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APPELLATE DIVISION.

MARCH 3RD, 1913.

*MORRISON v. PERE MARQUETTE R.R. CO.

Railway—Breach of Statutory Duty—Neglect to Furnish Accommodation for Passengers at Station—Dominion Railway Act—Exposure of Passenger to Cold—Damages—Remoteness—Findings of Jury.

Appeal by the defendants from the order of a Divisional Court, ante 544, affirming the judgment of BRITTON, J., ante 186, 27 O.L.R. 271.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

D. L. McCarthy, K.C., and R. S. Bracken, for the defendants.

J. H. Rodd, for the plaintiff.

THE COURT dismissed the appeal with costs.

MARCH 6TH, 1913.

LECKIE v. MARSHALL.

Judicial Sale—Realisation of Vendor's Lien on Mining Properties—Reserved Bid—Date of Sale.

Appeal by the defendants William Marshall and Gray's Siding Development Limited from the order of BRITTON, J., ante 826.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

George Bell, K.C., for the appellants.

Glyn Osler, for the plaintiffs.

THE COURT allowed the appeal, and referred the case back to the Master in Ordinary, with a direction to postpone the sale, but not to a day later than the 16th July, 1913, and to fix a reserved bid. The appellants to have the costs of this appeal and of the motion before BRITTON, J.

MARCH 8TH, 1913.

WALLER v. TOWN OF SARNIA.

Negligence—Municipal Corporation—Repair of Pavement—Statutory Duty—Delegation to Contractor—Use of Dangerous Material—Necessity for Precautions—Injury to Child—Necessary Work—Notice of Action—Contributory Negligence.

Appeal by the defendants from the judgment of LEITCH, J., ante 403.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

T. G. Meredith, K.C., and J. Cowan, K.C., for the defendants.

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

The judgment of the Court was delivered by SUTHERLAND, J.:—The creosote wood block pavement on Front street, in the town of Sarnia, had become out of repair, and the municipal corporation, the defendants herein, called upon those who had laid the pavement and had guaranteed to keep it intact, or in good condition, for a stated period not yet expired, to make it right. The United States Wood Preserving Company thereupon undertook the work, supplying plant and materials and employing the workmen.

While the work was being done, the cauldron in which the asphalt pitch used in connection therewith was melted, was placed on Lochiel street adjacent to the point on Front street

where the pavement was being repaired. The melted pitch was dipped out of the cauldron into pails by means of an iron ladle with a piece of pine board nailed on to it to form a handle.

In the course of the work the pitch would adhere to the ladle, and it was found necessary from time to time to clean it off. The course pursued by the workman, under instructions from his employers, was to thrust the ladle into the fire at the base of the furnace so as to burn off the accumulations. This resulted in the wooden handle catching fire from time to time, being partly consumed, and gradually weakened.

On the 19th April, 1910, the workmen "had put out the second batch of pitch for the day." One man was cutting up more barrels of pitch for the next batch, and the man in charge of the ladle was cleaning it in the manner indicated. He saw its contents burning and drew or jerked the ladle out of the fire, whereupon the handle and ladle separated, the workman stepped aside to avoid injury to himself, the ladle was rolled over a pile of sand kept on hand to dump the pitch on when cleaning it, and its melted and blazing contents thrown in the air. Some of these fell upon the face and clothing of the plaintiff Reginald Waller, a boy of about six years of age, who was a few feet in the rear of the workman, and injured him somewhat severely.

His father brings this action on his own account for expenses incurred by him, and also as next friend for his son for damages in consequence of the injuries sustained by him.

The defendants plead that the injuries were not caused by them or their servants; that no notice in writing of the accident was given, as required by the statute in that behalf; that neither the defendants nor their servants were guilty of any negligence; and that the accident occurred in consequence of the negligence of the plaintiff Reginald Waller in going where he was injured after being ordered and directed to keep away from the work being done. . . .

There was, I think, ample evidence to warrant the findings of the trial Judge.

There was a statutory duty on the part of the defendants to keep the street in repair. The defendants themselves could have undertaken the work of repairing the pavement in question, and, if so, would have been under the obligation of taking such precautions in doing it as not to expose the public to danger of injury. The work of heating the pitch and handling it when heated was necessarily dangerous and required care and precaution. Under such circumstances, a duty was cast upon the

defendants, the responsibility for which they could not escape by delegating it to an independent contractor. . .

[Reference to Halsbury's Laws of England, vol. 21, secs. 796, 797; Dalton v. Angus (1881), 6 App. Cas. 740, 829; Penny v. Wimbledon Urban District Council, [1898] 2 Q.B. 72; Holliday v. National Telephone Co., [1899] 2 Q.B. 392, 398; Clements v. County Council of Tyrone, [1905] 2 I.R. 415, 542.]

It was contended on behalf of the defendants that what occurred here was not something in connection with the actual doing of the work, but was of a casual and collateral character. I am unable to agree with this contention. It is perhaps difficult, upon the authorities, to state in any general way just what is meant by casual and collateral. What the man was doing here was something necessary to be done in furtherance of the work of repair. See also Ballentine v. Ontario Pipe Line Co. (1908), 16 O.L.R. 654, 662; Hardaker v. Idle District Council, [1896] 1 Q.B. 343; Kirk v. City of Toronto (1904), 8 O.L.R. 730; Valiquette v. Fraser (1907), 39 S.C.R. 1; Longmore v. J. D. McArthur Co. (1910), 43 S.C.R. 640.

As to any neecssity for a notice of action, I do not think the cases cited by the appellants' counsel, referring to actions for damages arising out of the nonrepair of streets, apply This is not an action for damages against the defendant corporation in consequence of its liability to repair highways, but an action for damages in consequence of negligence in the doing of repairs.

The defence of negligence on the part of the plaintiff Reginald Waller was not made out.

I think the appeal must be dismissed with costs.

HIGH COURT DIVISION.

HODGINS, J.A. MARCH 1ST, 1913.

FAIRWEATHER v. CANADIAN GENERAL ELECTRIC CO.

Master and Servant—Death by Drowning of Foreman of Powerhouse—Necessary Work Done for Benefit of Master—Scope of Foreman's Duty—Negligence—Defective Plant or System—Dangerous Work—Absence of Safeguards—Liability at Common Law and under Workmen's Compensation for Injuries Act—Voluntary Assumption of Risk—Contributory Negligence—Evidence—Findings of Trial Judge.

Action by Edna Isabella Fairweather, widow of Henry Ivon Fairweather, to recover $10,000 damages for the death by drowning of her husband, foreman in charge of the defendants' Nassau power-house, on the Otonabee river, while cutting away the ice and débris on and over the apron of the sluiceway, by reason, as the plaintiff alleged, of the negligence and carelessness of the defendants.

The action was tried by HODGINS, J.A., without a jury, at Peterborough and Toronto.

E. G. Porter, K.C., for the plaintiff.

G. H. Watson, K.C., and L. M. Hayes, KC., for the defendants.

HODGINS, J.A.:—The facts in this case on which liability must be determined are somewhat complex. The plaintiff's husband . . . had gone out on the ice which had formed on and over the apron of a sluiceway, for carrying off water, ice, and débris, leading through the wing-dam from the forebay, and discharging into the Otonabee river. When about four or six feet from the outer end, and while cutting away the ice with a short axe so as to clear the apron, he fell into the river, and, notwithstanding the efforts of his companion, Bert Lockington, to reach him with his ice axe, he was carried around by a swift eddy and under the ice near the dam, and drowned. . . .

The river water is admitted through the two westerly openings of the dam into the forebay; and, in order to keep the rack clear of débris, anchor ice, and other obstructions, this sluiceway is used, and is left open when anchor ice is present. . . . The importance of keeping the rack clear and allowing the free transit of water through the flume to the wheels is admitted. In fact it is absolutely necessary.

There was a letter put in evidence (exhibit 12), from the superintendent of the Peterborough works to the deceased, dated six days before his death, delivered to him by Cotton on the same day, which shews the importance attached to uninterrupted operation of the power plant: "Peterborough, Jan. 8th, 1912. Mr. Fairweather: This will be handed to you by Mr. Cotton. I have sent him out to see you, to give you the results of his experience in running the power-house, which he did for a good many years, very satisfactorily indeed. I am frank to say that your operation of the power-house has been fairly satisfactory until the cold weather came, and since then it has been at times quite unsatisfactory. I hope Mr. Cotton will be able to give you

such information that will eliminate further cause for complaint. Saturday morning and this morning the unsatisfactory operation cost us anywhere from $100 to $500. You can quite understand that such a condition of affairs is intolerable, and must be stopped at once." . . .

The contentions of the defence were: (1) that what the deceased was doing was not his work, as he had a helper specially employed to clear away ice, and had the right to call upon others near-by for that purpose; (2) that he knew of and voluntarily incurred the risk, and that the defendants had provided ropes, the use of which would have prevented the fatal result of a fall into the river; (3) that he was in a specially dangerous place at the moment of the accident, which he need not have occupied; (4) that the clearing away of the ice could have been done by getting down into the sluiceway and working from there, instead of on the top of the ice. . . .

I do not think that a foreman in charge of such a station, responsible for its efficient operation, is travelling outside his duty if he does or assists in doing work which those under him may be employed to do, if it is work necessary and proper to be done. . . . My conclusion from the evidence . . . is, that there was such an amount of ice there that . . . it was necessary to clear it away. . . . It was work that was urgent and that required speedy action. And, apart from the question whether the deceased was justified in doing it just as he did, I think it was natural and proper for him to have taken steps at that time to clear the apron. . . . I do not think that the right to call for others, if proven to be known to the deceased, could in itself absolutely debar him as operator in charge from doing or assisting in doing necessary work at the moment, if, in his judgment, he could do it without calling them in.

What the deceased did was done entirely for the benefit of the defendants, under the pressure of their written complaint, and was undoubtedly necessary, when undertaken, for the proper operation of the works under his charge, on the successful working of which the defendants' principal works depended. . .

It cannot be said that in this case, upon the evidence, the deceased's employment did not "directly or indirectly oblige him to encounter" the peril (as put by Lord Atkinson in Barnes v. Nunnery Colliery Co., [1912] A.C. at p. 50); nor that the thing he did was different in kind from anything he was required or expected to do (per Lord Loreburn, L.C., in the same case, at p. 47.) . . .

[Reference to Whitehead v. Reader, [1901] 2 K.B. at p. 51; Rees v. Thomas, [1899] 1 Q.B. 1015.]

I think the act that resulted in the death of Fairweather was not only in the line of his duty, but was really the result of what might almost be called an emergency. . . .

[Reference to Higgins v. Hamilton Electric R.W. Co., 7 O.W.R. 505.]

The next question is, whether the defendants were negligent in their system or plant, and whether the plaintiff's injury and death were caused by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings, and premises connected with, intended for, and used in the business of the defendants.

I think there were defects, and that the defendants were negligent in that respect, both at common law and under the Workmen's Compensation for Injuries Act. The element which was being dealt with was a dangerous one—water power. The wing-dam, which is very long, is wholly unprotected, both on its outer and inner sides, as are the walls of the forebay and flume except between them and along one side of the latter. There is a depth of twenty feet of water in the forebay. The surface of the wing-dam was and continued to be covered with ice or ice and snow. Work under Cotton . . . was treated as dangerous . . . ; and the use of ropes, which were kept in the . . . power-house . . . was resorted to. . . . There were no life-belts nor life-lines (since supplied). . . .

[Reference to Cairns v. Hunter Bridge and Boiler Co., 2 O.W.N. 472; Quinto v. Bishop, 2 O.W.N. 1152; Montreal Park and Island R.W. Co. v. McDougall, 36 S.C.R. 1; where the absence of safeguards was held to constitute negligence; and, in regard to the common law liability of an employer, to Wilson v. Merry, L.R. 1 Sc. App. 333; Smith v. Baker, [1891] A.C. 325, 362; Schwoob v. Michigan Central R.W. Co., 9 O.L.R. 86; Canada Woollen Mills Limited v. Traplin, 35 S.C.R. 424; Nylaki v. Dawson, 6 O.W.R. 509, 7 O.W.R. 300; McKeand v. Canadian Pacific R.W. Co., 1 O.W.N. 1059, 1061, 2 O.W.N. 812.]

But, notwithstanding these two findings, the defendants contend that the deceased accepted the risk. In determining this question, it is necessary to consider the cases on the subject. . . .

[Reference to Thomas v. Quartermaine, 18 Q.B.D. 685, 695, 697, 701, 702; Smith v. Baker, [1891] A.C. 325, 344, 356, 360, 361, 362; Williams v. Birmingham Battery Co., [1899] 2 Q.B. 338; Yarmouth v. France, 19 Q.B.D. 647, 651; Church v. Appleby, 60 L.T.R. 542; Canada Foundry Co. v. Mitchell, 35 S.C.R. 452; Montreal Park and Island R.W. Co. v. McDougall,

36 S.C.R. 1; Blanquist v. Hogan, 1 O.W.R. 15; Gordanier v. Dick, 2 O.W.R. 1051; Brooks Scanlon O'Brien Co. v. Fakkema, 44 S.C.R. 412; Cameron v. Douglas, 3 O.W.R. 817; Grand Trunk Pacific R.W. Co. v. Brulott, 46 S.C.R. 629; Thrussell v. Handyside, 20 Q.B.D. at p. 364.]

I am satisfied that, in the circumstances . . . as to the situation created by the letter, the conditions during the week preceding and on the morning of the 14th January, the deceased did not, within the meaning of the maxim "volenti non fit injuria," as explained by these cases, voluntarily accept the risk. He falls within none of the three descriptions, and his case is well covered by Mr. Justice Anglin's view in Grand Trunk Pacific R.W. Co. v. Brulott.

The last question is, whether, notwithstanding the defect in the condition of the ways, etc., and although the defendants cannot succeed upon their plea that the deceased voluntarily accepted the risk—as I hold they cannot—they have still shewn such contributory negligence in the deceased as to prevent the plaintiff—his widow and personal representative—from succeeding.

In cases of neglect of duty by the master, contributory negligence is a good defence, and may be proved by shewing any act of negligence on the part of the workman but for which the accident would not have happened, which negligence may well include recklessness even in a needful exposure to danger.

I confess that this aspect of the case has given me considerable anxiety, and I am not wholly satisfied that I am right in the view that the defendants must fail here too. . . .

[Examination of the evidence.]

On the whole, therefore, and with some hesitation, I think that the defendants have failed to shew contributory negligence in the deceased.

There will be judgment for the plaintiff for $2,500, with costs of action. The apportionment of this sum may be spoken to before the formal judgment is settled.

MASTER IN CHAMBERS. MARCH 4TH, 1913.

BROWNE v. TIMMINS.

Practice—Delay in Proceeding with Action—Judgment at Trial Dismissing Action Set aside—Addition of Party Plaintiff—Leave to Amend—Amended Statement of Claim Delivered after Lapse of two Years—Motion to Set aside—Validation—Terms—Interest—Costs.

This action was brought on the 8th January, 1908, to recover from the defendant $150,000 and interest from the 8th February, 1907; and also $23,619.06 and interest from the 28th February, 1907; and for other relief in respect of $350,000 worth of shares in La Rose Mining Company. The action was tried and judgment given on the 29th April, 1910, dismissing the action with costs, without prejudice to any action the United Cobalt Exploration Company might be advised to bring—it appearing that that company was entitled to the money in question. On the plaintiff's appeal to a Divisional Court on the 22nd September, 1910, the trial judgment was set aside, and the United Cobalt Exploration Company added as a party plaintiff, with liberty to all parties to amend as advised—with costs in the cause. From this judgment the defendant appealed to the Court of Appeal, and on the 16th January, 1911, the appeal was dismissed.

Nothing further was done until the 10th February, 1913, when a new statement of claim was delivered. This the defendant moved to set aside as being filed without leave, and therefore irregular, under Con. Rule 305, the time not having been extended under Con. Rule 353.

Grayson Smith, for the defendant.

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

THE MASTER:—In explanation of the delay, an affidavit has been filed by Mr. McKay, that it was owing to the inability of the plaintiff to get a witness who is at present in California, but with whom the solicitors are now in communication, and whom they will be able to have at the trial.

Against the motion was urged the long silence and delay and also the principle of Hudson v. Fernyhough, 61 L.T.R. 722, affirmed in the Court of Appeal, 88 L.T.J. 253, and other cases cited in Yearly Practice, 1913 (Red Book), pp. 346, 347.

The present case, however, is, I think, distinguishable, because, by the order of the Divisional Court, the United Cobalt Exploration Company was added as a party plaintiff with its

consent—the necessary license to do business in the Province having also been produced.

The more regular course, no doubt, was to have amended the writ of summons and statement of claim as soon as the time for any further appeal from the judgment of the 16th January, 1911, had expired. That judgment, however, confirmed the order of the 22nd September, 1910, which had made the exploration company a party plaintiff, and the omission to act promptly on the part of the plaintiff's solicitors (as now explained) is not a ground for setting aside the statement of claim and for nullifying the decisions of the Divisional Court and of the Court of Appeal.

It would have been better if the plaintiffs' solicitors had moved for an order under Con. Rule 353, and had also previously informed the other side of the reason of this delay of somewhere about two years. Therefore, while the statement of claim may be properly validated as of this date, it would seem fair that the question of interest on any sums the plaintiff may ultimately recover be left open to the trial Judge or other tribunal to be dealt with, as in the similar case of Finkle v. Lutz, 14 P.R. 446, if it appears right so to direct.

The costs of the motion will be to the defendant in any event; and the trial should certainly not be any longer delayed, as the interest on the sums claimed is nearly $9,000 a year.

MIDDLETON, J. MARCH 4TH, 1913.

RE PHILLIPS.

Will—Construction—Legacies to Nephews and Nieces and to Strangers—Subsequent Direction to Divide Fund among "the Aforesaid Heirs"—Meaning of "Heirs"—Restriction to Nephews and Nieces.

Motion for an order determining a question arising upon the will of Lydia Phillips, deceased.

J. H. Spence, for the executors.

G. H. Kilmer, K.C., for nephews and nieces of the testatrix, legatees under the will.

W. A. Lewis, for other legatees.

MIDDLETON, J.:—The question arises with respect to the following clause, "I also give and bequeath to the following per-

sons''—then follows a list of nine persons, to each of whom is given the sum of $50; six of these are described as nephews or nieces; the other three are named without description, and were not related to the testatrix. Immediately after this list of names is the following clause: ''All moneys in bank, mortgages, and notes, held by me, after all expenses are paid, to be equally divided among the aforesaid heirs.'' There remains an amount of $3,900 to which this clause applies. In addition, there is the proceeds of a parcel of realty, as to which the testatrix died intestate.

The question is, is this sum divisible among the six nephews and nieces or among the nine legatees?

The nephews and nieces contend that the expression ''the aforesaid heirs'' must be construed narrowly, and that they are alone entitled. The other legatees contend that the word ''heirs'' is used in a colloquial sense, and is equivalent to ''legatees,'' and that the fund is divisible among the nine.

I have been unable to find any English case in point; but there are several American cases which deal with the precise question.

In Clarke v. Scott, 67 Pa. St. 46, it is said of the word ''heirs'' that it ''popularly often includes devisees, the persons who are made heirs—'hæredes facti' ''—but the outstanding principle to be gathered from all the cases is, that that is not the natural signification of the word; and this meaning is not to be attributed to it unless the will itself renders it imperative.

In Porter's Appeal, 45 Pa. St. 201, the facts are singularly like the facts here. The testator had there given legacies to six nephews and nieces, and also to some strangers; and then directed his residuary estate ''to be equally divided among the whole of the heirs already named in this my will, proportioned agreeably to the several amounts given to each in the body of this my will.'' After pointing out that popularly a legatee or devisee may be spoken of as an ''heir,'' but, strictly speaking, an heir is one on whom the law would cast the estate if there were no will, the Court proceeds to inquire in which sense the word in the residuary clause is to be taken, and says: ''We have had considerable difficulty with this question, on account of the comprehensiveness of the words 'the whole of the heirs already named;' but we cannot persuade ourselves that the testator intended to make his coachman, to whom he gave a $300 legacy, his heir also, and to admit him to the distribution of the residue along with the right heirs. Yet this absurd consequence would follow from construing the words to embrace all

the previously named legatees. We think the better opinion is, that the expression refers to the six nephews and nieces who would have been legal heirs and who are named; in other words, that the word 'heirs' is to have its technical and proper instead of its popular signification. There is nothing in the text of the will to forbid this construction; and, therefore, we feel bound to adopt it."

This case does not stand alone. Townsend v. Townsend, 25 Ohio St. 477, is very similar. There the testatrix made certain provisions—for her husband, for her collateral blood relatives, for blood relatives of a former husband, and for persons not related by blood or marriage, also for certain religious and benevolent institutions; and then provided, "the balance of my estate shall be equally divided among the heirs herein named." The Court held that those entitled to take were confined to the named persons who came within the descriptive word "heirs," and that the technical meaning of that word must not be departed from, unless to carry out the manifest intention of the testatrix; and that, upon the whole will, the Court was not "constrained to substitute 'legatees' for 'heirs'."

In Graham v. De Yampert, 106 Ala. 279, a similar residuary clause was construed as directing a division among the legatees, when it appeared that no heirs, in the strict sense of that word, were included among the named persons; and in Re Hull, 96 N.Y. St. Repr., the surrounding circumstances compelled the Court to think that the testator had used the word in some sense other than its strict meaning, and held that in that will it meant all the named beneficiaries.

In the will in hand, there is nothing to prevent me from giving to the word its strict meaning; in fact, there is much to prevent any other meaning being attributed to it. The testatrix has indicated her heirs by following the name of each with the words "my nephew" or "my niece." The amount of the legacies given in the first instance, $50 each, is comparatively small; and it is unlikely that she would have intended the comparatively large benefit to be conferred upon strangers. Another factor is this, that, unless she intended to differentiate between her heirs and the strangers, it would have been much simpler to have directed a division among the nine than to have adopted the more elaborate provision found in the will.

The order will, therefore, declare that the fund in question be divided amongst the nephews and nieces; the costs of all parties to be paid out of the estate.

As the testatrix died intestate with respect to a parcel of land, the proceeds of this land will bear the costs.

FALCONBRIDGE, C.J.K.B. MARCH 4TH, 1913.

HUBBARD v. GAGE.

Principal and Agent—Agent's Commission on Sale of Land—Option for Limited Time—Expiry of Option—Subsequent Sale to Purchaser Found by Agent.

Action by a land agent against another land agent for a commission on the sale of land.

S. F. Washington, K.C., for the plaintiff.
W. T. Evans, for the defendant.

FALCONBRIDGE, C.J.:—There is very little, if any, dispute about the facts. The plaintiff is not a mere agent. He had an option from the defendant in his own name, accompanied, it is true, by a letter whereby he was to get a commission if the option was accepted. That option expired. The property was subsequently sold, under another option given to H. S. Lees by the owners of the property—not by the defendant, who only had an option from them, but who made a profit out of the transaction.

The plaintiff had had negotiations with Lees during the life of his own option; but Lees and the defendant had been unable to agree upon terms.

It is not the ordinary case of principal and agent, where the mere finding of a purchaser is ordinarily sufficient to entitle the agent to commission. It is more like Sibbitt v. Carson (1912), 26 O.L.R. 585, and Sutherland v. Rhinhart (Supreme Court of Saskatchewan (1912)), 2 Dom. L.R. 204.

The plaintiff fails, and his action must be dismissed with costs.

I refer to the Appellate Division his application for leave to amend.

LATCHFORD, J. MARCH 5TH, 1913.

McNALLY v. ANDERSON.

Dower—Mortgage—Wife Joining to Bar Dower—Payment of Mortgage—Discharge—Failure to Register—Ownership by Husband of Estate in Fee During Coverture—Dower Attaching.

The plaintiff, the widow of James McNally, deceased, brought this action for a declaration that she was entitled to dower in certain lands in the town of Aylmer.

W. R. Meredith, for the plaintiff.
W. H. Barnum, for the defendant.

LATCHFORD, J.:—The lands were purchased by the deceased in 1895, and about the same time mortgaged for $350. The plaintiff joined in the mortgage to bar her dower. In 1899, the husband of the plaintiff assigned to one Pierce for the benefit of his creditors, conveying to the assignee his right of redemption. Such title as Pierce obtained under the assignment was transferred by various mesne conveyances—all duly registered—to the defendant, who asserts that he acquired an absolute title to the lands freed from the plaintiff's right to dower.

The mortgage in which the plaintiff had joined to bar her dower was given when her husband was seized in fee of the lands. It was paid off, and a discharge thereof executed before the assignment was made; but the discharge was not registered until after the assignee had conveyed to one of the defendant's predecessors in title. The plaintiff's husband died intestate after the conveyance to the defendant had been made and registered.

The lands at the date of the assignment were apparently subject to the mortgage. The discharge, as stated, had not been registered. If the mortgage was paid off before maturity, and therefore void, the fact was not established in the admissions on which the trial proceeded. In the view I take, the point is not material.

The plaintiff is, on other grounds, entitled to succeed. As soon as her husband acquired the land in fee, her right to dower arose. Her bar of dower in the mortgage did not operate to any greater extent than was necessary to give effect to the rights of the mortgagee: R.S.O. 1897 ch. 164, sec. 7, sub-sec. 1; now 9 Edw. VII. ch. 39, sec. 10, sub-sec. 1. See Re Auger, 26 O.L.R. 402. When the mortgage was paid off, her suretyship was at an end. It is quite true that the husband died seized of no estate, legal or equitable, in the lands. But he was the owner of an estate in fee during coverture. The plaintiff's right of dower then arose. It was not barred except for the purpose of the mortgage; and, when the mortgage was paid off, her right was as complete as if the mortgage had not been given.

She is entitled to dower as claimed, and to the costs of this action.

There will be a reference to the Master at St. Thomas, if the parties cannot agree upon the amount payable. Costs of reference to the plaintiff.

DIVISIONAL COURT. MARCH 6TH, 1913.

*McKAY v. DAVEY.

Sale of Goods—Representations—Warranty—Breach—Swarms of Bees—Foul Brood Act—Inspection—Disease—Cause of Action—Damages.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Grey in favour of the plaintiff in an action for damages for breach of an alleged warranty upon the sale of bees or for contravention of the Foul Brood Act.

The appeal was heard by MULOCK, C.J.Ex., CLUTE and SUTHERLAND, JJ.

E. D. Armour, K.C., for the defendant.

I. B. Lucas, K.C., for the plaintiff.

CLUTE, J.:—In February, 1911, the plaintiff bought from the defendant about twenty swarms of bees, upon the representation, as he says, that they had been inspected and "were clean and all right." Twelve of these hives, the rest having died during the winter, were brought to the plaintiff's premises about the 1st May, making, with the nine hives the plaintiff then had, twenty-one hives in all.

By the 1st June some of the bees had died off, leaving only thirteen hives altogether, viz., nine of the plaintiff's and four of those bought from the defendant. These were inspected on the 10th June, 1911, when it was found that all four of those purchased from the defendant were diseased with "foul brood," the nine hives of the plaintiff still remaining clean.

The plaintiff attempted to treat them, but found them so bad that all purchased from the defendant had to be destroyed.

It was argued at bar that these bees might have been infected from the honey supplied by the plaintiff feeding the bees during the winter; but, upon a perusal of the evidence, I think it is wholly improbable.

The plaintiff had sold out all he had in the spring of 1910, except one hive at his father-in-law's, three miles away. The bees so sold by the plaintiff were claimed to be diseased, and he made a settlement with the purchaser. He started anew with three hives, which were inspected in 1910, and reported clean. These three at the time of the purchase had increased to nine.

*To be reported in the Ontario Law Reports.

It appears from the evidence of the inspector that the defendant's bees had been inspected on the 26th June, 1910. Of thirty-five hives he examined fourteen, and of these he found three diseased with foul brood, and instructed the defendant how to treat them.

I think the evidence shews that the defendant knew or had good reason to know that there was "foul brood" among his bees when he sold them; and, at all events, he sold them without the inspector's authority, as required by sec. 6 of the Foul Brood Act, 6 Edw. VII. ch. 51.

But it is said for the defendant that there was no warranty, and the Act was not passed for the benefit of purchasers; and, as it provides a penalty, no action will lie at the instance of a private individual for a contravention of the Act.

I think that the representations made at the time of the sale did amount to a warranty that the bees were clean, when in fact they were tainted with "foul brood."

The trial Judge in effect found that the plaintiff had satisfied the burden of proof when he found the probabilities in favour of the plaintiff's story, and that he was in error in supposing that "he was forced to find with considerable hesitation that he (the plaintiff) had not satisfied the burden of proof."

Having regard to the evidence and to the finding as above indicated, I think the only proper conclusion to be reached is, that the plaintiff had satisfied the burden of proof cast upon him. Taking the whole judgment, it is a strong finding indeed upon all essential points in favour of the plaintiff; and the assumption that the plaintiff had not satisfied the onus probandi cast upon him was quite erroneous.

I, also, am of opinion that the statute was made for the benefit of those engaged in bee-keeping. Section 5 imposes a penalty for knowingly selling or bartering or giving away diseased colonies or infected appliances; and sec. 6 also imposes a penalty upon any person who sells or offers for sale any bee hives or appurtenances whose brood has been destroyed or treated for "foul brood," without being authorised by the inspector so to do.

While this statute is in the interests of the public, in the sense of decreasing the danger that would limit the supply, yet it has for its immediate object the benefit of those engaged in bee-keeping (to which class the plaintiff belongs), in order to prevent the danger of infecting clean colonies by the introduction of bees already tainted with foul brood. The evidence clearly shews that this disease is very contagious, the slightest

taint in honey being sufficient to spread the disease. The statute aimed at preventing that by forbidding the sale, and the injury to the plaintiff arose from the act done by the defendant in contravention of the statute: Hagle v. Laplante, 20 O.L.R. 339, 1 O.W.N. 413; Groves v. Lord Wimborne, [1898] 2 Q.B. 402.

The distinction in the law between an Act passed prohibiting a certain thing, with penalty in case of breach, in the interests of the public or for a certain class, is pointed out in Ward v. House, 4 App. Cas. 13. . . .

I do not think the damages in this case should be limited to a return of the purchase-money. Having regard to the nature of the business, the defendant must have known that these bees would be associated with others; and, if tainted, the natural consequence would be to spread the disease among other colonies. . . .

[Reference to Penton v. Murdock, 22 L.T.R. 371; Earp v. Falkner, 34 L.T.R. 284; Mullett v. Mason, L.R. 1 C.P. 559; Wolverhampton New Waterworks Co. v. Hawkesford, 6 C.B. N.S. 356; Bowing v. Goodchild, 2 W. Bl. 906; Couch v. Steele, 3 E. & B. 402; Atkinson v. Newcastle Waterworks Co., 2 Ex. D. 441; Emerton v. Matthews, 7 H. & N. 586; Burnaby v. Babbitt, 16 M. & W. 644; Watkins v. Naval Colliery Co., [1911] 2 K.B. 174; Groves v. Lord Wimborne, [1898] 2 Q.B. 402; Britannic Merthyr Coal Co. v. David, [1910] A.C. 74; Butler v. Fife Coal Co., [1912] A.C. 149, 160; City of Vancouver v. McPhalen, 45 S.C.R. 194, 214.]

The appeal should be dismissed with costs.

MULOCK, C.J.:—I agree with the view expressed by my brother Clute in his written judgment, that the representations made by the defendant at the time of the sale amounted to a warranty that the bees were clean, whereas they were then in fact tainted with foul brood. I, therefore, would dismiss this appeal with costs.

I express no opinion as to whether the Foul Brood Act gives to the plaintiff a cause of action.

SUTHERLAND, J., dissented, for reasons stated in writing.

Appeal dismissed; SUTHERLAND, J., *dissenting.*

MIDDLETON, J. MARCH 8TH, 1913.

RE WILSON.

Will—Construction—Charge on Land for Payment of Debts—Exoneration pro Tanto of Residuary Estate—Devise in Trust—Expenses of Creation of Trust Fund to be Borne by General Estate—Expenses of Administration to be Borne by Trust Fund.

Motion by the executors of the will of Samuel Wilson, deceased, for an order, under Con. Rule 938, determining two questions arising upon the construction of the will.

W. G. Thurston, K.C., for the executors and the residuary legatee.

F. L. Button, for adults interested in the proceeds of lot 17.

E. C. Cattanach, for infants interested in the proceeds of lot 17.

MIDDLETON, J.:—Two questions arise on the construction of this will: first, with respect to the sum of $2,000 charged upon the proceeds of lot 17; second, with reference to the incidence of the executors' compensation and costs regarding the execution of the trusts declared as to the same lot.

The testator gave his farm and certain other lands to his son Robert, charged with the payment of $2,500 to his daughter Mary. He then gave his executors lot No. 17 upon trust, with power to sell, and out of the proceeds to pay to Mary $2,500, "also to pay $2,000 toward paying my just debts;" the residue to be invested for the benefit of the children of the deceased son William, and to be divided between them when they attain age. The residue of the estate, real and personal, after payment of the testator's debts, is then to go to Robert.

At the time of the testator's death, he was indebted in a considerable sum, far exceeding the $2,000. He left property of very substantial value other than that specifically devised.

The first question is this: can Robert, as residuary devisee, call upon the executors for the $2,000 towards the debts, or are the proceeds of that lot only to be resorted to if the residuary estate is not sufficient to pay the debts?

It is said that the words used are not sufficient to charge the proceeds of this realty and to exonerate pro tanto the residuary estate, because the residue is to go to Robert "after the payment of my just debts."

I do not think that this is the real meaning of the will. The testator, I think, intended $2,000, part of the proceeds of lot 17, to be applied in and towards payment of his debts, and then gave the residue after the debts had been paid—that is, after the residuary estate had been resorted to, to the extent necessary to supplement the $2,000—to his son Robert.

Reading the will as a whole, and without seeking to import into it technical rules that probably were not present to the mind of the testator, his language seems to me plain and sufficient.

The second question depends upon the effect to be given to the principle laid down in Re Church, 12 O.L.R. 18. There the testatrix directed her residuary estate to be divided into four equal shares, three of which were to be paid over at once, and the fourth to be held upon trusts covering an extended period of time. It was held that the expense of administering the trust, after the share in question had been set apart, should be borne by the share itself, and not by the general estate.

Applying that principle to this will, the general estate must bear all the costs of the creation of the trust fund arising from lot 17; but the costs of investing this fund during the minority of the beneficiaries, and of its distribution, must be borne by the fund itself. It is just as if the testator had directed his executors to pay the residue of the proceeds of lot 17 to an independent board of trustees. Until the fund should be created and paid over, the expense would fall upon his general estate. After payment over, the fund would have to bear the costs of its own administration.

Costs of all parties may come out of the estate; of the executors as between solicitor and client.

MIDDLETON, J. MARCH 8TH, 1913.

*SMITH v. TOWNSHIP OF BERTIE.

Municipal Corporations—Police Village— Nonrepair of Sidewalk—Liability of Township Corporation for Injury to Person—Municipal Act, R.S.O. 1897 *ch.* 223, *secs.* 715-750.

Argument of question of law upon the pleadings and admissions.

The action was to recover damages resulting from an accident arising, it was said, from lack of repair of a sidewalk in

*To be reported in the Ontario Law Reports.

the police village of Crystal Beach. The defendants (the township corporation) set up that they were not liable for an accident of this kind within the limits of the police village.

H. S. White, for the plaintiff.
G. H. Pettit, for the defendants.

MIDDLETON, J.:—Neither counsel was able to refer me to any case in which this question has been discussed; and I have been unable to find any discusion of the exact nature of a police village and the effect of its incorporation upon the liability of the parent municipality.

Under the Municipal Act, R.S.O. 1897 ch. 223, sec. 714, "On the petition of any of the inhabitants of an unincorporated village, the council or councils of the county or counties within which the village is situate may by by-law erect the same into a police village, and assign thereto such limits as may seem expedient."

In supposed pursuance of this statute, on the 7th December, 1898, the County Council of the County of Welland passed a by-law enacting that the village of Crystal Beach and its neighbourhood—defined by metes and bounds—"be erected into an incorporated police village, apart from the township of Bertie, in which the same are situated, by the name of Crystal Beach."

The by-law then proceeds: "And the inhabitants of such village of Crystal Beach shall be and become a body corporate free from such township; and, as such, shall have perpetual succession, with such powers and privileges as are conferred on and held by incorporated police village within this Province; and the powers of such corporation shall be exercised by and through and in the name of the Corporation of the Village of Crystal Beach."

There was absolutely no power on the part of the county council to enact this latter clause. It is entirely ultra vires and void. The position of a police village must be found in the Municipal Act as it stood at that date; and plainly the "erection" of a limited territory into a police village falls far short of incorporation. . . .

[Reference to secs. 715 to 750 of the Act.]

I think it is abundantly plain that, under this statute, a police village does not become a separate incorporation, but that the scheme is really one by which a limited territory is set apart, and the trustees are empowered to raise indirectly, through the

township, by way of local assessment, sums required for certain local improvements.

In 1903, this legislation was supplemented by the addition to the Municipal Act of sections found as secs. 751 and 757 in the Consolidated Municipal Act of 1903. By sec. 751, when the census return of the police village shew that it contains over 500 inhabitants, then, upon petition, the council of the county may declare the trustees of the police village a corporation; and, after the passing of such a by-law, certain additional powers are given to the incorporated board. It may construct works as local improvements under secs. 664 et seq. of the Municipal Act; and, after incorporation, the board becomes responsible for the maintenance and repair of all works, improvements, and services undertaken by it; and the board is made responsible for damages sustained by reason of any default; and the provisions of sec. 606 of the Act are made to apply to the incorporated board.

This amendment goes to fortify the view I have expressed of the true position of trustees of a police village under the earlier Act.

It follows from this, that the defendant municipality is responsible for the condition of all roads within its limits, under sec. 606; and that the fact that the trustees of the incorporated village have authority to construct sidewalks and to repair them, within the limits of the village, does not absolve the township from its primary liability. The lack of repair resulting in an accident imposes liability upon the entire municipality; and, while this is in one sense, unfair, it is no more unfair than the situation which arises when any work constructed as a local improvement falls into disrepair. There the municipality as a whole is liable for the lack of repair in a work constructed as a local improvement. If the trustees of the police village fail to renew a decayed sidewalk, the township is not justified in leaving it as a source of danger, and may remove it altogether. . . .

[Reference to Faulkner v. City of Ottawa, 8 O.W.R. 126, 10 O.W.R. 807.]

I, therefore, determine the question in favour of the plaintiff, and direct that the costs be paid by the defendants in any event of the litigation.

If the defendants desire to take the opinion of an appellate Court, I suggest to the parties the wisdom of allowing the remaining issues to be determined before an appeal is taken, so that the whole matter may be reviewed upon one appeal. This may readily be accomplished by an order extending the time for appealing this decision until the issues of fact are determined.

TROWBRIDGE v. HOME FURNITURE AND CARPET CO.—MASTER IN CHAMBERS—MARCH 5.

Security for Costs—Plaintiff Ordinarily Resident out of Jurisdiction—Temporary Residence in Jurisdiction—Con. Rule 1198(b)—Assets in Jurisdiction—Evidence—Admissions.]—Motion by the defendants for an order requiring the plaintiff to give security for costs, under Con. Rule 1198(b). The action, which was begun on the 10th February, 1913, was to recover $50,000 damages for breach of an agreement between the parties to employ the plaintiff as manager of the defendant company. The agreement was dated the 4th July, 1912, and in it the plaintiff was described as "of the city of Toronto." He was to have full control of the business and receive a salary of $50 a week. The engagement was to continue so long as the business shewed a net profit of at least ten per cent., and the plaintiff was to be entitled to one-half of any further profit. The motion was supported by an affidavit of the president of the defendant company, stating that the plaintiff came to the city of Toronto from Ohio, where he had always previously resided, and that he was informed by the plaintiff that his family still lived there, and that the plaintiff has no assets in Ontario exigible under an execution. The plaintiff said in answer that he was now, and was for some time prior to the commencement of the action, a resident of Toronto, where he intended and still intended to reside. He did not contradict the allegations as to his family being resident in Ohio, nor of his having no assets within the Province. Neither deponent was cross-examined. But, since the argument, a further adffiavit was filed by the plaintiff's solicitor exhibiting two letters from the president of the defendant company, dated the 18th and 25th January, which contained expressions that might imply that there was something due to the plaintiff. All that was said was, "The adjusting of any sum that you are entitled to can be taken up at any time," in the first letter; and, in the second, "Just as soon as it is possible to get off balance sheet shewing state of affairs, we will arrange to settle with you." The Master said that these expressions were not such as that in Stock v. Dresden Sugar Co., 2 O.W.R. 896. In answer to this, an affidavit of the president was filed, stating that, since these letters were written, he had made an examination of the company's books and affairs and was satisfied that the company had a counterclaim against the plaintiff which greatly exceeded any sum that might be owing to the plaintiff for his services, even if he was not disentitled by reason

of his misconduct. The Master said that, in these circumstances, this case did not differ from Nesbitt v. Galna, 3 O.L.R. 429; and the order for security must issue within four days, unless it was thought worth while to cross-examine the president on his second affidavit, in which case the motion should be spoken to again. Costs of the motion to be in the cause. H. S. White, for the defendants. J. F. Boland, for the plaintiff.

JACKMAN v. WORTH—MASTER IN CHAMBERS—MARCH 8.

Pleading—Statement of Claim—Joinder of Causes of Action—Parties—Different Capacities.]—This action was brought by the plaintiff on behalf of himself and all other shareholders of the Seneca Superior Silver Mines Limited, except the individual defendants, against those defendants and the company, to set aside certain dealings with the shares of the company, which, he said, were in fraud of the company, as being sales of treasury stock for "a price infinitely below their proper value." The relief claimed was in substance to have these sales declared void, and to have the certificates in respect thereof cancelled; and to have the directors and shareholders and the company restrained from dealing in any way with these shares or attempting to validate the transfers and pretended sales thereof. The plaintiff also claimed $500,000 damages against three of the personal defendants for fraud and conspiracy. The plaintiff also claimed $500,000 damages against the company and Worth, one of the personal defendants, for breach of an agreement of the 29th February, 1912, to which he and the company and the plaintiff were parties, authorising a sale to Worth (on certain terms only) of these shares. This latter claim was made by the plaintiff in his personal capacity and for his own benefit. The defendants moved to strike out this latter claim. The Master said that it was clear from Stroud v. Lawson, [1898] 2 Q.B. 44, that in an action of this character, where different reliefs were sought, there must be two plaintiffs, though they might be the same person suing in different capacities. Here the plaintiff was acting only in his capacity as shareholder, bringing his action on behalf of the company. In that form he could make any claim for his sole personal benefit, and certainly he could not be suing on behalf of the company and for relief against it in the same action. The plaintiff must, therefore, amend by claiming on his own behalf for any damages accruing to himself

personally, as well as for the relief he seeks for the benefit of the company. In view of what was said in Stroud v. Lawson, supra, he would do well to consider whether he could do this under Con. Rules 185 and 186. That would depend (1) upon whether the two actions (for such they were) arose out of the same transaction or series of transactions and involved a common question of law or fact; and (2) whether the defendants were the same in both actions; as it was held they were substantially in the Stroud case. The second claim was only against the company and one of the personal defendants. These questions might come up for discussion later. At present an order should go requiring the plaintiff to amend as he might be advised so as to conform to Con. Rule 185. Costs of the motion to be to the defendants in any event. In Stroud v. Lawson, the action was properly brought by the plaintiff in his two capacities, though his statement of claim did not make a case allowing joinder of the two claims. Featherston Aylesworth, for the defendants. T. P. Galt, K.C., for the plaintiff.