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COURT OF APPEAL.

JUNE 17TH, 1911.

REX v. NAOUM.

Criminal Law—Bigamy—First Marriage in Macedonia—Evidence—Admission—Macedonian Law—Proof of—Criminal Code, sec. 307.

Case stated by the Junior Judge of the County of York, at the request of the prisoner, who was convicted on a charge of bigamy.

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

L. V. McBrady, K.C., and H. E. McKittrick, for the defendant.

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

The judgment of the Court was delivered by MACLAREN, J.A.:—The accused was convicted of bigamy in a case tried without a jury in the County Judge's Criminal Court at Toronto.

The second marriage at Toronto was fully proved; also the fact that the first wife was alive when this second marriage took place. The learned County Judge reserved for this Court the question whether there was sufficient legal evidence of the first marriage which took place in Macedonia, upon which to found or warrant the conviction of the accused. The evidence was made a part of the case.

Bigamy is defined in sec. 307 of the Criminal Code. That portion of the section which covers the present case reads as follows: "Bigamy is the act of a person who being married goes through a form of marriage with any other person." Before the enactment of the Code in 1892 it was defined in our statute as the act of any "one who being married, marries any other person

during the life of the former husband or wife," which is still the law in England. Even under this latter provision it was held that the first marriage had to be proved more strictly than the second. As will be seen from the above citation from the Code, it is now sufficient to go through a form of marriage in the second instance to constitute the offence. It is still necessary, however, to prove a real legal marriage in the first instance.

In the stated case the learned Judge summarizes the evidence upon which he convicted the accused as follows: "The proof of the first marriage, which took place in Macedonia about eight years ago, consisted (in addition to the confession of the prisoner that he had been married before) of the evidence of several witnesses who said that they were present when the ceremony was performed, that the ceremony took place in the village Greek church and was performed by the priest of that church in the presence of the villagers gathered there to witness it, and that such ceremony was performed in the same manner and by the same officiating priest as and by whom weddings usually were performed in that village, and (in so far as the witnesses were qualified to speak) according to the rites, laws and customs of that country." "The evidence also showed that following this marriage ceremony the prisoner and the woman with whom he went through the marriage ceremony lived together as man and wife and had two children born to them. The accused left this wife and the two children in Macedonia when he came to Canada."

First, as to the confession, and what weight, if any, should be given to it; strictly speaking, it is not a confession as the accused did not in terms admit that he had been guilty of any crime. It was in form simply an admission that he had been married in Macedonia to Sophia Stein. Practically the distinction is not material in this case as it was made after he was arrested on the charge of bigamy.

It is pointed out by the authorities that evidence of such oral admissions or confessions is to be received with caution. Parties are often liable to be misunderstood, and the change of a few words often makes a great difference. Again, parties cohabiting may say that they had been married in order to escape the moral odium attaching to their conduct, and others often make admissions without due consideration, or possibly for some ulterior motive. Also where, as here, the admission is a mixed question of law and fact, as a legal marriage must be proved, it is sometimes said that the same weight is not to be given to it as to one of pure fact. However, it is now generally

conceded that such admissions or confessions, if deliberate and voluntary and clearly proved, are among the most effectual proofs in the law; and the degree of credit to be given to them to be estimated by the judge or jury according to the particular circumstances of each case. See Taylor on Evidence, 10th ed., sec. 865.

The authorities are not at all in accord as to what degree of weight is to be given to such an admission. The Court of Appeal for Lower Canada in Reg. v. Creamer, 10 L.C.R. 404, composed of five Judges, held unanimously that the admission of the first marriage by the prisoner, unsupported by other testimony, was sufficient to support a conviction. To the same effect is a unanimous judgment of the Supreme Court of the United States in Miles v. United States (1880), 103 U.S. 404. In Regina v. Simmonsto, 1 C. & K. 165, (same case reported as Regina v. Newton, 2 Mood. & Rob. 503), Wightman, J., after consultation with Cresswell, J., it being the case that the only evidence of the first marriage in New York was the admissions of the defendant, instructed the jury that if they believed the witnesses and that there was a legal marriage they might find the prisoner guilty.

There are also a number of other cases in which such admissions have been received without, however, relying upon them exclusively as in the foregoing.

[Reference to Truman's Case, 1 East. P.C. 470; Regina v. Upton, 1 Russell on Crimes, 7th ed., at p. 983; Regina v. Flaherty, 2 C. & K. 782; Regina v. Johnston, 103 L.T. Journal at p. 109.]

On the other hand, it was held at nisi prius by Lush, J., in Regina v. Savage, 13 Cox C.C. 178, that the admission by the prisoner that he had married his first wife in Scotland was not evidence of a legal marriage, and he directed an acquittal. This case was followed by a Divisional Court in our own province in Regina v. Ray, 20 O.R. 176, and still later in England by Lawson, J., in Rex v. Lindsay, 18 Times L.R. 761. The report in Regina v. Savage, supra, can scarcely be an exact one as Lush, J., is credited with saying, when Regina v. Newton, supra, was cited to him, "that he could not act upon that case as it was at variance with the law; and he should therefore overrule it."

In Regina v. Griffin, 4 L.R. Ir. Common Law, at p. 516, Barry, J., who formed one of the majority in a reserved bigamy case, says that he had spoken to Mr. Justice Lush about the Savage case, who said that he never intended to overrule Regina v. Newton, and all that he decided in the Savage case was that

he did not think the evidence of the first marriage sufficient to warrant a conviction. Barry, J., adds: "I see no reason why a man's admission that he has been married should not be evidence against him as well as his admission that he had committed murder. If the admission be not evidence of a legal marriage, no man should be allowed to plead guilty to a charge of bigamy."

Besides the admission in this case there was received the testimony of witnesses from Macedonia who were present at the marriage of the accused, including the best man, who was married in the same Greek church by the same priest, and who swore that the marriage was similar to all the other marriages in that village. These witnesses spoke of the custom. The only one of them who claimed to have knowledge of the Macedonian law on the subject was Nassau Johnson, who said that he was able to speak of the "law and rites and customs" regarding marriage in Macedonia. He had studied these in the Greek school and Servian college. There was no written law; but the priest knew the law. He was only 16 when he left college and came to this country.

If it were necessary to prove the Macedonian law as to marriage I do not think the testimony of these witnesses would be sufficient for that purpose. The leading authority on the subject is the Sussex Peerage Case, 11 Cl. & F. 134. It was there laid down that although it was not necessary that one should be a professional lawyer to prove the foreign law, it must be one who was *peritus virtute officii*. Bishop Wiseman, who had held a quasi-judicial position at Rome, was held qualified to prove the canon law as to marriage, which was in force in that city. In this case the House of Lords overruled the decision of Wightman, J., in Regina v. Dent, 1 C. & K. 97, who accepted in the case of a Scotch marriage the testimony of a non-professional witness who had no special knowledge as to the law of Scotland.

The best evidence on such a point is that of a foreign Judge, or of a barrister or solicitor practising in the courts of his own country. In addition, the following have been held to be competent; a colonial Attorney-General, who was not a lawyer, as to the law of the colony: Sussex Peerage Case, supra, at p. 124; a Governor-General of Hong Kong, as to the marriage law there: Cooper v. Cooper, [1900] P. 65; an English barrister, who had been employed by the Colonial office, as to marriage questions in Malta, although he had never practised there as to Maltese law: Wilson v. Wilson, [1903] P. 153; a Persian ambassador as to the law of his country, which he is required officially to know:

Re Dost, 6 P.D. 6; a Chilian notary as to the testamentary law of Chili: Re Whitelegg, [1899] P. 267; as to the marriage law of Michigan, a minister of 25 years' standing in that State, who had studied these laws and had communications with the Secretary of State regarding them, and had celebrated many marriages: Regina v. Brierly, 14 O.R. 535. The following have been held not to be competent; a jurisconsult who studied the foreign law at a university in another country and who had not practical knowledge of it: Bristow v. Segneville, 5 Ex. 275; Re Turner, W.N. 1906, p. 27; Re Bonelli, 1 P.D. 69; as to Canadian marriage law an English barrister who frequently argued Canadian appeals in the Privy Council: Cartwright v. Cartwright, 26 W.R. 684; as to Scotch marriage law, a priest of that country who had celebrated many marriages there: Regina v. Savage, supra.

While the testimony of the witnesses from Macedonia is insufficient to prove the foreign marriage law, it is not without weight. It proved the custom of the country, and that the ceremony was performed *in facie ecclesiae,* and also co-habitation and the birth of the issue of the marriage, and that the wife and children are still living with the mother of the prisoner—circumstances which go to remove the objection to the reception of the admissions in some of the cases referred to.

The prisoner's admission as to his marriage in Macedonia was given under such circumstances as fully justified the trial Judge in giving weight to it. He had just been arrested and knew the nature of the charge against him. He was duly cautioned by the constable, and his statement was clear, deliberate and unambiguous, and quite in accord with the testimony of the Macedonian witnesses, even to the minor details. Although he was ably and strenuously defended yet his counsel did not ask in cross-examination a single question regarding the admission made by him.

On the whole, I am of opinion that there was ample evidence, if the Judge believed it as he did, to support the conviction. It might have been well if the Macedonian marriage law had been proved. I think it probable that there could be found a Greek priest from Macedonia in the city who could give similar evidence to that accepted by the Divisional Court in the Brierly case.

In my opinion the question should be answered in the affirmative.

MAGEE, J.A.:—I agree, for the reasons given by my brother Maclaren, that the conviction should be affirmed. But even apart from the admission of the prisoner, confirmed as it is by other witnesses, it may be that under treaties or otherwise, the Court may be bound to take judicial notice of the status of the Greek church in Macedonia, and under presumption of identity of foreign law with our own until the contrary is proved, accept the validity of the ceremony performed. It is, however, unnecessary to discuss this.

JUNE 17TH, 1911.

RE ONTARIO BANK.

BARWICK'S CASE.

Banks and Banking—Winding-up—Contributory—Purchase by Bank of its own Shares in Name of Officers' Guarantee Fund—Liability of Subsequent Purchaser—53 *Vict. ch.* 31, *sec.* 64 (*D.*).

Appeal by the contributory from the judgment of BRITTON, J., affirming the order of the Official Referee settling the list of contributories as including the name of the appellant.

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

C. A. Moss, for the contributory, Mrs. Barwick.

J. Bicknell, K.C., and F. R. Mackelcan, for the liquidator.

The judgment of the Court was delivered by GARROW, J.A.:—The shares in question had at one time been held in the name of the Officers' Guarantee fund. And it is not disputed that they had been purchased with the money of the bank and were so held in order to cover the illegality of the bank dealing in its own shares. But the shares were afterwards sold and transferred to the late Walter Barwick, of whose estate the contributory is executrix. Mr. Barwick apparently transferred and procured himself to be duly registered as owner in the proper books of the bank. All this occurred several years before the liquidation proceedings began, down to which period there had been no repudiation nor attempt at repudiation; nor any steps taken to

procure the removal of the name of the holder from the list of shareholders in the register. Such being the case, it appears to me to be now quite hopeless to raise the questions which Mr. Moss urged upon us as reasons why the contributory should be relieved. The bank as corporate entity could not of course lawfully buy, deal in or lend its money upon the security of its own shares, or consent or agree to any person doing so on its behalf: see 53 Vict. ch. 31, sec. 64, the Bank Act then in force. And there is no evidence that by any corporate act the bank ever did, or ever attempted to authorize anyone to do so.

What was really done was this: the manager, whether with or without the knowledge of the directors does not, I think, clearly appear, improperly and illegally used the funds of the bank to purchase the shares, intending to re-sell them. This was, of course, a gross breach of trust on the part of the manager, and the money so employed could also have been at once sued for and recovered from him, and also from the directors if he was acting with their knowledge or consent.

But I am unable to see a valid cause of complaint which could have been successfully urged even by Mr. Barwick himself in his lifetime, after the purchase and before the liquidation, much less now by his executrix after the liquidation proceedings had been commenced, and the rights of all parties thereby vitally altered.

Mr. Barwick's title, assuming that he purchased without notice, could not have been injuriously affected by the prior breach of trust. And the registration of the transfer to him gave him, in my opinion, an unimpeachable title.

But if there is any doubt as to that, there can, I think, be none as to the present position of matters. It is no longer a question between the purchaser and the bank. The other shareholders and the creditors are now the persons chiefly interested. And as against them the contributory, in my opinion, shews no cause whatever for relief. To give them a right to hold the contributory, all that seems to be necessary is to prove the agreement to become a shareholder, and the placing of the purchaser's name upon the register. If found there when liquidation commences, there it must remain unless upon proof that it was placed there without the knowledge or consent of the contributory.

[Reference to In re International Contract Co., Langer's case, 37 L.J.N.S. (Ch.) 292; Oaks v. Bergrand, L.R. 2 H.L.C. 325; In re Hull and County Bank, Burgess's case, 15 Ch. D. 507; Cree v. Somervail, 4 App. Cas. 648.]

The result is that the appeal must be dismissed with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JUNE 15TH, 1911.

THIBODEAU v. CHEFF.

Negligence—Parent and Child—Fire Caused by Act of Imbecile Son—Liability of Parent—Mischievous Propensity—Scienter—Tort of Minor.

Appeal by the defendant from the judgment of BRITTON, J., in an action for damages, tried at Chatham with a jury, ante 1035.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

M. Wilson, K.C., for the defendant.

O. L. Lewis, K.C., for the plaintiff.

BOYD, C.:—For injuries committed by an infant in the course of his employment as a servant by his father, the latter is responsible as in other cases of master and servant. But the rule of common law is that a parent is not, because of his family relationship, legally responsible to answer in damage for the torts of his infant child. Upon this rule exceptions are engrafted that where the father has knowledge of the wrongdoing and consents to it, where he directs it, where he sanctions it, where he ratifies it or participates in the fruits of it, he becomes in effect a party to it, and as such is liable to the injured person. That is the result of the American decisions upon which Mr. Schouler frames the statement of the law adopted by the Ontario Court of Appeal in File v. Unger, 27 A.R. 468.

A subsequent American author puts the same conclusion more briefly thus: "A parent may be liable for his child's torts committed with his knowledge and acquiescence": Tiffany on Domestic Relations, p. 239, sec. 120 (1896).

In the case under consideration the father did not see the act done and consent to it. Nor did he direct the doing of it, nor did he share in any benefit, on the contrary, he shared in the destruction caused by it; so that the precise question is—did he so acquiesce with knowledge that he has made himself accountable to the plaintiff?

The correct doctrine as to liability in the present case is in my opinion stated in the article on Parent and Child in 29

Cyc., p. 1666 (1908), thus: "While a parent may be liable for an injury which is directly caused by the child when the parent's negligence has made it possible for the child to cause the injury, and probable that the child would do so, this liability is based upon the rules of negligence rather than upon the relation of parent and child."

I find this passage is quoted and accepted as a valid statement of law by the Court of Errors and Appeals in New Jersey in November, 1908, by Voorhees, J., speaking for the Court, in Doran v. Thompson, 47 N.J.L.R., at p. 754.

No objection was made to the frame of the questions as submitted for consideration. There was an objection made to the reception of evidence as to acts of the boy, not brought home to the knowledge of the father, but these were not irrelevant, with a view of shewing the propensity of the boy to strike matches for the purpose of lighting fires. Lucifer matches *per se* are of course not dangerous things, but they are very obvious sources of danger when ignited by foolish or reckless hands. The defendant was told by the plaintiff, a week or so before the fire, that the plaintiff had a good crop in the granary and he did not wish it destroyed, and he asked the defendant to look after his children.

The evidence was, as usual, contradictory, but there was testimony for the jury on these points: the boy was in the habit of carrying round and using matches and tobacco; he was in the habit of playing with a wheelbarrow and running it round as a traction engine in the barn-yard and by the straw stack; he started little fires with matches and straw beside buildings on two occasions: one under the kitchen in Belleville's place "to make steam" in May, 1908 (not reported to the defendant), and one on Bourgeon's place, next neighbour to the defendant, in the summer of 1909, a year before the fire in question, which Bernier told the father about, though the father denies it.

At Emery's place in July, 1910, the boy was twice stopped on the same day as he was about to light a match in the straw (not reported to the father).

And the father admitted to Belleville that his store was once nearly burned by the boy (this is contradicted).

The salient facts have all been found by the jury, and, although objection was made to some points of the charge of the learned trial Judge, yet as a whole he placed the matters to be determined fully and fairly before the jury. They have found that the fire which destroyed the stack and granary of the plaintiff was caused by Rollin Cheff, the infant son of the de-

fendant. They have found that this boy, by reason of the weakness of his intellect, his want of intelligence, and of not understanding the difference between right and wrong, and by reason of his being addicted to the habit of smoking and the frequent use of matches, was a dangerous person to be at large without being under surveillance, or being watched by some person of ordinary discretion to prevent his setting out fire. They also find that the father (in whose house he lived and under whose custody he was) knew of the character and habits of Rollin, and of the danger from fire of his being at large alone.

The jury find that the father was guilty of negligence in the premises, by reason of his not taking any steps to control or restrain the boy in carrying and lighting matches and in setting out fires, after the defendant had been told of these actions by his neighbours.

They also find (though this would be rather for the Court than the jury) that the probable result of the lack of necessary precaution in the custody of the son was to enable the son to destroy property.

There seems no doubt that the son, though sixteen years of age, was stunted and undeveloped in body and mind; he busied himself with matches and smoking, and kindling fires in getting up steam as he played with a wheelbarrow which he regarded as a traction engine. He was a congenial idiot of irresponsible impulses, whose fitting place was, where he now is, under treatment in the asylum at Orillia. The unfortunate father had this inmate of his house, and, unless vigilant supervision of the son's movements was exercised, deplorable results might be expected.

The usual rule as to dangerous articles appears to be pertinent to this situation. Anyone possessed of a dangerous instrument owes a duty to the public, or to such members of the public as are reasonably likely to be injured by its misuse, to keep it with reasonable care so that it shall not be misused to the injury of others: Palles, C.B., in Sullivan v. Creed, [1904] 2 Ir. 329. [Reference to Palm v. Jursen, 117 Ill. App. Ct. R. 535.]

The American authorities (and I find no English ones on the precise point) indicate that the father's sanction (that is, his knowledge and acquiescence) may be proved by evidence of circumstances leading reasonably and fairly to the conclusion, though there be no proof of direct and express sanction. It is stated in 29 Cyc. 1665 that the father is not liable for torts committed without his authority, express or implied, and in Beedy v. Reading, 16 Me. 362, the Court says that the maxim that

where a man has the power of prohibiting the doing of a thing, his omission to exercise that power is an evidence of his assent, is one which may be applied with great propriety to minor children residing with and under the control of their father. I take it then that the proof of the father's assent or consent may be express or implied, and that, when a father carelessly and negligently countenances his child in having and using the dangerous agency which may be expected to do harm, he is liable without direct proof of his actual knowledge of the particular act of tort, so long as the circumstances of the case reasonably satisfy the Court or the jury of the father's responsibility.

It may be safely laid down that the father is liable for the conduct of his young child if he knows of the child's frequent wrongdoing in a particular direction, and by his attitude or his inaction (when he is able to restrain or confine the child), he indicates his willingness that the misconduct should be repeated. This appears to be so *a fortiori* when the child is of imbecile or demented mind, incapable of distinguishing right from wrong, and one whose manner and habit of playing or intermeddling with dangerous things easily obtained, or to which there is easy access, is likely to, or even may probably, bring about destructive results to the property of others.

A case is noted in 10 L.R.A. N.S. (1907), at pp. 935, 936, in an Ohio Court, which I cannot find in the library, in which the jury were instructed that the defendant would not be liable for the tort of his seven-year-old demented son, unless he knew the boy was demented and dangerous, and knowingly permitted him to be at large without proper surveillance; Cluthe v. Swendson, Cin. Sup. Ct., 9 Ohio, Dec. Reprint 438; see Johnson v. Gliddon, 11 South Dak. R. 237, 74 Am. St. R. 795; and Meers v. McD., 110 Ky. 926, 96 Am. St. R. 475.

We find here this accumulation of circumstances constituting the elements of the defendant's liability: (1) the tortious act of the child and his irresponsible character; (2) the boy's easy access to matches which he was in the habit of handling and playing with and igniting; (3) the knowledge by the father of his child's incapacity and his manner of acting and playing; (4) the likelihood of danger arising to property from setting out fires by the boy and the complaints made by the neighbours on this score; (5) the failure of the father to take steps to avert disaster by removing effectively the articles producing danger, or by corporal restraint of the child.

These things being established, I cannot doubt that the

verdict and judgment is well founded and should not be disturbed.

The appeal will be dismissed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I agree.

BOYD, C. JUNE 16TH, 1911.

RE AUSTON.

Will—Construction—Direction to Executors to Pay Mortgage—Deficiency of Free Personalty—Pecuniary Legacies—Apportionment of Mortgage Burden.

Motion by beneficiaries of real estate under C. R. 938, for an order construing the will of Rebecca Ogden Auston, on the question whether the deficiency of personal estate to pay debts, etc., should be met out of personalty represented by the stock, or borne pari passu by the land and the stock.

A. McLean Macdonell, K.C., for beneficiaries of real estate.
O. H. King, for executors.
E. C. Cattanach, for the infant.

BOYD, C.:—The will of the testatrix is dated the 13th July, 1909, and her death occurred on the 9th November, 1910.

The will directs that all her just debts, funeral and testamentary expenses shall be paid forthwith by her executors. Then, is the direction to the executors "to pay off any mortgage on any of my real estate which remains unsatisfied" at her death.

Then the bequest of legacies to the extent of about $4,000. And next is the clause—"Subject to the payment of the above mentioned legacies and bequests by my executors I give all my estate and property real and personal to the sons (the executors) upon trust:"

(1) As to stock in a company, worth at least $50,000, to set it apart in defined portions for various relatives.

(2) As to her land, to sell and divide the proceeds into four equal portions for relatives (some of whom are the same as those who take shares in the stock).

Parenthetically a discretion is given to the executors to refrain from selling, in which case a division is to be made in specie.

There is a last provision of the rest and residue of the estate not thereinbefore disposed of, among children indicated—but in fact I am told there is no such residue, apart from the sum of $5,843. The debts and funeral expenses amounted to about $1,900; the mortgage on the only land owned by the testatrix was $8,000; the legacies as mentioned, $4,000. The total undisposed of personal estate which is primarily liable for the payment of debts is $5,843.

The meaning of the words "subject to the payment of the above mentioned legacies and bequests" would include, I think, as a bequest the direction that the mortgage should be paid by the executors. The mortgage is not treated as "a debt" due by the testatrix, and I do not know whether it was made by her or not, and the direction as to payment of debts and funeral expenses is in effect a first charge on the assets and to be paid out of the most readily available personal estate. Deducting then $1,900 or so from the $5,843 available assets, it would leave about $4,000 of free personalty to answer the mortgage and the legacies which together amount to $12,000; so that there is a shortage of $8,000 to be paid out of the real and personal property specifically held in trust by the executors, i.e., the stock and the land.

The contention before me was limited to this: on the one hand, that all should come out of the personalty represented by the stock, and on the other hand that the deficiency should be borne pari passu by the land and the stock.

The clause directing the executors to pay the mortgage is relied on to shew that the land is to go clear to the beneficiaries. On the other hand the testatrix devises the land subject to the payment of the mortgage, if I have construed the context correctly.

The declaration as to payment of the mortgage by the executors simply means that the land is not primarily charged with that burden, but that it is to be discharged by the application of personal estate properly applicable thereto. That is the effect of the Wills Act, 10 Edw. VII. ch. 57, sec. 38, sub-secs. 1 and 2. This disposition leaves the former equitable rule in full force which is that the pecuniary legatee is to be paid in priority to the devisee where the personalty or residuary estate fails to answer both.

This $5,843 should be applied in payment of debts and funeral expenses, and the balance of $4,000 should be applied to pay off the legacies in full. That leaves the $8,000 mortgage to be paid rateably out of the assets designated by the testatrix, i.e., the land and the stock.

My brother Middleton has referred me to Re Smith, [1899] 1 Ch. 365, which has been helpful in reaching this result.

This mixed fund is practically the residuary estate, and to apportion this mortgage burden pari passu upon the real and personal property comprised therein conforms to the principle recognised in the Devolution of Estates Act, 10 Edw. VII. ch. 56, sec. 6.

The costs will be paid by the estate.

DIVISIONAL COURT. JUNE 19TH, 1911.

BÉLANGER v. BÉLANGER.

Executors and Administrators—Grant of Letters of Administration to Infant Widow of Intestate—Validity until Revoked—Power to Revoke—Surrogate Court—High Court—R.S.O. 1897 *ch.* 59, *secs.* 17, 21, 63, 64—*Independent Proceeding for Revocation—Action to Set Aside Conveyance Made by Administratrix—Infant Children of Intestate—Conveyance Made without Consent of Official Guardian—Confirmation by Court in Action—R.S.O.* 1897 *ch.* 127, *sec.* 3—10 *Edw. VII. ch.* 56, *sec.* 19.

Appeal by the plaintiffs from the judgment of BRITTON, J., ante 543.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

C. G. O'Brian, K.C., for the plaintiffs.

H. S. White, for the defendants.

MIDDLETON, J.:—Two questions were argued upon the appeal—(1) The effect of the infancy of the administratrix; (2) Whether the Court should now set aside the sale in view of the order made by Mr. Justice Britton.

Upon the first point I agree with the trial Judge that the letters of administration granted by the Surrogate Court cannot be treated as a nullity. It is the adjudication of the Court having jurisdiction in the premises, and is binding upon the High Court. This is the law quite apart from the statutory provision relied upon by the learned trial Judge: Noell v. Wells 1 Lev. 335; and even if the letters of administration should now

be revoked this would not affect the validity of all acts done during their currency: Allen v. Dundas, 3 T.R. 125; Boxall v. Boxall, 27 Ch. D. 220.

For reasons discussed at length in Mutrie v. Alexander, 18 O.W.R. 836, it is quite clear that, apart from special statutory provisions, the High Court has no power to interfere with the Surrogate Court in the exercise of its particular jurisdiction, and no statutory provision enables this Court to revoke the letters of administration granted by the Surrogate Court.

The circumstances surrounding the sale indicate that there was no fraud or overreaching, and this action is an attempt to obtain from a *bonâ fide* purchaser the advantage of an increase in value quite unforeseen at the time of the sale.

If the plaintiffs are not bound by the sale then they are entitled to obtain this benefit, the Court having no concern with the moral aspect of the case.

The consent of the official guardian ought to have been obtained at the time of the sale, and the statute, then and now, invalidates a sale in the absence of his consent, "without an order of a Judge of the High Court." The trial Judge approving of the sale on the evidence before him, made an order under this statute confirming it, and thereupon dismissed the action.

This order has, I think improperly, been embodied in the formal judgment, but it is really an order made by the learned Judge in the exercise of a special statutory jurisdiction and as to which there is no appeal.

Even if open to review, upon the evidence and in the circumstances disclosed, I do not think we should interfere.

The appeal should be dismissed with costs.

LATCHFORD, J.:—I agree.

BOYD, C., also agreed in the result, for reasons stated in writing.

DIVISIONAL COURT. JUNE 20TH, 1911.

PICKERING v. THOMPSON.

Executor de son Tort—Party Dealing with, Protected—Acts of, When Binding—Execution Act—Exemptions—Tools and Implements of Trade—Right of Selection—9 Edw. VII. ch. 47, secs. 3, 4, 6, 7.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of the County Court of Essex of 23rd March,

1911, in an action for $500 damages for alleged conversion of certain property of the plaintiff's late husband, claimed by her as his administratrix. At trial judgment was given the plaintiff against the Thompsons, for $100, and the action dismissed as against the defendant Pearson.

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

A. St. G. Ellis, for the defendants.
F. D. Davis, for the plaintiff.

MIDDLETON, J.:—Though one who takes upon himself to deal with the assets of a deceased person is in one sense a wrongdoer and is rightly treated as an executor "de son tort" because he has no rightful title to the office, from the earliest times it has been recognized that his acts are not entirely void.

Campbell, C.J., in Thomson v. Harding, 2 E. & B. 630, says (at p. 640): "Where the executor de son tort is really acting as an executor, and the party with whom he deals has fair reasons for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property."

But long before this in Coulter's case, 5 Co. 30 (a), it is said that "all lawful acts which an executor of his own wrong does are good," this statement being based on the still earlier case of Graysbrook v. Fox, 1 Plow. 282, where an administrator acting under a void grant was treated as an executor de son tort, which determined that "if the defendant here had averred that the administrator had aliened the goods to him for a certain sum and had employed the money in discharge of the funeral or of the debts of the deceased, or about other things which an executor should be forced to do, then the sale for such purposes should not be avoided but should remain indefeasible." Though one reason given was the colour of right derived from the void letters, the governing factor in the decision was that "he that has the right suffers no disadvantage although he be bound by the act of the administrator, for it is no more than he himself was compellable to do, and the administrator having done that which the executor was himself obliged to do, his act shall be allowed good," and it was "no detriment to anyone that the thing done should remain stable and firm without impeachment."

This is accepted as correctly stating the law in Ellis v. Ellis, [1905] 1 Ch. 613.

Paull v. Simpson, 9 Q.B. 365, determines that when one takes

possession of the property of a deceased person and hands it over to another, the giver and not the receiver is the executor de son tort unless there is some collusion, in which case both giver and receiver as joint wrongdoers become jointly executors de son tort, but in ordinary cases the giver is alone liable. There cannot be a series of executors de son tort. If a trust fund is handed over, then in equity it may be followed: Hill v. Curtis, L.R. 1 Eq. 91; but if handed over for value, then the fact that this value given had been rightly used in payment of debts might be set up in answer.

[Reference to Mountford v. Gibson, 4 East 441, as being in no way in conflict with the above.]

The plaintiff's appeal fails.

The plaintiff has been awarded $100 as the amount allowed under 9 Edw. VII. ch. 47, s. 3 (f). I do not think this can stand. The plaintiff has sued as administratrix. The right is after the death vested in the widow (sec. 6), and not in the administrator —in fact the claim of the widow must in general be made against the administrator.

The right is further defined under sec. 7 as a right to select the chattels exempt from seizure. No selection was made before the sale, and a sale having been made, a new right intervenes and no claim can be made against a purchaser in good faith.

The right which has been given effect to is the right given by sec. 4 to receive the proceeds of the sale up to $100. This is a right that must be exercised against the vendor, and not against the purchasers, the present defendants.

The right to select exempt chattels is by sec. 7 given to the debtor "his widow or family"; the right to claim $100 in lieu of tools and implements of trade is a right given to the debtor personally, and the distinction may well have been made intentionally. The general exemptions which may be selected are articles used not alone by the debtor but also by his family. The tools of the debtor's trade are of use to him personally, but are not generally of value to the widow.

The defendants' appeal should be allowed and the action should be dismissed with costs.

MEREDITH, C.J.:—I agree.

TEETZEL, J.:—I agree.

BOYD, C. JUNE 23RD, 1911.

McKENZIE v. ELLIOTT.

Building Contract—Contract or No Contract—Quantum Meruit —Charge for Superintendence—Alleged Rescission of Contract — Evidence — Onus — Dispensing with Architect — Plans and Specifications—Extras—Parol Modification of Written Contract.

Appeal by the defendant from the resport of the Master in Ordinary. The plaintiff sued for the price of a barn built for the defendant, and for a percentage of the price for superintendence of the work, claiming $10,129. The defendant paid from time to time $5,000, and the suit is for the balance, $5,129.

J. Shilton, for the defendant.
W. Mulock, for the plaintiff.

BOYD, C. (after stating the nature of the action) :—The defence is that the work was done under a contract therefor made on the 5th March, 1910, for $7,000, to be completed in October, according to given plans and specifications, and that at the time the work began it was mutually agreed that the size of the barn should be reduced 20 feet in length, and that some wood and stone should be supplied from an old barn of the defendant. The defendant understood, though it was not so agreed, that this reduction in size and supply of materials would have effect in also reducing the price. That there was no other agreement for the erection of the barn, and no agreement to pay for the cost or the superintendence as claimed by the plaintiff. In reply the plaintiff sets up that the contract was rescinded and cancelled shortly after its being signed and in consideration of the sum of $100 paid by the defendant to the plaintiff, and that the barn was put up without any reference to the contract, its plans and specifications, and on the contrary according to the defendant's directions by the plaintiff as his agent and employee. The main issue was, therefore, contract or no contract ? And according to the right view of that issue the next question is, how much is to be paid ? The whole action was referred for the consideration of the Master in Ordinary under sec. 121(*b*) of the Judicature Act, 9 Edw. VII. ch. 21. The Master first considered and disposed of the terms under which the work was done, and finds that there was no written contract in force and so reports. Then

he proceeds with the accounts and reports the total cost on the footing of quantum meruit . . . and he allows 10% for superintending the work. The defendant appeals on both branches. Of course, if the Master erred as to the contract issue, his whole report falls as being without foundation.

[The learned Judge, after referring to the evidence on one phase of the case as casting light upon the relative credibility of the two litigants, with regard to which he says that the testimony of the defendant impresses him more favourably than that of the plaintiff, proceeds:] Having carefully read and considered the evidence taken by the Master on the issue of contract or no contract, I feel constrained to differ from the conclusion he has reached.

The contract for building the barn in question was in writing, filled up by the plaintiff and signed by both parties, in which the plaintiff agrees to put up the building according to the plans and specifications prepared by qualified architects, for the price of $7,000. The barn was to be built 140 feet by 50, and the plaintiff held the plans and specifications, a change was made by mutual consent by which the dimensions were to be 120 x 50, and some timber from another barn was to be contributed by the defendant; he was under the belief and expectation that this change would have reduced the cost by $1,000. No intimation was given to the defendant that the work as prosecuted was otherwise than in pursuance of the contract and its plans and specifications. The contract was on the 5th March; the work was begun on the 2nd May; and on the 6th December, at or about its completion, an account was for the first time sent in by the plaintiff claiming $8,630, no claim for superintendence being mentioned. On the 15th December McKenzie writes to the defendant that he will accept $8,315 in full, making (with the deduction of $5,000 paid) the net balance for the whole work $3,315. (He asked that some few materials on the ground shall be turned over to him on this basis of settlement.) The Master's finding on a quantum meruit basis, including superintendence, is far in excess of this—but the exact figures have not been laid before me.

The burden is on the plaintiff to shew and shew clearly that the contract was wholly displaced and at an end for all purposes. All the undisputed facts that he has to rely upon are the change I have spoken of as to size and a few hundred dollars' worth of materials. It is noticeable that the plaintiff's first attitude was that this was no more than a partial change or modification, and

not a concellation of the written contract. [Reference to the evidence on this point.]

The Master, I think, erred in his appreciation of the whole body of evidence and its application to this controversy in its legal aspect.

The plaintiff procured the printed standard form of contract from the architects, and himself filled it up, leaving certain blanks which would be intelligible and pertinent only in case of an architect being employed. It was signed by both parties in this partially incomplete form, and it was stipulated (exactly when does not appear) that no architect should be employed—but nothing was said about any superintendence being contemplated or provided for by the contractor. He could not very well exercise the dual part of doing the work and supervising impartially its proper execution; the evidence shews that the defendant trusted to the experience and honesty of the man who was building the barn. [Reference to the evidence as to the dispensing with an architect.]

The Master has dealt with the case as one in which no law is involved. He holds that the writing drawn by the plaintiff himself and signed by both practically means nothing. One has to draw an inference as to what the contract price was intended to be. As a whole, the contract in writing he regards as indefinite and indeterminate. His conclusion seems to be—if the contract is in force as to the price it must be in force for all purposes. If the defendant sets up the contract for one purpose, surely it is good for all purposes. Ergo, because it is unworkable as to the manner of payment and as to the duties of the architect, it is all vitiated and may be disregarded. This view involves, to my mind, the radical error of the report. He rejects the position of the defendant that the terms of the writing were to stand except that they were going to do away with the services of an architect. But he accepts the contention of the defendant that the barn was to be built according to the plans and specifications which were a part of the contract. He finds upon the evidence that the parties agreed to build the barn substantially upon the plans which the defendant had paid for, and therefore intended to be utilized. The plaintiff was to build to the plans unless otherwise directed by the defendant (a privilege every owner has). The Master says the plaintiff proceeded to build the barn substantially according to the plans. He could not do otherwise. There was no other course open to him. That is what he did. This finding goes far to discredit the plaintiff's evidence. . . . The Master correctly appraised the ineptitude of the defendant,

an elderly man without business experience, with no particular knowledge of barn-building or anything else except the occupation that he had followed all his life. "He took nobody's advice. He never at any stage acquainted himself with the plans. He made no inquiries as to the price of material in any trade or the price of labour; in fact, he just allowed this barn to be put up. . . He left the matter practically altogether to the plaintiff."

The simple explanation is that he was incompetent to give instructions; that he relied on the plaintiff building according to the plans, and never was told that all was being built on a different footing of liability from the original contract. So that the Master must have found it incredible to believe that this experienced barn-builder was going on blunderingly under the leadership of a blind guide when the astonishing outcome was that without use of or reference to plan or specification the barn comes out at last a good facsimile of its architectural frame and fashion as originally designed. The Master discards the miraculous view and accepts the matter-of-fact story of the defendant. The correct result is put in the defendant's words—"It was solely in his hands to build it on the plans."

The alleged orders and interferences of the defendant which, according to the flexible evidence of the plaintiff, added $2,500 to the expense appear, on critical examination, to be close upon zero. Certain extras were ordered by the defendant which he is willing to pay for beyond the $7,000—such as those relating to alterations in the stables in regard to which he had some knowledge . . .

The engineer and skilled witnesses say that this class of barn is not built without plans: that no unskilled person could direct its building; that the barn built resembles that of the plan except in minor details; that as between the two no layman would know the difference; and that the so-called extras were small and some merely additions and alterations of existing work.

The Master comments upon the terms of the contract as if it was so incomplete as to be not comprehensible. But its form is explained by the fact that the plaintiff intended to go on without the control of an architect, and he so presented the matter to the owner that in view of being promised a better and cheaper result he agreed to the elimination of the architect clauses from the written agreement. That explains why no payment by monthly progress estimates was observed, but substantial sums were paid from time to time as the work went on, and as required by the builder. The contract was varied as to the architect at the request of the plaintiff, and so it was varied as

to the size of the building and the supply of some old materials at the request of the owner with the view of lessening the expense. But these changes did not affect the other parts of the contract. There still remained the substantial bargain that a barn was to be built according to the plans and specifications and to be completed by the 1st of October, for the total price of $7,000. The blank parts of the writing as to the architect effectively carried out that change. The other changes were in legal effect the making of a new contract, manifested by the writing as to what was not changed, and by the oral concord as to what was to be changed in size and old materials.

Probably the legal effect was that the building as diminished was to be built at the same price, $7,000, as no stipulation was made for a reduction; and this aspect of the case is rightly and aptly pleaded in the defence. For extras beyond what is provided for or implied in the plans and specifications the defendant would be liable, and this he admits. But I am inclined to think that in estimating the value of these the account should be taken having some regard to the lessening of the expense to the contractor occasioned by the reduction in size and the value of the materials supplied by the owner. However, the defendant makes no demur to paying $7,000 for the barn and extras as found upon proper investigation. . . .

The contract to build a place on a man's own land in the same year does not require to be in writing, but, being in writing, it may be changed, varied, or modified by parol without displacing its essential significance. Unless the change is of such a revolutionary character as to provide for a totally different structure, the ruling terms as to price, etc. remain intact. No difficulty arises here as to the outcome of the plaintiff's work when compared with the original plans and specifications. The Master in his final judgment has found upon the evidence that the barn as it stands is substantially in accord with the writings and drawings. With that I quite agree. The variations are of minor character and easily distinguishable and to be dealt with as extras if the cost be thereby increased.

It may be well to refer now to the law applicable to this contract. The general proposition is stated in Halsbury's Laws of England, vol. 3, at p. 180 (sub tit. Building Contracts) thus: "When the contract is not required by statute to be in writing, but has actually been reduced to writing, the parties may at any time waive, dissolve, or annul it or in any manner add to, subtract from, vary, or qualify the terms by parol agreement." This contract has in its body a good provision (third) for the

variations by the proprietor in the details of the plans and specifications which may be required at any time during the progress of the works. This provides for the change at his will, to which the contractor cannot object, and which works no termination of the contract as a whole. But the parties may before the work is begun agree to such a change as the present change, which leaves the rest of the agreement intact. [Reference to Gore v. Lord Nugent, 5 B. & Ad. per Parke, B., at p. 61; Patterson v. Lockley, L.R. 10 Ex. p. 335; Hudson on Building Contracts, vol. 1, p. 448; Pepper v. Burland, 1 Peak N.P. 103, per Lord Kenyon; McCormick v. Connolly, 2 Bury R.S.C. 404.]

Here the contract price for the whole as varied was $7,000: to this extras are to be added, to be ascertained according to a just and reasonable valuation, having regard to the diminution of expense which has resulted to the contractor from the reduced size of the building, and giving credit for the wood and stone and other materials supplied by the owner. The account will have to be taken in this way, unless the parties are content that I should now fix the price. To save the expense of further litigation in the Master's office, I propose to give judgment that the plaintiff shall receive $8,000 in full of all his work. That I think, is about the fair estimate to be arrived at from the various figures given by all those who spoke as to the lump sum. Of course, the standard price of the whole is $7,000, subject to its being added to as I have indicated—but with no allowance for superintendence, which was not contemplated as a part of the contract price. . . . The plaintiff himself offered at one time to take $8,300. And $8,000 is the sum I would now give, unless either of the parties seeks a further reference. In that case the costs of such reference would be reserved and the Master should report specially on the various items that I have indicated.

But whatever the parties may do as to the price to be paid for the barn, I think that the plaintiff will have to pay the costs of the reference in the Master's office up to the present and the costs of appeal. The whole has been occasioned by his insisting on a wrong basis of payment, and all that has been done proves futile. Of course,, if the case goes on, the evidence already taken may be used for what it is worth before the Master—but that does not exempt the plaintiff from now paying these costs. If the case rests here, I would give no costs up to the judgment of reference; but, if the case goes on, I would reserve the costs to be dealt with at the close on further directions.

DIVISIONAL COURT. JUNE 23RD, 1911.

CASE v. FEIGHEN.

Contract—Sale of Goods—Conditions Relieving Vendor from Liability—Findings of Jury—Property not Passing—Right of Purchaser to Damages—Assessment of Damages.

Appeal by the plaintiffs from the judgment of the 4th Division Court of Simcoe, of the 12th May, 1911.

The appeal was heard by RIDDELL, LATCHFORD, and SUTHERLAND, JJ.

R. S. Cassels, K.C., for the plaintiffs.

M. H. Ludwig, K.C., for the defendant.

RIDDELL, J.:—The plaintiffs, a joint-stock company manufacturing threshing machines, etc., sued the defendant upon his promissory note for $155 and interest in the 4th Division Court of the County of Simcoe—the defendant disputed the claim and counterclaimed for $200 damages for the plaintiffs' failure to deliver to him two grain boxes and one wood case side stacker to be used in connection with threshing machine purchased by the defendant from the plaintiffs."

At the trial before His Honour the County Judge and a jury in October, 1910, the jury found damages upon the counterclaim $200; the plaintiffs' claim was then $192.20—the County Court Judge thereupon dismissed the plaintiffs' claim with costs. Upon motion, a new trial was granted—and I pay no more attention to that trial.

A new trial was had before the same learned Judge and a jury at Collingwood on the 11th March, 1911, resulting in a finding of $200 damages on the counterclaim. Upon this judgment was directed to be entered dismissing the action with costs—a new trial being again applied for, the motion was refused.

The plaintiffs now appeal.

The evidence shews that the defendant purchased from the plaintiffs "one Ironside Wood Separator . . . and one wood case side stacker . . ." for $567 in notes at various dates. The contract expressly states that the said machinery was "purchased upon and subject to the following mutual and independent conditions . . ." *inter alia*, "Each machine and attachment is ordered at a separate fixed price, which price unless otherwise specially agreed, bears the same ratio, etc., etc. This

order is divisible as to each machine and attachment ordered . . . It is further understood and agreed that any . . . omission on the part of the company does not confer any right to damages for delay or loss of work or earnings or to other damages . . . In no event shall the company be liable otherwise than for the return of cash and notes actually received by it . . .

"The company assumes no liability for non-shipment, delay in shipment or transportation. Acceptance by purchaser is a full waiver of any claim for delays in filling this order arising from any cause . . . The property in the above machinery shall not pass to the purchaser until the purchase money . . . and the notes given therefor . . . shall have been fully paid . . ."

The evidence further shews that the separator was delivered promptly to the defendant but the side stacker was not—that the defendant came to Toronto about this and was told that it would be sent for from Wisconsin and shipped in about 5 days, but it did not come. Three months after, i.e., in December, 1906, correspondence began about this stacker and about paying the notes, but the stacker did not make its appearance for that season. In August, 1907, a side stacker did come along to the defendant and the defendant tried to put it on but could not succeed; it was built for left hand instead of right hand, he says, finally a representative of the plaintiffs came up, found the side stacker no good and told the defendant to ship it back. Further correspondence took place, the plaintiffs offering to take back the defective machinery if it was not injured and credit the defendant with its value and this the defendant seems to have agreed to (February 25th, 1908)—the carrier was returned and the defendant credited with its value. No claim was made by the defendant on account of this machinery during the correspondence, except for 92 cents freight and the interest on the note with $3 for grain boxes. Even his solicitors (October, 1908), complain only of the way the value of the carrier was applied, saying that this should have been all applied on the first note and at length. October 31st, 1908, this claim was acceded to. The first note was paid and a promise made to pay the remainder. This was not done and action was brought for the last note, then for the first time the claim is made by the defendant which I have already set out. This account will enable us to understand the findings of the jury which are as follows:—

1. Q. Did defendant make note sued on? A. Yes.

2. Q. Has it or any part thereof been paid? A. No, unless endorsement on back of note of $7.50 means anything.

3. Q. Was side carrier to be furnished? A. Yes.

4. Q. Was it furnished as agreed? A. No.

4. Q. Side carrier being returned and credited on note, was this a settlement of any claim for damages? A. No.

5. Q. If defendant entitled to damages by reason of side stacker not being furnished, how much would you assess it at? A. Two hundred dollars.

6. Q. Was the document of September 1st, 1906, signed by Feighen and part of the contract? A. Yes.

7. Q. What is the value of side stacker? A. $17.50."

Although the title has not passed it is clear that special damages such as are claimed by the defendant in this case may be validly claimed if the facts justify this finding.

New Hamburg Manufacturing Co. v. Webb, 23 O.L.R. 44, is authority for this proposition, and the reasoning in that case is conclusive against the proposition that in general the amount of damages to be recovered is limited to the value of the machine supplied.

And whatever may have been the state of matters in Sawyer-Massey v. Ritchie, 43 S.C.R. 614, which led to the remarks of Mr. Justice Idington at p. 620, I can find nothing in the correspondence or in the conduct of the defendant to estop him from claiming damages if damages are in other respects due him.

Nor can I find that the jury is wrong in their estimate of damages; although the amount must necessarily not be easily capable of definite determination, the elements are quite as clear as in the case of Chaplin v. Hicks, 27 Times L.R. 458, and more so—there the defendant contracted that he would give to fifty ladies selected by the votes of readers of a newspaper a chance of presenting themselves before him so that twelve of them might be chosen by him for engagements at varying remuneration. The plaintiff was one of those chosen, but she was not given a reasonable opportunity of presenting herself to the defendant and sued for damages. The jury awarded her damages to the amount of £100, this was sustained by Pickford, J., and the Court of Appeal.

In the present case the damages, while in a sense nearly hypothetical, are not in my view impossible of estimation by a jury. I think therefore all the answers of the jury are justified by the evidence. But upon such answers the defendant proves himself out of Court. By his contract under his signature he agrees that no omission of the company shall confer any right of damages of any kind—he buys under a contract which expressly provides that the company assumes no liability for non-

shipment. All the damages he can claim for are covered by these provisions of his contract, and I think the findings of the jury cannot help him.

The appeal should be allowed and judgment entered for the plaintiffs for the amount sued for, and the counterclaim dismissed, all with costs.

LATCHFORD, J.:—I agree.

SUTHERLAND, J.:—I agree.

MIDDLETON, J. JUNE 23RD, 1911.

RE GOLDFIELDS, LIMITED AND HARRIS MAXWELL CO.

Company—Mandamus—Form of Transfer—Affidavit of Witness—Companies Act, sec. 116.

Motion under sec. 116 of the Companies Act for a mandatory order directing the Harris Maxwell Co. to enter the Goldfields Co. as shareholder in respect of a large number of shares transferred.

G. H. Kilmer, K.C., for Goldfields, Limited.
F. E. Hodgins, K.C., for Harris Maxwell Co.

MIDDLETON, J.:—As an action is pending in which the transfers from Mason and Patterson are attacked, no order should be made, but this is without prejudice to any new motion when these actions are over.

With reference to the other transfers I think the position taken by the company is untenable. Re Shantz & Good shews that these shares paid up and non-assessable, are property—and may be freely transferred, and the company has no right to object to the transfers.

In Re Shantz there was some foundation for the objection because there was a by-law dealing with the matter, here there is no such by-law, and this is a company whose shares were to be dealt with on the open market, and so differs widely from a private concern which is in truth a substitute for a partnership.

A number of technical objections have been raised.

(a) As to the form of transfer. Certificates were issued

by the company under its seal for the shares "transferable only on the books of the corporation by the holder thereof in person or by attorney upon surrender of this certificate properly endorsed."

A form of endorsement is printed which contemplates signature by the assignor only, and which is in the ordinary form in use and is clearly adequate. This form, after an assignment of the stock, appoints an attorney to transfer on the books of the company.

A by-law is now produced which provides for a transfer book and the signature of the transfer therein by both transferor and transferee.

The form of transfer provided by the company must be taken as the form approved by the directors, and if the signature of the transferee is necessary, the transferee is ready to sign the book, but is not permitted by the company to do so.

(b) The transfers were executed in blank and are now filled up by the transferee. When the assignments were so executed and handed over there was implied authority to complete them.

(c) There is no affidavit of a subscribing witness. No doubt is cast upon the genuineness of these documents and the affidavit of Mr. McKay is sufficient to cast the onus upon the company.

If I thought such affidavits necessary I would allow them to be made now, and as they would form part of the material on this motion, the costs payable by the company would be correspondingly increased.

The absence of a subscribing witness does not seem to me to be fatal.

I have not attempted to go through the mass of certificates produced to ascertain their accuracy. No particular cases were discussed, and I suppose that these general rulings are sufficient.

The order should go for a mandamus, and if the signature of the transferee is necessary, it is understood that this covers the permitting of the transferee to execute the transfer book.

The company must also pay the costs.

DIVISIONAL COURT. JUNE 23RD, 1911.

SUMMERS v. BLAIR.

Landlord and Tenant—Illegal Distress—Circumstances Aggravating Trespass—Punitive Damages.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., of the 8th April, 1911. The plaintiff, a dentist

in New Liskeard, lessee of the defendant, brought action to recover $5,000 damages for alleged wrongful and malicious seizure and sale of plaintiff's goods and chattels for rent claimed as overdue. At the trial the plaintiff recovered judgment for $350.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

M. K. Cowan, K.C., for the defendant.

A. G. Slaght, for the plaintiff.

LATCHFORD, J.:—The plaintiff claims that the defendant wrongfully and maliciously seized and took certain furniture and effects of the plaintiff, maliciously advertised such chattels for sale and sold them under a false and pretended claim of right, and that by such wrongful and malicious conduct the plaintiff was deprived of said furniture, etc., and was subject to the ignominy and public contempt of having his furniture advertised for sale, and thereby suffered loss and damage by reason of injury to his reputation and to his practice in the profession of dentistry.

The defence is that at the time the distress was made a month's rent was due to the defendant by the plaintiff. Whether the rent was due or not depended on whether it was or was not payable in advance. If due, as the defendant alleged, on October 15th, the distress on November 4th was not illegal. If not due, as the plaintiff contended, until November 15, the distress was wrongful and the plaintiff entitled to recover the actual loss he sustained, $6.40.

The jury evidently considered the distress as at least wrongful, inasmuch as they awarded the plaintiff as damages $350. As the plaintiff had during the trial expressly abandoned his claim to special damages for injury to reputation and loss of practice, the award of any sum in excess of the damages proved can be supported, if at all, only on the ground that the jury considered the distress to be a trespass, not only wrongful but malicious, which justified a verdict such as this was, of punitive damages. It seems to be the law that circumstances aggravating a trespass may be considered in estimating damages.

[Reference to Merest v. Harvey, 5 Taunt. 442, 15 R. Rep. 545; Lewis v. Lyons, 2 Stark 317, 20 Rev. Rep. 688; Livingstone v. Ranyard's Coal Co., 5 App. Cas. 25, per Lord Blackburn, at p. 39; Chase v. Scripture, 14 U.C.R. 598; Lynch v. Bickle, 17 C.P. 549.]

In the last two cases the damages seemed excessive, but in neither did the Court disturb the verdict. We cannot, I think, interfere here and the appeal must be dismissed with costs.

MIDDLETON, J., gave reasons in writing for arriving at the same conclusion, and concurred in dismissing the appeal, with costs on the County Court scale.

BOYD, C., concurred in the judgment of MIDDLETON, J.

DIVISIONAL COURT. JUNE 23RD, 1911.

RE ANGUS AND TOWNSHIP OF WIDDIFIELD.

Municipal Corporations—By-law to Provide Funds for Improvements—Motion to Quash—No Intention to Act on By-law—Posting up Copies of By-law—Municipal Act, sec. 338 (2)—Unreasonableness of By-law—Costs.

Appeal by the applicant, Angus, from the order of MEREDITH, C.J., of the 12th December, 1910. The order complained of dismissed the applicant's motion to quash by-law No. 180 of the municipality of Widdifield, to provide funds for certain improvements.

The appeal was heard by RIDDELL, LATCHFORD, and SUTHERLAND, JJ.

J. M. Ferguson, for the appellant, Angus.

W. H. Irving, for Widdifield and North Bay.

RIDDELL, J.:—The Township of Widdifield was about 10 by 12 miles in extent and therefore contained about 120 square miles of territory; it had an assessed value of a little over $500,000. The town of North Bay adjoining the township, the town council passed early in 1910 a resolution to annex a part of the township, about 1,500 acres in all, and a proclamation of date the 7th April, 1910, appeared in the Ontario *Gazette* of the 23rd April, 1910, pp. 686, 687, giving effect to the proposed annexation as of the 1st January, 1911, upon certain conditions set out in the proclamation and not material to be here copied. The part of the township annexed is said by the clerk to be about one-half a square mile, but this must be a mistake as the proclamation makes it nearly 2½ square miles, the assessment of this being about $300,000, leaving about $200,000 for the remainder of the township.

A by-law was submitted to the people on the 2nd September, 1910, to expend $33,000 for carrying out certain improvements, opening, grading and gravelling streets, all within the part of the township to be annexed within a few months, and made a part of the town of North Bay. Of the 911 voters qualified to vote upon this by-law, 337 did vote, 179 for, and 158 against. A motion was made to quash the by-law before the Chief Justice of the Common Pleas and by him refused.

This is an appeal from that refusal.

Upon opening the case before us, counsel for the township (who also appeared for the town of North Bay which had been directed by another Divisional Court to be notified) stated that there was no intention that the by-law should be acted upon, but he refused to consent to its being quashed. I do not understand the position—if there be no intention that the by-law be acted upon, it can be kept alive for no legitimate purpose. And there may be many good reasons for getting rid of the by-law altogether—it may embarrass if, and when, other moneys are required to be raised, etc.

The proposal to saddle the township with an indebtedness for money to be expended upon a part of it which is within a few weeks to be part of another municipality is to my mind a monstrous one—that I think the opponents of the motion admit. No aid should be given to a municipality endeavouring to support such a proposal; and they must be acting clearly within their powers before such a by-law can be supported.

One direction made by the statute of 1903, 3 Edw. VII. ch. 19, sec. 338 (2), is that "the council shall put up a copy of the by-law at four or more of the most public places in the municipality." It has been held that the onus rests upon the township, if this direction be disregarded, of proving that the omission to comply with the direction has not affected the result: In re Pickett & Wainfleet, 28 O.R. 464, at p. 467, followed in Begg v. Dunwich, 21 O.L.R. 94, at p. 99.

In the present case the council did not select the places for posting up the copies—the whole matter was left to the reeve Murphy. He put up four on telegraph poles all within about three-quarters of a mile and all within the part of the township to be annexed, not one more than three-quarters of a mile from the centre of North Bay, but all on the leading streets from the country district. The reeve knows of no other posters to his own knowledge. But he says that he gave one to Mr. Meadows who said he had put it up in the post-office at Woodland. One was given to a policeman, but that seems to have been put up in or near North Bay.

There is another post-office, Trout Lake, it is said, although I cannot find it in the post-office list. Then there is apparently another at Widdifield. It appears also that several public meetings were held in opposition to the by-law in parts of the township remote from North Bay and from the territory to be annexed.

It is argued that the statute has not been complied with in respect of the posting of the notices. First it is said that the council did not put up the copies—the council exercised no judgment at all, but left the whole matter to Murphy. This is true and it may be that in some cases something might turn upon such a fact. It may be that the Court would not enter into the inquiry at all if the council were to exercise a discretion and judgment, and in good faith select certain places for the posting—whereas if the council did nothing of the kind the Court might enquire with some strictness into the locus, and whether the statute was in fact complied with. I do not decide this however; simply saying that the statute seems to call upon the council to exercise a judgment, and it would be well that councils should pay strict attention to the requirements of the statute. And again the attention of municipalities should be drawn to the advisability of preserving regular proof by statutory declarations of the posting. I have in Begg v. Dunwich, 21 O.L.R. 94, at p. 95, cited a case as early as 1850 in which our Courts have said this in substance: In re Lafferty v. Wentworth & Halton, 8 U.C.R. 232.

Re Mace v. Frontenac, 42 U.C.R. 70, was cited to us as concluding the township. This is a full Court judgment and therefore binding upon us. [Reference to Mace case, and quotations from judgments therein, the opinion being expressed that that case "is not exactly on all fours with the present."]

I reiterate the regret expressed in Re McCracken and Sherbourne, 23 O.L.R. 81, at p. 100, that "our Courts have ever imported into the consideration of municipal by-laws the English practice in the King's Bench when considering by-laws of corporations, whether common law and customary corporations, or those deriving their being from Royal Charter." I should be better satisfied if municipal councils elected by the people to govern them should be treated as other legislative bodies; and thus the only enquiries would be the power of the council to pass the legislation in question—and whether that power had been exercised in the manner prescribed by statute. But that is not the law—we must under the decisions binding upon us go into the question of the reasonableness of the by-law. And upon this it

does not seem to me that there can be any doubt that the by-law is grossly unreasonable. If the mere statement of the facts of the case do not convince of the unreasonableness of the by-law, it were useless to elaborate argument.

I think the appeal must be allowed and the by-law quashed. Had the township consented to this it might well have been without costs, but the extraordinary position taken by the township, which I confess my inability to understand, namely, agreeing not to act upon the by-law, but insisting that it is not to be quashed—justifies us in directing that the respondents pay the costs of this appeal and before the Chief Justice.

LATCHFORD, J.:—I agree in the result.

SUTHERLAND, J.:—I agree in the result.

MEREDITH, C.J.C.P. JUNE 26TH, 1911.

WESTERN CANADA FLOUR MILLS, LIMITED v. MIDDLEBORO.

Principal and Agent—Agreement in Writing—Assignee of Agent—Agent, Trustee for Principal of Outstanding Accounts—Commission of Agent Varying According to Principal's Profits.

Action tried before MEREDITH, C.J., without a jury at Toronto on the 2nd May, 1911. The question between the parties was as to the right of the plaintiffs against the defendant as assignee of the estate of Lloyd & Scully, to the money which was due by purchasers of flour sold by Lloyd & Scully under an arrangement between them and the plaintiffs made on the 15th September, 1909, and evidenced by a writing signed by the parties bearing that date.

E. F. B. Johnston, K.C., and Gideon Grant, for the plaintiffs.

A. G. Mackay, K.C., for the defendant.

MEREDITH, C.J.:—The terms embodied in the writing, as far as it is necessary to refer to them for the purpose of the present inquiry, are that Lloyd & Scully were "to act as agents on commission" of 15 cents a barrel on flour, which was to "be treated

as on consignment''; that they were to make up monthly statements, ''giving date of sales, to whom sold, quantity, grade and price''; that the statements were to be mailed to the plaintiffs' Toronto office promptly at the end of each month, and that the plaintiffs were to draw on them at 15 days for the flour sold, at current prices less the commission. What is meant by ''current prices'' is the plaintiffs' selling price at the time of the sales, which was communicated from time to time to Lloyd & Scully.

''All expenses in connection with shipments'' were to be borne by Lloyd & Scully, except the cost of insurance which was to be borne by the plaintiffs.

The parties carried on business under this arrangement from the time it was made until the 4th July, 1910, when the assignment to the defendant was made.

While according to this arrangement drafts at 15 days from the end of the month were to be drawn on Lloyd & Scully for the flour sold by them during the month, charged to them at ''current prices'' less their commission, they sold, according to the testimony of William A. Smith, their manager at Sault Ste. Marie, at varying prices, and made no return to the plaintiffs of the prices at which the sales were made.

The shipping bills which accompanied the flour shewed on their face that it was sent to Lloyd & Scully on consignment, and monthly returns in accordance with the arrangement were made by them to the plaintiffs.

At the time of the assignment, Lloyd & Scully had on hand a considerable quantity of the flour which had been consigned to them by the plaintiffs, and no question has arisen as to it, the plaintiffs' ownership of it having been acknowledged by the defendant.

The question in dispute is as to the right of the plaintiffs to the outstanding accounts for the flour which had been sold, and to these the plaintiffs claim to be entitled, to the extent of the amount owing to them by Lloyd & Scully, on account of the flour.

The plaintiffs also claim to rank against the estate in the hands of the defendants, as preferential creditors for the amount so owing.

It was shewn at the trial that the Bank of Hamilton and the Imperial Bank had obtained from Lloyd & Scully, shortly before the assignment was made, an assignment of these outstanding accounts and had collected some of them, and it was admitted by the plaintiffs' manager upon his examination as a witness at the trial that some of these accounts are not collectable.

The plaintiffs' right to the outstanding accounts depends upon whether the true relation between them and Lloyd & Scully was that of principal and agent.

No doubt, as was decided in Ex parte White, L.R. 6 Ch. 397, 21 W.R. 465, the use of the word "agent" is not decisive, and the conclusion of the Court in that case was that the true relation between so-called agent and the person who claimed to be the principal was that of vendor and purchaser.

Ex parte White was considered in Ex parte Bright, 10 Ch. 566, where it was pointed out by James, L.J., that it was a decision on facts.

In that case it was contended that although the relation of the parties was ostensibly that of principal and agent, it was really that of vendor and purchaser, and in support of that contention reliance was placed on the fact that the so-called agent was entitled to retain the advance on the principal's prices at which the goods were sold by the agent, but it was answered by the Master of the Rolls (p. 570), that there is nothing to prevent the principal from remunerating the agent by a commission varying according to the amount of the profit obtained by the sale, and that "*a fortiori* there is nothing to prevent his paying a commission depending upon the surplus which the agent can obtain over and above the price which will satisfy the principal."

If this be the case I see nothing in the fact—if it be the fact—that the prices at which Lloyd & Scully sold the flour varied from the plaintiffs' "current prices," for what is that but remunerating the former by a commission of 15 per cent., plus what they realized over and above the principal's selling price.

The fact that Lloyd & Scully were to pay the plaintiffs the price of the flour sold by accepting the 15 day draft, and that this would require them to pay in advance of their being paid by the purchasers where the flour was sold at longer credit, does not in principle, I think, differ their position from that of the agent in the Bright case, who guaranteed all accounts, for what was done by Lloyd & Scully was in effect to guarantee that the price of the flour would be paid, and if not paid would be paid by Lloyd & Scully by the payment of the 15 day drafts to be drawn on them.

My conclusion is that the real relation between the plaintiffs and Lloyd & Scully was that of principal and agent, and it follows that in respect of the accounts outstanding at the time of the assignment, Lloyd & Scully were trustees of them for the

plaintiffs to the extent of the amount unpaid by the former to the latter in respect of the flour sold to the persons by whom the accounts were owing, and the defendant as assignee held and holds these accounts upon and subject to the same trust.

The defendant is not answerable for the moneys collected by the two banks, nor are the plaintiffs entitled to a preferential claim against the estate in the hands of the defendant for the whole of their claim against Lloyd & Scully, but they are entitled to be paid by the defendant what has been collected by him of the outstanding accounts, which appeared at the trial to be $1,181.58, and to have such of the outstanding accounts as have not been paid to the defendant transferred to them in order that they may be paid the residue of what they are entitled to receive out of them according to my determination as to the extent of their rights, and subject to the obligation to account for and pay to the defendant anything they may collect in excess of what they are so entitled to.

It will be desirable, if it is practicable, for the parties to agree as to the amount which the defendant is adjudged to pay in respect of the collections made by him, but if they are unable to do so, there will be a reference to the Master to ascertain the amount, and if there is any dispute as to the accounts which are for, or as to the extent for which they are for, flour of the plaintiffs sold by Lloyd & Scully to the persons by whom the accounts are owing, and not paid for to Lloyd & Scully, there will also be a reference as to it.

The defendant must pay the costs of the action. If a reference is had, the costs of the reference and further directions will be reserved, to be dealt with by a Judge in Chambers after the report.

HYATT v. ALLEN—SUTHERLAND, J.—JUNE 14.

Company—Directors—Class Action by Certain Shareholders—Application to Settle Minutes of Judgment—Objection that Company not Properly before Court.]—Application to settle minutes of judgment noted ante 927. SUTHERLAND, J., said that since the delivery of his judgment reported in 18 O.W.R. 850, some difficulty had arisen in connection with the settlement of the formal judgment, the individual defendants objecting that the record was not properly passed and the defendant company not properly before the Court at the trial of this action, so as to enable the trial Judge to pronounce an appropriate and complete judgment. The defendant company was not represented.

The plaintiffs contend that under the terms of two interlocutory orders dated respectively the 8th and 15th days of September, 1910, the defendant company was duly made a party to the action and service of the writ of summons and statement of claim upon it dispensed with. The learned Judge says that he is inclined to think that the company was not before him at the trial in such a way as to enable him to deal with the matters in question effectually, but that as the plaintiffs' counsel upon the application to settle the terms of the judgment seemed strongly to think otherwise, he had settled the terms of the judgment as submitted to him. If the plaintiffs wish to take the risk of entering the judgment in the form in which it has been settled, and of an appeal therefrom on the grounds above suggested, they may do so. On the other hand, they may take an alternative course suggested by the learned Judge namely: to retain the matter before him, adjourning such further trial, if any, as may be necessary to a day to be fixed by him after the record has been put in proper form in so far as the defendant company is concerned, so as to make the matter ripe for complete trial and disposition. In the case of their electing to take this course, the costs of the appeal thus far and of the applications to settle the judgment will be reserved. E. G. Porter, K.C., for the plaintiffs. M. L. Gordon, for the defendants.

BRADFIELD v. BANK OF OTTAWA—BRITTON, J.—JUNE 17.

Banks and Banking—Deposit of Trust Money by Two Executors—Cheque Signed in Blank by One Executor—Improvident Loan Made by the Other Executor at Instance of Bank Manager—Money Used to Pay Overdraft on Another Account—Liability of Bank—Fraudulent Transfer.]—Action by the executors of the estate of the late George F. Bradfield to recover the sum of $2,532.49, and interest, alleged to have been wrongfully transferred from the plaintiffs' account to that of the Imperial Supply Co., in the defendants' bank at Morrisburg, whereby the defendants obtained payment of an indebtedness of that amount, consisting of an overdraft of the said Supply Co., of which one H. H. Bradfield, a brother of Geo. F. Bradfield, was secretary-treasurer, and was liable to the defendants for that company's debt. Graham, the defendants' manager, knew that the money on deposit to the credit of the George F. Bradfield estate, in large part was held by the plaintiffs in trust for the infant children of the deceased. In an apparently friendly way the manager ad-

vised the plaintiff Ada A. Bradfield, widow of the deceased, and one of the executors in the management of the estate, and suggested to her that she should get the signature of the other executor, the Rev. G. S. Anderson, to cheques in blank, so that it would not be necessary for her to put him to the trouble of meeting her for the payment of small accounts.

On the 20th April, 1909, the Supply Company owed the bank on what was called overdraft account, including interest made up to the day, $2,532.49. This company had no available assets in Ontario out of which this debt could be realized, and Graham was pressing H. H. Bradfield for payment of this debt, but without success, as he was unable to pay it. The defendants' manager then for the purpose of getting payment suggested to H. H. Bradfield that he should borrow from his sister-in-law. H. H. Bradfield hesitated, and was not willing even to ask for the loan. The manager then expressed his willingness to go, to which H. H. Bradfield consented. The manager went alone to the plaintiff Mrs. Bradfield, and suggested the loan, and she, upon his request, and without any other, or independent advice, trusting entirely to what was said by the manager, consented to make the loan. The exact amount was not then mentioned, but it was to be about $2,500. Mr. Graham did not inform Mrs. Bradfield of the indebtedness of H. H. Bradfield to the bank, or of its being the manager's intention to apply the money to be borrowed in payment of any of H. H. Bradfield's debts. The manager did not consult the executor, Anderson, about the loan—did not inform him of the loan—but requested Mrs. Bradfield not to inform him. Mrs. Bradfield then signed a cheque, with no amount stated. The cheque was one of those already signed by Mr. Anderson, and signed merely for the purpose before mentioned—not signed for the purpose of making a loan to any one, and this Mr. Graham knew. Having obtained the cheque so signed, the manager went to his bank, filled in the exact amount of the debt, represented by the overdrawn account of The Imperial Supply Co. Limited, after adding interest to the amount. The manager then prepared a note, making it "on demand" for the same amount with interest until paid. He took cheque and note to H. H. Bradfield and obtained his endorsement of the cheque in the name of R. H. Bradfield & Co., and his signature to the note as secretary-treasurer of The Imperial Supply Co. Limited, and his endorsement upon the note as it was drawn, payable to the order of H. H. Bradfield. The manager returned to the bank—the cheque was placed to the credit of the Imperial Supply Co., closing that account. The note was retained at the

bank for Mrs. Bradfield. It does not appear just when the note was handed to her. Anderson did not become aware of this transaction until long after. He never acquiesced in it. He thought it wrong and so stated, but was ignorant of his rights and liabilities. H. H. Bradfield failed in 1910, and his estate paid only 12½ cents on the dollar of its liabilities. Nothing was paid on the note except three sums amounting to $125. The learned Judge held that the receipt of these moneys did not in any way estop the plaintiffs from maintaining this action. There was no acquiescence on the part of the executor Anderson, and Mrs. Bradfield was simply leaving everything to the bank. Even if Mrs. Bradfield had power to adopt and ratify this expropriation of the estate money, she did not do it. The defendants received this money of the estate under the circumstances above stated, stamped with the special trust created by the will of George Bradfield in favour of his children. They received it behind the back and without the knowledge or consent of one of the executors. The defendants' manager knew that in procuring this money from Mrs. Bradfield, for the bank's debtor, first, and then for the bank, he was obtaining money that did not belong to Mrs. Bradfield in her own right, and that she ought not to lend it as he was asking her to do. The manager was assisting Mrs. Bradfield to commit a fraud upon her children, and therefore he was committing a fraud, and the defendants cannot retain the money so obtained. [Reference to Thomson v. Clydesdale Bank, Limited, [1893] A.C. 282, 291; Bodenhain v. Hoskyne, 2 De G. M. & G. 903.] Judgment for the plaintiffs for $2,681.49. R. A. Pringle, K.C., and I. Hilliard, for the plaintiffs. W. Greene, and R. F. Lyle, for the defendants.

O'CONNELL v. KELLY—DIVISIONAL COURT—JUNE 17.

Landlord and Tenant—Tenancy from Year to Year—Evidence—Corroboration—Use and Occupation—Statute of Limitations—Counterclaim.]—Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 923. The appeal was heard by MEREDITH, C.J., TEETZEL and LATCHFORD, JJ., and dismissed with costs, without prejudice to the right, if any, of the plaintiff to compensation out of the estate in respect of the costs. J. J. Coughlin, for the plaintiff. J. C. Makins, for the defendant.

RYAN v. FRASER—BOYD, C.—JUNE 19.

Replevin—Con. Rules 1068-1070—*Undetermined Liability—Right to Distrain.*]—Motion in appeal to set aside a replevin order under Con. Rules 1068-70. Judgment: I have looked at the cases cited, but all go to the merits, which cannot be dealt with at the opening of the proceedings in a replevin suit when the order to replevy is attacked. True it is that replevin does not lie if anything is due for rent; but that is the very matter in dispute upon the law and the facts. The proper construction of the special terms of the lease are involved in this contest, and there is controversy about the actual facts of the case. The plaintiff swears that the improvements to be made as a condition of his paying rent have not yet been made, and though he has been induced to take possession by the misrepresentation of the landlord, his claim is that no rent as such is due, but only an undetermined liability for use and occupation. This strikes at the root of the dispute; for there is no other sum certain due, there is no right to distrain. These are all matters to be dealt with at the trial upon the oral testimony that may be adduced; not to be disposed of by weighing statements in affidavits or otherwise, on an interlocutory motion such as this. The appeal should be dismissed with costs in the cause in any event to the plaintiff; and both orders made by the County Judge should be affirmed, the last one of which is unusually favourable to the person who now appeals. McCarthy, for the defendant. J. F. Warne, for the plaintiff.

RE SUTHERLAND—MIDDLETON, J.—JUNE 20.

Will—Construction—"Descendants"—Estate Tail.]—Motion by executors under Con. Rule 938 for construction of will of James Sutherland. Judgment: "Descendants" means children and their children and their children to any degree and is, in most instances, and clearly in this, equivalent to "issue": Ralph v. Carrick, 11 Ch. D. 873. The devise to "Esther Slimmon and to her descendants" gives her an estate tail. The legacy of $4,000 to Ida Sutherland, at the date of the will an unmarried woman, "the said money to be for her descendants, and if my said daughter should die without leaving any living issue, then her share is to go to my nearest living relatives," is an ineffectual

attempt to make an estate tail, of personal estate, with remainder to the "nearest relatives." This confers upon the daughter an absolute right to the $4,000. See Flood on Wills, 522-3. This also disposes of the similar legacy of $4,000 to Winnifred Sutherland. Costs out of estate. F. Aylesworth, for the executors. W. M. Douglas, K.C., for three adult daughters. E. C. Cattanach, for infant grandchildren.

LANGDON v. MOLSONS BANK—MIDDLETON, J., IN CHAMBERS—JUNE 21.

Security for Costs—Residence and Domicile—Animus Revertendi.]—Appeal by the defendants from an order of the Master in Chambers, refusing an order for security for costs. Judgment: When a plaintiff is not resident within the jurisdiction, the defendant is entitled, subject to certain exceptions, to have an order for security for costs: Crozat v. Brogden, [1894] 2 Q.B. 30 (C.A.)—as said by Buller, J., in Pray v. Edie, 1 T.R. 267, "for this reason, that if a verdict be given against the plaintiff he is not within the reach of our law to have process served upon him for the costs." And though this reason may not now apply, the rule requiring "residence" has never been changed—the residence must be real, and is quite a distinct thing from domicile. The question of what constitutes residence has been considered recently in connection with some municipal cases, and what is there said applies to cases of this kind. Mere temporary absence does not amount to an abandonment of residence so long as there is an *animus revertendi*. Here there is not on the plaintiff's own affidavit any intention of returning. He has not changed his domicile, it may be, but beyond peradventure he has changed his residence. He has not maintained any local abiding-place in Ontario. See cases collected in Re Sturmer and Beaverton, 2 O.W.N. 1116, 1227, and Re Fitzmartin and Newburg, 2 O.W.N. 1114, 1177. The appeal must be allowed with costs to the defendants in any event of the cause, and the order made for security. The costs below may be in the cause and the time for giving security may well be extended, so as to give the plaintiff ample opportunity, to the 18th September. The plaintiff may also have leave to move to vacate this order upon shewing an actual return to Ontario and a bona fide intention to reside here permanently. I. F. Hellmuth, K.C., for the defendants. W. R. P. Parker, for the plaintiff.

RE DONNELLY—MIDDLETON, J.—JUNE 23.

Administrator—Local Administrator—Principal Administrator—Respective Powers and Duties of. —Motion by the Canadian administrators under Con. Rule 938. MIDDLETON, J., said that as soon as the Ontario creditors are paid, the local administrator holds the property solely for the principal administrator, and the principal administrator making such sale of the property as it sees fit, can call upon the local administrator to convey to its nominee. The question of price is one entirely for the principal administrator and if the Pennsylvania law admits of payment in other land, this is no concern of this Court or of the local administrator so long as the local creditors are paid in full. We are not concerned here with the foreign creditors, they will look to the foreign administrator who will receive the assets (or their proceeds) so soon as the local creditors are satisfied. The commission of the local administrator and its advances and the costs of this motion, which may be paid out of the estate by it, must be repaid before it can be called upon to convey. The foreign infants must look to their guardian to protect their interests and the principal administrator will be answerable for any misconduct in the Courts of the domicile. The proposed arrangement is entirely a matter for the principal administrator which must assume the entire responsibility. The administration in Ontario is ancillary only, and as soon as the Ontario creditors are paid the principal administrator is supreme. Order accordingly. F. M. Field, K.C., and C. A. Moss, for the administrator. J. B. McColl, for the adult beneficiaries. F. W. Harcourt, K.C., for the infants. E. N. Armour, for the Commonwealth Trust Co., the American administrators.

GOODALL V. CLARKE—MIDDLETON, J., IN CHAMBERS—JUNE 23.

Further Directions—Appeal from Judgment on—Matter in Appeal Book.]—Motion by the defendant for an order settling the matter to go into the appeal book. Judgment: The action was tried and the question of liability determined and a reference ordered. The measure of damages was in no way determined. Upon the reference and appeals wide difference of opinion was found as to the true measure of damages, and the defendant desires to take the opinion of the Supreme Court. His appeal from the report has been quashed by the Supreme Court, and he now desires to appeal from the judgment upon

further directions and intends asking the Supreme Court upon this appeal to consider the questions dealt with upon the reference and the Judge, Divisional Court, and Court of Appeal upon appeal from the report. It is not for me to discuss what the Supreme Court may do upon the appeal coming before them. Desaulniers v. Payette, 35 S.C.R. 1, seems to indicate that upon an appeal the Court may be bound by an interlocutory judgment as to which there is no appeal, and that the only question open to review is the very question to be determined in the Court below upon the motion before it. Upon the motion upon further directions the only question before me was the proper judgment upon the report. The only material I could look at was the pleadings, the judgment of reference, the report, and the order varying that report. These were conclusive upon me and I could not, even had I so desired, go beyond them, and I so hold. This is in accordance with the practice as very well settled. See Downey v. Roaf, 6 P.R. 89. There has been some difference of opinion as to what may be looked at upon the question of costs. So far as I know there never has been any difference of opinion upon this question. I must settle this case in accordance with my ruling and exclude everything except the pleadings, judgment, report, and order on appeal therefrom. Costs in the appeal. R. S. Cassels, K.C., for the plaintiff. F. E. Hodgins, K.C., for the defendant.

FARMERS BANK v. TODD—MIDDLETON, J.—JUNE 23.

Banks and Banking—Bills of Exchange and Promissory Notes—Payment—Debtor and Creditor.]—Appeal by the liquidator of the Farmers' Bank from the award of an arbitrator. Judgment: The Farmers' Bank had authority to receive money and had no authority to substitute their own liability as debtors. What was done they had no right to do and Todd and Cook never paid the notes. They asked the Farmers' Bank to do so for them and the bank undertook to do so. Had it complied with its undertaking no dispute would have arisen. Donogh v. Gillespie, 21 A.R. 292, is precisely in point and binds me. The liquidator's appeal must be dismissed with costs, and the cross-appeals must be allowed. The arbitrator has no right to make the successful parties pay the costs as he has done by allowing them to be deducted from their fund. The award must be amended in this respect by directing the liquidator to pay the other claimants (Conger Co. and Steele Briggs Seed Co.) $100 for

costs of the arbitration, which their counsel said they would themselves apportion, and the costs of the cross-appeals. J. W. Bain, K.C., and M. L. Gordon, for the liquidator of the Farmers' Bank. W. G. Thurston, K.C., for the Conger Coal Co. A. C. McMaster, for the Steele Briggs Seed Co.

HARRIS MAXWELL CO. v. GOLDFIELDS, LIMITED—MIDDLETON, J., IN CHAMBERS—JUNE 23.

Pleading—Statement of Claim—Amendment—Embarrassing Issue.]—Motion by the defendants to strike out an amendment to the statement of claim as embarrassing. Judgment: After the judgment of the Honourable Mr. Justice RIDDELL, reported 2 O.W.N. 1087, the plaintiffs elected to amend by continuing the action of the company and an amendment having been made, a motion to strike out the amendment as not being in conformity with this order was made before the Master and enlarged before me. After some argument it was arranged that the plaintiffs further amend the statement of claim, which was done, and the motion was again argued, not only as a motion upon this ground, but also as a motion attacking the statement of claim as embarrassing. I do not think the statement of claim offends against the order in any way. I then consider the "proposed amendment" as though incorporated in the statement of claim. Only one question was argued upon this. It was said that the plaintiffs could not in any way rely upon fraud that had been practiced upon individual shareholders—that any individual shareholder defrauded would have the right to attack any document in respect of which he had been defrauded, or he might, if so advised, affirm the contract, or by his actions he may lose the right to repudiate, but his rights are a matter in which he alone is concerned, and the company cannot base any claim upon the shareholders' right to repudiate. I think this is so, and that any attempt on the part of the company to set up the right of the shareholder, based upon a fraud practiced upon him, is an attempt to raise an issue not open to the plaintiffs and is embarrassing. If the documents signed by the shareholders are not in themselves operative because they are not sufficient in form or void (as distinguished from voidable) for any reason, they do not operate to transfer the shares, and as against the transferees this invalidity can be set up. The pleading should be amended in accordance with the above. Costs to the defendants in the cause. G. H. Kilmer, K.C., for the defendants. F. E. Hodgins, K.C., for the plaintiffs.

GOLDFIELDS, LIMITED v. HARRIS MAXWELL CO.—MIDDLETON, J., IN CHAMBERS—JUNE 23.

Pleading—Counterclaim—Particulars.]—Appeal by the defendants from an order striking out paragraph nine of the counterclaim. The learned Judge said that for the same reason as stated in the previous case, the paragraph in question could not be supported. It was also objectionable for another reason. The notice of an alleged fraud upon the shareholders might be some foundation for asking for delay in the prosecution of the action, but where the shareholders are not shewn to have repudiated the transaction in question by reason of any fraud or deceit that there may have been, the plea falls short of what would have been necessary for a dilatory plea. The order for particulars is complained of, and as part of the pleading of which particulars has been ordered is now to be struck out, the order must be amended. Save as to this the order should stand. The defendants must amend the paragraphs in question in accordance with the above, and the order for particulars should be amended so as to confine it to the amended pleading. Costs to the plaintiffs in the cause in any event. F. E. Hodgins, K.C., for the defendants. G. H. Kilmer, K.C., for the plaintiffs.

COONS v. ELVIN—RIDDELL, J.—JUNE 24.

Conveyance of Timber—Sale or Mortgage—Evidence.]—Action for a declaration that a conveyance of timber was but a mortgage security to secure repayment of $2,500 and interest, and for damages for alleged wrongful sale of timber. The the learned Judge held, basing his findings upon the conduct and demeanour of the witnesses, that the bill of sale produced at the trial, correctly and accurately expressed the agreement between the parties, and that the transaction was one of sale out and out and not of mortgage. Action dismissed with costs. F. E. O'Flynn, for the plaintiff. E. G. Porter, K.C., and J. F. Keith, for the defendant.

HAWES GIBSON & CO. v. HAWES—MEREDITH, C.J., IN CHAMBERS—JUNE 27.

Examination for Discovery—"Party Adverse in Interest"—Con. Rule 439.]—Appeal by the receiver from the order of the

Master in Chambers of June 23rd, ante 1345, refusing to set aside appointment for examination for discovery of James Hawes. The appeal was dismissed, costs to the defendant in the cause. H. D. Gamble, K.C., for the receiver. F. R. Mackelcan, for the defendant.