THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM MARCH, 1915, TO THE END OF JULY, 1915.

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APPELLATE DIVISION.

MARCH 1ST, 1915.

STUMPF v. PULLEYBLANK AND STEPHENS.

Master and Servant—Death of Servant—Negligence—Findings of Jury—Appeal—Evidence — Nonsuit — Building Trades Protection Act, R.S.O. 1914 *ch.* 228, *sec.* 6.

Appeal by the defendant Stephens from the judgment of MAGEE, J.A., upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,000, in an action by the administrator of the estate of Michael Stumpf, deceased, for damages for his death, caused, as alleged, by the negligence of the defendants.

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

R. T. Harding, for the appellant.

T. L. Monahan, for the plaintiff, respondent.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:— . . . A church was being built at Mildmay, in the county of Bruce. The plaintiff's husband, walking underneath certain scaffolding to proceed to work for the defendant Stephens, was killed by the collapse and fall of the said scaffolding. The scaffolding was erected and maintained by the defendant Pulleyblank. The defendant Stephens and his men had used it in order to carry out his contract with the church, which was that of plastering. His work, as far as the use of the scaffold was concerned, was done, but he was finishing his contract in another part of the church.

Questions were put to the jury—the only one involving any liability on the part of Stephens being as follows: "In what did

Stephens's negligence, if any, consist?" The answer is: "He should not have allowed his employees to work on or underneath the scaffold when he considered it unsafe." This answer, under the rule laid down in such cases, excludes any finding that Stephens himself had by anything that he had done weakened the scaffold.

The learned trial Judge cited to the jury sec. 6 of the Building Trades Protection Act, R.S.O. 1914 ch. 228. This section has manifestly no relation to any alleged liability of Stephens, whose men were not using the scaffold at the time.

I am of opinion, after a careful perusal of the evidence, that a nonsuit ought to have been entered, and that there is not upon the whole case sufficient evidence to support the finding of the jury against Stephens, even if that would import any legal liability.

I am, therefore, of opinion that the appeal of Stephens should be allowed and the judgment against him set aside with costs, if exacted.

MARCH 1ST, 1915.

*BARRETT v. PHILLIPS.

Division Courts—Appeal—Evidence Taken at Trial—Duty of Judge—Division Courts Act, R.S.O. 1914 *ch.* 63, *sec.* 106—*New Trial.*

Appeal by the plaintiff from the judgment of the 1st Division Court in the County of Hastings, pronounced by the Junior Judge of the County Court of that county, dismissing with costs an action brought to recover $151.88 upon an acceptance.

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

J. P. MacGregor, for the appellant.

Eric N. Armour, for the defendant, respondent.

The judgment of the Court was delivered by RIDDELL, J.:—This . . . case . . . is one of the class of cases coming under the Division Courts Act, R.S.O. 1914 ch. 63, secs. 62(*d*) and 106, and the judgment is appealable under sec. 125(*a*).

Upon the appeal it was stated to us that all the evidence had

*To be reported in the Ontario Law Reports.

not been taken down by the learned County Court Judge, and that the appeal could not be decided upon what had been taken down. We found also that it was not practicable to obtain such admissions as, taken along with the notes of the trial Judge, would enable us to dispose of the case.

We, therefore, following two cases* in this Division (when differently constituted), order that there shall be a new trial; costs both of the former trial and of the appeal to be costs in the cause.

It is to be hoped that the trial Judge will on the new trial obey the express command of sec. 106, and "take down the evidence in writing." This is the right of every litigant, and should be no more disregarded than his right to adduce evidence in support of his claim: and this duty of a Judge trying such a case in the Division Court can be no more disregarded than his duty to hear the evidence adduced. It cannot be made too plain that "notes of evidence" are not "the evidence" which the Judge is required to "take down . . . in writing," unless these notes are so full as to shew the substance of what was said. If the Judge has no stenographer, he should take down the narrative at least as fully as is the custom in an examination for discovery, etc., before a Master who takes the examination in long hand.

MARCH 2ND, 1915.

GOODERHAM v. TORONTO R.W. CO.

Negligence — Collision of Vehicles on Highway — Findings of Jury—Evidence—Appeal.

Appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff, upon the findings of a jury, in an action for damages for injury to the plaintiff's automobile by a collision with a car of the defendants.

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

D. L. McCarthy, K.C., for the appellants.

T. P. Galt, K.C., for the plaintiff, respondent.

*One of the cases is Smith v. Boothman (1913), 4 O.W.N. 801.

The judgment of the Court was delivered by LATCHFORD, J.:—The evidence discloses nothing to warrant the finding of the jury that the motorman, by exercising reasonable care, could have stopped his car, and thus have avoided the collision, after he became aware or ought to have become aware that danger was imminent.

No signal indicating an intention to turn eastward was given from the automobile. The motorman had not the slightest reason for apprehending that the chauffeur would change his course and turn eastward around the corner.

As there is no evidence on which the finding of negligence can be based, the action fails.

The appeal should be allowed with costs here and below.

MARCH 2ND, 1915.

VAN ZONNEFELD & CO. v. GILCHRIST.

Sale of Goods—Perishable Goods—Contract—Delivery to Agent of Purchaser for Carriage—Instructions as to Preservation in Carriage—Duty of Vendors—Goods Rendered Useless by Negligence of Purchaser's Agent—Liability for Loss.

Appeal by the plaintiffs from the judgment of COATSWORTH, Junior Judge of the County Court of the County of York, dismissing an action in that Court, and awarding the defendant judgment upon his counterclaim for $75. The action was for the price of bulbs shipped by the plaintiffs from Holland; and the counterclaim was for duty and freight.

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

J. P. MacGregor, for the appellants.

A. J. Anderson, for the defendant, respondent.

RIDDELL, J.:—The plaintiffs are bulb-growers in Susenheim, Holland; the defendant, a florist, near Toronto.

The defendant having had no previous dealings with the plaintiffs, their traveller called on him at his place and obtained an order for certain bulbs, which was transmitted to the plaintiffs in Holland.

At the end of the order were written the words: "To be shipped at once American Express Company; keep from heat

and frost." In another part of the order in print appears the following: "Please ship as per your Am. Cat. terms of 1908, which terms I acknowledge having fully taken notice of and fully agree to the above order for bulbs and plants of which a copy has been taken in by us."

The catalogue referred to contains the terms:—

"2. All goods travel at purchaser's risk and expense from sellers' stores."

"11. By placing orders buyers are considered to agree with these terms even there where they differ from the laws of their country."

The plaintiffs, on receipt of the order, packed the bulbs thereby ordered with care, and delivered them to the American Express Company at Rotterdam, Holland, in a case marked "Bulbs, Perishable, Rush." The plaintiffs had not been accustomed to ship by this company, but did so by reason and in pursuance of the defendant's instructions contained in the order.

The goods so marked came across the Atlantic to New York, and were by the express company placed in a refrigerator car, i.e., a car intended to prevent heat coming in from the outside, and vice versa. Apparently through some negligence of the express company, the bulbs were frozen in transit from New York to Toronto, and were worthless.

The defendant claimed that the plaintiffs were bound to keep the goods from heat and frost until such time as they reached his hands. The plaintiffs contended that they had no responsibility except to keep the bulbs safe from heat and frost while in their possession, and that their responsibility closed when the bulbs were handed over to the express company.

At the trial before Judge Coatsworth, he apparently took a middle view. . . .

It would seem that, in the opinion of the learned County Court Judge, the contract of the plaintiffs was to furnish the express company such information that they would understand that they were to keep the bulbs free from heat and frost.

On the appeal before us by the plaintiffs, counsel for the defendant renewed his contention as to the liability to keep the bulbs free from heat and frost until actual receipt by his client at his place here, and argued that the plaintiffs undertook for the express company, railway company, and carter.

The plaintiffs' counsel contended that there was no liability for anything which took place after the delivery to the express company; and that in any case the marking of the bulbs as they

were marked instead of with the words of the order had no effect in causing the loss.

On this latter point the proceedings at the trial are not wholly satisfactory, but all difficulty is removed by the very proper and laudable conduct of Mr. Anderson, who saved considerable costs which one or other litigant would have had to pay, as well as the judicial time, by admitting (what was to my mind fairly clear on the evidence) that, had the goods been marked precisely as in the order, their treatment would have been exactly the same.

Under the circumstances of this case, I do not think that the plaintiffs undertook to keep the bulbs free from heat and frost.

Clearly the bulbs were the property of the defendant after delivery to the express company: Benjamin on Sale, 5th ed., pp. 349, 350, and cases cited, especially Dutton v. Solomonson (1803), 3 B. & P. 582, per Lord Alvanley, C.J., at p. 584.

Equally clear is it that the express company were the agents for the defendant, and the receipt by the express company was actual receipt by the buyer: Benjamin on Sale, 5th ed., p. 218, and cases cited in n.(4).

While there is nothing in law to prevent a vendor agreeing to protect from heat and cold the goods of his purchaser after they have been actually received by the purchaser through his named agent, but before actual personal receipt by him, it would require very clear language to prove such a contract. The language we have here is not so clear that we are obliged to hold that the plaintiffs made such a contract; and the defendant cannot complain if the words selected by himself are rather taken in a sense against him.

I do not think that the words bear the interpretation the defendant seeks to put on them, but the reverse. The obligation undertaken by the plaintiffs cannot be placed higher than to pack the goods properly, in view of the warning, and to give reasonable notice that the goods were such as should be transmitted with speed and were likely to be damaged by heat or frost. Perhaps the obligation cannot be placed so high.

Adopting the test suggested, the bulbs were admittedly properly packed: so, too, the agents of the defendant did that which they would have done had the words of the defendant been employed. They had all the notice they required to act upon, and, had they had any further notice, they would not have acted differently. I think the defendant must himself shoulder the negligence of his agents, and cannot transfer the burden to the plaintiffs.

The judgment should be set aside, and judgment entered for the plaintiffs for the amount sued for and interest; and dismissing the counterclaim; all with costs both here and below.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., agreed.

KELLY, J., also agreed, for reasons briefly stated in writing.

Appeal allowed.

MARCH 2ND, 1915.

*COOK v. DEEKS.

Company—Contracting Company—Contract Taken by Majority of Directors as Individuals—Duties and Liabilities of Directors—Trust—Rights of Minority Shareholders—Evidence—Conflict—Finding of Trial Judge—Appeal—Ontario Companies Act, R.S.O. 1914 *ch.* 178, *secs.* 23, 93—7 *Edw. VII. ch.* 34, *secs.* 80, 81, 87, 89—*Ontario Interpretation Act, R.S.O.* 1914 *ch.* 1, *sec.* 27.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 6 O.W.N. 590.

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

Wallace Nesbitt, K.C., and A. M. Stewart, for the appellant.

E. F. B. Johnston, K.C., and R. McKay, K.C., for the defendants, respondents.

The judgment of the Court was delivered by HODGINS, J.A.:— . . . I make no pretence of dealing with the evidence in detail. . . . My conclusions, so far as they are material, do not differ from those of the learned trial Judge.

Resolved into its simplest elements, the appellant's complaint against the individual respondents is, that, while concealing from him their intention, they appropriated the Lake Shore contract to themselves, absorbed the organisation which belonged to the Toronto Construction Company, and used it in carrying out that contract. It is asserted that this contract in fairness should have come to the company, as it was within the scope and indeed within the actual practice of the business,

was negotiated for by those who were charged with the carrying on of the enterprise, and has been completed with the assistance of the employees, who were got together, trained, and organised to perform the work of the company. And, in order more fully to enable this to be done, the individual respondents, it is charged, virtually stopped the operations of the company and decided to abandon further work.

The proposition of law as laid down by the appellant, in view of what happened, is, that the directors who were managing the affairs of the company owed to it and to its shareholders a duty co-extensive with their opportunities, i.e., measured by their activities in connection with the company's business, which duty disabled them from taking the contract for their own advantage and from refusing to seek and get it for the company's benefit.

The conclusion drawn from this proposition is, that they are trustees of the contract for the company, and must account for the profits therefrom. In fact, the appellant seeks to put the individual respondents, notwithstanding their disclosure and the ratification by the shareholders of their action, in the position which a trustee of a contract held for the benefit of creditors was, in Bennett v. Gaslight and Coke Co. of London (1882), 48 L.T.R. 156, held to occupy when he secretly secured the renewal for the benefit of his own firm.

Much of the evidence called by the appellant is devoted to impugning the bona fides of the individual respondents in the course taken by them, and that on the respondents' part in justifying themselves. But the legal proposition which I have stated, if established, renders motive unimportant, and should therefore be considered first. It cannot be contended that, when the individual respondents took the contract, they did not disclose it. Their reticence only lasted till it was practically secured. But, when it was entered into, the disclosure was ample and full. The resolutions of the directors, which distinctly decline this contract and disclaim any interest in it, were confirmed by the shareholders at a meeting duly called; and, if this is effective, no further question can arise.

It must be admitted at the outset that there are to be found in the books many expressions of opinion by very eminent Judges which would indicate the source of the idea that underlies the appellant's contention, and, if read literally, give it some apparent support. . . .

[Reference to Benson v. Heathorn (1842), 1 Y. & C. Ch. 326; York and North Midland R.W. Co. v. Hudson (1853), 16 Beav.

485, 491; In re Cawley & Co. (1889), 42 Ch. D. 209, at p. 233; Allen v. Gold Reefs of West Africa Limited, [1900] 1 Ch. 656, at p. 671; North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589, 593; Aberdeen R.W. Co. v. Blaikie (1854), 1 Macq. H.L. 461, 471; Gilbert's Case (1870), L.R. 5 Ch. 559, at p. 566; Liquidators of Imperial Mercantile Credit Association v. Coleman (1873), L.R. 6 H.L. 189.]

All these expressions of opinion, however, relate to actual transactions or dealings with the property of the company, or with its corporate rights or those of the shareholders, and are not intended to lay down mere academic propositions. I have not been able to find any case where they have been applied as comprehending a duty so extensive as is here contended for, nor to a situation in any sense similar to that developed in this case. The trend of decision is rather to restrict the responsibility and increase the discretion of directors, and to free them from the serious burdens which trustees are still carrying, provided they make proper disclosure to and obtain the consent of the company. See Lindley on Companies, 6th ed., p. 511.

Some limitations to the responsibilities of directors may be mentioned as illustrating this tendency. While they cannot as a rule profit in the course of their agency yet they may do so with the knowledge and consent of their principal, i.e., the company: Benson v. Heathorn, ante; Parker v. McKenna (1874), L.R. 10 Ch. 96, at p. 124. They are to be regarded as really commercial men managing a trading concern for the benefit of themselves and all the other shareholders, and as such are allowed a discretion: In re Forest of Dean Coal Mining Co. (1878), 10 Ch. D. 450, at pp. 453, 454. The strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent: In re Faure Electric Accumulator Co. (1888), 40 Ch. D. 141, at pp. 150, 151; they are not trustees for individual shareholders: Percival v. Wright, [1902] 2 Ch. 421; and they are not bound to take any definite part in the conduct of the company's business, but so far as they do undertake it they must use reasonable care in its despatch: In re Brazilian Rubber Plantations and Estates Limited, [1911] 1 Ch. 425, at p. 437.

But there is in our legislation (the Companies Act, R.S.O. 1914 ch. 178, sec. 93, 1907, 7 Edw. VII. ch. 34, sec. 89), as in England, a definite restriction upon the action of directors which in itself recognises the fact that they may be interested in matters in which neither the company nor other shareholders are con-

cerned, and which goes far to define their position. That restriction is as follows: "No director shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as vendor, purchaser or otherwise." And the director is bound to disclose the nature of his interest "at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists," or at the next meeting after he has acquired such interest. And if he properly discloses "he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realised by such contract or arrangement." But this is not all. By statute, "the affairs of the company shall be managed by a board of . . . directors" elected by the shareholders, and, with unimportant exceptions, "no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present:" (1907) 7 Edw. VII. ch. 34, secs. 80, 81.

The directors are empowered to pass by-laws to regulate various things, including "the conduct in all other particulars of the affairs of the company," but these by-laws are subject to confirmation or rejection at the next general or annual meeting (sec. 87).

A glance at the extraordinarily comprehensive list of powers of companies, under sec. 23 of R.S.O. 1914 ch. 178, will indicate how extensive those affairs may be and what a wide range of activities are open to them. It is well settled in England that the duties of a director are measured by the articles of association; and it must follow that in Ontario their duties are defined by the statute under which the company is incorporated. See Costa Rica R.W. Co. v. Forwood, [1900] 1 Ch. 756, [1901] 1 Ch. 746, 760; Imperial Mercantile Credit Association v. Coleman (1871), L.R. 6 Ch. 558, 567.

While these provisions do not of course exhaust the subject, they seem to indicate some important qualifications which must be taken into account in dealing with the questions raised in this case. From these statutory provisions it will be seen that a director may be concerned in a matter so that his duty and interest do or may conflict with that of the company or its shareholders. If he fully discloses that interest and does not vote, he is discharged from liability on account of his fiduciary relationship.

It is also clear that the business of a company, so far as it is done by a director as such, must be transacted at a meeting of

directors, and that their regulation of the conduct of the affairs of the company, if embodied in by-laws, is subject to the will of the shareholders. In matters to which these statutory provisions do not extend, the company's business is left generally in the hands of the directors as the agents of the company. And the principle underlying the law of joint stock companies in this regard may be well expressed in the reply to the question propounded by Lord Hatherley, then Sir W. Page Wood, V.-C., when he asks, regarding the institution of litigation, "Who are the proper judges?" and answers his own question thus: "Parliament clearly intended that in general the company should be the judges of that, as of every part of the company's business, supposing the company be put in the position to judge:" In re London and Mercantile Discount Co. (1865), L.R. 1 Eq. 277, 283.

Now, if the acceptance or rejection of a contract within the scope and practice of the company's operations is not the business of the company and a question of policy, and comprehended in the expression "the conduct . . . of the affairs of the company," I am unable to imagine anything that may be so described.

Viewed, as I think it should be, in relation to the actual conditions under which directors assume office and to ordinary business considerations, the rule of responsibility is extensive enough. It should not be pushed to such an extent as to render it impossible for business men to assume the position of directors. . . .

[Reference to Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392, at p. 465.]

If, then, the taking or not taking of this contract was a matter within the directors' discretion, the decision in North-West Transportation Co. v. Beatty, supra, seems almost exactly to cover the point at issue. . . . That case was followed with approval in Burland v. Earle, [1902] A.C. 83, and Dominion Cotton Mills Co. Limited v. Amyot, [1912] A.C. 546.

These cases also afford an answer to the contention that it must be shewn that the confirmation by the shareholders must be by an independent majority, i.e., disregarding the votes of the shareholders who are directors.

Can it be said that there was any unfairness or impropriety, other than that set out in the Beatty case, which would leave this case outside the scope of that decision ?

The general principle, set out in Normandy v. Ind Coope & Co. Limited, [1908] 1 Ch. 84, at p. 108, is, that the Court never interferes with the majority as against the minority except in case of fraud. The sort of fraud or unfair dealing that will call

for the interposition of the Court can only be ascertained from an examination of the principles on which the Courts have proceeded when dealing with this subject. . . .

[Reference to Martin v. Gibson (1907), 15 O.L.R. 623; Ving v. Robertson & Woodcock Limited (1912), 56 Sol. J. 412; Punt v. Symons & Co. Limited [1903] 2 Ch. 506; Madden v. Dimond (1906), 12 B.C.R. 80; Menier v. Hooper's Telegraph Works (1874), L.R. 9 Ch. 350.]

Many other cases illustrate different situations in which this rule has been applied so as to prevent directors acting improperly with regard to the company's assets or the legal rights of the company or its shareholders. But it must not be forgotten that the power to vote at a general meeting is not given to a director as such but to him as shareholder (In re Cawley & Co., 42 Ch. D. at p. 233); and that the authority of the majority, if used according to the rights conferred by the articles of association or the statute, is legally exercised: Benson v. Heathorn, supra; Salmon v. Quin & Axtens Limited, [1909] 1 Ch. 311; Quin & Axtens Limited v. Salmon, [1909] A.C. 442; Automatic Self-Cleansing Filter Syndicate Co. Limited v. Cuninghame, [1906] 2 Ch. 34; Goodfellow v. Nelson Line (Liverpool) Limited, [1912] 2 Ch. 324; and Molineaux v. London Birmingham and Manchester Insurance Co., [1902] 2 K.B. 589, 596. And this right is not controlled by the fact that the interests of the shareholder may be adverse to that of the company or of other shareholders: Pender v. Lushington (1877), 6 Ch. D. 70 (votes of nominees of shareholders to be given in the interests of a rival company); Greenwell v. Porter, [1902] 1 Ch. 530 (voting by agreement in a particular way). An interesting and instructive case on this point is Marshall's Valve Gear Co. v. Manning Wardle & Co. Limited, [1909] 1 Ch. 267.

It may be noted that by the Ontario Interpretation Act, R.S.O. 1914 ch. 1, sec. 27, it is provided that "in every Act, unless the contrary intention appears, words making any . . . number of persons a corporation or body politic and corporate shall . . . vest in a majority of the members of the corporation the power to bind the others by their acts." The correctness of the view that the majority here should rule may be tested by considering what would be the result of the appellant's contention if adopted in this case. It would mean that three-fourths of the assets of the company would be employed against the wish of three-fourths of the shareholders. It would also mean that the directors would either have to devote themselves

to the execution of the contract during its continuance or else resign and allow the minority to continue the business and employ the joint capital as it wished. It would further require that in order to change the policy of the company the directors must sell or transfer their shares to others, who then could vote free from the directors' disability. Indeed, it is not too much to say that it would completely deprive the company of the advantage conferred on it by the Legislature of regulating its business according to the wish of the majority, and reduce the directors to mere ciphers in the conduct of the company's business, unable to direct and yet driven by necessity to act against their interests and contrary to their own opinion.

That this has not heretofore been the view in which companies and directors have been regarded, either in England or here, is evident from the cases of Macdougall v. Gardiner (1875), 1 Ch. D. 13, and Purdom v. Ontario Loan and Debenture Co. (1892), 22 O.R. 597, which follows it. . . .

These practical considerations seem to me to indicate that the appellant's position in untenable and to require the Court to reject the theory that opportunity is the same thing as interest, and that conditions which might ripen into such an interest are equivalent to the accomplished fact.

An examination of the case, however, in the light of the authoritative statements which have determined the extent of fiduciary responsibility, leads, I think, to the same conclusion. . . . .

I do not think the solution of the question is simplified by the ease with which a remedy can be suggested, i.e., by declaring the individual respondents trustees of the contract for the company. If they are trustees of the contract, the trust must have arisen when it was taken by them, and then only by reason of the antecedent conditions, so that it comes to the same thing in the end. The view that directors are trustees limits the trust to the company's money and property (Great Eastern R.W. Co. v. Turner (1872), L.R. 8 Ch. 149, per Lord Selborne, at p. 152), while the same learned Judge confines their agency to transactions which they enter into "on behalf of the company."

It was argued that the resolution to abstain from further business and to sell the assets was a virtual winding-up of the company, and that the appellant was entitled to some remedy therefor, it being a breach of trust or a fraudulent act. But counsel for the appellant could not point out to my satisfaction just what that remedy was. Obviously such action is within the corporate powers. I am unable to assent to the proposition that

the winding-up of the company or the determination to cease business can give the minority shareholders a right of action against the directors in the name of the company. The cessation of its business activity without winding-up, thus preventing the shareholders from realising their shares of the assets, might of course be more disastrous for them than closing it out. But that situation can be put an end to, if it is unfair, by asking the Court for a winding-up order. If that remedy is not sought, then, I think, the minority has only itself to blame if the state of affairs complained of is allowed to continue.

One other grievance was urged. That is the gradual absorption or use of the personnel of the organisation of the company by the individual respondents in the course of carrying out the contract in question. Here again, unless the respondents induced the employees to break their engagements with the company, which was not argued, I can see no right of action by the company against them apart from the main contention of the appellant.

Both these latter heads of complaint disappear if the main ground is made out. For *ex concessis* they were necessary adjuncts to the performance of the contract; and, if the appellant is entitled, in right of the company, to the benefit of its performance, he cannot complain of the use of the company's organisation, or to its desistment from other things.

My conclusion is, that to give effect to the appellant's contention would be to extend the fiduciary duty of a director to such an extent that minority control would be the rule instead of a rare exception only, caused by the fraud or unfair dealing of the majority; and would place directors who disclose their interest and have their action ratified by the shareholders in the same if not in a worse position than those who conceal their interest and become liable under the statute.

Nothing that I heard nor that I have read has convinced me that the learned trial Judge took a wrong view of the position, character, or actions of the parties to this action; and, as I think the law fully bears out his conclusions, I would affirm his judgment with costs.

Appeal dismissed.

MARCH 4TH, 1915.

BANK OF OTTAWA v. HALL.

Promissory Note—Accommodation Note—Endorsement to Bank as Collateral Security for Debt of Payee—Debt Paid before Action Begun—Claim of Bank to Hold Note for Subsequent Debt — Evidence — Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of KELLY, J., 7 O.W.N. 475.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

G. F. Shepley, K.C., and G. W. Hatton, for the appellants.

G. H. Watson, K.C., and S. J. Birnbaum, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

MARCH 5TH, 1915.

NIXON v. NICKERSON.

Fire — Destruction of Property—Negligence—Evidence—Damages—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendant from the judgment of LENNOX, J., 7 O.W.N. 255.

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

R. McKay, K.C., for the appellant.

H. D. Gamble, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LENNOX, J. MARCH 2ND, 1915.

RE STEWART.

Will—Construction—Lapsed Legacies—Predecease of Legatees —Residuary Clause—Trust—Wills Act, sec. 37.

Motion by the executors of Archibald Stewart, deceased, upon originating notice under the Trustee Act and Rule 600, for an order declaring the true construction of the 4th, 5th, and 6th clauses of the will of the deceased, and giving general directions as to the administration of the estate.

The motion was heard in the Weekly Court at London.

Jared Vining, for the applying executors.

U. A. Buchner, for the executors of Margaret McDonald.

W. R. Meredith, for James McDonald.

C. G. Jarvis, for Flora McQueen.

F. P. Betts, K.C., for the Official Guardian, representing the infants.

No one appeared for James McEwen, who was served with the originating notice.

LENNOX, J.:—The testator gave and devised all his real and personal estate to the executors in trust to dispose of it in the manner provided for by his will.

The will is dated the 8th August, 1910, and the testator died on the 17th February, 1914.

The 4th clause is: "To pay out of my estate $300 unto my sister Margaret McDonald . . . and this amount to be left by her will to her son James McDonald of the said city of London."

Margaret McDonald, without knowledge of the bequest to her in her brother's will, made a will dated the 9th April, 1912, by which, amongst other things, she provided: "2. To my daughter Flora McDonald I give my property of every nature and kind but she is to make the payments hereinafter mentioned. 3. Upon the death of the present wife of my son James or so soon thereafter as convenient he is to be paid $500 and in the meantime he is to get the interest therefrom. 4. Should my son James predecease his wife then the share bequeathed to him shall be equally divided among the children of my son Archie."

Margaret McDonald died in the lifetime of her brother, to wit, on the 16th September, 1913.

I am of opinion that neither Margaret McDonald nor her son James take anything under the 4th clause of the will of the testator Archibald Stewart; that the legacy of $300 there mentioned lapsed by reason of the predecease of the legatee, and is to be disposed of under the residuary clause (6) of the will.

By the 5th clause of his will, the testator gave to his nephew James McEwen "in trust for the eldest and first born child of Neil McEwen and Lizzie May McEwen, . . . the sum of $3,000 and interest thereon to be paid to her when she attains the age of 21 years."

This "eldest and first-born child" was born on the 19th February, 1910, was living at the time the testator made his will on the 8th August, 1910, was named Anna Virginia Stewart, and died in the lifetime of the testator on the 16th August, 1910. Another daughter, Mary Elizabeth McEwen, was born to Neil and Lizzie May McEwen in the lifetime of the testator, whether before or after the date of the will is not shewn, but manifestly after that date, and is still living. This bequest of $3,000 is claimed on behalf of this second daughter Mary Elizabeth.

I am of opinion that she is not entitled—that she does not come within the terms or meaning of the will; that there is a lapse as to this $3,000 also, and that it also will fall into the residuary estate. I cannot accede to Mr. Betts's very ingenious argument that, as the will purports to give the fund to James McEwen in trust, it must be paid to him and be held in trust for the personal representatives of this "first born child." The object of the testator's bounty failed in the lifetime of the testator, and it is not the class of gift provided for by sec. 37 of the Wills Act.

All parties will have their costs out of the estate, the executors as between solicitor and client.

LENNOX, J. MARCH 2ND, 1915.

RE ROBINS.

Will—Construction—Legacies—Insufficiency of Personal Estate to Pay—Direction that Real Estate not to be Encroached upon—Proportionate Abatement of Pecuniary Legacies—Unnecessary Motion—Costs.

Motion by the executor of Emily Robins, deceased, upon originating notice under the Trustee Act and Rule 600, for an order determining questions arising upon the terms of the will in regard to the administration of the estate.

C. St. Clair Leitch, for the executor.

E. W. M. Flock, for the legatees Rawson A. Robins and Almeda E. Turvill.

F. P. Betts, K.C., for the Official Guardian, representing the infants.

LENNOX, J.:—There is not sufficient ground for asking the assistance of the Court here. There is no difficulty in construing the will or administering the estate. There is a growing tendency to come to the Court for directions or advice upon points which present no difficulty for any solicitor who will read and think; and, were it not that I am convinced by the correspondence between the executor's solicitor and the Official Guardian, that the application was launched in good faith, and because he in fact entertained an honest doubt as to what he ought to do, I would leave the executor to pay his own costs.

The testatrix makes it quite clear that the real estate specifically devised is not to be encroached upon for payment of legacies. Without this property there is not sufficient estate to pay the legacies in full. The bequest of the household furniture to Lydia E. Baumwart is specific. The other bequests, in paragraphs 6, 7, and 8, are pecuniary legacies. There is no distinction to be drawn between these pecuniary legacies. They will abate proportionately and be paid ratably.

There will be costs out of the estate, which I fix at $28, namely, $10 each to the executor and Official Guardian and $8 to the solicitor for the adult legatees.

CLUTE, J. MARCH 2ND, 1915.

EVANS v. FISHER MOTOR CO. LIMITED.

Master and Servant—Contract of Hiring—Salary—Bonus—Dismissal—Reasonable Notice—Damages in Lieu of.

Action for arrears of salary and wrongful dismissal.

The action was tried without a jury at Barrie.
A. E. H. Creswicke, K.C., for the plaintiff.
M. B. Tudhope, for the defendants.

CLUTE, J.:—The plaintiff claims that he was engaged by the defendant company from the 28th August, 1913, at a yearly salary of $3,600, payable $125 every half month, and the balance of $600 to be deferred until the expiration of the year; that he was wrongfully dismissed on the 6th October, 1914; and claims the sum of $841, with interest, for salary, and $2,000 for wrongful dismissal. The defendants state that the plaintiff was in the employ of the Tudhope Motor Company when it was taken over by the defendants as a going concern; and, by a verbal agreement, the plaintiff was continued in the defendants' employ for one year from the 1st September, 1913, at a salary of $3,000; that before the expiration of the year the plaintiff was notified that if he wished to remain in the service of the defendants his salary would be reduced to $2,000 for the next year; that he continued at the reduced rate until the 6th October, 1914, when he voluntarily left the defendants' employ, and asked for his dismissal.

The plaintiff has been paid to the 15th September at the rate of $3,000 per year, and the defendants have paid into Court $113.76, and say that that sum is sufficient to satisfy the plaintiff's claim in full. The defendants further plead that the plaintiff was to receive a bonus of $600 at the end of the year if the defendants' business amounted to a certain figure, which they allege it did not reach, and they claim that the plaintiff is not entitled to any part of the bonus.

The plaintiff has failed to satisfy me that he was to receive the bonus of $600 irrespective of whether the company made a profit or not. I find that the bonus was to be upon the same terms as those upon which he was employed in the Tudhope company, which was taken over; that the company made no

profits after it was taken over, and that he never became entitled to any bonus. No doubt, he had a conversation of some kind with Fisher, who became the president of the defendant company, but at the time the alleged conversation took place the company had not been taken over nor was there evidence to satisfy me that Fisher was the president of the company at that time or had authority to make the alleged bargain. However this may be, I find that no concluded bargain to that effect was made.

The plaintiff was engaged from the 28th August, 1913, at the yearly salary of $3,000, payable $125 every half month. Some time in August, 1914, Mr. Vallance, the general manager of the company, informed the plaintiff that the management was considering a reduction in the salary of the plaintiff, and the plaintiff then told Vallance that he "would not stand for any reduction;" and on or about the 28th August the plaintiff was again notified that a cut was necessary, and the plaintiff said that he would not accept it. The plaintiff continued in the defendants' employ until the 6th October, 1914, at the higher rate of wages, when he was dismissed, and the reason given was, that he "would not accept a reduction in salary." The plaintiff was paid at the rate of $3,000 a year up to the 15th September, and was formally dismissed on the 6th October.

Whether from oversight or otherwise on the part of the defendants, I find that the plaintiff continued in the defendants' employ until he was dismissed, at the same rate at which he was employed for the previous year. Having regard to what took place when the plaintiff was advised that the salary would be cut, and his refusal to continue work at that rate, I think a reasonable notice to the plaintiff would be three months from his dismissal. This would amount to $925, for which the plaintiff is entitled to judgment, with costs of action: Harnwell v. Parry Sound Lumber Co. (1897), 24 A.R. 110; Gould v. McCrae (1907), 14 O.L.R. 194; Halsbury's Laws of England, vol. 20, paras. 185, 186, 187; In re African Association Limited and Allen, [1910] 1 K.B. 396.

The plaintiff is entitled to receive the money paid into Court and apply the same upon the judgment.

MIDDLETON, J. MARCH 2ND, 1915.

WINGROVE v. WINGROVE.

Contract—Agreement between Father and Son that Farm Shall be Son's at Death of Father—Failure to Establish—Evidence—Corroboration — Statute of Frauds — Possession — Ejectment—Mesne Profits.

Action by the executors of David Wingrove, deceased, to recover possession of 50 acres of land, forming part of a farm of which, it was said, the testator died possessed. The defendant, Henry Wingrove, the testator's second son, set up an agreement, alleged to have been made between himself and his father, by which he became, upon his father's death, entitled to the whole farm.

The action was tried without a jury at Milton and Toronto.

E. F. B. Johnston, K.C., and W. E. Buckingham, for the plaintiffs.

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

MIDDLETON, J.:—The farm consists of 150 acres—100 acres having been conveyed to the testator on the 14th March, 1883, by his father's executors; the 50 acres was purchased for $800 on the 24th April, 1886.

The testator had, in addition to his wife, who survived him, a family consisting of two sons and two daughters. James, the elder son, about 45 years of age, left home some 22 years ago, on the occasion of his marriage. The father then gave him a farm and farming outfit. That farm is said to have been worth $3,000, subject to a mortgage of $1,000. The farm outfit is said to have been worth about $1,000; so that James received as his portion roughly $3,000. At this time the defendant was about 12 years of age.

When the defendant was about 21, he had a conversation with his father, in which he asked him what he intended to do for him. The father then expressed his intention of giving Henry the home farm, but what then took place is not in any way relied upon as being the contract under which Henry claims. No doubt, relying upon his father's intention, Henry worked on, not receiving regular wages, but receiving money from time to time as he required or desired it. When Henry (the defendant) became 26 years of age . . . he desired from his father more

liberal treatment than he had received. The father took the position that Henry had received more than his wages would amount to, and in granting the request took from Henry a receipt in full for wages during 5 years, the period which had elapsed since Henry attained majority. This receipt is erroneously dated in August, 1901, instead of August, 1906, but it was executed on the latter date.

The father continued to operate the farm, and the son continued to live with him, but nothing of importance took place until an occasion, the date of which is not at all satisfactorily fixed. A brother-in-law of the father had died in 1907, and the father was one of his residuary legatees, and expected to receive a considerable sum of money. Some years afterwards he did receive about $5,000. Henry desired to get married, and had been talking matrimony for some time; his father rather discouraging him. Undoubtedly some transaction took place between the father and son at this time, and it is upon what then took place that the son bases his alleged title.

During the trial the son gave the conversation in slightly different forms, and it is perhaps fairest to take the statement as given in the examination for discovery, where what is said is this:—

"Q. 83. Then what took place? A. Well his asthma was troubling him pretty bad, and he said he was getting tired of farming, and he said if I got married I could take the place.

"Q. 85. You might tell me as near as you can how it came about? . . . A. I think he suggested himself—I was going at that time with my present wife, and he suggested to me that I might as well get married and take the place. He had prospects of getting quite a bit of money, and he said he thought it was time he was getting a rest.

"Q. 86. What did he say about the place? A. I could get married and take the place."

The marriage took place in October, 1908. The son was unable to place the conversation more definitely than to say that it might have been the summer before the marriage or the summer before that.

The father owned a place in Freelton, and at the time of the marriage he moved out to this place with his wife and two daughters, then unmarried. On Henry's return with his wife from the marriage trip, on the eve of the departure for Freelton, a further conversation took place, testified to by the son and his wife. Their recollection differs, though perhaps not materially, as to what was said. The son puts it this way: "When I got

married he said to my wife and me both, 'There is the place, make what you can out of it, and I will expect you to give me such things as I might ask you for,' And he said, 'When I die you will get the deed.' ''

This is not relied on as being in itself the contract, but as a corroboration of the antecedent gift.

The son has remained in possession of the farm from that time down to the present, with the exception of a period of joint possession which will be mentioned.

The son gave the father hay, fuel, and some farm produce, amounting, he says, to $200 per annum. His father was not exacting, and, when produce was not on hand, purchased for himself. This arrangement did not last for long. The daughters married, the old people became lonely, and they moved back to the farm and occupied for a couple of years a portion of the house which was set apart for their exclusive use. During this time they paid no rent to the son, and the father worked upon the farm so far as he was able.

A little over a year before the father's death on the 2nd December, 1914, he bought another farm from a son-in-law, and moved upon it. In a few months he resold the farm to the son-in-law, and from that time on he and his wife lived under the same roof with the son-in-law and his family, though in separate parts of the house.

By his will, dated the 5th October, 1914, the father gave the front 100 acres to his son Henry, charged with a legacy of $2,000 in favour of his (the father's) widow, with the further provision that, if this was not adequate to support and maintain her properly, the land was charged with what additional amount should prove to be necessary. He then gave the northerly 50 acres to his elder son James; the residue, consisting of a mortgage of $2,000 and some chattels, he gave to the widow, subject to a charge of $1,000 in favour of each of the two daughters. In addition to this, there was a sum of a little over $600 in the bank to the joint credit of the testator and his wife, which the wife, as survivor, has taken.

The provisions in favour of the widow are expressed to be in lieu of her dower.

The difference between the situation created by this will and that claimed by Henry is manifest. He receives 100 acres, valued upon the application for probate at $5,000, subject to $2,000, and he is deprived of the rear 50 acres, worth $2,000; so that, apart from a mortgage about to be mentioned, there is involved some $4,000. . . .

During the last year of the testator's life, he placed a mortgage for $1,000 on the whole 150 acres. At that time he made a statutory declaration, put in in evidence without objection, but which I do not think ought to be regarded at all, as it is not a statement against interest. In this declaration he stated that he was the absolute owner of the land.

The insurance on the property was carried in the name of the father. This insurance, it is said, had its origin prior to 1908; but it is admitted by the son that the father, throughout his life, paid one-half of the insurance premium.

The property was assessed, to the knowledge of the son, in the name of the father, the son being assessed as tenant and voting on manhood franchise.

On one occasion the father complained of the seed which was being used by the son, and stated emphatically to the son, "I will not allow unclean seed to be used on my farm."

During the last summer, while the father was critically ill, the son saw him, I think, on two occasions, though the son admits only one. On the first of these occasions he asked the father to give him a deed of the farm, offering him $1,000 cash. On the second occasion he asked for a deed, offering $2,000. On each occasion the father stated in effect, "I will not convey my farm as long as I live, and you will not know what provision I have made for you until I am gone."

After the father's death, when the will was read, the son asserted that the will did not indicate his father's intention, but had been prepared by his mother or at her instance; but he did not then, nor until this action was brought, make any claim under the agreement he claims to have made with his father. He admits that on no occasion prior to the beginning of this action did he tell any one adversely interested of the agreement under which he claims.

It is admitted by all that the father was a strictly honourable and honest man, and one unlikely to repudiate any obligations he thought he was under.

A series of eight wills were made by the testator between the date of the alleged bargain and his death. In the first seven of these the whole 150 acres was given to Henry for his life only. In the last will the material change is made that the 100 acres is given to him absolutely. I have considerable doubt as to this being admissible evidence; and, therefore, I pay little attention to it.

From these circumstances, and others given in evidence, it appears to me that the case is one in which I ought, in the first

place, to be very clearly satisfied that there was an intention on the part of the father to confer ownership upon the son, before inquiring into the question of corroboration and the effect of the Statute of Frauds.

I should say that the corroborative evidence consists of the interested statement of Henry's wife and her father; and the disinterested evidence of several independent farmers, to whom the deceased is said to have made statements during his lifetime. These witnesses all speak of the use by the testator of various expressions indicating the fact that he had given his farm to his son. I do not desire unnecessarily to discredit these witnesses, but I find it impossible to believe that they could have an accurate memory extending over many years which enables them almost invariably to give the very words of a chance conversation in which they had no real interest. . . .

In its final analysis the case must, I think, be determined upon the evidence of the son, bearing in mind his interest, which would, even unconsciously, cause him to place his case as favourably towards himself as he could. Furthermore, I cannot help feeling that the situation is one in which the zeal the son not unnaturally had on behalf of his own case would unconsciously colour his testimony. Traces of the existence of these things are not absent when the varying expressions used are carefully noted.

Taking the statements that I have quoted from the examination for discovery, upon the occasion on which it is said the contract was made, it is to be noticed that the witness three times uses the expression that his father told him that if he got married he could "take the place;" add to this the fact that "no deed was to be given" during the father's lifetime; and the conclusion that I draw is, that the father, expecting to receive money from the Hurst estate, and thinking that he had earned a right to comparative leisure, was ready to place the son in possession of the farm, with the idea that he should operate it and give the father "such things as he might ask for;" the arrangement being one terminable entirely at the will of the father, but expected to continue during the father's lifetime if the son so long behaved himself; but that the father reserved to himself the jus disponendi of the property and the right to dispose of it as he saw fit upon his death, giving then to Henry just as much as he thought proper.

I do not think that any good purpose would be served by reviewing in any way the familiar authorities upon this branch

of the law. What was said by Chief Justice Draper in Orr v. Orr (1874), 21 Gr. 397, and adopted and approved by Chancellor Spragge in Jibb v. Jibb (1877), 24 Gr. 487, is just as cogent now as then. It is with the greatest difficulty that a parol family understanding can be converted into a contract enforceable in a Court of law. It is so easy to transmute mere vague expressions of intention into promises that the peril is most obvious. The mischief aimed at by the Statute of Frauds is no imaginary one, if the title to land could be made to depend upon the interpretation to be placed upon the recollection of an interested party of vague and ambiguous words.

Everything in this case convinces me that the father remained the owner of this property until the time of his death, and that the son must be content with the measure of benevolence the father has meted out to him. . . .

I think the plaintiffs should have judgment declaring that the defendant is not entitled to retain possession of any portion of the lands in question under colour of any contract or agreement between himself and his father, and for possession of the rear 50 acres of the farm. The plaintiffs are also entitled to their costs of the action. I do not think that any case has been made for mesne profits.

MIDDLETON, J. MARCH 2ND, 1915.

WINGROVE v. WINGROVE.

Pleading—Reply—Statute of Frauds—Action for Possession of Land—Motion to Strike out Reply—Jurisdiction of Master in Chambers—Demurrer.

Appeal by the plaintiffs from the order of the Master in Chambers, 7 O.W.N. 827.

The appeal was brought on in Chambers and was adjourned to be heard by the Judge at the trial, and was heard by MIDDLETON, J., accordingly.

The judgment in the preceding case deals with the result of the trial.

The same counsel appeared.

MIDDLETON, J.:—The appeal relates to the applicability of the Statute of Frauds. The course of pleading was this: the plaintiffs claimed to eviet; the defendants set up the agreement;

the plaintiffs replied the Statute of Frauds. The Master struck out this reply, on the ground that the Statute of Frauds could only be relied upon as a defence to an action, and could not be set up in reply: relying upon the judgment of North, J., in Miles v. New Zealand Alford Estate Co. (1886), 32 Ch. D. 266, 279.

In the view that I have taken of the case, I have not to determine the question thus raised. I am by no means sure that the view accepted by the Master is entitled to prevail; but I think the Master was wrong in entering upon the question at all. The question of law thus raised was practically a demurrer to the reply. This is not and never was a question to be dealt with in Chambers, but by the Court itself. When demurrers were abolished, the intention was that all questions of law and fact in general be disposed of at the hearing. When questions of law can advantageously be disposed of in a preliminary way, they are still to be disposed of by the Court in the manner pointed out by the Rules. The Master's true function is to deal with preliminary matters and proceedings necessary to enable the case to be heard, not himself to undertake its decision. An appeal from the Master must ordinarily end with the decision of a Judge, and the matter is then concluded once and for all, although the point of law involved may be one upon which it is desired to take the decision of the Appellate Division or the Supreme Court.

The appeal from the order of the Master must, therefore, be allowed, and the motion before him be dismissed, with costs to the plaintiffs in any event of the cause.

MIDDLETON, J., IN CHAMBERS. MARCH 3RD, 1915.

*DICARLLO v. McLEAN.

Solicitor—Lien for Costs—Collusive Settlement to Defeat Lien—Liability of Defendant for Costs of Plaintiff's Solicitor—Evidence.

Motion by the plaintiff's solicitors to compel the defendant to pay the said solicitors' costs of the action, including the appeals to the Appellate Division and the Supreme Court of Canada, upon the ground that the action had been settled between

the parties and the proceeds of the litigation paid to the plaintiff behind his solicitors' backs, in fraud of the solicitors' rights and collusively.

H. H. Dewart, K.C., for the solicitors.
J. E. Day, for the defendant.

MIDDLETON, J.:—The cases fall into two distinct classes. If a solicitor has a lien upon the proceeds of litigation for his costs, and gives notice of that lien to the opposite party, and, after such notice, money is paid over to the client, the Court will in general, on motion, compel the party paying to pay the solicitor's costs. As put by Richards, J., in Brown v. Conant (1856), 2 P.R. 208, 211: "It is like paying a debt that has been assigned after notice. It is the notice which creates the right." In all cases falling within this class the plaintiff's position as dominus litis is fully recognised, and the amount which the plaintiff had agreed to accept limits the defendant's liability.

The other class of cases is where upon the facts it is shewn that the parties have acted collusively. In this case the defendant renders himself liable to pay the full amount of the solicitor's bill, his liability being in no way limited by the amount paid to the plaintiff.

For the solicitor to succeed in cases of this class it is essential that he should establish "collusion," in the sense in which the word is used, to the entire satisfaction of the Court. . . .

[Reference to Brunsdon v. Allard (1859), 2 E. & E. 19; Price v. Crouch (1891), 60 L.J.N.S.Q.B. 767; Murietta v. South American etc. Co. (1893), 62 L.J.N.S.Q.B. 396; Dunthorne v. Bunbury (1888), 24 L.R. Ir. 6, 9; In re Margetson and Jones, [1897] 2 Ch. 314; Morgan v. Holland (1877), 7 P.R. 74; The Hope (1883), 8 P.D. 144.]

The plaintiff was an impecunious Italian labourer; the defendant is a contractor. During the course of his employment the plaintiff was injured, and lost an arm. The action was tried and resulted in a verdict for the plaintiff of $1,500 damages. An appeal was had to a Divisional Court of the Appellate Division, with the result that the judgment upon that verdict was affirmed: Dicarllo v. McLean (1913), 4 O.W.N. 1444. A further appeal was had to the Supreme Court of Canada, when a new trial was ordered because of the assumed misconduct of a juror. The case was then entered for the second trial. Security had been given upon the appeal; a motion had been made for the delivery up of this security. This motion failed, as the bond

covered the costs of the first trial and the appeal to the Appellate Division, and these costs, as well as the costs of the appeal to the Supreme Court, were made to abide the result of the new trial.

The plaintiff was known by the defendant to be in abject poverty. The defendant had seen him begging upon the streets of Toronto. The defendant, through his employees, procured the plaintiff to be taken to Simcoe, and he there settled with him for $400, making no provision for the costs, which he knew would far exceed this sum. The brother of the defendant at once bought for the plaintiff a ticket for transportation to Italy, out of the money paid over, and the plaintiff left for Italy, taking the money with him.

Upon this motion the defendant and his brother had been examined at length, and, with every endeavour to view the defendant's conduct charitably, I cannot avoid being driven to the conclusion that the settlement was collusive within the definition given in the cases cited. I do not mean to say that I think that the defendant desired to defraud the plaintiff's solicitors. He knew that the costs were heavy. He desired to end the litigation with the least possible expenditure of money. He knew that the plaintiff could not have paid his solicitor. He knew that the plaintiff, when given this money, would not pay his solicitor. He was ready to assist the plaintiff to leave the country without discharging his obligation. He displayed that reckless disregard for the rights of others which amounts to dishonesty, and he acquiesced in, if he did not suggest, the plaintiff's dishonesty.

There is much in the surrounding incidents of the transaction and in the evidence which calls for comment. The defendant is a most unsatisfactory witness, and his lack of frankness induces suspicion. His brother appears to be far more truthful, but even in the brother's evidence there are unpleasant features. The fact that the settlement took place behind the back of the defendant's own solicitor; that an outside solicitor was brought in to prepare the documents; that the defendant refuses to give the name of the solicitor employed, because he was regarded "as a gentleman, and he said it was not necessary for him to say;" the fact that the defendant denied all knowledge of how this pauper plaintiff travelled from Toronto to Simcoe, when it appeared that he was taken there by the defendant's employee at the defendant's expense; that the defendant, after all that had taken place, suggested that the plaintiff was still available in Ontario; that it was deemed necessary to have no fewer than

seven witnesses to the signature to the release; that Moretti, the man who was employed to look up the plaintiff and take him to Simcoe, was regarded as entitled to special reward for his services—* are all most significant facts.

The order sought will, therefore, be granted, with costs.

MIDDLETON, J. MARCH 3RD, 1915.

RE OSTERHOUT AND CADA.

Vendor and Purchaser—Agreement for Sale of Land—Construction—Assumption of Existing Mortgage—Discharge of Existing Mortgage and Creation of New Mortgage for Larger Amount at Increased Rate of Interest—Allowance—Adjustment—Costs.

Motion by the purchaser, upon the return of an originating notice, for an order declaring the true interpretation of an agreement for the sale and purchase of land.

H. K. Harris, for the purchaser.
J. W. Pickup, for the vendor.

MIDDLETON, J.:—Under an agreement for purchase, the purchaser, after an initial payment, is to pay $25 per month "until the principal sum and interest has been reduced to the amount of a certain mortgage which will be upon the said land at that time; a deed is then to be given to the party of the second part (the purchaser) subject to the said mortgage, which he is to assume."

At the time of the transaction, there was a mortgage on the land for $1,700, bearing interest at 6 per cent. This mortgage was dated the 12th September, 1912; it was for 5 years, and called for payment of $25 half-yearly, and permitted payment of any greater sum on account of principal.

After the date of the agreement (the 3rd June, 1913), on the 7th December, 1914, the vendor paid off this mortgage, and made a new mortgage for $1,950, bearing 7 per cent. interest.

The question between the parties is, what allowance, if any, the purchaser is entitled to by reason of the substitution of this mortgage.

*Mr. Martin Leo McLean, the brother, says this: "At a certain point in this procedure, he (Moretti) came to me and said: 'Mr. Leo, me fix Dicarlo all right. Will you give me $3 a day next summer?' I said: 'Oh! I guess so, Henry, you are a pretty good man.'"

The vendor takes the position that the contract does not preclude his placing on the property any mortgage bearing any rate of interest, so long as he does not act fraudulently or unreasonably, and does not compel the payment of any greater sum than the balance due on the contract.

This does not appear to me to be the meaning of the contract. It speaks of an existing mortgage, which will still exist when the payments contemplated bring the balance due down to the amount of the mortgage. The then existing mortgage was what was meant. The substantial difference between the two mortgages represents 1 per cent. on $1,950 for the time the mortgage has to run. The repayment clauses are not quite as favourable, but this is such a minor matter that it may be overlooked.

On the adjustment, the vendor must allow the difference I have indicated, and must pay the costs of the motion, which I fix at $25.

MIDDLETON, J. MARCH 3RD, 1915.

RE HENDERSON.

Surrogate Courts—Order of Judge on Passing Accounts Fixing Compensation of Executors—Appeal—Forum — Surrogate Courts Act, sec. 34.

Appeal by the beneficiaries under the will of James Henderson, deceased, from the order of the Judge of the Surrogate Court of the County of York, upon the passing of the executors' accounts, as regards the amount allowed to the executors as compensation for their services, etc.

N. F. Davidson, K.C., for the appellants.

J. T. Small, K.C., for the executors, objected that the appeal was not brought before the proper tribunal.

MIDDLETON, J.:—The sole question raised is as to the propriety of the amount allowed by the Surrogate Court Judge for the executors' compensation.

The preliminary objection was taken by Mr. Small that, under sec. 34 of the Surrogate Courts Act, R.S.O. 1914 ch. 62, the appeal ought to have been made to a Divisional Court.

The section is very peculiar. The first sub-section provides that any person who deems himself aggrieved by an order, deter-

mination, or judgment of a Surrogate Court, may appeal to a Divisional Court. Sub-sections 2 and 3 provide that no appeal shall lie unless the value of the property affected by the order, determination, or judgment, exceeds $200, and that the practice and procedure shall be the same as that provided upon an appeal from the County Court. Sub-section 5 provides that an appeal shall also lie from any order, decision, or determination of the Judge of the Surrogate Court, on the taking of accounts, in like manner as from the report of a Master, and that the practice upon such appeal shall be the same as upon an appeal from a Master's report. It is then provided that sub-secs. 2 and 3 shall not apply to the appeal provided for by sub-sec. 5.

Appeals from orders on passing accounts have been heard without objection by the Divisional Court, also by a single Judge.

It is most desirable that there should be uniformity of practice; and it may be that the only appeal in cases of this kind is that provided by sub-sec. 5; but no decision of mine can in any way control the action of a Divisional Court.

It may, however, be noticed that sub-sec. 1 relates to appeals from the decision of the Court, and that sub-sec. 5 relates to the decision of the Judge on the passing of accounts. Sub-section 5 had its origin in doubts raised as to the possibility of appealing from the determination of a Judge upon passing accounts under the provision now found in sub-sec. 1.

It is clear to me that the present appeal is competent, and that the case should be heard upon its merits.

MIDDLETON, J., IN CHAMBERS. MARCH 4TH, 1915.

RE KEMP AND CITY OF TORONTO.

Assessment and Taxes—Special Assessment under Local Improvement By-law—Decision of Court of Revision—Appeal from, to County Court Judge—Time for—Assessment Act, R.S.O. 1914 *ch.* 195, *secs.* 57, 72—*Local Improvement Act, R.S.O.* 1914 *ch.* 193, *sec.* 39(2)—*Ascertaining Date of Decision—Day on which Parties Notified thereof—Objection to Right of Appeal—Waiver.*

Motion by the Corporation of the City of Toronto for an order prohibiting the Senior Judge of the County Court of the County of York from proceeding to hear an appeal by one Kemp

from a decision of the Court of Revision for the City of Toronto in respect of assessments under a local improvement by-law.

Irving S. Fairty, for the city corporation.
D. Urquhart, for Kemp.

MIDDLETON, J.:—The appeal relates to assessments under a certain local improvement by-law. The case was heard by the Court of Revision on the 9th February, and on that day the Court recorded its decision. No notice of this fact was given to the parties until the following day, the 10th. The notice of appeal was served upon the 13th.

Three questions were argued: (1) whether the time limited for appealing is 5 days, under the Assessment Act, R.S.O. 1914 ch. 195, sec. 72, or 3 days, under sec. 57; (2) whether the time for appealing runs from the date of the actual pronouncing of the judgment or from the date of the notice to the parties; (3) whether the right to object was waived by the action of the City Clerk in bringing the appeal before the County Court Judge.

By the Local Improvement Act, R.S.O. 1914 ch. 193, sec. 39 (2), it is enacted that "the provisions of the Assessment Act as to appeals to the Judge shall apply to an appeal" from any decision of the Court of Revision. In the Assessment Act, secs. 72 et seq. relate to appeals from the Court of Revision. Sub-section 2 of sec. 72 gives the right to appeal upon 5 days' notice, "subject to the provisions of sections 56 to 60."

Turning to these sections, we find a provision by which municipalities are enabled by by-law to make certain provisions for the taking of the assessment between certain fixed dates, and for the fixing of separate dates for the return of rolls for separate wards or subdivisions of wards, and for the holding of a Court of Revision for the hearing of appeals from the assessments in these wards or subdivisions. Concerning these appeals there is a further appeal to the County Court Judge within 3 days from the decision.

Mr. Urquhart argues, and I think rightly, that the provision of the Assessment Act which is made applicable to local improvement appeals is the general provision found in sec. 72, and that secs. 56 to 60 must be confined to cases falling within the ambit of these sections; in other words, that the limited time for appealing fixed by sec. 57(3) applies only to cases where a by-law has been passed providing for separate dates for the return of

rolls from wards or subdivisions of wards, and has no application to appeals save from the general assessment.

The sections are very confused and ambiguous, but the leaning ought to be in favour of giving the widest possible right of appeal rather than one which would render the proceedings invalid.

If I should be wrong in this view, and it should become necessary to consider the other point argued, I should be of the opinion that the decision of the Court of Revision was not given, within the meaning of sec. 57(3), until some notice had been given to the parties, and that the mere recording in the book of the Clerk of the Court of the opinion of the members of the Court was not sufficient. This is in accordance with the views expressed in Fawkes v. Swayzie (1899), 31 O.R. 256, where it is said that where an opinion or decision in the County Court is not pronounced or delivered in open Court it cannot be said to be pronounced or delivered until the parties are notified of it.

The action of the Clerk of the municipality in obtaining an appointment from the County Court Judge is not, I think, any waiver of the rights of the municipality. The Clerk was merely discharging his statutory duty.

The motion therefore fails, and, I suppose, costs should follow.

MIDDLETON, J., IN CHAMBERS. MARCH 4TH, 1915.

RANKIN v. VOKES.

Pleading—Statement of Claim—Motion to Strike out, as Disclosing no Reasonable Cause of Action and for Misjoinder of Parties—Refusal to Try Legal Issues Separately—Dismissal of Motion—Leave to Renew at Trial—Costs.

Motion by the defendant Vokes to strike out the statement of claim, on the ground that it disclosed no reasonable cause of action, and for misjoinder of parties.

R. G. Smythe, for the defendant Vokes.
J. R. Roaf, for the plaintiff.

MIDDLETON, J.:—Rankin sold some land to Vokes. He had bought from the defendants Lane and Lines, but had not paid the price The transaction, it is said, was closed by Vokes agree-

ing to pay the price to Lane and Lines, who acknowledged that they held everything in excess of the amount necessary to satisfy their claim, in trust for Rankin.

Lines and Lane do not now desire to sue Vokes. Rankin desires to enforce his remedy. He now sues claiming to have a right to recover against Vokes, and has made Lane and Lines parties defendant, so that they may be compelled to give discharge to Vokes upon payment of the money to which Rankin claims to be entitled. The contention is, that this form of action is entirely misconceived.

At present I am not at all impressed with the suggestion that there is any difficulty, but I do not think that this case is one in which it is desirable to separate the trial of the legal issues from the questions of fact. I therefore dismiss the motion, and allow the action to proceed to trial, reserving to the defendant the full right to urge his contention to the trial Judge.

This decision is not to be regarded as any determination of the legal question sought to be raised, but merely a determination that it is inexpedient to adjudicate upon that question on this interlocutory motion. The costs will be costs to the plaintiff in the cause unless the trial Judge otherwise orders.

CLUTE, J. MARCH 4TH, 1915.

WALLACE v. GUMMERSON.

Vendor and Purchaser—Agreement for Sale of Land—Action by Vendor for Purchase-money—Misrepresentations of Vendor — Evidence — Findings of Fact of Trial Judge — Right of Purchaser to Rescind—Notice to Vendor—Finding against Election to Affirm—Claim for Value of Chattels—Demand for Return—Counterclaim—Damages—Use and Occupation —Reference—Costs.

Action by a vendor of land to recover instalments of the purchase-price and interest.

The action was tried without a jury at Barrie.

A. E. H. Creswicke, K.C., for the plaintiff.

J. F. Boland, for the defendants.

CLUTE, J.:—The action is to recover two instalments of principal, with interest, upon an agreement for the sale of a fruit

farm in the township of Grimsby, in the county of Lincoln, under an agreement for sale, dated the 8th June, 1914.

The defence is misrepresentation and fraud. I am unable to accept the evidence in full of either the plaintiff's or the defendants' witnesses. The recollection of Mrs. Wallace, the wife of the plaintiff, and of John Solery, the husband of the defendant Constance Solery, was the most reliable.

The plaintiff was the owner of a small fruit farm, near the village of Grimsby. The defendants, who had resided at Port Hope, were looking for such a farm as a home. The defendant Annie Gummerson, the wife of Alfred White Gummerson, was in ill-health from injuries received from a fall, and required a house, as she expressed it, with conveniences up to date.

Charles H. Kirk is an insurance and land agent, residing in the village of Grimsby, and prior to the 6th June had shewn the defendants several properties, and had passed by the property in question. Not having this property listed, on that morning he called up the plaintiff by telephone, and was authorised by him to sell his property near Grimsby. The agent was informed of the kind of property the defendants wanted, and thought this would suit them. The agent and the defendants went to the property and were shewn over it by the plaintiff on Saturday the 6th June, and on Monday the 8th June the agreement was signed.

The misrepresentations alleged were made during the time the parties were looking over the property and on a visit to the defendant Solery's husband, who was a captain, and whose boat was in the Welland canal, where the plaintiff and the defendants visited him, on his boat, on Saturday afternoon.

The defendants charge that the plaintiff represented that the dwelling-house was "an up to date residence with all modern conveniences," and specifically represented that it "was electrically lighted," and that the water supply for the house was "provided by a pumping system installed by himself, and that such water was supplied from Lake Ontario, and that the water supplied for the purposes of the said dwelling-house was exactly the same as the water the said defendants had been accustomed to use in the city of Toronto."

It was further alleged that representations were made in regard to black currant bushes upon the property and as to the condition of the furnace and the sewerage system and the quantity of fruit the property would yield. I disposed of all these adversely to the plaintiff on the argument, except as to the electric light and the water supply.

As to the electric light the defendants failed to satisfy me that the plaintiff represented that the house was wired. I do not attribute wilful falsehood to the defendants or to the witness John Solery, in regard to this. I am inclined to think the defendants rather took it for granted that the house was wired because they saw wire leading into the house, which was, in fact, the telephone wire.

The main question, therefore, remains as to the water supply. I do not rely upon the recollection of the witness Kirk in support of the plaintiff's contention in regard to this. I find as a fact that from what the plaintiff did in shewing the defendants the water system and the hot and cold water, and the pump for soft water, and from what he said, they were naturally led to believe, and did believe, that the house was supplied with hard and soft water fit for use. I find that there was no supply of hard water or drinking water fit for use, that the drinking water was obtained from a neighbour, that the 60-foot well upon the place had been demonstrated to be of no use, had run dry, and had not been used for a number of years.

It is proper to say that there were no representations made that there was a well, but the agent swears that there was a well which he thought supplied hard water, as the property had been in his hands for sale on a previous occasion. He further says that, had he known that there was no well or water fit to use for drinking purposes, or other than rain-water, he would have felt it incumbent upon him to have told this to the defendants, and that he supposed there was a good supply of good water upon the premises fit for use.

I am uncertain, and therefore do not find as a fact, that the plaintiff used the expression that the water was brought from the lake, but I am satisfied that he knew they were under the impression that the premises had a good supply of water fit for use, including drinking water, and that he took no means to correct this impression, but that by what he said and did he intentionally led the defendants to that conclusion.

I think, under the circumstances of the case, there was an intentional suppression upon his part of the facts in regard to the water supply, and its fitness for use, and that the defendants would not have entered into the agreement had not they believed that there was an ample supply of good water.

I think the defendants were entitled to repudiate the contract and to have it set aside and cancelled, and that they have not elected, after a knowledge of the facts, to affirm it.

The evidence shews that on the 13th June, being the Saturday following the date of the agreement, when the plaintiff was about to leave the premises, although the defendants had not yet entered into possession, the defendant Alfred White Gummerson was present on the premises with the plaintiff and one Grose, when the plaintiff, producing a bottle of whisky, said they would have a drink, and he went to the neighbour, Taylor, and brought a pail of water. The defendant Gummerson asked him where he got it, and he said from Taylor's. Nothing further was said, and at this time the pipes had been emptied of water. I was asked to infer that from this incident the defendant knew that the supply of drinking water for the house had been obtained, and could only be obtained, from the neighbours. I do not so find. I think the contrary is the fact, and that the defendant had no such knowledge or suspicion, but supposed, as he swears, that the reason the plaintiff went to the neighbour was because the supply of water had been cut off temporarily from the pipes when the plaintiff left the premises.

The plaintiff's action is in effect one for specific performance, seeking to recover the second and third instalments under the agreement. There was, in my opinion, such misrepresentation in regard to the water supply as disentitles the plaintiff to specific performance; and, unless the defendants by their election are precluded from seeking to set aside the contract, they are entitled to have it declared that the same was obtained by misrepresentation and to have it set aside.

I think the misrepresentation in this case was such as to amount to fraud, but even misrepresentations, without fraud, are, under some circumstances, grounds for rescission: see Fry on Specific Performance, 5th ed., Canadian notes, paras. 660 and 661; Wall v. Stubbs (1815), 1 Madd. 80, where Plumer, V.-C., observed that, "whether the misrepresentation be wilful or not, or of a fact latent, or patent, such misrepresentation may be used to resist a specific performance, unless the purchaser really knew how the fact was;" Higgins v. Samels (1862), 2 J. & H. 460, at p. 466, where Page Wood, V.-C., considered it unnecessary to prove that the representation complained of was made with a knowledge that it was false, and relied on Taylor v. Ashton (1843), 11 M. & W. 401, and Evans v. Edmonds (1853), 13 C.B. 777.

Upon this point Mr. Creswicke referred to Shurie v. White (1906), 12 O.L.R. 54, but in that case the deed had been executed, and the plaintiff was held not entitled to a rescission of

the contract, and on pp. 59 and 60 the distinction is pointed out, with the cases governing the same. In Cameron v. Cameron (1887), 14 O.R. 561, affirmed in appeal, the deed was executed shortly after the agreement was made, and so in Bell v. Macklin (1887), 15 S.C.R. 576, where it was held that a party who seeks to set aside a conveyance of land executed in pursuance of a contract for sale is bound to establish fraud: Brownlie v. Campbell (1880), 5 App. Cas. 925, at p. 938. This distinction is pointed out in many cases.

It was further urged that the defendants had made election to affirm the contract and could not now repudiate it. On the contrary, the defendants, as early as the 20th June, soon after they discovered the defect in the water supply, notified the plaintiff, through their solicitor, Mr. McConachie, by letter, stating that the property was misrepresented as to the furnace, electric light, the water supply, and currant bushes. A lengthy correspondence took place, and the defendants still insisted upon their objections, which continued to the 21st August, and on the 14th September following this action was brought. Mr. Creswicke relies upon the first letter of the 20th June, complaining of the misrepresentations, as shewing that the defendants had elected to affirm the agreement. One clause of the letter reads as follows: "Mrs. Gummerson asked me to notify you that she would not pay anything further on the purchase-price until these have been made good or allowance made for the same," referring to the misrepresentations.

On the 4th July, the defendant Mrs. Gumerson called the deal off, by letter of that date.

I find, upon the evidence, that there was no election, and that the defendants are not precluded by any acts of theirs from having the contract set aside: Boulter v. Stocks (1913), 47 S.C.R. 440; Carrique v. Catts and Hill (1914), 7 O.W.N. 500.

The plaintiff further seeks to recover $101, being the value of a dray and a set of harness. I find in favour of the defendants as to this item, that when the $15 was paid upon the hay, it was upon the understanding and agreement that the defendants should have the use of the dray and harness for the season, and no sufficient demand has been made for the same, and I find that the property is the property of the plaintiff, and that he is entitled to receive the property in kind, and not the $101 as claimed.

The plaintiff fails in his action, which should be dismissed with costs. The defendants are entitled to have the agreement of the 8th June, 1914, set aside and delivered up to be cancelled,

and to have returned to them the $200 paid on account of the purchase-money. No doubt, the defendants have been put to some expense by reason of the misrepresentations complained of. This branch of the case was not fully gone into. I suggest as a reasonable adjustment that the plaintiff be allowed $500 for use and occupation, upon which the $200 part purchase-money, which the plaintiff has received, may be applied, leaving $300, from which should be deducted $100 for expenses of moving, etc., and that the remaining $200 be applied on the plaintiff's costs.

In case the parties do not come to some arrangement of the kind suggested, there may be a reference as in Stocks v. Boulter (1911), 3 O.W.N. 277, at p. 281; S.C. in appeal (1912), ib. 1397.

In addition to the cases above referred to, reference may also be made to the following: Central R.W. Co. of Venezuela v. Kisch (1867), L.R. 2 H.L. 99, 114, 120, and 121; In re Puckett and Smith's Contract, [1902] 2 Ch. 258 (C.A.); Barnard v. Riendeau (1901), 31 S.C.R. 234; Pagnuelo v. Choquette (1903), 34 S.C.R. 102; Adam v. Newbigging (1888), 13 App. Cas. 308; Capel and Co. v. Sim's Ships Composition Co. (1888), 58 L.T.R. 807, at p. 811.

I will hear the parties as to the officer to whom the reference is to be made, in case counsel cannot agree as to this. In case of a reference, further directions and the costs of the reference will be reserved.

LENNOX, J. MARCH 4TH, 1915.

SOBOLOFF v. REEDER.

Vendor and Purchaser—Agreement for Sale of Land—Authority of Agent of Purchaser—Joinder of Agent as Party Defendant—Action for Specific Performance—Land Subject to Restrictive Covenant as to Building and Occupation—Knowledge of Agent—Conveyance to Purchaser to Contain Restrictive Covenant—Costs.

Action by the vendor for specific performance of an agreement for the sale and purchase of land.

A. Cohen, for the plaintiff.
J. J. Gray, for the defendants.

LENNOX, J.:—The action is for specific performance, and is founded on a written agreement to purchase land in Toronto

from the plaintiff, entered into and signed by the defendant Gee in his own name. It is clearly shewn by the examinations for discovery and the statements of defence, and was admitted at the trial, that Gee in making the purchase was the duly authorised agent of the defendant Reeder and acted for him and on his behalf. The agreement is, therefore, binding upon Reeder according to its terms: Cave v. Mackenzie (1877), 46 L.J.N.S. Ch. 564; Heard v. Pilley (1869), L.R. 4 Ch. 548; Fry on Specific Performance, 5th ed., Canadian Notes, p. 171; Halsbury's Laws of England, vol. 7, p. 379; para. 782. It is none the less binding upon him, if it is a fact, as alleged, that Gee failed to follow the specific instructions of his principal: Duke of Beaufort v. Neeld (1845), 12 Cl. & F. 248, 273.

The plaintiff does not press for judgment against the defendant Gee. It is, therefore, unnecessary to consider whether the action could be maintained against both. In the uncertainty as to the party liable, until after discovery at all events, it was not improper to join him as a defendant: Rule 67. The trial costs have not been increased by his name being upon the record. He has set up a counterclaim which he cannot maintain. The action as against this defendant and his counterclaim will be dismissed without costs.

The defence of the defendant Reeder is, that the land in question is subject to a restrictive covenant as to building and occupation contained in the deed under which the plaintiff claims.

The agreement sought to be enforced is in the form of an offer to purchase, signed by the defendant Gee, and an acceptance of the offer by the plaintiff. It was drawn up by Gee without instructions by the plaintiff as to its form, and, in the part containing the offer, has this provision: "The purchaser takes the property subject to any covenants that run with the land." Gee says that he did not know of this provision; but he is a land agent, it is the form he regularly used, it was printed by his order, his name is printed on it, he propounded it to the plaintiff as a proper agreement, he handed it to the defendant Reeder immediately it was executed, and Reeder accepted and acted upon it without objection. The contract is of the defendants' making, the language is their language, and neither of them can be heard to object.

It is argued that the plaintiff was bound to disclose specifically the tenure under which she held the property. Too much reliance was placed upon the language of English cases founded upon conditions which do not exist here under our system of registered titles; and, in addition to all this, Reeder and his agent

were the only persons alive to the probability, perhaps having actual knowledge, of there being embarrassing building and occupation restrictions.

It is objected in the pleadings that a proper deed was not tendered. This objection is not open to the defendant Reeder. The deed was prepared by his solicitors, executed by the plaintiff, left in the solicitors' possession, and subsequently returned to the plaintiff—the defendant Reeder refusing to carry out the purchase. The deed is not fair to the plaintiff; and, to avoid the expense of a reference, I direct that it be amended by inserting a special restrictive covenant similar to that contained in the deed from the Robins Realty Company Limited to the plaintiff, dated the 10th May, 1910, and registered as No. 65906F, West Toronto, and that it be executed by the defendant Reeder.

The title has been accepted and adjustments made. If there is need for later adjustments which the parties cannot agree upon, or for any cause they think a reference is necessary, I may be spoken to.

There will be judgment for specific performance by the defendant Reeder of the agreement in the pleadings mentioned, with costs of this action, but not including costs to the plaintiff occasioned by the joinder of the defendant Gee, and the usual judgment as to sale of the property and payment of the deficiency, if any, by the defendant Reeder.

This defendant's counterclaim will be dismissed with costs.

BRITTON, J. MARCH 5TH, 1915.

RE PULEY.

Will—Construction—Division of Estate after Death of Widow "between" Adopted Daughter and Children of two Sisters —Adopted Daughter Entitled to one Half—Children of Sisters to Share Remaining Half per Capita—Period of Vesting—Absence of Residuary Clause—Adopted Daughter Dying after Testator but before Widow — Avoidance of Lapse—Children Taking Share of Parent.

Petition by the Toronto General Trusts Corporation, trustees under the will of William Puley, deceased, for the advice and direction of the Court, under the Trustee Act, in regard to carrying out the trusts of the will.

The petition was heard in the Weekly Court at Toronto.

D. B. Simpson, K.C., for the petitioners.

R. J. McLaughlin, K.C., for the children of Mary Williams and Betsy James.

W. D. McPherson, K.C., for some of the next of kin of Mary A. Piper.

J. Douglas, for others of the same class.

A. J. Armstrong, for other adults interested.

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

BRITTON, J.:—William Puley made his will on the 15th May, 1880, and died on the 16th September, 1881.

The only parts of the will that occasion difficulty and require consideration are the following:—

"V. My trustees aforesaid are hereby instructed to allow my wife Elizabeth the free and uninterrupted use of the new house and furniture we now occupy and the land thereto adjoining during the term of her natural life or so long as she remains my widow and no longer. The trustees aforesaid shall allow my wife Elizabeth a stated sum per annum to be paid half-yearly the said sum to be sufficient for her comfortable maintenance so long as she shall remain my widow and no longer. Should she become the wife of another man then the allowance aforesaid shall cease and the house and furniture aforesaid shall be let or otherwise disposed of as my trustees aforesaid shall determine.

"VI. My trustees aforesaid shall manage the whole of my estate to the best of their judgment investing the rents and profits thereof in good security until the death of my wife Elizabeth or until she shall become the wife of another man. As soon as practicable after either event the whole of my real estate shall be sold and the proceeds of such sale shall be added to my moneys previously invested and the sum total shall be equally divided between my adopted daughter Mary Ann and the children of my whole sisters Mary Williams and Betsy James care being taken first of all to pay all expenses incurred in the management of my estate by my trustees aforesaid and their liberal remuneration for the trouble and attention necessary to giving due effect to this my last will and testament.

"VII. And further I hereby direct my trustees aforesaid to see to the education of my adopted daughter aforesaid and make such allowance from time to time as they shall deem necessary for her board and clothing. And my wish is that she shall live with my wife and that my trustees aforesaid be and are hereby appointed her guardians."

The widow, Elizabeth Puley, died on or about the 26th May, 1914.

The Toronto General Trusts Corporation are now trustees of this estate and present their petition asking for instructions and advice upon the following questions:—

(1) In reference to the bequest in paragraph VI. of the will, did the testator intend that his adopted daughter, Mary Ann Piper, should have taken half of the whole, and the children of Mary Williams and Betsy James the other half, or would the said Mary Ann Piper and the children of Mary Williams and the children of Betsy James have taken equally, per capita?

(2) When did the residuary estate of the testator vest in the ultimate parties entitled, i.e., did it vest on the death of the testator, with the time of distribution postponed, or did it vest on the death of the widow?

(3) The adopted daughter, Mary Ann Piper, died after the death of the testator, but before the death of the widow; did the bequest to Mary Ann Piper lapse into the estate of the testator, or how otherwise?

(4) Did the bequests to the children of Mary Williams and Betsy James, who died after the testator, but before the death of the widow, (a) leaving children, (b) without leaving children, lapse, i.e., in case of the children of Mary Williams or Betsy James so dying leaving children, would such children take the parent's share?

In construing any will, and in endeavouring to ascertain what was the real intention of the testator, cases involving the interpretation of other wills are not of so much importance and are not necessarily of binding authority upon a Judge in reference to the same words used by another testator.

In the present case, however, I feel myself bound by, and shall follow, Hutchinson v. LaFortune (1897), 28 O.R. 329. That was the decision of a Divisional Court and seems expressly in point.

Mr. McLaughlin in his argument for the children of the sisters of the testator cited a great many cases coming down for a century prior to the case in 28 O.R. deciding that "between" may mean "among." "Between" certainly may mean "among," and is frequently used in that sense.

In this case there is nothing in the will itself, or in the circumstances under which it was made, so far as I am permitted to look at these circumstances, from which I can say with reasonable certainty that "among" was meant.

The testator had no children. He was very fond of his so-called adopted daughter. He provided for her education, and expressed a wish that she should continue to reside and make her home with the widow. It may therefore well be that the testator intended to give the adopted daughter one-half on the division.

A reference was given to me by Mr. Simpson to the case of Re Davies (1913), 4 O.W.N. 1013. That is a case in which my brother Middleton came to a different conclusion from mine. In that case a trust fund was created from which the income was to be paid to the wife until the youngest child attained the age of 21 or married. Then a trust fund was to be created for certain purposes, and, when that fund was sufficient for the purposes named, the surplus was to be divided between the widow and the daughters, "share and share alike." The widow's contention was that she took half and the daughters took the other half. The learned Judge held against the widow's claim.

The distinction between that case and the present is, that in the Davies will were the words "share and share alike." These words were held to limit the share of the widow to the amount of any one of the daughters. The words "share and share alike" are not, nor are any equivalent words, in the clauses of the will now being considered.

My answer to the first question is, that the adopted daughter took one half, and the children of the sisters Mary Williams and Betsy James took the other half; these children taking equal shares of the one half, per capita.

(2) In answer to the second question, I am of opinion that the bequest vested upon the death of the testator. It was the intention of the testator to deal finally with his property; there was no clause devising residue. Payment over was postponed until the death or marriage of his widow, but provision was made for the complete care of and dealing with his whole estate until the time for distribution should arrive.

(3) As the time of vesting was the death of the testator, and as the adopted daughter, Mary Ann Piper, survived the testator, the gift to her did not lapse.

(4) The bequests to the children of Mary Williams and Betsy James, who died after the death of the testator but before the widow, not leaving children, did not lapse, nor did these bequests lapse in the case of leaving children, but the said children would take the share the parents would have taken if he or she had survived the widow.

The petitioners ask generally what is the proper course to

pursue, and who are entitled to share. Having answered the specific questions, 1, 2, 3, and 4, it is not necessary now to do more.

If any difficulty arises in regard to those claiming to be entitled, a further application may be made.

Costs of all parties out of the estate.

LENNOX, J. MARCH 5TH, 1915.

RE COTTER.

Will—Construction—Incomplete Devise—Trust—Predecease of Trustee—Residuary Estate — Distribution — Avoidance of Intestacy—Discretion of Trustee—Period of Ascertainment of Class of Beneficiaries.

Motion by the Trusts and Guarantee Company, administrators (with the will annexed) of the estate of Elizabeth Cotter, deceased, for an order determining certain questions arising in the administration of the estate as to the proper construction of the will.

The motion was heard in the Weekly Court at Toronto.

G. D. Conant, for the applicants.

G. N. Shaver, for Robert Henry Johnston.

D. Urquhart, for Honora Ann Walsh.

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

LENNOX, J.:—The deceased appointed her daughter Margaret Brimacombe executrix of her will and trustee of her estate, and devised all her estate to her. . . .

The executrix died, without issue, in the lifetime of the testatrix, and the Trusts and Guarantee Company were appointed administrators with the will annexed.

The clauses of the will causing difficulty are:—

"Second, I give devise and bequeath unto my said trustee my house and lot . . . to be held by my said trustee in trust for my grandson Harry Johnston until he arrives at the age of 26 years, but in case he should die before arriving at that age, then my said trustee shall dispose of said property as she is hereinafter directed to dispose of the residue of my estate."

"Fourth, I give devise and bequeath unto my daughter Margaret Brimacombe all the rest residue and remainder of my

estate real and personal of whatsoever kind and nature and wheresoever situate in trust to pay firstly all my just debts funeral and testamentary expenses as soon as convenient and to divide the balance after payment of debts and funeral expenses between herself and my grandchildren in such shares and in such manner as to her shall seem best."

Harry Johnston lived to attain the age of 26 years, and is still living, and there are a great many other grandchildren of the testatrix, ten in all.

I am asked, what estate or interest does Harry Johnston take under clause 2? It is argued for him that he takes the fee simple of the lands. I do not think so. What he takes he takes through the trustee, and I see nothing to indicate that the testatrix intended to benefit him *under this clause* in any case beyond the age of 26; after that time, or upon his death in the meantime, the lot was to become part of the residuary estate, and to be disposed of under clause 4. Provision was made for him, after he attained 26, as a grandchild in another way.

Question 2: "If the said Robert Henry (Harry) Johnston takes less than a fee simple interest in the property aforesaid, does the remaining interest form part of the residue to be disposed of as directed by paragraph 4 of the said will, or is the said remainder to be distributed as upon an intestacy?" Subject to the limited interest conferred upon Harry Johnston, the testatrix died intestate as to this lot if effect cannot be given to clause 4 by reason of the death of the trustee—if effect can be given to this clause, then this lot and the other undisposed of land or effects, referred to upon the argument, fall into the residuary estate and are to be distributed as nearly as may be according to the provisions of the residuary clause of the will.

Contrary to the weight of argument addressed to me upon the motion, I am of opinion that there is nothing to prevent the Court from giving effect to the residuary clause, and that the testatrix did not die intestate as to any of her estate real or personal. The question is of practical importance, as upon an intestacy Honora Ann Walsh, a daughter of the testatrix, would take in preference to her six children, grandchildren of the testatrix; but, if the otherwise undisposed of estate is governed by the fourth clause, she takes nothing.

If a trust is clearly created, the Courts will not allow it to fail for want of a trustee. I think the property intended to be included in the residuary clause is clearly impressed with a trust in favour of Margaret Brimacombe and the grandchildren of the testatrix, or such of them as were living at the time of her

death. I make no distinction between the trustee, herself a beneficiary, and the other beneficiaries. It is true that a discretionary power is conferred upon the trustee, and she was not to be bound to divide equally, but she was bound to give each a "share," and the Court in such case would restrain her from giving a purely illusory share. The primâ facie right was to have an equal division, and it was not intended that the trustee should act capriciously or dishonestly. The Court cannot exercise the personal discretionary power conferred upon the trustee, but is in a position to carry out substantially the intention of the testatrix. The property included in the residuary clause—and it includes the lot described in the second clause—in my opinion should be distributed according to the number of grandchildren living at the death of the testatrix, the share of each being increased by the share which Margaret Brimacombe would have taken had she survived.

If it appears necessary that a trustee should be appointed, I may be spoken to, or it may be made the subject of a substantive motion.

Costs of all parties out of the estate.

MACDONELL v. DAVIES—LENNOX, J.—MARCH 2.

Arbitration and Award—Ground Rent of Premises Fixed by Award—Action for Value of Use and Occupation—Fair Rental Value of Premises—Evidence.]—The plaintiff sued for the money value of the defendant's use and occupation of premises in the city of Toronto from the 30th September, 1910, until the 29th July, 1914, claiming $125 a month, or $5,750, giving credit for $2,062.50, paid on account of occupation rent. The learned Judge said that no satisfactory evidence of the fair rental value of the premises was given; and that the plaintiff had no right to recover upon the basis of a use and occupation rent. In a brief written opinion the learned Judge referred to a previous action between the same parties, MacDonell v. Davies (1913), 4 O.W.N. 620, and to proceedings upon an arbitration and an award made by the arbitrators. He found that the defendant had paid the plaintiff, for the period of his occupation, at the increased ground rent determined upon by the arbitrators, with interest—in all $2,062.50; and, as the award had not been set aside or questioned, this was all the plaintiff was entitled to. Action dismissed with costs. G. H. Watson, K.C., for the plaintiff. M. H. Ludwig, K.C., for the defendant.

BELL v. SMITH—LENNOX, J.—MARCH 3.

Partnership—Purchase of Farm by Syndicate—Profits Received by two Members—Concealment and Misrepresentation—Lien—Sale of Property—Dissolution of Partnership—Account—Parties—Costs—Forfeiture.]—This action was brought by S. H. Arundel Bell, the plaintiff in the action of Bell v. Coleridge (1913-14), 5 O.W.N. 655, 6 O.W.N. 200, against John A. Smith, who was not a defendant in that action, and John G. Coleridge and Michael Nugent, for a dissolution of the partnership existing between the parties in respect of a purchase of land, and for other relief. Lennox, J., tried the present action without a jury at Sandwich, and reserved judgment. He now disposes of the case in a written opinion in which he refers to the evidence and to the conclusions in the former action, and finds that the defendants Smith and Coleridge induced the plaintiff to believe that the Pratt farm was being purchased through the agency of Coleridge at $450 an acre, and by this means induced the plaintiff to complete the purchase thereof and enter into partnership with them; that, by this means and by intentional concealment and by misrepresentation of what was really being done, they obtained from the plaintiff $3,750 more than they were entitled to or than the plaintiff should have been asked to pay, and they are jointly liable to the plaintiff for this sum, with interest from the 21st May, 1913. In addition to other remedies, the plaintiff will have a lien upon the Pratt farm and the interest of the defendants Smith and Coleridge in it for the $3,750 and interest. By the partnership agreement, the defendants Smith and Coleridge were to pay the instalments of $2,500 falling due on the 1st August, 1913, and $7,500 on the 1st May, 1914. They are in default as to both these payments, and there will be judgment directing them to pay these sums with interest on each from the day on which it should have been paid into Court to the credit of this action; and, in default, judgment for dissolution of the partnership, a sale of the property, the taking of the accounts, and with the other provisions usual in a judgment in a partnership action. The plaintiff's costs of the former action, including the costs of the appeal therein to the Appellate Division, are to be recoverable out of the partnership assets as against the defendants Smith and Coleridge, upon the taking of the partnership accounts, if there is a dissolution; and, if not, or if there is a deficiency of assets, the plaintiff will have judgment against the defendants for two-fifths of that sum. Half of the final payment for the farm is to be borne by

the plaintiff and the other half by the defendants Smith and Coleridge. These defendants are to pay the costs of this action. The defendant Nugent will be bound by this judgment, and must submit to be redeemed and convey the property to the purchaser. There is no authority for declaring that the defendants have forfeited their shares. D. L. McCarthy, K.C., for the plaintiff. Matthew Wilson, K.C., and F. D. Davis, for the defendants.

ORENSTEIN v. SMITH—LENNOX, J.—MARCH 3.

Marriage—Contract to Marry—Action for Breach—Evidence—Abandonment of Contract by Mutual Consent—Damages—Provisional Assessment.]—Action by Minnie Orenstein against Samuel Smith for breach of promise of marriage, tried without a jury. LENNOX, J., said that, the promise of marriage being established by an undisputed agreement in writing signed by the parties, the onus was on the defendant to shew justification for not marrying the plaintiff. There was no great preponderance of evidence either way, and there was a great deal of difficulty in coming to a conclusion. The length of time which had elapsed, and the total inaction of the plaintiff and her father for months, and years in fact, were circumstances which gave great weight to the defendant's contention that the plaintiff became unwilling to marry him before the date fixed for the marriage, and that the agreement was abandoned by mutual consent. The learned Judge could not bring himself to believe that either party regarded the contract as subsisting, or desired its continuance, after the meeting at the house of the defendant's mother in the summer of 1912. The parties were then in agreement upon everything except upon the question of the engagement ring—a souvenir valued at upwards of $100, which the plaintiff insisted upon retaining and had since retained. Take it all in all, the plaintiff had not made out her case. As it was an indulgence to the defendant to be allowed in to defend, after he had made default, the action should be dismissed without costs. If there should hereafter be judgment for the plaintiff, the damages should not be assessed at more than $300 or $400. J. M. Godfrey, for the plaintiff. L. F. Heyd, K.C., for the defendant.

POIZNER v. COTTIER—LENNOX, J.—MARCH 3.

Damages—Negligence—Personal Injury to Plaintiff.]—An undefended action for damages for negligence, tried without a jury. The learned Judge said that there was no doubt at all that the plaintiff sustained serious injuries by being run down by the defendant's automobile. Whether these injuries would be permanent or cause him inconvenience when his business should become brisk again, there was no means of judging, and damages could not be based on speculation. Judgment for the plaintiff for $1,200 with costs. A. Cohen, for the plaintiff.