the trial Judge.

The decision of Masten, J., proceeded upon the hypothesis that there was simply a sale by the plaintiff to James and a sale by James to the wives of the Kriegers; and, upon that hypothesis, the Court did not differ from the conclusion of Masten, J.; but that was not the real nature of the transaction.

The appeal should be allowed and the report of the Master varied by striking out the sum of $1,739.25 allowed for profits and $163.17 allowed for interest.

Neither party should have against the other the costs of the appeals to Masten, J., and to this Court.

Appeal allowed.

First Divisional Court. January 10th, 1919.

*COWAN v. FERGUSON

Injunction—Breach of Covenant—Restriction upon Use of Land—Erection and Operation of Foundry—Obsolete Restriction—Change in Character of Neighbourhood—Status of Plaintiff to Invoke Restriction—Acquiescence—No Damage or Likelihood of Damage Shewn.

Appeal by the plaintiffs from the judgment of Latchford, J., 14 O.W.N. 303, dismissing the action with costs.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

R. McKay, K.C., and Gideon Grant, for the appellants.
M. A. Secord, K.C., for the defendant, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said, after stating the facts, that the case was one for the application of the principle applied by Latchford, J., that where, after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the Court will not enforce the covenant.

Reference to Sobey v. Sainsbury, [1913] 2 Ch. 513, at pp. 529, 530.

It was contended for the appellants that this principle is applicable only when the party seeking to enforce the covenant or his predecessor in title had been a party to making the changes; but the contrary was emphatically stated in the case referred to.

The judgment of Latchford, J., might also be supported upon the ground that the appellants, knowing that the respondent was erecting a building to be used as a foundry, acquiesced in what he was doing and even made suggestions as to the mode of constructing part of the building.

It was conceded, besides, that the appellants had not sustained and would not in the future sustain any injury from the use to which the respondent had put his property.

The case was not one in which the Court should interfere to enforce the covenant.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. FEBRUARY 10TH, 1919.

*TRUSTS AND GUARANTEE CO. LIMITED v. GRAND VALLEY R.W. CO.

Railway—Bondholders—Coupon-holders—Distribution of Fund in Court being Proceeds of Sale of Railway—Priorities—Mortgage—Operation as to After-acquired Property—Rental—Charge on Railway Lands—Discharge upon Payment out of Fund—Costs—Payment out of Fund.

Judgment was given on the appeal in this case on the 20th December, 1918: see ante 247.

On the 27th January, 1919, the case was (again) mentioned to the Court (MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS,

JJ.A.) upon the question of the effect of the mortgage of the 30th May, 1902, in respect of the franchise within the city of Brantford.

A. W. Ballantyne, for the bondholders of 1907.

A. C. McMaster and J. H. Fraser, for the bondholders of 1907 who exchanged 1902 bonds.

W. S. Brewster, K.C., for the bondholders of 1902.

M. H. Ludwig, K.C., and J. R. Roaf, for coupon-holders.

W. T. Henderson, K.C., for the Corporation of the City of Brantford.

The judgment of the Court was read by HODGINS, J.A., who said that power to acquire the Brantford Street Railway, or the franchise under which it was operated, was not in fact possessed by the Grand Valley Railway Company until 1906, but reliance was placed upon the mortgage of the 30th May, 1902, as being wide enough to include property afterwards acquired, although there was no power to acquire it at the time the mortgage was given.

The words of the mortgage were comprehensive enough, and the principle to be applied was covered by what was said in Collyer v. Isaacs (1881), 19 Ch.D. 342, 351.

The provisions of the mortgage were wide enough to cover the right or franchise of the Brantford Street Railway Company when that company passed into the control of the Grand Valley Railway Company, and it should be held that the mortgage ranked now in priority to that of 1907 upon the Brantford Street Railway, as well as upon the railway running from Brantford to Galt.

Reference to Holroyd v. Marshall (1862), 10 H.L.C. 191, 211.

The rental of a piece of property not taken over by the Corporation of the City of Brantford when it acquired the railway, was claimed by one Smith. The rental of this piece was charged upon the right of way; and, as the statute set out distinctly the various incumbrances subject to which the city corporation was buying the railway, this rental, charged upon the right of way, should be paid or discharged out of the purchase-money; and this should be referred to the Master to be dealt with in his distribution of the fund in Court.

Upon the question of the costs of the coupon-holders, it was suggested that the trial Judge had given costs out of the fund to the parties whom he had directed to represent the classes, and that they should not, on appeal, be ordered to pay costs of the other parties, in view of the importance of the questions raised and the amount involved.

On the whole, probably, justice would be done by directing that, upon the question of the priority of the coupon-holders, they

should not be required to pay the costs of the other parties. These costs might fairly be taxed and paid out of the fund, as the whole dispute had arisen because of the dealing of the company itself, which had produced a good deal of confusion among the respective classes of bondholders. The order for costs out of the fund should cover the costs of all parties other than the two representative coupon-holders, and should include both previous arguments and that of the 27th January, 1919. And the appeal of the coupon-holders should be dismissed without costs.

FIRST DIVISIONAL COURT. FEBRUARY 13TH, 1919.

*WEYBURN TOWNSITE CO. LIMITED v. HONSBURGER.

Company—Incorporation of Saskatchewan Company by Memorandum of Association under Saskatchewan Companies Act—Incapacity to Carry on Business beyond Limits of Province—Effect of Subsequent Declaratory Legislation upon Transactions beyond Limits—Contract for Sale of Land in Saskatchewan by Company to Person in Ontario—Contract Executed in Saskatchewan by Company and by Purchaser in Ontario—Carrying on Business beyond Limits—Ratification of Previous Oral Arrangement—Agreement not Void because Executed by Purchaser in Ontario—Action by Company for Specific Performance—Defence—Misrepresentations—Failure to Prove.

Appeal by the plaintiff company and cross-appeal by the defendant from the judgment of MASTEN, J., 43 O.L.R. 451, ante 49.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. N. Tilley, K.C., and J. W. Payne, for the plaintiff company.

A. Courtney Kingstone, for the defendant.

MEREDITH, C.J.O., in a written judgment, said that he agreed with the conclusion of the learned trial Judge that the appellant company by its incorporation acquired no capacity to carry on its business beyond the limits of the Province of Saskatchewan, and that the declaratory legislation of 1917 could not give validity to transactions entered into beyond those limits and before the passing of the Act.

He also agreed with the disposition made of the defence based on misrepresentations, which was the subject of the cross-appeal.

The learned Chief Justice was unable, however, to agree with the conclusion of Masten, J., as to the effect on the transaction in question of the decision of the Judicial Committee in Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566, 26 D.L.R. 273.

The view of Masten, J., was that the agreement of the parties was made between certain agents of the plaintiff company and the defendant, and that it was made in this Province; that, although the agreement was not enforceable by reason of the provision of the Statute of Frauds, the appellant ratified it and evidenced it by executing under its corporate seal the agreement sued on.

The agreement sued on was executed by the plaintiff company in the Province of Saskatchewan, and was forwarded by mail to Gayman, who acted for the plaintiff company at Jordan, and he procured the execution of it by the defendant at that place.

The learned Chief Justice was unable to see how the fact that the oral arrangement was made at Jordan, or the fact that a promissory note for part of the purchase-money was given by the defendant to the plaintiff company's agent there, or that the note was renewed through and payments on it were received by the plaintiff company's agent there, bore upon the question which was to be determined, viz., whether or not the agreement sued on was invalid because in entering into it the plaintiff company was carrying on business beyond the limits of the Province of Saskatchewan; nor how the execution of the agreement sued on could be treated as a ratification of the oral arrangement that had been entered into at Jordan. Assuming, as Masten, J., held, that the plaintiff company had not capacity to enter into that arrangement, how could there be any ratification of it? It was a void proceeding and incapable of ratification.

It followed that the question mentioned was the real and only question to be determined.

The learned Chief Justice could not bring himself to believe that the decision in the Bonanza Creek case was intended to apply to such a transaction.

The plaintiff company executed the agreement in Saskatchewan, and by it was bound to sell the land with which it dealt to the defendant on the terms which the agreement contained; and the fact that it was executed by the defendant in Ontario did not affect the question.

Surely it could not be that, if the plaintiff company had received by mail an offer sent from another Province, and by letter written

and posted in Saskatchewan had accepted the offer, and had afterwards prepared and executed there an agreement in terms of the offer, and had posted it to the purchaser for execution by him, and he had executed it in the other Province, and had returned it by mail to the plaintiff company, it must be held that the transaction was entered into beyond the limits of Saskatchewan and was therefore a nullity. Or, if it had been that the defendant had made his oral arrangement in Saskatchewan, and it had been carried out as the transaction he did enter into was carried out, it could not be that the mere fact that the written agreement had been sent by the defendant and it had been executed by him there, would, by the application of the doctrine of the Bonanza Creek case, make the agreement void.

The appeal should be allowed, the judgment appealed from set aside, and there should be judgment for the plaintiff company for the relief claimed, with costs to the plaintiff company here and below.

It must not be understood from what the Chief Justice had said that he was of opinion that the plaintiff company had not capacity to make, in another Province, a contract reasonably necessary or incidental to the proper or successful carrying out of its provincial object of selling lands in Saskatchewan. That question did not arise, and the Chief Justice expressed no opinion as to it.

MACLAREN, MAGEE, and FERGUSON, JJ.A., concurred.

HODGINS, J.A., agreed in the result for reasons stated in writing.

Appeal allowed and cross-appeal dismissed.

HIGH COURT DIVISION.

ROSE, J., IN CHAMBERS. FEBRUARY 10TH, 1919.

POWERS v. TERWILLIGER.

Surrogate Courts — Action to Establish Will — Removal into Supreme Court of Ontario—Surrogate Courts Act, sec. 33—Issue as to Jurisdiction—Dispute as to Domicile of Testator—Testamentary Capacity — Undue Influence — Application to Separate Issues for Purposes of Trial.

Motion by the defendants for an order, under sec. 33 of the Surrogate Courts Act, removing this cause from the Surrogate

Court of the County of Prince Edward into the Supreme Court of Ontario; and also for an order separating the issues, and directing that the issue as to the jurisdiction of the Ontario Court to admit to probate the will propounded by the executors, which was a later will than one which had already been admitted to probate in Florida, where it was said the testator was domiciled at the time of his death, be tried before the issues as to testamentary capacity, undue influence, etc.

R. McKay, K.C., for the defendant A. C. Terwilliger.
J. Y. Murdoch, for the defendant Ella Brock Terwilliger.
W. N. Tilley, K.C., for the plaintiffs, executors.

Rose, J., in a written judgment, said that the application for the removal of the cause was manifestly a proper one, and was not opposed. The usual order should be made.

An order separating the issues ought not to be made at this stage. If there was really an issue as to domicile, it was probable that some at least of the witnesses who would be called upon that issue would also be called upon the other issues; and there was no evidence before the learned Judge upon which he could say with certainty that the one issue could be tried with much less expense than would be involved in the trial of the whole action. On the other hand, if the issue as to jurisdiction was tried separately, and the executors succeeded upon it, and then the other issues were tried out at a later time, the result would be delay and great additional expense. Many examinations for discovery had already been had, and the case seemed to be nearly ripe for trial.

In all the circumstances, it seemed to be much better that nothing should be done now to fetter the discretion of the Judge at the trial, who, when the parties with their witnesses were before him, would be in a better position to determine whether both issues or only one of them ought to be tried.

There should be no order on this branch of the application.

The costs of the application should be costs in the cause, unless otherwise ordered by the trial Judge.

LENNOX, J. FEBRUARY 10TH, 1919.

RE LATIMER.

Will—Construction—Gift of Land and Personalty to Son Subject to Payment to Daughter of Sum of Money and Giving her a Home while Unmarried—Death of Son shortly after Death of Testatrix—Provision for Daughter Charged on both Realty and Personalty — Condition — Forfeiture — Impossibility of Literal Performance.

Motion by Agnes O. Latimer for an order determining a question of the proper construction of a clause in the will of Hester Ann Latimer, deceased.

The motion was heard in the Weekly Court, Ottawa.

J. Arthur Jackson, for the applicant.

H. A. Stewart, K.C., for W. H. Latimer and Margaret Augusta Latimer.

LENNOX, J., in a written judgment, said that the testatrix died on the 4th June, 1916. The clause to be interpreted was:—

"I give and bequeath to my . . . son Frederick Morton Latimer all the real estate and personal effects and chattels . . . that I may die possessed of for his own use and benefit forever subject to the payment by him to my . . . daughter Margaret Augusta Latimer . . . of $1,000 to be paid to her in 10 years without interest, and also to give her a home with him wherever he may reside as long as she remains unmarried."

At the time of her death the testatrix was the owner of a farm.

Frederick Morton Latimer died on the 18th October, 1918, seised of all the rights conferred upon him by the will of the testatrix, and without having made a will. Letters of administration of his estate had been granted to his widow, the applicant. He left no children. His next of kin appeared to be his brother, W. H. Latimer, and his sister, Margaret Augusta Latimer. The latter was an adult at the date of the execution of the will.

The question for determination was, whether the clause of the will quoted created a charge upon the real and personal estate devised and bequeathed to Frederick; and the learned Judge was of opinion that it did. This applied both to the $1,000 and the provision for a home.

Reference to Johnston v. Denman (1889), 18 O.R. 66; Withers v. Kennedy (1833), 2 My. & K. 607.

It was contended for the applicant that the provision for "a home" did not constitute a charge; or, if it did, that the gift of

a home depended upon the fulfilment of a condition subsequent—the continuance of the life of Frederick—and was defeated or forfeited by his death. But the will did not say "during the life of Frederick," but "as long as she remains unmarried."

There was not, in any proper sense, a condition. If there was, the subsequent and unforeseen impossibility of literal performance avoids, not the bequest, but the condition.

Reference to Graham v. Bolton (1885), 9 O.R. 481; Perry v. Walker (1866), 12 Gr. 370.

If the condition is one that ought not to be exacted or the language is indefinite, the condition is ignored: Clarke v. Darraugh (1883), 5 O.R. 140; Hamilton v. McKellar (1878), 26 Gr. 110.

The Courts construe gifts of this character liberally in favour of the named beneficiary and to avoid forfeiture: Hamilton v. McKellar, supra; Macklem v. Macklem (1890), 19 O.R. 482; Oliver v. Davidson (1882), 11 Can. S.C.R. 166, dissenting judgments of Ritchie, C.J.C., and Henry, J.; and cases cited.

The event determining or forfeiting the interest or bequest must be something brought about by the act or omission of the beneficiary, something which he can control, or for which he is at least in a legal sense, responsible: In re Macklem and Commissioners of Niagara Falls Park (1887), 14 A.R. 20; Halsbury's Laws of England, vol. 28, paras. 1163, 1164, 1170.

Order declaring the charge in favour of Margaret. Costs of all parties out of the estate of Frederick Morton Latimer.

MASTEN, J., IN CHAMBERS. FEBRUARY 13TH, 1919.

RE TORONTO HAMILTON AND BUFFALO R.W. CO. AND McCALLUM.

Railway—Expropriation of Land—Railway Act, R.S.C. 1906 ch. 37, sec. 196—Appointment of Arbitrator to Determine Compensation—Application for—Dispensing with Service of Notice of Application on Persons Having Interest—Appointment of Board of three Arbitrators.

Application by the railway company, under sec. 196 of the Railway Act, R.S.C. 1906 ch. 37, for the appointment of a person to be sole arbitrator for determining the compensation to be paid by the railway company in respect of lands in the township of Sherbrooke, in the county of Haldimand.

J. A. Soule, for the railway company.

J. C. Payne, for the executors of Lachlan Campbell and for Josephine McCallum and Georgina McCallum.

Masten, J., in a written judgment, said that the trustees of the estate of Thomas C. Street, deceased, who were interested in the lands, were not represented. No notice of this motion had been served upon them, though notice of expropriation had been given to them by advertisement pursuant to the order of Britton, J., dated the 3rd December, 1918.

Application was now made to dispense with publication of notice of this application on the Street trustees, pursuant to sub-sec. 3 of sec. 196 of the Railway Act.

Having regard to the circumstances disclosed, the learned Judge thought he should exercise his discretion by dispensing with the publication of notice so far as the present application was concerned, but the dispensing with such notice should have no bearing upon the question of proper notice being given to all parties of the sittings of the arbitrators.

The applicants, relying upon the decision in Re Toronto Hamilton and Buffalo R.W. Co. and Burke (1896), 27 O.R. 690, asked for the appointment of a single arbitrator. Since that case was decided in 1896, the statute had been amended by inserting, at the end of sub-sec. 1 of sec. 196, a clause providing that the Judge shall, at the request of either party on such application, appoint three arbitrators to determine such compensation, one of whom may be named by each party on such application.

In view of this amendment, the learned Judge said, he would accede to the contention of the executors and trustees and appoint three arbitrators to determine the compensation.

The parties did not, on the application, name the arbitrators whom they chose, and, if necessary, the matter might be further mentioned for this purpose.

Costs of the application should be costs in the arbitration proceedings.

Clute, J. February 14th, 1919.

*RE WILKITES.

Infant—Custody—Contest between Parents as to Custody of Child of 11 Years—Infants Act, R.S.O. 1914 ch. 153, sec. 2—Interests of Infant—Misconduct of Father—Custody Awarded to Mother.

Upon the application of Sylvester Wilkites, the father of the infant Vitalia Wilkites, for the delivery to him by his wife, Antonia

Wilkites, the mother, of the person of the infant, an issue was directed to be tried "to decide as to whether the said Sylvester Wilkites should have the custody of his daughter Vitalia."

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

George Wilkie, for Sylvester Wilkites.

McFadden, for Antonia Wilkites.

Clute, J., in a written judgment, said that the infant was 11 years old. The parents were Lithuanians. They were married in Glasgow, and lived there for some years. The father came to Canada 7 years ago; the mother and child, then 4 years of age, followed the father shortly afterwards. There had been differences between the husband and wife for some years. He accused her of immoral conduct.

The evidence failed to satisfy the learned Judge that the woman was leading an immoral life. On the contrary, he was satisfied, from the whole evidence, that she was a hard-working, sober woman, trying to do the best she could for her child. The difficulties in the family had arisen largely from the husband's jealousy; he watched every turn and move she made, and imputed everything to misconduct and disloyalty upon her part. The husband was guilty of gross misconduct towards his wife in language and in act. He beat her on several occasions without cause and put her in continual fear of him, and it was this and his imputations against her that caused her to leave his home, taking the child with her.

In the circumstances, she was justified in leaving. She and her child were boarding in a comfortable house with reputable people. There was no suggestion that this was not so. The child was well clothed and well cared for, attended school, church, and Sunday-school; she was evidently a bright child, in perfect health.

The husband was living in a boarding-house, and had made no special provision to take the child.

The child seemed perfectly contented and happy, and wished to remain with her mother.

In the learned Judge's opinion, it was much better for the child that she should remain with the mother, at her tender age, than be placed under the care of her father; and, unless the law declared that the father was, upon the facts, entitled to the custody of the child, in disregard of the child's interests, she should be allowed to remain in the charge of her mother.

Reference to sec. 2 of the Infants Act, R.S.O. 1914 ch. 153; In re A. and B. Infants, [1897] 1 Ch. 786; Re Scarth (1916), 35 O.L.R. 312; Re Mathieu (1898), 29 O.R. 546; In re Storey,

[1916] 2 I.R. 329, 336; In re Agar-Ellis (1878), 10 Ch.D. 49, 71; Re Taggart (1917), 41 O.L.R. 85.

The learned Judge, following In re A. and B. Infants, was of opinion that he was not precluded from awarding the custody to the mother; and, accordingly, decided the issue in favour of the mother and against the father's claim to the custody of the child.

ROSE, J. FEBRUARY 15TH, 1919.

RE WALMSLEY.

Will—Construction—Residue of Estate Divided into Shares and Shares Given to Named Persons—Codicil Directing that Sum be Deducted from the Shares of each of three Legatees—Sums Deducted to be "otherwise Applied" by Executors—No Direction Given as to Disposition of Sums Deducted—Declaration of Intestacy as to these Sums.

Motion by the executors of the will of Thomas Walmsley, deceased, for an order determining a question as to the effect of a codicil.

H. S. White, for the executors.

J. B. Clarke, K.C., for the executor of the will of James Walmsley, deceased.

R. J. Gibson, for David Charles Walmsley, Jesse Harvey Walmsley, and Arthur Cook Walmsley.

J. M. Bullen, for Alice Godwin and all other residuary legatees except those represented by R. J. Gibson.

A. B. Armstrong, for W. J. Landrill and other next of kin of the testator.

ROSE, J., in a written judgment, said that, by the 41st clause of the will, made in February, 1912, the testator directed his trustees, after making a certain provision for his wife and providing for the legacies, bequests, and dispositions mentioned in the earlier clauses, to divide the residue of his estate into 30 equal shares; and by succeeding clauses he disposed of those 30 shares. By clause 51, 3 shares were to be held in trust for David Charles Walmsley; by clause 52, 3 of them were to be held in trust for Jesse Harvey Walmsley; and, by clause 53, 3 of them were to be held in trust for Arthur Cook Walmsley.

By a codicil made in March, 1912, he directed: "Out of the moneys payable in respect of the shares in the 51st, 52nd, and 53rd

paragraphs of said will mentioned, the sum of $6,000 is to be deducted by my executors and otherwise applied by them—$2,000 out of the shares in the 51st paragraph mentioned, $2,000 out of the shares in the 52nd paragraph mentioned, and $2,000 out of the shares in the 53rd paragraph mentioned."

The codicil did not prescribe the other disposition of the $6,000 which the executors were to make; and the question was as to the effect of the clause quoted.

The learned Judge—after stating and discussing the contentions of counsel, and referring to Hall v. Warren (1861), 9 H.L.C. 420; Ramsay v. Shelmerdine (1865), L.R. 1 Eq. 129, 134; Edwards v. Findlay (1894), 25 O.R. 489; Theobald on Wills, Can. ed., pp. 42-45; Halsbury's Laws of England, vol. 28, pp. 572-574; Freel v. Robinson (1909), 18 O.L.R. 651—said that the question was, whether it was quite certain that the testator did not intend that the three legacies should be reduced in amount unless he effectively transferred to some other beneficiary the money kept back from the three legatees. To the learned Judge's mind, it was not certain, and his decision was that each of the three took $2,000 less than the amount given to him by the will: see Quinn v. Butler (1868), L.R. 6 Eq. 225; Tupper v. Tupper (1855), 1 K. & J. 665.

The remaining question was: What becomes of the $6,000; does it fall back into the residue for division amongst the residuary legatees other than those from whose shares it is taken, or is there an intestacy as to it?

Reference to Skrymsher v. Northcote (1818), 1 Swanst. 566, 570; In re Palmer, [1893] 3 Ch. 369, 372, 373, which states the rule thus: "If a testator, after bequeathing his residuary estate in shares, simply revokes a gift of one of those shares, he takes that share out of the residue, and that share, being taken out of it, must, unless otherwise disposed of, be treated as undisposed of." In re Whiting, [1913] 2 Ch. 1, does not lay down anything opposed to this statement.

There should be an order declaring that each of the three legatees takes $2,000 less than the amount payable in respect of the shares given by the will in trust for him; and that there is an intestacy as to the $6,000.

The costs of all parties should be paid out of the $6,000, those of the executors being taxed as between solicitor and client.

RE LEE AND SANAGAN—SUTHERLAND, J.—JAN. 29.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Default of Purchaser under Previous Agreement—Power of Sale on one Month's Default without Notice—Exercise of, by New

Sale—Rights of First Purchaser and his Assignees.]—Motion by A. L. Sanagan, purchaser, for an order, under the Vendors and Purchasers Act, declaring that a good title to land, the subject of a contract of purchase and sale, had not been shewn. The vendor, W. Cecil Lee, had agreed to sell to one W. S. Hayes, and the contract contained the following power of sale: "And the vendor shall be at liberty on one month's default without notice or upon two weeks' notice to enter upon (and whether any entry has been made or not) resell and convey the said lands to any other purchaser." There were subsequent assignments of the agreement, which were registered. Hayes made default, and the agreement between Lee and Sanagan was entered into under the above power of sale without notice. It was objected that there should be a quit-claim from the purchaser under the first contract of sale and from all the parties interested. The motion was heard in the Weekly Court, Toronto. SUTHERLAND, J., decided that, default having been shewn for a longer period than one month, the vendor was entitled to sell under the power of sale without notice. There should be an order that the objection had been answered. No order as to costs. J. Edmund Jones, for the purchaser. T. D. Leonard, for the vendor.

MASSON V. SHAW—LATCHFORD, J.—FEB. 15.

Vendor and Purchaser—Agreement for Sale of Land—Assignment of another Agreement—Exchange—Fraud—Findings of Fact of Trial Judge—Dismissal of Action—Costs.]—Action for a declaration that the plaintiff is entitled to a conveyance, free from incumbrances, of lot 18, block 176, plan R 3, Second avenue, Saskatoon; that an assignment of a certain agreement was fraudulent and void and should be set aside; and for damages. The action was tried without a jury at Toronto. LATCHFORD, J., in a written judgment, discussed the evidence, made certain findings of fact, and stated his conclusion that the action failed. The action should be dismissed with costs payable by the plaintiff to the defendant, less the costs thrown away by the adjournments had at the request of the defendant. As the plaintiff did not reside within the jurisdiction of the Court, the $1,000 now in the hands of the plaintiff's solicitors should, subject to any lien which they might have, be made available for the payment of such costs. Wallace Nesbitt, K.C., and W. H. Lockhart Gordon, for the plaintiff. D. L. McCarthy, K.C., for the defendant.

COUNTY COURT OF THE COUNTY OF SIMCOE.

VANCE, Co. C.J. FEBRUARY 1ST, 1919.

RE BARRIE BOARD OF EDUCATION.

Public Schools—Election of Trustees—Neglect to File Declarations of Qualification—Election Set aside on Summary Application under sec. 64 of the Public Schools Act—Sec. 61 (4) of Act—Sec. 69 (4) and (6) of the Municipal Act.

At the annual election of school trustees, four were to be elected; six persons were nominated; all went to the poll; and four were declared elected.

None of the six filed a declaration of qualification.

A complaint was made by one Wallwin under sec. 64 of the Public Schools Act, R.S.O. 1914 ch. 266.

W. A. J. Bell, K.C., for the applicant.

W. A. Boys, K.C., for the persons declared elected.

VANCE, Co.C.J., set aside the election and ordered a new election, on the ground that the election held was invalid because declarations of qualification were not filed.

By sec. 61 (4) of the Public Schools Act, the provisions of the Municipal Act, respecting the time and manner of holding the election, including the mode of receiving nominations for office, and the resignation of persons nominated, vacancies, and *declarations of qualification and office*, shall *mutatis mutandis* apply to the election of school trustees.

By sec. 69 (4) of the Municipal Act, R.S.O. 1914 ch. 192, which the learned Judge held to be made applicable by sec. 61 (4) of the Public Schools Act, in an urban municipality every candidate for any municipal office shall on nomination-day, or before 9 o'clock p.m. on the following day, file in the office of the clerk a declaration, Form 2, i.e., a declaration of qualification. And, by sub-sec. (6), if the declaration is not filed within the time mentioned in sub-sec. (4), the candidate in default shall be deemed to have resigned, and his name shall be removed from the list of candidates and shall not be printed on the ballot-paper.

In the Public Schools Act of 1909, 9 Edw. VII. ch. 89, sec. 61 (4) is in the same words as that section in the revised statute, except that the earlier enactment has "declarations of office," instead of "declarations of qualification and office."

Probably the change has been generally overlooked.