The
Ontario Weekly Notes

VOL. XI. TORONTO, JANUARY 5, 1917. No. 17

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 29TH, 1916.

*ANNING v. ANNING.

Husband and Wife—Conveyance of Land by Husband to Wife—Oral Agreement that Property to Become Wife's only in Event of her Surviving him—Predecease of Wife—Issue as to Ownership—Evidence—Delivery of Deed—Registration—Trust—Improvidence—Corroboration.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 10 O.W.N. 415, finding in favour of the defendants an issue as to the ownership of a house and lot.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and MASTEN, JJ.

Gideon Grant, for the appellants.

W. J. McWhinney, K.C., for the defendants, respondents.

MIDDLETON, J., in a written judgment, said that on the 9th November, 1900, the land was bought by and conveyed to the plaintiff Charles Henry Anning, and no one contended that at that time the wife had any claim thereto. On the 18th October, 1901, Anning conveyed the land to his wife, "in consideration of natural love and affection and the sum of $1," reciting an intention to confer an absolute title upon the wife. The conveyance was registered on the 21st October, 1901. The transaction was intended to be and was a real one—an actual gift, immediately operative, and without any condition.

Anning now said that the arrangement was that the property

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

was to become the wife's only in the event of her surviving him. This statement was incredible. The property was intended to be the wife's, and the event which happened—the pre-decease of the wife—was not expected or contemplated.

It was suggested that the deed was not delivered; but a deed cannot be registered unless it is a complete and operative instrument.

In December, 1904, a mortgage was made by the wife with the knowledge and consent of the husband, which could only have been effectual if the deed was delivered.

Anning seemed to have thought that the only conveyance was the duplicate of the deed which he retained in his possession, and that so long as he retained it he retained some dominion over the property. The recorded instrument ceased to be in his custody or control when it was registered.

It was said that the production of the duplicate deed for the purpose of having the mortgage of 1904 prepared amounted to a conditional delivery—"conditioned on the wife surviving her husband." But such a delivery was nugatory. The deed, unless executed in such a form as to amount to a testamentary instrument, would be void: Foundling Hospital Governors and Guardians v. Crane, [1911] 2 K.B. 367.

The suggestion that the wife held as trustee for her husband was clearly contrary to the facts.

Nor was there any evidence to support the contention that the transaction was void for improvidence.

The plaintiffs' case would have failed, even if full credit were given to the plaintiff Charles Henry Anning, for lack of any corroboration; but it also failed because the evidence of that plaintiff was not credible.

The appeal should be dismissed with costs.

RIDDELL, J., agreed.

MASTEN J., agreed in the result.

MEREDITH, C.J.C.P., read a dissenting judgment, in which he examined the facts and law with great care. His conclusion was, that the story of the plaintiff Charles Henry Anning was true; that between him and his wife the expressed agreement was that the deed of the land in question from him to her was not to take effect unless and until she survived him; that, upon the authority of Gudgen v. Besset (1856), 6 E. & B. 986, she having died

before him, the deed never became operative as between them; and that her heirs at law had no higher right than she had.

The learned Chief Justice was of opinion that the appeal should be allowed and the issue found in favour of the plaintiff Charles Henry Anning.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

HIGH COURT DIVISION.

KELLY, J. DECEMBER 26TH, 1916.

FRANCIS v. ALLAN.

Contract—Compromise of Claim against Estate of Deceased Person —Promise of Executor to Pay Sum in Settlement—Acceptance —Consideration—Forbearance.

Action by a niece of Henry W. Allen, deceased, to recover $3,000 from his estate or from the defendant Norman Allan, his son.

The action was tried without a jury at Toronto.

G. W. Holmes and W. A. Lamport, for the plaintiff.

M. K. Cowan, K.C., and E. H. Brower, for the defendants.

KELLY, J., in a written judgment, dealt with the facts at length. The plaintiff's claim as made after the death of her uncle was for $1,150 upon promissory notes made by him in her favour and $2,000 which he had promised to leave her by his will, which he had failed to do. The defendant Norman Allan, in November, 1913, undertook with the plaintiff in writing that she should receive $3,000 inclusive of the promissory notes. The plaintiff acceded to the proposal. In May, 1914, the plaintiff received $102.18 from the executors. On the 7th January, 1915, without any previous hint at dissatisfaction, the defendant Norman Allan wrote to the plaintiff assuming to repudiate the compromise he had made with her in November, 1913.

A compromise of a disputed claim, honestly made, constitutes a valuable consideration, even if the claim ultimately turns out to be unfounded; it is not even necessary that the question in dispute should be really doubtful, it being sufficient that the parties in good faith believe it to be so: Halsbury's Laws of England, vol. 7, p. 387, para. 801; Cook v. Wright (1861), 1 B. & S. 559.

Apart from the question of consideration arising from acceptance of a settlement less advantageous than her original claim, forbearance by one party at the request, express or implied, of another, constitutes good consideration. The defendant Norman Allan's promise could not be accounted for unless on one or both of two considerations—the plaintiff's acceptance of less than she believed she was entitled to or the putting her mind at rest so as to stay her hand in the prosecution of her claim against her uncle's estate, Norman Allan and his co-defendant being the executors.

Reference to Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449; Ockford v. Barelli (1871), 20 W.R. 116; Miles v. New Zealand Alford Estate Co. (1886), 32 Ch.D. 266; Holsworthy Urban District Council v. Rural District Council of Holsworthy, [1907] 2 Ch. 62, 73.

Judgment for the plaintiff against the defendant Norman Allan for $3,000 and interest from the 24th November, 1914, subject to a credit of the $102.18 paid in 1914, with costs. As against the executors, action dismissed without costs.

MIDDLETON, J. DECEMBER 26TH, 1916.

CLARKSON v. PLASTICS LIMITED.

Landlord and Tenant—Building Lease—Landlord's Covenant to Pay for Building—Price to be Determined by Appraisal Company—Ex Parte Valuation—Failure to Determine Price—Declaration of Rights of Parties—Company Acting as Valuator.

Action by the liquidator of the Chemical Laboratories Limited, landlord, against Plastics Limited, tenant, under a lease dated the 14th January, 1911, for a declaration that the sum of $4,890.50 was the price to be paid for the tenant's building upon the demised premises.

The tenant agreed to build a factory, and the landlord covenanted that upon the termination of the lease he would pay for the building "at a price to be determined, upon the application of either party, by the Canadian Appraisal Company." On the election of the landlord, the lease was terminated on the 31st December, 1915.

Application was made by the plaintiff to the Canadian

Appraisal Company "to make an appraisal of the buildings erections and improvements placed on the lands;" and, without any notice to the tenant or taking any evidence, that company made an appraisement "that the present value of such building as of August, 1915, based upon the cost of reproducing same new, after deducting all depreciations for wear and tear and other reasons, is $7,787.82 . . . which figures represent a true and correct appraisal of said buildings as a going concern on said date."

On receipt of this appraisement, the landlord's solicitor drew attention to the fact that a "going concern" valuation was not fair; and the appraisal company, then deeming that the property was to be valued as an asset of a concern in liquidation, reviewed the valuation, reducing it to $4,890 (31st December, 1915).

The defendant, the tenant, sought to uphold the first valuation.

The action was tried without a jury at Toronto.

G. H. Kilmer, K.C., for the plaintiff.

R. U. McPherson, for the defendant.

MIDDLETON, J., in a written judgment, said, after setting out the facts, that the price to be paid by the landlord to the tenant under the lease had never been considered; and the evidence made it clear that this was a matter of substance. The award did not follow the terms of the submission, and the valuator had not in any sense made any finding upon the matter submitted. There is a wide difference between a mere valuation and the determination of a price to be paid. And quære whether the valuation could be made ex parte and without evidence or argument, and whether a company can act as a valuator or arbitrator.

The only thing open was to declare that the appraisal company had not yet determined the price to be paid by the landlord to the tenant under the lease, and that none of the valuations made precluded the company from now determining that question.

It would be better to have a new agreement as to the mode of determining the sum to be paid.

No costs.

MIDDLETON, J. DECEMBER 26TH, 1916.

IMPERIAL TRUSTS CO. OF CANADA v. LANGLEY.

Assignments and Preferences—Insolvent Debtor—Intention to Prefer Particular Class of Creditors—Conveyance of Land to Trustee—Subsequent Conveyance by Debtor and Trustee to Company as Trustee—General Assignment for Benefit of Creditors—Execution Creditors—Priorities.

An issue directed to be tried for the purpose of determining the ownership of land.

The issue was tried without a jury at Toronto.
G. H. Kilmer, K.C., for the plaintiffs.
A. J. Russell Snow, K.C., for the defendant Langley.
Grayson Smith, for the James Robertson Company.
R. Wherry, for the White Supply Company.

MIDDLETON, J., in a written judgment, said that Mr. A. F. Lobb, a practising barrister and solicitor, had received and misapplied clients' money to the amount of about $55,000. He was also indebted in other large sums. Realising a peculiar obligation in respect of the claims of these clients, Lobb, upon finding himself hopelessly insolvent, made up his mind to prefer these particular creditors in the distribution of his estate. On the 7th October, 1914, he conveyed certain land, his only asset of any value, to one Richardson, whom he had previously asked to act as trustee. The conveyance was absolute in form and was expressed to be for "valuable considerations and the sum of $1." On the same day, by an instrument in writing, Lobb declared that the conveyance to Richardson was in trust for the benefit of the named creditors.

Some few weeks after this, affairs took a serious turn, and criminal proceedings were feared. Lobb then left the country. Before going, he consulted Mr. C. P. Smith, who was acting for one of the clients, and Mr. Smith undertook to act also for him in an endeavour to arrange his affairs.

Mr. Smith drew and sent to Lobb for execution a general assignment for the benefit of his creditors. This was signed but not acted upon, Mr. Lobb taking the position that he desired to give his property (as he had done) for the benefit of his clients, "exclusively for that class of sufferers," as it is put in one letter.

Richardson was an old man and not regarded by some as a

suitable assignee, and was not anxious to act if there was to be any trouble.

The result was that at a meeting in Buffalo on the 16th November, 1914, a deed was made to the Imperial Trusts Company, by Richardson and Lobb, in trust for the preferred creditors. At this same meeting, a general assignment for the benefit of creditors was executed, but care was taken that this should be delivered subsequent to the conveyance to the trust company.

The conveyance to Richardson should be regarded as the dominant instrument, and the later conveyance to the trust company as being really nothing more than a change of the trustee.

On the 4th November, 1914, an execution was placed in the sheriff's hands. This would bind only the interest of the execution debtor as it then was; and, Lobb having at that time conveyed the land, and having no further interest in it unless a surplus remained after paying his creditors, the trustee's title must prevail as against the execution.

It was admitted that under the circumstances the preference given to the limited class of creditors could not be attacked: In re Lake, [1901] 1 Q.B. 710.

Among other things, it was contended that the deed to Richardson was not operative, as the assent of a creditor was not shewn. New Prance & Garrard's Trustee v. Hunting, [1897] 2 Q.B. 19, affirmed in Sharp v. Jackson, [1899] A.C. 419, was conclusive authority against the proposition. This was a trust for the benefit of the named persons, and so effective without more.

The issue must be found in favour of the trust company.

Not without hesitation, the learned Judge concluded that no costs should be awarded. The trust company should take their costs out of the funds in their hands.

MIDDLETON, J. DECEMBER 27TH, 1916.

*OLSSON v. ANCIENT ORDER OF UNITED WORKMEN.

Insurance—Life Insurance—Disappearance of Insured—Presumption of Death — Evidence — Absence and Silence — Inquiry — Seven-year Period, when Commencing—Action upon Policy—Costs—Insurance Act, R.S.O. 1914 ch. 183, sec. 165 (5).

An action upon a policy of insurance upon the life of Peter Olsson.

The action was tried without a jury at Sandwich.
A. B. Drake, for the plaintiff.
A. G. F. Lawrence, for the defendants.

MIDDLETON, J., in a written judgment, said that the first question was, whether, upon the facts shewn, there was a presumption of the death of the insured. The only evidence was that of his wife. He was a lake-captain, not owning a boat, but employed by owners from time to time. A letter from him to his wife of the 17th April, 1909, was the last heard of him. He had left his home in Collingwood some three years before this time, and his wife said that they exchanged letters every few weeks. She replied to this letter, but her letter was not answered and not returned, and she wrote no more. All earlier letters had been destroyed. The address for reply was the Chicago office of the Lake Carriers Shipping Association. No inquiry was made there at the time, and no evidence was given as to any recent inquiry there; any inquiry would now be useless. The only inquiry made by the plaintiff was from friends of her husband and lake-captains from time to time at Collingwood. From them she learned nothing.

The underlying principle of the rule as to presumption of death from absence is, that absence and silence are to be taken as indicating death as their cause when there is nothing in the circumstances to indicate any other reason for the absence or silence. The presumption arises only when the absence and silence continue for seven years.

The husband had been away three years, and had written once before. The absence of any subsequent communication with the wife was enough to raise the presumption.

Difficulty arose from the absence of inquiry; but the learned Judge was not able to suggest the inquiry that should be made.

The presumption is not conclusive; and it was open to the defendants to make any inquiry or institute any search they saw fit. If a prima facie case is made out and not answered, it is enough.

At the expiry of seven years from April, 1909, i.e., in April, 1916, the insured must be presumed to be dead.

A question was raised as to the date when death is to be presumed. By the Ancient Order of United Workmen Act, 6 Geo. V. ch. 106 (O.), if the death took place after the 1st July, 1916, the amount to be paid is reduced by almost one-half. The action was begun on the 9th August, 1916.

In Duffield v. Mutual Life Insurance Co. of New York (1914),

32 O.L.R. 299, it was said by Clute and Riddell, JJ., that the seven years was not the seven years commencing with the date when the person was last seen or heard from, but the seven years next before the bringing of the action. The case was taken to the Supreme Court of Canada, but nothing there said indicated that this view was approved by that Court, the other Judges of the Appellate Division did not indicate their approval of it; and in no other case is there any indication that "the seven years" means anything other than the seven years after disappearance.

Reference to In re Rhodes (1887), 36 Ch.D. 586; Nepean v. Doe d. Knight (1837), 2 M. & W. 894, 913.

Judgment for the plaintiff; but, as no application was made in a summary way under sec. 165 (5) of the Insurance Act, R.S.O. 1914 ch. 183, to determine the sufficiency of the proof of death, there should be no costs.

MIDDLETON, J. DECEMBER 28TH, 1916.

*GROBE v. BUFFALO AND FORT ERIE FERRY AND R.W. CO.

Railway—Mortgage to Secure Bondholders—Action to Enforce—Claim upon Judgment for Damages for Injuries Sustained by Passenger — Priorities — "Working Expenditure" — Ontario Railway Act, 6 Edw. VII. ch. 30, secs. 44, 45—3 & 4 Geo. V. ch. 30, sec. 48—Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, para. 48 (b)—"Any Subsequent Transaction, Matter or Thing"—Claim of Priority upon Judgment Confined to Rents and Revenue—Assets Representing Rents and Revenue—Finding of Master—Merger of Judgment—Appeal—Costs.

An appeal by the claimant Mollie E. Weber from a report of the Master in Ordinary.

The action was brought to enforce a mortgage made by the defendant company to secure bondholders.

The appellant claimed priority in respect of a judgment recovered against the defendant company by one Sarah Di Marco, and assigned by her to Frederick J. Weber, through whom the appellant claimed.

The action in which Di Marco recovered judgment was for damages for injury sustained by her while a passenger on one of the defendant company's trains, by reason of the company's negligence.

The appellant asserted that Frederick J. Weber, who was largely interested in the company, paid the DiMarco claim out of his own pocket and took an assignment of the judgment to himself so as to prevent the company being put out of business by the immediate enforcement of the judgment, and that, as the original judgment was entitled to priority over the debenture mortgage as being for a "working expense" of the railway, the appellant, as assignee, was still entitled to priority.

The Master disallowed the claim of the appellant.

The appeal was heard in the Weekly Court at Toronto.

W. N. Tilley, K.C., and S. B. Spencer, for the appellant.

W. J. McWhinney, K.C., and C. L. Dunbar, for the contestants, respondents.

MIDDLETON, J., set out the facts in a written judgment, and said that the Master had found, upon the evidence, that the Di Marco judgment was paid by the company out of the funds of the company in part and out of money lent by Weber to the company as to the residue. The learned Judge said that there was nothing in the evidence to justify this finding. It was plain that Weber paid the money out of his own pocket to free the company when it was in a tight place.

The judgment was not merged because sued on in Ontario.

By the Act incorporating the company, 50 Vict. ch. 76, sec. 18 (O.), the directors may from time to time issue bonds, and, to secure the same, may mortgage the undertaking in the manner provided by the Railway Act of Ontario, the provisions of which are made applicable. By virtue of the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, para. 48, cl. (*b*), the reference is, "as regards any subsequent transaction, matter or thing," to the general Act in force at the time: Kilgour v. London Street R.W. Co. (1914), 30 O.L.R. 603. In 1906 the general Railway Act was recast, and 6 Edw. VII. ch. 30, sec. 44, deals with the power to mortgage and the effect of a mortgage when made. "Working expenditure," in sec. 44, means money properly spent for "working expenses." Section 45 makes the bonds a first charge on the company and its property "save and except as herein provided."

In 1910, the mortgage to enforce which this action was brought was made, and, by 10 Edw. VII. ch. 138 (O.), it was confirmed. There was nothing in the confirming Act which interfered with the provisions of the Railway Act giving priority to "working expenditure."

Di Marco's injury was on the 20th February, 1911; her judgment was recovered on the 23rd February, 1912.

In 1913, the Railway Act was amended (3 & 4 Geo. V. ch. 30), and by sec. 48 the mortgage-charge is made subject to the payment of the "working expenditure" of the railway—the definition of the words quoted being similar to that of "working expenses" in the earlier Act. The effect is to make working expenditure a prior charge on all the assets of the company instead of on "rents and revenues" only.

A sum to be paid for damages to a passenger injured in an accident is one which would be "usually carried to the debit of revenue as distinguished from capital account." The statute is different from that under which In re Wrexham Mold and Connah's Quay R.W. Co., [1900] 2 Ch. 436, was decided.

The claim cannot be regarded as a "subsequent matter, transaction or thing;" and the amendment of 1913, having regard to the Interpretation Act, has not made the claim a charge on all the assets in priority to the mortgage—even assuming that the mortgage does not confer upon the bondholders any vested right, but that their title is subject always to displacement by legislation giving priority to working expenses. That assumption may be too favourable to the claimant: Barnhill v. Hampton and St. Martins R.W. Co. (1906), 3 N.B. Eq. 371; though the learned Judge does not agree with that decision.

The Master's report against the claim to priority made by the appellant should be affirmed, upon the ground indicated, but with leave to the appellant, if so advised, to make, within one month, a claim before the Master upon the basis of having a right to some part of the money to be distributed as representing rents and revenue of the defendant company liable to pay the plaintiff's judgment, without prejudice to the rights of either party in regard to the merits of such claim. No costs.

LATCHFORD, J. DECEMBER 29TH, 1916.

LOUDON v. SMALL.

Contract—Sale of Hotel Business—Action for Balance of Purchase-money—Terms of Contract not Fully Carried out by Vendor—Failure to Procure Lease of Premises Freed from Option to Purchase Business—Possession Given and Rent Paid—Liquor License Transferred and Business Carried on—Part Failure of Consideration—Damages Offset pro Tanto against Balance of Price—Implication of Term as to Prohibitory Liquor Law.

Action to recover the purchase-money of an hotel business sold by the plaintiff to the defendant in July, 1914, for $40,000.

The agreement provided that possession was to be given as soon as the lease of the hotel premises and the license to sell intoxicating liquors could be transferred to the defendant; that the agreement was to be null and void in case the transfer of the lease or license was refused; and that the lease was to be free of any right of purchase by Hollwey, the lessor. The sale was to be completed by the 1st August, 1914, "if possible."

At the time of the agreement, as the defendant knew, the plaintiff held no demise of the term; Hollwey had a right, under his agreement with one Tremble, who had transferred his rights to the plaintiff, for a 10-year lease, to acquire the business, at any time during the 10 years, for $37,500.

The defendant took possession on the 1st August, 1914, and paid $10,000 on account of the purchase-money; the license was transferred to him; but Hollwey refused to execute a lease unless it contained an option for him to purchase the business for $37,500.

No lease was then executed; but the defendant continued in possession, paid rent monthly to Hollwey, and made payments to the plaintiff; and, in April, 1915, and again in April, 1916, obtained a renewal of the liquor license. In June, 1916—after the passing of the Ontario Temperance Act, 6 Geo. V. ch. 50—Hollwey made a lease to the plaintiff, freed from the option to purchase; and in July, 1916, the plaintiff executed an assignment of the lease to the defendant, which he refused to accept.

The defendant counterclaimed for damages for breach of the agreement.

The action and counterclaim were tried without a jury at Toronto.

W. G. Thurston, K.C., for the plaintiff.
W. N. Tilley, K.C., for the defendant.

LATCHFORD, J., in a written judgment, after setting out the facts, said that it was plain that the case was not one where the plaintiff had so far made default that the consideration for which the defendant gave his promise had wholly failed. Nor, as argued by Mr. Tilley, was it a case where a contract is entered into on the assumption that a particular state of things will exist, and the discontinuance of that state of things occurs without the fault of either party, as in Krell v. Henry, [1903] 2 K.B. 740, and other Coronation procession cases. There was no implied term in the agreement of sale that prohibition would not become the law of the Province, or even that the license for the premises would be renewed.

The case was rather one of several promises on the part of the plaintiff, some of which he performed. If the unperformed promises caused damage, the defendant was entitled to claim that damage. Damage resulted to the defendant not so much from the failure to obtain a lease—that could be had at any time by paying Hollwey for his option—but by failure to procure a lease freed from that option. In 1916, the plaintiff and Hollwey concurred in valuing the option at $2,500. Its existence previously caused a greater loss to the defendant. In 1915, a real estate agent named Porter, acting for an undisclosed principal, was willing to pay $43,000 for the business. He interviewed the defendant—who appears to have been willing to sell—Mr. Haverson, and Hollwey; but, as the latter refused to waive his option, nothing could be done.

It was fair to estimate the damage thus suffered by the defendant at the value which Hollwey placed upon his option in 1914—$6,000.

There should be judgment for the plaintiff for the balance of the purchase-money admitted to be unpaid, $13,522.76, less $6,000, or for $7,522.76, with interest and costs.

ORPEN v. MACKIE—SUTHERLAND, J.—Dec. 28.

Receiver—Motion to Continue—Evidence—Prejudice.]—Motion by the plaintiff to continue a receiving order; heard in the Weekly Court at Toronto. SUTHERLAND, J., in a written judgment, said that, in view of the facts set forth in the affidavit of Mr. McKay and of the assignment from Glendenning to Martha B. Glendenning, dated the 6th June, 1916, he did not think he should make an order as asked continuing the order made on the 16th instant appointing the Guardian Trust Company Limited receiver. He was unable to say that, in the circumstances, if the order were made, it might not affect prejudicially the interest of some of the parties other than the plaintiff. Motion dismissed with costs. T. R. Ferguson, for the plaintiff. R. McKay, K.C., for the Thunder Mining Company Limited, the Chartered Trust Company, and Messrs. Johnston, McKay, Dods, & Grant. J. H. Spence, for G. T. Clarkson, assignee of George Glendinning, the Mackie estate, and the Bank of Nova Scotia. G. H. Sedgewick, for George Glendinning.

SHEA v. DORE—FALCONBRIDGE, C.J.K.B.—DEC. 29.

Limitation of Actions—Possession of Land—Ownership—Devise.]—Action by the daughter of James Dore, deceased, for the ascertainment and declaration of the rights of herself and his other children in regard to his lands, and for partition or sale. The action was tried without a jury at Hamilton. FALCONBRIDGE, C.J.K.B., in a written judgment, said that this case fell within the provisions of the Limitations Act, R.S.O. 1914 ch. 75, sec. 12. The caretaker cases such as Heward v. O'Donohoe (1891), 19 S.C.R. 34, did not apply. Diana Dore was at the time of her death the absolute owner of both parcels by length of possession and occupation and receipt of rents and profits, and the defendant was her devisee. Action dismissed with costs. H. D. Petrie, for the plaintiff. A. O'Heir, for the defendant.