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HIGH COURT DIVISION.

BRITTON, J. JUNE 29TH, 1914.

RE LEISHMAN.

Will—Construction—Devise and Bequest to Son, Subject to Charge for Maintenance of Widow—"Comforts she has been Used to"—Ascertainment of Proper Sum for Maintenance—Powers of Court—Originating Notice—Rule 600—Additional Bequest to Widow of Life Income from Insurance Moneys.

Motion by Charlotte Leishman, widow of the late John Leishman, upon originating notice, for an order determining her rights and interests under her husband's will, as between her and her son Robert.

D. Inglis Grant, for Charlotte Leishman.

A. E. H. Creswicke, K.C., for the executors of John Leishman and for Robert Leishman.

BRITTON, J.:—The will is dated the 25th October, 1905, and the testator died in the latter part of the year 1909. At and before the time of the testator's death, he and his son Robert were carrying on, in partnership, at Bracebridge, a hotel and livery business, each owning an undivided one-half of that business, its plant and property.

The following is a copy of the will:—

"I direct that my just debts and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my decease.

"I give devise and bequeath my undivided interest in the hotel property known as the Albion Hotel and the lands con-

nected therewith being lot number fifteen on the westerly side of Main street part of lot number fourteen on the westerly side of Main street part lot number ten on the north side of Thomas street and part of lot number one on the easterly side of Manitoba street together with all my interest in the furniture chattels fixtures in said hotel also in the horses rigs and other chattels to my son Robert subject to his supporting and keeping my wife Charlotte during the remainder of her natural life in a suitable and proper manner according to her station in life and so that she may have the comforts she has been used to.

"I further give devise and bequeath my life insurance in the Ancient Order of United Workmen amounting to two thousand dollars and my insurance in the Independent Order of Foresters amounting to one thousand dollars which are both payable to my wife Charlotte to my son Abial subject to a life interest therein to my said wife it being my desire that she shall use and enjoy the income from said moneys during her lifetime and that after her death the principal shall go to my said son Abial.

"I further give devise and bequeath to my said son Robert any moneys I may have in the Bank of Ottawa together with the residue of my property of whatsoever kind and wheresoever situated.

"And I hereby nominate constitute and appoint Isaac Huber and Henry B. Bridgland both of the town of Bracebridge aforesaid to be the executors of this my last will and testament contained on this and the preceding page."

The executors have not taken any active part in the administration of the estate. Robert states, and it is not denied, that the money in the bank at the time of his father's death was not sufficient to pay his father's debts and the funeral expenses. Robert gives what appears to me a fair and candid statement of what he has contributed and done in the maintenance of his mother since the death of his father. Robert's statement is practically accepted as to the money payments, but the mother complains that she is not being supported and maintained in a suitable and proper manner according to her station in life, and that she is not being supplied with "the comforts she has been used to."

The testator has charged his property with such maintenance, and Robert has accepted the property subject to the charge. The question is, is Robert doing his whole duty under the circumstances? I am of opinion that he is not, and that the mother's

complaint is well-founded—although I am not able to agree with the argument of her counsel that she is entitled to as large a sum as is claimed. The question is not what Robert can do, retaining the property received from his father, and continuing in a business not now so profitable as formerly; but what Robert may be compelled to do in carrying out his father's direction, with his father's property bequeathed to Robert, subject to its being used for the maintenance and support of the widow and mother. Robert is able to pay a larger sum than he has been paying.

The widow is now 75 years of age, in feeble health, and her wants are different now from those in former years. In addition to food and raiment, she requires personal care and attention and watchfulness in her day-by-day going about. After the death of the testator, and down to the end of 1912, the maintenance provided was irregular in times of payment and as to amount paid. The amount paid was quite insufficient. And, if the mother was satisfied with it, as Robert says, it is evidence that she was not disposed lightly or hastily to complain. Since 1912, Robert has paid regularly $20 a month. The regularity of these later payments has satisfied the mother upon that point, for she knew what she was getting and when. That is not sufficient for the reasonable requirements of a woman of her age and health, and considering what she had been accustomed to. It may be that, with advancing years, and considering the way support was at first given, the widow is now more restless and exacting. At first her complaint was of irregularity and uncertainty. She said, and no doubt truly, that she would rather have a little, and have it regularly and without asking for it, than more, given grudgingly, after request on her part and questioning on the part of Robert. Mother and son drew apart, and they are now standing on their strict legal rights. It is not easy to determine just what the widow "has been used to." In the days of her health and during her husband's lifetime, she worked with her husband, and was content even if without what were called luxuries. She had what she desired, so far as appears. The charge for maintenance entitles the widow to it from the property bequeathed to Robert, apart from the interest upon the money from life insurance.

The words of the will in reference to the insurance money are—"to my son Abial subject to a life interest therein to my said wife it being my desire that she shall use and enjoy the income from said moneys during her lifetime and that after her death the principal shall go to my said son Abial." That seems

to be something over and above mere maintenance—addition to maintenance. See Davidson v. Davidson, 17 Gr. 219.

It is quite clear that a money payment will be best for both mother and son—in fact, to supply food and clothing in kind would lead to constant friction.

I am of opinion that, until and unless otherwise ordered, Robert Leishman shall pay to his mother Charlotte Leishman for her maintenance as provided in the will the sum of $40 for each month, payments to be made on the 15th day of each month, unless that day is Sunday or a holiday, and in case of the 15th being a Sunday or holiday, payment shall be made on the next working day, the first payment to be made on the 15th August next; arrears from the time Robert ceased paying at the rate of $20 a month to be paid on or before the 15th July next.

Upon the question of jurisdiction, Rule 600 is wide enough to cover such an application as the present, and to permit its being disposed of on originating motion.

No order as to costs.

LENNOX, J. JUNE 30TH, 1914.

SODEN v. TOMIKO MILLS LIMITED.

Master and Servant—Death of Servant—Negligence—Knowledge of Possible Danger—Instruction—Warning—Death Caused by Want of Care on Part of Deceased—Findings of Fact of Trial Judge—Costs.

Action by Matilda Soden, widow of John Soden, to recover damages for his death, while working in the defendants' lumber mill, by lumber falling upon him, while he was engaged in removing it, owing, as the plaintiff alleged, to the negligence of the defendants.

The action was tried without a jury.

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

A. E. Fripp, K.C., for the defendants.

LENNOX, J.:—The plaintiff has failed to establish a cause of action against the defendant company. In the situation in

which he was placed by the company on the 28th September, 1912, the plaintiff's husband, John Soden, could, notwithstanding the negligence of the company, if any there was, by the exercise of reasonable care on his part, have avoided the accident which resulted in his death.

It is true that if employers of labour knowingly place an ignorant or unskilled employee in a situation which, although not necessarily unsafe, is yet likely or liable to cause injury to an ignorant or inexperienced operator, it is the duty of the employers to instruct their employee as to the proper method of operation, approach, or control, and to warn him of incidental dangers before exposing him to the risk. Neglect of this and injury resulting as the proximate cause will subject the employers to damages: Drolet v. Denis, 48 S.C.R. 510. It is alleged that the gangway, and appliances in connection with it, were constructed in an improper way and were defective in detail, and I think that they were at one time. Subsequently, however, and before the happening of the accident complained of, a new system of fastening the levers was adopted, and there is evidence, which has not been directly met, that by this means a condition of efficiency and safety was secured. I cannot, therefore, find as a fact, because there is no evidence to establish it, that, at the time of the casualty, the condition or arrangement of the ways and their appliances were defective, or were out of repair, or were unsafe for an employee, acquainted with the conditions and situation, and exercising ordinary intelligence and care; but, all the same, the arrangements were of a character that might readily prove fatal to a green hand—to a new or inexperienced operator; and the defendant company, if legally, are not morally, blameless, for, by a few moments' thought, a trifling expenditure, and the exercise of the most elementary mechanical skill, every element of danger could have been eliminated.

The questions then are: Had the deceased, in the circumstances of this case, having regard to the condition of the ways at the time, a fair chance to protect himself? Did the defendant company negligently expose him to a danger of which he was ignorant? And what was the immediate cause of the injury?

If, as I have said, the conditions involved a liability to injury, obvious to the company, though remote—and I have already found this to be the fact, and the event proved it—and if this man was wholly ignorant of the danger and met his death

through want of instruction and warning, the plaintiff is entitled to damages.

The plaintiff's husband was not directly instructed by the defendant company or by any one in superintendence as to the proper method of executing the work he was engaged in at the time of the accident, nor was he directly warned as to the probable consequence in case of pulling out the wrong pin. But he was working in the yard for a long time, in the neighbourhood of others who were performing this service from day to day, and the proper method to be employed to lower the pile of lumber, and the effect of pulling a pin in an adjoining compartment while standing in the compartment, were so obvious that it would not be unreasonable to infer that he knew just what ought to be done and how to do it with safety to himself, before he ever engaged in this service for the company. But there is more than this. He had on several occasions, before the day of the accident, been engaged in the same work, and had been shewn how to do it by a fellow-labourer, and had, at least upon one occasion, been warned by this man, Howe, of the danger involved in pulling out the pin in the compartment he was standing in; and his answer at the time would indicate that he fully appreciated the risk involved. He had, too, on the day of the accident, in conjunction with Foucault, but each taking his own part of the work, already successfully let down three piles of lumber and apparently understood just how to do it.

I am forced to the conclusion that, at the time of the casualty, the deceased understood how to perform the work in which he was engaged, with safety to himself; that he knew that the pin he should then pull was the pin near him in compartment number 5; that he appreciated the danger involved in pulling the pin in compartment number 6, in which he was then standing; that he thoughtlessly and inadvertently—but not through want of knowledge—pulled the pin in number 6 instead of number 5, and that this was the cause of his death.

The action will be dismissed; and, as the defendants are not entirely blameless, it will be dismissed without costs, but with liberty to the defendants, if they desire to do so, to appeal on the question of costs.

LENNOX, J. JUNE 30TH, 1914.

MITCHELL AND DRESCH v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Street Railway—Laying Rails on Streets under Authority of By-law not Submitted to Electors—Statutory Requirement—Action by Persons Affected to Restrain Laying of Rails and to Compel Removal—Locus Standi—Special and Particular Injury—Parties—Jurisdiction—Ontario Railway and Municipal Board.

Action for an injunction restraining the defendant company from constructing a street railway line upon certain portions of Ferry street, Chatham street, and Victoria avenue, in the city of Windsor, and for a mandamus compelling the company to restore the portions of these streets which had already been interfered with, and for damages.

J. H. Rodd, for the plaintiffs.

A. R. Bartlet, for the defendants.

LENNOX, J.:—For some years the defendants have held franchises as to certain streets and parts of streets in Windsor, but it is not pretended that any of them cover the line in question. The by-laws conferring them were all passed prior to the 16th April 1912, and none of them were assented to by the electors.

On the 27th April, 1914, by by-law No. 1713, the Municipality of the City of Windsor purports to authorise and empower the defendant company "to construct a line of railway from Sandwich street, in the city of Windsor, south along Ferry street to Chatham street, thence along Chatham street to the intersection of Victoria avenue, thence along Victoria avenue to London street, with suitable curves on Sandwich, Pitt, Chatham, and London streets," being the line of railway the construction of which the plaintiffs seek to enjoin. This by-law was not submitted to the people, as required by statute.

The by-law has no legal effect. It does not touch the question. It is argued that the Corporation of the City of Windsor is a necessary party. I do not think so. No right or interest of the city is being questioned or attacked; not even by-law 1713, if the municipality can be said to be interested in it. The situation is

this. The plaintiffs complain and shew that they are being injured, and in a way special and particular to themselves, by the acts of the defendant company upon certain highways. *Primâ facie* to break the roadbed of the highway and obstruct it is a wrong, and an actionable wrong at the suit of the persons injured, where it causes them special damage; and it is none the less a wrong when done by a railway company. The defendant company must desist or establish a justification. They seek to do this by what they call the authority of the municipality.

The statute says that authority cannot be so conferred. The document they set up does not prevent their being wrongdoers as against the plaintiffs—they are ordinary trespassers causing special and peculiar damages to the plaintiffs by reason of the situation of their properties. I find nothing to oust my jurisdiction by reason of the powers conferred upon the Ontario Railway and Municipal Board.

There will be judgment for an injunction and mandatory order in the terms prayed for, and a reference to the Master at Sandwich to assess the damages sustained by each of the plaintiffs; judgment for these damages as found and for the costs of the action and reference.

MIDDLETON, J., IN CHAMBERS. JUNE 30TH, 1914.

HYATT v. ALLEN.

Costs—Appeal to Privy Council—Judgment—Interpretation of —Costs Incurred in Court of Appeal—Taxation.

Motion by the plaintiffs for a direction to the Taxing Officer to tax to the plaintiffs the costs incurred by them in Ontario in respect of an appeal to the Judicial Committee of the Privy Council.

Featherston Aylesworth, for the plaintiffs.
M. L. Gordon, for the defendants.

MIDDLETON, J.:—By the certificate of the Privy Council, in addition to the sum taxed for the costs of the appeal incurred in England, the defendants are directed to pay the plaintiffs' costs of the appeal to the Privy Council incurred in the Court of Appeal.

The learned Taxing Officer has refused to tax any of the costs of the appeal incurred in Ontario, owing to the peculiar form of expression used in the certificate.

I think the words used in the certificate, "costs of this appeal incurred in the Court of Appeal," must be taken to mean the costs of the appeal incurred in Ontario before the case was certified to England, and that the Taxing Officer should tax the costs incurred in Ontario, taking care to see that there is no overlap, and that nothing is allowed which is already covered by the costs taxed in England.

There will be no costs of this application.

MIDDLETON, J., IN CHAMBERS. JUNE 30TH, 1914.

REX v. HUCKLE.

Criminal Law—Habeas Corpus—Application by Person Imprisoned in Penitentiary under Conviction of Court of Record —Penitentiaries Act, secs. 64, 65*—Remission of Part of Sentence for Good Behaviour — Cancellation — Prison Regulations—Prison Offences.*

Motion, upon the return of a habeas corpus, to discharge a convict from custody.

G. Russell, for the applicant.

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

MIDDLETON, J.:—Huckle was convicted before His Honour Judge Snider of extortion, and sentenced to seven years' imprisonment, on the 12th December, 1908. His sentence will not expire by effluxion of time until the 12th December, 1915.

Under sec. 64 of the Penitentiaries Act, the Inspectors of Penitentiaries are empowered, subject to the approval of the Minister of Justice, to make regulations under which a record may be kept of the daily conduct of every convict, noting his industry and the strictness with which he observes the prison rules, with a view of permitting the convict to earn a remission of a portion of the time for which he is sentenced, not exceeding six days for every month during which he is exemplary in conduct and industry. When the convict is thus accorded

seventy-two days of remission, he is allowed to earn ten days' remission for each subsequent month during which his conduct and industry continue satisfactory. Under the statute, for certain offences, such as attempting to escape, or assaulting officers, the whole remission earned may be forfeited.

Rules were prepared and approved by the Governor-General in Council on the 26th November, 1898. These Rules provide that the Warden may deprive a convict of not more than thirty days of remission for any offence against prison rules, and that there may be forfeiture of more than thirty days with the sanction of the Minister of Justice. Section 65 of the statute provides for the drawing up of a list of prison offences, a copy of which is to be placed in each cell in the penitentiary.

This motion is based upon a fundamental misconception of the provisions of the statute. It is assumed that the convict is entitled as of course to a remission of his sentence unless he is deprived of it for misconduct. A convict may so behave himself that he cannot be regarded as exemplary in conduct and industry, and yet not be guilty of any offence against the prison rules. In that case he would serve the full term of his sentence, for he would have earned no remission. A convict, on the other hand, may, by reason of exemplary conduct and industry, earn a shortening of his sentence, but he may by specific offences forfeit that which he has earned: e.g., this convict apparently had earned some remission, I do not know how much; but on the 18th October, 1910, the Minister of Justice approved of a report of the Warden, dated the 8th September, 1910, by which all remission then accorded was forfeited.

Another fundamental misconception underlying this application is the assertion that the applicant is not bound by the penitentiary regulations; it is said that he has not been furnished with a copy of them, and that he ought not to be bound by any rules of which he has no knowledge. Apart from these rules, there is no right of remission, for the remission is, by the statute, to be under the regulations prescribed.

Then it is argued that the award of remission or the forfeiture of remission must be on some proceeding in the nature of a trial, so that the convict may be heard. This is clearly not what is contemplated by the Act. Some one must determine whether the conduct of the convict is exemplary. Primâ facie the Warden and officers of the prison must discharge this duty. Their conduct will be subject to review by the Minister; but the

statute surely does not contemplate a controversy in the Courts over a question of prison discipline.

The Habeas Corpus Act probably has no application to this case, and I am not sure that the writ was not granted per incuriam. It does not apply to any person imprisoned by the judgment, conviction, or order of the Supreme Court or other Court of record. Where, as here, the accused is imprisoned under a conviction, he must seek redress by application to the Minister of Justice, who alone appears to have authority to review the action of the prison officials.

The application is, therefore, dismissed with costs, and the convict is remanded to custody.

Since the above was written I have been handed a statement shewing that, apart from cancelled remission, the accused has 87½ days to serve, and in addition 117 days forfeited—204½ days in all.

MIDDLETON, J., IN CHAMBERS. JUNE 30TH, 1914.

REX v. FAUX.

Municipal Corporation — By-law — Seal—Municipal Act, 1913, *sec.* 258(3)—*Prosecution for Offence—Objection—Affixing Seal—Conviction—Motion to Quash.*

Motion by the defendant for an order quashing his conviction by a magistrate for being drunk in a public place in the township of Otonabee, contrary to a by-law of the township.

The objection was that a valid by-law was not proved; the original not having been sealed when passed, and the corporate seal having been affixed only after the objection was taken before the magistrate.

By the Municipal Act, 1913, sec. 258(3), it is provided: "Where, by oversight, the seal of the corporation has not been affixed to a by-law, it may be affixed at any time afterwards, and, when so affixed, the by-law shall be as valid and effectual as if it had been originally sealed.

G. N. Gordon, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—This motion, I think, fails. The true effect of the sealing of the by-law is to validate it from the beginning.

The legislative will was then exercised, and the intention of the Legislature was to permit the sealing to relate back; and, after the sealing has taken place, I am to treat the by-law as a good and valid by-law from the date of the passing.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. JUNE 30TH, 1914.

RE ELLIOTT INFANTS.

Infants — Custody — Children's Protection Act of Ontario — Order of Police Magistrate—Application by Father for Custody—Welfare of Children.

Application by the father of the infants, on the return of a habeas corpus, for an order for delivery of the custody of the infants to the applicant by a Children's Aid Society.

Eric N. Armour, for the applicant.

J. R. Cartwright, K.C., for the Children's Aid Society.

MIDDLETON, J.:—These children have been taken into custody by the Children's Aid Society, and the case was heard at great length before the Police Magistrate at Belleville.

The evidence taken in shorthand covers 137 full pages. In the result, the magistrate, by reason of the father's neglect, ordered the children to be made wards of the Children's Aid Society, and directed the Corporation of the County of Hastings to contribute towards their maintenance and support until a foster home is provided. The children are yet in the custody of the society. Application is now made by the father for an order restoring to him the custody of the child.

Upon the evidence, which commended itself to the magistrate, and which I see no reason to disbelieve, it is quite plain that the father did desert and neglect his children; and I think that as a matter of discretion I should now decline to interfere. Having regard to the welfare of the children, I am satisfied that they will be better cared for as wards of the society than they ever have been by the father.

As usual in cases of this kind, there are not lacking those whose sympathy with the father has resulted in affidavits

strongly supporting his case; but these are more than offset by the affidavits in answer; and the Police Magistrate, who is a careful and experienced man, has had the great advantage of seeing the witnesses and hearing the oral evidence; and his view is not lightly to be interfered with. Quite apart from this, my own view is that the children are better as they now are.

MIDDLETON, J. JUNE 30TH, 1914.

RE MILLER.

Will—Construction—Absolute Gift—Subsequent Words Cutting down—Effect of—Gift over—Failure.

Motion by the executors of Sarah E. Miller, deceased, upon an originating notice, for an order determining a question arising as to the construction of her will.

F. P. Betts, K.C., for the applicants.

T. G. Meredith, K.C., for the next of kin of William B. Chase, deceased.

T. Coleridge, for the residuary legatees under the will.

MIDDLETON, J.:—By her will, dated the 4th March, 1904, Sarah E. Miller, who died on the 23rd February, 1911, after certain minor bequests, gives her property to her brother William B. Chase, "with power to sell and dispose of as full as I could do now my real estate consisting of houses 147 and 151 on Horton street in the city of London and seven lots in Knowlwood Park near the city of London and three lots in Oxford Park also in and near the city of London and it is my will and intent that my said brother William B. Chase shall use so much of the proceeds of my property as shall be necessary to provide a comfortable maintenance for him during his lifetime and that if any of my property or the proceeds thereof shall not be necessary for the comfortable maintenance of my said brother and shall remain at his death then such part so remaining shall be divided equally between my niece Sarah Smuck and my nephew LeRoy Chase." The brother, William B. Chase, was appointed sole executor of the will.

Chase was a paralytic; and evidently the main object of the

testator's beneficence. He survived the testatrix, and died at the Home for Incurables in the city of London, on the 22nd June, 1913. At the time of his death, he had $501.85 in cash, and there was a balance due upon an agreement for sale of the houses, amounting to $1,911.35. The three Oxford Park lots also remained; they are valued at $200. This makes a total of $2,613.20; all of which originated, it is admitted, from the sister's estate.

The question is, whether the gift over to the nephew and niece can take effect. This question resolves itself into a determination whether there can be found in the will anything to cut down the absolute gift to the brother.

In the much discussed case of Constable v. Bull, 3 DeG. & Sm. 411, it was held that the words there found, perhaps not very widely different from the words here used, cut down the gift to a life estate. In the Irish case of In re Walker, [1898] 1 I.R. 5, the true principle is well explained. The choice is between an absolute gife and a life estate. There does not seem to be any middle ground. If the beneficiary has the right to deal with the corpus, then the gift of any balance that may remain is repugnant and void, for the property is vested in the first taker absolutely, and the attempt to give what remains at the death of that first taker is an attempt to do something not permitted by law.

The same result is arrived at in In re Jones, [1898] 1 Ch. 438. There a testator gave absolutely to the widow, and what remained at her death, over. It was held that this failed.

It is probably impossible to reconcile all the cases satisfactorily; but the tendency of all the later cases is against the attempt to cut down an absolute estate to a life estate, unless the testator's intention is clear beyond peradventure.

The order will, therefore, declare that the property vested in William B. Chase absolutely, and that the attempted gift over fails to take effect.

MIDDLETON, J. JUNE 30TH, 1914.

RE MESSENGER.

Will—Construction—Appointment of Trust Company as "Executor and Trustee"—Revocation by Codicil of Appointment of Executor and Appointment of Individuals as Executors—Effect as to Trusteeship.

Application by the National Trust Company, upon originating notice, for an order determining a question arising upon the construction of the will and two codicils thereto of David H. Messenger, deceased.

G. H. Watson, K.C., for the company, and for the daughter and granddaughter of the testator.

C. L. Dunbar, for the executors named in the second codicil.

MIDDLETON, J.:—A somewhat troublesome question arises on the will of the late David H. Messenger, who died on the 3rd August, 1913. By his will he appointed the National Trust Company executor and trustee of his will. Throughout he speaks of the company as his "executor and trustee." He directs his "executor and trustee" to pay his debts. His property is then given to his "executor and trustee," to be held and disposed of by such "executor and trustee" upon certain trusts. The "executor and trustee" shall, after realisation, hold the property during the lifetime of the testator's daughter, and shall pay her the income. Upon the death of the daughter, if the granddaughter survives, it shall pay her the income, and after her death, leaving issue, her issue is to take. In default of issue, the money goes to charities.

By codicil dated the 14th December, Mrs. Cassidy, the testator's housekeeper, is given the testator's house for life. She is also given the income from the testator's estate within Ontario, for life. The testator then directs his "executors" to invest and keep invested the estate from which the income is to be derived during the lifetime of Mrs. Cassidy, and upon her death these assets are to be disposed of by his "executors and trustees" in the manner provided for by the will.

By a subsequent codicil, dated the 21st October, 1907, the appointment of the National Trust Company as "executor" is revoked, and, instead, two personal friends are named as executors. Save as to this, the will and former codicil are confirmed.

The trust company now contends that all the testator has done is to revoke its appointment as executor, and that it still continues as trustee. This motion is to have it so declared, and for a declaration as to its rights and duties during the lifetime of Mrs. Cassidy.

Mr. Watson also appears for the daughter and granddaughter, and they desire that the trust company should be the custodian of the assets. No case is made or suggested for the removal of the executors from their office, but the suggestion is that their duties as executors have now been fulfilled, and that the functions of the trust company now arise.

There is no room for doubt that the offices of executor and trustee are in their nature easily distinguished; and there is equally no room for doubt that it is competent for a testator to appoint different persons to hold these different offices. In each case the true inquiry is, whether the testator has used the words in their strict legal significance, or whether he has indicated that the terms have been used in some secondary or colloquial sense, so that one office, and not two, is really indicated.

Turning to the will, I think it is plain that throughout the testator has not intended any distinction. The company is named as "executor and trustee." It is directed as "executor and trustee" to discharge the function of paying debts and testamentary expenses, which properly belongs to the office of executor. It is directed as "executor and trustee" to hold the fund during the lifetime of the daughter and granddaughter, and ultimately to divide the proceeds. This all properly belongs to the office of trustee. When the will is varied by codicil, his executors were directed to keep the fund invested during the lifetime of Mrs. Cassidy; but, upon the death of Mrs. Cassidy, it is the "executors and trustees" who are to divide. Then, for some reason, the testator changes his mind, revokes the appointment of the trust company as executor, and appoints instead the personal executors.

I cannot think that the testator intended to create the state of confusion contended for by Mr. Watson, and to mean that as to his Ontario estate—which is practically all that he had—the executors should hold it during the lifetime of Mrs. Cassidy, and that upon her death the National Trust Company should intervene as trustee. Nor do I think it likely that he could have intended that the trust company should have any functions to perform as trustee when he removed it from its position as executor.

Had the will drawn a clear line between the functions of the executors and the functions of the trustees, there is no doubt that the testator could have well nominated his friends as his executors and the trust company as his trustee; but he would then have directed the executors, on the realisation of the estate, to hand it to the custodial care of the trust company. Nothing of that kind is found. Everything points in the other direction; and I think it should be so declared.

Upon the argument of the motion I suggested to the parties the desirability of avoiding a somewhat unseemly contest as to the custody of this estate. It appeared to me that the trustees represented by Mr. Dunbar might well consent to have a third trustee appointed who would more particularly care for the interests of those entitled in remainder. This was not acceptable to Mr. Watson; but I again suggest the desirability of seriously considering the adoption of this course.

As I have no jurisdiction over the solicitor who prepared the codicil, his fault must be attributed to the testator, whose estate must bear the costs of this motion.

MIDDLETON, J. JUNE 30TH, 1914.

RE RISPIN.

Will—Legacies—Insufficiency of Estate to Pay in Full—Abatement—Legacy to Creditor in Satisfaction of Debt—Claim to Priority—Payment of Legacy in Full by Executors—Allowance by Surrogate Court Judge — Appeal — Originating Notice—Determination of Question Arising on Will.

Appeal by Charles Roe from an order of the Judge of the Surrogate Court of the County of Middlesex, upon passing the accounts of the executors of one Rispin, deceased.

T. G. Meredith, K.C., for the appellant.
W. R. Meredith, for the executors.
U. A. Buchner, for Dr. Tisdall, a legatee.

MIDDLETON, J.:—This motion is an appeal from the determination of the Surrogate Court Judge with reference to a payment of a legacy of $1,500, made by the executors to Dr. Tisdall.

Some question was raised as to the jurisdiction of the Surrogate Court Judge to deal with this question upon an audit. To avoid doubt, it was agreed by all parties that this motion should be treated, not merely as an appeal from the order of the learned Surrogate Court Judge, but also as a motion, as upon originating notice, to determine the question now arising.

By his will the testator gave a number of pecuniary legacies, including among others a legacy of $1,500 to Dr. Tisdall, who had been attending him during his last illness. This legacy was to be taken in satisfaction of the doctor's bill against the testator. This bill at the time of the decease would amount to about $300. The question is, whether the fact that Dr. Tisdall was a creditor and that the legacy was to be accepted by him in satisfaction of his claim, gives him priority over the other legatees. The estate has not turned out as well as contemplated by the deceased, and the general pecuniary legatees will not receive more than fifty cents on the dollar.

The precise point is determined in favour of the abatement by the decision in In re Wedmore, [1907] 2 Ch. 277, where it was determined that the principle by which a legacy given in satisfaction of dower was entitled to priority and did not abate, was inapplicable to the case of a legacy given in satisfaction of an ascertained debt. The learned Surrogate Court Judge has declined to follow this decision, deeming it to be in conflict with the principles enunciated in a number of earlier cases.

No doubt, there are dicta looking the other way; but this is the only decision upon the precise question; and I think the safer course is to follow this decision, so long as it is not overruled by some Court of higher authority. In the last edition of Theobald, the case is accepted without question, and the statement adhering in the earlier editions of that work, which favours the view entertained by the learned Surrogate Court Judge, has been modified so as to accord the decision.

With all respect to those who entertain the contrary view, the decision in question commends itself to me. The law by which a legacy to a widow in lieu of dower is entitled to priority is now too well settled to admit of question. It is in truth based upon the doctrine of election. The testator, desiring to dispose of property which is not his, namely, his wife's dower interest, in effect offers her a price which he is willing to pay for it. Before those claiming under the testator can take a benefit under his will which deals with this property sought to be purchased from the widow, they must pay the price.

This has no application whatever to the case of a creditor. The testator is not purchasing anything from him; and, although his failure to rank as a creditor may benefit the legatees, it cannot be said that any assets pass from him to the testator or his estate. He takes the legacy by the bounty of the testator. The testator has chosen to limit his bounty by directing that it is conditional upon the creditor waiving his claim as creditor. The bounty is so much the less, because part of the money received in truth represents a debt. The creditor should have the right, and no doubt has the right, to decline to receive the legacy upon these terms. He could then assert his claim, but I can conceive no foundation for the statement that because a debt, which may be trivial in amount, has to be forgiven as a condition of the receipt of the legacy, the legatee, therefore, acquires priority.

The testator's bounty is limited by the inadequacy of his estate, so all the beneficiaries should abate.

If the intention of the testator is to be sought, it is inconceivable that this would justify the contention of the legatee. If the testator had realised that his estate might not be sufficient to pay all, is it likely that he would intend his doctor, whose bill was only $300, to receive the $1,500 in full, at the expense of the near relatives, whose legacies would have to abate?

For these reasons, I think the appeal should be allowed, and that an order should now be made, on the originating notice, declaring that the legacy to Dr. Tisdall abates *pari passu* with the other legacies.

The costs will come out of the estate.

ELLIS v. ELLIS—MIDDLETON, J.—JUNE 29.

Fraudulent Conveyance—Action by Judgment Creditor of Grantor to Set aside—Evidence—Finding of Fact of Trial Judge.]—Action for a declaration that a certain conveyance of land made by the defendant Ellis, the plaintiff's husband, to the defendant Bowman, was fraudulent and void as against the plaintiff, who on the 18th June, 1913, recovered judgment against her husband for the delivery to her of certain chattels and the payment of $2,288, with interest, the judgment being unsatisfied as regards the money, and to vacate the registration of the conveyance. The reasons for the judgment of the 18th June (the Chancellor) are to be found in the note of Ellis v.

Ellis, 4 O.W.N. 1461, and the judgment was affirmed by the Appellate Division on the 23rd December, 1913: 5 O.W.N. 561. The conveyance was dated the 29th April, 1913, nearly six months after the commencement of the action of Ellis v. Ellis, and was not registered until the 8th September, 1913. The learned Judge, after stating the facts and reviewing the evidence, states his conclusion that judgment should be entered declaring the impeached conveyance fraudulent and void as against the plaintiff, and directing that the registration thereof be vacated, with costs to the plaintiff. J. G. Wallace, K.C., and J. Rowe, for the plaintiff. S. G. McKay, K.C., for the defendants.

RE MCINNES—MIDDLETON, J., IN CHAMBERS—JUNE 30.

Settled Estates Act—Order for Sale of Lands—Proceeds Invested by Executors in Mortgage Taken in Name of Accountant of Supreme Court—Mortgage-moneys Paid to Executors—Special Order Authorising Accountant to Execute Release.] — Motion by the petitioners, the executors and trustees under a will, for an order directing the Accountant of the Supreme Court of Ontario to execute a discharge of a mortgage. On the 30th April, 1908, TEETZEL, J., made an order under the Settled Estates Act, allowing a sale of lands; but for some reason this order did not follow the well-established practice, and direct the moneys to be paid into Court, but directed that the moneys should be held by the executors and trustees and be by them invested and reinvested, with the approval of the Official Guardian; the mortgages to be taken in the name of the Accountant. A mortgage was taken in the name of the Accountant, and in due time was paid off to the executors. The executors tendered a certificate of discharge of the mortgage to the Accountant for execution by him. By executing the discharge he would certify to the untrue statement that he had received the mortgage-money. In the meantime the executors had proceeded to reinvest the money in other securities received by them. MIDDLETON, J., said that the Accountant could not be asked to discharge the mortgage, in these circumstances; but an order should be made, by which, upon an affidavit being filed shewing that the money had been received by the executors—that being so far only a statement—the Accountant should be authorised to exe-

cute a release, reciting the terms of Mr. Justice Teetzel's order, and the payment of the money to the executors thereunder. The learned Judge added that it was a pity that a small estate should be put to this expense, but there seemed to be no other way out of the trouble which had been created by the course adopted. J. Tytler for the petitioners. F. W. Harcourt, K.C., for the infants.

COLE v. DESCHAMBAULT—LENNOX, J.—JUNE 30.

Trust—Purchase of Crown Lands—Declaration of Trust in Respect of Share of Plaintiff's Assignor—Form of Judgment.]—The judgment pronounced by LENNOX, J., on the 12th May, 1914 (ante 359), was settled by him in the following form. Let judgment be entered for the plaintiff in the terms of the prayer of the statement of claim, and for a reference to the Local Master at Ottawa to take an account and allow to the plaintiff one-fourth share of the net receipts and profits of the lumber and wood cut and converted by the defendant, and directing the defendant to convey to the plaintiff an undivided one-fourth share and interest in Petrie Island, upon payment of such sum, if any, as is found to be owing by the plaintiff to the defendant upon account of purchase-money, after charging the defendant with one-fourth part of the receipts and profits aforesaid, and for payment of the balance, if any, owing by the defendant to the plaintiff upon the taking of the accounts, and for the costs of the action and reference. H. H. Dewart, K.C., and C. A. Seguin, for the plaintiff. W. C. McCarthy, for the defendant.

GRANT CAMPBELL & CO. v. DEVON LUMBER CO. LIMITED—LENNOX, J.—JUNE 30.

Contract—Timber—Innocent Misrepresentation as to Quantity—Rectification of Contract—Payment for Value of Work Done — Evidence — Findings of Trial Judge.] — Action to recover the balance of the amount due to the plaintiffs for work done for the defendants in cutting and getting out logs from timber limits, and for rectification of the agreement between the parties. LENNOX, J., said that the questions to be determined were: (1) the basis upon which the agreement was entered into; (2) whether the defendants misrepresented the

quantity of timber to be cut and got out; and (3) whether, if there was misrepresentation, it was falsely and fraudulently made, or only mistakenly and innocently. The learned Judge finds as facts that the actual quantity of timber was 4,829,846 feet; that the plaintiffs would not have entered into the contract had they known or had reason to believe that the quantity exceeded 2,500,000 feet; that the defendants knew this; that they were not guilty of wilfully false or fraudulent representations, although they represented to the plaintiffs that what they were contracting to get out was approximately 2,500,000 feet, and the plaintiffs accepted and acted upon that representation. The defendants were honest, but mistaken. It was a mutual mistake. There was no manifest need to limit the undertaking of the plaintiffs in terms; they were to strip the whole area; both parties intended to deal with the cutting and getting out of about 2,500,000 feet. The delay in scaling resulted in the plaintiffs getting out a much larger quantity without being aware of it. The learned Judge said that he would have no hesitation in reforming the contract so as to carry out the actual intention of the parties, as found by him, if that were necessary. But it was admitted that, if the plaintiffs' contention was correct, they were entitled to $21,726.48; and two additional items of $454.75 and $398 may be conceded by the defendants; making a total of $22,578.23. Judgment for the plaintiffs for this amount with costs; but, if the defendants desire it, they may have a reference to the Local Master at Ottawa to ascertain what sum, if any, is owing to the plaintiffs in respect of these two items; and, in that event, the judgment will be for $21,726.48, including the sum paid into Court, with costs, and for a reference as to the two items, costs of the reference being reserved. R. A. Pringle, K.C., for the plaintiffs. M. J. Gorman, K.C., for the defendants.

KLENGON v. GOODALL—LATCHFORD, J.—JUNE 30.

Sale of Goods—Action for Price—Written Agreement—Statute of Frauds—Sale by Sample—Findings of Fact as to Quality—Condition as to Cleanness—Counterclaim—Goods Stored for Purchaser—Pledge by Vendor.]—Action to recover the price of 2,352 bushels of pease, sold by the plaintiff to the defendant by a written contract dated the 22nd November, 1913; the pease were delivered to the defendant at Wiarton. The defendant admitted the making of the contract; but asserted that it was not sufficient under the Statute of Frauds, and alleged that the pease were not according to the sample mentioned in the agreement,

and that he should not be obliged to accept or pay for them. The defendant also counterclaimed damages in respect of pease purchased from the plaintiff under an earlier agreement and (as alleged) not according to sample. The learned Judge said that the initial difficulty was to determine what was the "sample taken by Mr. S. J. Hogg," referred to in the agreement of the 22nd November; the pease to be supplied by the plaintiff were to be "fully up to" this sample. The learned Judge finds as a fact that the sample mentioned in the agreement was the sample taken by Hogg about the 1st October, and was the sample mentioned in the first agreement. It was made up of a number of samples, all of uncleaned pease, the produce of several different farms. The pease were, however, to be cleaned. This term was not expressed in the contract; but it was understood by both the parties that cleaning was to be done. The pease which the plaintiff procured from the farmers, placed in the defendant's bags, and stored for him at his request at Wiarton, were fully equal to the sample taken by Hogg. The price agreed to be paid by the defendant was much above the market-value of the pease. The defendant resold some of the pease, through a broker at Montreal, and these were rejected by buyers, not, however, because they were not clean, but because, as the learned Judge finds, they were not "good boilers." There was no representation or undertaking by the plaintiff that these pease should be suitable for domestic purposes. All the pease were "cleaned," within the meaning of the arrangement between Hogg and the plaintiff. The defendant's counterclaim failed, and should be dismissed with costs. The plaintiff was entitled to recover the price of the pease at Wiarton, $3,469.50, with costs of storage and interest and his costs of suit. If the parties should not agree as to the cost of moving pease from one store-house to another at Wiarton and of the storage in the elevator there, there should be a reference, at the defendant's expense, to the Local Master. The fact that the plaintiff had been obliged to borrow money from a bank on the security of the pease stored at Wiarton did not preclude him from bringing this action. The defendant could obtain the pease at any time by paying for them. The Statute of Frauds had no application. S. H. Bradford, K.C., and T. H. Wilson, for the plaintiff. H. Cassels, K.C., for defendant.

CORRECTION.

REX v. BOOTH, ante 549. RIDDELL, J., did not dissent; he concurred in the judgment delivered by CLUTE, J.