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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*RE CHERNIAK AND COUNCIL OF COLLEGE OF PHYSICIANS AND SURGEONS FOR ONTARIO.

Physician—"Infamous or Disgraceful Conduct in a Professional Respect"—Ontario Medical Act, R.S.O. 1914 ch. 161, sec. 31 (1)—Conviction for Offence against Ontario Temperance Act—Evidence—Penatly—Removal of Name from Register—Suspension—Sec. 32a. of Act (9 Geo. V. ch. 25, sec. 21).

Appeal by Cherniak from an order or resolution of the council of the 7th July, 1919, directing that the name of the appellant be stricken from the register of the college for infamous or disgraceful conduct in a professional respect.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

F. D. Davis, for the appellant.

H. W. Shapley, for the college council, respondents.

MACLAREN, J.A., in a written judgment, said the resolution of the council was: "That the report of the Discipline Committee be adopted and that, upon the facts ascertained and appearing in the said report and the evidence therein referred to, the said Dr. Cherniak be found guilty of infamous or disgraceful conduct in a professional respect; and that the name of the said Dr. Cherniak be and the same is hereby erased from the register; and that the Registrar be hereby ordered to erase the said name from the register accordingly."

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

The appellant was convicted by a Police Magistrate of a violation of sec. 51 of the Ontario Temperance Act, "by unlawfully giving and administering intoxicating liquor to a person not in need of liquor and when the use of such liquor was unnecessary and otherwise in contravention of the Ontario Temperance Act."

The appellant admitted the conviction and told the Discipline Committee what the evidence before the magistrate was.

Section 31(1) of the Ontario Medical Act, R.S.O. 1914 ch. 161, provides: "Where any registered medical practitioner has . . . been convicted . . . of an offence which, if committed in Canada, would be an indictable offence, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register."

The offence of which the appellant was convicted was not an indictable offence.

The notice given to him was, that the Discipline Committee of the Medical Council was to make inquiry whether he had been guilty of infamous or disgraceful conduct in a professional respect, in connection with the subject-matter of his conviction by the magistrate.

The conviction had to be proved as a fact, it being the foundation for the investigation by the Discipline Committee and the council; and it was proved by the admissions of the appellant.

It was then the duty of the committee to investigate and of the council to decide, upon the evidence, whether the conduct of the appellant, as thus established, was "infamous or disgraceful conduct in a professional respect."

Reference to Allinson v. General Council of Medical Education and Registration, [1894] 1 Q.B. 750, at p. 763.

The Legislature chose as the deciding body the council, whose members were best fitted to decide questions of professional ethics. This Court should give to their unanimous decision at least as much weight as would be given to the verdict of a jury on a question of fact.

The penalty imposed, the erasure of the name of the appellant from the register, was the only one that could be imposed under the statute in force at the time of the commission of the offence. Under sec. 32 of the Act, the council may at any time direct the Registrar to restore the name of the appellant to the register.

The appeal should be dismissed.

MEREDITH, C.J.O., agreed that the appeal should be dismissed. He read a short judgment, in which he said, among other things:—

"Physicians are entrusted by the Legislature with the privilege of prescribing liquor, under certain conditions, for their patients;

and for a physician to abuse that privilege by supplying liquor to be drunk as a beverage is, in my opinion, to be guilty of infamous or disgraceful conduct in a professional respect, within the meaning of sec. 31(1) of the Ontario Medical Act."

HODGINS, J.A., also agreed, for reasons stated in writing, that the appeal should be dismissed. He referred to the Allison case, supra, and also to Re Washington (1893), 23 O.R. 299, 311; Re Crichton (1906), 13 O.L.R. 271.

He regretted that the council did not act upon the powers conferred upon them at the last session of the Legislature and suspend the appellant, instead of erasing his name from the register: 9 Geo. V. ch. 25, sec. 21, adding sec. 32*a*. to the Ontario Medical Act.

MAGEE and FERGUSON, JJ.A., dissented, for reasons stated in writing by the latter.

Appeal dismissed (MAGEE *and* FERGUSON, JJ.A., *dissenting*).

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

McCORMACK v. CARMAN.

Company—Foreign Corporation—Shares—Action by Shareholder to Set aside Transfer of Shares to Another—Purchase—Failure to Disclose Option—Consideration—Fraud—Finding of Fact of Trial Judge—Reversal on Appeal—Dissolution of Corporation by Decree of Foreign Court—Assets of Corporation and Trustees thereof in Ontario—Right of Shareholder to Have Assets Administered in Ontario.

Appeal by the defendants from the judgment of LOGIE, J., at the trial, on the 26th March, 1919, declaring that 694,900 shares of the Ontario Petroleum Company had been wrongfully issued to the defendant F. J. Carman, directing that they be re-transferred to the company, and directing payment by the defendants F. J. Carman and Elma Carman of dividends thereon received by them, amounting to $50,258.40, with c . Other relief was also granted by the judgment.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. N. Tilley, K.C., and A. Weir, for the appellants.

Hamilton Cassels, K.C., and R. S. Cassels, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that this was a class action brought by the plaintiff, on behalf of himself and all other shareholders in the Ontario Petroleum Company, a Dakota corporation, organised by the defendants to take over from them oil land in the township of Mosa, in Ontario, and to develope the same. The claim of the plaintiff was to set aside the defendant F. J. Carman's purchase, and was based on the failure to disclose Carman's option and on the allegation that Carman gave no consideration. The learned trial Judge concluded that, when Carman incorporated the company, he conceived and then had a present intention of defrauding the future shareholders; but the learned Justice of Appeal did not agree that that was the proper inference from the facts. He was of opinion, upon consideration of all the evidence, that the transfer by Carman to the company of 750,000 shares and the option must be treated as one transaction, entered into honestly and in good faith on the 1st November, 1916; that Carman did exercise that option on the 5th March, 1917, and in doing so did assume substantial obligations which he had honestly and faithfully performed; that the defendants had not been guilty of fraud in the taking, exercising, or performance of the option or agreement; and that the purchase should stand.

Before this action was commenced, the Ontario Petroleum Company was, by order of the Court in South Dakota, dissolved and its property vested in the individual defendants for the benefit of the shareholders and creditors of the dissolved corporation. The learned trial Judge declared that the order of dissolution was obtained by fraud; he did not set it aside, but appointed a new trustee and receiver. The defendants said that, at the time the Ontario Petroleum Company (Dakota) was organised, it had no license to do business in Ontario, and consequently the conveyances to that company could not be recorded; that they had obtained an Ontario charter with the object of vesting the properties in the Ontario company; and that the dissolution in Dakota was not for a fraudulent purpose, but was merely a preliminary to making a transfer of the assets to the Ontario company. Counsel for the respondent, however, agreed that, for the purposes of this appeal, the Court should consider the Dakota company as dissolved; and, in view of that agreement, it was unnecessary to deal with the issue.

The appeal should be allowed with costs and the action should be dismissed without costs.

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

HODGINS, J.A., also read a judgment. He was of opinion that the Dakota decree dissolving the corporation entirely disabled

the plaintiff from prosecuting this action in its present form: Coxon v. Gorst, [1891] 2 Ch. 73. But the assets were in this Province, and so were the trustees in whom they were vested; and, therefore, it was open for any creditor of or any one who held the status of shareholder in the defunct company to have the assets administered here: Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221; Ewing v. Orr Ewing (1883), 9 App. Cas. 34.

During the argument both counsel assented to the proposition that the company must now be treated as non-existent owing to the Dakota decree of dissolution. That disposed of the present case, though it did not prevent recourse being had to what was practically administration.

The learned Justice of Appeal, however, agreed with the result on the facts to which the other members of the Court had come, and that the appeal should be allowed with costs and the action dismissed without costs.

MEREDITH, C.J.O., agreed with the views of both HODGINS, J.A., and FERGUSON, J.A.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*GETTY & SCOTT LIMITED v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Goods—Conversion—Negligence—Terms of Shipping Order—Damages—Interest—Costs—Mercantile Law Amendment Act, sec. 7(1)—Railway Act of Canada, sec. 345—Judicature Act, sec. 35(3).

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of MASTEN, J., at the trial, of the 15th April, 1919, in favour of the plaintiffs for the recovery of $1,477.39 in an action for the conversion of certain goods which the plaintiffs had bought from one J. A. Scott, of Quebec, and which were shipped by the defendants' railway.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

M. A. Secord, K.C., for the plaintiffs.

W. N. Tilley, K.C., and J. D. Spence, for the defendants.

HODGINS, J.A., reading the judgment of the Court, said that the learned trial Judge had held that the defendants were negligent, and had fixed the damages at 16½ cents per square foot of the goods (leather), holding that the plaintiffs were bound by the shipping order, which made the value of the goods, at the place and time of shipment, the limit of the carriers' responsibility. The sole right of the plaintiffs to the goods was by virtue of the shipping order, because they were then actively repudiating liability to the vendor for the price, and they had no independent contract with the defendants to deliver at all hazards. The goods were, at the time, by sec. 345 of the Railway Act, at the owner's risk; and, unless the plaintiffs could rely upon the shipping order, they must fail altogether. The view of the trial Judge that the parties were bound by the agreement set out in the shipping order was right. The defendants were still carriers, or their liability must be judged as if they were, because the resumption of the carriage, under its original terms, was within the contemplation of both parties.

Reference to Swale v. Canadian Pacific R. W. Co. (1913), 29 O.L.R. 634.

The right of action of the plaintiffs appeared to be governed by sec. 7(1) of the Mercantile Law Amendment Act, R.S.O. 1914 ch. 133.

The learned Judge said that he could find no authority for the proposition that where, innocently though negligently, a carrier has converted goods, damages must be limited to the price which he received at the sale, except in some cases where the person entitled to the damages was himself bound to sell.

Here there was no wanton conversion, but an honest effort to prevent the sale, and nothing defeated it but some unexplained congestion in the defendants' Montreal departments.

The appeal of the defendants should be dismissed.

It appeared that at the trial amendments had been permitted, including a plea bringing into Court $1,136.54, proceeds of the sale of the goods, in full satisfaction. As the amount found due was larger than that, no change could be made in the disposition of the costs.

The plaintiffs asked the appellate Court to allow interest, from the date of the writ of summons, instead of from that of the judgment. Section 35(3) of the Judicature Act leaves the giving of interest by way of damages in actions for conversion to the jury, and the jury's discretion will not be interfered with: Mayne on Damages, 7th ed., pp. 177, 178. The same rule should be applied to the decision of a Judge, especially where, as here, the defendants acted in perfect good faith.

Both appeals dismissed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*McLAUGHLIN v. GENTLES.

Principal and Agent—Authority of Agent—Action against Undisclosed Principals—Limitation of Authority—Revocation—Knowledge of Person Giving Credit to Agent—General Agency.

Appeal by the defendants other than the defendant Chisholm from the judgment of LENNOX, J., at the trial, of the 18th June, 1919. The action was brought to recover the price of goods sold and delivered by the plaintiff. The trial Judge gave judgment for the plaintiff for $939.77 against all the defendants, and directed the appellants to pay Chisholm's costs of defence.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. J. Scott, K.C., for the appellant Drayton.

T. R. Ferguson, for the appellants Gentles, Burton, and Millar.

A. J. Russell Snow, K.C., for the plaintiff, respondent.

T. J. Agar, for the defendant Chisholm.

HODGINS, J.A., reading the judgment of the Court, said that it appeared that the plaintiff knew nothing of the fact that the defendant Chisholm was a member of a syndicate or was acting for others, when the goods were sold and delivered. He had now, however, elected to sue the syndicate, which of course included Chisholm.

The whole sum of $2,000 had been expended for goods supplied previously to the opening of the account with the plaintiff; and, if the appellants were now made liable, it must be upon the sole ground that the plaintiff was not bound by the limitation placed by the principals upon the agent.

If Chisholm was a general agent for the appellants, there would be no liability: Miles v. McIlwraith (1883), 8 App. Cas. 120.

Whether the authority of Chisholm was limited or not, the authority was to go upon the property to engage in operations which were in the nature of mining or exploration and to order such things as were reasonably necessary for that purpose. The limitation did not restrict his authority, so far as third persons were concerned, except that it was to cease when a certain amount had been expended. Up to that limit he was the agent of the appellants to do such acts as were necessary for the purpose for which he went upon the ground; and, so far as the goods in question were concerned, they would, apart from the limitation, have been equally necessary whether he was to take out such ore as was really

available in or near the surface of the vein, or was to go down deeper, or operate more largely, with the view of mining the property as if it was owned by his principals and himself.

The learned Judge said that the cases were not uniform, and that principals had been held liable where the agency was a general one.

After a review of the English and Ontario cases, he said that he thought it was open to this Court to follow Miles v. McIlwraith, supra, untrammelled by other decisions.

The appellants never heard of the plaintiff nor did he make any claim on them. The fund provided for expenses had all been paid out and appropriated to accounts earlier in date than that of the plaintiff, and properly so. No right against the appellants existed unless it could be based upon the fact of agency irrespective of limitation of authority or the course of dealing. To allow the plaintiff to recover against the appellants would be to ignore the limitations of his agency, the exhaustion of the fund provided, and the revocation of his authority, all of which happened in fact before the plaintiff supplied any of his goods.

That part of the plaintiff's claim which consisted of an assigned account presented no different features.

The appeal should be allowed, the judgment for the plaintiff set aside as against the appellants, and the actions dismissed with costs to the appellants.

The plaintiff should have judgment against Chisholm for the amount of his (the plaintiff's) claim and costs.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*DIME SAVINGS BANK v. MILLS.

Guaranty—Indebtedness of Company as Customer of Bank—Construction of Instrument—Limitation of Amount of Liability—Bank Allowing Increased Indebtedness or Liability—Agreement for "Addition thereto"—Interest—Liability of Guarantors.

Appeals by the defendants Mills and Howell respectively from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, of the 23rd April, 1919, in favour of the plaintiffs for the recovery of $3,520.25 and costs, and dismissing the defendants' counterclaims. The action was upon a guaranty.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

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

M. A. Secord, K.C., for the appellant Howell.

E. S. Wigle, K.C., for the plaintiffs, respondents.

HODGINS, J.A., in a written judgment, said that by the instrument executed by the defendants, they jointly and severally guaranteed the payment of any and all sums of money which might at any time be owing and payable by a certain company, when organised, to the plaintiff bank, not exceeding $6,000 at any one time, upon notes, acceptances, endorsements, overdrafts to be made by the company when organised, or upon any account whatsoever. "Acceptances of this guaranty, notice of default, renewal, or extension of time for payment of any part of said indebtedness, any release thereof, addition thereto, or change or other form of security, are hereby waived and agreed to. This . . . is a continuing guaranty, covering all indebtedness of said" company "when organised to said bank, not exceeding $6,000 at any one time, upon any account whatsoever, until revoked by notice given to said bank." The recitals preceding the operative part of the instrument were: (1) that the company "wishes and expects to borrow . . . divers sums of money from time to time, not to exceed $6,000 at any one time, upon notes, endorsements, acceptances, and any account whatever." (2) That the bank agreed to lend to the company "sums of money, from time to time as above stated, not exceeding $6,000 at any one time, upon notes, acceptances, endorsements, overdrafts, etc., made or endorsed or upon any account whatsoever, provided that the payment of the said loans be guaranteed by the undersigned."

The defendants contended that the guaranty, properly construed, prevented the bank from exceeding the limit of $6,000 at any one time.

It appeared that at odd times, from a Saturday to the following Monday, there was an unauthorised overdraft of something like $20, which was promptly covered on Monday. These trivial overdrafts not being authorised, the creditor (the bank) was not chargeable with having increased the amount of the company's liability by these amounts. They were involuntary, so far as the plaintiffs were concerned, and were promptly disavowed, being immediately covered by the debtor. See Davey v. Phelps (1841), 2 M. & G. 300.

The evidence further shewed that when the company sold motors, they brought in their customers' notes, endorsed by themselves, and either discounted or sold them to the bank, the company remaining liable as endorsers. These transactions, if

treated as loans to the company, caused the amount of the indebtedness to exceed $6,000 by about $2,500 at one time.

These transactions were strictly within the terms of the guaranty, which allowed borrowings to be "upon notes, acceptances, endorsements . . . or upon any account whatsoever." The contract of guaranty is strictissimi juris, and the defendants were entitled to insist upon a rigid adherence to the terms of their obligation.

But the instrument contained a provision which must have its ordinary meaning given to it—"renewal or extension of time for payment of any part of said indebtedness, any release thereof, *addition thereto* . . . are hereby waived and agreed to."

These discounts or sales of customers' notes were an addition to the indebtedness, and so were agreed to. They were all afterwards paid by the customers, and no practical harm had been done to the defendants.

The learned Judge said that he had so far discussed the matter as if the defendants were correct in their construction of the instrument. But, in his opinion, the instrument primarily contemplated direct advances to the company up to $6,000, to enable the company to begin operations and finance them. The limitation of $6,000 was intended as a protection to the bank, not a prohibition against advancing more than that amount.

The liability of the defendants as sureties was measured by the liability of the company, and interest should run from the time when its indebtedness became due to the company.

If the amount for which judgment had been entered was incorrect, the Registrar should ascertain the proper amount, and the judgment below should be amended accordingly.

Both appeals should be dismissed.

MEREDITH, C.J.O., and MAGEE, J.A., agreed with HODGINS, J.A.

MACLAREN, J.A., agreed in the result.

FERGUSON, J.A., also agreed in the result, for reasons stated in writing.

Appeals dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*MATHER v. BANK OF OTTAWA.

Guaranty—Directors of Company Guaranteeing Account with Bank—Construction of Guaranty-bond—Extent of Liability of Guarantors—Payments Made by Company—Evidence—Letters.

Appeals by the plaintiff and the defendants by counterclaim from the judgment of LATCHFORD, J., 15 O.W.N. 354.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

G. F. Henderson, K.C., for the appellants the plaintiff and George S. May, defendant by counterclaim.

A. W. Anglin, K.C., for the appellants the other defendants by counterclaim.

I. F. Hellmuth, K.C., and Wentworth Greene, for the Bank of Ottawa, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the controversy between the parties was as to whether the Bank of Ottawa was entitled to recover upon a guarantee-bond given to it by the appellants and others in respect of the indebtedness of a certain company to the bank—$96,631.10 and interest—or whether, as the appellants contended, their liability on the bond was at an end, and they were entitled to have it delivered up to be cancelled.

The contention of the bank was, that the extent of the liability of the guarantors was to be determined upon a consideration of the terms of the bond alone, and that, according to its true construction, they were liable for the ultimate balance owing by the company as a direct debt to the bank—the amount they might be called upon to pay being limited to $150,000.

The contention of the appellants was two-fold: first, that, according to the true construction of the bond, the guaranty was one for a part of the company's indebtedness ($150,000), and, that sum having been paid by themselves and the company, their liability was at an end; and, second, that the bond was executed in pursuance of an agreement entered into between the guarantors and the bank, the terms of which were evidenced by a letter of the 1st November, 1911, from Burn, the general manager of the bank, to Fraser, one of the guarantors (now deceased), and that the terms of the bond were controlled by this agreement, or, if not, that the appellants were entitled to have the bond reformed so as to conform with the terms of the agreement.

The learned Chief Justice, after a review and discussion of the evidence, said that his conclusion was, that the guarantors were liable for the whole of the direct indebtedness of the company, but were not to be called on for more than $150,000 in all.

If it were assumed that the guaranty was applicable only to $150,000 of the indebtedness, it by no means followed that the payment of that sum by the company on account of its indebtedness—it still remaining indebted in more than that sum—discharged the guarantors. Ellis v. Emmanuel (1876), 1 Ex. D. 157, does not support the view that, in the case of such a guaranty, where it is a continuing one, the surety's liability is discharged pro tanto by payments made by the principal debtor on account of his indebtedness.

So long as any indebtedness exists, the surety is liable to make good any part of it, not exceeding the amount which he has guaranteed.

The appeal should be dismissed.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS and FERGUSON, JJ.A., agreed in the result, for reaons stated by each of them in writing.

Appeals dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

FOSTER v. OAKES.

Principal and Agent—Sale by Agent of Syndicate of Block of Shares in Mining Company—Agent himself Becoming Purchaser of Portion of Shares—Knowledge of Members of Syndicate—Ratification—Evidence—Onus—Bona Fides—Disclosure—Deceit—Misrepresentations—Election—Account—Liability for Shares Lost by Agent—Trusts and Trustees—Judgment—Declaration—Costs—Counterclaim—Appeal.

Appeal by the plaintiff from the judgment of KELLY, J., 12 O.W.N. 76, dismissing the action and awarding the defendants the relief asked by their counterclaim.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., and S. J. Birnbaum, for the appellants.

R. McKay, K.C., and J. Y. Murdoch, for the defendants, respondents.

FERGUSON, J. A., reading the judgment of the Court, said that it was conceded on the argument that the appeal from the part of the judgment which dismissed the action must be dismissed. The argument was therefore restricted to the counterclaim. The defendants by their counterclaim alleged that the plaintiff, acting as agent for a syndicate of which they were members, sold 85,556 shares of the capital stock of the (Canadian) Tough Oakes Gold Mines Limited to the Kirkland Lake company for 10 shillings per share, or $207,986.65, and that be received that sum for the syndicate, but by misrepresentation led the syndicate to believe that he had sold to the Kirkland Lake company 95,556 shares at $2 per share, or $191,112, and accounted for the smaller sum only, whereas he should have paid over the greater amount and should have returned the extra 10,000 shares as unsold; and that, therefore, he had, at the time of the trial, in his hands and unaccounted for, $16,786.65 in money and 10,000 shares, the property of the syndicate; and that the defendant Oakes, as owner of 8 1-3 per cent. of the syndicate shares, and the defendant Robins, as owner of 5 per cent., were entitled to those proportions of the money and shares so held by Foster and not accounted for.

Foster's contentions that, before making the purchase, he disclosed to the defendants the fact that he intended to be a purchaser, and that they agreed to his purchasing 95,556 shares at $2 per share, or that they subsequently, with full knowledge of the facts, ratified, adopted, or confirmed such a purchase, were not supported by the evidence. But, even assuming as correct Foster's statement that the defendants agreed or intended that Foster should himself be a purchaser, and that he did purchase, the same result must be arrived at. He set up and sought to maintain against his principals a purchase by himself of property which his principals had entrusted to him for sale. In such circumstances, the burden was on him to prove that the transaction was entered into in good faith, after full and fair disclosure of all material circumstances and of everything known to him respecting the subject-matter of the contract, which would be likely to influence the conduct of his principals, and particularly that he himself was the purchaser or interested in the purchase; and, if there had not been such disclosure, or if there had been any underhand dealing or deceit, such a transaction could not stand: McPherson v. Watt (1877), 3 App. Cas. 254, 266; Dunne v. English (1874), L.R. 18 Eq. 524, 534; Bowstead on Agency, 6th ed., p. 134; Seton on Decrees, 4th ed., pp. 790, 1360.

It was, upon the evidence and findings, clear that Foster did not make the required disclosures, either before or after the alleged purchase; from which it followed that the defendants, if they so elected, were entitled to have the purchase of such of the shares as

belonged to them set aside, and to obtain from Foster an accounting in respect of his dealings therewith.

The defendats were entitled to affirm Foster's alleged purchase, or to disaffirm it and have an accounting from him.

The trial Judge found that Foster was liable to pay to the defendants the value of such of the Kirkland Lake shares as came to Foster's hands as the result of his dealings with the Tough Oakes shares. The evidence on this issue was so fragmentary and unsatisfactory that the trial Judge was quite justified in refusing to accept it as sufficient to relieve Foster from liability. On the other hand, the Court should not deprive Foster of the opportunity to adduce further evidence in support of his contention that those shares were lost without neglect on his part and in circumstances entitling him to be relieved from further liability in respect thereof.

The judgment appealed from should be varied by striking out the paragraphs dealing with the defendants' Tough Oakes shares, and substituting a declaration that, in case the defendants should now elect to affirm the purchase set up by Foster, Foster is, as between him and the defendants, the owner of the shares, and has paid the full purchase-price thereof; or, in case the defendants should elect to disaffirm Foster's purchase, declaring Foster a trustee for them, directing that he account as a trustee, and directing a reference to the Master to take the accounts and report specially as to certain matters such as profits, damages, market-value of the shares, etc.

The judgment should also be varied by striking out the paragraphs dealing with the rights of the parties as to the 25,000 Kirkland Lake shares, and substituting therefor declarations that Foster received part of these shares as trustee for the plaintiffs, and directing an account and a reference, etc.

Further directions and costs of the reference should be reserved.

The plaintiff (Foster) should pay the costs of the counterclaim down to and including the trial.

The appeal from the judgment dismissing the action should be dismissed with costs.

There should be no costs to either party of the appeal from the part of the judgment which dealt with the counterclaim.

Judgment below varied.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*SMITH v. RAE.

Physician and Surgeon—Undertaking to Attend Woman in Childbirth—Contract Made with Woman's Husband—Failure of Accoucheur to Attend—Death of Child—Sufferjng of Woman—Action by her against Accoucheur—Findings of Jury—Perversity—Evidence—Action not Brought under Fatal Accidents Act—Damages—Appeal—Dismissal of Action.

Appeal by the defendant from the judgment of DENTON, Junior Judge of the County Court of the County of York, upon the findings of a jury, in favour of the plaintiff, for the recovery of $500 damages with costs, in an action for negligence of the defendant, an accoucheur, in failing to attend the plaintiff in childbirth, as, the plaintiff alleged, the defendant had agreed to do, whereby the plaintiff lost her child.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

Gideon Grant, for the appellant.

C. Carrick, for the plaintiff, respondent.

MIDDLETON, J., reading the judgment of the Court, said that the action was brought by a married woman against a practising physician and surgeon. The plaintiff expected to be confined, and she and her husband called upon the defendant, who undertook and agreed to attend her. The contract was made with the plaintiff's husband. The confinement, which was expected to be about the middle of November, did not take place until the 2nd December, 1918. The defendant did not attend the plaintiff, and the child died during delivery. The action was for the defendant's alleged breach of duty in failing to attend at the time of the confinement.

The rule that actions of this kind should be tried by a Judge without a jury was amply justified by the event of this case, for it was plain that the jury had either failed to apprehend the question for trial or had acted from some improper motive.

The child was born when a nurse was in attendance, but no professional accoucheur. The child died soon after birth. The plaintiff made a normal recovery, and had suffered no ill effects. The claim of the plaintiff was based upon the death of the child and upon the suggestion that the plaintiff endured physical suffering from which she might have been spared had the defendant been present at the time of her delivery and administered an anæsthetic.

Several questions were submitted to the jury, most of which were not now of importance. Questions 6, 7, and 8 and the answers thereto were as follows:—

6. Was the defendant notified early enough on the 2nd December to permit his attending in time to render the plaintiff effective professional aid? A. Yes.

7. Did the notice which the defendant received justify him in believing that he would be in time if he reached the plaintiff at 8.30 p.m. A. No.

8. Was the defendant negligent in not attending? A. Yes.

There was no evidence which justified the answer to question 7.

The plaintiff was wrong in her contention that when a professional man undertakes to attend a case of this description he thereby undertakes to drop all other matters in hand to attend the patient instanter, upon receiving a notification. He must, having regard to all the circumstances, act reasonably. The first message received did not indicate any urgency. It was a request for him to call some time during the evening, and the message received from the husband did not then indicate any extreme urgency. The defendant had other patients who had some claim upon his time and attention. In view of the information he had, it could not possibly be said that he acted negligently or unreasonably.

The contract was with the husband—the action was by the wife. She could not sue on the contract, and her claim must be based upon tort. Had there been actual misfeasance in anything done to the plaintiff, she could recover for the tort—but an action for damages for failure to attend must be based on a breach of contract to attend.

The assessment of so large a sum as $500 for damages indicated that the jury failed to understand the matter before them, or else acted perversely. There was no evidence to shew that the plaintiff suffered any greater pain by reason of the failure of the defendant to attend. Obviously no action would lie concerning the death of the child, for that was not shewn to have been occasioned by the defendant's non-attendance.

Further, the action was not brought under the Fatal Accidents Act.

The verdict and judgment should be set aside and the action should be dismissed.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*ADAMS v. KEERS.

Mortgage—Action for Foreclosure—Redemption by Execution Creditor of one of three Owners of Equity of Redemption—Rights of Co-owners—Redemption of Plaintiff's Mortgage—Ascertainment of Respective Interests—Apportionment—Effect of Redemption—Consent to Sale—Costs.

Appeal by the defendant Ferguson from the order of MASTEN, J., 46 O.L.R. 113, 16 O.W.N. 347.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

J. W. Payne, for the appllant and the defendant Keers.

H. A. Harrison, for the defendants the Toronto Railway Company.

J. R. Roaf, for the defendant Gray.

MIDDLETON, J., in a written judgment, said that the defendants Ferguson, Keers, and Gray were in equity entitled to the land in the proportion of 40, 35, and 25 per cent. respectively. It was said that advances had been made by one or more of the owners for the common benefit in excess of his or their due proportion. On an account being taken, the amount of such excess would be a charge on the interest of those in default. In the hands of Adams the mortgage could not be divided. There was one mortgage and one equity of redemption. Any one of the owners might redeem, but on redemption he must pay the entire debt. After redemption by any one of the co-owners, the mortgage could not be set up by him as against his co-owners. He could set up against them only the amounts of their respective shares, and he would be entitled to tack to such share of the mortgage any balance due to him by such owner on the accounting with respect to advances, and would be bound to give credit for any balance due by him.

Any person having a charge upon the share of one co-owner would undoubtedly have the right to redeem the whole mortgage in the plaintiff's hands; but, after redemption, the incumbrancer would have no greater right than the owner of the share upon which he held the charge. None of the original owners could by making a charge upon his share interfere with the rights of his co-owners or impose any added burden upon them.

The order of Masten, J., should be varied in accordance with the views expressed and the consent now given to a sale taking place;

and there should be no costs of the appeal to Masten, J., nor of this appeal, as no one of the parties was entirely right in his contention.

MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., agreed with MIDDLETON, J.

HODGINS, J.A., read a dissenting judgment. He was of opinion that the appeal should be allowed and the order of Masten, J., set aside.

Order below varied (HODGINS, J.A., *dissenting*).

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

REX v. LOFTUS.

Criminal Law—Theft—Solicitor—Money Entrusted to, for Investment—Improper Security Taken in Solicitor's own Name—Evidence not Warranting Conviction for Stealing—Stated Case—Statement of Trial Judge, whether properly before Appellate Court.

Case stated by one of the Judges of the County Court of the County of York upon the trial and conviction of the defendant in the County Court Judge's Criminal Court upon a charge of stealing $800, the property of one Elsie McGinn.

The question stated for the opinion of the Court was, whether there was any evidence upon which the defendant could properly be convicted.

The case was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., MIDDLETON, J., and FERGUSON, JJ.A.

J. G. O'Donoghue, for the defendant.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.O., reading the judgment of the Court, said that the defendant was a practising solicitor, and the money which he was alleged to have stolen was, according to the testimony of the prosecutrix, entrusted to him by her to be invested. According to the testimony of the defendant, the money was lent to him on the understanding that he was going to invest it and that the investment would yield interest at the rate of at least 7 per cent. per annum, and that he was in the meantime to pay the interest on a mortgage upon a house owned by the prosecutrix.

The defendant testified that the money of the prosecutrix, with other moneys of his own, was lent to a builder named Thomas, on the security of some houses he was building, and that they were deeded to the defendant to secure the loan. It was also testified by the defendant, but denied by the prosecutrix, that she was told that her money was lent in that way.

The County Court Judge found that the money was entrusted to the defendant for investment, and was of opinion that it was the defendant's duty to invest in securities, whereas the securities taken by the defendant were not securities at all, within the meaning of the authorisation of the prosecutrix; and, consequently, that the defendant appropriated the money to his own use, and was, therefore, guilty of the theft charged.

If the statement of the County Court Judge could be looked at, it shewed that he erred in convicting the defendant, because his investing the money in improper securities could not properly be held to be an appropriation to his own use, and still less the theft of the money.

Counsel for the Crown contended that this statement was not part of the case and could not be looked at; but the learned Chief Justice did not see why, when it was sent up with the evidence, it might not be looked at. If necessary, the case should go back to the County Court Judge to be amended so as to shew what his finding of fact as to this was.

But, even excluding this statement, the conviction could not be sustained. The uncontradicted evidence was, that the money of the prosecutrix was lent to Thomas, as the defendant testified, on the security which he said he took. The fact that such an investment was an improper one, and the further fact that the security was taken in the defendant's own name, did not warrant a finding that the money was stolen by the defendant, however improper his conduct was in so dealing with money entrusted to him for investment, as, according to the testimony of the prosecutrix and the finding of the County Court Judge, it was.

The question submitted should be answered in the negative.

Conviction quashed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

CONTINENTAL COSTUME CO. v. APPLETON & CO.

Sale of Goods—Contract—Sale to Retailer by Traveller from Wholesale House—Term of Sale—Liberty to Return Goods Unsold—Oral Evidence to Establish Term—Contradiction by Document and Conduct of Parties—Extension of Time for Payment—New Bargain Free from Term.

Appeals by the plaintiffs from the judgment of the County Court of the County of York dismissing the action, which was brought to recover $240.95, a balance alleged to be due to the plaintiffs upon a bill of goods purchased by the defendants from the plaintiffs.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

A. C. McMaster, for the appellants.

M. A. Secord, K.C., for the defendants, respondents.

MACLAREN, J. A., read a judgment in which he said that the dispute between the parties was in regard to the terms of the sale made on the 8th October, 1918, at the defendants' store in Galt by the plaintiffs' traveller, Carson. The defendants (husband and wife) and their assistant all professed to give verbatim the words used by Carson in telling them that they might return any coats that they did not want or could not sell; but all three, in their conflicting versions, differed from each other even more widely than is usual with witnesses whose testimony one can safely rely upon. The trial Judge, with hesitation, dismissed the action, notwithstanding a very vigorous denial by Carson that he had ever used language to that effect. The trial Judge either overlooked or did not attach sufficient weight to the written evidence coming from the defendants as to the conduct of the parties.

Carson had taken the goods with him to Galt, and the defendants made their selection from them. He sent a list of the goods sold and the prices to the plaintiffs in Toronto, and the plaintiffs at once sent the defendants an invoice, having on its face, in bold letters: "Terms net cash, 10 days; Nov. 1." The defendant Appleton said that he did not discuss terms with Carson, but that the above were the usual terms. The plaintiffs drew upon the defendants on the 1st November and again on the 15th November, but the drafts were not honoured. The plaintiffs wrote to the defendants for payment, and on the 15th December Appleton called at the plaintiffs' office in Toronto and

explained to the manager that sales were bad on account of the prevailing influenza, and proposed paying by instalments. It was finally agreed that he should pay half on the 1st January, 1919, and half on the 1st February. He did not allude to his having made any arrangement with Carson.

Early in January the defendants sent the plaintiffs $379, being half the amount due, with interest. On the 22nd January the plaintiffs received by express from the defendants two boxes containing 12 of the coats sold to the defendants by Carson. Later the plaintiffs received a letter from the defendants which said that they were taking the liberty of returning the 12 coats and asking the plaintiffs to dispose of them "for us"—"Please take this matter up with Mr. Carson and have him place the coats for us." The defendants subsequently wrote another letter much to the same effect.

The letters and the conduct of the defendants were quite inconsistent with the defence now set up, that they were to be at liberty to return any unsold coats.

The appeal should be allowed with costs, and there should be a judgment for the plaintiffs for the amount claimed with costs.

MEREDITH, C.J.O., and FERGUSON, J.A., agreed with MACLAREN, J.A.

MAGEE, J.A., also agreed with the reasons and conclusion of Maclaren, J.A., adding that, even if the finding of the trial Judge, that the original sale was upon the terms of a right to return goods unsold, were accepted, there was a new bargain, free from those terms, when, in December, an extension of time was agreed to without mention of any such right.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

JONES v. TORONTO GENERAL TRUSTS CORPORATION.

Executors—Contract Entered into by one Executor—Absence of Authority to Bind Co-executor—Failure to Prove Approval of Co-executor—Action by Contractor for Price of Work and Material—Defence of Non-concurring Executor—Payment into Court of Part of Sum Claimed—Total Relief from Personal Liability—Terms—Costs—Indemnity of Contracting Executor out of Estate of Testator—Steam Boilers Inspection Act and Regulations—Expensive Litigation over Trifling Sum.

Appeal by the defendant Harris from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of $214 and costs against both defendants.

The action was for a balance of work and materials alleged to have been done and furnished by the plaintiff for the defendants.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Erichsen Brown, for the appellant.

F. J. Hughes, for the defendant corporation.

W. D. M. Shorey, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the action was brought against the defendants as executor and executrix of the will of T. M. Harris, deceased, for the price of work done and materials supplied in making repairs to and in connection with the boiler in a warehouse which formed part of the estate in the hands of the defendants.

The appellant, in the affidavit filed with her appearance, deposed that she had a good defence to the action upon the merits; that she entered into no contract on her own behalf or on behalf of the estate in respect of the work and materials done and supplied by the plaintiff, and submitted that no judgment de bonis propriis could be signed against her. She also deposed that the charges made by the plaintiff were excessive, and gave particulars of the excess, amounting to $151.72; she also brought into Court $158, which, as she deposed, was more than the plaintiff was entitled to, and said that she desired to "defend for the difference." She also set up that the repairs were made without compliance with the statutory regulations respecting inspection in advance of commencing the work, and submitted that the plaintiff, therefore, could not recover. She also pleaded the Statute of Frauds and a set-off of $20 owing to the estate for old lumber purchased and taken away from the aforesaid warehouse.

The affidavit filed by the defendant corporation was made by an officer, who deposed that, before the repairs were ordered, the appellant was consulted, and approved of the plaintiff undertaking the work; that a cheque was drawn in favour of the plaintiff for the amount of his account, and that the appellant refused to sign it, alleging that the price charged was excessive; while the defendant corporation was ready and willing to pay the plaintiff's account. There was in this affidavit no suggestion of defending the action and no statement that the corporation had a defence to it on the merits, but only a submission that neither the estate nor the corporation should be liable for the costs of this action.

The amount claimed by the plaintiff was $272.01, from which the trial Judge made deductions amounting to $43.01, and allowed in respect of the set-off $15.

The view of the trial Judge was, that the corporation had authority to bind the appellant by the contract with the plaintiff

which it entered into for the repairs; but in this he erred, as it was clear that an executor had no authority so to bind his co-executor.

No evidence was given at the trial of the appellant having approved of the repairs being made by the plaintiff.

There was no escape from the conclusion that the plaintiff was not entitled to recover against the appellant. Viewed strictly, her defence was a defence only to the amount of the plaintiff's claim in excess of $158—in effect, all that she sought was to reduce the plaintiff's claim to that sum. In that she had failed at the trial, for the claim had been reduced by only $58.01. Perhaps, in view of her denial of personal liability and of having contracted with the plaintiff, either for herself or for the estate, it would be scarcely fair to hold her to what in strictness might be the result of the position taken in her affidavit.

On the whole, the learned Chief Justice had come to the conclusion that the proper disposition to be made of her appeal was to allow it without costs and to vary the judgment by dismissing the action as against her without costs, providing by the order now pronounced that the judgment and order are not to prejudice the right, if any, of the corporation, to be indemnified out of the estate for what they were required by the judgment to pay and their costs of the action and of the appeal.

The contention based upon the provisions of the Steam Boilers Inspection Act and regulations under it was disposed of upon the argument adversely to the appellant, there being no evidence that such a regulation as was relied upon was in force when the plaintiff's work was commenced.

Remarks upon the expensive litigation over a trifling amount.

FERGUSON, J.A., agreed with MEREDITH, C.J.O.

MACLAREN, MAGEE, and HODGINS, JJ.A., also agreed with MEREDITH, C.J.O., except as to the disposition of the costs of the appeal, which they thought should be paid by the plaintiff.

In the result the appeal was allowed with costs.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*METALS RECOVERY CO. v. MOLYBDENUM PRODUCTS CO.

Mechanics' Liens—Claim of Lien for Work and Materials—Increase in Selling Value of Land—Work Done for Company in Possession of Land under Agreement for Purchase—Title to Land Remaining in Vendor—Vendor not Originally Made Party to Action for Enforcement of Lien, but Served with Notice of Trial—Lien as against Vendor then at an End—Appeal—Costs.

Appeal by the American Molybdenites Limited from the judgment of the Assistant Master in Ordinary in a mechanics' lien action.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

J. J. Gray, for the appellant company.

Gordon Waldron, for the plaintiff company.

J. Cowan, for nine lien-holders.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought under the Mechanics and Wage-Earners Lien Act for the establishment and enforcement of a lien on two lots in the township of Monmouth, the title to which was in the appellant company. The defendant company held an agreement for the purchase of these lots at a large price, most of which was as yet unpaid. The work of the plaintiff company was done for the defendant company, and it was asserted that the selling value of the lots was increased by it, and that the plaintiff company was entitled to a lien in priority to the appellant company for the amount of that increased value. The only defendant to the action as begun was the defendant company. The appellant company was served with notice of the trial, but not until after the time for bringing an action for the enforcement of the lien had elapsed; the appellant company did not appear and was not represented at the trial.

By the judgment of the Assistant Master in Ordinary it was declared that the plaintiff company and certain other lien-holders were entitled to liens on one of the lots for the respective amounts mentioned in schedule 1 of the judgment. It was also declared that the selling value of this lot had been increased by the value of the work done and the material furnished or placed on or adjacent to it by the lien-holders. A schedule attached to the judgment gave

the names of persons entitled to incumbrances other than mechanics' liens, one of whom was the appellant company; and the judgment provided that, in default of payment of the amount of the liens, the lot was to be sold and the purchase-money applied in payment of the claims mentioned in the schedules—that is, the claims of lien-holders and incumbrancers other than lien-holders—as the Master should direct.

The learned Chief Justice was of opinion that the appellant company, if it ever became a party to the action, became a party only when the notice of trial was served upon it, and that the lien as against that company, if it ever existed, was then at an end.

Reference to Juson v. Gardiner (1864), 11 Gr. 23, and Byron v. Cooper (1844), 11 Cl. & F. 556.

Larkin v. Larkin (1900), 32 O.R. 80, is on all fours with the case at bar, and is decisive against the plaintiff company. That case was rightly decided.

The appeal should be allowed, and the judgment below, in so far as it purported to affect the rights of the appellant company, should be set aside. The reversal of the judgment and the allowance of the appeal should be without costs: had the appellant company availed itself of the opportunity it had of attending the trial and taking the objection to the proceedings upon which it had now succeeded, the Assistant Master in Ordinary would have given effect to the objection, as it was his duty to do, following Larkin v. Larkin.

The order now made would of course not affect the liability of the appellant company under the terms of the order of the Second Divisional Court extending the time for appealing, but those terms must be complied with.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

REX v. THOROLD PULP CO. LIMITED.

Contract—Water Taken from Government Canal—Excess—Payment for—Lease—Construction—Penalty.

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., ante 159.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

H. H. Collier, K.C., for the appellant company.

T. F. Battle, for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the question for decision was as to the liability of the appellant company to pay for water from the old Welland Canal in excess of the quantity to which the company was entitled under the terms of a lease from the Crown, dated the 9th May, 1910, to use, at a greater price than that which it was to pay for the water which it was entitled to use—$3 per horse-power.

The question turned upon the effect of the following clause of the lease:—

"In case the lessee shall use surplus water for any greater number of hours than specified in the lease, or shall use or draw a greater quantity of water at one time than that specified in the lease, the lessee shall pay to the lessor on this account an additional sum of 25 cents per hour for each horse-power of water so allowed to run over and above the hours and quantity of water specified in this lease, but the lessee shall have no recourse against the lessor for damages caused through wrongful and excessive use by any other lessee or water-taker."

It was contended by the appellant company that the additional sum which, according to the provisions of the above clause, the lessee was to pay, was 25 cents per hour for each hour during which an excessive user lasted; and that, in this case, the excessive user having gone on for more than 6 years, the amount payable would be several hundred thousand dollars, and that the sum payable must be treated as a penalty.

The Crown contended that the clause meant that, if the lessee used water for more hours in a day than he was entitled to, his liability was to pay 25 cents an hour during one 24 hours for each year during which the excessive user continued; and that, if he used more than he was entitled to use, he was liable to pay 25 cents per hour for each horse-power for one 24 hours in each year; and that, so reading the clause, the appellant company was liable for $6 per horse-power for one 24 hours for each year during which the excessive use continued.

The use of the word "additional" presented a difficulty in the way of construing the clause as the Crown contended that it should be construed, and as it had been (as was said) the practice of the Department of Railways and Canals to construe it.

The learned Chief Justice was inclined to think that the word "additional" was used in the sense of "increased"—whether or not that was the case was immaterial, because the Crown was content to accept $6 per horse-power for the excess.

It was highly improbable that any one contemplated that the clause meant what it was now contended by the appellant company it meant; and the proper conclusion was, that the measure of the appellant company's liability was to pay 25 cents per hour for one

24 hours in each year for the excessive quantity used; and it was immaterial whether that was to be in addition to the $3 per horse-power or the whole price that was to be paid.

It was conceded by counsel for the appellant company that, if the price to be paid was $6 or $9 per horse-power, no question as to its being a penalty arose.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*RE McKINLEY AND McCULLOUGH.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Conveyance Made in 1888 to Person "in Trust"—Evidence of Nature and Terms of Trust and of Right of Person to Sell, Required by Purchaser—Absence of Actual Notice of Adverse Right—Constructive Notice—Registry Act, secs. 71 (1), 72, 73—Presumption—Lapse of Time—Objection Declared Invalid.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring whether an objection to the title made by the purchaser was or was not a valid objection.

The motion was referred to the Court by MIDDLETON, J.: see ante 176.

The motion was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

T. A. Gibson, for the vendor.

A. D. McKenzie, for the purchaser.

MEREDITH, C.J.O., in a written judgment, said that the motion was referred to the appellate Court because of the decision of Kelly, J., in Re Thompson and Beer (1919), ante 4, and a previous decision of Middleton, J., himself, in an unreported case, the two being in conflict.

The question raised was as to the effect of the fact that in one of the conveyances forming a link in the chain of title, a conveyance, dated the 1st May, 1888, from William Cayley to John Turner, the words "in trust" followed the name and description of the grantee, there being nothing in the conveyance and nothing registered to shew what the trust was, and the vendor being unable to furnish any evidence of what the trust, if any, was.

The learned Judge referred to the views expressed by Kelly, J., and Middleton, J., and to secs. 71 (1), 72, and 73 of the Registry Act; and said that the cases referred to by Middleton, J., if any authority for the proposition was needed, established that a purchaser for value without notice, whose conveyance was registered, was not affected by constructive notice of any prior instrument affecting the land, or any interest in the land, unless the instrument was registered, or unless he had actual notice of it or of the existence of the interest.

That a person who has notice of an instrument has notice of its contents is undoubted, but it is constructive notice only.

In the case of a trust of land, the trust—at all events if it is an express trust—must be evidenced by an instrument in writing; and, there being no such instrument registered, it is to be adjudged fraudulent and void against subsequent purchasers and mortgagees for valuable consideration without actual notice.

In this case the purchasers subsequent to the conveyance had actual notice, not of any instrument declaring or evidencing a trust, but only, at the most, that the land was conveyed to the grantee in trust.

Reference to London and Canadian Loan and Agency Co. v. Duggan, [1893] A.C. 506.

All that the purchaser in this case had actual notice of was, that the land was conveyed to the grantee "in trust," and, but for the provisions of the Registry Act, he would have been affected with notice, but only constructive notice, of fact and instruments, to a knowledge of which he would have been led by an inquiry for the instrument or other circumstances creating the trust; and such notice as that does not now affect the title of a purchaser for value whose conveyance is registered.

After the lapse of so many years since the conveyance by Turner, it should be presumed that the sale by him was properly made, especially as the possession of the land had been consistent with the registered title.

The objection of the purchaser to the title should not prevail.

MACLAREN and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., read a dissenting judgment. He was of opinion that the vendor had not made out a title which should be forced upon the purchaser. It was for the vendor to make more effort to obtain information, or he could apply to quiet his title or have it brought under the Land Titles Act.

Objection declared invalid (MAGEE, J.A., *dissenting*).

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

*MATHESON v. TOWN OF MITCHELL.

Will—Devise of Lands to Town Corporation for Public Park forever—Acceptance on Conditions of Will—Condition or Proviso that Park be Kept in Proper Order and Repair—Breach—Action for Mandatory Order to Compel Corporation to Perform Condition—Obligation to Superintend Performance not Assumed by Court—Forfeiture for Breach—Claim for Declaration—Continuous Breach Beginning more than 10 Years before Action—Limitations Act, R.S.O. 1914 ch. 75, secs. 5, 6(9)—Proviso—Condition Subsequent—Rule against Perpetuities.

Appeal by the plaintiff from the judgment of ROSE, J., 44 O.L.R. 619, 15 O.W.N. 314.

The appeal was heard by MACLAREN and MAGEE, JJ.A., and LATCHFORD and MASTEN, JJ.

J. C. Makins, K.C., for the appellant.

F. H. Thompson, K.C., for the defendant, respondent.

MACLAREN, J.A., in a written judgment, said that the action was brought by the executor of the will of the late Thomas Matheson for a mandamus to compel the town council to keep in proper repair as a public park certain land devised to the town corporation by the testator, who died in 1883, or, in the alternative, that the land should be given up to the plaintiff to form part of the estate of the testator.

The trial Judge held that the case was not a proper one for a mandatory order such as was formerly made in the Court of Chancery, because the Court would not undertake to superintend for all time to come the performance of continuous duties involving the exercise of a certain amount of discretion. In this the trial Judge was right.

There was a proviso in the will to the effect that if the town council should not keep the land and the fences surrounding it in proper order and repair and as a public park should be kept, the land should revert to and become part of the testator's estate. In answer to the claim based upon this proviso, the defendants set up the Limitations Act, R.S.O. 1914 ch. 75, sec. 5 and also sec. 6(9). The trial Judge held, upon the evidence, that there had been a continuous breach of the duty to keep in repair for over 30 years before the institution of the action, and that the plaintiff's right of action first accrued more than 30 years before he instituted it, and that the statute was a good defence. On this ground also, the action was properly dismissed.

The devise was to "the Corporation of the Town of Mitchell" and the habendum to "the said Corporation of Mitchell and its successors forever." The proviso was, that if the corporation neglected or refused to keep up the park and the fences in proper order, etc., the lands should revert to and form part of the testator's estate. According to the authorities the proviso was an express common law condition subsequent, obnoxious to the rule against perpetuities, and therefore void. If the land had been granted to the corporation so long as it should be used and maintained and kept in proper order and repair and as a public park should be kept, the result might have been different, but it had been granted forever, and the proviso was wholly inoperative.

The case was practically on all forms with Re St. Patrick's Market (1909), 1 O.W.N. 92.

The appeal should be dismissed, but without costs.

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

MASTEN, J., agreed in the result, for reasons stated in writing. He expressed no opinion upon the question whether the proviso was void as being obnoxious to the rule against perpetuities.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. DECEMBER 19TH, 1919.

JERMY v. HODSON.

Vendor and Purchaser—Agreement for Sale of Land—Construction—Legal Title not in Vendor—Time for Making Conveyance—"All Reasonable Diligence to Obtain Title"—Action for Return of Purchase-money—Provision as to Time—Waiver—Absence of Notice to Convey within Reasonable Time—Vendor not in Default—Finding of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of ROSE, J., 15 O.W.N. 323.

The appeal was heard by MACLAREN and MAGEE, JJ.A., and LATCHFORD and MASTEN, JJ.

G. S. Gibbons, for the appellant.

R. D. Moorhead, for the defendants, respondents.

The judgment of the Court was read by MAGEE, J.A., who said that the appeal was by the plaintiff from a judgment dismissing

an action brought for the return of purchase-moneys paid to the defendant for 10 sub-lots in Vegreville townsite, in Alberta.

After setting out the facts, the learned Judge said that the defendant admitted that the lots were of speculative value, the market varying from day to day. The slump in values came in the summer of 1914, and the defendant would not then care to try to effect a sale.

It was questionable whether, under the terms of the agreement itself, time was of the essence of the contract as against the vendor. But, whether it was so or not, the plaintiff undoubtedly by his letters in 1914 waived it.

It then became his right at any time to fix a reasonable time within which the vendor should perform his part.

None of his letters did fix any time—much less a reasonable time. There was alternate threat and waiting—neither of which would be intimation to the plaintiff that a reasonable time was given to him within which he must carry out his agreement.

An announcement that performance is required at once or action will be brought is only an intimation that further effort is useless and no incentive to endeavour to complete. On the contrary, it tends to prevent exertion, and is a notice that it is now too late. It is no answer to say that, notwithstanding the threat, the plaintiff did wait, if, during the time of waiting his own convenience, he had thus in effect prevented the defendant from believing that anything he could do might not be rendered useless at any moment.

The fact that the defendant agreed by the contract to do his best to perfect the title did not make him more liable than if he had positively agreed to furnish a good title. It could not be said that he did use his best endeavour. He urged his vendors, and he procured a solicitor to act for him, but the solicitor in effect did no more than himself. He, like the plaintiff, could have given his vendors a reasonable time within which to carry out their bargain—but, whether with the object of making use of the purchase-money or not, he did nothing towards enforcing his rights. He did not allege that he had set aside any sum to meet the payments, though he said that the bank would have honoured a draft upon him, accompanied by the transfers.

Upon the whole, it did not appear that the trial Judge was in error.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. DECEMBER 15TH, 1919.

*RE McCARTY.

Power of Attorney—Authority to Convey Land—Provision that Power not Revoked by Death of Donor—Powers of Attorney Act, R.S.O. 1914 ch. 106, sec. 2—Transfer Executed by Donee after Death of Donor in Name of Donor—Refusal of Master of Titles to Register—Case Stated under sec. 88 of Land Titles Act, R.S.O. 1914 ch. 126—Land Vested in Representatives of Donor.

Case stated by the Master of Titles, under sec. 88 of the Land Titles Act, R.S.O. 1914 ch. 126.

William Proudfoot, K.C., for Thomas McCarty.
A. M. Denovan, for the purchasers.
Edward Bayly, K.C., for the Attorney-General.
F. W. Harcourt, K.C., appeared as Official Guardian.

MIDDLETON, J., in a written judgment, said that Mary McCarty, the owner in fee simple of certain land, by a general power of attorney, dated the 25th July, 1916, appointed her husband, Thomas McCarty, her attorney, giving him general powers to deal with all her real and personal property, to sell and convey it, etc. By the instrument she covenanted, for herself, her heirs, executors and administrators, to allow, ratify, and confirm whatever her attorney should do by virtue of the instrument; and the instrument also contained an express provision "that these presents shall not be revoked by my death."

Mary McCarty died on the 3rd August, 1919, intestate. The fact of her death was, of course, known to her husband, and was also well known to the purchasers at the time they made an agreement for the purchase of the land owned by her. The husband, having, after the death of his wife, agreed to sell the land, tendered for registration at the Land Titles office a deed or transfer to the purchasers, bearing a date subsequent to the date of the wife's death, by which she purported to convey the land to the purchasers. The Master of Titles refused to receive or act upon this conveyance, owing to the doubt which he felt as to the statute enabling a good conveyance to be made in the name of a dead person under the power of attorney.

The question turned upon the construction of sec. 2 of the Powers of Attorney Act, R.S.O. 1914 ch. 106: "Where a power

of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, subject to such conditions and restrictions, if any, as may be therein contained."

Reference to Watters' Property Statutes, p. 303, for the law apart from the statute, which had its origin in 29 Vict. ch. 28, sec. 22, and has no corresponding English counterpart.

Powers of attorney are to be construed strictly: Bryant v. La Banque du Peuple, [1893] A.C. 170.

Upon the death of the donor, her estate in the lands came to an end. It passed to her heirs, subject to the provisions of the Devolution of Estates Act vesting it temporarily in her personal representatives. The statute indicated two distinct things contemplated by it: (1) an authority conferred upon the donee to sell or deal with the property which had vested in the heirs, devisees, or personal representatives, in the name and on behalf of those heirs, devisees, or personal representatives; and (2) a power to act in the name of the donor of the power, and to deal with the property, which was not to be revoked by the death of the donor. These two things were quite distinct. There was much that might be done after the death of the donor in getting in and managing his estate, quite distinct from selling it. For some reason, the draftsman of the power, evidently having the provisions of the statute present to his mind, had chosen to provide only that the power should not be revoked by the death of the donor, and had not chosen to confer the right to sell or dispose of the property in the name and on behalf of the heirs, devisees, or executors or administrators.

The Master rightly refused to register the conveyance. The provision in the instrument does not enable a conveyance to be made of property which is vested in the representatives of the deceased donor.

If the sale of the land which has been arranged is deemed to be desirable, and the Official Guardian is satisfied of its propriety, he may allow the sale to be carried out under the provisions of the Infants Act. The adult children concur in the sale, and it is probable that it is in the interests of the infants. If this course is adopted, the costs of Thomas McCarty and the Official Guardian may be paid out of the proceeds of the sale—otherwise it is not a case for costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 15TH, 1919.

*RE KNIBBS AND ROYAL TEMPLARS OF TEMPERANCE.

Insurance (Life)—Change of Beneficiary—Friendly Society—Issue of New Certificate—Assignment or Surrender—Undertaking to Pay Premiums—Insurance Act, R.S.O. 1914 ch. 183, sec. 181 (2).

Motion by the Dominion Council of Canada and Newfoundland Royal Templars of Temperance, a friendly or benevolent society, for an order directing the disposition of a sum of $1,000 in the hands of the society, the amount of an insurance upon the life of Frederick Knibbs, now deceased.

Lyman Lee, for the society.
R. J. McLaughlin, K.C., for Charles Harper.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, said that the insured, Frederick Knibbs, under a "life insurance certificate," dated the 6th March, 1903, was entitled to a "mortuary benefit" of $1,000, payable "to the beneficiary or beneficiaries designated hereon." The endorsement made the benefit payable to Angelina Harper Knibbs, his wife. Both the certificate and the endorsement purported to reserve power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order; but no point was made of this by either party; and the learned Judge assumed that the provisions of the Insurance Act applied.

On the 28th June, 1906, Knibbs, by a writing endorsed on the policy, changed the beneficiary to Charles Harper, his stepson; and his wife signed a memorandum agreeing to this change. The certificate was then delivered to the company, and a new certificate was issued, dated the 12th July, 1906, payable to the stepson.

Knibbs died on the 16th July, 1919, and left him surviving two daughters and four infant children, issue of a deceased daughter, who died on the 12th July, 1906.

The testator's wife predeceased him, dying on the 13th September, 1913.

The argument on behalf of the infants was that, the policy having been declared to be for the benefit of the wife, a preferred beneficiary, the attempt to make it payable to the stepson, not within the class of preferred beneficiaries, was nugatory, and the money must now be dealt with under the statutory provisions applicable where a sole beneficiary dies in the life of the insured.

This contention overlooked the provisions of sec. 181, sub-sec. 2. What was here done amounted to an assignment or a surrender —probably the latter. The rates were raised, and the new policy was on a different plan—"Level System"—and the stepson undertook the burden of paying the premiums.

The stepson was entitled to the fund. The Official Guardian might have his costs, fixed at $10, out of it.

LOGIE, J. DECEMBER 16TH, 1919.

*KANKKUNEN v. TOWNSHIP OF KORAH.

Highway—Nonrepair—Injury to Motor-vehicle and Person of Owner—Liability of Township Corporation—Negligence—Contributory Negligence—Findings of Trial Judge—Work upon Road Done by Provincial Department of Public Works—Construction of Culvert—Road not Property of Province but of Municipality—Municipal Act, sec. 460 (7).

Action for damages for injuries to person and property sustained by the plaintiff by reason of the failure of the Municipal Corporation of the Township of Korah, the defendants, to keep one of their roads, known as "The People's Road," in repair.

The action was tried without a jury at Sault Ste. Marie.

E. V. McMillan, for the plaintiff.

James McEwan, for the defendants.

LOGIE, J., in a written judgment, after setting out the facts, found that the road, at the place where the plaintiff was injured and his motor car damaged, was not kept in repair by the defendants within the meaning of sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192; that the injury and damage sustained by the plaintiff were sustained in consequence of the default of the defendants; that, the work upon the road having gone on for two weeks, the defendants had implied notice of the obstruction; and that the plaintiff was not guilty of any negligence contributing to the accident.

The defendants, however, set up that they were excused from liability by reason of sub-sec. 7 of sec. 460 of the Municipal Act, which reads:—

"Nothing in this section shall impose upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred

upon him by law, and over which the corporation had no control . . ."

Counsel for the defendants contended that, as the Department of Public Works performed the work in question in the exercise of a power or authority conferred upon it by law, to wit, the Public Works Act, and as the corporation had no control, there was no liability resting upon the defendants for the negligence of the contractor of the Public Works Department.

Section 13 of the Public Works Act, R.S.O. 1914 ch. 35, gives the Minister power, for any purpose relative to the use, construction, maintenance or repair of "a public work," to enter upon, take, and use land, as therein set forth. Assuming that this section gave the Minister power to enter upon a road subject to the jurisdiction of a municipality, the interpretation of the words "public work" in sec. 2 (*h*) made it clear that such was not the intention; by clause (*h*), "public work" means and includes, among other things, "the roads and bridges . . . and all other property belonging to Ontario, and also all works and properties acquired, constructed, extended . . . repaired . . . or improved at the expense of Ontario, or for the . . . repairing . . . or improving of which any public money is appropriated by this Legislature . . . ."

The construction of the culvert upon this road manifestly did not fall within the first of the above definitions, because the road did not "belong to Ontario." Nor did the expenditure of public money of Ontario upon the construction of the culvert, or appropriation of public money therefor, bring it within either of the succeeding definitions; if it did, the result would be to constitute the road a "public work" of Ontario, which it is not. It was and still is, notwithstanding the public money expended upon it, a highway of the township of Korah, over which the township had and has jurisdiction.

For these reasons the defence failed; but, as the accident happened by the gross negligence of the foreman of the Public Works Department, in failing to protect what was in essence a trap for the public using the road, it was reasonable to think that, upon the attention of the proper authority being called to it, the defendants might be reimbursed.

The damages were not serious: in respect of the personal injuries of the plaintiff they should be assessed at $15, and the damages to his motor-car at $535; and judgment should be entered for the plaintiff for $550 with costs.

MIDDLETON, J. DECEMBER 17TH, 1919.

*RE BICKNELL.

Will—Provision for Daughter—Gift Made to her upon her Marriage in Lifetime of Testator—House Property Conveyed Subject to Mortgage — Advancement — Ademption — Presumption — Obligation of Estate to Exonerate Property from Mortgage—Company-shares Held by Testator—New Shares Issued in Lieu of Dividends—Whether Income or Capital—Question of Fact.

Motion by the executors and trustees under the will of James Bicknell, deceased, for the advice and direction of the Court upon certain questions arising in the administration of the estate.

The motion was heard in the Weekly Court, Toronto.

C. Kappele, for the executors.

T. N. Phelan, for Mrs. Keachie, a daughter of the testator.

W. Lawr, for Mrs. Robertson, another daughter.

James W. Bicknell, son of the testator, in person.

F. W. Harcourt, K.C., for the infant grandchildren and unborn issue of the children of James Bicknell.

MIDDLETON, J., in a written judgment, said that the testator died on the 22nd October, 1914, leaving a widow and three children. The will, which was duly admitted to probate, was dated the 28th June, 1912. By it, after certain minor provisions, he demised and bequeathed the residue to his executors in trust to convert into money, to invest the money, to pay out of the income certain legacies not now important, and to divide the balance of the income into four shares, one of which was to be paid to his wife during her lifetime and one to each of his three children. The corpus of his estate was to be divided into four equal shares, one share being identified as the share of his wife, and upon her death this share was to be equally divided among his children her surviving and the issue of any deceased child. The other three shares were to be identified as belonging respectively to each of the three children; and, subject to certain powers of advancement, the capital set apart for each child upon his death without issue was to be divided among the surviving children; but, if the child left issue, it was to go to the issue of the child.

No difficulty arose upon the construction of the will, but a question arose by reason of the fact that on the 18th March, 1913, a year after the making of the will, on the occasion of the marriage of one of the daughters, the testator bought a house for

her. The price of the house was $17,000, and it was the testator's intention to pay it in full; but it was found to be incumbered by a mortgage for $7,200, and the mortgagees declined to accept payment before maturity. The transaction was closed by a conveyance to the daughter, subject to this mortgage, which was stated to form part of the consideration, and which the grantee (the daughter) agreed to assume and pay. The testator in his lifetime paid three gales of interest and small instalments of principal which fell due upon the mortgage; and his executors had paid the full balance.

The learned Judge said that upon the material before him he had no doubt that it was the intention of the testator that his children should be treated on an equal footing—had he lived, he would doubtless have made a similar provision for each child upon forisfamiliation. There was nothing to shew that he intended the gift of this house to interfere with the provisions made by his will; and, in the absence of something to shew such an intention, in the existing circumstances, it should not be presumed that what this daughter received was so much in the nature of a double portion as to justify the learned Judge in holding that the conveyance of the house operated as an ademtion of any part of the benefits provided by the will.

There were two considerations of paramount importance: (1) the provision made by the will differed totally in kind from the property conveyed; (2) the provision made by the will was in favour of the issue of the daughter, subject to her life-estate, while the house was given to her absolutely.

The daughter had no claim upon the estate for payment of the amount due upon the mortgage; no doubt, her father intended to pay off this mortgage and thus to give her the amount of the mortgage-debt, but the gift never was completed, and there was no liability upon the part of his estate.

Drew v. Martin (1864), 2 H. & M. 130, referred to.

The testator, at the time of his death, held shares in two companies. Recently shares were issued by these companies in lieu of dividends that would ordinarily have been paid as cash upon the shares held by the testator. The question whether the shares recently issued were to be treated as income or corpus was a question of fact: Bouch v. Sproule (1887), 12 App. Cas. 385. Here the new shares in truth represented a dividend declared upon the old, and were therefore income: In re Malam, [1894] 3 Ch. 578; Re Colvile (1918), 144 L.T.J. 327.

Order declaring accordingly; costs of all parties to be paid out of the corpus of the estate.

FALCONBRIDGE, C.J.K.B. DECEMBER 18TH, 1919.

BINGHAM v. TOWN OF TRENTON.

Highway—Nonrepair—Injury to Foot-passenger by Slipping on Sidewalk—Depression in Sidewalk—Accumulation of Water—Frozen Surface—Municipal Act, sec. 460(3)—"Gross Negligence"—Liability of Town Corporation—Damages—Prospective Profits.

Action for damages for injury sustained by the plaintiff by a fall upon a slippery sidewalk.

The action was tried without a jury at Belleville.

W. J. McCallum, for the plaintiff.

A. Abbott, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that in the town of Trenton, two blocks or slabs in a cement sidewalk had sunk in towards each other, making a depression 5 or 6 inches deep at the end nearest the street, and 4 or 5 feet long. That condition had existed for over two years. The town authorities knew of its existence, but all they did was, about November, 1918, to put down a grating and drain in the street opposite the depression. This took care of some water overflowing from the sidewalk, but did not by any means drain all the water out of the depression.

On the 31st March, 1919, the plaintiff, without any negligence on his part, slipped and fell on the ice formed by the freezing of the water therein.

The town authorities had intended to repair it when the winter of 1918-9 came, and they had patched it up since the accident.

The sidewalk was permitted to remain in such a condition as to accumulate water, which, in freezing weather, would cause, and which the defendants' officers ought to have known would cause, dangerous ice; and there was gross negligence in the defect in the walk itself, which, forming a receptacle, invited and caused the formation of the ice.

No doubt, at the time when the plaintiff sustained his injury, weather conditions had made all walks slippery and more or less dangerous, but that fact did not relieve the defendants from liability: Killeleagh v. City of Brantford (1916), 38 O.L.R. 35.

Reference also to Denton on Municipal Negligence respecting Highways, pp. 155-166, and cases there cited, and to Gordon v. City of Belleville (1887), 15 O.R. 26; City of Kingston v. Drennan (1897), 27 Can. S.C.R. 46; Yates v. City of Windsor (1912), 3 O.W.N. 1513, 22 O.W.R. 608; City of Vancouver v. Cummings (1912), 46 Can. S.C.R. 457; Roach v. Village of Port Colborne

(1913), 29 O.L.R. 69; Huth v. City of Windsor (1915), 34 O.L.R. 245, 542.

Disregarding as speculative and too remote the plaintiff's claim for large prospective profits to arise from a projected partnership, I think the sum of $800 would be fair compensation.

There should be judgment for that sum and costs.

MASTEN, J. DECEMBER 18TH, 1919.

CREIGHTON v. CREIGHTON.

Will—Devise and Bequest to Widow—Use of both Real and Personal Property during Natural Life—Absolute Powers of Disposition and Appropriation—Property which at Death of Wife shall "Remain Unused"—Distribution among Children—Rights of Children after Death of Widow—Election of Widow—Questions Raised by Action instead of Originating Notice—Costs.

Action for a declaration as to the rights of the parties claiming interests in the estates of George Platt Creighton and Helen Henderson Creighton, his wife. The former died in 1881, leaving a will; his widow died in March, 1919, intestate.

The action was tried without a jury at Owen Sound.

W. H. Wright and J. A. Horning, for the plaintiff.

A. D. Creasor, for the defendant George P. Creighton.

D. Inglis Grant, for the defendant Levina LePan Creighton.

MASTEN, J., in a written judgment, said that the decision of the action turned upon a clause of the will of George Platt Creighton, by which he gave all his real and personal estate to his wife in trust to pay legacies and bequests and the remainder to have and to hold for her own use during her natural life with power to her absolutely to sell and convey and to mortgage any portion or portions of the testator's real estate which she might deem advisable and absolutely to appropriate to her own use such portions of his personal estate and proceeds of the sale of his real estate as to her might seem proper and in all ways to deal with his estate both real and personal as if it were her own absolutely; and, after the decease of his wife, he gave and devised and bequeathed all his real and personal estate "which shall then remain unused by my wife" unto his three sons and one daughter (naming them), to be by them equally divided amongst themselves share and share alike. The testator also directed that in this division a certain "store

and premises" in Owen Sound, "now owned by my said wife," should be reckoned as part of his estate; and he further directed that his wife in her lifetime might advance sums of money to the children, and such sums should be taken account of in the final division and deducted from the children's shares.

It was admitted that the widow was put to her election by the terms of the will; and the learned Judge found as a fact that she had elected to take under the will; and so the store and premises referred to became part of the estate to be dealt with under the will.

The testator died possessed of both real and personal property, all of which passed into the possession of the widow under the terms of the will. The real estate remained in the same plight and condition as at the time of his death, with two exceptions, viz., the "old homestead," which was sold by the widow for $4,000 cash, and the property referred to above as the "store and premises," which property was added to, built upon, and altered, moneys of the estate being expended for those purposes.

The personal estate and effects of the testator were sworn to be of the value of $5,000, and at the time the action was brought there remained, of the $5,000, about $1,000.

Dealing with the rights of the parties in regard to the estate as they stood at the date of the widow's death, the learned Judge referred to Halsbury's Laws of England, vol. 28, para. 1410; In re Thomson's Estate (1880), 14 Ch. D. 263; Re Cutter (1916), 37 O.L.R. 42; Re Johnson (1912), 27 O.L.R. 472; and other cases; and said that he was of opinion that the whole of the real and personal property of the testator formed a common fund, and no distinction was to be made in the manner of dealing with different parts; that the widow took a life-interest in the residue after payment of debts and legacies, with a power of disposition during her lifetime, but no power of disposition by will; and that the residue remaining upon her death was distributable in accordance with the will of the husband.

Judgment declaring accordingly; the costs of all parties to be paid out of the estate, but only such costs as would have been incurred had the matter been dealt with upon originating notice.

KELLY, J., IN CHAMBERS. DECEMBER 19TH, 1919.

MORROW v. MORGAN.

Practice—Writ of Summons—Special Endorsement—Action for Recovery of Land—Failure to Set out Particulars—Rules 33, 772 —Form 5.

Appeal by the defendants from an order of the Master in Chambers dismissing an application by the defendants to set aside the writ of summons, on the ground that the endorsement thereon was not within the Rules relating to special endorsements.

A. C. Heighington, for the defendants.
Harcourt Ferguson, for the plaintiff.

KELLY, J., in a written judgment, said that, under Rule 33, a writ of summons may, at the option of the plaintiff, be specially endorsed with a statement of his claim in actions (amongst others) for the recovery of land, with or without a claim for rent or mesne profits. The Rule requires that in such case the writ shall be in accordance with form No. 5 appended to the Rules; which means, substantially according to that form (see Rule 772). That form, which relates to specially endorsed writs, indicates the nature of the particulars to be set forth in the special endorsement; the part of it which applies to writs for recovery of lands, contains particulars intended to give the defendant, in a general way at least, information as to the grounds on which the plaintiff rests his claim. This seems to be a reasonable and proper requirement, for the endorsement should be sufficient to shew a cause of action.

In the present case the endorsement did not comply with that requirement, but merely claimed possession, the defendant remaining in ignorance, so far as knowledge can be derived from the endorsement itself, of the grounds for the claim, and being left to speculation as to what he had to meet in his defence.

The appeal should, therefore, be allowed, with costs thereof and of the order appealed from.

KELLY, J., IN CHAMBERS. DECEMBER 19TH, 1919.

REX v. TERESCHUK.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41(1)—Having Intoxicating Liquor in Place other than Private Dwelling-house—Proof of Intoxicating Nature of Liquor Found on Premises—Proof that House where Liquor Found not "Private Dwelling-house" — Use of House as Bawdy-house—Conviction of Defendant as Keeper—Sec. 2(i) of Act.

Motion to quash the conviction of the defendant, by the Police Magistrate for the City of Sault Ste. Marie, for a breach of the Ontario Temperance Act, 6 Geo. V. ch. 50, in having intoxicating liquor in a place other than the private dwelling-house in which he resided.

R. T. Harding, for the defendant.
Edward Bayly, K.C., for the Crown.

KELLY, J., in a written judgment, said that the grounds urged in support of the motion were, that the evidence did not indicate that there was liquor on the defendant's premises—that the contents of a certain bottle found were not proven to be liquor—and that the house in which the defendant was alleged to have had the liquor was his private dwelling-house, in which he at the time resided.

There was sufficient evidence, if the Police Magistrate chose to believe it, indicating that the liquor which the defendant had upon his premises at the time, and which he gave to one who was a witness on the prosecution of the charge, was liquor of the kind prohibited by the Act. The magistrate evidently believed and accepted the evidence of that fact: the conviction could not, on that ground, be distrubed.

On consideration of the other objection, the same result must follow. Section 41(1) of the Ontario Temperance Act declares that "except as provided by this Act, no person, by himself, his clerk, servant, or agent, shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license."

"Private dwelling-house" is interpreted by sec. 2 (*i*), to "mean a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence."

The accused had been convicted for having been, on the very day of the occurrence on which the conviction now moved against was founded, and on divers days prior thereto, the keeper of a common bawdy-house—the same house, it was conceded, in which the offence now in question was alleged to have been committed. This fact, so established, took away from the house the exclusive character of a private dwelling-house, as so interpreted, and made the act complained of a breach of the provisions of sec. 41. A bawdy-house could not properly be said to be a dwelling actually and exclusively used and occupied as a private residence.

Motion dismissed with costs.

MIDDLETON, J. DECEMBER 19TH, 1919.

*RE JACKSON AND SNAITH.

Executors and Trustees—Breach of Trust—Investment in Land—Sale of Land to Replace Trust Funds—Contract of Sale—Objection to Title Made by Purchaser—Necessity for one Beneficiary Joining in Conveyance—Evidence of Concurrence—Possible Election of Beneficiaries to Take Land in Specie or Assert Lien—Right of Purchaser to be Safeguarded—Order under Vendors and Purchasers Act.

Application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring the purchaser's objections to the title invalid.

The application was heard in the Weekly Court, Toronto.
William Cook, for the vendor.
N. B. Gash, K.C., for the purchaser.

MIDDLETON, J., in a written judgment, said that the question which arose was as to the ability of the executors and trustees under the will of William Jackson, who died on the 6th March, 1904, the will bearing date the 22nd February, 1903, and having been duly admitted to probate on the 22nd March, 1904, to make title to certain lands.

Under the will the executors had authority to sell the testator's real estate, and were directed to invest the proceeds of the mortgage and real estate in such securities as executors and trustees are empowered to invest in, the income to be paid to the wife for her life, and after her death the proceeds to be equally divided among the three sons.

In breach of trust, the executors invested certain moneys of the estate in the land which was the subject of the contract, and now sought to realise upon this land for the purpose of replacing the trust funds. The sale that had been arranged will not only recoup the trust estate but leave a substantial profit to those beneficially interested.

The objection was, that the executors could not make title unless at least one of the beneficiaries joined in the sale and conveyance to evidence his concurrence: In re Patten and Guardians of Edmonton Union (1883), 52 L.J.N.S. Ch. 787.

Reference also to Power v. Banks, [1901] 2 Ch. 487, 496; Murray v. Pinkett (1846), 12 Cl. & F. 764; In re Jenkins and H. E. Randall & Co.'s Contract, [1903] 2 Ch. 362.

In view of these decisions, there could be no doubt as to the right of the executors and trustees to convey; but the purchaser was entitled to evidence shewing that at the date of the sale all of those beneficially interested had not elected to assert a lien upon the land, nor elected to take the land in specie. This could be satisfactorily and conclusively shewn either by establishing that some one of those beneficially interested was not of age, and so was not competent to elect, or by having one of the beneficiaries join in the conveyance for the purpose of expressing his assent thereto. The learned Judge said, however, that he was not prepared to hold that this was the only way in which it could be established that no election had been made by the beneficiaries. This should be shewn by some evidence which could be made of record.

The law is accurately summarised in Williams on Vendor and Purchaser, 2nd ed., p. 287.

No formal notice of motion or affidavit was produced on this motion; some material ought to be filed before any order can issue; if it is not convenient to have the concurrence of one of the beneficiaries evidenced by his joining in the conveyance, it may be desirable that the fact that no election has been made be established by an affidavit filed upon this motion; and, that being done, an appropriate declaration may be made upon the face of the order to be issued.

FALCONBRIDGE, C.J.K.B. DECEMBER 19TH, 1919.

O'DELL AND MITCHELL v. CITY OF LONDON.

BROWNLEE v. CITY OF LONDON.

Municipal Corporations—Escape of Water from City Water-main—Flooding of Premises of Citizens—Negligence—Vis Major—Unprededented Frost—Reasonable Precautions—Notice of Action—London Water Works Act, 36 Vict. ch. 102, secs. 1, 17—Parties—Water Commissioners—City Corporation.

Actions for damages for loss of the plaintiffs' goods and interference with their business, alleged to have been caused by flooding by water escaping from the defendants' water-main under Talbot street, in the city of London.

The actions were tried together, without a jury, at London.

G. S. Gibbons and J. C. Elliott, for the plaintiffs.

T. G. Meredith, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that he preferred the evidence of the plaintiffs' witnesses—both expert and ordinary—and he found that the flooding was caused by the negligence of the defendants in the following particulars:—

1. The maintenance of the hydrant attached to the sidewalk in such a manner as to prevent the frost-jacket attached thereto from performing its functions properly.

2. The failure of the defendants to maintain the hydrant in question free of water and ice, whereby the hydrant was prevented from operating in its proper manner.

3. Unreasonable delay in shutting off the water after the break in the main, by reason of the defendants' failure to maintain a proper system of men and appliances to attend promptly to breaks during cold weather, and proper means, e.g., charts, for the purpose of enabling repair-gangs, without undue delay, to locate the valve or valves to be shut off.

Seventy-five per cent. of the loss and damage in these cases could have been averted if proper precautions had been adopted.

The defence of vis major, i.e., unprecedented frost, is available to defendants only when they have shewn that they had taken all reasonable precautions, and that the injuries complained of not only might but must have happened independently of their neglect: Nitro Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co. (1878), 9 Ch. D. 503, at p. 517; Mackenzie v. Township of West Flamborough (1899), 26 A.R. 198, at pp. 201, 203.

As to the defence of want of notice of action, under sec. 17 of the London Water Works Act, 36 Vict. (Ont.) ch. 102, that section does not apply to this action, which is really not against the Commissioners and their officers, but against the Commission and the Corporation of the City of London, whose agents they are (sec. 1).

The city corporation was therefore a necessary party: McDougall v. Windsor Water Commissioners (1900), 27 A.R. 566, affirmed in S.C. (1907), 31 Can. S.C.R. 326; Young v. Town of Gravenhurst (1911), 24 O.L.R. 467, 471.

Judgment for the plaintiffs with costs in both actions. Reference to the Master at London to assess damages. Further directions and subsequent costs reserved until after report.

HODGINS, J.A., IN CHAMBERS. DECEMBER 20TH, 1919.

*GORDON v. SEE.

Trial—Action for Criminal Conversation—Allegation of Adultery and Claim for Damages—Judicature Act, sec. 53—Entry of Action for Trial at Non-jury Sittings—Inadvertence—Application to Transfer to Jury List—Waiver of Right to Trial by Jury—Rules as to Trial.

Motion by the plaintiff to transfer this action from the list of cases for trial at a non-jury sittings, for which it was entered, to the list of cases for trial at a jury sittings.

G. Hamilton, for the plaintiff.
W. Lawr, for the defendant.

HODGINS, J.A., in a written judgment, said that the ground of the motion was, that the cause of action was criminal conversation, and that, under the Judicature Act, sec. 53, the action or issue must be tried by a jury. For the defendant it was contended that the allegation of adultery and the claim for damages therefor did not make the action one for criminal conversation; but, if the action was for criminal conversation, the entry of it for trial on the non-jury list was a waiver within the concluding words of sec. 53—"unless the parties . . . waive such trial." To this the plaintiff replied that the action was entered on the non-jury list by inadvertence.

The learned Judge said that he was of opinion that the action was one for criminal conversation within the meaning of sec.

53: Pollock on Torts, 10th ed., p. 238; Bannister v. Thompson (1913-14), 29 O.L.R. 562, 32 O.L.R. 34.

The waiver must be of the trial by jury. The entry of an action on the non-jury list is not necessarily a final waiver or election, owing to the provisions of the Rules. Under them the Judge at the trial may try any case with a jury, notwithstanding its appearance on the non-jury list. Section 53 should be read as requiring a trial by jury, unless, on the case being called, the parties, or their solicitors or counsel, waive this statutory right, or unless some very clear and definite fact of waiver, equivalent to a deliberate prior consent, is established.

The convenience and safety of having the assistance of a jury in the cases mentioned in the section are obvious; and mere mistake should not avail to defeat the provisions: cf. Adair v. Wade (1885), 9 O.R. 15.

The case should, therefore, be transferred to the jury list, to be heard at the next sittings. The plaintiffs must pay the costs of the motion in any event and the additional fee for entry.

The order should issue as a Chambers order, so that the defendant may take advantage of Rule 507 if he so desires.

KELLY, J. DECEMBER 20TH, 1919.

CARSWELL v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY.

Street Railway—Injury to Bicyclist—Negligence of Motorman—Evidence—Findings of Jury.

Action for damages for personal injuries sustained by the plaintiff, by being struck, when riding a bicycle upon a highway, by a car of the defendants.

The action was tried with a jury at Sandwich.

R. L. Brackin and A. J. Gordon, for the plaintiff.

J. H. Rodd and H. L. Barnes, for the defendants.

KELLY, J., in a written judgment, said that evidence was submitted by the plaintiff from which the jury could infer that his bicycle on which he was riding was struck by the defendants' car, while he was endeavouring to pass the obstruction (gravel and other building material) which occupied the pavement from the kerbstone towards the southerly rail of the southerly pair of

car tracks, in circumstances which negatived contributory negligence and pointed to negligence by the defendants.

Part of that evidence was that he had received no warning that a car was approaching; and that, having turned towards and ridden close to the tracks in order to avoid running into the obstruction on the pavement, he had about passed the part of the gravel which extended nearest to the track, and was turning from the tracks and towards the kerbstone, when the car struck him.

The evidence as to the condition of the pavement by reason of the presence thereon of the building material was open to the suggestion that the plaintiff had got into a place of danger and was in the act of getting out of it when the car struck his bicycle.

In the evidence for the defence the motorman admitted knowledge of the existence of the building material on the pavement, and said that he saw the plaintiff and his companion, Cole, proceeding along the pavement, and that he kept his eye upon them; and he said that he continued to sound the gong, and that the plaintiff, who had turned away from the rail to a distance of about 4 feet therefrom, swerved towards the car when it was about 4 feet behind him, and his bicycle was struck by the car-step. He also admitted that, if the car caught up to the plaintiff while he was upon the narrow space between the building material and the car-track, there might be danger to him.

The learned Judge said that he could not reconcile himself to the view that a motorman on a street-car, who sees a pedestrian or a conveyance—whether it be a bicycle, carriage, motor-car, or other vehicle—proceeding ahead of him in a position which may be dangerous, has discharged his duty and relieved himself from the charge of negligence and resultant liability, merely by sounding the gong or otherwise giving warning. In the recent case of Barr v. Toronto R. W. Co. and City of Toronto (1918), 44 O.L.R. 232, the judgment in which was affirmed on appeal (1919), 46 O.L.R. 64, the learned trial Judge said (44 O.L.R. at p. 234) that a railway company must not run down persons who are in a dangerous position in front of a car.

The jury's finding in the present case was "that the motorman should have slowed the car down to give the plaintiff a chance to pass the obstruction." The evidence sufficiently supported the findings, and judgment should accordingly go in the plaintiff's favour with costs.

CREED v. MCCAMMON—FALCONBRIDGE, C.J.K.B.—DEC. 17.

Slander—Verdict for Nominal Sum—Costs—Counterclaim.]—Action for slander. Counterclaim for sums of money said to be due for services, etc. The action and counterclaim were tried with a jury at a Toronto sittings. The jury found a verdict for the plaintiff for 25 cents for the slander and made no finding upon the counterclaim. FALCONBRIDGE, C.J.K.B., in a written judgment, said that judgment should be entered for the plaintiff for 25 cents; that the counterclaim should be dismissed, except as to two small items, which had been struck out of the record; and that there should be no costs either of the claim or counterclaim. H. H. Dewart, K.C., and Norman S. Macdonnell, for the plaintiff. C. B. Henderson, for the defendant.

MINOR v. AMES.—FALCONBRIDGE, C.J.K.B.—DEC. 17.

Promissory Notes—Action on—Defence—Counterclaim—Commission—Partnership—Expenses—Costs—Judgment—Delivery up of Share-certificates.]—Action to recover the amount of a promissory note and other money-claims. Counterclaim for a commission, money paid for expenses, etc. The action and counterclaim were tried without a jury at Welland. FALCONBRIDGE, C.J.K.B., in a written judgment, said: (1) that the defendant had failed to establish any defence to the claim on the note for $1,130; (2) that the plaintiff had failed to prove the allegations made in para. 3 of the statement of claim; (3) that the plaintiff and defendant in 1918 entered into a partnership arrangement for the purpose of producing gas in the county of Haldimand; (4) that there were claims on both sides for expenses while promoting the partnership interests—these should be set off the one against the other; (5) that the defendant's claim for commission on the sale of the plaintiff's interests in the Moulton lease should be disallowed. In the result the plaintiff should have judgment for $1,130 and interest at 6 per cent. from the 2nd April, 1919, and costs. Counterclaim dismissed without costs. On payment of the judgment, the plaintiff should re-assign and deliver up to the defendant the certificates for 27,000 shares of the Tar Island Producing and Refining Corporation. W. M. German, K.C., for the plaintiff. L. B. Spencer, for the defendant.

GATFIELD v. GATFIELD—KELLY, J.—DEC. 17.

Husband and Wife—Alimony—Desertion—Evidence.]—Action for alimony, tried without a jury at Windsor. KELLY, J., in a written judgment, said that the right of the plaintiff to alimony was beyond doubt. It was a clear case of deliberate, unjustifiable desertion of the plaintiff by the defendant and of his positive refusal to contribute anything to her or for her support. That was amply established by his own evidence, as was also the fact that he made no charge against her of improper conduct. As he himself put it, he was "absolutely through with her." Having regard to the circumstances and to his means, he should pay her alimony at the rate of $55 per month, payable monthly, and also pay her costs of the action. R. L. Brackin, for the plaintiff. A. St. G. Ellis, for the defendant.

ROWELL v. ISENBERG—KELLY, J.—DEC. 17.

Vendor and Purchaser—Agreement for Sale of Land—Action by Vendor for Balance of Purchase-money—Defences—Fraud and Misrepresentation—New Agreement—Counterclaim—Findings of Fact of Trial Judge—Judgment for Instalment of Purchase-money and Interest—No Acceleration Clause in Agreement—Costs.]—Action to recover the unpaid portion of the purchase-money of land, and interest thereon, under an agreement of September, 1917, for sale by the plaintiff to the defendant, and also to recover a small sum said to have been paid by the plaintiff for taxes. By their defence, the defendants sought to be relieved from the agreement, alleging misrepresentation by the plaintiff inducing the agreement; and also set up that in August, 1918, an arrangement was reached by which the plaintiff was to take back the property in consideration of being allowed to retain the sum of $200 paid at the time of the contract and a further sum realised by the plaintiff under a judgment; and the defendants counterclaimed for the return of the $200 and interest and for damages for fraud and misrepresentation. The action and counterclaim were tried without a jury at London. KELLY, J., in a written judgment, reviewed the evidence and found in favour of the plaintiff as to the defences set up. The learned Judge was of opinion, however, that the plaintiff was not entitled to judgment at the present time for the full amount claimed. There was overdue and unpaid when this action was commenced only $209.70, and the agreement did not contain an acceleration clause. No evidence was offered as to the sum alleged to have been paid for taxes. There should be judgment for the plaintiff for $209.70 and interest thereon from

the teste of the writ of summons, with costs on the Supreme Court scale, and the counterclaim should be dismissed with costs. R. G. Fisher, for the plaintiff. W. R. Meredith, for the defendants.

WRIGHT v. MITCHELL—FALCONBRIDGE, C.J.K.B.—DEC. 20.

Negligence—Explosion in Building—Injury to Property of Plaintiff—No Allegation or Proof of Negligence—Evidence—Not a Case of Res Ipsa Loquitur—Transfer of Premises of Defendants.]—An action for damages for injury to the property of the plaintiff by an explosion of acetylene gas which was being manufactured by the defendant Mitchell upon the premises of the defendants the Parks, situated close to the plaintiff's property. The action was tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he had now come to the conclusion, upon consideration of the authorities cited in the elaborate written arguments submitted, that this was not a case of *res ipsa loquitur;* and that, as the plaintiff had not alleged nor proved any negligence of the defendants, or any of them, she must fail. It might well be also that the transfer of their interests vesting ultimately in the unfortunate man Snider, who was killed in the explosion, would absolve all three defendants. And, in this connection, the fact, if it was a fact, that there was no visible change of possession nor any registration of change of ownership, could not affect the case. The action should be dismissed with costs. U. A. Buchner, for the plaintiff. O. L. Lewis, K.C., for the defendant Mitchell. H. N. Graydon, for the defendants the Parks.

COUNTY COURT OF THE COUNTY OF YORK.

DENTON, JUN. CO. C.J. DECEMBER 9TH, 1919.

RE O'HARA & CO.

JARVIS'S CLAIM.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim to Rank on Estate in Hands of Assignee—Contestation—Action to Establish Claim—Time for Bringing—Assignments and Preferences Act, sec. 27 (2)—Extension of Time after Expiry of 30 Days—Jurisdiction of County Court Judge—Reasons for Making Order.

Motion by H. P. Jarvis, the claimant, for an order, under sec. 27 (2) of the Assignments and Preferences Act, R.S.O. 1914 ch. 134, extending the time for bringing an action to establish his claim against the insolvent estate of H. O'Hara & Co., in the hands of an assignee for the benefit of creditors.

C. H. Kemp, for the applicant.
Hamilton Cassels, K.C., for the assignee.

DENTON, JUN. Co.C.J., in a written judgment, said that the claimant sought an order allowing further time within which the action mentioned in sec. 27 (2) should be brought. The claimant also asked that the notice of contestation should be set aside or treated as a nullity, on the ground of unreasonable delay in serving it. This second contention, though not abandoned, was not pressed in argument.

The first question to be decided on this motion was, whether there was jurisdiction in the learned County Court Judge to grant the order after the expiration of the 30 days mentioned in the sub-section.

In the learned Judge's opinion, Gilbert v. The King (1907), 38 Can. S.C.R. 207, following or adopting the views expressed in Banner v. Johnston (1871), L.R. 5 H.L. 157, at pp. 170 and 172, and Vaughan v. Richardson (1890), 17 Can. S.C.R. 703, could well be applied to the section of the Assignments and Preferences Act under which this application was made; and he held that he had jurisdiction to make the order after the expiry of the 30 days.

The next question was, whether the order should be made.

It is not suggested that the estate had been distributed, or that any person or interest would be prejudicially affected if the

order should be made, except the other creditors, whose dividends would be lessened if the plaintiff established his claim.

It was contended, however, by counsel for the assignee: (1) that the order should not be made until a prima facie case was made out, which he argued has not been done; (2) that the plaintiff's claim sounded in damages, and was not provable as against the assignee; and (3) that no sufficient excuse for failure to apply before the expiration of the 30 days had been shewn.

The learned Judge was unable to agree that the order should be withheld on any of these grounds. The claimant swore that he had a meritorious claim against the debtor for a large sum, arising out of various transactions. There was no reason to suspect, much less to assume, that the claim was fictitious or unfounded. Part of the claim might sound in damages, and as such might not be provable, but the Court which tried the action would determine that. It was true that the claimant has not shewn that he could not have applied for this order before the 30 days expired, but it must be remembered that he had an action pending against the debtors, and in that action he had some ground for thinking that the assignee might be added as a party defendant. He served his notice of motion to add the assignee in that action before the 30 days expired, but the motion was not heard until after, when it was dismissed without prejudice to the present application being made: see Jarvis v. O'Hara (1919), ante 72.

In all the circumstances, the order asked for should be made. The action against the assignee might be begun at any time within 10 days from this date.