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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

*BELLAMY v. WILLIAMS.

Promissory Notes—Printed Forms—Signature and Delivery to Payees without Filling up Blanks—Authority to Payees to Fill up Blanks but not to Alter Printed Words—Payees Changing Printed Statement of Place of Payment—Material Alteration—Endorsee for Value before Maturity not Holder in Due Course—Bills of Exchange Act, secs. 31, 145.

An appeal by the plaintiff from judgment of FALCONBRIDGE, C.J.K.B., 12 O.W.N. 232.

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

J. M. Pike, K.C., for the appellant.

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

MEREDITH, C.J.O., read a judgment in which he said that the appellant sued as holder in due course of a promissory note for $2,300, dated the 6th October, 1909, made by the respondent, payable to the order of Aitken & King, and by them endorsed to the appellant, and of another promissory note, dated the 8th April, 1910, for $650, made by the respondent, payable to the order of Aitken & King, and by them endorsed to the appellant. The notes were endorsed to the appellant before they became due, and for valuable consideration.

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

The notes were both on printed forms: in one the place of payment named in print was "The Canadian Bank of Commerce here," and in the other "The Dominion Bank here." When the notes were produced and put in evidence at the trial, the words "Canadian Bank of Commerce" in the one and "Dominion Bank" in the other were stricken out by lines drawn through them, and the words "office of Aitken & King" written over the words stricken out.

The result of the changes made was, that the appellant could not recover.

Section 145 of the Bills of Exchange Act, R.S.C. 1906 ch. 119, did not apply, because what were altered were not promissory notes, but blank forms intended to be filled up and used as promissory notes; and the appellant failed because the effect of handing to Aitken & King the signed blank forms was to authorise them to fill up the blanks, but not to make any change in anything material that was printed in the forms; and because, the changes that had been made being apparent, the appellant did not become holder in due course, but was put upon inquiry, and could stand in no better position than Aitken & King, who endorsed the promissory notes to him: Henman v. Dickinson (1828), 5 Bing. 183, 184.

Aitken & King had no authority to make the changes in the places of payment which they made.

Reference to Angle v. North Western Mutual Life Insurance Co. (1875), 92 U.S. 330, and cases cited; Daniel on Negotiable Instruments, 6th ed., para. 142; Corcoran v. Doll (1867), 32 Cal. 82.

Section 31 of the Bills of Exchange Act provides: "Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit."

It is the proper conclusion that the right to make changes in a blank form intended to be filled up and used as a promissory note, as to a material particular, such as the place of payment undoubtedly is, is excluded by the section, the right being limited to filling up blanks.

The appeal should be dismissed.

LENNOX, J., and FERGUSON, J.A., agreed with the Chief Justice.

MACLAREN, J.A., was also of opinion that the appeal should be dismissed. He read an elaborate judgment, with many references to authorities and to the provisions of the Bills of Exchange Act.

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

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

*RE OTTAWA SEPARATE SCHOOLS.

Constitutional Law—Act respecting the Appointment of a Commission for the Ottawa Separate Schools, 7 Geo. V. ch. 59—Intra Vires of Legislature of Ontario—Decision on Previous Act, 5 Geo. V. ch. 45—Suspension of Powers of School Board while Purpose to Disobey Law Exists.

Question referred by the Lieutenant-Governor in Council, under the authority of the Constitutional Questions Act, R.S.O. 1914 ch. 85, to the Appellate Division of the Supreme Court of Ontario for hearing and consideration.

Question: Are the provisions of the Act respecting the Appointment of a Commission for the Ottawa Separate Schools, 7 Geo. V. ch. 59, within the legislative authority of the Legislature of Ontario?

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

McGregor Young, K.C., and W. N. Tilley, K.C., for the Attorney-General for Ontario.

N. A. Belcourt, K.C., and J. H. Fraser, for the Ottawa Separate School Board.

MEREDITH, C.J.O., in a written judgment, said that it had been declared by the Judicial Committee of the Privy Council that a former Act for the appointment of a Commission for these schools, 5 Geo. V. ch. 45, as framed, was ultra vires: Ottawa Separate School Trustees v. Ottawa Corporation, [1917] A.C. 76, 33 Times L.R. 41, 32 D.L.R. 10.

All that had been decided was, that the Act 5 Geo. V. ch. 45, as framed, was ultra vires: there was nothing to indicate or to

require this Court to hold that, in the circumstances which existed as to these schools, it was not competent for the Legislature to make provision for meeting the conditions which these circumstances had created, and by a properly framed enactment to suspend the powers of the Separate School Board if and so long as it refused to conduct the schools under its management, in accordance with the law. Indeed, the careful wording of the declaration of the Judicial Committee, and the fact that it was limited to the Act *as framed*, appeared to indicate the contrary and to warrant the inference that, in the view of the Judicial Committee, it would be competent for the Legislature to pass such an Act as that now in question, or at all events to indicate that the right to do so was left open.

The learned Chief Justice then pointed out differences in the two Acts, and said that the provisions of the Act now in question were not, in his opinion, open to the objection held to be fatal to the validity of the earlier Act, but were intra vires the Legislature by which they were enacted.

The Chief Justice added that, even if it were not as clear as he thought it was that the effect of the decision of the Judicial Committee was not to declare that it was not competent for the Legislature to meet such conditions as existed in the case of these Ottawa schools, by providing for the suspension of the powers of the Board if and while it refused to obey the law and insisted upon conducting the schools under its charge in defiance of the law, he would decline to take the responsibility of holding that where such conditions existed the Legislature was powerless to provide an effective remedy for ensuring that the schools should be conducted according to law, and for securing to those separate school supporters who were desirous that the law should be obeyed the privileges which they were entitled to enjoy under the provisions of the British North America Act—always provided that, where the remedy is the suspension of the powers of the Board, that suspension is to continue only so long as the purpose and intention to disobey the law exists.

The question referred should be answered in the affirmative.

MACLAREN and MAGEE, JJ.A., agreed with the Chief Justice.

HODGINS and FERGUSON, JJ.A., also agreed that the question should be answered in the affirmative, for reasons stated by each in writing.

Question answered in the affirmative.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

REX v. BUTTERWORTH.

Municipal Corporations—By-law Requiring Coal Sold to be Weighed upon Municipal Scales—Necessity for Request from Buyer or Seller—Construction of By-law—Prosecution for Infraction of By-law—Failure to Prove Request—Magistrate's Conviction Quashed.

Appeal by the defendant (by leave of MIDDLETON, J.) from an order of ROSE, J., in Chambers, 30th August, 1917, dismissing a motion by the defendant to quash a conviction made by the Deputy Police Magistrate for the City of Ottawa on the 15th August, 1917, for an infraction by the defendant of a by-law of the Municipal Council of the Corporation of the City of Ottawa.

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

Taylor McVeity, for the appellant.

F. B. Proctor, for the complainant, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said the defendant was a coal-dealer, carrying on business in Ottawa, and the conviction was for his having, on the 9th and 10th days of August, 1917, at Ottawa, unlawfully caused five loads of coal sold by him to be delivered in Ottawa "without first having the same weighed upon one of the city weigh-scales, contrary to the by-law of the Corporation of the said City of Ottawa in such case made and provided."

The by-law was passed on the 6th May, 1912. By sec. 48 it was provided that "no person shall, upon or after the sale thereof, deliver any coal from a waggon or other vehicle or cause the same to be delivered without having the same weighed upon one of the city weigh-scales in accordance with the provisions of this by-law." Sec. 46: "Every buyer and seller of . . . coal . . . and all other articles exposed for sale may require the same to be weighed at one of the public weigh-scales or machines of the corporation."

The concluding words of sec. 48—"in accordance with the provisions of this by-law"—must refer to the provisions of sec. 46. The effect of sec. 48 is, therefore, not to make it compulsory on persons delivering coal from a waggon or other vehicle to have the coal weighed upon the city weigh-scales in all cases, but only

in cases where the buyer or seller requires that it should be weighed there.

The conviction must be quashed, because it was neither alleged nor proved that the buyer of the coal had required that it should be weighed at one of the public weigh-scales or machines of the corporation.

It was unnecessary to consider the question whether, if the by-law had provided that, in all cases and regardless of any request by buyer or seller, the coal should be weighed upon one of the city weigh-scales, such a provision would be ultra vires.

The appeal should be allowed with costs and the conviction quashed with costs.

Order accordingly.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

AULT v. GREEN.

Deed—Conveyance of Land—Action by Execution Creditor of Grantor to Set aside as Fraudulent—Amendment at Trial—Substitution of Claim for Declaration that Conveyance Security to Grantee for Endorsements of Notes—Discretion of Trial Judge—Appeal—Declaratory Judgment—Appeal "as to Costs only"—Unsuccessful Appeal as to other Matters—Judicature Act, sec. 24.

Appeal by the defendant Green from the judgment of SUTHERLAND, J., 12 O.W.N. 381.

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

Taylor McVeity, for the appellant.

C. J. Holman, K.C., for the plaintiff, respondent.

H. Fisher, for the defendant McCormick.

MEREDITH, C.J.O., reading the judgment of the Court, said that the respondent sued as assignee of a judgment creditor of the appellant, having an execution in the hands of the Sheriff of the County of Carleton; and, in the action as originally framed, the plaintiff alleged that a conveyance dated the 1st March, 1913, from the appellant to the defendant McCormick, of certain lands in Ottawa, was fraudulent and void as against the creditors of

the appellant; and the relief sought was to set aside the deed in order that the lands conveyed might be sold to satisfy the respondent's execution.

At the trial, the respondent was allowed to amend his statement of claim by substituting the allegation that the conveyance to the defendant McCormick, though absolute in form, was in fact a mortgage to secure McCormick against his liability as endorser of promissory notes of the appellant for his accommodation. At the trial, counsel for the appellant objected to the allowance of the amendment, and contended that, as the allegation of fraud was abandoned, the action should be dismissed.

The trial Judge refused to give effect to that contention, and proceeded with the trial. The result was a judgment for the respondent declaring that the deed was held by McCormick as security for his endorsement of certain promissory notes; respondent was ordered to pay the costs of McCormick, and the appellant was ordered to pay the respondent his costs of the action, including the costs which he was ordered to pay to McCormick.

The question whether the amendment should be allowed was one resting in the discretion of the trial Judge; and the Court could not say that in allowing the amendment he wrongly exercised that discretion.

The appellant's objection to the pronouncing of a declaratory judgment could not prevail. By the act of the defendants, a conveyance which, upon its face, shewed that the appellant had parted absolutely with the property described in it, had been registered; and the respondent, as an execution creditor having an execution in the sheriff's hands, was entitled to have the obstacle which the conveyance, owing to its absolute form, presented to his realising his debt out of the appellant's interest in the land, removed.

The appellant's attack upon the judgment, as to the relief granted, having failed, he could obtain no relief as to the costs, for his appeal then resolved itself into an appeal as to costs only, within the meaning of sec. 24 of the Judicature Act, and the Court had no jurisdiction to entertain it, as no leave to appeal had been obtained from the trial Judge: Buckley v. Vair (1917), ante 87.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

*Re ELLIOT.

Executors—Borrowing Money for Necessary Expenditures—Mortgage of Part of Estate—Order Authorising—Payment of Succession Duties—Expenditures for Repairs and Permanent Improvements and Purchase of Trade-fixtures—Whether Chargeable against Capital or Income—Dilapidations Existing at Death of Testator — Tenant for Life and Remaindermen—Apportionment—Costs.

Appeal by Edward John Elliott from an order of the Judge of the Surrogate Court of the County of York on passing the accounts of the executors of the will of John S. Elliot, deceased; and from an order of BRITTON, J., of the 18th June, 1917, allowing the executors to mortgage for $21,000 land forming part of the estate of the deceased.

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

Grayson Smith, for the appellant.

C. J. Holman, K.C., for the executors and widow, respondents.

W. H. Wallbridge, for the other beneficiaries, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that by the testator's will and a codicil to it he appointed his wife and the Toronto General Trusts Corporation his executors, and directed that the income of his estate until the period of distribution, which was not to be later than 10 years from the date of his decease, after paying all expenses for upkeep, taxes, repairs, and other necessary expenses, be used and expended by his wife in maintaining a home for herself and their children and in the support, maintenance, and education of the children, and that, when the period of distribution arrived, the corpus of the estate should be divided between his wife and his three children—two-thirds in equal proportions between the children and one-third to his wife absolutely.

The order of Britton, J., was made on the application of the executors; it authorised them to borrow, on a mortgage of the testator's hotel property, $21,000, which was required to pay: (1) succession duties; (2) some small advances made by the corporation, amounting to about $300; (3) an existing mortgage on the property; and (4) the executors' commission up to the

time of the application. The order provided for the application of the money borrowed for those purposes.

The Chief Justice said that the order was properly made. Any question as to the application of the payment for succession duties would be dealt with on the passing of the accounts of the executors; but it was proper that those duties should be paid in the first instance by them.

The appeal from the order of the Judge of the Surrogate Court related to expenditures made by the executors for repairs and permanent improvements and in the purchase of trade-fixtures from an outgoing tenant of the hotel property owned by the testator at the time of his decease.

No question was raised as to the propriety of making these expenditures, but the appellant contended that they should be charged against income, and not, as the Judge decided, against capital.

The executors were not justified in purchasing the trade-fixtures or making the permanent improvements without obtaining the sanction of the Court; but, if they had applied under the Settled Estates Act for authority, it would no doubt have been given on proper terms, as was done in In re Freman, [1898] 1 Ch. 28, 33, and In re Hotchkys (1886), 32 Ch. D. 408.

Part of the repairs were rendered necessary by dilapidations existing at the time of the death of the testator.

Inasmuch as, by the will of the testator in the case at bar, repairs were to be paid for out of income, any want of repair arising after the death of the testator must be made good out of income; but this obligation does not extend to dilapidations existing at the time of his death: Brereton v. Day, [1895] 1 I.R. 518; In re Smith (1901), 17 Times L. R. 588, 84 L.T.R. 835.

There was not before the Surrogate Court Judge nor this Court the material necessary for apportioning the burden of the expenditures in question in accordance with the rule laid down in In re Freman; and, unless the parties could agree as to this, the case must to back to the Surrogate Court to be dealt with in accordance with that rule—that the expense of the repairs should be borne by the capital, but the tenant for life should keep down the interest on that capital.

It did not appear how the monthly deductions to which the tenant was entitled under the terms of his lease had been dealt with. If the executors deducted them from the income, it was possible that the widow would pay out of her income more than she would be called upon to pay according to the rule for apportioning the burden of the expenditures which should be applied.

If the parties desired it, the case might be spoken to on the question of the reference back.

If the case goes back to the Surrogate Court, the appellant should pay the costs of the appeal as to these expenditures if it be determined that less than has been charged to capital should have been charged to it; but, if the opposite conclusion is reached, there should be no costs of the appeal to either party, as each party has failed in maintaining the proposition for which he contended.

The appeal from the order of Britton, J., should be dismissed with costs.

Order accordingly.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

*RE SPINK.

Will—Construction of Codicil—Residuary Bequest in Will not Revoked by Codicil except as to Insurance Moneys—Uncertain Language of Codicil.

An appeal by Ruby Irene Middleton and by the representatives of the estate of Eliza Fuller Spink, deceased, and the executors of John Lawrence Spink, whose will was in question, except John K. Brodie, from the order of MASTEN, J., 12 O.W.N. 308, upon an originating motion for the construction of the will and a codicil.

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

I. F. Hellmuth, K.C., and N. Sinclair, for the appellants.

R. J. McLaughlin, K.C., and L. Macaulay, for Blanche Gertrude Brodie and John K. Brodie, respondents.

The judgment of the Court was read by MEREDITH, C.J.O., who said that by the testator's will, dated the 23rd December, 1913, he (1) directed that his debts and funeral expenses should be paid; (2) directed that his burial-plot should be for the use of his wife and children and their families; (3) bequeathed his household goods and effects etc., to his wife, Eliza Fuller Spink, absolutely; (4) directed that the policies of insurance on his life should be payable for the benefit of his wife or wife and children

in accordance with the policies; (5) directed that the residue of his estate should be divided into two equal shares, one of which he gave to his wife absolutely, and the other share he gave to his executors and trustees upon trust to convert it into money and invest it and to pay the income arising therefrom to his wife during her life, and upon her death to divide the corpus among his four children, Debir Major Spink, Blanche Gertrude Brodie, Pearl May Watson, and Ruby Irene Middleton, in equal shares, with a provision that if any of his children should die before receiving his or her share leaving no child or children him or her surviving such share should become the property of his "living children or their issue, the child or children of a parent so dying to inherit their deceased parent's share or portion."

The wife, one Chipman, the daughter Ruby, and the son Debir were appointed executors and trustees.

The codicil was executed on the 3rd February, 1914. It recited that the testator's son Debir had died on the 29th December, 1913, and named new executors, three being the same as in the will, and the fourth being the testator's son-in-law, John K. Brodie. It continued: "My wife shall have all and everything that might have come to her or me under the will . . . of her son Debir . . . and . . . my wife . . . shall have . . . one fourth of my life insurance . . . one quarter of these policies go direct to my wife but all my other property now goes with my last son dead to my three daughters under the terms of my said last will. In all other respects I confirm my said will."

The question for decision was, whether or not the effect of the codicil was to revoke the provisions of the will and to substitute for them the provisions of the codicil, and that question had been answered in the affirmative by Masten J. The respondents contended that the bequest to the wife of one half of the residue was revoked by the codicil.

The son Debir died without issue and unmarried; his estate amounted to about $11,000; by his will it was given in equal shares to his father and mother; the insurance-money arising from policies on the testator's life amounted to about $20,000; the share of it which the wife would have taken under the will amounted to $9,000—under the codicil it was only $4,000; and the residuary estate amounted to about $30,000, including the testator's share of Debir's estate.

The learned Chief Justice, after a full discussion of all the circumstances and reference to numerous authorities, said that the order of Masten, J., should be reversed, and that there should be substituted for the declaration made by him a declaration that,

upon the true construction of the codicil, the provisions made by the will for the wife of the testator, other than that as to the insurance-money, were not revoked, and that under the codicil the three daughters took only one half of the residue, subject to the provisions of the will, including the bequest of the life interest to the wife.

The Chief Justice based his conclusion upon two grounds: (1) that the provision of the codicil relied on as a revocation was not a statement or declaration by the testator intended to operate as a devise or bequest of the property to his three daughters, but an erroneous statement as to what the effect was of the changes he had made by the earlier provisions of the codicil or as to the effect of his son's death upon the dispositions he had made by the will; (2) that gifts contained in a will, made in plain and explicit language, are not to be revoked by the uncertain language of a codicil, and the less so where the testator uses in the same testamentary writings plain and appropriate words of revocation in other respects.

The costs throughout are to be paid out of the residuary estate.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

PAGET GRAIN DOOR CO. v. NORTH AMERICAN CHEMICAL CO.

Estoppel—Claim of Creditor against Company—Meeting of Creditors of Company—Statement of Representative of Creditor that his Claim was against Third Person—Change of Position of Company and Creditors on Faith of Statement—Adoption of Statement by Creditor—Bill of Exchange Drawn on Third Person—Letter of Creditor Demanding Payment.

An appeal by the defendant company from the judgment of the Senior Judge of the County Court of the County of Huron, after trial of the action without a jury, in favour of the plaintiff company.

The action was brought to recover the amount of an account for work done and materials supplied to the defendant company by the plaintiff company; and the substantial defence was, that the plaintiff company was estopped by what took place at a meeting of the creditors of the defendant company from claiming

to recover from it, or that the result of it was a novation by which the plaintiff company released the defendant company from its indebtedness and accepted one Ransford as its debtor.

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

J. J. Maclennan, for the appellant company.

William Proudfoot, K.C., for the plaintiff company, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that there was no doubt that the appellant company owed the debt sued for. The appellant company, being in financial difficulties and desirous of effecting a reorganisation, called a meeting of its creditors for the 3rd May, 1916; and a meeting of the creditors of Ransford was also called for the same time and place. Arthur Paget, the secretary of the respondent company, attended the meeting on its behalf. At this meeting it was proposed by the appellant company that its creditors should accept, for the larger part of their claims, shares in that company. Paget declined to accept the compromise, saying that his company's claim was not against the appellant company, but against Ransford. Ransford appeared to acquiesce in this, and thereafter was treated by the appellant company as its creditor, and was settled with in accordance with the terms of the compromise offered, which he and the other creditors accepted.

After the meeting, the respondent company drew upon Ransford for the amount of the account; the bill was dishonoured. After this, on the 10th May, 1916, the respondent company wrote to Ransford from its Goderich office that instructions had been received from the head office to place his unpaid draft for collection at once, and asking him, "before doing so," "to pay part at least and give security for the balance or some other satisfactory arrangement that it will be paid in the near future."

The draft was not put in evidence; but, in the absence of evidence to the contrary, of which there was none, it must be taken that it was drawn on Ransford personally.

It was a fair inference, having regard to what was said at the meeting by Paget, that he had been sent by the respondent company to represent it as a creditor, not of the appellant company, but of Ransford, especially as there was no denial by Paget that he attended the meeting in that capacity.

The proper inference from the drawing of the bill on Ransford was, that Paget must have reported to his company what had

taken place at the meeting of creditors, and that in drawing upon Ransford the respondent company was acting in accordance with the position Paget had taken at the meeting, that the respondent company was not a creditor of the appellant company, but of Ransford, in respect of the claim in this action.

If Paget was acting within the scope of his authority in what he did and said at the meeting, the respondent company was estopped from now claiming against the appellant company; for that company and the other creditors, relying upon the position Paget had taken, materially changed their positions to their prejudice if the respondent company succeeded in maintaining its claim against the appellant company.

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

Judgment accordingly.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

RE COLEMAN AND TORONTO AND NIAGARA POWER CO.

Costs — Arbitration — Award — References back — Railway Act, R.S.C. 1906 ch. 37, sec. 199.

Motion by A. B. Coleman, the land-owner, to vary as to costs the minutes of the order of this Court made on the 12th June, 1917: see 12 O.W.N. 282.

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

I. F. Hellmuth, K.C., for the applicant.

D. L. McCarthy, K.C., for the respondent company.

HODGINS, J.A., reading the judgment of the Court, said that the original reference and the one directed on the 9th November, 1915, were part of the same reference, and so would be that ordered by this Court on the 12th June.

When the result is finally put in the form of the award which the arbitrators have now to make, all three references must be taken to be part of the same arbitration, the costs of which will be governed by the Railway Act, R.S.C. 1906 ch. 37, sec. 199, i.e., determined by the amount awarded.

The statute leaves no real discretion to the arbitrators, and consequently they were wrong in dividing the costs as they did.

The order pronounced on the 12th June should be read as providing, as it was intended it should, that the statute was to govern the costs, if, in the final result, the amount awarded exceeded the amount originally offered.

No costs of this application.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1917.

UPPER CANADA COLLEGE v. CITY OF TORONTO.

Appeal—Motion to Extend Time for Appealing—Dismissal without Costs.

Motion by the defendants to extend the time for appealing from the order of LATCHFORD, J., ante 119, dismissing a motion by the defendants for an order directing a reference to ascertain what damages, if any, the defendants had sustained by reason of an interim injunction, and directing that the plaintiffs should pay such damages as might be found.

The motion was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Irving S. Fairty, for the defendants.

Frank Arnoldi, K.C., for the plaintiffs.

THE COURT refused the application without costs.

HIGH COURT DIVISION.

CLUTE, J. DECEMBER 10TH, 1917.

*NOECKER v. NOECKER.

Contract—Oral Promise of Mother to Bequeath Personal Property to Son—Consideration—Support of Mother by Son—Fulfilment of Obligation by Son—Evidence—Statute of Frauds—Part Performance Referable to Relationship—Allowance for Board and Lodging of Mother—Claim against Administrator—Set-off of Amount Due on Mortgage of Land Made by Son to Mother although Remedy Barred by Limitations Act—Costs.

Action for specific performance of an alleged agreement made between the plaintiff and the late Emma Noecker, his mother, to

give him or leave him by will her whole estate; or, in the alternative, to recover $4,395 for his mother's support and the occupation by her of a portion of his house. The action was brought against Charles W. Noecker, administrator of the estate of Emma Noecker, and Charles T. Noecker was added as a defendant in his own right and as representing the other next of kin of the deceased.

The action was tried without a jury at Guelph.

C. R. McKeown, K.C., for the plaintiff.

J. M. Kearns, for the defendant Charles W. Noecker.

J. A. Scellen, for the other defendant.

CLUTE, J., in a written judgment, said that the plaintiff was the illegitimate son of the late Emma Noecker, and was born and had always lived upon the farm he now occupied. The farm was owned by his mother's brother, Ferdinand Noecker. When the plaintiff married in 1896, the farm was conveyed to him, and he made a mortgage upon it to his mother and Ferdinand for $4,000, which was cancelled by the will of Ferdinand Noecker. In 1904, a new mortgage was made by the plaintiff to his mother, but nothing had been paid upon it, and it was barred by the Limitations Act.

After Ferdinand's death, Emma Noecker came to live upon the farm with her son; and the learned Judge finds that an oral agreement was then made between mother and son that, if she was permitted to live upon the farm, at her death she would leave her estate to him. She had never been married, and had no other child.

The learned Judge finds that the plaintiff fulfilled the agreement by allowing his mother to remain upon the place until her death and by supplying her with wood, clothing, and general support, she using as she pleased her income from an estate (exclusive of the mortgage on farm) of between $5,000 and $6,000.

Emma Noecker made a will, but after her death it could not be found, and its contents were not proven.

The evidence of many witnesses, in addition to the plaintiff's own, which the learned Judge credited, shewed satisfactorily that Emma Noecker intended her property, which consisted mainly of bank shares, to go to the plaintiff upon her death.

The fact of the mother going to live with her son might be referable to their relationship; so that the mere fact of her leaving her own place of abode and going to live with her son was not, in the circumstances, such an act of part performance as to take the case out of the Statute of Frauds, which was pleaded. Reference

to Fry on Specific Performance, 4th ed., paras. 578-582; Cross v. Cleary (1898), 29 O.R. 542.

But, in the circumstances, the plaintiff was entitled to remuneration as upon a quantum meruit for the board, lodging, and care of the deceased for six years before action, and $8 a week should be allowed therefor, which would amount to $2,496: Douglas v. Douglas (1914), 15 D.L.R. 596; Rycroft v. Trusts and Guarantee Co. (1917), 12 O.W.N. 240.

Counsel for the defendants admitted that the plaintiff was entitled to an allowance, but insisted that, although the right to recover upon the mortgage was barred, by reason of nothing having been paid on account of either principal or interest for more than 10 years (McFadden v. Brandon (1904), 8 O.L.R. 610), yet, when the plaintiff sought to recover for board and lodging etc., the defendants were entitled to have the amount which, but for the Limitations Act, would be due upon the mortgage, deducted from the amount allowed for board and lodging etc.; and referred to Courtenay v. Williams (1844-6), 3 Hare 539, 552, 15 L.J. Ch. 204, and other cases.

[The learned Judge examined and quoted from the judgments in the case cited and several others.]

The only case directly in point was an unreported one cited by the Lord Chancellor in the appeal in the Courtenay case; but the general principle applied to this case.

The $4,000 mortgage was discharged, and a new mortgage, dated the 30th April, 1904, was made by the plaintiff to his mother; and in that mortgage the interest was payable yearly at 5 per cent. and the principal at the end of 10 years; the mortgagor covenanted with the mortgagee to pay the mortgage-money and interest.

There was therefore a debt consisting of the principal and interest due upon the mortgage; and, although the remedy was barred, the debt remained and formed part of the estate of the intestate, and could be retained by the administrator as against any claim made by the plaintiff against the estate.

In order to clear the plaintiff's title from any cloud, it should be declared that the mortgage was barred by the Limitations Act, and a discharge should be executed by the administrator.

The rights of the parties could not have been adjusted without coming to the Court; and the costs of all parties should be paid out of the estate, the costs of the administrator-defendant as between solicitor and client.

There being no sum due to the plaintiff greater than the amount of the mortgage and interest, the plaintiff was not entitled to recover the $2,496.

MIDDLETON, J. DECEMBER 10TH, 1917.

*DUNLOP v. ELLIS.

Will—Construction—Gift to Son—Gift over to Daughter in Event of Death of Son—Validity—Gift of Corpus to Daughter upon Attaining Certain Age—No Gift over—Invalidity of Gift—Trust — Conditions — Power and Discretion of Trustee — Control by Court—Benefit of Lunatic—Right of Inspector of Prisons and Public Charities to Payment of Fund—Maintenance of Lunatic in Hospital for Insane—Possible Right of "Issue" of Lunatic.

Action by the Inspector of Prisons and Public Charities, administrator of the estate of Ernest Bailey, deceased, and committee of the estate of Henrietta Toomey, an insane patient in the Hospital for the Insane at London, for a declaration of the plaintiff's rights in respect of shares of the estate of the mother of Ernest and Henrietta under the mother's will.

The action was tried without a jury at Toronto.

D. C. Ross and K. J. Wright, for the plaintiff.

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

MIDDLETON, J., in a written judgment, said that Jeanette Bailey, the mother, died, a widow, in 1903. Ernest was insane and was admitted to the asylum in London in June, 1905; he died there in January, 1915, unmarried, being then about 35 years old. Henrietta was admitted to the same asylum in 1909, and was, at the time the action was begun, 34 years old. The defendant was the executor of and trustee under the will of the mother. The will and a codicil were proved in October, 1903.

On the 12th February, 1915, the estate of the mother, in the hands of the executor-defendant, consisted of $817.01 cash and $5,257.28 in securities.

Nothing had been paid for the maintenance of these patients in the asylum, and there was due the Government for Ernest $1,537.78, and for Henrietta $1,774.28, up to the end of 1917.

By the will and codicil, the estate of the mother was divided equally between the son and daughter. One share was to be held by the defendant as trustee, and the income was to be paid to the son until he should reach the age of 34, and he was then to receive the corpus. The other share was to be held by the trustee, and the daughter was to receive the income until she should reach

the age of 40, when she was to receive the corpus. If either died before "the date of payment" of the corpus, leaving issue, the issue was to take; and, if either died without issue "before the period for payment" of his or her share, the share of the one so dying was to form part of the share of the survivor and to be dealt with in the same way.

All this was by the will declared to be subject to certain trusts and conditions, under which the trustee had power, upon certain things happening, to withhold payment or apply the funds as he might in his discretion deem best. The learned Judge construed the will as meaning that if the child has issue the issue takes—if it has no issue the survivor takes. The earlier provisions relate to death before the period of payment. The trusts and conditions were intended to make the same provision as to death after the period for payment when payment is withheld by reason of any of the matters mentioned.

The same result would follow if the conditions operated to postpone the "date of payment" or "period of payment" until the inhibitory circumstance had been removed.

There being, in the case of the child who might die first, a gift over, the clause in question is valid; but, in the case of the surviving child, no gift over, the clause was invalid. There was, in the earlier part of the will, a gift to the daughter, and this could not be cut down by any provision which did not divest the property given her.

If the gift to the daughter were rendered inoperative, there would be an intestacy, and the son and daughter would, on the testatrix's death, have taken vested interests, and the daughter as next of kin of the son would have the whole. In this view, the daughter's interest would pass under the control of the plaintiff as her statutory committee, and the defendant had no right to retain it against him.

If the clause was valid, the events which had happened brought it into operation, and the income of the estate might, in the absolute and uncontrolled discretion of the defendant, be paid to or expended for the benefit of the daughter as he saw fit. But in no case was this discretion quite beyond all power of review by the Court.

Where there is a trust coupled with a discretionary power, the Court is entitled and bound to interfere when there is an intent to accomplish a purpose alien to the intention of the author of the power—here the testatrix. She intended the income of this fund to be used for the benefit of her daughter. The defendant had not paid anything for the maintenance of the daughter

during the many years of her insanity, nor did he pay anything for the son during his insanity. The defendant justified this course by stating that under the humane laws of this Province these unfortunates will be cared for at the public expense; and he desires to keep this fund intact and to allow it to accumulate so that the heirs of the daughter may receive a larger sum. The lunatic has one child—a little girl. She may benefit by this course if she survives her mother—if she should predecease her mother, only remote relatives will gain. In the meantime the maintenance of the mother is cast upon the public. The defendant is endeavouring to advance the interest of one not within the scope of the trust, and so failing to exercise the discretion and power entrusted to him by the will.

In the view taken the funds must be handed over to the plaintiff, and with the wide power he has as Inspector under the statute, he will, no doubt, use what is necessary for the advancement of the child.

Costs of the defendant to be paid out of the funds.

The style of cause may be amended by adding the official title of the plaintiff and by shewing that he sues as next friend as well as committee of Henrietta Toomey.

SUTHERLAND, J. DECEMBER 11TH, 1917.

RE SOPER AND ACKERMAN.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Power of Liquidator of Incorporated Company to Convey—Proofs of Authority—Sufficiency—Declaration under Vendors and Purchasers Act.

Motion by Augustus Soper, the vendor, for an order, under the Vendors and Purchasers Act, declaring that an objection made by Jerome Ackerman, the purchaser, to the title to certain land, the subject of an agreement for sale and purchase, was invalid.

The motion was heard, as in Weekly Court, at the sittings at Sandwich.

J. H. Rodd, for the vendor.

M. Sheppard, for the purchaser.

SUTHERLAND, J., in a written judgment, said that on and prior to the 30th April, 1898, the title to the land in question

stood in the name of the Mecca Sanitarium of Sandwich Limited, an incorporated company.

By deed dated the 27th June, 1899, and registered on the same day, one Macpherson, as liquidator of that company, purported to convey the land to one Cleary.

By deed dated the 15th October, 1900, and registered on the next day, Francis Cleary (his wife joining to bar dower) conveyed the land to Soper.

By a written agreement dated the 30th May, 1916, Soper sold the land to Ackerman.

The deed to Cleary contained no recitals, and concluded as follows: "In witness whereof the said corporation has hereunto affixed its seal attested by the hand of the liquidator thereof," and purported to be executed by Macpherson as liquidator of the company.

Proof of the authority of Macpherson to execute the conveyance to Cleary was required by Ackerman; and Soper submitted certain proofs deemed by him to be adequate.

After setting out these proofs, the learned Judge said that, having regard to the material and to the lapse of time since the conveyance made by the liquidator to Cleary and the conveyance by Cleary to Soper, and the acts of ownership of Soper since the conveyance to him, it was conclusively established that F. H. Macpherson was legally appointed liquidator of the company and legally entitled to make the conveyance to Cleary of all the interest of the company in the land.

Order declaring accordingly; no order as to costs.

CLUTE, J. DECEMBER 11TH, 1917.

*MAHONEY v. CITY OF GUELPH.

Municipal Corporations—Work Directed to be Done by Board of Commissioners Appointed Pursuant to Statute—Use of Explosive—Negligence of Engineer—Injury to Member of Board Present when Work Being Done—Non-liability of Corporation.

Action for damages for personal injuries sustained by the plaintiff on the 31st March, 1916, the plaintiff then being Mayor of Guelph, caused by the explosion by the defendants of dynamite in a cement-dam on the river Speed, with the object of blowing

out a portion of the dam to save the bridge over the river from danger by flooding. The plaintiff alleged negligence on the part of the defendants, the Corporation of the City of Guelph, or their servants or officers, which negligence was the cause of his injuries.

The action was tried without a jury at Guelph.

Sir George Gibbons, K.C., W. E. Buckingham, and V. H. Hattin, for the plaintiff.

I. F. Hellmuth, K.C., and P. Kerwin, for the defendants.

CLUTE, J., in a written judgment, said that the defence, in substance, was, that the plaintiff, at the time of his injury, was ex officio a member of a Board of Commissioners duly elected under a by-law of the city passed pursuant to an Act respecting the city of Guelph, 1 Geo. V. ch. 90. This Board, among other things, had charge of the execution and carrying out of all works in connection with highways and bridges, authorised by the city council.

On the day of the injury, the City Engineer recommended to the Board that part of the dam should be blown out by dynamite in order to save the bridge, and the Board instructed him to do as he had recommended. The occasion was urgent, there being imminent danger of the bridge being carried away.

When the dynamite was exploded, a crowd of people had gathered near, and the plaintiff and the other two members of the Board were present. The plaintiff said that he was there merely from curiosity, and took no part in the work. He, however, was active in keeping the crowd back, on one side of the river, at a point about 175 feet distant from the point of explosion, and he and the crowd on that side were standing at that distance when the explosion took place. A piece of cement from the dam, a piece about 4 or 5 inches in diameter, struck the ground near where the plaintiff was standing and hit him on the leg below the knee, breaking both bones and seriously injuring him. He was the only one hurt.

The learned Judge, after reviewing the evidence, stated his opinion to be that, having regard to the fact that the place where the dynamite was being used was near the highway, and having regard to the nature of the explosive used—called "Racka-rock"—extra precaution and care should have been taken to protect any person passing on the highway from injury. This should have been done either by seeing that the crowd was removed to a proper distance or that the place was properly covered and protected: Citizens' Light and Power Co. v. Lepitre (1898), 29 S.C.R. 1.

Had a stranger been passing along the highway and been injured by reason of the explosion, the defendants would have been liable for negligence. But the plaintiff was not in the same position as a stranger. He was a member of the Board, and was present as a member of the Board, as well as from curiosity. At the instance of the engineer, he requested the people to move back from the danger area. He knew there was danger, and exercised his own judgment as to where he should go to be free from that danger—he took the risk, believing that he was safe where he was at the time of the injury. As a member of the Board, he authorised the doing of the work, and was present when it was done. Whether the Board had authority, without the mandate of the council, to order the work to be done, the Board assumed the responsibility. As a member of the Board, he was in charge of the execution of this very work, and was present. The defendants—the city corporation—were bound to take all necessary care; but he, having the matter immediately in hand as a member of the Board, was bound to see that that care was taken. He became the victim of his own negligence. He could not take advantage of the oversight or negligence of a person who was subject to his authority and thereby make the defendants liable.

Damages assessed at $1,100 to save another trial in the event of an appellate Court holding the defendants liable.

Action dismissed without costs.

MIDDLETON, J. DECEMBER 12TH, 1917.

*RE TORONTO GENERAL TRUSTS CORPORATION AND McCONKEY.

Arbitration and Award—Submission in Lease—Valuation of Buildings—Application under Rule 604 for Determination of Questions as to Construction of Submission—Remedy by Stated Case under Arbitration Act, R.S.O. 1914 ch. 65, sec. 29—Refusal of Application—Judicature Act, R.S.O. 1914 ch. 56, sec. 16 (b).

Motion by McConkey, the tenant, under Rule 604, for an order determining certain important and difficult questions, arising upon the arbitration clauses of a lease made in 1896, relating to the valuation of the buildings upon the demised premises.

The motion came on for hearing in the Weekly Court at Toronto.

E. T. Malone, K.C., for the landlord, took the preliminary objection that the Court ought not to undertake to interpret the lease, which contained the submission under which arbitrators had been appointed, but should leave the parties to work out their remedies under the Arbitration Act, R.S.O. 1914 ch. 65.

A. W. Ballantyne, for the applicant.

MIDDLETON, J., in a written judgment, said that the objection must prevail. Since the power to pronounce merely declaratory judgments was given, there was no instance of a Court interpreting a submission so that arbitrators might know exactly what their duty was. Rule 604 did not create any new jurisdiction—it merely provided a mode by which the jurisdiction conferred by sec. 16 (*b*) of the Judicature Act, R.S.O. 1914 ch. 56, could be exercised.

If the arbitrators think that the lease or submission should be interpreted by the Court before they proceed with the arbitration, they can state a case: sec. 29 of the Arbitration Act.

Ottawa Young Men's Christian Association v. City of Ottawa (1913), 29 O.L.R. 574, affords an illustration of the principle applied.

No order save that the costs of this motion be dealt with as part of the costs of the arbitration.

CLUTE, J., IN CHAMBERS. DECEMBER 13TH, 1917.

*REX v. LYNCH-STAUNTON.

Ontario Temperance Act—Magistrate's Conviction for Offence against 6 Geo. V. ch. 50, sec. 42—Canvassing for or Soliciting Orders for Intoxicating Liquor—Distribution of Circulars Inviting Orders for Foreign Dealer.

Motion on behalf of Mark Lynch-Staunton to quash a conviction made against him by a magistrate for a violation of sec. 42 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

J. G. Farmer, K.C., for the applicant.

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

CLUTE, J., in a written judgment, said that the charge was, that on the 10th November, 1917, at Hamilton, the defendant did unlawfully canvass for or did receive orders for intoxicating liquor for

beverage purposes, within the Province of Ontario, contrary to the provisions of sec. 42 of the Act: "Every person . . . who, by himself, his servant, or agent, canvasses for, or receives, or solicits orders for liquor for beverage purposes within this Province, shall be guilty of an offence against this Act . . ."

One Blunt, who was employed by the defendant, went from door to door of the houses of people in Hamilton and left at each door an envelope which enclosed a list of intoxicating liquors for sale by a dealer in Buffalo, New York, and a request for orders therefor. Blunt did not know what the envelopes contained, but the defendant did know. The defendant did not, nor did Blunt or any other agent of the defendant, receive orders; the offence charged consisted simply in distributing the envelopes with the enclosures. Blunt was a witness at the trial before the magistrate; he admitted that he delivered the envelopes and that he was instructed by the defendant.

The learned Judge was of opinion that what was done amounted to "canvassing" and "soliciting" within the meaning of sec. 42.

Reference to Rex v. McEvoy (1916), 38 O.L.R. 202.

Motion dismissed without costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 14TH, 1917.

*SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Costs—Action against Local Board of Health and Medical Officer of Health—Taxation against Plaintiffs of Costs Ordered to be Paid to Defendants—Right to Costs—Defence Conducted by Municipal Corporation—Public Health Act, sec. 26—Municipal Act, secs. 8, 245 (5)—Payment of Salary to Corporation Solicitor.

An appeal by the plaintiffs from the taxation by the Senior Taxing Officer at Toronto of the defendants' costs of an appeal to the Appellate Division.

W. Lawr, for the plaintiffs.

R. H. Parmenter, for the defendants.

MIDDLETON, J., in a written judgment, said that this action was brought against the Local Board of Health and the Medical Officer of Health for alleged negligence resulting in the death of the plaintiffs' infant child. At the trial, the action was dismissed without costs (12 O.W.N. 241), and an appeal from the judgment of the trial Judge was dismissed with costs (ante 64). The defendants' costs of the appeal were the subject of the taxation; and the ground of the appeal was, that, as the defence was undertaken by the solicitor for the Corporation of the City of Belleville, the defendants had incurred no costs, and none could be taxed to them.

The decision upon a motion, made before the trial, for security for costs (see 38 O.L.R. 244), left the question of the right of the defendants to recover costs open.

Costs are an indemnity and an indemnity only, and cannot be made a source of profit to a party, nor can a party, by any voluntary payment he may make, increase the burden cast upon his adversary who has been ordered to pay his costs.

Reference to Jarvis v. Great Western R. W. Co. (1859), 8 U.C.C.P. 280, 285; Meriden Britannia Co. v. Braden (1896), 17 P.R. 77; Gundry v. Sainsbury, [1910] 1 K.B. 645; Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12; and other cases.

The defendants are public officers, and in truth represent, for certain purposes, the inhabitants of the City of Belleville, who constitute the corporation: Municipal Act, R.S.O. 1914 ch. 192, sec. 8; and represent the ratepayers, who contribute the funds for the carrying on of the affairs of the corporation. The municipal council is the governing body of the corporation and has general charge of its affairs. Section 26 of the Public Health Act, R.S.O. 1914 ch. 218, enables that general executive and governing board of the corporation to consider the action of the local board which is complained of and to assume responsibility for it, rendering the corporation liable to pay any damages or costs which the plaintiff may be entitled to by reason of the action of the board; and in such case the defence is conducted by the municipality in the ordinary way.

The municipal funds are the thing attacked by the plaintiffs, and the whole legislation is a mode of protecting those funds. One agent of the corporation may have made it liable—another agent may have to defend its coffers. In substance, the defence is the defence of the corporation, and the plaintiffs are in no way concerned in the details of the domestic machinery set in motion to answer their claim.

Reference to Re City of Berlin and The County Judge of the

County of Waterloo (1914), 33 O.L.R. 73; Rex on the prosecution of Cobham v. Archbishop of Canterbury, [1903] 1 K.B. 289.

Here the statute (Public Health Act, sec. 26) gave the council the right to appoint the solicitor to conduct the defence of the local board, and this carried with it the right to costs duly incurred in the conduct of the defence.

The Municipal Act, sec. 245 (5), gets over all difficulty as to payment of the corporation's solicitor by salary.

Appeal dismissed with costs, fixed at $25.

SUTHERLAND, J. DECEMBER 14TH, 1917.

RE HEAL.

Will—Construction—Legacy Payable on Conditions—Duty of Executors—Bequest of Income to Daughter—Death of Daughter before Death of Testator—Residuary Devise to Daughter—Lapse by Reason of Predecease — Gift over — Heirs of Woman still Living but without Issue—Investment of Funds of Estate—Limitation of Securities by Will—Executors Permitted to Invest in Securities Authorised by Trustee Act.

Motion by the executors of the will of James Heal, deceased, for an order determining several questions arising upon the construction of the will.

The motion was heard in the Weekly Court at Toronto.

G. W. Morley, for the executors.

W. J. Tremeear, for the children of Samuel Heal.

F. W. Harcourt, K.C., for the infants.

SUTHERLAND, J., in a written judgment, said that the first question was, whether a legacy of $1,500, payable to Archibald McFeters under certain conditions named in the will, should be paid to him by the executors, or whether a certain 50 acres of land should be conveyed to him instead. The learned Judge was of opinion that the $1,500 was properly payable to Archibald; indeed, upon the motion, there was no opposition raised thereto by any one.

Question No. 2 arose in this way. The executors being directed by the terms of the will to pay to the granddaughter of the deceased, one Elizabeth McFeters, during her natural life, an

annuity of $200, and to pay the residue of the income from the estate, not otherwise disposed of, to Mary Jane Hickey, a daughter of the deceased, for and during her natural life, and the latter having died before the testator, the executors were in doubt as to the final disposition of the residue of the income.

One portion of the will was as follows: "After the death of my daughter Mary Jane Hickey and the death of my granddaughter Elizabeth McFeters I direct my executors to divide the principal of my estate amongst the heirs descended from the blood of Elizabeth McFeters. If any of the said heirs of Elizabeth McFeters is or are under age I direct my executors to use their portion or any part of it for their education or maintenance as they see fit. If the said Elizabeth McFeters should leave no heirs as aforesaid I direct that my executors shall divide my estate among such of my heirs and the heirs of my brothers and sisters as they think fit having regard to the character and occupation or need of the party or parties to whom the estate is divided. All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my daughter Mary Jane Hickey."

The learned Judge was of the opinion that the devise of the residue of the estate to Mary Jane Hickey lapsed by reason of her having predeceased the testator. It was too soon to determine who would ultimately share. Elizabeth McFeters, a widow of about 50 years of age, being still alive, she might yet have heirs who would be entitled to the consideration of the executors in the ultimate division of the estate.

A further question was, whether the funds of the estate might, instead of being invested in first mortgages on real estate, or deposited in some chartered bank, as mentioned in the will, also be invested in the investments authorised by the Trustee Act. As all parties represented on the motion deemed it to be in the interests of the estate that the executors should be permitted to do this, and as it appeared proper and desirable, authority should be given so to do.

Order accordingly; costs of all parties out of the estate.

SUTHERLAND, J., IN CHAMBERS. DECEMBER 14TH, 1917.

REX v. KILGORE.

Criminal Law—Magistrate's Conviction for Vagrancy—Sentence to Imprisonment—Sentence Suspended and Defendant Left at Large—Subsequent Direction of Magistrate for Enforcement of Sentence—Defendant not again Brought before Magistrate—Warrant of Commitment without Formal Conviction—Defective Warrant—Defendant Arrested and Taken to Gaol—Habeas Corpus—Motion for Discharge—Dismissal upon Crown Supplying Conviction and Amended Warrant.

A motion, upon the return of a writ of habeas corpus, for an order discharging the defendant from custody.

Peter White, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

SUTHERLAND, J., in a written judgment, said that two informations were laid against the accused on the 27th July, 1917: in one he was charged with being a vagrant, and in the other with unlawfully appearing in an intoxicated condition on the streets of Arnprior, in each case "within the space of two days last past to wit on the 26th day of July instant." On the first information there was an endorsement by the magistrate that the accused pleaded "guilty" to the charge and was sentenced to 6 months' imprisonment at hard labour, and that he entered into his own recognizance that if his sentence were suspended he would "go to Carp and take the gold cure from Dr. Groves, August, 17th; this space of time has been allowed in order to let Kilgore have time to earn money enough to pay for cure;" and that sentence "was suspended till called upon." On the other information there was an endorsement to the effect that the accused appeared on the same day, the 27th July, and pleaded "guilty," and was sentenced to pay a fine of $10 and costs.

A further information for vagrancy was laid against the accused on the 20th August, 1917. On this information there appeared an endorsement by the magistrate that the information "had not been prosecuted. Kilgore was sent to Pembroke to serve sentence, date July 27th, and suspended."

The warrant of commitment returned to the writ was dated the 20th August. It recited that "William Kilgore was this day charged before me, A. Grierson, one of His Majesty's Justices of

the Peace in and for the County of Renfrew . . . for that the said William Kilgore did unlawfully become a vagrant by screaming, swearing near the street, and making violent threats to his wife continually." It was directed to the constable of the Town of Arnprior and to the keeper of the common gaol at Pembroke, and commanded the constable to take the accused and deliver him to the keeper of the gaol, and the keeper to receive the accused and safely keep him in gaol "until he shall be thence delivered by due course of law, which is 6 months' imprisonment, h. l."

The defendant was not brought before the magistrate on the 20th August, 1917, but the constable arrested him, and delivered him into custody.

One of the grounds for discharge alleged was, that the defendant was not served with any summons or other paper whatever in connection with the charge mentioned in the warrant of commitment. In this respect, the learned Judge said, the case was similar to Robinson v. Morris (1909), 19 O.L.R. 633, as also in the fact that the accused was sentenced, and, instead of being imprisoned at once, was allowed to depart on his own recognizance.

There was no formal conviction. The warrant of commitment was inaccurate in that there was a reference to the accused appearing before the magistrate on the 20th August; and was defective in that it did not set out or recite a conviction. But the defendant, on the 27th July, pleaded guilty to the charge and was convicted; the sentence was not immediately carried into effect but temporarily suspended at the request of the defendant; and it would be absurd if, because he was not again brought before the magistrate—an omission which was regarded in Robinson v. Morris as of little consequence—and because there was no formal conviction and the warrant was defective, these matters could not now be remedied.

Upon the Crown, within one week, procuring and filing a formal conviction and having the warrant amended so as to cure the error and omission indicated, the motion should be dismissed.

Order accordingly; no costs.

KELLY, J., IN CHAMBERS. DECEMBER 14TH, 1917.

MASON v. FLORENCE.

Mortgage—Action for Foreclosure—Motion for Summary Judgment—Defence—Interest, whether Payable from Date of Mortgage or Dates when Moneys actually Advanced—Arrangement between Mortgagor and Mortgagee—Form of Covenant for Payment of Interest.

Appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff for judgment for foreclosure.

A. C. Heighington, for the plaintiff.
J. S. Lundy, for the defendants.

KELLY, J., in a written judgment, said that the plaintiff relied upon the form of that part of the covenant for payment, in the indenture of mortgage, which applied to interest for the first 6 months of the term of the mortgage, his position being that he was entitled to interest from the date of the mortgage upon the whole amount of principal, notwithstanding that the principal was advanced from time to time during that 6 months.

The defendants claimed to be entitled to have the interest charged on the sums so advanced from the respective dates of the advances—not from the date of the mortgage—and in his affidavit the defendant Joseph L. Florence referred to an arrangement which, he alleged, he had made with the plaintiff, that interest was to be charged only from the dates on which the moneys were advanced. The defendants paid into Court the amount with which, on that mode of calculation, they were chargeable.

It was nowhere stated whether this arrangement was before or after the making of the mortgage. The plaintiff had proceeded upon the assumption that, if any arrangement was made, it was prior to the making of the mortgage, and that, consequently, the defendants were precluded from now setting it up. But that was by no means clear. There was quite sufficient in the affidavit to establish the defendants' right to put forward their defence; and the motion for judgment was rightly refused.

Appeal dismissed with costs.

SUTHERLAND, J. DECEMBER 15TH, 1917.

STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION.

Railway—Trustee for Bondholders and for Municipalities Guaranteeing Payment of Bonds—Account—Payments Made by Trustee under Engineer's Certificates—Res Adjudicata—Bona Fides—Interest—Delivery of Unguaranteed Bonds—Costs.

Action by Thomas Stothers and the Municipal Corporations of the Towns of Goderich and Kincardine and the Townships of Ashfield and Huron against the Toronto General Trusts Corporation for an account of all moneys received and paid out by the defendant corporation as trustee for bondholders and municipalities in connection with the West Shore Railway and for payment to the plaintiffs of any and all moneys improperly paid out by the defendant corporation and for interest and for delivery to the plaintiffs and cancellation of the bonds of the railway company deposited with the defendant corporation by one John W. Moyes and of any bonds of the railway company in its possession or control.

The action was tried without a jury at Toronto.

E. D. Armour, K.C., William Proudfoot, K.C., and C. Garrow, for the plaintiffs.

I. F. Hellmuth, K.C., and E. G. Long, for the defendant corporation.

SUTHERLAND, J., in a written judgment, after stating the facts and referring to many agreements, by-laws, and statutes, and to the order of Middleton, J., in Re Ontario and West Shore R.W. Co. (1911), 2 O.W.N. 1041, and to the correspondence between the parties and their solicitors, said that, in so far as the matter of most importance in this action was concerned, namely, the payments made by the defendant corporation under the authority of the engineer's certificates, what he was in effect asked to do was to hear and determine an appeal from the order of Middleton, J. This was not open to the learned Judge; he was compelled to assume that the order was rightly made, and that the matter of the payments was res adjudicata.

Upon the evidence, it would be impossible to find the defendant corporation guilty of any wilful breach of the trusts imposed upon it by the terms of the trust-deed. Anything done by the corpora-

tion was apparently done in good faith and in reliance upon the certificates and other documents referred to and the truthfulness and accuracy of the statements therein contained.

As to the item of $18,000, or upwards, the interest upon the proceeds of the sale of bonds received by the defendant corporation, no provision therefor was contained in the mortgage, and, in pursuance of the agreements between the railway company and the defendant corporation, the latter allowed and paid to the railway company from time to time interest at rates agreed upon, which interest was applied by the company in payment of interest on the guaranteed bonds issued by the company; they got the benefit of this interest.

The plaintiff Stothers being now, as trustee for his co-plaintiffs, entitled to receive the same, there should be judgment in his favour for delivery to him of the unguaranteed bonds to the amount of $20,000, and for two sums of $317.96 and $30.06 (admitted in the defence), with costs down to the filing of the statement of defence. Otherwise, the action should be dismissed, with costs to the defendant corporation subsequent to the filing of the defence.

KELLY, J., IN CHAMBERS. DECEMBER 15TH, 1917

RE DAKTER AND McGREGOR.

Land Titles Act—Application to Terminate Caution—Status of Applicant—Transferee of Registered Owner—Rules Made under Authority of sec. 138 of 1 Geo. V. ch. 28—Rule 24—Form 21.

An appeal by Alexander Dakter from an order of the Local Master of Titles at Haileybury dismissing an application to terminate a caution.

J. M. Ferguson, for the appellant.

J. A. McEvoy, for the cautioners, McGregor and others, respondents.

KELLY, J., in a written judgment, after stating the facts, said that it appeared that the Local Master, in refusing to terminate the caution, proceeded on the ground that only a registered owner had the right to make application for that purpose.

The Land Titles Act, 1 Geo. V. ch. 28 (R.S.O. 1914 ch. 126), sec. 138, authorised the making of Rules in respect of the carrying out of the Act. Rules having been made, Rule 24 provided for an application to the Master to terminate a caution, and referred to Form 21, one of the Forms comprised in schedule A. to the Rules. A reference to that Form shewed that the intention of the framers of the Rules was, that a transferee of the registered owner—as well as the registered owner—could make the application.

The appellant had the right to apply; and the application should not have been refused merely on the ground that he had no such right, whatever the merits of the case might otherwise be.

The order of the Master should be set aside with costs, and the application should be allowed to proceed upon its merits.

Appeal allowed.

CLUTE, J., IN CHAMBERS. DECEMBER 15TH, 1917.

*HENNEFORTH v. MALOOF.

Slander—Defence—Justification—Particulars—Practice.

An appeal by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion to strike out para. 3 of the statement of defence or for particulars thereunder.

The action was for slander in saying that the plaintiff "is a common whore and prostitute." The paragraph of the defence objected to was: "The defendant, besides denying as aforesaid that he spoke of and concerning the plaintiff the words set out in paragraph 3 of the statement of claim, alleges, as the fact is, that, if the said words were spoken by him, the same were true in substance and in fact."

J. M. Ferguson, for the plaintiff.
R. McKay, K.C., for the defendant.

CLUTE, J., in a written judgment, discussed the English authorities, most of which are collected in Halsbury's Laws of England, vol. 18, p. 673, para. 1245 *et seq.*, the leading ones being Zierenberg v. Labouchere, [1893] 2 Q.B. 183 (C.A.), and Arnold & Butler v. Bottomley, [1908] 2 K.B. 151; and referred also to some Ontario cases cited on the argument, which he thought were not in point or were not at variance with the English cases.

He was of opinion that particulars should be given of the facts upon which the defendant relied to support the defence above quoted; and that the defendant would not be entitled to examine the plaintiff for discovery until after such particulars had been given.

Appeal allowed, and order for particulars granted; costs of the motion and appeal to the plaintiff in any event.

TORONTO GENERAL TRUSTS CORPORATION v. WEAVER—MASTEN, J.—DEC. 10.

Judgment—Defendant not Appearing at Trial—Judgment for Plaintiffs by Default—Judgment Set aside on Terms.]—Motion by the defendant to set aside the judgment for the plaintiffs entered by MASTEN, J., at the Sandwich sittings, the defendant not appearing, and for a new trial. The motion was heard in the Weekly Court at Toronto. MASTEN, J., in a short memorandum in writing, said that the judgment should be opened up and set aside, on the terms following. The defendant to pay to the plaintiffs the costs of the trial at Sandwich on the 22nd October, 1917, together with the costs of the present motion; such payment to be made within 10 days after the amount of costs has been ascertained by taxation; and on the further condition that the action be forthwith set down for trial at the Toronto non-jury sittings. In default of compliance with all the above terms within one month, the application will be dismissed. J. M. Bullen, for the defendant. Frank Arnoldi, K.C., for the plaintiffs.