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HIGH COURT DIVISION.

MIDDLETON, J. SEPTEMBER 13TH, 1920.

DUNBAR v. TEMPLE.

Settlement — Trust-deed — Power of Appointment — Exercise of — Fraud upon Power — Status of Possible Appointee to Attack Appointment — Acquiescence — Laches — Following Trust-fund — Trustees — Limitations Act.

In this action, the plaintiff, a daughter of the late Mary Jones Temple and of the defendant Charles V. M. Temple, attacked certain appointments made by the latter in favour of her sister and brother, the defendants Gertrude L. Temple and Cuthbert K. W. Temple, under the marriage settlement of the parents, and sought to have the funds now held under these appointments declared to be a part of the original trust-fund and to be still subject to the terms of the marriage settlement.

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

H. J. Smith, for the plaintiff.

J. A. Worrell, K.C., for the defendant Wurtele.

A. J. Anderson, for the defendant C. K. W. Temple.

H. J. Scott, K.C., and W. Lawr, for the other defendants.

MIDDLETON, J., in a written judgment, said that at the date of the marriage settlement, the 29th April, 1864, the wife had about £21,000 (face value) which was placed in settlement. The husband contributed nothing. Under the settlement, the income was to be divided between the husband and wife so long as they both lived, and on the death of either the whole income was to be paid to the survivor for life, and on the death of the survivor the principal is to be paid to "all and every or such one or more of the children . . . exclusively of any other or others of such children . . . in such shares and proportions and with

such provision as to maintenance . . . and such conditions and limitations over . . ." as the husband and wife during the joint lives, or the survivor, may by deed or instrument in writing appoint. In default of any such direction or appointment, the children take equally.

The plaintiff contended that, although no appointment had been made in her favour which would justify this action, and she might in the end take nothing, she had the right to attack the appointments made, so that, if she should become entitled as a surviving child, she might find the fund available.

The learned Judge was of opinion that the plaintiff had a locus standi to maintain the action.

The wife died on the 18th September, 1872. There were three children: Gertrude, born in 1865; Ida, the plaintiff, born in 1866; and Cuthbert, born in 1868.

In 1880, the defendant Charles V. M. Temple married a second time, and of this marriage there was born a son, the defendant Arthur Temple. On this marriage, Charles purported to settle on his wife £2,671, part of a sum of £5,000 given him by the will of his first wife. But the latter had no property at the time of his death, and her will was never proved, and there was in fact no such fund.

When Gertrude came of age in 1886, her father made an appointment in her favour of $22,000, portion of the trust-fund, releasing his own life-interest in this, so as to entitle her to immediate possession of this sum. Ont he same day, Gertrude executed a settlement by which this $22,000 was transferred to her father in trust to pay the income to himself and the corpus to her upon his death; but, owing to another gift, this operated only on $9,000. On the same day, Gertrude, by deed of donation, gave to her step-mother $13,000, which was expressly accepted in satisfaction of the £2,671, and was to be held for the benefit of any issue of the second marriage, and in default of issue was to revert to the husband's estate.

When the plaintiff came of age and was proposing to get married, her father offered to settle $9,000 on her if she would abandon the marriage; she declined, and the settlement was not made.

In April, 1887, the father, by a similar deed, settled $18,000 on Gertrude, releasing his life-estate, and on the same day she executed a trust-deed in his favour, giving him a life-estate, with remainder to herself. This made $40,000 withdrawn from the fund.

In January, 1890, by a similar deed, $27,000 was appointed and released to Cuthbert, and this he settled on his father for life, remainder to himself. This transaction of appointment and settlement was attacked, and the grantee made no attempt to

support it. It was agreed that a judgment might go declaring this void and directing that the fund be restored to the original trust.

Gertrude died in 1918, unmarried, and left her estate to her half-brother Arthur, subject to some pecuniary legacies.

The earlier settlement on Gertrude was a fraud upon the power. It was an attempt to divert $13,000 from the fund to the second marriage settlement, and to the extent of $13,000 it must be declared void, and the $13,000, so far as it can be identified, restored to the original trust.

The learned Judge considered that he had power to separate the $13,000 from the balance of the $22,000, and that there was a valid intention to settle the $9,000 on Gertrude.

The second settlement on Gertrude was not open to attack.

There was no such acquiescence on the part of the plaintiff as to preclude her attack. The delay had been great, and would prevent any personal remedy; but, as the fund was still in existence and could be followed, there was no reason why it should not be declared still subject to the original trust.

The Limitations Act afforded the trustees ample protection.

There should be a judgment declaring that the appointment of $13,000, portion of the $22,000, in favour of Gertrude, was void, and that this $13,000 was still subject to the trusts of the original settlement.

And, on Cuthbert's admission, it should be declared that the release and appointment and the settlement of $27,000 on him were void, and this fund was also still subject to the deed of 1864.

The $9,000 and the $18,000 appointed to Gertrude were well appointed, and under her will her half-brother became absolutely entitled, subject to the father's life-estate.

A claim made against the defendant Charles V. M. Temple as executor of his wife was dismissed.

The question of the necessity of appointing new trustees and for an account might be discussed before issuing judgment.

Costs of all parties (those of the trustees as between solicitor and client) should be paid out of the $13,000.

There was no moral turpitude on the part of the defendant Charles or his daughter Gertrude.

ORDE, J. SEPTEMBER 14TH, 1920.

HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO v. ALBRIGHT.

Contract—Construction—Sales of Shares and Assets of Company—Liabilities—Sinking Fund Payments—Interest—"Accrued"—Payment of Sum in Adjustment—Declaration—Specific Performance.

Action by the Commission and the Ontario Power Company of Niagara Falls against J. J. Albright, arising out of a difference of opinion as to the meaning of a certain agreement, dated the 12th April, 1917, by which the defendant, on behalf of himself and other shareholders of the plaintiff company, agreed to sell to the plaintiff Commission 90,000 of the total issue of 100,000 shares of the plaintiff company, and also the remaining 10,000 shares "to the extent that the holders thereof put the vendor in the position to make delivery" thereof prior to the time for completion, in consideration of the issue of certain debentures of the Commission and of the execution by the Commission of a certain other agreement.

The plaintiffs asked for a declaration that the defendant ought to have left in the hands of the plaintiff company on the 1st August, 1917, the sum of $1.25 for each electrical horse power sold by the plaintiff company and paid for by the purchasers thereof during the period from the 1st January to the 30th June, 1917, and for specific performance of the agreement of the 12th April, 1917, in accordance with such declaration, or for damages, and for an account.

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

C. S. MacInnes, K.C., and Christopher C. Robinson, for the plaintiffs.

A. W. Anglin, K.C., for the defendant.

ORDE, J., in a written judgment, said that the time for the completion of the agreement was the 1st August, 1917. It was a term of the agreement that the assets of the plaintiff company and of another company, called the transmission company, whose capital stock was all owned by the plaintiff company, should be those set out in a schedule, and that the defendant would cause or procure the plaintiff company and the other company to do such things as might be required, so that the liabilities of those two companies should be only those described in another schedule (D), any other liabilities being assumed by the defendant.

The defendant also agreed with the plaintiffs that, in addition to the assets set out in the schedule, there should be left in the hands of the plaintiff company, at the time for completion, a sum estimated by the defendant to be equal to:—

"(a) Interest and sinking fund payments on the bonds and debentures of the power company (plaintiff) and the transmission company mentioned in schedule D, which shall have accrued but shall not be due at the time for completion; and (b) the proper proportion of all rentals and payments . . . adjusted to the time for completion."

And it was provided that if such estimate should, after completion, prove inaccurate, the excess or deficiency, when determind, should be paid by the defendant to the plaintiff company, or by the plaintiff company or the Commission to the defendant, as the case might require.

It was a disagreement as to the meaning of this clause, and particularly the part lettered (a), relating to the sinking fund payments, which gave rise to the action. The difficulty arose from the use of the word "accrued" in reference to the sinking fund payments.

The learned Judge, after a consideration of all the provisions of the agreement, agreed with the plaintiffs' contention that the word "accrued" has reference to the period during which electrical horse power was sold, and that on the 1st August, 1917, not one month, but seven months, had run, during which the sinking fund payments had "accrued," and that, instead of leaving with the plaintiff company the sum of $15,638.54, the defendant should have left a sum amounting approximately to $110,000.

There should be judgment for the plaintiffs for the declaration asked, and for the plaintiff company for the amount which ought to have been left in its hands on the 1st August, 1917, with interest from that date, and with costs.

ORDE, J. SEPTEMBER 14TH, 1920.

*TOWNSHIP OF SOUTH GRIMSBY v. COUNTY OF LINCOLN AND TOWNSHIP OF NORTH GRIMSBY.

Highway—Queenston and Grimsby Road—Liability of Township Corporation for Maintenance—Statutory Exemption—45 Vict. ch. 33 (O.)—Assessment—Legality of Levy upon Township—Action for Declaration—Previous Action in County Court—Res Judicata—Defences on Merits—Improvement of Road under Good Roads System—Highway Improvement Act, R.S.O. 1914 ch. 40—Abrogation by Township Corporation of Right of Exemption—Acquiescence—Authority of Reeve—Absence of By-law Authorising Abandonment.

Action for a declaration that the plaintiffs, the Municipal Corporation of the Township of South Grimsby, are not liable for the levy made upon them by the defendants the Municipal Corporation of the County of Lincoln, under county by-law No. 605, in respect of the Queenston and Grimsby road; that the levy is illegal and void; and that the plaintiff corporation should not be assessed, rated, or taxed for any portion of the cost of the road under the system for the improvement of highways adopted by the county corporation under the provisions of the Highway Improvement Act R.S.O. 1914 ch. 40; and also for a declaration that the defendants the Municipal Corporation of the Township of North Grimsby are liable for all assessments in respect of the road; and for a mandamus, an injunction, and other incidental relief.

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

W. S. MacBrayne, for the plaintiffs.

A. W. Marquis, for the defendant county corporation.

G. S. Kerr, K.C., and G. B. McConachie, for the defendant township corporation.

ORDE, J., in a written judgment, referred to County of Lincoln v. City of St. Catharines (1894), 21 A.R. 370; Regina v. Corporation of Louth (1863), 13 U.C.C.P. 615; and Village of Merritton v. County of Lincoln (1917), 41 O.L.R. 6. All these cases had to do with the road in question.

He also referred to the Ontario Act (1882) 45 Vict. ch. 33, by which the original Township of Grimsby was divided into North and South Grimsby, and quoted sec. 8, as follows:—

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

"From and after the . . . last Monday of December, 1882, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby road, shall be assessed, rated and taxed against the . . . Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor."

The defence of res judicata was raised upon a judgment of a County Court recovered by the county corporation against South Grimsby for $453.43 levied in 1917 by county by-law 605, the levy in question in this action. The learned Judge was of opinion that the binding effect of the County Court judgment must be limited to the cause of action which merged in that judgment, and that the plaintiffs in this action were not concluded from seeking in the Supreme Court of Ontario a determination of the broad question of their liability under the good roads by-laws of the County of Lincoln for assessments subsequent to the year 1917: Davis v. Flagstaff Silver Mining Co. (1878), 3 C.P.D. 228; Webster v. Armstrong (1885), 54 L.J.Q.B. 236; Midland R.W. Co. v. Martin & Co., [1893] 2 Q.B. 172.

The first defence upon the merits was, that the exemption accorded to the plaintiffs by sec. 8 of the Act of 1882 did not apply to the Queenston and Grimsby road, now that it had become part of the good roads system under the Highway Improvement Act. The learned Judge felt bound by the decision of the Appellate Division in the Merritton case, supra, to decide in favour of the defendants upon this defence.

The other ground of defence upon the merits was, that the plaintiffs, through their representative, had agreed to abrogate their right to exemption, in consideration of an allotment of certain additional milege of road. There was evidence that, in the course of the negotiations leading up to the adoption of the good roads system by the county council, the Reeve of the Township of South Grimsby had acquiesced in the allotment of some additional mileage to his township because the inclusion of the Queenston and Grimsby road in the system would necessitate the township corporation's contributing to the maintenance of that road. There was no evidence that the Council of South Grimsby ever formally authorised its Reeve to make any such bargain, or that what he did was ever ratified by that council. No authority was cited to support the contention that the Reeve of a township can forgo a statutory right to exemption in this loose way; and,

in the absence of any such authority, the learned Judge was of opinion that nothing less than a by-law of the township deliberately abandoning or authorising the abandonment of its right to the exemption could be invoked to support any such arrangement as was alleged here.

Action dismissed with costs.

ORDE, J. SEPTEMBER 15TH, 1920.

LUSK v. PERRIN.

Mortgage—Application of Payments Made by Mortgagor—Principal —Interest—Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22—Order of Local Judge Made on Application of Mortgagor—Irregularity—Default in Payment of Interest —Entry by Mortgagee upon Vacant Possession—Forcible Entry of Dwelling House—Remedy—Criminal Code, secs. 102, 103—Cutting Timber—Right of Mortgagee in Possession to Profits of Land—Mortgagee not Chargeable with Waste— —Possession Restored to Mortgagor—Dismissal of Action— Costs.

Action by Lusk, mortgagor, against Perrin, mortgagee, and Runnett, Perrin's agent, to recover possession of the mortgaged premises, which the defendant had entered in the plaintiff's absense; for an injunction to restrain the defendants from entering and cutting wood and timber; and for damages for trespass and for forcible and illegal entry.

The action was tried without a jury at Haileybury.

M. F. Pumaville, for the plaintiff.

W. A. Gordon, for the defendants.

ORDE, J., in a written judgment, said that, as the defendants almost immediately after the commencement of the action went out of possession and desisted from any further acts of trespass, the only question which remained for adjudication was that of the damages, if any, which the plaintiff had sustained by the alleged wrongful acts of the defendant; and, assuming that the plaintiff was not entitled to exemplary damages, the actual damage done was within the jurisdiction of a Division Court.

In April, 1913, the plaintiff mortgaged to Perrin the north half of lot 8 in the 3rd concession of Harley to secure payment of

$2,500 and interest payable annually at 6 per cent. The principal was to be paid in 13 annual instalments, 12 of $200 each and the last of $100, on the 1st April, 1914, and following years. The plaintiff duly paid the first year's interest and $200 on account of principal. Nothing further was paid either for principal or interest up to the next gale-day, and the plaintiff was then in default. On the 8th April, 1915, the Mortgagors and Purchasers Relief Act, 5 Geo. V ch. 22, was passed. On the 17th May, 1915, the plaintiff paid Perrin $182.41. The year's interest due on the 1st April, 1915, amounted to $138. The plaintiff said that he asked Perrin to apply the $182.41 wholly towards interest—i.e., to aply $44.41 towards future interest. On the 10th November, 1915, the plaintiff paid $70; and he made a further payment of $125 on the 1st May, 1916.

The learned Judge finds on the evidence that the two sums of $44.41 and $70 were intended to be and were in fact paid by the plaintiff in reduction of the instalment of $200 which had fallen due on the 1st April, 1915.

The plaintiff from time to time made further payments to Perrin, but at no time had he fully paid the amount due for interest, and he was continually in arrear until the autumn of 1919. On the 1st November, 1919, Perrin gave the plaintiff notice of his intention to proceed under the power of sale, claiming $2,347.06 and interest as due. The plaintiff delivered to Perrin a notice disputing the amount claimed and requiring that an account be taken by the Local Master at Haileybury, and also claiming the benefit of the Mortgagors and Purchasers Relief Act. A hearing took place before the Local Master, who was also a Local Judge of the Supreme Court, and as such Judge he made an order, styled in the Supreme Court of Ontario, upon an application by Lusk for an order refusing permission to Perrin to continue proceedings, whereby, he "refused permission to continue proceedings," etc.

The plaintiff set up this order as having established that there were no arrears of interest, but upon an application under the Mortgagors and Purchasers Relief Act the Judge is not concerned with interest at all. The order was in fact irregular. The Act gives the Judge power to grant or refuse leave upon an application by the mortgagee. It does not give power to a Local Judge, upon an application by the mortgagor for an order refusing leave, to make any such order.

In January, 1920, the plaintiff left the mortgaged premises. When he returned, on the 9th February, he found Perrin in occupation of the dwelling house on the premises. Perrin refused to leave, and, with the aid of the defendant Runnett, cut and removed

some of the wood. Upon this action being begun, Perrin left the place and gave up possession.

There was ample ground for Perrin's taking possession in the plaintiff's default in the matter of interest. The mortgage contained the short form covenant "that on default the mortgagee shall have quiet possession of the said lands."

The lands being vacant, Perrin was able to enter peaceably and without resorting to the issue of a writ. The plaintiff alleged that Perrin entered the house forcibly, the doors being locked.

But the question whether an entry is forcible or not in no way affects the relative position of the mortgagor and mortgagee as to the possession of the mortgaged premises. Once in, whether peaceably or otherwise, he is in possession as against the mortgagor for all civil purposes, and the mortgagor's remedy is under the Statutes of Forcible Entry, 5 Ric. II., st. 1, ch. 18, and 15 Ric. II., ch. 2 (Criminal Code, secs. 102, 103): Halsbury's Laws of England, vol. 21, p. 193.

Being then lawfully in possession, did Perrin commit any act for which he could be made liable to the plaintiff in this action? The cutting of timber by a mortgagee in possession might be an act of waste, restrainable by injunction and for which the mortgagee might be accountable in damages: Falconbridge on Mortgages, p. 595. But a mortgagee may, in certain circumstances, cut timber without committing waste: Brethour v. Brooke (1893), 23 O.R. 658. According to the plaintiff, the timber cut comprised about 4 or 5 cords, worth in all between $20 and $30. In the circumstances, the cutting did not exceed a proper exercise of the mortgagee's right to take the profit from the mortgaged premises, for which of course he must account to the mortgagor.

A mortgagee who takes possession may find difficulty in voluntarily giving it up: In re Prytherch (1889), 42 Ch. D. 590, 599. But here the mortgagor demanded repossession, so that the mortgagee's liability to account to the mortgagor in respect thereof should be limited to the actual period of occupation.

Action dismissed with costs.

ORDE, J. SEPTEMBER 16TH, 1920.

*MARKS v. ROCSAND CO. LIMITED.

Company—Director—Payment for Services as Manager—Authority for—Resolution of Shareholders at Special General Meeting—Notice Calling Meeting—Failure to Mention Special Matters to Come before Meeting—Meeting Irregularly Called—Ontario Companies Act, sec. 46—All Shareholders not Present—Proxy from Absentee not Produced—Extent of Authority not Shewn—Invalidity of Resolution—Confirmation of Minutes at Subsequent Meeting—Effect of—Right of Plaintiff to Recover for Services as upon Quantum Meruit—Evidence—Corroboration—By-law Unnecessary.

Action to recover $1,200 for the plaintiff's salary as manager of the defendant company from the 15th June to the 15th December, 1918.

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

G. W. Mason, for the plaintiff.

J. R. L. Starr, K.C., for the defendant company.

ORDE, J., in a written judgment, said that in 1917 and the early part of 1918 the defendant company's affairs were financially involved. At a meeting of shareholders held on the 28th May, 1918, the plaintiff, who then held 100 shares, submitted a proposition to purchase 51 per cent. of the stock and to advance certain moneys to the company. This proposition resulted in the plaintiff and K., one of the original incorporators and already a holder of 280 shares, together advancing certain moneys and acquiring certain additional shares, so that by the 12th June, 1918, the plaintiff held 260 shares and K. 387, making 647 in all out of the 1,000 issued shares, thereby giving the plaintiff and K. control. The plaintiff said that an arrangement was made with K. whereby the plaintiff was to become general manager of the company, and he and K., as well as B., the secretary-treasurer, were to be remunerated for their services. The plaintiff said that he was appointed manager of the company in June, 1918, by K. and B. It was admitted that there was, at that time, no meeting of the directors, formal or otherwise, at which the plaintiff was authorised to act as manager; but from the middle of June, 1918, the plaintiff looked after the business of the company at its Toronto office, B. being at Erin, where the plant was. It appeared to have been taken for granted by the plaintiff and K. that, having control, they could practically undertake the complete management of the company.

On the 9th September, 1918, a meeting of shareholders, styled the "annual general meeting," was held, at which the plaintiff, K., B., and two others were elected directors. As part of the business at a subsequent meeting of the directors, it was resolved that a salary of $150 a month, dating from the 1st June, 1918, be paid to B. as secretary-treasurer. No mention was made of the plaintiff's position as manager or of any salary for him. The plaintiff, however, continued to perform the duties which he had entered upon in June, and K. admitted that from that time he regarded the plaintiff as the managing director of the company. The plaintiff complained that he had had no salary. In October he dismissed B. and the whole staff at Erin.

On the 2nd December, 1918, the plaintiff sent out notices of a special meeting of shareholders to be held on the 17th December, 1918, "to discuss matters of importance pertaining to the company's affairs." This notice be signed as "manager." A resolution was passed at this meeting authorising the payment of 6 months' salary at $200 per month to the plaintiff and 6 months' salary at the rate of $50 a month to K., to the 1st December. It was not shewn by the minutes that either the plaintiff or K. refrained from voting on this resolution.

The plaintiff, as manager, had no authority to call a meeting of shareholders. A special general meeting of shareholders can be called only upon the authority of the directors; and, although the plaintiff held a sufficient number of shares to enable him to exercise his right to have a meeting called under sec. 46 of the Ontario Companies Act, he did not follow the requirements of that section. And so, unless all the shareholders were present at the meeting, or were represented by proxy after due notice of the business to be transacted, no resolution passed thereat would bind the shareholders. The plaintiff said that there was only one absentee, and that he (the plaintiff) held and presented a proxy for that one; but the proxy was not produced, and the president remembered no such proxy. The minutes of the meeting did not mention it. But, even assuming that all absent shareholders were represented, it must be held, in the absence of some evidence as to the extent of the authority given by the proxy, that the authority was limited to the business for which the meeting was called. A meeting called "to discuss matters of importance pertaining to the company's affairs" could not be considered as having been called for any "special" purpose. It was beyond the power of that meeting, in the absence of any shareholder, unless represented by proxy, with full authority, to pass any resolution to remunerate two men who were then directors of the company.

At a subsequent meeting of shareholders on the 20th January, 1920, the minutes of the previous meeting were confirmed; but

again there was not a full attendance of shareholders, and no evidence was given as to the notice calling this meeting. Unless the notice set forth the fact that it was proposed to confirm the resolution passed at the meeting of the 17th December, the purported confirmation could not validate the earlier resolution: Lindley on Companies, 6th ed., pp. 425, 426.

In so far as the plaintiff's claim was based upon the resolution of the 17th December, 1918, it could not stand.

But the resolution corroborated the plaintiff's evidence that he rendered 6 months' services to the company in the capacity of manager and as to what would be a fair remuneration for those services. The shareholders actually present at the December meeting represented a large proportion of the capital stock—probably more than 90 per cent.

The plaintiff asserted a right to recover independently of any resolution. The evidence shewed that in June, 1918, the plaintiff definitely undertook, by arrangement with K. and B.—K. and the plaintiff together holding two-thirds of the stock—to manage the company's affairs at its Toronto office, and that the plaintiff expected to be remunerated for these services. These facts were recognised by almost all the shareholders.

No by-law is necessary for the employment of a director in some other capacity or for his remuneration for such additional services: Canada Bonded Attorney and Legal Directory Limited v. Leonard-Parminter Limited (1918), 42 O.L.R. 141, 154. When his employment began, the plaintiff was not in fact a director, and did not become one until 3 months later.

In these circumstances, the plaintiff was entitled to be paid for his services as upon a quantum meruit; and, as the value thereof had been practically determined by the shareholders themselves at $1,200, there should be judgment for the plaintiff for that amount, with costs.

KELLY, J. SEPTEMBER 17TH, 1920.

*CARR-HARRIS v. CANADIAN GENERAL ELECTRIC CO.

Contract—Commission Payable to Person for Use of Influence to Obtain Orders for Munitions from British Government—Illegal Contract—Evidence of Transactions Leading up to Contract—Public Policy—Money Paid on Account of Commission—Dismissal of Action for Balance—Public Policy—Costs.

An action to recover the balance alleged to be due to the plaintiff for commission on orders for munitions obtained by the defendants

from the British Government during the war, through the instrumentality of the plaintiff, as he alleged.

The action was tried without a jury at a Toronto sittings.
W. N. Tilley, K.C., and G. W. Mason, for the plaintiff.
Wallace Nesbitt, K.C., and H. W. Shapley, for the defendants.

KELLY, J., in a written judgment, said that the plaintiff represented to the defendants that, through the influence of a member of the Government in England and other persons with whom he was connected, he could obtain orders for the defendants, and the defendants sent him to England for that purpose, accompanied by the defendants' sales-manager, who knew all about munitions and the defendants' business, of which the plaintiff knew nothing. There was an agreement in writing to the effect that, in the event of the defendants securing contracts through the plaintiff's introductions or efforts, he was to receive from the defendants one per cent. of the amount of such contracts. The plaintiff did obtain an introduction to a deputy director-general of the Ministry of Munitions, and an interview took place between that functionary and the plaintiff and the defendants' sales-manager.

The learned Judge said that the matter of first importance was to determine whether the contract between the plaintiff and defendants was or was not the employment of the plaintiff on a commission basis to use his family connection or supposed influence with persons in high stations or official positions, and as such having intimate relations with those controlling the letting of munition contracts, to procure for the defendants by that means, and not necessarily on the defendants' merits as manufacturers, what they manifestly found themselves unable otherwise to obtain.

With due regard to the warnings given in earlier cases that caution must be exercised in declaring contracts void as against public policy, the learned Judge was forced to the conclusion that the circumstances in which the contract was made and the object it had in view brought it within the class of transactions which, according to binding authorities, should not only be discouraged, but actually be held invalid. That both parties repudiated any intention of wrongdoing did not render the contract valid.

Objection was taken at the trial to the admission of evidence of what took place leading up to the contract between the parties. Part at least of that evidence was taken subject to the objection; but, even if that part were disregarded, there remained quite sufficient to place it beyond doubt that the plaintiff, inexperienced as he was in the making of munitions, and unfamiliar with the defendants' business and equipment, was not so much retained

by the defendants to advocate their case on the merits as to use the influence he was thought to possess to procure for the defendants results not necessarily based on those merits.

The contract fell clearly within the authority of Montefiore v. Menday Motor Components Co. Limited, [1918] 2 K.B. 241, followed in Yeomans v. Knight (1919), 45 O.L.R. 55, and should be declared void.

That the defendants believed that the plaintiff was the means of procuring some contracts at least for them was evidenced by the fact that a substantial sum had already been paid to the plaintiff for commission; though, if he were legally entitled to any commission, it should have been one per cent. and not one-half of one per cent. Down to the time when they paid the plaintiff, the defendants had not repented of entering into a contract contrary to public policy. The Court should not be over-willing to encourage or condone illegal acts to which both plaintiff and defendant have been parties, even to the extent of awarding costs to a defendant successfully resisting, on that ground, a claim upon the illegal contract. The action should therefore be dismissed without costs.

ORDE, J. SEPTEMBER 17TH, 1920.

RE SHEARD.

Will—Construction—Distribution of Residue—Distribution among Children in Equal Shares—Share of Child who should Predecease Testator to Go to Children of that Child—Application to Children of Child already Dead at Date of Will.

Motion by Charles Sheard and Arthur Sheard, two of the beneficiaries under the will of George Sheard, deceased, for an order determining a question as to the distribution of the testator's estate, requiring the interpretation of the will.

The motion was heard in the Weekly Court, Toronto.

W. A. McMaster, for the applicants.

W. G. Thurston, K.C., for the executors.

G. M. Willoughby, for Lillie Olive Mitchell, Mary Henson, and Laurena Braden.

F. W. Harcourt, K.C., Official Guardian, for the three infant grandchildren of the testator.

ORDE, J., in a written judgment, said that the testator died on the 18th August, 1919, leaving a will dated a few days before his death, by which, after appointing executors, declaring that the provisions for his wife were to be in lieu of dower, and making certain specific bequests, he directed the executors to set apart a sufficient sum to provide an annual income of $4,000 for his wife. He then directed that the sum of $12,000 should be set apart and invested and one-third of the income thereof paid to each of his three grandchildren upon arriving at the age of 21 years, and $4,000 paid to each upon arriving at the age of 27; but, should any of them die before attaining the age of 27, the share or shares of the one or two so dying should be paid to the survivor or survivors, and so also with regard to the interest upon the share or shares of any dying before reaching the age of 27. Until the three arrive at 21, the income from the $12,000 was, the testator directed, to form part of his estate. The whole of the residue of the estate was given equally amongst the testator's children, share and share alike. Then, after certain provisions as to selling and investment, the will concluded with the clause which required interpretation, and which was as follows: "Should any of my children predecease me I direct that the share of said child so dying before me shall go and be given to and distributed equally amongst the child or children of such child of mine predeceasing me."

The testator left surviving him his widow and five children and the three grandchildren referred to, then aged 19, 14, and 11 respectively, all children of the testator's daughter Sarah Caroline Watt, who had died on the 5th April, 1911—8 years before the date of the will. There were no children of any other deceased child.

The question was, whether or not the three grandchildren, whose mother died prior to the making of the will, were intended to enjoy the benefit of the provision for representation of deceased children.

The learned Judge referred to In re Gorringe, [1906] 1 Ch. 319, [1906] 2 Ch. 341, 346, 347, 348; S.C. in Dom. Proc., sub nom. Gorringe v. Mahlstedt, [1907] A.C. 225; In re Brown, [1917] 2 Ch. 232; Loring v. Thomas (1861), 1 Dr. & Sm. 497; Barraclough v. Cooper (1905), reported in a note to In re Lambert, [1908] 2 Ch. 117, at pp. 121 *et seq.*; In re Williams, [1914] 2 Ch. 61; Re Kirk (1915), 113 L.T.R. 1204; Taylor v. Ridout (1862), 9 Gr. 356; Re Fleming (1904), 7 O.L.R. 651; and said that the words "Should any of my children predecease me" plainly had reference to futurity. To say that these words alone could be intended to refer to the death of a daughter who, to his knowledge, was already dead, was not giving them their natural meaning.

The will gave no share in the residue to the mother of the three Watt children. The whole clause must be considered as a provision for substitution solely; and there is nothing whatever in it on which to hold that it must be construed as also intended by way of direct gift to benefit the grandchildren.

There should be an order declaring that the three infant grandchildren were not entitled to any share in the residue. The costs of all parties should be paid out of the estate, those of the executors as between solicitor and client.

MIDDLETON, J. SEPTEMBER 18TH, 1920.

ONTARIO POWER CO. OF NIAGARA FALLS v. TORONTO POWER CO. LIMITED.

Contract—Supply of Electrical Energy—Construction and Operation—Adjustment of Accounts—Findings of Trial Judge—Balance in Favour of Defendants—Notices Demanding Payment—Forfeiture—Payment of Money into Court—Effect of, as "Payment"—Form of Judgment—Costs.

Seven actions were brought by the plaintiffs against the defendants, and were dealt with by MIDDLETON, J., in judgments noted in 16 O.W.N. 194 and 18 O.W.N. 123.

The accounts having been recast, argument was heard as to the disposition of the actions.

I. F. Hellmuth, K.C., and G. H. Kilmer, K.C., for the plaintiffs.
R. McKay, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that by his judgment of the 27th March, 1919 (16 O.W.N. 194), he determined the basis on which the accounts should be taken, and suggested that the accounts could probably be recast and the amount payable could be ascertained without the expense of a reference. Accepting this suggestion, the parties had recast the accounts, and the learned Judge had been spoken to from time to time as to various questions that had arisen. The result had been to ascertain that in regard to the transactions in the earlier months the amount paid by the plaintiffs to the defendants exceeded the amount that ought to have been paid upon the basis declared, and in the later months the amount paid fell short of the amount payable. In all cases the amount paid into Court, when added

to the amount paid, considerably exceeded the true balance payable.

The question of the disposition of the actions, in view of this evidence, had now been argued.

Counsel for the defendants did not seek to avoid the bringing into the account of the excess paid during the earlier months, and both parties desired that the accounts should be continued to the end of February, 1919; and the accounts had accordingly been continued to that date. The result was a net balance of $26,244.75 payable to the defendants.

The plaintiffs were ready and willing to pay the true amount due for power, and in these actions they asked for an injunction restraining the defendants from exercising the right given to them by para. 7 of the contract to terminate the agreement or cease supplying energy thereunder by reason of the default in payment of the price.

The contract was so difficult of interpretation that the parties could not agree upon the amount payable. In perfectly good faith the defendants claimed a very much larger sum than that which the purchasing company, in equally good faith, thought was the amount payable.

The defendants, in each of the earlier actions, had served a notice demanding payment of the specific amount due, according to their contention, and claiming the right to exercise the option given under para. 7, but this amount was not paid.

Within the time, and before the right to excercise the option, the action was brought, and an interim order was made restraining the defendants from exercising the optional right under para. 7, upon the terms that the plaintiffs pay to the defendants the amount the plaintiffs admitted to be due, and upon payment into Court of the difference between that sum and the amount claimed by the defendants. In the case of the earlier months, it now appearing that the amount paid exceeded the amount owing, it was clear that there was no right to forfeit; but counsel for the defendants took the position that in regard to the later months the situation was different, the amount actually paid being less than the amount actually due. To this it was answered that as to these amounts the notice was defective where it asked payment of a definite sum exceeding the amount due; and, where no definite sum was asked, the notice was defective in that a specific and definite sum ought to have been claimed.

The learned Judge was inclined to think that the notices given were defective; but he did not feel compelled to determine this, because he took the view that, when the motion for the injunction was made, and the money was paid into Court to the credit of the action, there was "payment" within the meaning

of the contract. The Court held the money as custodian for the party who might ultimately be declared entitled, but the payment was one which prevented clause 7 becoming operative. The money was intercepted before it reached the defendants, but was held in medio by the Court, which is, in truth, the representative and agent of both parties.

The judgment should declare that there is no right of forfeiture under clause 7 by reason of any default or supposed default with respect to the payments falling due, which are the subject of these actions, and the judgment should not award an injunction.

The actions were not consolidated; they were tried together; but the rights in question in them may yet be severable. One judgment should issue, styled in all the actions.

Success having been divided, there should be no costs to or against either party.