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APPELLATE DIVISION.

JULY 2ND, 1915.

*ROSE v. MAHONEY.

Principal and Agent—Claim for Commission on Sale of Land—Failure to Establish Agency — Recognition of Agent by Name and Promise to Pay Commission Inserted in Sale Contract without Knowledge of Vendor—Absence of Negligence.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of York in favour of the plaintiff for the recovery of $406.25 and costs, in an action for commission on a sale of land.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

E. Meek, K.C., for the appellants.

E. R. Sugarman, for the plaintiff, respondent.

KELLY, J., in a considered judgment, said that the evidence convinced him that the relationship which existed between the plaintiff and the defendants' solicitor, who drew the contract between the defendants as vendors and the purchaser, and who inserted the name of the plaintiff as the defendants' agent and a promise to pay him a commission, was such that any right the plaintiff might have to a commission, or to a share of a commission (apart from anything that might be deduced from the mention of the plaintiff's name), was against the solicitor, and not against the defendants. There was no evidence that the defendants employed the plaintiff, or that their solicitor had any authority to appoint him as their agent, or to delegate to him or to

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

any other person the authority given to the solicitor to sell. Indeed, there was positive evidence to the contrary.

With respect to the recognition of the plaintiff as their agent and the promise to pay commission, the defendants' minds never went with their act; when they signed, they believed that they were signing what it had been arranged that they should sign and what they expected and had reason to expect the solicitor would send them for signature, namely, an acceptance of an offer to purchase made by an intending purchaser, on terms discussed and agreed upon with the solicitor, and which he was instructed to embody in the contract. If negligence were material—which was doubtful in view of Carlisle and Cumberland Banking Co. v. Bragg, [1911] 1 K.B. 489, the defendants could not be said to have been negligent.

And, under these conditions, the defendants could not be held liable: Foster v. Mackinnon (1869), L.R. 4 C.P. 704; Lewis v. Clay (1897), 67 L.J.Q.B. 224; and the Bragg case, supra.

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

LATCHFORD, J., concurred, for reasons briefly stated in writing.

FALCONBRIDGE, C.J.K.B., and MAGEE, J.A., also concurred.

Appeal allowed.

HIGH COURT DIVISION.

BRITTON, J. JUNE 28TH, 1915.

*LAVERE v. SMITH'S FALLS PUBLIC HOSPITAL.

Negligence — Injury to Patient in Hospital — Carelessness of Attendants—Public Charitable Institution — Liability — Care in Selection of Attendants—Master and Servant.

Action for damages for negligence causing injury to the plaintiff, who was operated upon in the defendants' hospital, and who, by the reason of carelessness of the doctors or nurses or some one in attendance, was severely burnt by a hot brick or bricks in the bed to which she was removed after the operation and when she was unconscious. The doctors were not paid by the defendants; the nurses were; and the contract between the plaintiff and defendants was for a room, board, and attendance, for which she paid $9 a week.

The action was tried without a jury at Brockville.

J. A. Hutcheson, K.C., for the plaintiff.

G. H. Watson, K.C., and J. A. Hope, for the defendants.

BRITTON, J., reviewed the facts in a written opinion, and said that the contract was not that the defendants would nurse the plaintiff, but that they would give her reasonable care and attention, under the directions of her medical advisers, and comforts and conveniences, including food, under the direction of the hospital authorities.

The hospital is a charitable institution. The defendants are a corporate body under the name of "The Smith's Falls Public Hospital," but there is no share capital. Defendants in such a position may be held liable for damages resulting from negligence of employees and may have to pay: Mersey Docks Trustees v. Gibbs (1866), L.R. 1 H.L. 93.

Reference also to Hall v. Lees, [1904] 2 K.B. 602; Evans v. Mayor, etc., of Liverpool, [1906] 1 K.B. 160; Hillyer v. Governors of St. Bartholomew's Hospital, [1909] 2 K.B. 820.

The contract in the present case was—and the only duty to the plaintiff was—that the defendants should in good faith use due care and skill in selecting the medical staff and in employing and permitting nurses in training and other assistants to work for and attend to patients in the hospital.

The relationship of master and servant did not exist between the defendants and the physicians and nurses and other attendants assisting at an operation—no matter whether the attending physicians and nurses were paid by the defendants or not.

The hospital was well managed—the directors were not guilty of any negligence in selecting any of the official staff or attendants.

Action dismissed, without costs.

BRITTON, J., IN CHAMBERS. JUNE 28TH, 1915.

*RE LAW.

Executors and Administrators — Decease of Foreigner Having Property in Ontario—Letters of Administration Obtained from Ontario Court—Moneys Realised from Ontario Property—Payment by Ontario Administrator to Foreign General Administratrix — Interest of Infants — Trustee Act, R.S.O. 1914 *ch.* 121, *sec.* 38 (2).

T. P. Law lived in Chicago, Illinois, and died there, intestate, leaving an estate of about $20,000. Letters of administration of his whole estate were granted to his widow by the Probate Court at Chicago. A small part of his estate being in London, Ontario, letters of administration limited to that part of his estate were granted by the Surrogate Court of the County of Middlesex to the Canada Trust Company, who realised the assets, paid the expenses thereout, and had in hand a balance of $744.76, which was demanded by the administratrix at Chicago.

The Ontario administrators applied for leave to pay this sum into Court and for payment out to the administratrix, or for leave to pay directly to her.

The persons entitled to the estate, after payment of debts and liabilities, were the widow and three infant children.

F. P. Betts, K.C., for the applicants.

F. W. Harcourt, K.C., Official Guardian, for the infants.

BRITTON, J., said that the Official Guardian called attention to sec. 38 (2) of the Trustee Act, R.S.O. 1914 ch. 121; but this was not the final passing of the accounts; it was in fact only a collection by the Ontario administrators for the home administratrix, to enable the latter to pass the accounts and make final distribution.

Every material fact was established by the applicants; proof and papers having reference thereto had been filed on this application; and it appeared that the administratrix had given satisfactory security for all sums which might come to her hands belonging to the estate.

Order made allowing the applicants to pay the amount in theirs hands (less $5 costs to be paid to the Official Guardian) directly to the administratrix.

LENNOX, J. JUNE 28TH, 1915.

JOHNSTON v. HAYNES.

Fraud and Misrepresentation—Recovery of Moneys Obtained by —Statute of Limitations—Rescission—Amendment.

Action to recover a number of sums aggregating $29,000 paid by the plaintiff to the defendant, the plaintiff alleging false and fraudulent representations by which he was induced to pay over the money, and also to recover interest upon the sums from the dates at which they were respectively paid.

The action was tried without a jury at Toronto.
W. J. Elliott and H. D. Anger, for the plaintiff.
R. McKay, K.C., for the defendant.

LENNOX, J., in a considered judgment, found that every dollar of the total sum in question was obtained by the defendant from the plaintiff dishonestly and in pursuance of a fraudulent scheme, and upon material and false and fraudulent allegations knowingly made by the defendant with the intention to mislead; and that the plaintiff relied and acted upon these false statement, believing them to be true.

The defendant set up the Statute of Limitations, and contended that it ran against the plaintiff whether it was a case of undiscovered fraud or concealed fraud, and cited Dixon v. Jarvis (1839), 5 O.S. 694; Gibbs v. Guild (1882), 9 Q.B.D. 59 (C.A.); Osgood v. Sunderland (1914), 30 Times L.R. 530; and Oelkers v. Ellis, [1914] 2 K.B. 139.

The learned Judge pointed out the distinction between the common law and equity which existed before the Judicature Act; and said that as to all actions in which the Courts of law and equity had concurrent jurisdiction, as they had in an action such as this, the effect of the Statute of Limitations was, since the Judicature Act, to be governed by the law enunciated by Courts of equity; and the decision in Oelkers v. Ellis was in harmony with this.

This action was in effect for rescission, although the prayer of the statement of claim was not specifically for rescission; and an amendment should be permitted.

The Statute of Limitations did not avail the defendant, the whole basis of the action being fraud.

Reference was made to Imperial Gas Light and Coke Co. v. London Gas Light Co. (1854), 10 Ex. 39; Hunter v. Gibbons (1856), 1 H. & N. 459; Booth v. Earl of Warrington (1714), 4 Bro. P.C. 163; Hovenden v. Lord Annesley (1806), 2 Sch. & Ref. 607, 634; Barber v. Houston (1884), 14 L.R. Ir. 273; Armstrong v. Milburn (1885-6), 54 L.T.R. 247, 723 (C.A.); Molloy v. Mutual Reserve Life Insurance Co. (1906), 94 L.T.R. 756.

Judgment for the plaintiff with costs.

MIDDLETON, J., IN CHAMBERS. JUNE 28TH, 1915.

RE SCOTT v. SILVER.

Division Courts—Garnishee Summons—Liquidator of Company Made Garnishee—Personal Liability for Wages of Persons Employed by Liquidator in Carrying on Business of Company after Winding-up Order—Leave to Proceed against Liquidator—Necessity for—Question of Law for Judge in Division Court—Motion for Prohibition.

Motion by the garnishee in a plaint in the 3rd Division Court in the District of Kenora for an order prohibiting the Judge, the clerk, and the primary creditor from proceeding to enforce a judgment against the garnishee.

B. H. Ardagh, for the garnishee.

J. H. Spence, for the primary creditor.

MIDDLETON, J., delivering a considered judgment, said that the primary debtor was employed by the garnishee in the business of a company of which the garnishee was liquidator, and money was due to the primary debtor for wages when the garnishee summons was served. There was no question about the indebtedness of the primary debtor to the primary creditor nor as to the intedtedness of the garnishee to the primary debtor; but the garnishee had paid over the money to the primary debtor in defiance of the judgment directing the garnishee to pay it to the primary creditor.

Where a company is being wound up under the Winding-up Act, R.S.C. 1906 ch. 144, no action can be brought without the leave of the Court against the company in liquidation; but this refers to the indebtedness of the company at the date of the

winding-up order, and not to the obligations incurred by the liquidator in the course of the liquidation. It was said that leave should be obtained before suing the liquidator; but that was a matter of law, which the Judge in the Division Court had determined, and his decision could not be reviewed upon a motion for prohibition.

The liquidator's personal credit was pledged in his agreement with Silver: Burt Boulton & Hayward v. Bull, [1895] 1 Q.B. 276 (C.A.)

Motion dismissed with costs, payable by the liquidator, without prejudice to any right he may have to resort for indemnity to the assets of the company in liquidation.

MIDDLETON, J. JUNE 29TH, 1915.

RE BILTON.

Will — Admission to Probate — Subsequent Discovery of Pretended Codicils—Rejection by Executors as not Genuine—Duty of Executors.

Motion by the Canadian Red Cross Society for an order declaring that it is the duty of the executors named in the will of Naomi Bilton, deceased, to propound for probate two alleged codicils to the will, and transferring the proceedings from the Surrogate Court of the County of York to the Supreme Court of Ontario.

The testatrix by her will, dated the 6th February, 1912, and admitted to probate on the 10th June, 1914, gave substantially all her property to the University of Toronto, with certain devises over in the event of any attempt to convey the real estate to or permit its occupation by a departmental store.

By the earlier codicil, the land in Toronto, worth about $200,000, was given to one Armstrong as representing the Red Cross Society of Canada, "without any conditions as to the manner of disposal of the said real estate; by the later codicil, Armstrong was appointed the executor and trustee of the will and the two codicils.

The motion was heard in the Weekly Court at Toronto.

J. T. Small, K.C. for the applicants.

H. E. Rose, K.C., for the executors.

J. A. Paterson, K.C., for the University of Toronto.

MIDDLETON, J., said that the two documents purported to bear the signature of Naomi Bilton, but it did not in any way resemble her signature to the will—to judge from appearances, the two documents were signed, as to all the names, that of the testatrix and those of the witnesses, by the same hand.

The executors took the position that there was nothing to suggest that the documents had any genuineness whatever, and they declined to take the responsibility of involving the estate in litigation.

Counsel for the Red Cross Society sought to compel the executors to take the initiative, basing his argument upon the statement in Williams on Executors, 10th ed., p. 301: "If the executor, after probate, discovers any testamentary paper, he ought to bring it into the Court of Probate."

The learned Judge says that he is not now concerned with the validity of these documents, but he thinks it clear that it is not the duty of the executors to propound documents which they do not believe to be, and which are not shewn to be, testamentary.

Weddall v. Nixon (1853), 17 Beav. 160, and In re Speke (1914), 109 L.T.R. 719, cited by counsel for the applicants, considered.

Order declaring that it is not the duty of the executors to propound the alleged codicils for probate, but that it is their duty to distribute the estate under the authority of the grant of probate to them, unless the Red Cross Society or Armstrong, within a reasonable time, take proceedings to propound the codicils.

Costs reserved to be deal with after the result of any application for probate of the codicil is determined.

KELLY, J. JUNE 29TH, 1915.

*REX v. BATTERMAN.

Criminal Law—Conviction for Rape—Application by Convict for Stated Case—Refusal by Trial Judge—Evidence—Judge's Charge—Communication with Jury when Considering Verdict—Absence of Doubt.

Application by the defendant for a stated case.

The defendant was tried before KELLY, J., and a jury, at Owen Sound, on the 8th October, 1914, and was found guilty

of the offence charged—rape. It appeared at the trial that a letter was written, after the offence, by the solicitor for the prosecutrix and given to her husband to shew to the defendant, enclosed in an unsealed envelope addressed to the defendant; it was said that the letter was given to the defendant for perusal, was returned to the husband, and by him given back to the solicitor. It was not produced at the trial, nor was evidence given of its contents. In the charge to the jury, their attention was directed to this. While the jury were deliberating, the foreman sent to the Judge, by the Registrar of the Court, a note asking for the letter. The Judge instructed the Registrar to inform the jury that it was not possible to give them the letter; and the Registrar went to the jury-room for that purpose.

A stated case was asked for in respect of the following questions: (1) Was the Judge right in giving instructions or directions to the jury in the manner and by the means employed? (2) Was the Judge right in directing the jury that the letter was not evidence without pointing out that the fact as to the writing and delivery of the letter was proved, and also the facts as to how the letter was addressed? (3) Should the Judge have compelled the Crown to produce the original letter, or, on proof of its loss, have allowed secondary evidence of its contents to be given?

E. E. A. DuVernet, K.C., and D. C. Ross, for the defendant.
J. R. Cartwright, K.C., for the Crown.

KELLY, J., said that it had been held that a reserved case should not be granted unless the trial Judge has some doubt in the matter as to which it is suggested that a question be reserved: Regina v. Létang (1899), 2 Can. Crim. Cas. 505; Rex v. Brindamour (1906), 11 Can. Crim. Cas. 315; and in the present case he had no doubt about the propriety of refusing the application.

Willmont's Case (1914), 10 Cr. App. R. 173, cited by counsel for the defendant, distinguished.

Motion dismissed with costs.

MIDDLETON, J. JUNE 29TH, 1915.

*RE LUTHERAN CHURCH OF HAMILTON.

Church—Conveyance of Land to Trustees for—Appointment of New Trustees—Power of Trustees to Mortgage Land—Religious Institutions Act, R.S.O. 1914 *ch.* 186, *secs.* 7, 8, 16 (1), (2), 18—*Trustee Act.*

Motion by the trustees of the church for an order declaring that they had been duly appointed, and that, under the Religious Institutions Act, R.S.O. 1914 ch. 286, they had authority to mortgage lands held in trust for the Trinity Evangelical English Lutheran Church of Hamilton; or for an order under the Trustee Act appointing the applicants trustees and vesting the property in them.

The application was heard in the Weekly Court at Toronto.
Kirwan Martin, for the applicants.

MIDDLETON, J., said that on the 31st December, 1909, the land in question was conveyed to six persons described as "the trustees of the Trinity Evangelical English Lutheran Church of Hamilton." The trustees took the property as joint tenants, and not as tenants in common; but the conveyance did not define the trust nor make any provision for the appointment of new trustees. The church authorities wished to erect a new building, and for that purpose to raise money upon a mortgage. The trustees were not formally appointed as such by the congregation or otherwise, but at the time of the conveyance to them they held office as deacons in the church, and four of them were still deacons. At a meeting of the congregation on the 16th June, 1915, a by-law was passed providing that the deacons should not be regarded as trustees; and at another meeting on the 22nd June, 1915, after due notice, a resolution was passed approving and confirming the appointment of the six original trustees, confirming the appointment of two new trustees, and providing a mode of appointing successors to trustees hereafter.

The Religious Institutions Act appeared to be intended to enable difficulties such as those now arising to be satisfactorily solved without special legislation; referring to secs. 7, 8, 16 (1), (2), 18. All technical requirements of the Act as to notices of meetings and so forth having been complied with, the congre-

gation had ample power to appoint trustees and to determine the manner in which their successors should be appointed, and, upon this being done, the land, without conveyance, vested in the trustees so appointed.

The intention of the Legislature was, that the Religious Institutions Act should govern and control the appointment of trustees for religious institutions; and this by implication excludes the corresponding provisions of the general Trustee Act. If an order were made under the Trustee Act, doubt might be thrown upon many titles derived from proceedings under the other statute.

Order declaring that the property is now vested in the six present trustees, and that they have, under sec. 8 of the Religious Institutions Act, power to mortgage the said property.

MIDDLETON, J. JUNE 29TH, 1915.

*RE ARTHUR AND TOWN OF MEAFORD.

Municipal Corporations—Local Option By-law—Motion to Quash —Similar By-law Submitted to Electors and not Approved—Diversity of Judicial Opinion—Motion Referred to a Divisional Court—Judicature Act, R.S.O. 1914 *ch.* 56, *sec.* 32—*Irregularity in Service of Notice of Motion—Failure to File Affidavits in Time — Waiver — Solicitor's Slip—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 286—*Rules* 184, 298.

Motion by W. H. Arthur to quash a local option by-law passed by the Municipal Council of the Town of Meaford on the 16th February, 1914.

W. A. J. Bell, K.C., for the applicant.
W. E. Raney, K.C., for the town corporation.

MIDDLETON, J., said that the main attack upon the by-law arose from the fact that a similar by-law had been submitted to the electorate in 1913, and failed to obtain the necessary number of votes to permit of its being passed.

Reference was made to the proceedings in an action of Overholt v. Town of Meaford, in reference to a previous by-law, to Hair v. Town of Meaford (1914), 5 O.W.N. 783, the latter being a decision of MIDDLETON, J., upon a motion for an interim injunction. In view of the diversity of judicial opinion, it ap-

peared to be a proper case in which to adopt the course pointed out in sec. 32 of the Judicature Act, R.S.O. 1914 ch. 56; and the motion should, therefore, be referred to a Divisional Court.

It was objected that the motion was not made within the time limited by the Municipal Act. The notice of motion was served on the 13th March, 1915, which was within a year from the passing of the by-law; the affidavits were made in due time, but, by somebody's bungle, were not filed until the motion was set down on the 20th March. Rule 298 provides that the affidavits shall be filed before the service of the notice of motion. Section 286 of the Municipal Act, R.S.O. 1914 ch. 192, requires that the application shall be made within one year after the passing of the by-law; but it was contended that the notice of motion must be validly and regularly served within that time.

The learned Judge said that copies of the affidavits had been demanded, affidavits in answer and reply had been put in, and cross-examination had taken place. He declined to give effect to the objection, referring to Devlin v. Devlin (1871), 3 Ch. Ch. 491; Re Backhouse v. Bright (1889), 13 P.R. 117; Graham v. Sutton Carden & Co., [1897] 1 Ch. 761; Bank of Hamilton v. Baine (1888), 12 P.R. 439. The Rule which applied to this case was 184—not the Rule relating to an extension of time. There was an irregularity, but the proceedings were not void, and the irregularity should be ignored.

MIDDLETON, J., IN CHAMBERS. JUNE 30TH, 1915.

CREASOR v. BONSTELLE.

Practice—Substituted Service of Writ of Summons—Service by Mailing—Service Effective from Date of Mailing—Judgment—Regularity—Mortgage Action—Stay of Proceedings under Mortgagors and Purchasers Relief Act, 1915—*Condition of Payment of Nominal Sum for Costs.*

Appeal by the plaintiff from an order of the Master in Chambers setting aside the judgment in an action to recover mortgage-moneys.

E. H. Senior, for the plaintiff.
E. Meek, K.C., for the defendant.

MIDDLETON, J., said that the defendant made a mortgage calling for payment of interest and some small instalments of principal. On these falling due, the mortgagee brought this

action in the Supreme Court of Ontario for the full amount—a course that was probably forced upon him because of the holding that the acceleration clause operates automatically, so that the Statute of Limitations would run, and the whole amount was due, and the demand could not be split. The defendant was not able to pay in full, but paid small sums on account; and, although ample warning was given, the defendant appeared to be unable to avail himself of the extended time offered by the plaintiff's solicitor.

An order was made for substituted service of the writ of summons by mailing—on inadequate material. Service was made by mailing, there was no appearance, and the plaintiff signed judgment. That judgment was not irregular; but the Master set it aside, on the theory that the service by mailing became operative only when the letter reached the defendant. That was a wrong view. The service was made as soon as the act authorised was done and service was completed.

The Master's order setting aside the judgment should stand; and an order should be made staying the action, under the Mortgagors and Purchasers Relief Act, 1915, upon payment of $15 to represent the entire costs of the action and the motion under the Act.

MIDDLETON, J., IN CHAMBERS. JUNE 30TH, 1915.

*RE STANDARD LIFE ASSURANCE CO. AND KEEFER.

Insurance—Life Insurance—Policies Declare to be for Benefit of Wife and Children—Only one Child Surviving Insured—Rights of Children of Deceased Children—Insured Dying after Act of 1912—*Insurance Act, R.S.O.* 1914 *ch.* 183, *secs.* 170, 171 (9), 178 (7).

Thomas C. Keefer, who died on the 7th January, 1915, had two insurances upon his life, each for £1,000 sterling, in the Standard Life Assurance Company, effected in 1850 and 1851. The Act which first enabled an insured to declare policies to be for the benefit of his wife and children was passed in 1865. In 1866, and within the period of one year limited by that Act, the insured declared each of the policies to be for the benefit of his wife and children, without naming them. He was twice married; his first wife died in 1870, and his second in 1906. Only

one child, Charles H. Keefer, survived the insured; the two infant children of his youngest daughter survived him; and the two adult children of his son Ralph also. The insurance company paid to Charles H. Keefer one-third of the insurance-moneys; and paid two-thirds into Court.

Charles H. Keefer applied for payment out to him of the two-thirds also.

H. M. Mowat, K.C., for the applicant.

J. R. Meredith, K.C., for the Official Guardian, representing the infants.

The adult grandchildren were notified, but did not appear.

MIDDLETON, J., pointed out that, by sec. 170, the Insurance Act, R.S.O. 1914 ch. 183, applies to all contracts of insurance of the person and declarations whether made before or after the passing of the Act. Section 171 should be read as making provision for the case of beneficiaries other than preferred, and sec. 178 as dealing with the rights of preferred beneficiaries. Only by thus reading these sections can the Act be understood.

Section 171(9) provides that where there are more beneficiaries than one, and some beneficiaries predecease the insured, the surviving beneficiaries take; but, under sec. 178 (7), in the events that here happened, the grandchildren take.

Comment on the singular situation arising from the fact that the provision of sec. 178(7) by which the children of a preferred beneficiary predeceasing the insured take their parent's share was introduced only in 1912; so that, if the insured had died in 1912, the grandchildren would have taken nothing.

There is no good reason for not giving the statute its full effect; it is retrospective legislation of the most radical and drastic type.

Re Stewart Estate (1912), 4 O.W.N. 293, referred to.

Order made for payment out of the money in Court to the grandchildren; the shares of the adults forthwith, and of the infants as they attain majority.

Costs of all parties of the motion to be paid out of the fund.

MIDDLETON, J. JUNE 30TH, 1915.

RE GOUINLOCK.

Will—Construction—Devise—Life Estate with Power of Sale and Right to Encroach upon Corpus—Vendor and Purchaser—Right of Life-tenant to Convey.

Application by John Gouinlock, executor of the will of Charlotte Gouinlock, deceased, for an order determining certain questions arising upon the terms of the will in the course of the administration of the estate of the deceased.

The testatrix, after some bequests of personalty, gave her husband, the executor, all the residue of her estate, real and personal, "to have and to hold for his sole use and benefit in such manner as he considers best during his lifetime and after his death any of my estate then remaining shall be divided between my children as follows: to my daughter Edith May if she be at that time unmarried . . . four-tenths of my estate . . . and to my son Walter Fairgrieve three-tenths . . . and to my son James Muir three-tenths . . . but should my daughter Edith May be at that time married then my estate shall be equally divided share and share alike between my three children aforementioned. Should either of them die without issue the estate shall be equally apportioned to the survivor. In the event of the death of either of them with issue deceased's share shall go to the said deceased's children if any in equal shares."

The will was dated the 13th October, 1902; the testatrix died on the 10th April, 1912; the husband and three children named in the will (there were no others) survived her; at the time of the death of the testatrix all three children were of age; the daughter was then and at the time of the application unmarried; both the sons were married; one only had had issue.

The substantial portion of the estate of the deceased consisted of land, which the husband and executor desired to sell, having found a purchaser.

The motion was heard in the Weekly Court at Toronto.

J. Gilchrist, for the executor.

H. E. Rose, K.C., for the purchaser.

G. T. Walsh, for the adult beneficiaries.

F. W. Harcourt, K.C., for the infant grandchild and unborn issue.

MIDDLETON, J., said that, if the testator had given a fee simple, then a gift over engrafted upon that would be repugnant and void; but, if the testator had given a life estate, he might also give a power of sale and a right to encroach upon the corpus. That was what had been done in this case. The gift over of that porition of the estate of the testator which might remain indicated that the use and enjoyment which was permitted to the life-tenant was a use and enjoyment which might result in the consumption of the thing enjoyed.

It should therefore be declared that this was the construction of the will, and that the husband had the right to convey, and that a good title could be made.

Unless otherwise arranged, the costs should come out of the estate.

LATCHFORD, J. JULY 3RD, 1915.

RE ABBOTT.

Will—Construction—Trust for Investment—"Interest-bearing Securities"—Company-shares—Mortgages—Interest or Income.

Motion by the executrix of the will of Edwin Abbott, deceased, for an order determining questions arising upon the terms of the will in the course of administration of the estate of the deceased.

By clause 4, the testator directed his executrix to set aside from his estate $25,000 "to be held by her upon trust. This trust fund may be composed in whole or in part of interest-bearing securities held by me at the time of my decease. As these securities are paid-up I direct the said trust fund to be kept on deposit in at least three chartered banks at interest. As income or interest arising or derived from the said trust fund of $25,000 I give devise and bequeath unto my . . wife . . . for her own use and during the term of her natural life. In the event of the income of the said trust fund being less than the sum of $750 in any year during the life of my said wife, I authorise and empower my said executrix to withdraw from the principal of such trust fund whatever sum may be necessary in any year to cover the deficiency between the actual income derived from the said trust fund and the sum of $750."

After the death of his wife, the testator directed, the principal of the trust fund was to pass to his nephews.

The deceased held shares in a loan company, upon which calls amounting to $8,500 had been paid—$6,425 remaining unpaid. This company was said to be prosperous and had been paying dividends to its shareholders at the rate of 6 per cent. per annum.

The questions stated were: (1) whether the executrix was entitled, under clause 4, to pay-up with the funds of the estate the balance remaining unpaid upon the shares in the loan company, and whether she was justified in setting apart those shares, when so paid-up, to form part of the trust fund of $25,000; (2) whether, if the executrix should select shares held by the testator to form the whole or part of the trust fund, these shares should be taken into the fund at their par or market value; and, if the latter, at what period the market value should be fixed.

The motion was heard at the Ottawa Weekly Court.

J. A. Hutcheson, K.C., for the executrix.

J. R. L. Starr, K.C., for the nephews.

H. A. Stewart, K.C., and M. M. Brown, for other legatees.

LATCHFORD, J., said that the testator had interest-bearing securities in the form of mortgages, at the time of his death, in addition to the shares in the loan company, and shares in other companies. The word "securities" may include stock or shares such as the stock in the loan company: Re J. H. (1911), 25 O.L.R. 132; In re Rayner, [1904] 1 Ch. 176. But, in the present case, and notwithstanding the subsequent use of the word "income" as well as the word "interest," the interest-bearing securities mentioned in the will must be taken to mean only interest-bearing securities which the testator had, at the time of his decease, in the form of mortgages. The dominant idea in clause 4 is that the executrix shall hold $25,000 in trust. She may utilise the mortgages held by the testator as part of this fund; but, when these securities are paid-up, the principal must be deposited in a bank, where, under present conditions, it would earn interest at the rate of 3 per cent. per annum only; while there are many securities, in which a trustee may properly invest, which will bring in a greater return.

The first question should be answered in the negative. The answer to the second question is, that the executrix is not entitled to select any stocks.

Order accordingly; costs of all parties out of the estate of the testator—those of the executrix as between solicitor and client.

BRITTON, J. JULY 3RD, 1915.

RE CITY OF PETERBOROUGH AND PETERBOROUGH ELECTRIC LIGHT CO.

Arbitration and Award—Compensation for Electric Works Expropriated by City Corporation — Claims Excluded by Statute from Consideration of Arbitrators—Appeal from Award—Statement as to Claims Considered by Arbitrators —Right to Obtain for Information of Court.

Appeal by the Corporation of the City of Peterborough from the unanimous award of three arbitrators fixing the value of the plant and property of the Peterborough Electric Light Company, expropriated by the city corporation, at $154,615, payable by the city corporation, with interest at 5 per cent. from the 1st October, 1914, and with costs on the scale of the Supreme Court of Ontario. See the Ontario statutes 2 Geo. V. ch. 117, 3 & 4 Geo. V. ch. 114, and 4 Geo. V. ch. 87.

No items were given by the arbitrators in making the total of $154,615.

The Act 2 Geo. V. ch. 117 provides that nothing shall be allowed for prospective profits or for loss of profits and that nothing shall be allowed in respect of certain other matters and rights mentioned in the statute.

The appeal was on the ground that the arbitrators had in fact allowed some amount in respect of the excepted items or some of them.

The arbitrators gave no information on this point; and the Chairman of the Board, for whose examination as a witness for the purpose of obtaining evidence on the motion an appointment was issued, declined to be sworn.

The appeal was heard in the Weekly Court at Toronto.

M. K. Cowan, K.C., and G. N. Gordon, for the appellants.

W. N. Tilley, for the company.

Strachan Johnston, K.C., for bondholders of the company.

BRITTON, J., in a considered judgment, said that the appellants were entitled to know what the facts were. The Court could not accept as evidence what one arbitrator might say in regard to himself. The appeal was a legal proceeding in reference to an award. An arbitrator may be called as a witness in

a legal proceeding to enforce his award. In this case, the Chairman might be asked whether any of the claims excluded by statute were presented to the arbitrators for consideration—no question as to how or why any discretionary power was exercised—but what claims were presented, and were they or any of them allowed? See Duke of Buccleuch v. Metropolitan Board of Works (1872), L.R. 5 H.L. 418; James Bay R.W. Co. v. Armstrong, [1909] A.C. 624, 631.

The Chairman was said to be willing to give the necessary information on behalf of the Board, if his colleagues were willing, and if the Court desired it. The Court was entitled to know, as to the statute-excluded claims, what, if anything, was allowed.

Hearing adjourned until the 20th September, 1915, in order that the information may be obtained in such a way as the parties deem proper.

FALCONBRIDGE, C.J.K.B. JULY 3RD, 1915.

CANADIAN HEATING AND VENTILATING CO. LIMITED v. CUTTS.

Promissory Notes—Action against Maker—Statute of Limitations—Computation of Days in Statutory Period—Rate of Interest post Diem—Interest from Commencement of Action to Judgment in Addition to Six Years' Arrears.

Action on two promissory notes, tried without a jury at Owen Sound.

W. S. Middlebro, K.C., for the plaintiffs.
C. S. Cameron, for the defendant.

FALCONBRIDGE, C.J.K.B., said (1) that the note for $270 was dated the 22nd October, 1908. The last day of grace was the 25th January, 1909. The defendant was the maker. The writ of summons was issued on the 25th January, 1915. This was in time: Edgar v. Magee (1882), 1 O.R. 287.

(2) After maturity, interest should be computed on both notes at 5 per cent. only: St. John v. Rykert (1884), 10 S.C.R. 278.

(3) Six years' interest had accrued on the first note when the writ was issued. Nevertheless, the issue of the writ continues the computation of interest on both notes down to judgment.

Judgment for the plaintiffs for $565, with interest, to be computed by the Local Registrar on the above basis, and costs.

HAWES v. HAWES—MIDDLETON, J., IN CHAMBERS—JUNE 28.

Appeal—Motion for Leave to Appeal from Order of Judge in Chambers—Adjournment for Hearing before another Judge.] —Motion by the defendant Alfred Hawes for leave to appeal from an order of LENNOX, J., dismissing a motion made by the applicant for permission to serve a third party notice claiming relief against the defendant Thompson, notwithstanding the lapse of the time provided for the service of a third party notice under the Rules of Court. MIDDLETON, J., was of opinion, for reasons stated in writing, that there was no reason to doubt the correctness of the order made by LENNOX, J.; but, owing to peculiar circumstances existing, he enlarged the motion till a day on which it could be heard in Chambers by MEREDITH, C.J.C.P., who had made an order of reference. W. M. Douglas, K.C., for the applicant. F. Arnoldi, K.C., for the plaintiff.

RE BESWETHERICK AND GREISMAN—MIDDLETON, J.—JUNE 30.

Mortgage—Second Mortgage—Instalments of Principal in Arrear—Motion for Leave to Bring Action—First Mortgage not in Arrear—Interest and Taxes Paid in Full—Financial Embarrassment Caused by War—Motion Refused.]—Application by Beswetherick et al., under the Mortgagors and Purchasers Relief Act, 1915, for leave to bring a mortgage action. The applicants owned the land subject to a mortgage. It was sold to Greisman, who gave a second mortgage to secure the balance of the purchase-money. This was the mortgage in question. Greisman sold to the Excelsior Plate Glass Company, who were in possession. As part of their purchase-price they assumed and agreed to pay off both mortgages. All the interest on both had been paid; no taxes were in arrear; nothing was due under the first mortgage. More than six months before the motion, $500 was paid on the second mortgage, on account of principal. Two

instalments were now in arrear; and the applicants sought to compel Greisman to pay this. Greisman naturally looked to the glass company. Owing to business depression directly resulting from the war, the glass company was unable to pay. Greisman was tied up with many business ventures, and could not take money from these to pay the applicants without involving himself in disaster. MIDDLETON, J., said that a case has been made out bringing this matter within the statute. Greisman's embarrassment arose directly from a situation resulting from the war; no interest was in arrear; and the policy of the statute was that, in cases of the kind, matters should be held as far as possible in statu quo during the war-time. There was no suggestion that Greisman was preferring others or was intending in any way to defeat the applicants. He was apparently honestly endeavouring to keep things going, hoping that, when business should resume its normal course, he might be able to pull through. It was to meet just such cases that the Act was passed. No order and no costs. L. Davis, for the applicants. S. J. Birnbaum, for Greisman. Cook, for the Excelsior Plate Glass Company and others.

RE ARMSTRONG—MIDDLETON, J., IN CHAMBERS—JULY 2.

Infant—Custody—Separation of Husband and Wife—Agreement as to Custody of Child—Welfare of Child.]—Motion by the father of an infant for an order giving him the custody; and motion by the mother for leave to take the child permanently beyond the jurisdiction. By agreement of the parties embodied in a consent judgment of the 17th November, 1913, the child was left in the custody of the mother until he should attain the age of 15, subject to certain provisions as to access and temporary custody by the father, but the child was not to be taken outside of Ontario. The learned Judge said that no case was made to interfere with this agreement. He dealt with the application upon the assumption that, so far as the parents were concerned, their rights must be treated as governed by their own agreement; but that, where the welfare of the infant was concerned, that consideration was paramount; and no agreement by the parents could absolve the Court from considering the infant's welfare. The father's application dismissed with costs; the mother's, without costs. J. W. McCullough, for the father. S. W. Burns, for the mother.

RE DUNCAN—MIDDLETON, J., IN CHAMBERS—JULY 2.

Distribution of Estates — Intestate Succession — Absentee Next of Kin—Presumption of Death—Inquiry—Reference—Liability.]—Motion by the administratrix of an estate for an order permitting her to distribute the estate upon the theory that her sister Margaret Ann Duncan, who had not been heard of for many years, had predeceased the intestate. The amount involved was $3,000; and it appeared to the learned Judge that some further investigation should be made before the order sought should be granted; and for this purpose the matter should be referred to the Master in Ordinary to inquire and report, after due advertisement, who are the next of kin of the intestate and entitled to share in her estate. As the applicant is the only person entitled if she is correct in assuming that her sister predeceased the intestate, she cannot by this means free herself from liability; and the undesirability of incuring the expense of this reference is suggested. But, if she sees fit, she is entitled to it. C. W. Plaxton, for the applicant.

REAL CAKE CONE CO. v. ROBINSON—MIDDLETON, J., IN CHAMBERS —JULY 2.

Contempt of Court—Disobedience of Injunction — Consent Judgment — Locus Pœnitentiæ — Undertaking to Discontinue Manufacture of Goods in Form Similar to those of Plaintiffs—Costs.]—Motion by the plaintiffs for an order for the committal of the defendants for contempt of Court by disobeying a judgment pronounced on consent on the 17th May, 1915. The judgment restrained the defendants: (1) from manufacturing, selling, and dealing in ice-cream cones having thereon the words "real cake;" (2) from manufacturing, etc., cones so nearly resembling the cones made by the plaintiffs as to deceive; and (3) from passing off their cones as the cones of the plaintiffs. MIDDLETON, J., said that the rights of the parties were fixed and determined by the consent judgment. There was no breach of the first injunction—the word "real" had not been used by the defendants. There was a breach of the second and third injunctions—the defendants had manufactured and sold cones so nearly resembling the plaintiffs' cones as to deceive, and had, in effect, by producing cones of substantially the same make-up, passed off their cones as the cones of the defendants. The learned Judge also said that he preferred to regard the defend-

ants' conduct as being an assertion of what they believed to be their rights rather than as being contumacious; and, as the jurisdiction of the Court is primarily coercive to secure obedience to the injunction, he would make no further order if the defendants were ready to undertake to discontinue the use of the form of cone objected to, and to pay the costs of the proceedings for contempt. If the defendants were not ready to yield obedience to the consent judgent, an order should be made for their committal. The defendants to have a week to elect. J. M. Ferguson, for the plaintiffs. H. J. Martin, for the defendants.

McLEOD v. SAULT STE. MARIE PUBLIC SCHOOL BOARD—BRITTON, J.—JULY 3.

Contract—Erection of Building—Action for Balance of Contract-price, Extras, and Damages — Counterclaim — Disputed Items—Findings of Fact of Trial Judge.]—The plaintiffs contracted with the defendants to erect a large school building. The contract-price was $46,300. There were some extras, comparatively small. The plaintiffs' claim was for a balance alleged to be due upon the contract-price for work done, for extras, and for damages caused by stoppage of the work for a time by the alleged non-performance by the defendants of their part of the contract. The defendants denied liability for some of the items charged, alleged a short credit by the plaintiffs for work omitted by reason of changes as the work progressed, and counterclaimed the value of stone taken from the defendants' land and sold without the consent of the defendants. The action and counterclaim were tried without a jury at Sault Ste. Marie. BRITTON, J., in a considered judgment, examined the disputed items of claim and counterclaim one by one, and made findings upon them. The result of his findings is a judgment for the plaintiffs for $687.48 with costs, and for the defendants for $178.45 with costs of their counterclaim—all costs on the scale of the Supreme Court of Ontario. J. E. Irving, for the plaintiffs. P. T. Rowland, for the defendants.