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APPELLATE DIVISION.

JUNE 4TH, 1913.

FALCONER v. JONES.

Master and Servant—Injury to and Death of Servant—Workman Employed in Factory—Action by Widow under Fatal Accidents Act—Negligence—Person in Position of Superintendence—Contributory Negligence — Findings of Jury — Dangerous Work.

Appeal by the defendants from the judgment of MIDDLETON, J., based upon the answers of a jury to questions left to them at the trial, finding the defendants and their millwright guilty of negligence which caused the death of the plaintiff's husband, who was working for the defendants in their factory, through the starting of a shaft and pulleys when they ought not to have moved. The action was brought under the Fatal Accidents Act to recover damages for the death, and judgment was given at the trial in favour of the plaintiff for the recovery of $1,650 and costs.

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

H. H. Dewart, K.C., and B. H. Ardagh, for the defendants.

J. Jennings, for the plaintiff.

The judgment of the Court was delivered by MACLAREN, J. A.:—The defendants say that the accident was caused by the negligence of the deceased in interfering with the belt upon the shaft in question, in disobedience of the orders of the millwright.

The belt conveyed power from the main shaft in the basement of the factory through a small opening in the floor to a

counter-shaft, about two feet above the ground-floor, which drove the shaper at which the deceased was working. This counter-shaft and the pulleys upon it were protected by a box-covering, which could be removed when necessary. The belt had loosened and been unlaced, and the deceased appears to have removed the box, taken up the belt, and carried it to the room occupied by the millwright, whose duty it was to repair it. After it was repaired, the latter took it to its proper place, put one end over a loose pulley upon the counter-shaft, and through an instrument called a "shifter," and had the deceased drop one end through the hole in the floor, while he went down and put the belt around the main shaft and up through the hole, and then came up and laced it up. He went down to the basement to put the belt upon the proper pulley, a large one, 36 to 40 inches in diameter, upon the main shaft. He says that, as he was leaving, "I told Falconer (the deceased) to keep away, that I am going down to throw the belt on." He went down, and, by means of a stick, threw the belt on this large pulley, which was making three hundred revolutions a minute. This should merely have set the belt and the loose nine-inch pulley on the counter-shaft in motion, without affecting the counter-shaft itself. Instead of this, the jerk down below threw the belt from the loose pulley over on the fixed pulley alongside of it, which was slightly larger, and was bevelled to facilitate the transference when it was desired to set the counter-shaft and the shaper in motion. The millwright came upstairs at once, and found the deceased lying on the floor, not far from the rapidly revolving counter-shaft and pulley, having received a blow which drove his ribs into his heart. There was no eye-witness of the accident.

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

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

suddenly put in motion—whatever the instrument or substance which actually struck the fatal blow.

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

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

It was urged on behalf of the defence that the deceased himself removed the box-covering from the counter-shaft; but that would appear to have been necessary in order to remove the injured belt. Once the belt was repaired and was being replaced, the millwright was the person superintending the operation, and the deceased was merely assisting him, and was subject to his orders, and the superintendence of the millwright had not ceased when the accident happened. If the covering had been replaced, it would have been impossible for the accident to happen, whether it was done by the stick in question or by something else.

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

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

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

JUNE 4TH, 1913,

WILSON v. TAYLOR.

Mortgage—Sale under Power—Sale en Bloc instead of in Parcels—Duty of Mortgagee—Injury to Mortgagor—Damages—Evidence—Absence of Fraud or Wilful or Reckless Conduct.

Appeal by the plaintiff from the judgment of BOYD, C., ante 253.

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

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

J. L. Whiting, K.C., and J. A. Jackson, for the defendant.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—In the view of the Chancellor, the mortgagor has been damaged to the extent of at least $1800 as the effect of the sale of the mortgaged property *en bloc*, instead of in parcels.

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

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

The mortgage was for $4000, and was made on the 20th November, 1908. The principal was payable in annual instalments of $500, and interest at the rate of six per cent was payable annually.

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

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

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

Aldrich v. Canada Permanent Loan Co. (1897), 24 A.R. 193, is not an authority for holding that, in the circumstances of this case, it was the duty of the respondent to sell in parcels; and that for the reason mentioned by the Chancellor at the conclusion of his judgment. The mortgaged property in that case consisted of a farm of forty acres, with two dwelling-houses and other farm-buildings on it, and of a village property, with two stores on it, situate half a mile or more from the farm.

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

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

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

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

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

As said by Lindley, L.J., in Kennedy v. DeTrafford, [1906] 1 Ch. 762, 772, "a mortgagee is not a trustee of a power of sale for a mortgagor at all: his right is to look after his own interests first. But he is not at liberty to look after his own interests alone; and it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor, that is, all."

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

I would dismiss the appeal with costs.

JUNE 4TH, 1913.

*RE CITY OF TORONTO AND TORONTO AND SUBURBAN R.W. CO.

Ontario Railway and Municipal Board—Jurisdiction—Order Requiring Street Railway Company to Repair Tracks and Substructures and Pave Part of Roadway Used for Railway —Agreement between Company and Municipality—63 Vict. ch. 124—Covenant of Company — Construction — Contractual Obligation—Powers of Board—10 Edw. VII. ch. 83, sec. 3—"Tracks"—1 Geo. V. ch. 54—Terms of Order of Board—Omission to Prescribe Kind of Pavement to be Laid —Remitter to Board.

An appeal by the railway company from an order of the Ontario Railway and Municipal Board.

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

I. F. Hellmuth, K.C., and R. B. Henderson, for the appellants.

G. R. Geary, K.C., for the Corporation of the City of Toronto, the respondents.

MEREDITH, C.J.O.:—This is an appeal by the Toronto and Suburban Railway Company from an order, dated the 25th June, 1912, made by the Ontario Railway and Municipal Board, on the application of the Corporation of the City of Toronto, by which the appellants were ordered and directed to "put in a proper and sufficient state of repair" their "tracks and substructures on Bathurst street and Davenport road, in the city of Toronto, and to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof."

The order further ordered and directed the respondents "to pave the remaining portions in question herein of Bathurst street and Davenport road;" and that the appellants and the respondents should "work together under the supervision and direction of the Board's engineer in carrying out the terms" of the order; and that in case of difference between the parties as to the kind of pavement to be put down, the matter should be determined by the Board's engineer.

*To be reported in the Ontario Law Reports.

The jurisdiction of the Board to make this order is attacked by the appellants, upon the ground that, under the agreement between the Corporation of the Township of York, the predecessors in title of the respondents, and the appellants, whose name was then "The Toronto Suburban Street Railway Company Limited," which conferred upon the appellants the right to construct, maintain, and operate their railway, the obligation of the appellants is to keep in proper repair that portion of the travelled road upon which the railway should be constructed "between the rails and for 18 inches on each side of the rail or rails lying or being next to the travelled road;" and that that obligation does not require them, or authorise the respondents to require them, to do more than what is necessary to keep the road in a proper condition for the traffic, having regard to the character and original manufacture of the road; and that the order of the Board requires them to make a new road of a different kind, not to repair the old one.

The agreement bears date the 4th September, 1899; and, with slight variations, not material to the present inquiry, was confirmed by an Act 63 Vict. ch. 124, intituled "An Act respecting the Toronto Suburban Street Railway Company Limited," and is set out in schedule B to the Act.

Paragraph 6 of the agreement, upon which the appellants' obligation, so far as it is contractual, depends, is as follows: "6. The company shall, where the rails are laid upon the travelled part of the road, keep clean and in proper repair that portion of the travelled road between the rails and for eighteen inches on each side of the rail or rails lying on or next to the travelled road; and, in default, the township may cause the same to be done at the expense and proper cost of the company."

It is conceded that, when the agreement was entered into, neither Bathurst street nor Davenport Road was paved, and that both of them were what was described in the argument of counsel as "mud roads;" and the contention of the appellants is, that their obligation as to those parts of them which they have contracted to keep in repair is to keep them in repair as "mud roads" and no more.

Having regard to the provisions of paragraph 6, the proximity of the roads to a large and rapidly growing city, the duration of the franchise granted to the appellants by the agreement, the right of the public to use for the purpose of travel that part of the highways on which the railway should

be constructed, and the powers and duties under the Municipal Act of municipal corporations as to highways, I am of opinion that the covenant of the appellants contained in paragraph 6 should be construed as the Court of Appeals of the State of New York, in a recent case, construed a similar obligation imposed upon railway companies by an Act of the Legislature of that State.

I refer to Mayor, etc., of New York v. Harlem Bridge, etc., Co. (1906), 186 N.Y. 304, in which the Court of Appeals had to consider the nature and extent of the duty which, by a law of the State, was imposed upon railway companies to keep "the surface of the street inside the rails and for one foot outside thereof in good and proper order and repair, and conform the tracks to the grades of the streets and avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns;" and the conclusion reached was, that, "when the proper authorities, in view of the condition of the street as shewn to exist, decided that a granite block pavement should be laid . . . the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement." . . .

[Reference to Leek Improvement Commissioners v. Justices of the County of Stafford (1888), 20 Q.B.D. 794, and Scott v. Brown (1903), 68 J.P. 181.]

I am also of opinion that, even if the appellants are not under any contractual obligation to do that which the Board has ordered them to do, the Board had, under sec. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, jurisdiction to require them to do it. . . .

It was argued by Mr. Hellmuth that the word "tracks," as used in the section, means only the "rails," and that it does not extend to the space between the rails or the 18 inches on each side of them; and that there is nothing in the section which confers jurisdiction on the Board to require the appellants to do that which it has ordered them to do.

One of the purposes of the section, and probably its main purpose, was, as its language shews, to promote the security of the public and of the employees of railway companies; and, in my opinion, to carry out that intention "tracks" should be given its widest and not its narrowest meaning, and therefore as meaning, as applied to a railway laid on a highway, that part of it which is occupied by the railway.

It was also argued that the word "tracks" is used in the agreement with the limited meaning contended for; but, even if that were the case, as to which I express no opinion, it would have no bearing on the question of the construction to be placed on the same word when used in an Act of the Provincial Legislature.

It was also argued for the appellants that 1 Geo. V. ch. 54 limits the powers conferred on the Board by the Act of 1910; and that the effect of the later Act is to prevent the Board from making any order which would impose on a railway company a greater obligation than is imposed upon it by the agreement between the company and the corporation of the municipality, or the by-law of its council by which authority to construct the railway was conferred upon the company.

That, in my opinion, is not the effect of the Act. Its purpose and effect is, to make the tracks, switches, additional lines, and extensions of existing lines, which the Board orders to be constructed, subject to the terms of the agreement or by-law, and does not apply to existing tracks not constructed under an order of the Board.

It may be observed, as bearing upon the question of the sense in which the word "tracks" is used by the Legislature, that it is used in sec. 12, as enacted by 1 Geo. V. ch. 54, as synonymous with "lines."

For these reasons, I am of opinion that the appeal fails, so far as it is based on the contention that the Board has no jurisdiction to order the appellants to pave that part of the roadway which, by paragraph 6 of the agreement, they covenanted to repair.

The order is, however, open to the objection that it does not prescribe the kind of pavement which the appellants are to lay, but leaves that to be determined by the engineer of the Board, if the parties are unable to agree; and the case should, therefore, be remitted to the Board in order that that question may be dealt with and provision made as to the kind of pavement which is to be laid; and there should be no order as to the costs of the appeal.

MACLAREN and MAGEE, JJ.A., agreed.

HODGINS, J.A., agreed in the result.

Appeal allowed in part.

JUNE 4TH, 1913.

*CHANDLER & MASSEY LIMITED v. IRISH.

Company—Misapplication of Assets—Acquisition by Shareholder of Shares in Another Company—Acts of Agent—Breach of Trust—Winding-up of Company—Right of Liquidator to Follow Assets.

Appeal by the defendant from the order of a Divisional Court, 25 O.L.R. 211, 3 O.W.N. 383, affirming the judgment of Boyd, C., 24 O.L.R. 513, 3 O.W.N. 61.

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

H. E. Rose, K.C., and G. H. Sedgewick, for the appellant,

A. C. McMaster, for the plaintiffs.

MEREDITH, C.J.O. (after stating the facts) :—There was undoubtedly, as the Chancellor found, a misapplication of the money of the respondent company; and the appellant benefited by it to the extent of the $1,000 applied to pay up his shares in the new company. . . .

The appellant is, in my opinion, answerable for the misapplication of the money of the respondent company, because his agent, Chandler, was a party to the misapplication, and also on the ground that the appellant was a volunteer in the transaction, and that, as against him, the respondent company is entitled to follow the property that has been substituted in the place of the trust estate.

The other members of the Court agreed in the result.

Appeal dismissed with costs.

*To be reported in the Ontario Law Reports.

JUNE 7TH, 1913.

*EGAN v. TOWNSHIP OF SALTFLEET.

Highway—Nonrepair—Injury to Traveller—Notice of Accident—Consolidated Municipal Act, 1903, sec. 606—Insufficient Excuse for not Giving Notice—Absence of Prejudice.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth, dated the 10th March, 1913, dismissing the action, which was tried before him without a jury.

The action was brought to recover damages for personal injuries sustained by the appellant owing to the neglect of the respondent corporation to keep in repair a highway under the jurisdiction of its council.

The notice required by sub-sec. 3 of sec. 606 of the Consolidated Municipal Act, 1903, was not given, and the Judge was of opinion that, although the respondent corporation had not been prejudiced by the failure to give the notice, it was not shewn that there was a reasonable excuse for "the want" of it.

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

W. A. Logie, for the plaintiff.

F. F. Treleaven, for the defendant corporation.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—It appears from the evidence that there was a hole in the road, and that on the 26th November, 1912, the wheel of a loaded vehicle which the appellant was driving dropped into the hole up to the axle and threw him off "forward and straddle the tongue;" that Bates, the employer of the appellant, had driven into the same hole on the previous 26th October, and had promptly notified the respondent corporation of the condition of the road; that, before Christmas, Bates met the Reeve and told him that the respondent corporation was "liable to get in trouble," for "his man" (i.e., the appellant) had been thrown out in the same place; and that, after the accident, the appellant was confined to bed for two weeks and suffered so much that he could not sleep night or day.

These circumstances, according to decisions binding on this Court, do not afford reasonable excuse for the failure to give the prescribed notice. . . .

*To be reported in the Ontario Law Reports.

[Reference to O'Connor v. City of Hamilton (1905), 10 O.L.R. 529, 536.]

Beyond the fact that the respondent corporation was notified verbally by Bates of the happening of the accident, and the fact that for two weeks after it happened the appellant was not in a condition to give the notice, there is nothing but his ignorance of the law which is suggested as affording reasonable excuse for his failure to give the notice.

That ignorance of the law is not, nor is verbal notice to the respondent corporation of the accident, enough to excuse the want of the notice which the statute requires, is clear. For upwards of two weeks there was nothing in the physical condition of the appellant to prevent his complying with its requirements, and there was nothing done by the respondent corporation which misled the appellant. . . .

[Reference to Armstrong v. Canada Atlantic R.W. Co. (1902), 4 O.L.R. 560; Giovinazzo v. Canadian Pacific R.W. Co. (1909), 19 O.L.R. 325.]

The appeal must, therefore, be dismissed; but I cannot refrain from expressing my regret that the Legislature has not seen fit to dispense with the necessity for shewing reasonable excuse for the want of the notice. I see no reason why the want of it should bar the right to recover where it is shewn that the corporation has not been prejudiced by the notice not having been given within the prescribed time.

There should be no order as to costs.

JUNE 7TH, 1913.

CITY OF TORONTO v. FORD.

Municipal Corporations—Prohibition of Erection of Apartment Houses on Residential Streets—2 Geo. V. ch. 40, sec. 10—City By-law—Permit before Statute—"Location"—Revocation of Permit—Estoppel.

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., of the 27th March, 1913, in favour of the plaintiffs, in an action to restrain the defendant from locating or proceeding with the location and erection of an apartment house on Laburnam avenue, in the city of Toronto.

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

W. C. Chisholm, K.C., for the defendant.

Irving S. Fairty, for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant is not entitled to succeed if City of Toronto v. Williams (1912), 27 O.L.R. 186, was well decided; and we are asked to overrule it.

In our opinion, the Court in that case came to the right conclusion, and we agree with it, as well as with the reasoning on which it is based, and with the reasoning of the learned trial Judge, to which we cannot usefully add anything.

The appeal is dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J. JUNE 2ND, 1913.

STURGEON v. CANADA IRON CORPORATION.

Master and Servant—Injury to Servant—Negligence—Dangerous Work—Absence of Instructions and Warning—Contributory Negligence—Common Law Liability—Workmen's Compensation for Injuries Act—Damages.

Action by Joseph F. Sturgeon, an employee of the defendants, to recover damages for injuries sustained by him while acting as brakesman on a train of cars at the defendants' works.

The plaintiff claimed at common law and also under the Workmen's Compensation for Injuries Act.

The action was tried before LENNOX, J., without a jury.
A. E. H. Creswicke, K.C., for the plaintiff.
W. A. Finlayson, for the defendants.

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

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

In the absence of notice or warning, the plaintiff, in attempting to alight as he did near the switch as the car stopped, had the right to expect and believe that he would find some platform, walk, or structure upon which he could land and proceed with safety to the switch. In face of abundant uncontradicted evidence of the practice of landing upon and running along the walls, and evidence too that the method the plaintiff was attempting was sometimes pursued, it is idle to argue that the defendants expected or intended that the plaintiff should remain upon the car until the switch-platform was reached. Brennan was with the plaintiff the first night he worked upon the trestle until midnight, but they were not working near the switch or track in question; and, in fact, the accident occurred upon the very first occasion upon which the plaintiff was called upon to turn the left switch. The plaintiff could not, by the exercise of reasonable care, have avoided the injuries he sustained.

The defendants are liable as well at common law as under the statute, but I need not separately assess the damages, as the statute is broad enough to cover the amount which, I think, the plaintiff is fairly entitled to recover. There will be judgment for $1,800 with costs.

MIDDLETON, J. JUNE 4TH, 1913.

*RE GREEN AND FLATT.

Executors—Discharge of Mortgage—Foreign Probate of Will of Mortgagee—Registration of, with Discharge—Effect of—Registry Act, 10 Edw. VII. ch. 60, secs. 56, 65—Objection to Title—Vendor and Purchaser.

Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that an objection taken by the purchaser to the vendor's title had been satisfactorily answered.

The objection was to a discharge of mortgage executed by the executors of the mortgagee, who lived in Great Britain. His will was proved by the executors in the Probate Court of Scotland; the will and Scots probate and the discharge were registered in the registry office in Ontario for the county where the mortgaged lands, the subject of the contract of sale, were situated.

E. H. Cleaver, for the vendor.
Frank McCarthy, for the purchaser.

MIDDLETON, J., referred to the provisions of sec. 65 of the Registry Act, 10 Edw. VII. ch. 60; and also to sec. 56, which provides that a will may be registered (*a*) before probate, and (b) upon production of probate granted under the seal of any Court in Ontario or in Great Britain or in foreign countries. . . .

The executors of a deceased person cannot, in the ordinary Courts of civil jurisdiction, shew their representative capacity except by the production of letters probate. But executors, nevertheless derive their title, not from the letters probate—which are merely evidence—but from the will itself; and before probate is issued they are clothed with their full title. . . .

*To be reported in the Ontario Law Reports.

An administrator derives his title purely from the grant of administration; and a foreign administrator has not, under the statute, the right to discharge a mortgage: Re Thorpe, 15 Gr. 76. . . .

[The learned Judge pointed out that the statement in Weir's Law of Probate, p. 49, was too wide; and referred for an accurate statement to Williams on Executors, 9th ed., p. 242; Mohamidu v. Pitchey, [1894] A.C. 437.]

Objection overruled and order made as asked by the vendor; no costs.

LENNOX, J. JUNE 4TH, 1913.

VOGLER v. CAMPBELL.

Gift—Money in Bank Deposited in Names of Deceased Person and another—Evidence—Intention—Testamentary Gift—Failure of—Deed of Land—Action to Set aside—Account—Administrator—Costs.

Action to set aside a conveyance of land by John L. Campbell, deceased, to the defendant, and for an account, and for other relief.

O. L. Lewis, K.C., and H. D. Smith, for the plaintiff.
M. Wilson, K.C., for the defendant.

LENNOX, J.:—I stated my conclusion as to the deed at the trial.

As to the money in the Traders Bank, $2,029.35, standing in the names of the deceased John L. Campbell and the defendant, it is impossible to distinguish it from the money on deposit in Hill v. Hill (1904), 8 O.L.R. 710; and the result must be the same. Here, as in that case, the plaintiff's own evidence and depositions, and a great deal of other evidence in the case, shew that the purpose of the deceased in associating the defendant's name with his own in the bank account was, by this means, to make a gift to the defendant in its nature testamentary. The money continued to be the money of the deceased; it was drawn upon by him only; and, whatever was the form of the instrument, upon the understanding with the banker, and in the un-

derstanding of the parties, the defendant could not touch the money in the lifetime of the deceased. The evidence of the bank officials, the practice pursued, and above all the conditions attending the signing of the final cheque for $500, shew this. When the $500 was withdrawn on this cheque, it was distinctly for the personal use of the deceased; the defendant took it as an agent or trustee; it was not used; and it must be accounted for. This $500 and the $1,529.35 carried to the credit of the defendant's account on the 2nd April, 1912, making a total of $2,029.35, I find and declare to be money of and belonging to the deceased John L. Campbell, and undisposed of by will or otherwise at the time of his death. The defendant has appropriated this money to her own use. She is or has been the administratrix of the estate of the deceased, and must account for the money to the estate, with interest at five per centum per annum from the 25th February, 1913, the date when the accounts were passed by the Surrogate Court. I am not sure that I should charge the defendant with interest from the time the money was carried to the credit of her account.

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

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

The plaintiff has succeeded as to her other claims.

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

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

MIDDLETON, J. JUNE 5TH, 1913.

RE FILLINGHAM.

Will—Construction—Devise of Land Subject to Payment of Legacies—Disposition of Insurance Moneys—Application to Payment of Legacies—Designation under Insurance Act—Identification of Policy—Reconciling Clauses of Will.

Motion by the executors of James Fillingham for an order, under Con. Rule 938, determining questions arising upon the will of the testator.

G. A. Radenhurst, for the executors and (by appointment of the Court) for the infant Herbert E. Fillingham.

J. R. Meredith, for the Official Guardian, representing the other infants.

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

The testator had a policy of insurance in the Independent Order of Foresters for $1,000. This had been made payable to his wife, and was not otherwise dealt with save by the provisions contained in his will. By his will he gave his homestead to his son Herbert Edward, charged with the payment of certain legacies in favour of his brothers and sisters. This farm had come to the testator from his father, charged with the payment of an annuity in favour of his mother and some legacies in favour of the testator's brothers and sisters. The deceased then directed that the insurance money over which he had control, by reason of his wife having predeceased him, should be divided between his sons and daughters, share and share alike. He then provides that, if enough money is not realised from the sale of his interest in another parcel of land, and the money to his credit in the bank, and upon a note (which was paid off in his lifetime), to pay his brothers and sisters' legacies, "the balance to come out of the insurance money I have in the Independent Order of Foresters."

The contention made on behalf of the son Herbert Edward is, that the insurance money must, under the terms of the will, be applied in discharge of these legacies, and that the provision found in the later clause derogates from the gift contained in the earlier clause. The contention on behalf of the other

infants is, that the earlier clause in the will amounts to an instrument operative under the Insurance Act, and that the later clause is nugatory.

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

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

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

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

MIDDLETON, J. JUNE 5TH, 1913.

RE MACKENZIE.

Will—Construction—Annuity Payable out of Income from "Moneys and Securities"—Land Acquired by Testator after Execution of Will—Mortgage thereon Paid by Executors out of Personalty—Personalty Insufficient to Produce Amount of Annuity—Intestacy as to After-acquired Land—Rights of Widow as to Land—Election to Take Third in Lieu of Dower—Effect of Payment of Mortgage—Investment—Charge on Land—Right of Widow as Annuitant not Limited to Income—Trust—Arrears of Annuity—Statute of Limitations.

Motion by the executors of Donald Macleod Mackenzie, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the will of the deceased in the administration of his estate.

J. W. Elliott, K.C., for the executors.

G. Bell, K.C., for nephews and nieces of the testator.

E. P. Clement, K.C., for the executors of the widow and for adult beneficiaries.

MIDDLETON, J.:—Daniel Macleod Mackenzie died on the 30th October, 1889, leaving him surviving a widow, but no children. By the fourth clause of his will, he gave to his wife an annuity of $200, payable half-yearly during her life. By the fifth clause, he directs his executors to invest the moneys and securities of which he shall die possessed, and out of the interest to pay the annuity of his wife, and the residue, if any, to his sister; and, if his sister survives his wife, to pay her the whole interest during the term of her life.

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

The testator, after the date of his will—the 23rd June, 1884—purchased, for $2,200, a property known as the gallery property in Milton. This property was subject to a mortgage for $1,000, the assumption of which formed part of the purchase-price. After the death of the testator his executors paid off this mortgage out of the personal estate. The income derived from the personal estate was insufficient to pay the widow's annuity in full. The executors have paid to the widow the income derived from the gallery property; but even this is not sufficient to give her the $200 a year. There was no residuary clause in the will.

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

By the Wills Act, as to property mentioned therein the will is, in the absence of a contrary intention therein expressed, to be taken as speaking from the death of the testator. At the death of this testator this land could not be regarded as money or security. The principle is not unlike that applied in Re Dods (1901), 1 O.L.R. 7, and in In re Clowes, [1893] 1 Ch. 215.

These cases are in one sense the converse of this. The testator there owned land at the date of his will, but sold it before his death, taking back a mortgage to secure a portion of the purchase-money. It was held that the devisee of the land did not take the mortgage, as it was personalty. A fortiori, after-acquired land cannot pass under a gift of personalty. There is, therefore, no escape from holding that there was an intestacy as to this land.

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

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

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

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

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

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

MIDDLETON, J. JUNE 5TH, 1913.

RE SHEARD.

Will—Construction—Gift of Income of Fund—Investment of Corpus—"Home for his Absolute Use and Benefit"—Condition—Absolute Estate.

Petition to determine questions arising in the administration of the estate of the late Joseph Sheard.

W. D. McPherson, K.C., for the petitioners.
N. W. Rowell, K.C., for Elizabeth Sheard.

MIDDLETON, J.:—The affidavits filed make it clear that the wife, notwithstanding the suggestions contained in the will, is of perfect mental capacity, and sui juris.

The testator directs that $4,000 shall be invested, in the names of his executors, for the benefit of his son Frederick, and that the income shall be paid to him; and, if Frederick "shall take unto himself a wife," then the money shall be invested in real estate "so that my said son shall have a home for his absolute use and benefit." There is no gift over.

It is clear upon the authorities that this confers an absolute estate in Frederick. In Rishton v. Cobb, 9 Sim. 615, it was held that the estate would be absolute even if the gift of income terminated upon marriage. This decision has the approval of Farwell, J., in In re Howard, [1901] 1 Ch. 412. Upon the whole subject see Re Hamilton, 27 O.L.R. 445, ante 441, and in appeal ante 1170.

Declared accordingly. Costs out of the estate.

MIDDLETON, J., IN CHAMBERS. JUNE 5TH, 1913.

RE KENNA.

Infant—Custody—Right of Father—Welfare of Child—Foster Home—Children's Protection Act of Ontario, 8 Edw. VII. ch. 59, sec. 30—Father's Right to Determine Child's Religion—Limitation—Abdication of Paternal Right.

Motion by Philip Kenna, the father of Frederick Kenna, an infant of five years of age, upon the return of a habeas corpus, for an order for delivery of the child to the custody of the applicant; the child having been adopted by Albert Breckon and his wife and being in their custody.

The application was heard by MIDDLETON, J., in Chambers, on the 29th May, 1913, upon affidavits and oral evidence.

T. L. Monahan, for the applicant.

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

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

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

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

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

In May, 1911, Kenna sought the aid of the St. Vincent de Paul Society; and Mr. Patrick Hynes, its agent, at his instance, laid an information before the Police Magistrate under the statute, charging that the wife was allowing the child "to grow up without salutary parental control and in circumstances exposing him to an idle and dissolute life." The Police Magistrate heard the charge on the 1st June, and, after hearing the husband's evidence, in which he accused the wife of adultery, the magistrate dismissed the charge. As the child was only three

years of age, it is probable that the magistrate thought it should not be taken from its mother.

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

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

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

This evidence was untrue, as far as the records appear. No notice was given to the father of these proceedings; but, upon the faith of this evidence, the Commissioner determined that the child was a dependent and neglected child within the meaning of the statute, his father having deserted him and his mother being unable to support him, and that he was a Canadian by birth and a Protestant by religion. The Commissioner directed the child to be delivered to the Children's Aid Society, to be there kept until placed in an approved foster home, pursuant to the provisions of the statute. Thereafter the Children's Aid Society placed the child with Albert Breckon and his wife Ellen Breckon, under formal articles of adoption dated the 17th April, 1912.

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

The father now asserts his right to the custody of the child, because he claims that as its father he has the right to determine that it shall be brought up in the Roman Catholic faith; and his desire is to take the child to Montreal and there place it with Honisdos Charlebois and his wife, the godfather and godmother of the child, to whom he has agreed to pay $3.50 a week for its maintenance. These people have a family of their own, and are in very humble circumstances; and it is manifest that they are not in a position to care for the child in a way which would be at all comparable with the ability of the foster parents.

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

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

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

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

The principle emphasised in Re Faulds, 12 O.L.R. 245, of the supremacy of the father's right to determine the religious education of his children, is of great importance; but the father's right, as I read the cases, though not lightly to be interfered with, is not absolute. Indeed, its limitation is affirmed in the case in ques-

tion. It is there said that the father's wishes may be disregarded if there is strong reason or if the Court is satisfied that there has been an abandonment or abdication of the paternal right.

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

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

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

LENNOX, J. JUNE 5TH, 1913.

BEAHAN v. NEVIN.

Fatal Accidents Act—Right of Parents to Recover for Death of Child of Eleven Years—Reasonable Expectation of Pecuniary Benefit—Negligence—Motor Bicycle Casualty on Highway—Damages.

Action by Dennis Beahan, on behalf of himself and wife, under the Fatal Accidents Act, to recover damages for the death of his son, William Beahan, a boy of eleven years, who was struck by a motor bicycle ridden at a rapid rate along a street in the city of Windsor by the defendant Gordon Nevin, against whom and his father, the defendant Frederick Nevin, the plaintiff charged culpable negligence.

F. D. Davis, for the plaintiff.

T. G. McHugh, for the defendant Frederick Nevin.

E. S. Wigle, K.C., for the defendant Gordon Nevin.

Lennox, J.:—On the 29th October, 1912, the defendant Gordon Nevin was riding a motor bicycle in the city of Windsor, and ran over and knocked down William Beahan, a son of the plaintiff. The boy was so seriously injured that he died within a few hours. The plaintiff is a labourer, and brings this action on behalf of himself and his wife, Ollie Beahan. William was a little over eleven years old at the time of the casualty. He was a good boy, attended school, ran errands, was executing an errand at the time, and was strong, healthy, and clever.

Both parents swear that they expected him to be of assistance to them, and in their position in life it is not unreasonable to expect that before long he would be earning money and contributing to the upkeep of the family. There are seven other children. The eldest is twenty-three, and is still living at home—and, as I understand, the parents are gainers by this.

The casualty was caused by the negligence and want of care of the defendant Gordon Nevin in riding the cycle. It was a dark night—he was running without a light, and in passing a vehicle he was running, as he says, twelve to fifteen miles an hour. He was almost able to stop as it was; and, if he had slowed down in passing to the seven miles an hour limited by the statute, he would have been able to stop in time to avoid collision.

The measure as well as the basis of damages has been very much discussed in our own Courts. It is said here that the funeral expenses amounted to $200. I am not at liberty to take this into account.

Based upon a reasonable expectation of pecuniary benefit, I think a fair assessment of damages will be $530; and there will be judgment against the defendant Gordon Nevin for this amount, with the costs of the action—$230 of this will belong to the mother, Ollie Beahan.

The action will be dismissed as against the defendant Frederick Nevin without costs.

Reference may be made to Thompson v. Trenton Electric and Water Power Co., 11 O.W.R. 1009; McKeown v. Toronto R.W. Co., 19 O.L.R. 361; Ricketts v. Village of Markdale, 31 O.R. 180, 610; and article on Lord Campbell's Act, 46 C.L.J. 1.

LENNOX, J. JUNE 7TH, 1913.

RE BROWN.

Will—Construction—Distribution of Estate after Cesser of Life Interest—Division among Daughters—Shares Vesting at Death of Testator.

Application by the executors of Thomas Brown, late of the township of Egremont, in the county of Grey, farmer, deceased, for an order declaring the true construction of the will of the deceased and determining the persons entitled to share in his estate and the proportions in which they were respectively entitled.

W. M. Douglas, K.C., for the applicants.

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

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

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

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

W. J. Brown and Thomas Brown are sons of the testator and brothers of the six daughters designated as legatees in the will. Two of these daughters, who had married, died during the lifetime of the widow Sarah Ann Brown, namely: Elizabeth Ann, who died intestate and without issue on the 26th April, 1911, leaving her surviving her husband, George P. Leith; and Mary, who died intestate on the 3rd February, 1897, leaving her hus-

band, James Hamilton, and her infant son, James Thomas Hamilton, her surviving. Sarah Ann Brown died on the 17th October, 1912.

The distribution to be made depends upon whether or not the shares of the deceased daughters vested at the time of the testator's death. I am clearly of opinion that these shares became vested at that time. This is a case in which the enjoyment of the gift by the six daughters "is only postponed to let in some other interest," as was said in Packham v. Gregory, 4 Hare 399; and the gift vests at once. The decisions in Leeming v. Sherratt, 2 Hare 14, Mory v. Wood, 3 Bro. C.C. 473, and Rogers v. Carmichael, 21 O.R. 658, may be referred to. This point being decided, the distribution of these two shares presents no peculiar difficulty. If, however, it is desired that I should direct the actual distribution in detail, counsel for the executors may file a schedule for my approval and to be incorporated in the order.

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

REX v. STAIR—LENNOX, J.—JUNE 2.

Criminal Procedure—Direction as to Trial of Criminal Cause—Jurisdiction of Judge of High Court Sitting in Weekly Court.]—The defendant moved for an order directing that the trial of the defendant upon a criminal charge should be at the General Sessions for the County of York. The motion was made before LENNOX, J., in the Weekly Court at Toronto. LENNOX, J., said that, sitting in the Weekly Court, he had no jurisdiction in criminal cases; and he, therefore, made no order. T. H. Lennox, K.C., for the defendant. R. H. Greer, for the Crown.

TUCKER v. TITUS—LATCHFORD, J.—JUNE 2.

Fraud and Misrepresentation—Contracts Induced by—Action for Rescission—Affirmance by Disposing of Property Acquired—Dismissal of Action without Prejudice to Action for Deceit.]—The plaintiff's claim was for the rescission of certain contracts, on the ground that they were induced by fraud and misrepresentation. The learned Judge said that from the plaintiff's own evidence it appeared that, with full knowledge of all

that he now alleged and proved, he had, by disposing of part of the property acquired from the defendant, put himself in such a position that he had in law affirmed what he sought in this action to set aside. See Stocks v. Boulter (1912), 3 O.W.N. 1397, and Boulter v. Stocks (1913), 47 S.C.R. 440. It might be that, had the action been for deceit, the defendant would have to meet the claim by calling evidence. But, as no case had been made for rescission, the learned Judge was—in the absence of an amendment, which he refused to make, changing the whole form of the action—obliged to grant the defendant's motion for a nonsuit, and dismiss the action with costs, but without prejudice to the right of the plaintiff, if so advised, to bring an action for damages for deceit. E. G. Porter, K.C., and W. Carnew, for the plaintiff. A. Abbott, for the defendant.

WILSON v. SANDERSON-HAROLD CO.—FALCONBRIDGE, C.J.K.B.—JUNE 4.

Master and Servant — Dismissal of Servant — Action for Wrongful Dismissal—Justification — Acquiescence — Costs.] — Action to recover six months' salary of the plaintiff as manager of the defendants' business and for damages for wrongful dismissal. The learned Chief Justice said that there was abundant evidence supplied by Miller, and by the plaintiff's own admissions, to justify a charge, if not of active disloyalty, certainly of a feeling of unrest and dissatisfaction, which would not be consonant with the discharge of the plaintiff's highest duty to his employers, and which would reasonably lead Harold to the belief that the plaintiff's usefulness was gone or seriously impaired; and it seemed, too, that the plaintiff acquiesced in his own dismissal. He made no protest at the time (August, 1912), and he went on and asked for and was paid his bonus of $120, by cheque enclosed in a letter of the 18th September from Harold to "Dear Billy." On the 9th October, the plaintiff wrote to Harold about some stock held by the plaintiff in the defendant company (which stock had been allotted to him by them on the 1st April, 1912, as a bonus for past services), and there was no hint in this letter of any further claim. Then, in a letter of the 18th November, he put forward this claim. The action failed, but there were circumstances in the case which led the Chief Justice not to impose the penalty of costs on the plaintiff. Action dismissed without costs. W. S. Brewster, K.C., and J. R. Layton, for the plaintiff. F. Smoke, K.C., for the defendants.

LLOYD & CO. v. SCULLY—MASTER IN CHAMBERS—JUNE 5.

Practice—Action Brought in Name Denoting Partnership—Sole Member of Firm—Style of Cause—Irregularity—Amendment—Con. Rules 222, 231.]—This action was brought by "Samuel Lloyd & Company" as plaintiff. On an application by the defendants, under Con. Rule 222, for the names of the members of the firm, the answer was, that "the sole member of the firm of S. Lloyd & Co. is Theresa Lloyd." The defendants moved to stay the action, as improperly brought under Con. Rules 222 and 231. The Master said that, in its terms, Con. Rule 222 is not applicable to a case like the present so as to enable a single person doing business under another name, and not being an incorporated company, to sue in the firm name. It seemed clear from the decision of Osler, J.A., in Lang v. Thompson, 16 P.R. 516, as well as that in Mason v. Mogridge, 8 Times L.R. 805, that the action should have been brought by "Theresa Lloyd, carrying on business under the name, style, and firm of Samuel Lloyd & Company;" or so under some such wording. In the Lang case it was pointed out that the style of the cause should be amended in cases like the present, on proper terms. It is said by the plaintiff's solicitor that the effect of the present motion, if granted, will be to throw the trial over the sittings at Owen Sound fixed for the 12th inst. In view of this, I was asked on the argument to direct the defendants to plead forthwith and to take short notice of trial. But no such terms can be imposed when, as here, there is no irregularity or default on the part of the defendants. The notes sued on were long overdue. The action, which was begun on the 22nd April, apparently did not even then proceed with the despatch allowed by the Rules. If, for any reason, the plaintiff should think it best, she could move to change the place of trial to Toronto or move for judgment under Con. Rule 603, if there was no real defence. As the case stood, the plaintiff should amend, and the costs of this motion should be to the defendants only in the cause. J. F. Boland, for the defendants. Featherston Aylesworth, for the plaintiff.

RE EMMONS v. DYMOND—LENNOX, J., IN CHAMBERS—JUNE 5.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers—Refusal of Leave—Con. Rule 1278.]—Motion by the defendant for leave to appeal to the Appellate Division from the order of BRITTON, J., ante 1363, refusing to transfer this action from a County Court to the Supreme Court of Ontario. LENNOX, J., was not able to say that there was "good reason to doubt the correctness of the judgment" of BRITTON, J.; and it would be necessary for him to entertain that opinion, as well as to find that important matters were involved, before he could make an order under Con. Rule 1278. The application for leave was, therefore, refused; costs in the cause. E. C. Cattanach, for the defendant. R. U. McPherson, for the plaintiff.

TOURBIN v. AGER—LENNOX, J.—JUNE 5.

Injunction—Interim Order—Motion to Continue—Affidavits —Service.]—Motion by the plaintiff to continue an interim injunction. The affidavit of the plaintiff upon which the interim injunction was granted was not among the papers. The injunction order gave leave to file additional affidavits, but only upon condition of serving copies. Copies of two affidavits were not shewn to have been served. The case was not set down upon the list, and no one appeared for the defendant. Lennox, J., said that, in these circumstances, he would continue the injunction for a week, and the plaintiff could take such measures in the meantime as he might be advised. M. J. McCarron, for the plaintiff.

MALOT v. MALOT—LENNOX, J.—JUNE 5.

Marriage—Action for Declaration of Nullity—1 Geo. V. ch. 32—Constitutionality—Marriage of Children—License—Perjury —Evidence.]—On the 11th September, 1911, The Rev. S. James Allin, then of Windsor, pronounced the defendant and the plaintiff man and wife. The plaintiff, Minnie Malot, brought this action to have the marriage declared void. She swore that there were no witnesses present. The names "Fernie Allin" and "V. May Allin" appeared as witnesses on the marriage certificate,

but the whole of the writing upon the certificate was manifestly in the same hand. At the time of the marriage, or alleged marriage, the plaintiff was only a little over thirteen years of age, and the defendant, it was said, was less than nineteen. They were married upon a license; and the learned Judge said that, if the Attorney-General's department should inquire into how the license was obtained, and punish somebody, it might check the commission of perjury in the future. This was a very disgraceful case, the learned Judge said, and he would like to have heard from Mr. Allin how he was so woefully deceived as to the ages of these children, and about the witnesses; but when, at the trial, it was suggested that he should be called as a witness, it was said that he had been removed to another sphere of usefulness. The action was brought under the authority of 1 Geo. V. ch. 32. The learned Judge said that the evidence of the plaintiff to prove that the marriage was not consummated, and her manner of giving evidence, were both unsatisfactory; the story she told was a difficult one to believe; and yet, perhaps, as it was the only evidence, it ought to be accepted. The learned Judge said that he had not yet finally made up his mind as to this. There was no reason why the defendant should not be subpœnæd and examined. But, in any case, the jurisdiction to give judgment depends upon the constitutionality of the Act referred to, and this question, after a good deal of consideration, the learned Judge did not feel prepared to determine affirmatively. A day will be set for further argument, upon notice to the Attorney-General. F. A. Hough, for the plaintiff.

GROCOCK v. EDGAR ALLEN & CO. LIMITED—MASTER IN CHAMBERS—JUNE 6.

Trial—Postponement—Delay in Prosecution of Action—Evidence—Foreign Commission.]—Motion by the defendants to postpone the trial, "and, if necessary, for an order for a commission to take evidence in England" of five of the directors of the defendant company or of some of them. The facts appear in a note of a previous decision of the Master upon a motion by the defendants for particulars of the statement of claim, 3 O.W.N. 1315. That decision was given more than a year ago. According to the affidavit filed in support of the present motion, and not contradicted, the particulars then ordered were not given until the end of October, 1912. The plaintiff had been examined for

discovery on the 13th, 14th, 23rd, and 25th January, and the 26th May, 1913; his depositions extending over 240 pages. On the 6th May, the plaintiff served notice of the setting down of the case for trial at the Toronto non-jury sittings. The notice of this motion was served on the 29th May. The statement of claim put the plaintiff's damages at $15,000. A large part of the claim was based on representations alleged to have been made to the plaintiff by the directors of the defendant company, at their office in Sheffield, England, which were said to have been untrue, to their knowledge, or not to have been fulfilled. The plaintiff's depositions had been forwarded to the defendant company to see if they were prepared to accept the plaintiff's story, or if they wished to give evidence to the contrary, either by coming to the trial or by a commission. It was contended that the delay on the part of the defendants was inexcusable, and that the plaintiff should not be debarred from a trial at the current sittings. The Master said that it was desirable in all cases to have a speedy trial. This was not only in the public interest, according to the well-known maxim, but also in that of the parties, so that evidence may not be lost nor the memory of witnesses become blurred nor the successful party be deprived of the fruits of victory. But this principle is to be applied subject to another principle—that "a fair trial is above all other considerations" This was in effect the principle followed in regard to a foreign commission in Ferguson v. Millican, 11 O.L.R. 35—that defendants ought not to be deprived of "reasonable facilities for making out their defence." It applies here at least as strongly as to the Ferguson case. In view of the fact that the alleged breach was committed nearly two years ago, and the action therefor began on the 8th March, 1912, and was not at issue until December, 1912, through the delay of the plaintiff in giving particulars of the statement of claim, it seemed reasonable to let the case stand off the peremptory list, at least until the 16th June, to see the answer sent by the directors. No order need issue meantime; and the matter could be spoken to again on the 13th June, or earlier if the defendants should be heard from before that date. H. E. Rose, K.C., for the defendants. W. N. Tilley, for the plaintiff.

FRITZ v. JELFS—LENNOX, J., IN CHAMBERS—JUNE 6.

Pleading—Statement of Claim—Motion to Strike out Portion—Prejudice—Materiality.]—Appeal by the plaintiff from the order of the Master in Chambers of the 29th May, 1913, ante 1371, refusing to strike out certain paragraphs of the statement of defence of the defendant Green. LENNOX, J., dismissed the appeal; costs in the cause. L. E. Awrey, for the plaintiff. H. E. Rose, K.C., for the defendant Green.

RE PHILLIPS—LENNOX, J., IN CHAMBERS—JUNE 7.

Infant — Custody — Right of Father—Welfare of Infant—Conduct and Character of Father.]—Motion by the father of Ethel Gladys Phillips, an infant, on the return of a habeas corpus, for an order for delivery of the infant by the Children's Aid Society to the applicant. The learned Judge said that he found it very difficult to decide what should be done in this matter. The right of a parent to the custody and care of his child should not be interfered with except for weighty reasons satisfactorily shewn. There were a number of statements in the affidavits and papers filed on behalf of the Children's Aid Society that could not be regarded as evidence. The affidavits in support of the father's claim made it pretty clear that, in a general way, in his outside life, he was a well-behaved man; but they afforded no actual evidence as to the relations alleged to exist between the father and a woman at whose house he was boarding. So long as the father continued to make his home there, it could not be said that he was a fit and proper person to have the care, custody, education, or control of his daughter Ethel Gladys Phillips. It was, therefore, directed that the application should stand adjourned until Friday the 20th June instant. If it should then appear, to the satisfaction of the learned Judge, that the applicant had permanently abandoned his present residence and established a respectable and suitable home for himself and his daughter, and entered into an undertaking faithfully to carry out the new arrangement, the order asked for would be made; otherwise the application would then be dismissed with costs. C. Elliott, for the applicant. W. B. Raymond, for the Children's Aid Society.

SEGUIN v. TOWN OF HAWKESBURY—BRITTON, J.—JUNE 7.

Municipal Corporation—Closing of Street—Authorisation of Council—Work Done by Railway Company—Powers of Dominion Railway Board — Illegal Act — Injury to Neighbouring Land-owners—Damages—Costs.]—Four actions brought respectively by Arséne Seguin, Raoul Seguin, Joseph Seguin, and Albert Treaud, against the Corporation of the Town of Hawkesbury, tried together at L'Original, without a jury. The plaintiffs were land-owners in the town, their lands being on or near St. David street, and not far from the right of way of the Canadian Northern Quebec Railway Company. The defendants' council, on the 27th September, 1911, passed a by-law for closing a portion of St. David street. That by-law was quashed by the order of a Divisional Court: Re Seguin and Village of Hawkesbury (1912), ante 521. The order gave the defendants the option of providing for compensation to the applicant, the now plaintiff, Arséne Seguin, or of having the by-law quashed; but the defendants did nothing. After the passing of the by-law, and before it was quashed, the railway company closed the street for its whole width at the place of crossing. These actions were commenced on the 8th March, 1913, and were brought under secs. 468 and 629 of the Consolidated Municipal Act, 1903, to recover damages for the injury to the plaintiffs by the closing of the street. BRITTON, J., found that all that was done was with the consent and aid of the defendants; and the defendants were liable to the plaintiffs for anything in connection with the closing of the street by the railway company with the consent of the defendants. In the learned Judge's opinion, the Dominion Railway Board has no authority to close any street within a municipality. Closing must be by the municipality, and in the manner prescribed by the Municipal Act. The learned Judge also found as a fact that the case was not one of a "deviation," as contended for by the defendants, which might bring it within the jurisdiction of the Board. Accordingly, the plaintiffs were held entitled to recover damages by reason of the defendants being wrong-doers, the work being an unauthorised and illegal work, and also to damages for any injury caused by the work which would have been caused had the work been authorised. The plaintiff Arséne's damages were assessed at $250; the plaintiff Joseph's, at $100; the plaintiff Raoul's, at $75; and the plaintiff Treaud's, at $75. Judgment accordingly with County Court costs and without any set-off of costs; costs of the trial to be as of one action. A. Lemieux, K.C., for the plaintiffs. H. W. Lawlor and George Macdonald, for the defendants.

FIRST DIVISION COURT, MIDDLESEX.

MACBETH, Co. C.J. MAY 30TH, 1913.

MOODY v. KETTLE.

Principal and Agent—Agent's Commission on Sale of Land—Introduction of Purchaser by Agent—Purchase from Principal of a Different Property from that which Agent Employed to Sell.

Action by an estate agent for commission.

G. S. Gibbons, for the plaintiff.

T. H. Luscombe, for the defendant, cited Cronk v. Carman (1911), 2 O.W.N. 1027 (D.C.), as to the necessity for a contractual relationship.

MACBETH, Co. C.J.:—The defendant agreed to pay a commission to the plaintiff (who is a real estate broker) if the plaintiff sold for the defendant a coal-yard on Maitland street owned and occupied by the defendant.

The plaintiff introduced one Mathews as a prospective purchaser of this coal-yard; but, after examining the property in the defendant's company, Mathews declined to buy it. The defendant then offered to sell a smaller yard on Hill street, which had been leased to a tenant, but was then vacant. I have already found as a fact that the defendant did not at any time engage the plaintiff to sell the Hill street yard.

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

The plaintiff sues for a commission on the purchase-money of the Hill street yard.

It seems to be a complete answer to his claim to shew that he was not at any time employed to sell the Hill street yard.

Starr Son & Co. v. Royal Electric Co., 30 S.C.R. 384, is somewhat like the present case. There the plaintiffs, who were agents for the sale of electrical machinery, having in view a prospective customer for an electric light plant, were authorised by the defendants to offer a certain specifically described plant for $4,500; the customer refused to buy this plant, but subsequently purchased from the defendant a much smaller plant for $1,800. It was held that the plaintiffs were not entitled to a commission on the sale of the smaller plant. Mr. Justice Sedgewick, at p. 386, says: "The right of the appellant company to a commission depended solely upon whether they had sold the specific machine described in the telegram," i.e., the plant priced at $4,500.