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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 13TH, 1916.

RE AUTO TOP AND BODY CO. LIMITED.

Company — Winding-up — Disputed Claim of Liquidator to Payment for Services before Winding-up Order — Forum for Determination — Master's Office—Appeals— Costs.

Appeal by creditors with claims before the Court in a winding-up proceeding from the order of FALCONBRIDGE, C.J.K.B., ante 76.

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

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

J. P. MacGregor, for the liquidator, respondent.

THE COURT allowed the appeal, set aside the order, and directed that the question involved should be determined in the office of the Master in the winding-up, under the provisions of the Winding-up Act. Costs of the appeals to the Chief Justice and to this Court to be costs to the successful party on the final disposition of the matter in question: if the respondent is held entitled to keep all the money which he has retained for services rendered to the company before the winding-up order, he is to have the costs; otherwise he is to pay the appellants' costs.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

*STONEY POINT CANNING CO. v. BARRY.

Principal and Agent—Purchase of Goods—Contract Made by Supposed Agent of Defendant—Authority of Agent—Ratification—Holding out—Estoppel—Secret Commission—Fraud—Breach of Contract—Damages.

Appeal by the plaintiff company from the judgment of MIDDLETON, J., 8 O.W.N. 411.

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

I. F. Hellmuth, K.C., and J. G. Kerr, for the appellant company.

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

MEREDITH, C.J.C.P., read a judgment in which he reviewed the evidence at length, and said that there was sufficient evidence adduced at the trial to put upon the defendant the onus of proof that the goods in question were not part of the 94,000 cases regarding which the defendant admitted liability; the knowledge and the proofs upon that question were altogether with him; and, the proofs not having been given, it should be held that they were part of the 94,000 cans—not upon the ground of ratification, but of the previous general and undefined authority given to Derocher. Upon the whole evidence, the purchases in question were purchases within the authority of Derocher, acting for and in the name of the defendant carrying on business in the name of John Barry & Sons; and, if that was not so, the defendant was plainly estopped from denying that the contracts were his.

It is not the law that, if a purchaser's agent receives a commission from one who is not his employer, the transaction in which the commission was received cannot stand; it is fraud only that has that effect; the payment of a commission is nothing more than evidence of fraud. The existing rule is, that, where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable at law, whatever the effect produced on the mind of the person bribed might be: Harrington v. Victoria Graving Dock Co. (1878), 3 Q.B.D. 549. The right to set aside a transaction, on such a ground of fraud, should not

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

be confused with the right of the employer to recover from his agent the commission or other benefit which the agent had a right to receive only for his master's benefit, as in Hippisley v. Knee Brothers, [1905] 1 K.B. 1.

In this case, the defendant neither paid nor agreed to pay Derocher anything for his services; the defendant paid his expenses out of pocket in the "canned goods" business; the "splitting" of the commission with the plaintiff company's brokers was one of those things that are "very common in mercantile business;" the men were on most familiar and confidential terms with one another; it was impossible to believe that the commission received was a secret one, or that there was anything like fraud or bad faith in its payment; and the defendant had notice of it in a communication addressed to him in the name of his firm, but with the words "Attention personal Mr. Derocher" on the envelope.

Again, there was no reason why the plaintiff company should be made liable for its brokers' wrongdoing, if it was wrongdoing. Reference to Barwick v. English Joint Stock Bank (1867), L.R. 2 Ed. 259; S. Pearson & Son Limited v. Dublin Corporation, [1907] A.C. 351. It might be said that the plaintiff company could not take advantage of its brokers' fraud; but there was no evidence that the company obtained the contracts or any kind of advantage by it.

The appeal should be allowed, and judgment should be entered for the plaintiff company with damages in such amount as the parties may agree upon, or, if unable to agree, as the proper local officer may on inquiry find that the plaintiff company has sustained by reason of the defendant's breach of his agreement to buy the 23,000 cases of "canned goods" in question, with costs of the action and of this appeal.

The other members of the Court agreed in the result; written reasons were given by LENNOX and MASTEN, JJ., respectively.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Libel—Company—Allegations of Fraud—Discovery—Defences—Fair Comment—Particulars—Examination of Officer of Plaintiff Company—Relevancy of Questions—Financial Condition of Plaintiff Company—Discretion—Questions of no Practical Consequence—Discouragement of Appeals.

Appeal by the plaintiffs from an order of BOYD, C., 9 O.W.N. 478, reversing in part an order of the Master in Chambers, 9 O.W.N. 453, and requiring the president of the plaintiffs, an incorporated company, to attend for further examination for discovery and to answer questions which he refused to answer upon his examination as an officer of the plaintiffs.

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

I. F. Hellmuth, K.C., and W. J. Elliott, for the appellants.

G. M. Clark, for the defendants, respondents.

RIDDELL, J., read a judgment in which he described the alleged newspaper libel upon which the action was brought, and summarised the pleadings, the principal defence being what is known as "fair comment." The plaintiffs were exploiting a new and improved engine; the newspaper article complained of attacked the plaintiffs and their president as promoters of a fraudulent scheme. Particulars of the defence of fair comment were ordered and furnished.

Having regard to the pleadings, the defendants had to meet (after publication proved): (1) the charge that the words employed had the special meaning alleged in the innuendo; (2) the charge that the words were actionable in themselves; and the defendants had to prove: (3) the truth of the facts alleged in his defence; and (4) that their comment was fair.

Having these issues in mind, the learned Judge said, it seemed to him that the appeal could not succeed except as to some minor and unimportant matters.

The learned Judge took up one by one the questions which were objected to and directed by the Chancellor to be answered.

One objection was, that the officer should not be obliged to give the financial status of the company. The defendants, in the article, stated that the stock was almost worthless; and pleaded comment in good faith and without malice. The truth or falsity

of the statement that the stock was almost worthless might go to shew the good faith and absence of malice: McKergow v. Comstock (1906), 11 O.L.R. 637; Jenoure v. Delmege, [1891] A.C. 73; Watt v. Watt, [1905] A.C. 115, at p. 118. The questions on this point should be answered.

The order of the Chancellor should be affirmed and the questions by him directed to be answered should, with some few and trifling exceptions, be answered.

LENNOX, J., concurred.

MASTEN, J., read a short judgment in which he expressed the view that an appellate Court could not satisfactorily deal with a case of this kind—a matter of discretion. He concurred in the conclusions of RIDDELL, J., only protesting that he did not apprehend on what ground leave to appeal was granted.

MEREDITH, C.J.C.P., was of opinion, for reasons stated in writing, that the plaintiffs' officer was quite within his right in refusing to answer all the questions to which he objected.

The learned Chief Justice was, however, of opinion that the appeal should be dismissed, because appeals to this Court in respect of matters of practically no consequence should not be brought—they should be discouraged and stopped. Whether the officer did or did not answer these questions was a matter of no substantial consequence. Reference to Peek v. Ray, [1894] 3 Ch. 282.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

*ORMSBY v. TOWNSHIP OF MULMUR.

Municipal Corporations—Action against Township Corporation for Injury to Land by Sand Brought upon it by Escape of Water through Cutting in Highway—Liability—Finding of Jury—Necessity for Notice under Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 460—*Claim not Based upon Neglect to Keep Highway in Repair.*

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin dismissing an action brought in that Court to recover $300 for injury to land by sand brought thereon by water, the cause of which was said to be the weakening of an embankment, and unskilful and negligent work

on a highway, done by the defendants, the township corporation. The judgment appealed from was upon motion for a nonsuit, made before the verdict of the jury, which was in favour of the plaintiff for the recovery of $125 damages, the motion being renewed after the verdict.

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

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

C. R. McKeown, K.C., for the defendants, respondents.

MEREDITH, C.J.C.P., read a judgment in which he set out the facts, and said that the grounds upon which the judgment in appeal was based were, that the action was really one for damages caused by the neglect of the defendants to keep a highway vested in them in repair, and that no notice of the action had been given; in other words, that the plaintiff had no right of action except under sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192, which provides that no such action shall be brought unless notice has been given within 30 days; and no such notice was given.

The only ground for holding that the action was one based upon such neglect was that the sand which was deposited on the plaintiff's land came from a cutting made by the defendants in the highway for the purpose of more effectually draining it; but that circumstance could not make the claim one for neglect of the statute-imposed duty of the defendants to keep the road in repair; it was immaterial to the plaintiff, so far as the matters in question in this action were concerned, what state of repair the road may have been in, or where the sand came from, or in what manner it was lodged upon his land—or whether the cutting was repair or neglect to repair; all that he was concerned with was, that the defendants brought it there to his injury, which they had no right to do, and so were answerable to him for the loss he had sustained by that unlawful invasion of his property rights.

Strang v. Township of Arran (1913), 28 O.L.R. 106, distinguished and commented on.

The appeal should be allowed, and judgment be entered for the plaintiff in the Court below.

The other members of the Court agreed in the result, each giving reasons in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

McLAUGHLIN v. TORONTO R.W. CO.

Damages—Personal Injuries—Negligence—Street Railway—Injury to Passengers by Accidental Falling of Sign-board—Direct Impact—Additional Injury from Shock—Assessment of Damages—Evidence—Findings of Trial Judge—Appeal—Liability of Street Railway Company in Respect of Injuries other than those Caused by Direct Impact—Proximate Cause of Additional Injury.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 9 O.W.N. 407.

The appeal was heard by MEREDITH, C.J.K.B., RIDDELL LENNOX, and MASTEN, JJ.

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

E. G. Morris, for the plaintiffs, respondents.

LENNOX, J., read a judgment in which he stated that the injuries complained of by the plaintiffs, husband and wife, were alleged to have been occasioned by the falling of a metallic sign-board when they were travelling upon one of the defendants' cars. There was direct impact in each case; the husband received a severe wound upon his head; and the wife a slight scalp wound; but she alleged that she also received a severe mental shock; that she was pregnant at the time; and that the visible injury, combined with the mental shock, caused a miscarriage and necessitated a surgical operation. She was present when a surgeon dressed her husband's wound, immediately after the accident; and the defendants contended that the shock or mental disturbance and subsequent illness were mainly due to this circumstance. The defendants also attempted to prove that the woman was not pregnant at the time of the occurrence.

The action came on for trial with a jury, but the jury was dispensed with by consent.

The liability of the defendants for the injuries directly caused by the impact was not disputed.

The trial Judge found for the plaintiffs, awarding $75 damages to the husband and $900 to the wife.

There was nothing in the evidence which would justify interference with the conclusions reached by the trial Judge; and the appeal should be dismissed with costs.

RIDDELL, J., concurred.

MASTEN, J., also concurred, with some hesitation, for reasons briefly stated in writing. He was of opinion that the defendants had established that no miscarriage resulted from the accident, but, upon the evidence, it was quite possible that the subsequent troubles from which the woman suffered might have resulted from the accident; and the doubt entertained was not strong enough to warrant a reversal of the judgment of the trial Judge. The damages, also, were very large, in the circumstances, and might well be reduced to $500; but that was not the opinion of a majority, and so the judgment should stand.

MEREDITH, C.J.C.P., in a written opinion, pointed out that the appeal was not really as to the damages, but as to the liability of the defendants in respect of the injuries or supposed injuries of the woman-plaintiff other than the slight injury to the head, the liability for which was admitted; the real issues in the action had not been determined by the trial Judge, and should now be determined by the Court: (1) Was the woman pregnant at the time of the accident? (2) If so, was there a miscarriage? (3) If so, was the accident the proximate cause of it? These questions shall all be answered in favour of the defendants, and the woman-plaintiff's damages should be reduced to $25.

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

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

*RE ELLIOTT v. McLENNAN.

Certiorari—Application for Removal of Examination for Discovery in County Court Action—Jurisdiction of Examiner—Ministerial Act—Irrelevant Evidence—Judgment in County Court—Right of Appeal—Solicitor—Disputed Retainer—Remedy.

Appeal by Mr. J. B. Mackenzie from the order of BRITTON, J., 9 O.W.N. 468.

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

The appellant in person.

J. M. Ferguson, for the defendants in the action.

RIDDELL, J., read a judgment in which he said that the action of Elliott v. McLennan was an action qui tam, in the County Court of the County of York. The plaintiff was examined for discovery before a special examiner; on his examination he said

that he had not instructed the action to be brought. Upon this statement being read at the trial, the County Court Judge dismissed the action; and no appeal had been taken from the dismissal.

Mr. Mackenzie, who acted as solicitor for the plaintiff in the County Court, was naturally indignant at the plaintiff's statement, and moved for a certiorari to bring into the Supreme Court the obnoxious examination, in order to have it quashed; Britton, J., refused the motion; and Mr. Mackenzie now appealed, and also moved substantively for a certiorari. The two grounds alleged in the original notice of motion were, that the examination dealt with an irrelevant issue, and that the special examiner at Toronto had no jurisdiction to take the examination, as the plaintiff resided in the county of Ontario, and his solicitor had not given consent to an examination in the county of York.

Assuming that the examination was on an irrelevant issue, and that the special examiner had no authority for holding it, the application had yet been made without full consideration of the real functions of certiorari. Reference to Rex v. Titchmarsh (1914), 32 O.L.R. 569, 577, 578.

There were many difficulties in the applicant's way; one lay at the threshold, and was fatal. Nothing but a judicial act will be removed by certiorari—the remedy against an offender for a wrongful ministerial act is by action: Rex v. Lediard (1751), Sayer 6; Rex v. Lloyd (1783), Caldecott 309; Rex v. Woodhouse, [1906] 2 K.B. 501; Leeds Corporation v. Ryder, [1907] A.C. 420.

In the present case what was to be removed was the mere ministerial act of an officer of the Court. That he had no authority to do this act (if such were the case) was immaterial.

Assuming that the Court had power to remove the record with the judicial act of dismissal of the action, and that on such removal the obnoxious examination would be transmitted also to the Court, the applicant was not advanced; for the Court will not remove a record upon which it cannot proceed. Reference to Dr. Sands' Case (1699), 1 Salk. 145, disapproving the Duke of York's Case.

The Court could do nothing with the judgment if brought up; no appeal was taken, and the judgment was the judgment of a Court of competent jurisdiction properly seized of the case.

After judgment, there is always a judicial discretion to grant or refuse a certiorari: In re Aaron Erb (1908), 16 O.L.R. 597. In the present case, there would be no advantage in having the examination before the Court. Everything was in the County Court, and that Court had the same power over the proceedings now as the Supreme Court would have if they were brought into

it. Moreover, nothing would be gained if the examination were quashed.

The appeal and substantive motion should be dismissed with costs.

LENNOX and MASTEN, JJ., concurred.

MEREDITH, C.J.C.P., in a brief written opinion, agreed that certiorari was out of the question, and pointed out the applicant's remedy against the plaintiff in the action.

Appeal and motion dismissed with costs.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

ADAMS v. WILSON.

Negligence—Collision of Vehicles in Highway—Findings of Jury—Contributory Negligence—Dismissal of Action Brought by Injured Person.

Appeal by the defendant from the judgment of one of the Junior Judges of the County Court of the County of York (COATSWORTH), in favour of the plaintiff, upon the findings of a jury, in an action for damages for injury caused to the plaintiff, while riding a motor bicycle upon a street in the city of Toronto, by being run down by the defendant's motor-car, alleged to have been operated in a negligent and careless manner and at excessive speed. The jury assessed the plaintiff's damages at $450, for which amount judgment was given by the trial Judge.

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

G. H. Sedgewick, for the appellant.

E. E. Wallace, for the plaintiff, respondent.

LENNOX, J., read a judgment in which he set out the findings of the jury, which may be thus summarised: (1) The plaintiff and defendant were going in different directions on Defoe street when the accident happened; (2) there was negligence on the part of both the defendant and the plaintiff; (3) the defendant had not proved that the collision did not occur from any negligence or improper conduct on his part; (4) in answer to a question whether the plaintiff was guilty of contributory negligence, "We believe there was negligence on the part of the plaintiff."

The jury's answers were conclusive against the plaintiff's right to recover.

RIDDELL, J., concurred.

MEREDITH, C.J.C.P., read a judgment in which he referred to the evidence, the charge, the findings of the jury, and the judgment entered thereon.

"Notwithstanding the grievous injuries inflicted upon the plaintiff," the learned Chief Justice said, "through, in part, the negligence of the defendant, and notwithstanding the fact that the defendant escaped from the collision unscathed, the plaintiff's action wholly failed, according to the law administered in the Courts of this Province, because, according to the findings of the jury, the plaintiff would not have suffered any injury from the defendant's negligence but for his own negligence."

MASTEN, J., also read a judgment, in which, after setting out the facts and findings, he said that the 2nd and 4th answers of the jury were to be taken together, and, taken together, constituted a finding of contributory negligence.

Appeal allowed and action dismissed.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

RE ENGLISH.

Interest—Agreement to pay Sum for Past Maintenance—Construction—Time for Payment—Death of Promisor—Evidence—Surrounding Circumstances.

Appeal by the executors and residuary legatees under the will of Andrew English, deceased, from an order of the Judge of the Surrogate Court of the County of Kent allowing a claim against the estate made by William English, the brother of the deceased for ten years' board of the deceased and interest. The appellants complained of the allowance of $250.20 for interest.

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

J. G. Kerr, for the appellants.

O. L. Lewis, K.C., for the claimant, respondent.

LENNOX, J., read a judgment in which RIDDELL and MASTEN, JJ., concurred. He set out the agreement made between the deceased and the claimant on the 1st May, 1912, as follows: "I, Andrew English . . . do hereby acknowledge that my brother, William English, has furnished me with board, lodging,

and washing for the past ten years and more, and I hereby agree to pay him for the same at the rate of $3 per week for the past two years and $2.50 per week for the eight weeks previous thereto; and I hereby further agree to pay him at the rate of $3 per week for such time as he furnishes me with board, lodging, and washing subsequent to this date."

The amount payable by the terms of the agreement for the period ending on the 1st May, 1912, was $1,352. The $250.20 claimed and allowed was interest at 5 per cent. on $1,352 from the 1st May, 1912, to the 1st January, 1916.

"Does the contract," the learned Judge inquires, "mean that the money becomes payable immediately upon the signing of the instrument or 'at a time certain,' or was it to become payable upon the happening of a contingency, the death of Andrew English, a time necessarily uncertain?"

After referring to secs. 34 and 35 of the Judicature Act, R.S.O. 1914 ch. 56, the learned Judge said that he thought the clear interpretation of the agreement was, that William English was to be paid for the maintenance of his brother Andrew at Andrew's death, at the rate of $2.50 and $3 a week, for a period beginning on the 1st May, 1902. This was fairly clear from the wording of the agreement, and was put beyond doubt by the surrounding circumstances. It was quite manifest that the agreement was for post mortem purposes only, as evidence of a contract to pay, and to prevent a plea of the Statute of Limitations.

Reference to London Chatham and Dover R. W. Co. v. South Eastern R.W.Co., [1892] 1 Ch. 120, 144; McCullough v. Clemow (1895), 26 O.R. 467; McCullough v. Newlove (1896), 27 O.R. 627; City of Toronto v. Toronto R.W. Co. (1904), 7 O.L.R. 78; S.C., sub nom. Toronto R.W. Co. v. Toronto Corporation, [1906] A.C. 117.

The appeal should be allowed with costs; the disallowance of the interest in question to be without prejudice to any right the claimant may have to interest upon the amount owing to him under the agreement, treated as a contract for payment at the death of the testator. The Surrogate Court Judge may determine this if the parties do not agree.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

MURCH v. CITY OF TORONTO.

Principal and Agent—Solicitor and Client—Authority of Solicitor to Receive Moneys for Client—Absence of Ratification or Acquiescence—Evidence—Finding of Fact—Appeal—Right to Recover Money Paid to Supposed Agent and Misappropriated—Deduction of Sum Due by Plaintiff for Costs.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 9 O.W.N. 438.

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

Irving S. Fairty, for the appellants.

C. W. Plaxton, for the plaintiff, respondent.

RIDDELL, J., in a short written opinion, said that the case, when denuded of irrelevant detail, was reducible to a small compass. The defendants, the Corporation of the City of Toronto, agreed to pay to the plaintiff $7,000; the defendants placed in the hands of their solicitor a sufficient sum to pay $5,000, the balance after $2,000 had been paid; the defendants' solicitor paid the $5,000 to another solicitor (Lobb), believing him authorised to receive it for the plaintiff; and Lobb paid to the plaintiff only a portion of the $5,000. The plaintiff sued the defendants for the balance, repudiating the authority of Lobb to receive the money. The question was not whether the defendants' solicitor acted as most solicitors would have acted—no doubt he did. The question was one respecting the authority of an agent. The defendants, owing money to the plaintiff, paid it to a person who affected to act as the plaintiff's agent. Apart from estoppel, acquiescence, ratification, and the like—none of which existed here—a person paying to a supposed agent must make sure of the real agency, express or implied, of such supposed agent.

The learned Judge said that, as the question involved the honour of one solicitor and the prudence of another, he had read and re-read the evidence with great care; and, while there was much upon which to base an argument, the evidence fell short of proving authority on the part of Lobb to receive this money as agent of the plaintiff.

The appeal should be dismissed.

As Lobb became the agent of the defendants to pay the plaintiff, it would be just to deduct from the judgment the amount

of any claim for costs which Lobb might have against the plaintiff. No doubt, the parties could agree as to this.

LENNOX, J., concurred.

MASTEN, J., agreed in the result.

MEREDITH, C.J.C.P., read a dissenting judgment. He made an elaborate review of the evidence, and stated his finding thereon, that Lobb had power given him by the plaintiff to receive the money; and that the plaintiff's conduct, from the beginning until he placed his case in his present solicitor's hands, proved it conclusively; that being so, the defendants had paid the whole of the compensation to the plaintiff; the appeal should be allowed, and the action dismissed.

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

SECOND DIVISIONAL COURT. APRIL 14TH, 1916.

BRESETTE v. ROY.

Contract—Building Contract—Dispute as to Terms—Wages and Material—Payment to Contractor—Quantum Meruit—Findings of Fact of Master—Appeal—Costs.

Appeal by the defendant from the judgment of the Local Master at Hamilton in a mechanic's lien action, in favour of the plaintiff.

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

M. J. O'Reilly, K.C., for the appellant.

H. J. McKenna, for the plaintiff, respondent.

RIDDELL, J., delivering the judgment of the Court, said that the contract alleged by the plaintiff was, that he was to do certain carpenter work on the defendant's house, on the terms that the defendant should pay all wages and for all material, and also pay to the plaintiff 50 cents per hour for himself; while the defendant asserted that the plaintiff was to do the work for a certain fixed sum. The findings of the Local Master shewed that he substantially accepted, as he well might, the story of the plaintiff. This was not seriously disputed by the defendant; and the Court could not, in any case, reverse the decision of the Master on this

simple question of fact. The sole difference between the findings and the plaintiff's version of the agreement was, that the Master allowed 50 cents an hour on a quantum meruit, and not on an express contract.

The real ground of appeal was the defendant's allegation that on the 5th June there was a settlement, and after that date the defendant "paid the workmen himself." The plaintiff certainly made such a statement: p. 4 of the notes of evidence. But the Master found that the fact was otherwise—and properly so. The plaintiff, in his testimony before the Master, went on to say: "I paid, of course, but Mr. Roy gave me the money, and I kept track of every thing, all wages." Cheques drawn by the defendant after the 5th June, and endorsed by the plaintiff, were produced; and it seemed clear that the only difference after the 5th June was that the defendant was called on more promptly for money.

There was not any statement of accounts between the parties on the 5th June with a complete and final settlement followed by a change in relations thereafter.

There was no reason for differing from the Master in his conclusions of fact; and the appeal should be dismissed; but, since the trouble and delay occasioned by a reference back to the Master and a second argument before the Court were due to the default of the plaintiff in not appearing the first time the matter came before the Court, there should be no costs.

Appeal dismissed without costs.

HIGH COURT DIVISION.

BRITTON, J. APRIL 10TH, 1916.

RE CIVIL SERVICE CO-OPERATIVE SUPPLY ASSOCIATION.

Company — Winding-up — Debenture-holders — Appointment of Liquidator as Receiver—Conflict of Interests—Appointment of New Receiver on Behalf of Debenture-holders.

Motion by Herbert T. Owens, on behalf of himself and all other debenture-holders of the association, for an order appointing a receiver and manager of the association.

The motion was heard in the Weekly Court at Ottawa.

J. P. Ebbs, for the applicant.

G. D. Kelley, for the liquidator of the association.

BRITTON, J., read a judgment in which he said that debentures were issued by the association, some of which were now in the hands of holders for value. Endorsed upon each of these debentures were, among other conditions, these: (10) The principal moneys and accrued interest shall immediately become payable (a) if a petition shall be presented, or a resolution shall be passed, or an order shall be made for the winding-up of the association. (11) At any time after the principal moneys hereby secured become payable, the registered holder of this debenture may, with the consent in writing of the holders of the majority in value of the outstanding debentures of this issue, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures, of this issue, had concurred in such appointment.

The association was being wound up, and a liquidator had been appointed, who was in charge of all the property and assets of the association.

A majority in value of the debenture-holders did appoint the liquidator as receiver for the debenture-holders; but it was now said that there might be a conflict between the interests of debenture-holders and creditors, and this application was made for the appointment of another receiver and manager.

The learned Judge was of opinion—assuming the validity of the debentures—that the majority in value of the debenture-holders could appoint another receiver in place of the liquidator; and that the Court was not, by reason of the former action of the majority, debarred from now appointing another person—a person who would act as receiver and manager for the purpose of protecting the debenture-holders.

Order made appointing as receiver and manager a person who is acceptable to all those interested. Reference to the Local Master at Ottawa to fix the amount of security and to approve the security. It will not be necessary for the liquidator, until further order, to hand over the money in his hands as receiver. If the liquidator or any creditor or creditors take proceedings to test the validity of the debentures, this order is to be without prejudice to any such action. Costs of the application and order to be paid by the receiver, unless otherwise ordered. The form of the order may be spoken to, if difficulty arises.

MASTEN, J. APRIL 10TH, 1916.

FOSTER v. MALLORY.

McLAUGHLIN v. MALLORY.

Mortgage—Foreclosure—Final Order on Consent—Failure to Disclose Interest of Purchaser of Equity of Redemption—Opening Foreclosure—Parties—Costs.

Motion by McLaughlin, the plaintiff in the second action, to open the foreclosure effected by proceedings in the first action, to the extent necessary to allow him to redeem Foster, the plaintiff in the first action; and generally for the disposition of all pending motions in both actions.

See McLaughlin v. Mallory (1915-16), 9 O.W.N. 325, ante 47.

The motion was heard in Chambers.

D. L. McCarthy, K.C., for McLaughlin.

R. McKay, K.C., for Mountjoy.

C. J. Holman, K.C., for Foster.

MASTEN, J., disposing of the motion in a short memorandum in writing, said that judgment of foreclosure was pronounced on the 28th February, 1913, and was entered, in the usual form, on the 3rd March, 1913; it gave the usual period for redemption, viz., till Septenber. On the 20th March, a final order of foreclosure was made on consent of all parties then appearing on the record as parties to the action of Foster v. Mallory. On the 20th February, 1913, McLaughlin had entered into a binding agreement of purchase of the land in question, and was on 20th March the equitable owner, subject to Foster's mortgage. No consent from McLaughlin to the immediate foreclosure was obtained; and the fact that he was interested was not disclosed to the Judge who granted the final order of foreclosure.

All parties had, either directly or through their common solicitor, knowledge and notice of McLaughlin's interest; and there was good reason to believe that the final order was obtained with the purpose of cutting out his interest. That interest ought to have been disclosed when the application for the final order was made. Such an application is in its nature cognate to an application for an ex parte injunction, and the principle requiring full disclosure to the Court applies—differing this case from certain decisions cited in the argument of the motion.

Order made declaring that on and previous to the 3rd March, 1913, McLaughlin had an interest which entitled him to redeem,

setting aside the foreclosure as against him, and giving him leave to redeem. All proper and necessary parties may be added. The order may issue as a Court order.

No costs of this application nor of any of the motions here or below to any party.

MIDDLETON, J. APRIL 11TH, 1916.

ELLIS v. CITY OF TORONTO.

Highway — Nonrepair—Injury to Traveller—Cause of Action—Notice of Injury—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 460 (4)—*Time for Service—Expiry on Sunday—Service on Next Day—Interpretation Act, sec.* 28 (*h*).

Motion by the defendants to dismiss the action, which was brought to recover damages for injury sustained by the plaintiff by a fall upon a highway, by reason of nonrepair, as the plaintiff alleged.

The motion was made upon the ground that no cause of action was shewn because the notice required by sec. 460 (4) of the Municipal Act, R.S.O. 1914 ch. 192, was not given within seven days, the time prescribed by the enactment.

The motion was heard in the Weekly Court at Toronto.

Irving S. Fairty, for the defendants.

G. W. Adams, for the plaintiff.

MIDDLETON, J., held that sec. 28 (*h*) of the Interpretation Act, R.S.O. 1914 ch. 1, applied, and extended the time for giving the notice, the seven days having expired on a Sunday, and the notice having been served on the following Monday.

Motion dismissed with costs to the plaintiff in any event.

KELLY, J. APRIL 11TH, 1916.

RE GREEN.

Will — Construction — Devise and Bequest of whole Estate to Widow for Life—Right of Widow to Encroach on Capital of Personalty for Maintenance — Right to Income of Realty.

Application by the Capital Trust Corporation Limited, administrator with the will annexed of the estate of Philip Green, deceased, for an order determining certain questions as to the construction of the will, arising in the administration of the estate.

The motion was heard in the Weekly Court at Toronto.

W. Lawr, for the applicant-company.

K. W. Wright, for the Inspector of Prisons and Public Charities.

F. W. Harcourt, K.C., Official Guardian, as guardian ad litem of Lucy Green, a person of unsound mind.

KELLY, J., in a written opinion, set out the provisions of the will. There was, first, a direction to pay debts and funeral and testamentary expenses and a bequest of $100; then, a devise and bequest to the testator's wife for her life of all the residue of his estate, both real and personal; then, a devise, after the wife's death, of a parcel of land to the testator's daughter Susan; then, a direction that, after the wife's death, a farm of 100 acres should be sold and any securities for money converted into money; then, a direction that out of the moneys on hand at the death of the wife and the moneys realised from the sale of the farm and securities there should be paid specified sums to three other daughters and $100 to a church fund; then, a provision disposing, in favour of his daughters Lucy and Susan, of the shares of the other daughters and the son in the event of their dying before the wife's death; the residue of the estate was then bequeathed to the daughters Lucy and Susan; and there was a provision that, in the event of the daughter Susan predeceasing the wife, the land devised to Susan should go to Lucy; if the moneys were not sufficient to pay in full the legacies to the children, the legacies were to abate proportionately.

The will was made only two months before the testator's death. His estate consisted of realty valued at $2,000 and personalty $3,212.33. He left no debts except those incident to his last illness. His widow was far advanced in years, and unable to provide for herself. The income from the assets given to her to hold for her life would not provide for her needs. The corpus would, if not encroached upon, be sufficient to pay the legacies to the children in full; and the provision in the will for abatement pointed to his having in contemplation such a drawing upon capital as would reduce the amount available for payment of these legacies.

In these circumstances, the will should be construed as authorising the widow to draw upon the capital of the personal estate to the extent of her needs, as in Re Johnson (1912), 27 O.L.R. 472. She was not entitled, as in Re Tuck (1905), 10 O.L.R. 309, to an absolute control over the whole estate.

The conclusion stated in In re Thomson's Estate (1880),

14 Ch.D. 263, that the widow took nothing but an estate for life, with the full power of enjoying the property in specie, so that, if there was ready money, it need not be invested, but she might spend it, applied to the present case to the extent that the widow should have such part of the capital of the personal estate as, with the income of the real estate, would be sufficient for her proper support; and the administrator would be justified in making allowances and advances accordingly.

Costs (other than of the Inspector) out of the estate, those of the administrator as between solicitor and client.

KELLY, J., IN CHAMBERS. APRIL 12TH, 1916.

MELDRUM v. ALLISON.

Writ of Summons—Substituted Service on Solicitor—Application by Solicitor to Set aside—Locus Standi—Practice.

Appeal by Mr. W. N. Ferguson, a solicitor, from an order of the Master in Chambers refusing to set aside the service upon the appellant, in substitution for the defendant, of the writ of summons in this action.

Harcourt Ferguson, for the appellant.
J. S. Duggan, for the plaintiff.

KELLY, J., in a brief memorandum in writing, held, following Taylor v. Taylor (1903), 6 O.L.R. 356, 545, and Japhet v. Luerman, Annual Practice (English) for 1915, p. 79, that the appellant had no locus standi to move to set aside the service, which was authorised as substituted service by an order of the Master.

Appeal dismissed with costs, if demanded.

LENNOX, J., IN CHAMBERS. APRIL 12TH, 1916.

TAYLOR v. MULLEN COAL CO.

Contempt of Court—Disobedience of Judgment—Nuisance—Operation of Works—Punishment — Fines—Company—Agents.

Motion by the plaintiffs for an order directing the issue of a writ of attachment against John Mullen and Norval Mullen, directors and president and superintendent respectively of the defendant company, and Milton Hutton, manager of the company, and for an order for a writ of sequestration, for contempt of Court by the defendant company and its servants, agents, and workmen, in disobedience of the judgment of the Court (7 O.W.N. 764), affirmed by a Divisional Court of the Appellate Division (8 O.W.N. 445), whereby the defendant company and its servants, agents, and workmen, were enjoined from so operating its plant and works as to cause a nuisance to the plaintiffs or any of them by reason of smoke, dust, cinders, noise, etc.

The motion was heard in Chambers, no objection being made as to the forum.

T. Mercer Morton, for the plaintiffs.

A. R. Bartlet, for the respondents.

LENNOX, J., in a written judgment, referred to the evidence given by affidavits and orally, which, he said, was conflicting. His conclusion was, that the judgment of the Court had not been obeyed; that, notwithstanding alterations effected in machinery, plant, and operation, the defendant company had continued so to operate its plant and works as to cause a nuisance to the plaintiffs or to many of them. It was not enough for the company to do all it could to avoid a nuisance; it must so work its plant as not to continue the nuisance enjoined; or else not carry on its operations at that place at all.

Rule 554 authorising the imposition of a fine either in lieu of or in addition to punishment by attachment, committal, or sequestration, the learned Judge imposes a fine of $335 each on John Mullen and Norval Mullen and a fine of $30 on Milton Hutton, and requires the first two named to pay the costs of the application.

The order is not to issue for one month; and if, in the meantime, some satisfactory arrangement is come to between the parties, a reduction or remission of the fines will be considered.

If all parties agree, a fine of $700 upon the company will be imposed in lieu of the three fines.

MIDDLETON, J. APRIL 13TH, 1916.

*KENNEDY v. SUYDAM.

Will — Construction — Residuary Clause — Maintenance of "Residence"—Rule against Perpetuities—Executor—Power of Sale—Annuity Charged on Estate — Trustee Act, R.S.O. 1897 ch. 129, sec. 16—1 Geo. V. ch. 26, sec. 46—Devolution of Estates Act—Contract of Sale—Interpretation Act, sec. 14—Intestacy—Res Judicata—Land Titles Act—Registration under—Title to Land.

Action by Robert Kennedy to set aside a sale of land made by James H. Kennedy, executor of the will of David Kennedy, to the defendants Suydam and the Suydam Realty Company, who in turn sold to the defendants the Toronto Development Company.

David Kennedy died on the 17th February, 1906. After his death, several actions were brought with regard to his estate and the interpretation of his will. See, for instance, Kennedy v. Kennedy (1912-13), 26 O.L.R. 105, 28 O.L.R. 1; Kennedy v. Kennedy (1911), 24 O.L.R. 183; Foxwell v. Kennedy (1911), 24 O.L.R. 189.

By the will the testator gave to James H. Kennedy his dwelling-house; he directed that out of his estate there should be paid to his son David $400 per annum during the term of his natural life, adding, "I hereby charge my estate with this annuity in favour of my son David." The residuary clause will be found in the reports mentioned. The residue was to be employed by the executors (of whom only James H. Kennedy acted) to the maintenance and keeping up of the house devised to James, with power to the executors to "make sales of any real estate" and to use the proceeds for such maintenance; and, if it should be necessary to sell the house, that the residuary estate then remaining should be divided in equal proportions among the several pecuniary legatees.

The present action was tried without a jury at Toronto.

W. N. Tilley, K.C., and J. H. Fraser, for the plaintiff.

I. F. Hellmuth, K.C., for the defendants Henry Suydam and the Suydam Realty Company.

E. D. Armour, K.C., and W. H. Clipsham, for the defendants the Toronto Development Company.

MIDDLETON, J., after setting out the facts and referring to the previous litigation, in a written opinion of some length,

said that the plaintiff's fundamental contention was, that there was no power of sale which James H. Kennedy could rightly exercise.

The learned Judge, however, was of opinion that there was, apart from the residuary clause, a statutory power of sale vested in the executor: Trustee Act, R.S.O. 1897 ch. 129, sec. 16, the enactment in force when the sale was agreed upon; and this power might be exercised without the purchaser being put on inquiry to ascertain if it was being duly exercised. The sale was not carried out until after the new Act, 1 Geo. V. ch. 26, came into force; and that Act (sec. 46) made the provision found in sec. 16 of the earlier Act "subject to the provisions of the Devolution of Estates Act;" but the result was not changed, because the Devolution of Estates Act expressly preserves the express and implied power of sale found in the will; and, moreover, the right of the purchasers was based upon the contract, which was made before the amendment: see sec. 14 of the Interpretation Act, R.S.O. 1914 ch. 1.

Further, the power expressly conferred by the will did not fall merely by the direction to the executors to use the fund for a purpose which offended against the rule as to perpetuities. The executors would hold the fund to be distributed among those who would take upon an intestacy. This was not strictly an intestacy as to the property.

Then, the plea of res judicata had been satisfactorily made out; not so much because of any clearly expressed adjudication upon the precise point as because the adjudication which had taken place was necessarily predicated upon a determination, adverse to the plaintiff, of the very point in issue. In the former litigation two grounds were put forward as shewing the invalidity of the sale now in question, and the judgments were conclusive as to both; equally so if in the litigation one ground alone had been maintained: Henderson v. Henderson (1843), 3 Hare 100; Bake v. French, [1907] 1 Ch. 428; Humphries v. Humphries, [1910] 1 K.B. 796, [1910] 2 K.B. 531; Re Ontario Sugar Co., McKinnon's Case (1910), 22 O.L.R., 621; Southern Pacific R.R. Co. v. United States (1897), 168 U.S. 1.

So far as the land registered under the Land Titles Act was concerned, the registration was sufficient to confer an absolute title upon the purchasers.

Action dismissed with costs.

KELLY, J., IN CHAMBERS. APRIL 14TH, 1916.

*DUNN v. PHILLIPS.

Practice—Specially Endorsed Writ of Summons—Unnecessary Delivery of Statement of Claim—Statement Treated as Amendment of Endorsement—Rules 111, 127—*Costs.*

Appeal by the defendant from an order of a Local Judge dismissing a motion by the defendant to set aside a statement of claim delivered by the plaintiff.

A. E. Langman, for the defendant.
Grayson Smith, for the plaintiff.

KELLY, J., in a written opinion, disposed of the point of practice raised by the appeal. Rule 111, he said, provides that, where a writ of summons is specially endorsed, the endorsement may be treated as a statement of claim, and no other statement of claim shall be necessary. Here, the claim endorsed was for the recovery of possession of land; the plaintiff held it forth as a special endorsement, by using the form appropriate for that kind of endorsement, and for the present purpose it must be so considered. While a further statement of claim was unnecessary, the plaintiff was entitled, under Rule 127, to amend the claim specially endorsed on the writ. The statement of claim objected to was not a mere reiteration of the claim endorsed on the writ—which was the case in Dunn v. Dominion Bank (1913), 5 O.W.N. 103—but set forth facts and particulars, not mentioned in the endorsement, helpful to a proper submission and understanding of the claim, and such as would reasonably have been embodied in such an amendment as is permitted by Rule 127.

The new document should be treated as an amendment of the endorsement—the word "amended" being added. Subject to this, the appeal should be dismissed without costs.

MIDDLETON, J. APRIL 14TH, 1916.

*RE PERRAM AND TOWN OF HANOVER.

Municipal Corporations—Expropriation of Property and Water Power Leased to Claimant by Corporation — Compensation for Loss of Benefit for Unexpired Period of Lease—Deduction of Rent—Anticipated Profit or Loss from Business Carried on by Claimant—Expropriation under Public Utilities Act, R.S.O. 1914 *ch.* 204—*Arbitration and Award—Right of Appeal from Award—Application of Part XVI. of Municipal Act, R.S.O.* 1914 *ch.* 192.

Appeal by Perram from the award of the majority of three arbitrators upon the appellant's claim for compensation for the loss of leased premises taken by the Corporation of the Town of Hanover under the Public Utilities Act, R.S.O. 1914 ch. 204.

The appeal was heard in the Weekly Court at Toronto.

H. S. White, for Perram.

E. D. Armour, K.C., and F. S. Mearns, for the town corporation.

MIDDLETON, J., in a written opinion, referred first to a preliminary objection taken by the respondents, that no appeal lay. By sec. 4 of the statute, he said, Part XV. of the Municipal Act, R.S.O. 1914 ch. 192, was made applicable to the exercise by the corporation of the powers conferred by the statute. Part XV. gave power to expropriate lands required for municipal purposes, and it provided (sec. 325 (2)) that the compensation, if not agreed upon, should be determined by arbitration. The provisions as to arbitration, however, are found in Part XVI. of the Municipal Act; and the arbitration and award in this case were based upon the assumption that the provisions of Part XVI. applied. The right to appeal from the award being found in Part XVI., which is not in terms made applicable, it was contended that there was no right to appeal. The learned Judge did not agree with this contention. Part XV., giving the right to expropriate, being made to apply to the taking of lands under the Public Utilities Act, and providing for the determination by arbitration of the amount to be paid, the provisions of Part XVI., which are auxiliary to the provision giving the right to arbitrate, also apply, and the right to appeal, expressly conferred by Part XVI., exists.

Turning to the question raised by the appeal, the learned Judge said that the town corporation owned a factory building and land adjoining a stream flowing through the town. The factory had been operated by power taken from the head-race and a pond used for the storage of water retained to develope power further down the stream. In May, 1913, the corporation leased to Perram the factory building and premises for three years, with the right to take sufficient water to give 12 horse power, at an annual rental of $200.

For the purpose of establishing and operating a pumping station down stream, the corporation desired to acquire Perram's leasehold and water right; the necessary by-laws for effecting that purpose were passed; and the County Court Judge made an order giving the corporation immediate possession of the leased premises, about a year before the expiry of the lease. Possession was taken, and the arbitration to fix the compensation was had.

The majority of the arbitrators awarded Perram no damages and ordered him to pay the costs of all the proceedings—upon the theory that no profit was to be derived from Perram's business carried on in the factory, the making of yarn.

What the corporation were called upon to pay, the learned Judge said, was the value of that which they had expropriated, and they could not set off against that value the probable loss to Perram by his continuing in business, nor could Perram claim from the corporation the profits he might make if he continued in business—the expropriation of the factory did not necessarily involve his discontinuing his business.

Upon the evidence, Perram should be allowed the value of the 12 horse power to which he was entitled for one year and of the use and occupation of the factory, and a reasonable sum for the expense of removing his business to some other premises. Deducting from this the rent for a year, $200, his compensation should be fixed at $300. From this should also be deducted $100 due by him for rent at the time of expropriation, leaving him an award of $200; he should also have the costs of the arbitration and appeal, no compensation having been offered him by the corporation.

MIDDLETON, J., IN CHAMBERS. APRIL 15TH, 1916.

*ATTORNEY-GENERAL FOR ONTARIO v. CADWELL SAND AND GRAVEL CO. LIMITED.

Parties—Action by Provincial Attorney-General against Contractor Employed by Dominion Government—Removal of Sand and Gravel from Bed of Navigable Waters—Rights of Province and Dominion—Addition of Attorney-General for Dominion as Defendant—Rule 134.

Motion by the defendant company to add the Attorney-General for the Dominion of Canada as a party defendant.

A. W. Langmuir, for the defendant company.
Harcourt Ferguson, for the plaintiff.

MIDDLETON, J., in a written opinion, said that the plaintiff sued to recover a large sum of money, the value of sand and gravel removed by the defendant company from the beds of the St. Clair river and Lake Erie, the title to which, he alleged, was in the Province. The defendant company was a contractor employed by the Dominion Government, and the dredging of the river and lake was, it was said, for the purpose of constructing a steamboat channel for the use of vessels navigating the Great Lakes.

The Attorney-General for Canada desired to be added as a party.

The learned Judge was of opinion that the case came within the spirit and letter of Rule 134, and that the representative of the Dominion should be added, to defend that which had been done through its contractor.

Order made as asked; costs in the cause, subject to any disposition that may be made by the trial Judge.

MIDDLETON, J. APRIL 15TH, 1916.

RE TURNER.

Will—Construction—Bequest to Trustee of whole Estate for Sole Use and Benefit of Daughter for Life—Gift over of Trust Funds "Remaining Unappropriated"—Receipt of whole Estate by Daughter—Discharge of Trustee—"Appropriation"—Absolute Gift.

Motion by Robert Edward Sheppard for an order determining

a question arising with regard to the construction of the will of John Turner, who died in 1892.

The will was made in 1878, and by it he gave his personal estate to his executor, to be converted into money and held "in trust for the sole use benefit and behoof of my dear daughter Elizabeth Ann Sheppard . . . and to be at her sole disposal both as to principal and interest during the term of her natural life . . . and that her sole receipts . . . shall be . . . good and sufficient discharges to my said trustee . . ." This was followed by the provision that if, upon the death of the daughter, leaving children, "all or any of the aforesaid trust funds remain unappropriated by her," it should be divided equally between the children.

The daughter received the whole estate, amounting to about $5,000, many years ago; the executor died in 1900; the daughter lived until 1916, when she died, leaving an estate of upwards of $6,000, which by her will she left to her daughter Effie Amelia Davey.

Elizabeth Ann Sheppard left surviving her another child, Robert Edward Sheppard, who claimed half of what his mother left.

The motion was heard in the Weekly Court at Toronto.

A. E. Watts, K.C., for Robert Edward Sheppard.

J. Harley, K.C., for Effie Amelia Davey.

J. R. Layton, for the executors of Elizabeth Ann Sheppard.

MIDDLETON, J., in a written opinion, referred to In re Walker, [1898] 1 I.R. 5, and Re Johnson (1912), 27 O.L.R. 472; and said that he had come to the conclusion that there was an absolute gift to the daughter—bearing in mind that she had taken over the whole property and discharged the trustee. The property was to be held by the trustee for the sole use of the daughter. She had the right to demand and receive it from the trustee as and when she pleased, for it was to be at her sole disposal, both as to principal and interest during her life, and her receipt was to operate as a sufficient discharge of the trustee. The children would be entitled only to any portion of the trust fund unappropriated by her, remaining at her death. When she demanded and received the trust fund, she appropriated it, so that nothing remained as a trust fund at the time of her decease.

As the entire estate of the testator had been disposed of, there was no fund out of which costs could be paid, and justice would be best served by leaving the parties to bear their own.

SUTHERLAND, J. APRIL 15TH, 1916.

BANK OF OTTAWA v. MARTIN.

Husband and Wife—Promissory Note Signed by Wife at Request of Husband—Absence of Independent Advice—Failure to Shew Misrepresentation or Misconduct or Pressure or Undue Influence—Mortgage—Validity.

Action on a promissory note for $2,000 made by the defendants Charles Martin and M. E. Martin, his wife, payable to the order of the defendant R., and endorsed by the latter to the plaintiffs, in renewal of a previous note which they had discounted.

The defendants Charles Martin and R. did not appear, and judgment was entered against them.

The defendant M. E. Martin set up the defence that the original note and renewals were signed by her without independent advice and acting under the undue influence and pressure of her husband and of the plaintiffs.

The action as against the defendant M. E. Martin was tried without a jury at Toronto.

A. C. Heighington, for the plaintiffs.

Gordon Waldron, for the defendant M. E. Martin.

SUTHERLAND, J., read a judgment in which he reviewed the evidence and stated his conclusion that there was no misrepresentation or misconduct on the part of the plaintiffs and no undue influence or pressure on the part of the husband to induce the wife either to sign the notes or execute a certain mortgage which she made in favour of the plaintiffs. She fully understood, in each case, what she was doing, and the legal consequences. In these circumstances, the defence of lack of independent advice could not avail her: Howes v. Bishop, [1909] 2 K.B. 390.; Chaplin & Co. Limited v. Brammall, [1908] 1 K.B. 233; Bank of Montreal v. Stuart, [1911] A.C. 120; Euclid Avenue Trust Co. v. Hohs (1911), 23 O.L.R. 377, 24 O.L.R. 447; T. J. Medland Limited v. Cowan (1916), ante 4.

Judgment for the plaintiff against the defendant M. E. Martin for the amount of the note, with the declaration that the mortgage referred to is a valid and subsisting security, and with costs.

TAYLOR v. MORIN—FALCONBRIDGE, C.J.K.B.—APRIL 10.

Partnership — Agreement — Fraud — Findings of Fact of Trial Judge.]—Action for a partnership account, tried without a jury at Sudbury. The learned Chief Justice read a judgment in which he said that the plaintiff and defendant were associated from the early part of 1913 in the pool-room business in Sudbury, under an agreement which, the plaintiff said, was reduced to writing (exhibit 2), but which was never signed, owing, the plaintiff said, to the procrastination of the defendant. On the 17th July, 1914, the plaintiff and defendant executed, under seal, an agreement (exhibit 3) whereby an entirely different arrangement was made between the parties, not at all unfavourable to the plaintiff, inasmuch as his faithful service for two years was substituted for a payment of money to acquire an interest in the business. The plaintiff charged that the execution of the last-named agreement was induced by the fraud of the defendant in leading the plaintiff to believe that it was the unsigned agreement first-mentioned. The plaintiff had utterly failed to establish any such case. The Chief Justice also found as a fact that the defendant had given the plaintiff a proposition in writing setting forth all the terms of the second agreement except a line or two omitted at the plaintiff's request. These findings disposed of the whole case. The plaintiff "quit" before the time stipulated, and had no further claim. Action dismissed with costs. J. H. Clary, for the plaintiff. G. J. Valin, for the defendant.

CHAPMAN v. BRADFORD—FALCONBRIDGE, C.J.K.B.—APRIL 13.

Executors—Claim against Estate of Deceased Person—Evidence.]—Action for a declaration that the plaintiff was entitled to a conveyance in fee simple of a farm owned by his deceased father, or for damages or payment out of his father's estate of a sum of money. The learned Chief Justice dismissed the action without costs, saying that the plaintiff had failed, both on the facts and the law, to make out his case. Whenever there was a conflict of testimony, the finding was in favour of the defendants. L.F. Heyd, K.C., and C. W. Plaxton, for the plaintiff. B. N. Davis, for the defendants the executors and residuary legatees. D. Inglis Grant, for the defendants the adult remaindermen. E. C. Cattanach, for the Official Guardian, representing the infant defendants.

SHEPPARD v. DAVIDOVITCH—MIDDLETON, J.—APRIL 15.

Mechanics' Liens—Proof of Lien Made in Action of another Lien-holder—Independent Action afterwards Brought—Claim against an Additional Parcel of Land—Building Partly on two Parcels—Validity of Lien—Multiplicity of Actions—Consolidation—Statement of Claim—Service—Extension of Time.]—Motions by the defendants William and Letitia Hearn and the defendant Joseph Broderson for orders striking out the plaintiff's claim or dismissing the action, on the ground that it was frivolous and vexatious and against the policy of the Court to prevent multiplicity of suits. The action was brought to enforce a mechanic's lien; there was another action pending brought by one Rogers, to enforce his lien; and there were other liens. The building in respect of work upon which the liens were claimed was chiefly upon lot 4, but extended into lot 5. The action brought by Rogers related to lot 4 alone. The plaintiff in this action (Sheppard) proved his lien in the Rogers action; he proved it, as it was registered, against both lots, and it was so allowed. But a contention arose in the Rogers case as to the effect upon the lien when it is registered against part only of the land upon which the building stands. To be clear of this controversy, Sheppard proceeded independently to enforce his claim by this action. The motions were heard in the Weekly Court at Toronto. The learned Judge said that he could see nothing in the defendants' contention, and he thought that Sheppard should be allowed to proceed to enforce his lien as he proposed. An order for consolidation of the actions could not be made, as the parties were not all before the Court upon this motion. An order should be made extending the time for service of the statement of claim. The costs of the motions should be paid by the applicants to Sheppard in any event of the proceedings. H. Howitt, for the Hearn defendants. J. Finberg, for the defendant Broderson. G. C. Campbell, for the plaintiff.

CORRECTION.

In RE REX EX REL. STEPHENSON v. HUNT, ante 105, the County Court Judge referred to was the Judge of the County Court of the County of Middlesex, not of York.