The
Ontario Weekly Notes

VOL. XIII. TORONTO, OCTOBER 19, 1917. No. 6

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 9TH, 1917.

ROBINSON v. LONGSTAFF.

Vendor and Purchaser—Contract for Sale of Land—Option—Payment—Question of Fact—Finding of Referee—Appeal—Acceptance of Money Paid—Statute of Frauds.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 28.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. E. Raney, K.C., for the appellant.

A. J. Anderson, for the defendants, respondents.

The Court dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 11TH, 1917.

RE GILLIES GUY LIMITED AND LAIDLAW.

Company—Incorporated Trading Company—Power to Acquire and Sell Land—Title to Land Acquired by Company—Contract for Sale—Objection by Purchaser—Powers of Company under Letters Patent—Ontario Companies Act, R.S.O. 1914 ch. 178, secs. 23, 24—Application under Vendors and Purchasers Act.

Appeal by the purchaser from the order and decision of FALCONBRIDGE, C.J.K.B., ante 11.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. H. F. Lefroy, K.C., for the appellant.

F. F. Treleaven, for the vendors, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*OTTO v. ROGER AND KELLY.

Ditches and Watercourses Act—Award of Township Engineer—Objections of Land-owner—Drain Crossing Lines of Dominion Railway—Railway Act, R.S.C. 1906 ch. 37, sec. 251(4)—Insufficient Outlet—R.S.O. 1914 ch. 260, sec. 6—Personal Attendance of Engineer—Sec. 16—Action to Restrain Engineer and Contractor from Proceeding under Award—Remedy by Appeal to County Court Judge—Sec. 21—Curative Provisions of sec. 23—Dismissal of Action—Appeal.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 39 O.L.R. 127, 12 O.W.N. 45.

The appeal was heard by MEREDITH, C.J.C.P., MIDDLETON, LENNOX, and ROSE, JJ.

R. S. Robertson, for the appellant.

G. G. McPherson, K.C., for the defendant Roger, respondent.

W. G. Owens, for the defendant Kelly, respondent.

MIDDLETON, J., read a judgment in which he said that the plaintiff must fail unless he could successfully attack the award made by the engineer.

The most important ground of attack was, that the engineer did not, as directed by the Ditches and Watercourses Act, go upon the ground and meet the parties before making his award, but sent his assistant, and that the assistant was merely instructed to ascertain certain levels etc., and did not hear the parties or their evidence; so that there was not only no hearing by the engineer himself but no hearing at all. This, if made out upon the evidence,

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

would be a most serious defect; and, if it is not sufficient to relieve from the award, by reason of the curative provisions of the statute, minor objections need not be discussed.

When Townhsip of McKillop v. Township of Logan (1899), 29 S.C.R. 702, was decided, the statute made an award binding "notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act." This was held not to cure an insufficient notice originating "the proceedings, the section not covering the proceedings anterior to the award for the purpose of putting in operation the machinery of the Act" (p. 705).

The statute was amended after that decision; and, under the amended provision, the award, after the time limited for appealing, and after the determination of any appeal, is "valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings prior to the making of the award:" R.S.O. 1914 ch. 260, sec. 23.

It was argued that the omission to hear the parties was not "a defect in any of the proceedings" but was the failure to take one of the proceedings necessary to confer upon the engineer jurisdiction to make the award—the absence of the hearing was so fundamental a matter that, notwithstanding sec. 23, it rendered the proceedings void. This is too narrow a view of the statute. The appeal to the County Court Judge under sec. 21 is really a rehearing. The Judge may go into the whole matter de novo. He may go upon the ground and himself view the land. He may compel the engineer to accompany him and render all assistance. He may take evidence and amend the award, if necessary in order to do justice. If the engineer has been at fault he may be deprived of his fees. Thus any neglect or improper conduct on the part of the engineer may be set right upon the appeal. Anything that can be remedied on the appeal is covered by the curative section. The same validity is given to an award against which there is no appeal within the limited time as to an award dealt with upon an appeal.

It was argued that the award was bad because the drain was not carried to a sufficient outlet. This was based upon a misreading of McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446, where it was held that an award could not justify pouring the drainage-waters upon the lands of a stranger to the proceedings. The Municipal Drainage Act contemplates taking the waters to a sufficient outlet and not pouring them upon the land of some one else. This was all that was decided. See Healy v. Ross (1914-15), 32 O.L.R. 184, 33 O.L.R. 368.

Then it was said that the award was bad because it contemplated crossing the Grand Trunk Railway, and no permission had been obtained from the Dominion Board of Railway Commissioners. All that sec. 251 of the Railway Act requires is, that the consent of the Board be obtained before the work is actually done on the land of the railway company.

In all aspects of the case, the appeal failed, and must be dismissed.

MEREDITH, C.J.C.P., reached the same result, for reasons fully stated in writing.

LENNOX and ROSE, JJ., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*RE MITCHELL AND FRASER.

Landlord and Tenant—Landlord and Tenant Act, Part III.—Provisions respecting Overholding Tenants—Summary Ejectment Procedure—Application to Case of Mortgagee and Mortgagor—"Person"—"May"—Interpretation Act, sec. 29 (s).

Appeal by Donald Fraser, tenant, from an order of the Judge of the County Court of the County of Carleton, under Part III. (Overholding Tenants) of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, directing the issue of a writ of possession to put the landlord in possession of demised premises.

The appeal was heard by MEREDITH, C.J.C.P., MIDDLETON, LENNOX, and ROSE, JJ.

J. E. Jones, for the appellant.

H. M. Mowat, K.C., for the landlord, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the respondent had, in summary proceedings, before a Judge of a County Court, under legislation respecting "overholding tenants," obtained an order for a writ of possession of the land in question, although the only relationship between him and the appellants was that of one of several mortgagees and the mortgagor; and this appeal was against that order, on the ground that the Judge had no power to make it because the case was not one which came within the legislation.

If the decision of the learned Judge was right, then the legislation, although always labelled "overholding tenants" legislation, really had no more to do with the relation of landlord and tenant than with any other kind of possession; and any one could take advantage of its provisions instead of bringing an action for the recovery of land.

"The person entitled to the possession of the premises," in proceedings under the enactment respecting "overholding tenants," must be some one of the character of a "landlord," and the "occupant" must be some one of the character of a "tenant:" the word "person" cannot mean—for instance—a person claiming possession under a paper-title against a person claiming title by length of possession; nor can the word "occupant" include the latter person. Even the form in which the statute requires the proceedings to be taken is: "In the matter of , landlord, against , tenant." No such relationship existed between the parties to these proceedings—that was admitted. The regular, proper, and common course of proceeding in a case of mortgagee and mortgagor is to sue for foreclosure or redemption; and immediate possession may be sought and can be had in a proper case: Rules 460, 33, 56, 57, 62. The higher Court has full power to deal with such cases in all their aspects, which obviously cannot be the case in such proceedings as those in question.

The "overholding tenants" enactment was not intended to be a means of unfairly depriving any person of trial by jury, or of any of the ordinary methods of trial, and the ordinary rights of appeal after such a trial. The governing word, even in regard to cases within the legislation, is "may," not "shall," and "may" shall be construed as permissive: Interpretation Act, R.S.O. 1914 ch. 1, sec. 29 (*s*); and so the powers conferred upon County Court Judges by this legislation should be exercised in proper cases, but should not be exercised in a case which for any good reason ought not to be so tried, but should be tried in the ordinary way. In this case, other mortgagees and persons were concerned in any disposition of the mortgaged premises. Apart from that, this case was clearly not one within the "overholding tenants" legislation.

The appeal should be allowed and the order below be discharged.

MIDDLETON, J., reached the same result, for reasons stated in writing.

LENNOX and ROSE, JJ., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*HILL v. TORONTO R.W. CO.

Street Railway—Injury to Person Attempting to Enter Moving Car—Invitation—Sudden Increase of Speed—Negligence—Contributory Negligence—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of DENTON, JUN. Co. C.J., in an action in the County Court of the County of York, tried with a jury, in favour of the plaintiff (upon the jury's findings) for the recovery of $388.50 damages and costs. The plaintiff complained of personal injuries sustained, by reason of the negligence of the defendants' servants, when he was attempting to get upon one of their street-cars as a passenger.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., for the appellants.

S. Rogers, for the plaintiff, respondent.

ROSE, J., read a judgment in which he said that the plaintiff was crossing Dupont street in a south-westerly direction, with the intention of boarding an east-bound car belonging to the defendants, which stopped at one of the regular stopping-places. The plaintiff swore that, while he was still north of the east-bound line of rails and east of the car, it started forward, and he stopped; that the car stopped again when the front of the fender was a foot or two further east than the place where he was standing, and while he was still "in front of the vestibule;" that the motorman gave him "a kind of a move with his head to come on"—on cross-examination, the plaintiff put it, "motioned for me to come forward to go across in front of the car;" that he (the plaintiff) passed around the front of the car, and turned close to the fender, and went along the south side of the car towards the entrance at the rear-end; that, when he was opposite the front door, the car "began to creep along very slowly, as slow about as it is possible to go," and that its speed was not increased at all up to the time when he came to the rear-step.

Upon the evidence, it was open to the jury to find as they had done, that there was an invitation by the motorman to the plaintiff to get on the car when it was in motion. The invitation was to be found from all the acts sworn to—the stopping, the motion of

the head, and the starting slowly forward; and the jury might treat these as constituting an invitation to enter the car while it was in motion.

Whether it was negligent on the part of the plaintiff to attempt to enter the car, moving at the speed it was moving, was a question for the jury, and their finding that the plaintiff was not guilty of negligence in so doing could not be interfered with.

The plaintiff said that, when he reached the rear-end of the car, he took hold of the upright bars, one with each hand, intending to get on to the step; but, just then, the car gave a sudden jolt forward, which threw him off his balance, so that he missed his step "and never got to the step at all;" that, after an unsuccessful attempt by a passenger to help him on, he had to let go, and fell to the ground, sustaining the injuries of which he complained.

The jury found that the plaintiff's injuries were caused by the defendants' negligence, and that such negligence consisted in "not seeing the passenger safely on the car." That finding, read with the charge and the other findings, was not equivocal, but clearly meant that the motorman was negligent, in that, having invited the plaintiff to enter the moving car, and knowing or having the means of knowing that the plaintiff was acting upon the invitation, he gave the sudden "jerk" to the car without first ascertaining that the plaintiff had reached a place of safety.

It was said that, whatever was thought about the plaintiff trying to enter a slowly moving car, he ought to have desisted as soon as he found the speed increased. That would have been the safer course; but, on the evidence, the plaintiff was confronted with a sudden emergency, and it was open to the jury to find that his perseverance in his attempt to enter the car was the result of an error of judgment, in such emergency, which ought not to be called negligent.

The appeal should be dismissed.

MEREDITH, C.J.C.P., and LENNOX, J., reached the same result, for reasons given by each in writing.

RIDDELL, J., with some doubt, concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Negligence—Local Board of Health—Medical Officer of Health—Death of Diphtheria Patient—Action under Fatal Accidents Act—Evidence—Failure to Shew Negligence Causing or Contributing to Death—Public Health Act, R.S.O. 1914 ch. 218, sec. 58.

Appeal by the plaintiffs from the judgment of BRITTON, J. 12 O.W.N. 241.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. C. Mikel, K.C., for the appellants.

W. N. Tilley, K.C., for the defendants, respondents.

RIDDELL, J., read a judgment in which (after stating the facts) he said that the trial Judge was right in holding that there was no evidence that should have been submitted to the jury that anything done or omitted by the defendants or either of them could be said to have caused or contributed to the death of the plaintiffs' daughter.

In the first place, the provisions of sec. 58 of the Public Health Act, R.S.O. 1914 ch. 218, are explicitly "for the public safety;" the reasoning in Gorris v. Scott (1874), L.R. 9 Ex. 125, applies; and neither the child, during her lifetime, nor the plaintiffs, as her personal representatives or otherwise, have any right of action. And, outside of the statute, there was nothing in the way of "taking charge" of the child by the defendants.

The judgment of Riddell, J., however, was not based upon these considerations, important as they were, but upon the consideration that, even if there were liability to the plaintiffs for the death of their daughter, due to the negligence of the defendants, there was no evidence to indicate that the death was directly or indirectly, in whole or in part, due to such negligence.

The case of Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, and the medical cases cited therein, as well as Reed v. Ellis (1916), 38 O.L.R. 123, made it plain that the causal relation between the alleged negligence and the death must be made out by evidence, and not left to the conjecture of the jury.

The appeal should be dismissed.

LENNOX, J., agreed that the appeal should be dismissed, for the reasons stated by RIDDELL, J.

MEREDITH, C.J.C.P., for reasons stated in writing, was also of opinion that the appeal should be dismissed.

ROSE, J., was of the same opinion, for the reasons expressed by BRITTON, J.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*BIGRAS v. TASSE.

Fire—Setting out in Highway—Failure to Extinguish—Injury to Neighboring Property—Liability of Foreman of Gang of Men Engaged in Government Road-building—Act of Subordinate—Respondeat Superior—Servants of Crown—Evidence—Negligence.

Appeal by the defendant from the judgment of the Judge of the District Court of the District of Sudbury in favour of the plaintiff for the recovery of $217 and costs in an action for damages for loss of a house, barn, and other property by fire said to have spread to the plaintiff's land from a fire negligently set (it was alleged) by order of the defendant upon a highway.

The defendant was the foreman of a gang of men engaged in building a road for the Government of Ontario. The defendant employed one Arthur Richer as a labourer and his son Arthur Richer as "water-boy." This boy made a fire on the roadway to make tea for the workers. The fire spread, reached the buildings of the plaintiff, and destroyed them.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Harcourt Ferguson, for the appellant.

T. M. Mulligan, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that it was difficult to understand how it could reasonably be contended that the Crown was concerned in any of the matters out of which the action arose. The Crown was not making or concerned in the mak-

ing of tea for the workmen. They boarded and lodged themselves. The lighting of a fire daily for the purpose of heating their cold tea was entirely for their own benefit, and was their own act; and so, if there were any negligence in connection with it, they were all alike answerable for that negligence. It was the duty of each of them to take care that the fire was so far extinguished as to cease to be dangerous, before leaving it. The time of the year, the state of the weather, and the character of the country in which these fires were lighted, made care in extinguishing them a very obvious need and duty. And it could not be said that the District Court Judge was wrong in finding that there was a want of such care which was the cause of the plaintiff's loss.

The defendant could not escape liability because he was away from his work on the day when the fire that caused the mischief was lighted. If he were merely one of the workmen who warmed their tea or lighted their pipes at the fire, there might be a good deal to be said in favour of his escape. But he was the foreman of all these workmen and of the boy who actually lighted the fire; and it was from the defendant alone that the boy got his authority and orders to light such fires. The defendant was the author of the practice of having the fire lighted daily by the boy. And in regard to extinguishing it there seemed to be no difference on this from any other day. There was nothing in the evidence to shew that the defendant gave any orders or warning to the boy or to any one else to extinguish the fire after it had answered its purpose. And on the day when the mischief was done, and whilst the danger was apparent, and the defendant was there and could see it, no sufficient steps were taken by him and the men under him to save the plaintiff's property from injury from the running of the fire of the midday of the day before, which fire had not been extinguished. It was their duty then to take efficient means of staying, if they reasonably could, the further spread of the fire. They moved a mile away without doing so.

Assuming, without considering the question, that the setting out of the fire was not an unlawful act, and that the plaintiff, in order to entitle him to a judgment in his favour, must prove negligence in lighting or maintaining it, or in failure to extinguish it, the judgment below was right and should be affirmed.

LENNOX, J., was also of opinion, for reasons stated in writing, that the judgment for the plaintiff should be affirmed.

ROSE, J., concurred.

RIDDELL, J., read a dissenting judgment. He said that the relation of the defendant and the boy was not that of master and servant—the boy was, equally with the foreman, the servant of the Crown; and, as between the defendant and the boy, the maxim respondeat superior had no application. Assuming that the plaintiff's loss was due to the negligence of the boy (of which there was little, if any, evidence), the defendant could not hide behind the Crown and say respondeat superior, for the Crown can neither commit nor command a tort: Feather v. The Queen (1865), 6 B. & S. 256; the defendant was not liable for any negligence or default of those in the same employment as himself: Hiscox v. Lander (1876), 24 Gr. 250, 266, and cases there cited; the defendant would be liable if the boy, who was under his orders, was ordered by him to do any act either necessarily or naturally dangerous; but there was no evidence that the defendant ordered anything to be done from which danger should have been anticipated. The defendant was not to anticipate negligence of any kind; and, in the absence of the relation of master and servant, he was not liable for the negligence of another.

Appeal dismissed with costs; RIDDELL, J., *dissenting.*

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*SOUTHBY v. SOUTHBY.

Husband and Wife—Moneys Deposited by Husband in Savings Bank to Joint Credit of himself and Wife—Origin of Fund—Property-claim of Wife against Husband—Savings from Housekeeping Allowance—Claim under Document Addressed to Bank—Special Purpose of Deposit—Evidence.

Appeal by the defendant from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff in an action for a declaration that half the money in a savings bank in Toronto deposited to the credit of the plaintiff and defendant—wife and husband—jointly, was the property of the plaintiff, the wife.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. S. Lundy, for the appellant.

J. F. Boland, for the plaintiff, respondent.

RIDDELL, J., in a written judgment, said that the bank account was opened in May, 1915, under a direction, signed by both husband and wife, dated the 4th May, 1915, and addressed to the manager of the West Toronto Branch of the Molsons Bank, as follows: "We, the undersigned, request you to open a joint account in our names. All moneys which may be deposited by us or either of us to the said account are our joint property, but such moneys may be withdrawn by either one of us or the survivor of us."

The defendant, who had been living with the plaintiff, his wife, in Toronto, was going to Montreal in May, 1915; his wife was to remain in Toronto. He had some property in Toronto, mortgages outstanding, rents to be collected, etc., and his wife was to attend to all his business in Toronto. The wife's story was: "He said that he would take me over to the bank and put the money in a joint account. . . . I had to stay here to look after (my son at school) and also look after our property here. . . . He told me there were certain payments . . . He told me to draw any money out that I would need at any time, and told me to pay any small bills and such like."

It was not suggested that any of the money originally placed to the credit of the joint account had previously stood in the plaintiff's name. She had, before May, 1915, let her husband have money from time to time, but this was money she had saved from what he gave her for housekeeping expenses while they were living together. The moneys she thus let him have were merged in his general account, which in May, 1915, came to $215.62, the sum placed to joint account. The subsequent deposits to the joint account were from rents collected from the defendant's property, from a mortgage belonging to the defendant but put in his wife's name for convenience, etc.; none of the money was from the wife's earnings.

The Court will not prevent a husband from giving his wife what profits she can make out of his cows, poultry, etc., as "but a reasonable encouragement to the wife's frugality," especially where there is "no creditor of the husband to contend with:" Slanning v. Style (1734), 3 P. Wms. 334, 338, 339; but savings by her out of moneys allowed for household expenses etc. do not become hers without his consent (unless they are living apart): Everasley on Domestic Relations, 2nd ed., p. 294; Barrack v. McCulloch (1856), 3 K. & J. 110, 114.

There could be no pretence, therefore, that the plaintiff could claim any part of the money independently of the "joint property" document.

The defendant was going to Montreal, leaving his wife behind in Toronto—he had made certain mortgages, upon which payments were falling due in Toronto—and the reason for opening the joint account was, that the wife might draw out any money needed to make the accruing payments on the mortgages and "pay all small bills and such like." It was impossible to declare from this any intention on the part of the husband to make a present to his wife of any part of this money.

Reference to Lush on Husband and Wife, 3rd ed., p. 211; Marshal v. Crutwell (1875), L.R. 20 Eq. 328, 331; Mews v. Mews (1852), 15 Beav. 529; Everly v. Dunkley (1912), 27 O.L.R. 414.

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

LENNOX, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., was of opinion, for reasons stated in writing, that the appeal should be allowed and the action be dismissed.

ROSE, J., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 12TH, 1917.

*MAY v. HAINER.

Trusts and Trustees—Absolute Conveyance of Land—Trust for Children of Grantor—Oral Evidence—Surrounding Circumstances—Statute of Limitations—Tenancy at Will—Acts Determining—Caretaker.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Lincoln dismissing an action for the recovery of land.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

E. D. Armour, K.C., for the appellant.

A. W. Marquis, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that in 1894 John Hainer was the owner in possession of the land in question,

which was and had been for a good many years his home and the home of his family. He was then a widower for the second time, and had several children by each of his wives. Those of the first family had all grown up and left the parental home, except one daughter, Almeda, who was deaf and dumb. The children of the second family, two boys and a girl, were quite young. The plaintiff in this action was John Hainer's son-in-law, having married one of the daughters of the first wife; and he was also a next door neighbour of John Hainer. In these circumstances, the plaintiff obtained from John Hainer a deed, dated the 25th September, 1894, absolute in form and with the usual covenants, of the land in question, which property was apparently all that John Hainer had, and was his family homestead. The deed was not registered until the 19th October, 1915, about the time when John Hainer died. Notwithstanding this absolute conveyance, John Hainer remained in possession of the land, just as if no conveyance had been made, until he died; and his daughter Almeda and the members of the second family remained in possession after his death until Almeda's death, a few months before this action was brought against the members of the second family, who had since continued in possession and were in possession at the time of the action was brought, up to which time no attempt was made by the plaintiff or any one to evict them or disturb them in any substantial manner.

These being the facts, the learned Chief Justice was of opinion:—

(1) That the land was conveyed to the plaintiff upon some kind of trust in favour of those who had had the use and benefit of it ever since the deed.

(2) That the trust was not merely to permit the daughter Almeda to stay upon the land as long as she lived; but was for the benefit also of the three young children of the second marriage after their father's death.

Reference to Anning v. Anning (1916), 38 O.L.R. 277.

(3) That the plaintiff had not fulfilled the trust; that the trust would be violated by giving effect to the deed in the manner sought by the plaintiff; and so the action could not succeed in a Court of Equity.

(4) That, if the finding of a trust were discarded, the County Court Judge's decision in favour of the defendants upon the defence of the Statute of Limitations, was right—if there was no trust, the plaintiff became entitled to possession of the land upon delivery to him of the deed in 1894, and more than 23 years had passed since then.

(5) Certain acts of the plaintiff were relied on as shewing a right of entry by him within 10 years before the commencement of this action; and it was argued that each of these acts operated as a determination of a tenacy at will, under which those in possession held, and so gave the right of entry. But these acts were to be attributed to the tacit, if not expressed, leave of those in possession; and no kind of tenacy ever existed.

(6) There was no evidence upon which it could be found that the defendants or the daughter Almeda or their father were or was mere caretakers or a caretaker of the land for the plaintiff.

The appeal should be dismissed.

LENNOX and ROSE, JJ., concurred.

RIDDELL, J., said that he had some doubt at the hearing of the correctness of the decision of the learned County Court Judge; but a repeated perusal of the evidence had not convinced him that his doubts were well-founded. The appeal should be dismissed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

CAMERON, MASTER IN CHAMBERS. OCTOBER 5TH, 1917.

SUPERIOR COPPER CO. LIMITED v. PERRY.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Calls on Company-shares—Rule 25(h)—Assets in Ontario—Shares Partly Paid for—Conditional Appearance—Jurisdiction of Supreme Court of Ontario.

Motion by the defendants for an order setting aside the service of notice of the writ of summons upon the defendant Sutton, or for leave to enter a conditional appearance on his behalf.

M. L. Gordon, for the defendants.
A. W. Langmuir, for the plaintiffs.

THE MASTER, in a written judgment, said that the plaintiffs were duly incorporated under the laws of Ontario for the purpose

of acquiring and operating mining claims, with their head office at Sault Ste. Marie, Ontario. The defendant Perry resided in the State of Michigan, and was a shareholder in the plaintiff company. The defendant Sutton also resided in Michigan, and was trustee of the estate of the defendant Perry, who had been declared a bankrupt. The assets of the estate included shares of the stock of the plaintiff company, some standing (in the books) in the name of the defendant Perry and some in the name of the defendant Sutton. The par value of the shares was $10 each; and $1.38 had been paid on each of the shares standing in the names of the defendants, both of whom were citizens of the United States of America.

In this action the plaintiffs claimed a declaration that the shares standing in the names of the defendants were not paid for in full and were subject to further call and assessable by the plaintiffs.

The defendants contended that the action was not one in which they could be made subject to service out of Ontario.

The learned Master referred to Llandudno Urban District Council v. Woods, [1899] 2 Ch. 705; Kemerer v. Watterson (1910), 20 O.L.R. 451, 455; and J. J. Gibbons Limited v. Berliner Gramaphone Co. Limited (1912), 27 O.L.R. 402, 404; and said that the plaintiffs came within the provisions of Rule 25(*h*). The plaintiffs were suing on a contract, and the defendants had assets within the jurisdiction in excess of $200. The only effect of a conditional appearance would be to allow the defendants to dispute the jurisdiction. The question of jurisdiction should be settled at the earliest possible moment. It was quite clear that the Supreme Court of Ontario had jurisdiction to entertain the action.

The motion should be dismissed with costs to the plaintiffs in any event of the action.

MIDDLETON, J., IN CHAMBERS. OCTOBER 9TH, 1917.

*RE D.

Lunatic—Person Incompetent to Manage his Estate—Order Declaring—Lunacy Act, R.S.O. 1914 ch. 68, secs. 12, 37—Appointment of Guardians—Authorisation by Court of Continuance of Subscriptions for Charitable and Philanthropic Purposes.

An order having been made under sec. 37 of the Lunacy Act, R.S.O. 1914 ch. 68, declaring D. incompetent to manage his own

property and estate, and appointing guardians thereof, authority was sought, upon the settlement of the order, to continue charitable and philanthropic subscriptions similar to those made by him when competent, more particularly subscriptions to patriotic and Red Cross funds.

M. L. Gordon, for the petitioner

MIDDLETON, J., in a written judgment, said that the Court had, under sec. 12 of the Lunacy Act, wide powers for the management and administration of the estate of a person declared incompetent, "for the maintenance or benefit of the lunatic or of his family;" and these words ought to be liberally construed; but where what is sought is the disbursement of large amounts for the benefit of schemes and projects undoubtedly worthy, but which cannot by any stretch of the imagination be regarded as falling within those words, the statute appeared to afford no authority for judicial sanction.

In England, the jurisdiction in lunacy is not limited as here by statute, but is founded upon the ancient jurisdiction of the Lord Chancellor; and, even if English cases are applicable, no case goes far enough to authorise what is here sought.

In Halsbury's Laws of England, vol. 19, p. 438, it is said that allowances may be made to relations for whom the lunatic is not bound to provide, the Court being guided by what the lunatic would probably have done if sane; and such allowances, particularly when originated by the lunatic, are, when paid to persons as to whom he stood in loco parentis, almost a matter of course when the estate is ample, and may be originated by the Court even where this relationship does not exist, when claims for special consideration can be put forward.

Reference to In re Darling (1888), 39 Ch.D. 208, 211; In re Earl of Carysfort (1840), Cr. & Ph. 76; In re Evans (1882), 21 Ch.D. 297; In re Strickland (1871), L.R. 6 Ch. 226; Oxenden v. Lord Compton (1793), 2 Ves. Jr. 69; Ex p. Whitbread (1816), 2 Mer. 99.

Authority, therefore, could not be given for the continuance of subscriptions as sought.

MIDDLETON, J. OCTOBER 9TH, 1917.

*UNION BANK OF CANADA v. MAKEPEACE.

Assignments and Preferences—Assignment for Benefit of Creditors under Assignments and Preferences Act—Creditor Holding Mortgage-security—Valuation of, at Amount of Claim—Release by Assignee of Equity of Redemption—Effect upon Right of Creditor against Surety for Part of Claim—Discharge—Satisfaction.

An issue directed by an order of the Court to be tried, to determine the question whether the plaintiff bank was precluded from asserting any claim against the defendant by reason of the conveyance to the plaintiff bank of the equity of redemption in property mortgaged to the bank by the Specialty Manufacturing Company of Grimsby and the bank's abandonment of its right to rank against the estate of its debtor, the said company, to which the bank had made large advances, and, contemplating the making of further advances, took a guaranty from the defendant for $2,500 for advances to be thereafter made—the guaranty to cover the ultimate balance.

The issue was tried without a jury at Toronto.

W. N. Tilley, K.C., and D. C. Ross, for the plaintiff bank.

W. S. MacBrayne, for the defendant.

MIDDLETON, J., in a written judgment, said that on the 9th April, 1915, the manufacturing company made an assignment for the benefit of its creditors under the Assignments and Preferences Act, R.S.O. 1914 ch. 134. The assignee took nothing of value under the assignment, as all the company's property had been hypothecated to the bank. At a meeting of the creditors, it was decided to sell the equity of redemption for $300 if any one could be found to assume the bank's claim. The bank proved its claim at $13,707.39, and valued its securities at the same amount—$250 being the value given to assigned book-debts and $13,457.39 the value given to the mortgages on land and chattels. No purchaser was found by the assignee; and, when the bank began an action for foreclosure, the expected $300—the only source of payment of the assignee's and inspector's fees and the costs of the assignment—seemed impossible of realisation. The assignee thereupon offered the bank a release of the equity of redemption for $300. The bank agreed to this, and also agreed to abandon to the assignee all claim upon the book-debts then remaining uncollected. On the 13th November, 1915, a quit-claim deed of the mortgaged land was given, and, later, a release of the chattels;

and all claims upon the estate in the hands of the assignee were withdrawn.

By this course of dealing, the defendant, as surety, had not been discharged.

The bank, a creditor for a large amount, held, as security for all its claims, a mortgage upon the company's factory and its contents. The bank also held, as security for the ultimate balance due to it upon advances made after the date of the guaranty, the defendant's bond for $2,500. When the assignment was made, the bank became entitled to share in the property which should come to the hands of the assignee for distribution according to the terms of the deed of assignment and the statute.

When the bank's claim was filed, and its security was valued at the amount of its claim, the bank was shewn to have no right to share in any money or property which the assignee might receive. The abandonment of the right to rank as an unsecured creditor, or the release of any claim against the estate in the hands of the assignee, was something which did not prejudice the defendant, the surety. When a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security. All that the surety is then entitled to is a credit upon the account of the true value of the security improperly released: Taylor v. Bank of New South Wales (1886), 11 App. Cas. 596, 603. Here there was no damnification of the surety, because the bank had no right to share, and there was no estate in which it could share.

The valuation of the bank's securities did not extinguish the debt or release the debtor, the company. Bell v. Ross (1885), 11 A.R. 458, distinguished.

The assignee's relinquishment of the right to redeem did not interfere with the right of the bank, the creditor, to sue the mortgagor, the company, nor, a fortiori, did it deprive the creditor of its rights against the surety: Rainbow v. Juggins (1880), 5 Q.B.D. 422.

Where the right against a surety may be preserved by express reservation, this reservation may be implied: Gorman v. Dixon (1896), 26 S.C.R. 87.

No merger would be implied from the conveyance of the equity of redemption: Thorne v. Cann, [1895] A.C. 11.

Upon the issue presented, the finding is, that the defendant has not been discharged from her liability as surety for the indebtedness of the company to the plaintiff bank by reason of any payment or satisfaction of such indebtedness; the defendant to pay to the bank the costs of the motion which resulted in the order directing the trial of the issue and the costs of the issue.

CLUTE, J. OCTOBER 11TH, 1917.

*STARK v. SOMERVILLE.

Contract—Brokers—Dealings in Company-shares for Customer—Actual Transactions—Authority of Customer—Advances—Purchases—Sales—Credits—Account—Statute of Limitations—Starting-point for.

Action by stockbrokers against a customer to recover $3,708.30, a balance alleged to be due to the plaintiffs in respect of advances made by them for the purchase of stocks after crediting the proceeds of sales.

The action was tried without a jury at Toronto.

J. Denovan, for the plaintiffs.

D. O. Cameron, for the defendant.

CLUTE, J., in a written judgment, found as a fact that the purchases and sales purporting to be made on behalf of the defendant by the plaintiffs were actually made, and were not, nor were any of them, merely colourable transactions. He found, further, that the defendant ordered the purchases made by the plaintiffs on his behalf and that he authorised the greater part of the sales made, and that no sales were made by the plaintiffs for the defendant until after proper and sufficient demand had been made for the amount due to the plaintiffs, and that such sales were made fairly under the authority of a written agreement between the plaintiffs and defendant.

The defendant pleaded the Limitations Act, and contended that, as 6 years had elapsed after the plaintiffs ceased to purchase for the defendant, the indebtedness as it existed at that time was barred, notwithstanding the fact that the account was not closed, and that the plaintiffs held a large amount of stock to be realised upon, under the agreement, for payment of the account. The learned Judge said that it was clear beyond argument that every payment made and credit given by the plaintiffs from the sale of stocks held by them for the defendant and payment of dividends thereon was a payment made by the defendant upon the account as it stood when the payment was made; and that each payment gave a new starting-point for the statute to run; that there never was a time between payments when 6 years had elapsed; and that the Limitations Act never became effective to bar the account or any part thereof.

With respect to the Statute of Limitations, it was not disputed that it would begin to run from the time the plaintiffs could have sued for their claim: Reeves v. Butcher, [1891] 2 Q.B. 509; McFadden v. Brandon (1903), 6 O.L.R. 247. The real question was, whether the transactions which took place in regard to the sale of stocks and credit of the proceeds and of dividends took the case out of the statute from time to time as these payments were made. There was a clear understanding, acted upon throughout, that the proceeds of the sale of the stocks and the dividends paid should be credited as received upon the general balances; the payments were so credited; the defendant had knowledge of this from time to time and did not object; so that what took place amounted to an affirmation from time to time of what the original agreement in fact was, and a new starting-point was given to the statute.

Reference to Cockburn v. Edwards (1881), 18 Ch.D. 449, 457; Chinnery v. Evans (1864), 11 H.L.C. 115, 133; Dos Passos on Stockbrokers, 2nd ed., p. 236; Addison on Contracts, 9th ed., p. 188.

The defendant also contended that the transactions were gambling transactions and illegal, citing sec. 231 of the Criminal Code; Beamish v. James Richardson & Sons Limited (1914), 49 S.C.R. 595; James Richardson & Sons Limited v. Gilbertson (1917), 39 O.L.R. 423, 12 O.W.N. 160; and Maloof v. Bickell (1917), ante 4.

The learned Judge said that the transactions, so far from being "bucket-shop" transactions, were in every instance, according to the evidence, real and bona fide entered into at the request of the defendant.

Judgment for the plaintiffs for $3,708.30, with interest at 5 per cent. per annum from the 2nd May, 1913, and with costs.

KELLY v. HARRINGTON—LATCHFORD, J.—OCT. 10.

Contract—Promise to Pay over Part of Proceeds of Sale of Lands—Validity—Satisfaction by Conveyance to Husband of Promisee—Finding of Trial Judge.]—Action for a declaration that the plaintiffs were entitled to a sum of $910 paid into Court to the credit of the estate of Daniel Kelly. The action was tried without a jury at Toronto. LATCHFORD, J., in a written judgment, said that, when Daniel Kelly, on the 8th April, 1897, conveyed his interest in certain lands in Algoma and Thunder Bay to one John Conlon—Catherine Kelly joining to bar her dower—Conlon executed and delivered to her the agreement on which the plaintiffs' claim in this action was founded. Conlon thereby bound himself to account for and pay over to Catherine Kelly or her assigns one-fourth part of all proceeds derived from the Algoma lands and one-third part of all proceeds derived from the Thunder Bay lands. The moneys in Court were one-fourth of the proceeds of a sale of certain lands in Algoma; and the plaintiffs, as assigns of Catherine Kelly, were clearly entitled to the moneys, unless it could be shewn that the agreement made by Conlon was invalid, or that, if valid, it had been discharged. Its validity was, it must be found upon the evidence, amply established. Had the conveyances made in 1904 by Conlon to Daniel Kelly been made to Catherine Kelly, there would be no difficulty in finding that (apart from a matter of account) they were made in satisfaction and discharge of the agreement of 1897. It might well be that the outstanding right of Catherine Kelly, created in 1897, was forgotten. But, whether forgotten or not, it was not impaired or affected by what was done afterward by Conlon or her husband. Judgment for the plaintiffs as prayed, with costs. W. T. J. Lee, for the plaintiffs. A. E. Knox, for the defendants.

JARVIS V. CITY OF TORONTO—CAMERON, MASTER IN CHAMBERS —OCT. 12.

Jury Notice—Irregularity—Action against Municipal Corporation—Nonrepair of Highway—Judicature Act, sec. 54.]—Motion by the Corporation of the City of Toronto, the defendants, for an order striking out, as irregular, a jury notice filed and served by the plaintiff. By sec. 54 of the Judicature Act, R.S.O. 1914 ch. 56, actions against a municipal corporation for damages in respect of injuries sustained by reason of the default of the corporation in keeping in repair a highway shall be tried by a Judge without the intervention of a jury. The plaintiff sued for damages in respect of injuries sustained by reason of a pile of bricks negligently left by the defendants upon a highway in the city. THE MASTER, in a written judgment, said that the case came within sec. 54: a highway may be considered out of repair whan an obstruction such as a pile of bricks is allowed to remain upon the highway for an unreasonable time: Barber v. Toronto R.W. Co. (1896), 17 P.R. 293. Order striking out the jury notice with costs. M. H. Ludwig, K.C., for the defendants. A. R. Hassard, for the plaintiff.

REDMOND V. STACEY—CAMERON, MASTER IN CHAMBERS—OCT. 12.

Pleading—Statement of Defence—Rule 141—"Material Facts" —Particulars.]—Motion by the plaintiff for an order striking out as embarrassing certain paragraphs of the statement of defence. THE MASTER, in a written judgment, said, referring to Rule 141—"Pleadings shall contain a concise statement of the material facts upon which the party pleading relies"—that "a material fact" is defined in Odgers on Pleading as every fact which is essential to the plaintiff's cause of action or to the defendant's defence, which they must prove or fail. There are many facts which are not material to the main issue, but which will be proved or discussed at the trial, for the reason that they affect the amount of damages recoverable. It was decided in Millington v. Loring (1880), 6 Q.B.D. 190, that any fact which it is open to any party to prove at the trial is a material fact and may be pleaded. That decision has been followed continuously. No order in reference to para. 12 of the statement of defence. Particulars should be given of the allegations contained in para. 11. Costs in the cause. G. S. Hodgson, for the plaintiff. F. S. Mearns, for the defendant.

SURROGATE COURT OF THE COUNTY OF HASTINGS.

DEROCHE, SURR. CT. J. SEPTEMBER 24TH, 1917.

RE CARSCALLEN.

Distribution of Estates—Devolution of Estates Act, R.S.O. 1914 ch. 119—Persons Entitled to Share in Estate of Intestate Deceased—Nephews and Nieces—Exclusion of Grandnephews and Grandnieces—Distribution per Capita and not per Stirpes.

An application by the administrator of the estate of Ann Carscallen, deceased, intestate, for a summary order determining the question who were the persons entitled to share in the estate.

All parties consented to the question being determined by the Judge upon a summary application.

W. N. Ponton, K.C., for the administrator and the nephews and nieces of the intestate.

E. J. Butler, for the grandnephews and grandnieces.

DEROCHE, SURR. CT. J., held that under the Devolution of Estates Act, R.S.O. 1914 ch. 119, the surviving nephews and nieces of the deceased intestate were alone entitled to share in her estate and that the grandnephews and grandnieces were not entitled to any share; and that the distribution among the nephews and nieces should be per capita and not per stirpes.