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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

*SIERICHS v. HUGHES.

Contract—Sale of Flour—Failure to Deliver Full Quantity—Weekly Deliveries—Delivery "as Required"—Necessity for Demand—Agreement to Postpone Time for Delivery—Statute of Frauds—Construction of Contract—Loss of Right to Require Delivery—Abandonment—Inference from Silence.

Appeal by the defendant from the judgment of KELLY, J., 13 O.W.N. 10.

The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

W. N. Tilley, K.C., for the appellant.

W. B. Northrup, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that the plaintiff's claim was for damages for breach of contract arising out of a written agreement between him and the defendant for the purchase and sale of flour. The plaintiff was a baker, and the defendant a flour and feed merchant, both carrying on business in Belleville, Ontario. The contract read: "Bought of L. P. Hughes, Dealer in Flour and Feed etc. Terms Cash. Belleville, October 14, 1915. Mr. J. F. Sierichs. 1,560 bags H. Queen $2.45. Delivery as required—30 bags week is to be taken out by November 1st, 1916." The writing was signed by both parties.

Although the plaintiff was entitled to ask for and receive 1,560

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

bags, he asked for and received for use in his business only 1,077, leaving 483 undelivered.

In respect of the non-delivery of the 483 bags, the trial Judge assessed the plaintiff's damages at $1,038.45.

About the middle of October, 1916, which was a year after the contract was made—prices being then much higher—the plaintiff requested the defendant to make delivery of the 483 bags. The defendant took the position that, the plaintiff not having from time to time asked for 30 bags a week, he (the defendant) had considered the plaintiff as abandoning his right to the flour not asked for, and had disposed of it, and was not then able to deliver it, and was not bound to deliver it.

No oral variation of the written contract could be set up: Plevins v. Downing (1876), 1 C.P.D. 220, 225; and the parties were left to their right under the written contract. But the circumstances surrounding the making of the contract, the position of the parties, and their subsequent conduct, might be looked at to arrive at a conclusion as to the true intent and meaning of the words used in the contract: Bowes v. Shand (1877), 2 App. Cas. 455, 462.

The learned Judge said that he was unable to distinguish Doner v. Western Canada Flour Mills Co. Limited (1917), 13 O.W.N. 328, from the case at bar. It was there held that each delivery stipulated for should be treated like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties should be assumed to have contemplated a payment in damages rather than a rescission of the whole contract, and that the buyers, upon whom was the obligation to order, lost their right to require delivery to be made of the instalments which they had not ordered in due time.

Reference also to Coddington v. Paleologo (1867), L.R. 2 Ex. 193, 198, and Bowes v. Shand, supra.

The time fixed for delivery was of the essence of the contract and of the plaintiff's right to require delivery; it was necessary for the plaintiff to make requests for delivery by specifying his requirements before the defendant was called upon to make delivery or tender; the plaintiff lost his right to delivery unless he proved a request within the time or a waiver of the stipulation as to time; and it was conceded that he did not from time to time make such demands.

The plaintiff had failed to make out a right to succeed on the contract, unless there was a subsequent request for a postponement or an agreement to postpone. The trial Judge drew the inference from a conversation between the parties in September, 1916, that

the plaintiff requested a postponement and the defendant acquiesced. That did not appear to the learned Judge of Appeal to be the effect of the conversation; but, if it were, such an agreement, to be effective, must be in writing: Plevins v. Downing, supra.

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

MACLAREN, J.A., and SUTHERLAND, J., agreed with FERGUSON, J.A.

HODGINS, J.A., agreed in the result, for reasons stated in writing. He referred to Williams v. Moss' Empires Limited, [1915] 3 Q.B. 242; Jones v. Gibbons (1853), 8 Ex. 920; and the Doner case, supra.

As expressed in the last mentioned case, he still held the view that an inference of abandonment was not to be drawn from mere silence.

LATCHFORD, J., agreed with HODGINS, J.A.

Appeal allowed.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

*GEROW v. HUGHES.

Contract—Sale of Flour—Failure to Deliver Full Quantity—Weekly Deliveries—Delivery "as Required"—Two Different Kinds of Flour Contracted for—Necessity for Specifying Requirements—Demand for Delivery—Construction of Contract—Loss of Right to Require Delivery—Abandonment—Inference from Silence.

Appeal by the defendant from the judgment of KELLY, J., 13 O.W.N. 8.

The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

W. N. Tilley, K.C., for the appellant.

R. McKay, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that by the judgment appealed against it was directed that the plaintiff should recover against the defendant $1,737.80 as damages for breach of a contract for the purchase and sale of flour.

This case was tried with Sierichs v. Hughes, ante, and in appeal the two cases were heard together. Hughes was the defendant in both actions, and the facts and circumstances and the agreement in this case did not materially differ from those in the Sierichs case, except that in this case the plaintiff agreed to purchase and the defendant agreed to sell two kinds of flour, instead of one, from which it should be plain that the obligation was on the plaintiff to specify his requirements before the defendant was called upon to make delivery, and except that the document in this case was on its face incomplete, thereby necessitating the taking of evidence to explain its meaning and to arrive at the true contention of the parties.

The contract read: "Bought of L. P. Hughes, Dealer in Flour and Feed etc. Terms Cash. Belleville, Oct. 14, 1915. Mr. J. L. Gerow. 1,000 bags Rose...$2.70. 1,000 bags Queen...$2.45. Delivered as required up to Nov. 1, 1916. 35 bags week." This was signed by both parties.

The learned Judge of Appeal was of opinion that this document must be read to mean that the flour was to be delivered as required in instalments of about 35 bags per week, and that it was incumbent upon the plaintiff to specify his requirements and accept delivery in instalments of about 35 bags a week, so as to receive and accept by such instalment demands the whole 2,000 bags before the 1st November, 1916; that he failed to prove such specifications and requests and thereby his readiness and willingness to accept and receive the flour at the times and in the manner specified in the contract; that, as in the Sierichs case, the times and manner of specifying and requesting and accepting delivery were of the essence of the contract; that the plaintiff was not entitled, under the words of the contract itself, to ask or demand delivery at any other time or in any other manner; and that, the plaintiff not having attempted to prove any variation of the contract or request by the defendant to forbear, except in so far as that might be inferred from silence (Doner v. Western Canada Flour Mills Co. Limited (1917), 13 O.W.N. 328), his action failed.

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

MACLAREN, J.A., and SUTHERLAND, J., agreed with FERGUSON, J.A.

HODGINS, J.A., in a short memorandum, said that he concurred in allowing the appeal and dismissing the action, but adhered to his dissent on the points mentioned in the Doner and Sierichs cases.

LATCHFORD, J., agreed with HODGINS, J.A.

Appeal allowed.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

GOODCHILD v. WILCOX.

Will—Devise of Land—Conveyance by Deed—Action to Set aside—Mental Incapacity of Testator and Grantor—Undue Influence—Evidence—Title by Possession to Portion of Lands of Testator Acquired by Son—Evidence—Limitations Act—Adverse Entry—Findings of Trial Judge—Appeal.

Appeal by the defendant Annie Wilcox from part of the judgment of LATCHFORD, J., 12 O.W.N. 55.

The appeal was heard by MACLAREN and HODGINS, JJ.A., SUTHERLAND and KELLY, JJ., and FERGUSON, J.A.

J. H. Rodd, for the appellant and for the executors of the will of John R. Goodchild, deceased.

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

F. D. Davis, for the defendants the Western Trusts Company and James Caldwell.

FERGUSON, J.A., reading the judgment of the Court, said that the defendant Annie Wilcox appealed from that part of the judgment of Latchford, J., whereby he declared that the plaintiff Robert Goodchild had acquired as against his father, John R. Goodchild, deceased, and all those claiming under him, a possessory title to part of lots 60 and 61 in the 7th concession of the township of Malden, and that a certain conveyance from John R. Goodchild, deceased, to his daughter, the defendant Annie Wilcox, dated the 23rd February, 1915, was invalid, and that a will of the late John R. Goodchild, dated the 23rd February, 1915, was also invalid.

The deed and will were attacked on the grounds of mental incapacity and undue influence.

The learned Judge of Appeal said that a perusal of the evidence had not raised a doubt in his mind as to the correctness of the finding of fact of the trial Judge.

It was established that the plaintiff Robert Goodchild in 1900 entered into possession of the property under an unenforceable agreement made between the father and son, that the son should enter upon the property and that it was to be his; and, pursuant to that understanding, he entered and built upon the property a house and other buildings, took his family to reside there, and cultivated the farm, continuously residing on it and receiving from it the proceeds of all that was grown.

His father, John R. Goodchild, and his brother, James, resided across the road from Robert on the farm known as "The Homestead," and the three men assisted one another in the working of the two farms—they traded work—and in that way the father continued to enter upon Robert's place up to 1909, when he went to reside at Amherstburg. Counsel for the appellant referred to these and other acts to shew an adverse entry; but, according to McCowan v. Armstrong (1902), 3 O.L.R. 100, and the authorities therein collected, there was no entry by the father, followed by a new tenancy, sufficient to establish a new starting-point for the statute, which had already commenced to run; and, therefore, the plaintiffs' case was made out.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

EAST v. HARTY.

Principal and Agent—Husband and Wife—Erection of Building on Wife's Land—Contract Made with Husband—Agency of Husband for Wife—Evidence—Election—Ratification—Estoppel.

Appeal by the plaintiffs from the judgment of KELLY, J., 12 O.W.N. 413, in so far as it dismissed the action as against the defendant Margaret Harty.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

R. T. Harding, for the appellants.

Frank Denton, K.C., for the defendant Margaret Harty, respondent.

HODGINS, J.A., reading the judgment of the Court, said that a perusal of the evidence left no doubt in his mind that the learned trial Judge's conclusion was entirely right. He found that no agency existed or was contemplated either by the respondent or by her husband, James Harty, and that the appellants, when the contract for building the warehouse was made, had in mind dealing with James Harty as principal, and that notwithstanding that they knew from the beginning that these lands belonged, not to him, but to his wife.

When the appellants thought of collecting the account, charged all along in his bills to James Harty, they added at the head of the account the additional name "Margaret Harty," and then sought to find reasons why she should be made liable.

As urged before this Court, these were: (1) her ownership of the land; (2) the knowledge that her husband was, with her consent, building on it; and (3) that she had, after the warehouse was finished, given a mortgage to a creditor of her husband, covering part of the cost of its erection.

Nothing to support ratification or estoppel can be derived from numbers 1 and 2. She had given permission for her husband to build himself a warehouse on her land, on the express condition that it was not in any way to be involved in liability.

This she never departed from, nor in any single instance did she ever ratify any act of his by which he had professed to represent her. She was not estopped from denying that she ratified; and so the sole remaining question was, whether, by paying or securing a debt, part of which was contracted for the building, to some other individual, she had done anything that the appellants could benefit by.

To state the question thus was to answer it. Ratification in one independent, isolated, though similar, transaction, cannot enure to the benefit of a party not concerned in it. But here there was no ratification of agency, even in regard to the debt she paid. It was not her debt, and did not purport to be hers. It was her husband's, and she paid it, for reasons of her own; so that did not assist the appellants.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

WHIMBEY v. WHIMBEY.

Husband and Wife—Alimony—Cruelty—Assault—Insane Delusions of Husband as to Wife's Infidelity—Judgment Founded on—Pleading—Necessity for Full Investigation—Expert Evidence—Insufficiency—New Trial—Leave to Amend Pleadings.

Appeals by the defendant from the judgment of RIDDELL, J., at the trial, in favour of the plaintiff, awarding her alimony, to be fixed upon a reference, and dismissing the defendant's counterclaim.

The appeals were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

R. T. Harding, for the appellant.

C. W. Plaxton and T. G. Plaxton, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that during the trial questions were asked about one Alderson, who was defendant in an action brought by the husband (the defendant in this action) for alienating the affections of the wife (the plaintiff in this action), a woman of 56. The husband was 68. Alderson was not mentioned in the record in this action; but the trial Judge, finding the other action on the docket, and having decided to try both together, admitted evidence as to the alleged relations of Alderson and the wife and the husband's delusions in regard thereto. He also admitted, subject to objection, the evidence of the other men who were indicated by counsel as those charged by the appellant with frequenting the respondent's house for improper purposes. It appeared that the appellant had never made any charges as to any of these individuals until after the parties had separated.

After this evidence had been given, Dr. A. J. Johnson was called by the respondent, also subject to objection, and his opinion was asked and given as to the condition of the appellant's mind, having regard to the evidence of the respondent and of the men who had given testimony. Dr. Johnson had not the advantage, when giving his evidence, of having observed the appellant's demeanour in the witness-box, for the appellant was not called until after the professional witness had formed and expressed his opinion.

The trial Judge found that the husband assaulted the wife; that the assault threw her into an hysterical state, and, with the

pestering and annoyance to which he had subjected her, made her health precarious; that the husband suffered from delusions as to the infidelity of his wife, and it would be unsafe, both as to health and life, for her to return to him; and that the plaintiff had made out a case for alimony. The husband said he was willing to support the wife in another house; and the learned Judge found that the husband was not dishonest when he said that.

It appeared clear that the mental decay of the appellant was an essential element in the judgment that was rendered. This should be tried out, where it becomes an issue, in the fullest possible way, and before it becomes an issue it ought to be set out in the record. So serious a matter should not be investigated without both parties being prepared for its discussion, nor unless definitely raised by pleading.

Whether the trial Judge was right in his deductions was not the question. Probably he was not far astray. But, even if he was correct, it was questionable whether the proper judgment was one for payment of alimony. If the husband's delusions affected his general sanity, due protection must be accorded under the Rules. If the delusions did not affect his general sanity, there was a question whether the evidence of the men was admissible until the husband had testified to his belief in the truth of his own assertions—something he could hardly do if they were the product of an abnormal mind. See Walker v. Walker (1898), 77 L.T.R. 715. And the evidence of the sole alienist called was greatly weakened by the fact that it was based altogether upon his day in Court. He had no previous knowledge of the appellant and did not see him in the box.

With a view to a full investigation of the issues involved, there should be a new trial, before which all proper amendments should be made by both parties.

Costs of the last trial should be in the cause, and the costs of the appeal should be to the appellant in any event.

Order for a new trial.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

MILLER v. YOUNG.

Vendor and Purchaser—Agreement for Sale of Land—Vendor's Ability to Make Title—Delay—Time for Making Title—Notice—Waiver by Subsequent Tender of Conveyance—Unreasonably Short Time—Specific Performance—Building Restrictions—Covenant—Objection to Title—Waiver.

Appeal by the plaintiff (purchaser) from the judgment of BRITTON, J., 12 O.W.N. 382, in an action for the return of money paid upon a contract for the sale of land. Upon the counterclaim of the defendant (vendor), the trial Judge awarded specific performance of the contract.

The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

Shirley Denison, K.C., for the appellant.

W. N. Tilley, K.C., for the defendant, respondent.

HODGINS, J.A., in a written judgment, said that the agreement for the sale of the land contained a provision to this effect: the vendor agreed to use all reasonable diligence to obtain title to the land, but the purchaser was to have no claim for damages against the vendor in the event of his failing to obtain such title, except for the return of the money paid under the agreement and the sum of $8,700, equal to the property given in exchange; and that the vendor should not be required to produce any abstract of title, deed, or evidence of title, not in his possession. It was contended that, in order to establish the right to repayment, under that provision, it was necessary that conveyances to the appellant should be tendered for execution by the respondent or by his vendor, and that in tendering such conveyances the appellant did not waive or abandon his position that the time had elapsed during which the respondent could make title instead of payment. But the substitution of the return of the purchase-money without damages for the ordinary results flowing from non-performance of the contract in no way altered the legal position. The tender made on the 7th July, 1916, meant that, if the respondent could then convey or obtain a conveyance from the legal owner, the appellant would accept it. It was an acknowledgment by the appellant that the contract was still in force and would only be broken if the respondent should refuse or neglect to perform it.

The notice given on the 19th June, 1916, purporting to make time of the essence of the contract, so as to enable the appellant to treat it as at an end at the expiration of 10 days, was superseded by the subsequent acts of the appellant in tendering the conveyances on the 30th June and 7th July, 1916.

Even if that were not so, the period of 10 days was too short a time to give the respondent, in the circumstances then existing.

Up to the 29th June and indeed until the commencement of this action on the 28th July, 1916, the appellant was ready and willing to accept a conveyance of the land, in fulfilment of the contract. Since the 1st June, 1916, time was not of the essence, and the notice did not make it so; and the appellant had been properly held bound to carry out the contract, upon the terms stated in the judgment below.

The contention that the restrictions as to buildings upon the land were such as the appellant was not bound to accept was answered by the provisions of the contract, as well as by the fact that their existence was not made a reason for refusing the deeds. The agreement of the 19th February, 1915, provided that "the existing covenants that run with the lands or any restrictions on the lands and present tenancies are to be accepted." Nothing was said about the restrictions from March, 1915, till the conveyance from the respondent's vendors was obtained; and, having declined to carry out the contract solely on account of delay, the appellant lost the benefit of this subsidiary objection, even if the contract did not preclude him from insisting upon it.

The appeal should be dismissed with costs.

MACLAREN, J.A., LATCHFORD, J., and SUTHERLAND, J., agreed with HODGINS, J.A.

FERGUSON, J.A., took no part in the judgment.

Appeal dismissed.

FIRST DIVISIONAL COURT. APRIL 16TH, 1918.

*JUDSON v. HAINES.

Negligence—Collision of Motor-vehicles in City Highway—Proof of Negligence—Onus—Evidence—Findings of Jury—Form of Questions—Contributory Negligence—Ultimate Negligence.

Appeal by the plaintiff from the judgment of RIDDELL, J., upon the findings of a jury, in favour of the defendant, dismissing

the action, which was brought to recover damages for injury and loss sustained by the plaintiff in a collision between his motor-cycle and the defendant's automobile, upon a highway, by reason of the defendant's negligence, as the plaintiff alleged.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., LATCHFORD, J., and FERGUSON, J.A.

J. P. MacGregor, for the appellant.

H. H. Dewart, K.C., and G. W. Mason, for the defendant, respondent.

HODGINS, J.A., in a written judgment, said that the collision occurred at the corner of Bernard avenue and Spadina road, in the city of Toronto.

The jury answered questions as follows:—

(1) Has the defendant satisfied you that the occurrence was not caused by his negligence? A. No.

(2) Did the plaintiff contribute to the concurrence by his negligence? A. Yes.

(3) If so, in what did that negligence consist? A. Excessive speed.

(4) Could the plaintiff, by exercise of reasonable care, have avoided the accident? A. Yes.

(5) If so, how? A. Driving slower.

(6) Damages, if any? A. $3,500.

(7) If you find that the negligence of the defendant caused this accident, state fully in what the negligence consisted? (Not answered.)

(8) Notwithstanding the negligence of the plaintiff, could the defendant, by the exercise of reasonable care, have avoided the accident? A. Yes.

9. If so, how? A. By stopping his car.

10. Notwithstanding the negligence of the defendant, could the plaintiff, by the exercise of ordinary care, have avoided the accident? (Not answered.)

11. If so, how? (Not answered.)

The learned Judge of Appeal said that the findings of the jury amounted to these: that the appellant's speed was excessive, and that he could have avoided the collision if he had maintained a slower speed; and that the respondent, notwithstanding that fact, could have avoided the collision by stopping his car.

But for the form of the questions, no difficulty would have presented itself, as the answers of the jury indicated that each party was to blame; and their comment seemed to be that recklessness

on the one hand and want of prompt action on the other brought about the disaster.

There was nothing to suggest that the respondent was guilty of ultimate negligence, nor to lead to the supposition that the jury's answer would have been different if the question of onus had been expressly left to them.

The case was like Herron v. Toronto R.W. Co. (1912), 28 O.L.R. 59, where each negligence arose and existed unchanged until the moment of collision, and was "concurrent and simultaneous negligence of similar character by both parties."

It was unnecessary to discuss the contention that the charge to the jury should have pointed out that the statutory provision applied to both and put each in the wrong unless he could satisfy the jury that he was free from blame. The answers really amount to such a finding; and the appeal should be dismissed.

MACLAREN, J.A., and LATCHFORD, J., agreed with HODGINS, J.A.

FERGUSON, J.A., was of opinion, for reasons stated in writing, that there should be a new trial. The jury not having answered questions 10 and 11, the real meaning of their answers to the other questions was left in doubt.

MAGEE, J.A., agreed with FERGUSON, J.A.

Appeal dismissed; MAGEE *and* FERGUSON, JJ.A., *dissenting.*

FIRST DIVISIONAL COURT. APRIL 18TH, 1918.

FRIND v. FRIND.

Husband and Wife—Alimony—Evidence—Adultery—Cruelty—Desertion—Dismissal of Action—Appeal—Costs.

Appeal by the plaintiff rom the judgment of MIDDLETON, J., 12 O.W.N. 245, dismissing an action for alimony.

The appeal was heard by MACLAREN and MAGEE, JJ.A., CLUTE, J., and FERGUSON, J.A.

J. M Ferguson and J. P. Walsh, for the appellant.

A. C. McMaster and W. A. Skeans, for the defendant, respondent.

THE COURT dismissed the appeal, and directed that the appellant's disbursements on the appeal should be paid by the respondent. No order as to costs otherwise.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. APRIL 15TH, 1918.

INGERSOLL PACKING CO. LIMITED v. NEW YORK CENTRAL AND HUDSON RIVER R.R. CO. AND CUNARD STEAMSHIP CO. LIMITED.

Practice—Conditional Appearance—Rule 48—Service Effected in Ontario upon Foreign Company—Jurisdiction—Future Proceeding in Foreign Court upon Judgment Obtained in Ontario.

Appeal by the defendant the Cunard Steamship Company Limited from an order of the Master in Chambers refusing to allow the appellant company to enter a conditional appearance.

See notes of decision upon previous motions, 13 O.W.N. 481 and ante 30.

W. Lawr, for the appellant company.

H. S. White, for the plaintiff company.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that counsel for the appellant company admitted that he could not find a case where leave was granted to enter a conditional appearance when the service was effected within Ontario. Naturally so. The wording of Rule 48 excludes such a suggestion.

The learned Chief Justice said that he was not concerned on the present motion with what might happen to the plaintiffs if and when they invoked a foreign jurisdiction to enforce any judgment which they might recover here. They could essay the leaping of that stile when they came to it.

Appeal dismissed. Costs to the plaintiff company against the appellant company in any event of the cause.

MIDDLETON, J. APRIL 17TH, 1918.

PESHA v. CANADIAN PACIFIC R.W. CO.

Railway—Passenger Killed by Train when Alighting from another Train at Station—Invitation to Alight—Countermand—Failure to Bring to Knowledge of Passenger—Duty of Conductor and Trainmen to Care for Safety of Passengers—Fatal Accidents Act—Damages.

Action under the Fatal Accidents Act, by the daughter of a man who was killed by a train of the defendants, to recover damages for his death.

The action was tried with a jury at Chatham. The jury failed to agree; and it was arranged by counsel that the trial Judge should dispense with a jury and dispose of the case upon the evidence taken.

Gideon Grant and M. F. Pumaville, for the plaintiff.
Angus MacMurchy, K.C., and A. Clark, for the defendants.

MIDDLETON, J., in a written judgment, said that the deceased, an old gentleman of 83, was a passenger on the defendants' railway from Kent Bridge to Bothwell on the 3rd January, 1916. The train was a local one, and the conductor had orders to take the siding at Bothwell to allow a fast train to pass. The train drew up at the entrance to the siding near the station, and, when the switch was opened, entered it and stopped opposite the station. Pesha alighted on the side nearest the station and stepped upon the main line, which was between the train and the station. He was struck by the fast train and killed.

Unless there was a warning to the deceased, not to alight until the train was drawn up to the platform, it could not be contended that there was not an invitation to alight.

The trainman went through the car and called "Bothwell next station," and the train, after stopping at the switch to take the siding, drew up in front of the station with the main line between it and the platform. Express and luggage were removed and outgoing parcels placed on the train by the station-agent.

The conductor said that, when the train was about to take the switch, seeing Pesha on the platform, he said to him: "Do not get off here; we are going into the siding to meet a train, and we are going to back up and come to the platform."

If, in face of this warning, Pesha chose to take his chances, the action must fail—an invitation to alight may be countermanded, but to be effectual it must be shewn that it was given in such a way as to be in fact communicated to the passenger.

There was some serious doubt as to the giving of this warning in the full form stated by this witness.

When this warning was supposed to have been given, Pesha was standing at the door of the car, and the conductor was 6 feet away and on the bottom step. Pesha had the collar of his fur coat up, for the day was cold.

The trainman gave no warning.

The train was a short one, and the conductor and trainman could have easily done all necessary to protect the passengers. The danger from the passing train was known to them—it was easily seen from the platform—and the peril of the passengers who were to alight at the station was great if they did not wait till the train passed. When the invitation to alight had been given, the conductor and his assistants ought to have done more than they did, and should have seen that the passengers were made aware of the peril from the passing train, and that it was not enough to tell this old man unless it was seen that he heard and understood.

If it was intended to back out and draw up at the platform, why was baggage taken off and put on before the train drew up?

The learned Judge made it plain that he was not laying down any rule of law, but making a finding of fact that the death of Pesha was due to the negligence of the defendants' servants in failing to give any effective countermand to the invitation to alight, or effectively to warn him of his peril from the passing train, as they ought to have done when, after the calling of the name of the station, the train drew up opposite the station, in a place where it was reasonable for passengers to suppose they were expected to alight.

The amount of damages was not an easy matter. Viewing all the circumstances, they should be assessed at $500.

KELLY, J. APRIL 17TH, 1918.

RE McLEAN.

LE JEUNE v. BUTLER.

Will—Construction—Annuity to Widow—First Charge on whole Estate—Payment out of Corpus if Income of Estate Insufficient—Other Annuities—Order of Payment—Specific Legacy of Lump Sum Payable at Death of Widow—Interest—Distribution of Residue—Annuities Payable to Heirs on Death of Annuitants in Lifetime of Widow.

Allan Neil McLean, who died on the 25th May, 1893, by his will gave all his estate and effects to his executors and trustees for the purpose of distribution, as follows:—

He gave his wife "an annuity of $1,500 . . . as first charge on my estate." He then gave to his son and three daughters an annuity of $300 each; to his granddaughter Maude Brown $150 to be paid to her half-yearly; and to his sister Isabella Harriet McLean $150 payable half-yearly during her life. Then there was this clause: "I hereby wish after the payment of legacies that any interest or dividends from securities held by me . . . may be deposited at interest . . and which may be drawn out to pay annuities if sufficient from other sources are not collected, and I request my said trustees or executors as amounts due are paid off to reinvest the same as best they can, keeping the amount at interest, to pay the above annuities until the death of my said wife, then I desire that my estate shall be divided share and share alike to my son and his three sisters or should any one of them die before the said division takes place then their shares to their heirs or as they may desire in writing to leave it to. I leave to Maude Brown, my grandchild, $4,000."

William Allan McLean, the son and one of the executors, died in 1901, leaving a widow and three children.

By a judgment pronounced in November, 1916, in the action of Le Jeune v. Butler, the Imperial Trusts Company of Canada was appointed trustee under the will of Allan Neil McLean, and a reference to the Master in Ordinary was directed, etc.

The new trustee now moved for an order or judgment declaring the true construction, meaning, and effect of the will, in regard to questions stated in a certificate of the Master.

The motion was heard in the Weekly Court, Toronto.

A. C. McMaster, for the trust company, the applicant.

J. H. Fraser, for the plaintiff in the action.

A. McLean Macdonell, K.C., for the defendant Mary Ann McLean, the widow of Allan Neil McLean.

J. W. Carrick, for the defendants Emily Montague Butler and three others.

George Bell, K.C., for the other defendants, except William Elkington Butler, who was not represented.

KELLY, J., in a written judgment, said, after setting out the facts, that the first question was, whether the annuity of $1,500 to the widow was payable out of the corpus of the estate if the income was insufficient for the purpose.

After reviewing the authorities, and referring especially to Carmichael v. Gee (1880), 5 App. Cas. 588, the learned Judge said that his opinion was that the annuity of $1,500 in favour of the widow during her life was, as the will said, a first charge on the whole estate, not limited in amount to the income from any particular part, or from the whole, of the estate; and that, if the income proved insufficient, the corpus might be resorted to.

Answers to the other question were given as follows:—

(2) The legacy of $4,000 to Maude Brown (now Winlow) was not payable at the expiration of one year from the testator's death; it is payable at the time of the death of the widow of the testator, and will bear interest from that date.

(3) The order of payment is: (1st) The annuity to the widow. (2nd) The annuities to the son and three daughters and the granddaughter and sister (in her case ending with her death). (3rd) The legacy of $4,000 to the granddaughter is payable next after these annuities and in priority to the son and daughters of the testator (or their heirs) sharing the residue under the residuary clause. The annuities (except that to the widow) abate together in the event of an insufficiency after providing for the widow's annuity.

(4) Subject to the widow's annuity, the annuities to the son, three daughters, granddaughter, and sister, are payable out of the corpus if the income is insufficient. Notwithstanding that the annuity to the widow is a first charge on the estate, these other annuities (subject to the widow's first charge) are payable during the widow's lifetime (in the case of the sister ending with her death).

(5) If the death of the son, three daughters, or granddaughter, or any of them, happens before the death of the widow, the annuity to the one so dying does not cease, but continues to be payable until the widow's death to the heirs of the one so dying, or as the one so dying "may desire in writing to leave it to," as expressed in the will, in respect of residue.

Costs of all parties out of the estate; those of the trustee-applicant as between solicitor and client.

MIDDLETON, J. APRIL 19TH, 1918.

RE HEWITT AND ARMSTRONG.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Sheriff's Deed—Sale of Equity of Redemption—Evidence—Agreement to Pay off Mortgage—Sale of Part of Land Subject to Mortgage—Evidence—Validity of Sale and Deed.

Application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that a requisition on title made by the purchaser was sufficiently answered.

The application was heard in the Weekly Court, Toronto.

F. M. Gray, for the vendor.

J. Gilchrist, for the purchaser.

MIDDLETON, J., in a written judgment, said that the question was as to the validity of a sheriff's sale. Edward W. Thompson owned the land, subject to a mortgage and to certain executions. By his will he devised it, "should it realise more than the charges against it," to Elmira M. Thompson and her children. He contemplated a sale, for he directed that the proceeds should be invested, and authorised his executors to give conveyances and execute acquittances.

The will was dated in April, 1862, and was admitted to probate in 1881. The date of death was not given; it probably took place shortly after the date of the will.

Judgment was obtained against the executors of Thompson, to be enforced de bonis et terris testatoris, and on the 23rd August, 1866, placed in the hands of the sheriff for execution. The sheriff advertised the lands for sale in the ordinary way, in the Ontario Gazette. Another and different advertisement was published by the executors, indicating that the lots were being sold separately, and that terms of credit has been arranged with the creditors.

A plan, dated the 13th June, 1868, was registered about the same date, signed by the executors and by the sheriff.

The sheriff's deed (13th June, 1868) recited a sale on the 21st March, 1868, of the land—not of the equity of redemption.

By an instrument dated the 13th May, 1872, and registered on the 13th June, 1872, it was certified that the executors of Thompson had paid off and discharged the mortgage in question.

By deed dated the 16th June, 1868, the widow of Thompson released her dower in the land. This deed recited that at the sher-

iff's sale it was represented and agreed by the widow that she would release her dower and that the purchaser bought the land with that understanding and in that belief, and the land had been conveyed to him in fee simple by the sheriff.

The deed was evidently prepared by the late Robert G. Dalton, and was witnessed by him.

The objection now taken was that, under the statute which permits a sale of an equity of redemption, the equity of redemption in all the land covered by the mortgage must be sold, and that part only of the land cannot be sold: Van Norman v. McCarty (1869), 20 U.C.C.P. 42, following Heward v. Wolfenden (1868), 14 Gr. 188. No doubt, the legal question involved was familiar to Mr. Dalton.

In these circumstances, the proper inference of fact was, that some arrangement was made by the executors and the execution creditors to pay the mortgage off and to allow the sheriff to sell, not the equity of redemption merely, but the whole fee in the land —and so the sale would be valid.

The executors, who alone could attack the sale for any irregularity, were parties to it and were bound by it.

Order declaring that the objection to the title had been well answered.

MIDDLETON, J. APRIL 19TH, 1918.

LE GROULX v. KERR.

Negligence—Injury to Person by Machine-gun—Shell Exploded by Trespasser—Gun Used at Fair-grounds in Charge of Military Officer—Committee of Citizens Procuring Display of Gun to Aid Recruiting—Liability for Injury—Findings of Fact of Trial Judge—Damages—Suggested Case for Compensation out of Public Money.

Action against the members of a committee of citizens of Alexandria to recover damages for injuries sustained by the plaintiff, a young man, at the Fair-grounds in Alexandria, on the 17th August, 1915.

The action was tried without a jury at Cornwall.

G. I. Gogo and J. A. Chisholm, for the plaintiff.

R. A. Pringle, K.C., and F. T. Costello, for the defendants.

MIDDLETON, J., in a written judgment, said that a field-day to stimulate recruiting was arranged by a committee of citizens of Alexandria, named at a public meeting called by the Mayor. This committee was, as might be expected, not organised on a business basis, but loosely. Correspondence took place with the military authorities at Ottawa, and a machine-gun was sent from Kingston, with several belts of ball-cartridge. A target was erected under the supervision of the military, in the Fair-grounds; and, when the day came, the gun was operated by the officer in charge. The cartridges supplied were not quite suited to the gun, and failed to explode with regularity; and so some shells which had not exploded were ejected from the gun along with the exploded shells. The gun was fired from a platform; and, after it had ceased firing, a number of boys and young men crowded on the platform and attempted to obtain exploded shells as souvenirs. Attempts were made by the military to prevent this, and warnings were given as to the danger of taking the live cartridges. It appeared that a boy took one of these and inserted it in the barrel of the gun, which had been removed from the tripod and placed upon the platform to cool while the officer in charge was packing it for the return to Kingston. The gun-barrel was so hot that the cartridge exploded, and the plaintiff was struck.

The officer was not at fault; and it was not easy to place any blame save on the boy.

The injury inflicted was most serious.

The case was a peculiarly hard one, no matter how determined —hard upon the plaintiff if he could not recover against some one; and hard upon the defendants, who were public-spirited citizens, seeking to aid recruiting, if the plaintiff could recover against them.

The learned Judge now stated the facts so that they might be laid before those in authority with the view of seeing whether some compensation could not be made to the plaintiff out of public money. The accident was the result of what was being done in furtherance of the war; and the plaintiff stood in the same place as a wounded soldier.

If damages should be awarded, they would be assessed at $3,000.

If no arrangement be made, the case must be argued upon the facts found.

GOUINLOCK v. MACLEAN—BRITTON, J.—APRIL 18.

Architect—Work and Services in Erection of Building—Contract—Remuneration—Work Taken out of Architect's Hands during Progress of Work—Recovery on Quantum Meruit Basis—Negligence and Incompetence—Counterclaim—Dismissal—Money Paid into Court—Rule 316—Payment out on Account of Amount of Judgment.]—Action for $2,306.45, a balance alleged to be due for work and services of the plaintiff as architect for a building erected by the defendant. The defendant, without admitting liability, paid $1,500 into Court, and counterclaimed for damages for incompetence and neglect on the part of the plaintiff. The action and counterclaim were tried without a jury at Toronto. BRITTON, J., in a written judgment, said that in the course of the erection of the building the defendant, becoming dissatisfied, took the superintendence of the work out of the plaintiff's hands. The plaintiff had at first stated that his remuneration would be 5 per cent. of the cost of the building, and the defendant had apparently assented to this. It was contended for the defendant that, as the contract with the architect was for a completed work, and the building was not completed by the architect, there could be no recovery. The learned Judge did not agree with that contention. A great deal of work was done by the plaintiff before the building was taken out of his hands. The plaintiff claimed 5 per cent. on the value of the work done before the building was taken out of his hands and 3½ per cent. on the value of the work done afterwards. The learned Judge was of opinion that the percentage on the latter value should be only 2½ per cent. He ruled that the plaintiff was entitled to recover as on a quantum meruit, and fixed the amount (after deducting payments made before action) at $1,924.83, for which amount, with interest at 5 per cent. from the date of the commencement of the action, and with costs, he awarded judgment in the plaintiff's favour. As to the counterclaim, the learned Judge said that an architect does not guarantee the work nor the performance of the builders' contracts; and there was not sufficient evidence to warrant the conclusion that the plaintiff was incompetent or negligent. The counterclaim should be dismissed with costs. The defendant being found liable in part and for a greater sum than he had paid into Court, the case fell within Rule 316; and the $1,500 paid into Court should be paid out to the plaintiff and applied on the amount recovered against the defendant. R. S. Robertson and J. W. Pickup, for the plaintiff. J. W. Bain, K.C., and A. McLean Macdonell, K.C., for the defendant.

HILL v. LAMBTON GOLF AND COUNTRY CLUB—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 19.

Vexatious Proceedings—Motion to Dismiss Action as Frivolous and Vexatious—Judgment in Previous Action Barring Rights of Plaintiff—Dismissal of Action with Costs.]—Motion by the defendants to dismiss the action as frivolous and vexatious. The action was brought in November, 1917, in the name of Evelyn Hill, an infant, by Marion Hill, the infant's mother and next friend, to recover part of a block of land sold to the defendants. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he might have disposed of the motion on the short ground that there was a judgment of a Divisional Court expressly barring the rights of the infant plaintiff in the lands conveyed to the defendants; and, while that judgment remained unreversed, this action could not be maintained. But statements were made by counsel reflecting on the conduct of solicitors in regard to the alleged unauthorised alteration of the judgment referred to; and the learned Chief Justice therefore stated the history of the case, as he found it in the records of the Court. In his opinion, the action was not merely frivolous and vexatious, but immoral and unconscionable. Order dismissing the action with costs. G. M. Clark, for the defendants. A. C. McMaster, for the plaintiff.

CORRECTION.

In RE BOLTON, ante 87, John G. Barber should have been included among the persons entitled to a share in the "balance" referred to in para. 9 of the will in question.