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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

MOND NICKEL CO. v. DEMOREST.

Boundaries—Evidence—Position of Post—Finding of Fact of Trial Judge—Appeal—Ascertainment of Division-line between Lots—Lost Divisional Post—Locality of, not Ascertainable—Surveys Act, secs. 39, 40—Costs.

An appeal by the plaintiffs from the judgment of MIDDLETON, J., 13 O.W.N. 410.

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

J. M. Clark, K.C., and R. U. McPherson, for the appellants.

W. N. Tilley, K.C., for the defendants Demorest and Black, respondents.

R. S. Robertson, for the defendant Jefferson, respondent.

MAGEE, J.A., read the judgment of the Court. He said that the plaintiffs claimed lot 6 in the 2nd concession of the township of Lanark; and the defendants claimed lot 5 in the same concession; lot 5 adjoined the east side of lot 6. After stating the facts and reviewing the evidence, the learned Judge said that it should be declared that the divisional post originally planted between lots 5 and 6 could not be found, nor the exact locality thereof established, and that the division-line should be ascertained in the manner directed by secs. 39 and 40 and other apposite sections of the Surveys Act, R.S.O. 1914 ch. 166, that is, by dividing the width between the two established posts, those at the south-east angle of lot 5 and south-west angle of lot 6 in proportion to the intended width of those lots—that is, equally—and the side-lines between the lots should run, in accordance with the Act, from that point, and that the plaintiffs were entitled to possession of the land up

to that line, as part of lot 6. In that view, it was unnecessary to consider whether in any case the defendants' mining rights could extend so far as that line.

As the parties could probably agree upon that division-line, no direction need be given unless the parties required a direction for the ascertainment of the line; nor, unless asked for, need any injunction be granted.

The appeal should be allowed to the extent indicated. As the defendants did not admit the plaintiffs' title to any of the land, and the plaintiffs had succeeded for a substantial part of it, they should get their costs of the action and appeal from the defendants.

Appeal allowed in part.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*HESS v. GREENWAY.

Negligence—Lease of Part of Building—Injury to Goods of Lessee—Bursting of Steam-pipes—Cause of—Duty of Landlord—Duty of Tenant Undertaking Heating of Building—Provisions of Lease—Duty to Repair.

APPEAL by the plaintiff from the judgment of LATCHFORD, J., 15 O.W.N. 109.

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

T. N. Phelan, for the appellant.

G. H. Gilday, for the defendant Greenway, respondent.

William Proudfoot, K.C., for the defendant Elliott, respondent.

H. J. Scott, K.C., for the defendant the Sinclair & Valentine Company, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the questions to be determined were: (1) whether there was any duty resting upon the respondent Elliott, in the operation of the heating system, to take care that the piping in the part of the building occupied by the appellant was in a proper state of repair and condition; (2) whether that duty, if it existed, was an absolute one or only a duty to take reasonable care; (3) whether, if the duty was only to take reasonable care, the respondent Elliott had failed to discharge that duty.

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

The question arose as to the right of the respondent Elliott to delegate any duty resting upon him as to the heating of the premises, because it was clear that the appellant knew of the arrangement as to the heating system and the heating of the building that had been entered into with the Sinclair & Valentine Company, and must be taken to have assented to the delegation of the duty.

If the respondent Elliott owed any duty to the appellant, it was a duty, in the operation of the heating system, to take reasonable care to see that the heating appliances were and were kept in such a state of repair as that injury would not result to the occupants of the part of the building leased to the respondent Greenway from the operation of the heating system—in other words, not to be negligent in the performance of that duty.

The piping which, according to the contention of the appellant, was defective and out of repair, was situate in that part of the building leased to the respondent Greenway and sublet to the appellant. By lease from Elliott to Greenway, the latter covenanted with Elliott "to repair, reasonable wear and tear, lightning, and tempest only excepted;" and, although the appellant, being only a sublessee of part of the premises, did not incur any liability to Elliott on the covenant, he took subject to the obligation on the part of his immediate landlord, and had no right to look to Elliott to repair any part of the demised premises. He and his immediate landlord took the premises as they were; and, in such circumstances, the tenant is not entitled to claim from his landlord damages for loss sustained owing to the defective condition of the premises when they were let, or to any want of repair arising during the term. Therefore, if the heating appliances in the premises demised to Greenway were in bad condition or out of repair or became so during the term, no liability attached to the landlord to put them in proper condition or to repair them.

No negligence on the part of Elliott was proved. The proximate cause of the bursting of the pipes was the freezing, after the heating plant had been shut down, of water formed by the condensation of the steam which had lodged in a slight sag or depression in the pipes. This sag had existed from the time when the pipes had been first attached to the wall of the building, which was 11 years before the trial. The heating system had been operated during all those years without anything untoward happening, and nothing had occurred that shewed that any trouble or danger was to be apprehended from the existence of the sag; and it was impossible, on that state of facts, to find that Elliott was negligent because he did not take steps to have the sag taken out. Neither Greenway nor the appellant appeared to have anticipated danger from the existence of the sag; and, if they did not anticipate it, negligence should not be attributed to Elliott because he did not.

A landlord does not, in the letting of a building such as Elliott let, warrant that the building is reasonably fit for the purpose for which it is intended; the tenant takes it as it is; and the landlord is under no obligation to repair or to make good anything that is found to be defective or out of repair: Barker v. Ferguson (1908), 16 O.L.R. 252; Rogers v. Sorell (1903), 14 Man. R. 450; Betcher v. Hagell (1906), 38 N.S.R. 517.

The judgment dismissing the action as against the respondent Elliott should therefore be affirmed; and the same result must follow as to the other defendants. No case was made against the respondent Greenway; and the case against the Sinclair & Valentine Company failed for the same reasons as it failed against Elliott, and for the additional reason that that company owed no duty to the appellant, except the duty, in operating the heating plant, to do him no intentional injury.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*WOOLLINGS v. BARR.

Chattel Mortgage—Description of Goods Mortgaged—Sufficiency—Identification of Property—Inquiries—Evidence—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 134, sec. 10—Interpleader Issue—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of the District Court of the District of Temiskaming finding in favour of the plaintiff an interpleader issue as to the ownership of goods seized by the Sheriff of Temiskaming under the execution of the defendant and claimed by the plaintiff under a chattel mortgage.

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

Peter White, K.C., for the appellant.

A. G. Slaght, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the appellant contended that the description contained in the claimant's chattel mortgage did not satisfy the requirements of sec. 10 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 134—"such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known

and distinguished." The description in the chattel mortgage read: "All and singular the goods and chattels particularly mentioned and set forth in the schedule endorsed hereon (or hereunto annexed) . . . all of which . . . now are the property of the said mortgagor, and are situate in, around, and upon the premises known as logging and pulpwood camps situate at and in the vicinity of Long Lake and the navigable rivers tributary thereto, in the district of Temiskaming." And the schedule read: "The entire stock of horses, waggons, sleighs, harness, blankets, tools, and other logging and pulpwood camp equipment, including all meats, groceries, and provisions of every nature and kind in or connected with the said logging or pulpwood camps or logging and pulpwood operations carried on by the mortgagor on the shores of and in the vicinity of Long Lake and the navigable streams tributary thereto, in the district of Temiskaming."

The learned Judge said that, if there is sufficient material on the face of the mortgage to indicate how the property may be identified after proper inquiries are made, the statute has been complied with: Hovey v. Whiting (1887), 14 Can. S.C.R. 515, at pp. 520, 567, 569.

There was no difficulty in readily and easily identifying the horses mortgaged. The description covered the mortgagor's *entire* stock of horses in, around, or upon the camp in or connected with the logging and pulpwood operations of the mortgagor in the locality named; and whether or not the horses of the mortgagor were, at the time of the mortgage, in or around the camp premises connected with these operations, was a question of fact. The learned trial Judge appeared to have had no difficulty in identifying the horses; and, unless the Court was satisfied that his conclusion on the question of fact was erroneous, it should not be reversed. The Court was not satisfied that he was wrong; on the contrary, a study of the mortgage and the evidence led to the same conclusion.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*RE COTÉ.

Will—Construction—Devise to Children—Devise over in Event of Children Dying without Issue—Children Surviving Mother—Estate in Fee—Wills Act, R.S.O. 1914 ch. 120, sec. 33—Power of Executors to Sell Real Estate—Devolution of Estates Act, secs. 13, 14, 19—Death of Executors—Power of Sale Exercisable by Executor of Survivor or by Administrator duly Appointed—Trustee Act, sec. 45—Consent of Official Guardian or Order of Judge.

Appeal by Edward and Yvonne Coté from the order of LATCHFORD, J., 15 O.W.N. 419, determining questions arising under the will of Marie Eliza Coté, deceased.

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

C. E. Seguin, for the appellants.

E. C. Cattanach, for the Official Guardian, representing the infants interested.

MEREDITH, C.J.O., read a judgment in which, after setting out the provisions of the will and certain facts with regard to the relatives of the testatrix, he said that Latchford, J., had held that the estate, though absolute, was subject to be divested in the event of the death of the appellants (the two children of the testatrix) leaving issue living at their death, and that, if that last event should happen, the gift over to the father, mother, brothers and sisters of the testatrix, would take effect. The learned Chief Justice agreed with this view of Latchford, J. The testatrix evidently intended to provide for the gift over on the happening of either of the two events that she mentioned—her own death without issue, or her child or children, if she should have any, dying without issue.

The effect of sec. 33 of the Wills Act is, that "dying without issue" means a want or failure of issue in the lifetime or at the time of the death of the child or children, and not an indefinite failure of issue, no contrary intention appearing by the will.

The learned Chief Justice was unable to agree with the conclusion of Latchford, J., that the executors, if living, could not sell the real estate, because it had become "vested in the devisees, and the children can sell only the interest which is vested in them and subject to be divested in the event mentioned." The atten-

tion of Latchford, J., was not called to the provisions of sec. 14 of the Devolution of Estates Act—"Nothing in section 13," the vesting section, "shall derogate from any right possessed by an executor . . . under a will."

Though the power of sale which the will conferred might yet be exercised if the executors or one of them were living, the proceeds of the sale would be held by the executors upon the same trusts as those upon which the real estate is held, and cannot, therefore, be distributed until the event happens upon the happening of which the divesting provision of the will is not to take effect, i.e., the death of the child or children of the testatrix leaving issue surviving, or as, if they die without issue, the divesting provision takes effect.

Both of the executors being dead, the power of sale may be exercised by the executor of the executor who last died: Farwell on Powers, 3rd ed., pp. 106, 107; Williams on Executors, 9th ed., pp. 829, 830; or, if there is no such executor, by an administrator with the will annexed, appointed as provided by sec. 45 of the Trustee Act.

As infants are interested, no sale can be made by the executor without the written consent of the Official Guardian, or an order of a Judge: Devolution of Estates Act, sec. 19.

The judgment should be varied by substituting for the declaration that the power of sale is not now exercisable, a declaration in accordance with the opinion now expressed.

The costs of all parties of the appeal should be paid out of the estate.

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

MAGEE, J.A., in a written judgment, said that, inasmuch as there appeared to be no reason why one child's share should be affected by failure of issue of another, and as the event is the total failure of any issue of the testatrix, and the whole estate, and not merely one child's share, is to go over, he concluded that the event contemplated by the testatrix was her own death and the non-existence at that date of any issue. As that event did not occur, he thought that each of the children took an absolute interest in his or her share of the estate; and that the appeal should be allowed and the order varied accordingly.

Order as stated by the Chief Justice.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*CITY OF TORONTO v. SOLWAY.

Municipal Corporations—Power to Regulate Use of Buildings as Stables—Municipal Act, 1903, sec. 541a.—4 Edw. VII. ch. 22, sec. 19—5 Edw. VII. ch. 22, sec. 21—By-law—Operation Limited to Defined Area—Power of City Council—Discrimination—Monopoly—Permit for Stable—Effect of.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex., at the trial, in favour of the plaintiffs, the Corporation of the City of Toronto, enjoining the defendants from using any building upon the premises No. 50 Lakeview avenue, Toronto, as a stable for horses for delivery purposes, contrary to by-law No. 6087, passed by the city council on the 28th May, 1912.

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

Gordon Waldron, for the appellants.

C. M. Colquhoun, for the plaintiffs, respondents,

MEREDITH, C.J.O., reading the judgment of the Court, said that the by-law provided that no building should be located, erected, or used for a stable for horses for delivery purposes upon any of the properties fronting or abutting on either side of Lakeview avenue (with certain exceptions not affecting this case); but the provisions of the by-law were not to apply to any building erected or used on the day of the passing of the by-law for any of the purposes aforesaid "so long as it continues to be used as it was then used."

The appellants alleged that a permit was obtained by the female appellant on the 30th May, 1912, for the erection of a private stable on the premises No. 50, and that it was granted under conditions requiring the male appellant "to make outlays for drainage and the like, amounting to $400;" that these outlays were made; and that on the 18th August, 1916, the female appellant obtained a permit for underpinning and other work about the stable; and that, in these circumstances, the respondents were "not entitled to ask for equitable relief."

The appellants also attacked the validity of the by-law; and the male appellant counterclaimed, in the event of the injunction being granted, for payment of his outlays in and about the stable.

The legislation under the authority of which the by-law was passed was sec. 541*a*. of the Municipal Act, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19, and amended by 5 Edw. VII. ch. 22, sec. 21.

The appellant's stable was erected after the passing of the by-law, and the permit which was issued was for a "private stable for one horse and driving shed."

While the Municipal Act contains no express power to limit the operation of a by-law passed under the authority of sec. 541*a*. to a defined area of the municipality, the power to prevent, regulate, and control the location, erection, and use of buildings for a designated purpose carries with it the right to prescribe in what localities they may be located, erected, or used, and in what localities they may not.

The by-law is not open to the objection that it discriminates. It is general in its application in the future, as it applies to every one who desires to locate or to erect a building for the purpose mentioned in the by-law, and it is also general in its application to buildings previously erected which were then in use.

The argument that the by-law tends to create a monopoly is not well-founded—the council had authority to limit the scope of its prohibition to a defined area in the municipality and to exempt stables then in use.

Effect could not be given to the contention that the respondent was not entitled to the injunction because of the permit that had been granted and the outlay consequent upon the requirement as to drains and the like. The permit that was issued was for a private stable for one horse and a driving shed and not for a building for stabling horses for delivery purposes; and, in any case, a permit by a corporation official to do something that is prohibited by the by-law is of no force or validity.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*RUBBERSET CO. LIMITED v. BOECKH BROTHERS CO. LIMITED.

Trade Name—Infringement—"Passing-off"—Evidence—Deception—Reasonable Possibility—Descriptive Word—Secondary Meaning—Evidence—Patent for Invented Process—Expiry.

Appeal by the plaintiffs from the judgment of MASTEN, J., 15 O.W.N. 189.

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

R. S. Robertson and J. W. Pickup, for the appellants.

A. W. Anglin, K.C., and S. W. McKeown, for the defendants, respondents.

The judgment of the Court was read by HODGINS, J.A. After setting out the facts, he said that the appellant, having a monopoly of a process, the product of which they designated as "rubberset" as applied to brushes, lost that exclusive right in 1907. From that time until 1913 or 1914 there was no competition, and therefore no opportunity to establish any exclusive right, and no one to dispute their calling their brushes anything they pleased.

Reference to Universal Winding Co. v. George Hattersley & Sons Limited (1915), 32 R.P.C. 479.

As "Rubberset" is clearly a descriptive word, and was invented to express the exact article produced by the patented process, a monopoly in its use could not be asserted after the patent covering it ran out. In view of the short space of time since the expiry of the patent, about 11 years, during one half of which there was no one competing with them in Canada, it was most unlikely that "Rubberset" would lose its primary and descriptive character and acquire a dominating secondary meaning as describing the product of the appellants' factory.

Indeed, no evidence worthy of the name in support of that proposition appeared in the record, and there was much to lead to the conclusion that the witnesses who were called understood by "rubberset" only a brush of that character produced by the manufacturer whose goods they happened to have in stock and were dealing with. There was, however, evidence, which it seemed reasonable to accept, that while a brush marked "rubber-

set" carries with it an indication that it is one which can be depended upon for the security of its bristles, it must be designated to describe that particular quality, for the setting in vulcanised rubber is not something that can be distinguished by ordinary examination. This emphasises the descriptive character of the word—and the use by Sims of the phrase "set in rubber," although seemingly an exact equivalent, did not elicit any protest from the appellants.

Reference to Cellular Clothing Co. v. Maxton & Murray, [1899] A.C. 326, 343.

The Court agreed with the learned trial Judge upon the other branch of the case, and it was unnecessary to deal with the question of the appellants' technical right to maintain the action, or their disability by reason of statements said to be misleading in regard to the origin of their goods.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

RE P. BURNS & CO. LIMITED AND GRAND TRUNK R. W. CO.

Railway—Construction of Bridge and Approaches in Street of City—Change in Gradient of Street—Injurious Affection of Property Used as Coal-yard—Compensation—Award—Basis of—Depreciation in Selling Value—Disturbance and Injury to Business—Method of Ascertaining Extent of Injury.

Appeal by P. Burns & Co. Limited, claimants, from the award of P. H. Drayton, K.C., appointed sole arbitrator to determine the compensation to be paid by the railway company, contestants, for all damage sustained by the claimants in respect of their property, situate on the north-east corner of Bathurst and Front streets, Toronto, by reason of the exercise of the powers of the company, under the Dominion Railway Act and under the order of the Railway Board, in the construction of a bridge and approaches near the claimants' property. The arbitrator awarded $7,000. The claimants sought to have the amount increased.

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

J. H. Moss, K.C., for the appellants.

W. C. Chisholm, K.C., for the railway company, respondent.

The judgment of the Court was read by MEREDITH, C.J.O. He said that the property was occupied by the appellants as a coal-yard; and by the works of the respondents the access to the property as a whole was injuriously affected. The arbitrator concluded that the subdividing the property into lots and selling them was the most advantageous (to the land-owners) way of dealing with the property. It had a frontage on Bathurst street of 84 feet and 397 feet on Front street, and the division would be into two lots, one having a frontage of 84 feet on Bathurst street and of 138 feet on Front street, and the other a frontage of 259 feet on Front street. The access to this latter lot had not been interfered with.

The view of the arbitrator was that, as only the lot on Bathurst street had its access interfered with, the compensation should be limited to the deterioration in value of that lot by reason of access to it being interfered with.

The appellants contended that this was erroneous and that compensation should have been awarded for the damage to the property as a whole, and that an allowance should have been made for injury and disturbance to the business which the appellants were carrying on, on the property.

It was not open to question that the arbitrator was right in his conclusion as to the most advantageous way of dealing with the property in the interest of the appellants; and, that being so, they had no valid grounds for their complaint.

The arbitrator decided that the selling value of the lot fronting on Bathurst street had been depreciated to the extent of $7,000, and that the other lot had not suffered any depreciation in value. If that conclusion was right, the appellants had been compensated for the injury to their property as a whole.

The arbitrator allowed nothing for disturbance and injury to the business, because the loss claimed was in respect of the lot on Front street, upon which the appellants' coal was stored, and to and from which it was hauled, and that lot had not been injuriously affected.

The claim of the appellants on this head was based on the fact that the grade of the streets had been raised, and that teams

taking coal from the yard, which had to make the ascent, were unable to draw as heavy a load as they could have drawn if the grade had not been altered.

The arbitrator was right in concluding that the appellants were not entitled to compensation for any loss of business by reason of the interference with the access to the property. The compensation should be assessed by considering how far the property, in reference to its then state, but independently of the profits of any particular trade carried on, would be worth less to sell or let as a property in consequence of the damage for which compensation is claimed: Cripps on Compensation, 5th ed., p. 146.

The arbitrator awarded compensation on the basis of the difference between the selling value of the land if dealt with in the most advantageous way for the owner and its value as depreciated by the works of the respondents. That method necessarily excluded the claim which the appellants made for the injury said to be sustained owing to the use that was now being made of the property.

It appears yet to be a question whether compensation can be claimed because, although direct access to the highway is not interfered with, there has been a change in the gradient of the highway: per Lord Selborne, L.C., in Caledonian R. W. Co. v. Walker's Trustees (1882), 7 App. Cas. 259, 274.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*PETRIE v. RAE.

Contract—Manufacture and Sale of Goods—Formation of Contract—Written Order but no Written Acceptance—Correspondence and Delivery of Part of Goods—Appropriation of Goods to Order—Statute of Frauds—Delivery "at once"—"Reasonable Time"—Repudiation—Damages—Measure of.

Appeal by the defendants from the judgment of MIDDLETON, J., at the trial, in favour of the plaintiff, for the recovery of $1,488 damages (with costs), in an action for breach of an alleged agreement for the manufacture by the defendants for the plaintiff and

the sale and delivery to the plaintiff of 100 chucks—the delivery, as the plaintiff alleged, to be made "at once."

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

W. N. Tilley, K.C., and J. W. Payne, for the appellants.

R. S. Robertson, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that, according to the undisputed evidence, the appellants had on hand, at the time when the alleged contract was made, 12 partly manufactured chucks, but had not on hand the material or the appliances for the making of any more of them.

In December, 1916, negotiations were entered into between the parties (one Hess acting for the respondent) with a view to the respondent placing with the appellants an order for 100 chucks. Hess testified that he was told that the 12 partly manufactured chucks would be ready for delivery in about 3 weeks, and that the remainder of the 100 would be delivered in 3 or 4 months. Following the discussion, an order was sent by the respondent to the appellants for 100 chucks of varying sizes at stated prices. The order (No. 356) stated that "shipment is wanted at once," and on the order were the words, "confirming order given by our Mr. Hess." There was no written acceptance of the order.

There was delay and correspondence. Nine chucks were delivered from time to time in January and February, 1917; the invoices having on their faces (except in the case of one delivery) "order 356."

The contention of the appellants was that they did not accept the order and never agreed to fill it.

The learned Chief Justice said that it was impossible, in view of the delivery of the 9 chucks on the order and the correspondence, to give effect to that contention. Although there was no formal written acceptance of the order, the delivery of the 9 chucks stated to be delivered on the order was an acceptance, and an acceptance sufficient to satisfy the provisions of the Statute of Frauds: Martin v. Haubner (1896), 26 Can. S.C.R. 142, and cases there cited.

The provision of the order that shipment was wanted "at once" meant "within a reasonable time:" per Field, J., in Regina v. Rogers (1877), 3 Q.B.D. 28, 33.

It might be that, having regard to the nature of the transaction, the circumstances surrounding it, and the facilities the appellants had for manufacturing the chucks, a reasonable time for the manufacture and delivery of them had not elapsed on the 18th October, 1917 (the date of the respondent's demand for $1,488 as

the "difference in cost of chucks," the amount in excess of the contract-price which was the difference between the contract-price and the price on that day, and the amount for which judgment was given in the respondent's favour); but that question was unimportant, because on the 20th October, 1917, and again on the 2nd November, 1917, the appellants repudiated their contract, the result of which was that the respondent was entitled to rescind and to damages for the breach of it.

It was argued that in any case the damages were excessive—that the market-price at an earlier date should have been the basis of the assessment; but it was clear on the evidence that the time for delivery was extended in ease of the appellants.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

PUDDY v. McBURNEY.

Contract—Partnership—Wages—Appeal—Order for the Taking of Further Evidence.

Appeal by the defendant from the judgment of MASTEN, J., at the trial, in favour of the plaintiff, for the recovery of $2,001.51, with costs, and dismissing the defendant's counterclaim, with costs.

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

T. R. Ferguson, for the appellant.

T. H. Barton, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appeal was limited to the sum of $1,160, in which, by the judgment, the appellant was found to be indebted to the respondent for wages, and to the dismissal of the appellant's counterclaim for $1,987.99 for goods alleged to have been supplied to the Delmonte Cafe Company at the request of the respondent.

No statement of claim was delivered. The claim endorsed on the writ of summons was for the recovery of "the price paid by the plaintiff to the defendant for a share in the defendant's business under an agreement which the defendant has repudiated, and for wages earned by the plaintiff while working for the defendant."

By his statement of defence the appellant alleged that in or

about April, 1917, the defendant suggested to the plaintiff that the plaintiff should enter into partnership with him, but no partnership agreement was ever concluded between the plaintiff and the defendant.

No evidence was adduced upon the issue as to the partnership; but, after some discussion at the opening of the trial, the learned trial Judge is reported to have said:—

"If there was a partnership, the result of the judgment would necessarily be a declaration of partnership and taking of accounts, but it is common ground that such is not the situation, and neither party is seeking that result;" and to this counsel for both parties assented as being a correct statement of the case.

It was impossible to determine, on the material before the Court, whether the fact was that no partnership ever existed, or that a partnership did exist, and was afterwards dissolved by mutual consent.

In the absence of evidence as to this, the appeal could not satisfactorily be dealt with, and the proper course was to direct that the necessary evidence should be taken before Masten, J., and that the disposition of the appeal should be postponed until after it had been taken.

Order accordingly.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*REX v. KING.

Criminal Law—Obtaining Money by False Pretences with Intent to Defraud—Evidence—Furnishing Article Inferior in Quality to Article Bought and Getting Payment for it.

Case stated by COATSWORTH, Jun. Co. C.J., upon the trial and conviction before him of the defendant on a charge of obtaining money by false pretences with intent to defraud. The question submitted was, whether there was any evidence which would justify a conviction.

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

H. H. Dewart, K.C., for the defendant.

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

MEREDITH, C.J.O., reading the judgment of the Court, said that the case for the Crown presented at the trial was that one

McGarry gave an order to the defendant for a suit of clothes to be made from cloth a sample of which was given to M. by the defendant; that, when the order was given, M. made a deposit of $5; that, some days afterwards, he called for the clothes, paid the balance of the price agreed on, $30, and took them home; that, on examination at home, he discovered that they were made of cloth much inferior to the sample with which they were compared; that he took the clothes back and complained of this to the defendant; that the defendant insisted that the cloth of which they were made was the same as the sample, but eventually returned $10 of the price to M.; that M. insisted on getting back the sample, and, when the defendant refused to return it, M. gave back the $10, and proceeded to lay the charge upon which the defendant was convicted.

At the trial it was conceded by the defendant that the cloth of which the clothes were made was not the same as the sample which M. said he had received, but was of an inferior, though good, quality; and the testimony of witnesses called for the defence, who spoke as to the quality of the cloth, was to the same effect.

In order to reach the conclusion that M.'s money had been obtained by false pretences with intent to defraud, the trial Judge must have found that the defendant had given to M. the sample which he said he had been given; and, that having been found, there was no escape from the conclusion that the defendant was guilty of the offence of which he had been convicted.

During the argument, the learned Chief Justice said, he doubted whether the case for the Crown had been made out, because the clothes were delivered to M., and the balance of the price which he paid when he got them was received not by the defendant, but by another person in the shop; but the doubt was not well-founded, because the delivery of the clothes and the receipt of the money were but steps in carrying out the original plan that the defendant had formed, and were steps that he must have known would be taken in doing that.

There was no clear evidence as to the proprietorship of the shop, but there was enough to warrant the inference being drawn that the defendant was the proprietor of it; but whether or not that was the case was immaterial if the defendant was the person who devised and had carried out the plan of putting off on M. an article different from and inferior in quality to that which he had bought, and getting his money for it.

The question submitted should be answered in the affirmative.

Conviction affirmed.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*BRAWLEY v. TORONTO R.W. CO.

Street Railway—Injury to Passenger—Fall Caused by Breaking of Strap—Negligence—Prima Facie Case—Res Ipsa Loquitur—Evidence in Rebuttal—Finding of Jury—Absence of Evidence of Inspection—Damages—Husband of Injured Passenger Joined as Co-plaintiff—Bills for Medical Attendance and Nurses Included in Sum Assessed by Jury—Nothing Allowed to Husband for Loss of Consortium—Unsatisfactory Findings—New Trial.

Appeal by the plaintiff David Brawley and cross-appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 15 O.W.N. 308, 44 O.L.R. 568.

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

Gideon Grant, for the plaintiffs.

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

The judgment of the Court was read by MEREDITH, C.J.O. Dealing first with the appeal of the defendants, he said that the plaintiff Kate Brawley was a passenger on the defendants' railway, and was injured owing to the breaking of a strap in the car. She was standing and supporting herself by the strap—which was the use intended—and she alleged that, owing to the car having swerved violently, her weight was thrown upon the strap, which broke and gave way in her hand from the rod upon which it was mounted, causing her to fall violently upon the floor of the car.

In his charge to the jury, the trial Judge directed them, if they found the defendants guilty of negligence, to state in what particulars the negligence consisted—that, if they thought lack of inspection was the cause, they should indicate what kind of inspection they should find to have been reasonable; and he also directed them, if they found negligence, to "state fully and clearly what it is."

The second question left to the jury was: "If so, what was that negligence? State fully and clearly." The answer was, "Caused by broken strap."

The fact that the strap broke, when it was called on to bear the strain, cast upon the defendants the burden of shewing that the breaking was not due to any negligence of theirs.

The case was one for the application of the rule res ipsa loquitur. Where an accident happens from an inanimate object, and is one

that does not ordinarily happen if the persons who have the management of it use proper care, it may be inferred, in the absence of any explanation from them, that it happened through their want of care.

Reference to McPhee v. City of Toronto and Bulmer (1915), 9 O.W.N. 150; Sangster v. T. Eaton Co. (1894), 25 O.R. 78, 21 A.R. 625, affirmed by the Supreme Court of Canada, T. Eaton Co. v. Sangster (1895), 24 Can. S.C.R. 708; Toronto R.W. Co. v. Fleming (1913), 47 Can. S.C.R. 612.

The defendants adduced evidence for the purpose of rebutting the prima facie presumption which arose from the breaking of the strap, but made no attempt to shew that the strap had been inspected or tested or that any system for the inspection or testing of straps was in use by the defendants, nor to shew how long the strap which broke had been in use.

Reference to Murphy v. Phillips (1876), 35 L.T.R. 477, 478.

A strap will not last for ever; and it was shewn by a witness that the strap which broke shewed signs of deterioration, and that it was beginning to wear. That distinguished this case from Ferguson v. Canadian Pacific R.W. Co. (1908), 12 O.W.R. 943, where an apparently perfect rail broke.

The trial Judge was evidently of opinion that it was not a case where res ipsa loquitur; and the jury were not instructed, as they should have been, that the burden rested upon the defendants of rebutting the presumption of negligence which arose from the breaking of the strap, and that unless that burden had been satisfied the plaintiffs were entitled to succeed.

In view of this and the unsatisfactory nature of the answer to the second question, the ends of justice would be best served by setting aside the judgment and directing a new trial.

The ground of the plaintiff David Brawley's appeal was that he was not awarded any damages, although he had expended $768.07 for medical and other treatment for his wife and had lost her society and companionship for about a year in consequence of the injuries which she had received, in respect of which the jury assessed her damages at $1,000. Without objection, these expenses were dealt with as part of the damages sustained by the plaintiff Kate Brawley, and must therefore be taken to have been included in the $1,000 awarded to her. It seemed strange that nothing was allowed to David for the loss of consortium; and, if any injustice had been done in that regard, it could be remedied upon the new trial.

Both the appeals should be allowed, the judgment should be set aside, and a new trial should be had between the parties; the costs of the last trial and of the appeals to be costs in the cause to the party ultimately successful, unless the Judge presiding at the new trial should otherwise direct.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*STEINBRECKER v. MUTUAL LIFE INSURANCE CO.

Insurance (Life)—Promissory Note Made by Assured in Favour of Agent of Insurance Company for First Premium—Note Overdue and Unpaid at Time of Death of Insured within Year Covered by Premium—Premium Paid by Agent to Company before Maturity of Note—Payment Made for Assured—Inference from Facts—Terms of Policy—Policy not Ceasing to be in Force.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., at the trial, in favour of the plaintiff, for the recovery of $2,000, in an action upon a policy of life insurance.

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

D. L. McCarthy, K.C., and H. J. Sims, for the appellants.

Gideon Grant, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to recover the amount payable under the terms of a policy of the defendants, dated the 7th November, 1916, on the life of the plaintiff's deceased husband, Arthur Steinbrecker, she being the beneficiary named in the policy. The first premium was not paid in cash; the deceased made a promissory note for the amount in favour of one Hood, a sub-agent of the defendants, dated the 13th November, 1916, payable in 3 months. Hood delivered the policy to the deceased on that day; the deceased failed to pay the note at maturity, and paid no part of it except $10, which he paid to Hood on the 21st March, 1917. On the 6th February, 1917, Hood paid the defendants the amount of the premium, less his commission. Steinbrecker died on the 5th August, 1917. The policy was in his possession, but the official receipt for the first premium and the note were in the hands of Hood; the note was overdue, and nothing but the $10 had been paid on it.

The learned Chief Justice set out these and other facts and quoted the provisions of the application and policy, among which was the usual one that if a promissory note be given for any premium and be not paid at maturity the policy shall cease to be in force.

The Chief Justice said that it was a reasonable inference from all the circumstances, beginning with the making of the note payable to Hood, and not to the defendants, and ending with the

payment of the premium by Hood, followed by his applications to the deceased for payment of the note long after the 6th February, that Hood had led the deceased to believe that he would provide for the payment of the note when it matured, and that Hood intended to do this and himself to pay the note if the deceased was not able to pay it at maturity, and that when Hood paid the premium he intended to pay it for and on behalf of the deceased, and not, as he now said, because he was by his agency contract obliged to do so.

It was not disputed that it was within the authority of Hood to take a promissory note for the first premium. When a note is given it operates as a payment of the premium; but, if it is not paid at maturity, the policy ceases to be in force. It goes into force when the premium is paid in cash or by a promissory note.

Acey v. Fernie (1840), 7 M. & W. 151, and London and Lancashire Life Assurance Co. v. Fleming, [1897] A.C. 499, distinguished.

In the case at bar there was not a mere debiting of the amount of the premium to the agent's account, but an actual payment of it by him to the defendants—a payment made while the policy was in force and within the period that had been allowed for paying the premium.

Reference to In re Economic Fire Office (Limited) (1896), 12 Times L.R. 142.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

TANNER v. SUTOR.

Title to Land—Lost Deed—Failure to Prove—Reference in Will to Deed—Recovery of Possession of Land—Lien for Improvements Made in Mistake of Title—Conveyancing and Law of Property Act, sec. 37—Damages for Removal of Chattels—Findings of Trial Judge—Appeal—Costs.

Appeal by the defendant from the judgment of BRITTON, J., 15 O.W.N. 349.

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

A. G. Slaght, for the appellant.

C. W. Bell, for the plaintiffs. respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought for the purpose of obtaining a declara-

tion that the defendant had no rights upon or to 1.67 acres, part of lot 4, range 5, Seneca, and to recover damages for an alleged trespass by the defendant upon this land. The defendant set up possession by himself and his predecessors in title for a sufficient length of time to bar the rights of the plaintiffs, and he also alleged that William Alexanber Tanner, from whom he purchased, had made lasting improvements on the land, to the value of about $700. There was, at the time of the conveyance to James Tanner by his father, a barn on the north-westerly part of lot 4. The main value of the land in dispute consisted, when the action was commenced, of this barn and some small buildings used in connection with it. Since then the barn had been destroyed by fire. The judgment directed to be entered was a judgment declaring that the defendant was not entitled to the barn and for the delivery of possession of it to the plaintiffs and for $50 damages for the removal of chattels from the barn, with costs on the Supreme Court scale, without set-off.

The learned Chief Justice said that he had grave doubts as to whether the defendant had not shewn a title to the barn; but his doubts were not such as to warrant the reversal of the judgment of the trial Judge, nor ought his finding against the defence based on the Limitations Act, in view of the conflicting evidence as to possession, to be disturbed.

The learned Chief Justice was unable to see how the will could be read as containing a devise of the acre on which the barn stood. The will excluded it from the devise to the plaintiffs, but there was no devise of it to James—only a statement that it had been conveyed to him, which was not in accordance with the fact.

The case, however, was one for the application of the provisions of sec. 37 of the Law of Property and Conveyancing Act, and the defendant was entitled to a lien on the one acre to the extent of the amount by which the value of it was enhanced by the lasting improvements made on it by his predecessor in title.

The judgment should be varied by declaring the lien for the improvements, with proper provisions for ascertaining the amount of it and for enforcing it according to the practice of the Court, by reducing the damages to $5, by striking out the provisions as to costs, and substituting for them a provision that there shall be no costs to either party of the action or of the appeal.

Judgment below varied.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*REX v. LOFTUS.

Criminal Law—Theft—Solicitor and Client—Failure to Account for Money and Securities until after Charge Laid—Criminal Code, sec. 355—Absence of Fraudulent Intent.

A case stated by WINCHESTER, late Senior Judge of the County Court of the County of York, upon the trial and conviction of the defendant on a charge of having stolen $3,000 in money, the property of Mary Heydon. The question submitted was whether there was any evidence upon which the defendant could properly be convicted.

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

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

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

FERGUSON, J.A., reading the judgment of the Court, said that the defendant was a solicitor, and the complainant, Mary Heydon, a client who had entrusted him with moneys for investment. She deposed that she had instructed him to invest in first mortgages on real estate only; but she was forced during the trial to recede from that position. It was satisfactorily established that she had authorised several other kinds of investments; also that part of the moneys received by the defendant had been lent to him.

Two days after the charge of theft had been laid against the defendant, he paid $550 to the complainant. The learned County Court Judge seemed to have treated that payment as an admission of guilt, although the uncontradicted evidence of the accused was that the $550 was raised from securities which he held in part for himself and in part for the complainant. He produced the securities and explained why he had not produced and handed them over at the time when a demand was made on him for an account. The County Court Judge gave no written reasons for his finding, but must have been of opinion that the failure to produce the securities prior to the laying of the charge, coupled with the payment of the $500, was in itself sufficient evidence to justify a conviction.

Counsel representing the Attorney-General, who relied on sec. 355 of the Criminal Code, appeared to doubt the sufficiency of the evidence.

In the opinion of the learned Justice of Appeal, in order to support a conviction under sec. 355 it is necessary for the Crown

to make out (a) a failure to account or pay, or (b) fraudulent conversion, or (c) fraudulent omission to account—in other words, where an account has been given, it must be found that prior defaults in giving an account were the result of fraudulent intent.

In this case, the accused has accounted, and there is no evidence to support a finding of fraudulent intent: Rex v. Mackay (1918), 29 Can. Crim. Cas. 194, 197.

The question submitted should be answered in the negative.

Conviction quashed.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*J. G. BUTTERWORTH & CO. LIMITED v. CITY OF OTTAWA.

*CITY OF OTTAWA v. J. G. BUTTERWORTH & CO. LIMITED.

Municipal Corporations—City By-law Passed in 1912 Requiring Coal to be Weighed on City Scales and Fees to be Paid—Powers of City Council—Municipal Act, 1903, secs. 326, 537 (1), 580 (9), 582—Repeal of sec. 582 by 3 & 4 Geo. V. ch. 43—Effect of—Erection of Weighing Machines within City Limits—Power to Lease—Power to Employ Weighmasters—Validity of Leases—Construction of By-law—Res Judicata—Compulsory Weighing and Imposition of Fees—Declaratory Judgment—Injunction—Right of City Corporation to Recover Fees for Weighing—Discontinuance of Weighing Station—Appeals—Costs.

Appeals by J. G. Butterworth & Co. Limited and J. G. Butterworth and cross-appeal by the Corporation of the City of Ottawa from the judgment of LATCHFORD, J., 15 O.W.N. 396, in four actions.

The appeals and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, J.A., MIDDLETON, J., and FERGUSON, J.A.

Taylor McVeity, for the company and Butterworth.

F. B. Proctor, for the city corporation.

The judgment of the Court was read by MEREDITH, C.J.O., who, after stating the facts, said that it was contended by counsel for the Butterworths that the sections and clauses of by-law 3358 which were attacked were invalid; that the city council had no

authority to establish weighing machines or to require that coal should be weighed on them, and still less authority to make it compulsory on coal-dealers to have the coal sold by them weighed by these machines; and it was contended for the corporation that the council had jurisdiction to enact the sections and clauses attacked.

It was held by this Court in Rex v. Butterworth (1917), 13 O.W.N. 263, that the construction of the by-law contended for by the Butterworths is its true construction; and that question was no longer open to discussion.

The learned Chief Justice said that the Court agreed with the view of Latchford, J., that sec. 582 of the Municipal Act, 3 Edw. VII. ch. 19, which was the statute in force when the by-law was passed, conferred upon the councils of cities power to do what the section provides for. To give effect to the contention of counsel for the Butterworths would be to read out of the section the words "or other convenient places," or to attribute to the Legislature the intention to limit the right of cities and towns, at all events, to erect and maintain weighing machines to erecting and maintaining them in villages—which was most unlikely and would be absurd. What was doubtless meant was, that the councils of townships, cities, towns, and villages might erect and maintain weighing machines at convenient places within their own limits and that township councils might erect and maintain them also in villages.

In the opinion of the Chief Justice, councils of cities, towns, and villages have, independently of the authority conferred by sec. 582, power to provide facilities for weighing coal, derived from sec. 580 (9) of the same Act. Sections 326 and 537 (1) might also be invoked in support of the existence of the power to establish weighing machines and to appoint weighmasters. In this connection, the Chief Justice, however, expressed no opinion as to the right of a council to make the use of weighing machines compulsory or to require persons who do not desire to make use of them to pay fees for such compulsory use.

It was argued for the Butterworths that the effect of the repeal, by the Municipal Act, 1913, 3 & 4 Geo. V. ch. 43, of sec. 582, and the re-enactment of it limiting its operation to township councils, was that, by sec. 411 (6), any by-law which had been passed under the authority of sec. 582 ceased to be operative when that legislation came into force.

It was, however, unnecessary to decide whether the provision of the by-law as to the imposition of fees ceased to be in force when the authority by virtue of which it was passed—assuming that the only authority was that conferred by sec. 582—was repealed. In view of the construction which had been given by

this Court to the by-law, the fact that the use by the Butterworth company of the weighing machines was not compulsory would be a sufficient reason for refusing to pronounce such a judgment.

That the Court ought not, in such a case as this, to pronounce a declaratory judgment was clear: Barraclough v. Brown, [1897] A.C. 615.

The claim for an injunction to restrain the enforcement of the by-law and the prosecution of the Butterworth company for infraction of it, properly failed—if the by-law was invalid, that defence was open to the company if it should be prosecuted for violating the provisions of the by-law.

The conclusion of Latchford, J., that the city corporation was entitled to recover the amount for which it obtained judgment in respect of the fees for weighing was correct.

Reference to Brice on Ultra Vires, 3rd ed., p. 652.

The claim of the Butterworths for possession of the weighing machines they had leased to the city corporation was properly dismissed.

There was no ground for awarding damages or an injunction in respect of the discontinuance of the weighing station at the St. Lawrence and Ottawa Railway depot.

The appeals of the Butterworths should be dismissed with costs; the cross-appeal should be allowed with costs, and the judgment in favour of the Butterworths reversed, and their first action dismissed but without costs.

Appeals dismissed; cross-appeal allowed.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*BARR v. TORONTO R.W. CO. AND CITY OF TORONTO.

Street Railway—Injury to Person Alighting from Car in Highway by Outward Swing of Rear Steps of Car—Negligence—Proximate Cause of Injury—Liability—Duty of Railway Company to Passenger Continuing until Place of Safety Reached.

Appeal by the defendant company from the judgment of MIDDLETON, J., 15 O.W.N. 192, 44 O.L.R. 232.

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

R. McKay, K.C., and G. S. Hodgson, for the appellant company.

William Proudfoot, K.C., and G. H. Gilday, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the view of Middleton, J., was that the obligations of the appellant company to the plaintiff who was injured as its passenger were ended when she reached a place of safety upon the road, and he rested his judgment upon an invasion by the appellant company of her rights as a traveller upon the highway, and his conclusion was that there was a duty resting upon the conductor of the car to see that "all is safe before he signals the motorman to round the curve."

The view as to the obligation terminating when the passenger reaches a place of safety was, in the opinion of the Chief Justice, too narrow. The obligation of the company was greater towards a passenger who had not completed her journey, but in order to do that had to transfer to another line, than it would be to a passenger who had completed his journey; but, even as to such a passenger, the company was bound to provide a stopping place at which the passenger could proceed to the sidewalk without having to pass through such a pool of water as existed at the usual place for crossing McCaul street, or subjecting him to the danger, before he had reached the sidewalk, assuming that he had not unnecessarily delayed in crossing, of being struck by a car when it was swinging round a curve such as existed at the stopping place.

The conductor and the motorman knew or ought to have known that their passengers would not, at all events, be likely to wade through the pool, but would do as the plaintiff did—proceed to the rear of the waggon in order to be able to pass dry-shod to the sidewalk. They also knew that the horses and waggon were where they were, and that the space between them and the car when it rounded the curve was so small that any one who was standing or walking in that space would inevitably be struck by the moving car; they were, therefore, guilty of negligence in starting the car without first making sure that the passengers who had left the car were not still between it and the waggon; and that negligence was the proximate cause of the injuries which the plaintiff received.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*FAULKNER v. FAULKNER.

Will—Testamentary Capacity—Capability at Time when Instructions Given—Will Executed three Days after Instructions Given and one Day before Death—Evidence—Appeal—Reversal of Findings of Trial Judge—Establishment of Will.

Appeal by the defendant from the judgment of MIDDLETON, J., 15 O.W.N. 330, 44 O.L.R. 634.

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

H. H. Dewart, K.C., for the appellant.

W. N. Tilley, K.C., and H. E. Irwin, K.C., for the plaintiff, respondent.

MACLAREN, J.A., read a judgment in which he referred to and distinguished Murphy v. Lamphier (1914), 31 O.L.R. 288, upon which the trial Judge in this case largely based his opinion.

After stating the facts and reviewing the evidence, the learned Justice of Appeal said that, in his opinion, the trial Judge had not attached sufficient importance to what took place on Tuesday afternoon, when the instructions for the will were given; and he did not allude to the fact that the testator, before his last illness, had told Dr. Forrest that he was going to leave his property to the defendant. Too much importance was attached to the fact that certain female relatives, to whom small legacies were left in the previous will drawn by Cameron, were not mentioned in the will now in question. He must have been dissatisfied with the first will when he destroyed it. These relatives were spoken of as "needy relatives," but there was no evidence as to their circumstances nor as to their number or degree of relationship; and, if they were needy, legacies ranging from $100 to $500, as stated by Mr. Cameron, would not go far to relieve them, and would be a petty amount out of an estate of more than $23,000.

The learned Justice of Appeal referred to other circumstances and facts appearing from the evidence which indicated that on the Tuesday the testator was in a condition to dispose of his property and to remember and call to mind those whom he wished to benefit; and the execution, on the Friday, of the document drawn in accordance with the dispositions for which instructions were given on the Tuesday, was to be upheld.

Parker v. Felgate (1883), 8 P.D. 171, approved in Perera v. Perera, [1901] A.C. 354, 361, referred to.

The judgment should be reversed and the action be dismissed with costs.

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

HODGINS, J.A., read a short judgment. He agreed with the conclusion that the will must be established. He drew attention to two cases in Canada where the Court had, in circumstances not entirely dissimilar, upheld wills: Menzies v. White (1862), 9 Gr. 574; McLaughlin v. McLellan (1896), 26 Can. S.C.R. 646.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 23RD, 1919.

*RE STUDEBAKER CORPORATION OF CANADA LIMITED AND CITY OF WINDSOR.

Assessment and Taxes—Business Assessment—Business of Manufacturer—Show-room and Sales-room Situated in City—Factory in another Place—Assessment by City—Assessment Act, R.S.O. 1914 ch. 195, sec. 10 (1) (d).

An appeal by the Studebaker Corporation of Canada Limited from an order of the Judge of the County Court of the County of Essex allowing an appeal from the decision of the Court of Revision of the City of Windsor as to the business assessment of the appellant corporation. The appeal was upon a special case stated by the Judge of the County Court under the Assessment Act.

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

A. J. Gordon, for the appellant corporation.

F. D. Davis, for the city corporation, respondent.

MEREDITH, C.J.O., in a written judgment, said that he was of opinion that, upon the facts as disclosed in the special case, the appellant corporation was properly assessed under cl. (*d*) of sub-sec. 1 of sec. 10 of the Assessment Act, R.S.O. 1914 ch. 195.

The business assessment is upon persons occupying or using land for the purpose of any business mentioned, or described in sec. 10, and the provision of cl. (*d*) is, that every person carrying on the business of a manufacturer shall be assessed for a sum equal to 60 per cent. of the assessed value of the land.

The appellant corporation was undoubtedly carrying on the business of a manufacturer; and the business carried on in Windsor was a part of that business. The appellant corporation's business had two branches, one its manufactory proper, and the other its show-room and sales-room, and both were integral parts of the business of a manufacturer carried on by the appellant corporation.

The appeal should be dismissed with costs.

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

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

Appeal dismissed with costs.

HIGH COURT DIVISION.

SUTHERLAND, J. JUNE 24TH, 1919.

*RE WALKER.

Alien Enemy—War Measures Act, 1914—Consolidated Orders respecting Trading with the Enemy—Order 28—Order Vesting Property of Alien Enemy Situated in Ontario in Custodian Appointed under Act—Public Policy—Order of Court of Foreign State—Comity of Nations.

Motion on behalf of the Secretary of State of Canada for an order vesting in the Minister of Finance and Receiver-General, as the custodian appointed under the Consolidated Orders respecting Trading with the Enemy, 1916, and conferring upon him power to get in, sue for, recover, receive, hold, and manage, o half of the assets situated in the Province of Ontario of the est e of Franklin Hiram Walker, deceased, on the grounds that one half of the assets belonged to or was held or managed for or on behalf of the Countess Ella Matuschka, an enemy, and that such vesting was expedient for the purposes of the Consolidated Orders.

The motion was made under Order 28 of the Consolidated Orders, passed pursuant to the War Measures Act, 1914.

The Countess Ella Matuschka was the daughter and only child of the deceased; she was married to a German, and was thus regarded as an alien enemy.

Franklin Hiram Walker lived in Detroit, in the State of Michigan; he made his will on the 14th June, 1916, and died there

three days later. His estate was inventoried at $3,762,397.90, of which $2,969,209.49 were assets within Ontario.

The will was a lengthy document—roughly, the estate was divided between the widow and daughter, but there were many trusts and provisions, and one peculiar provision by which the widow and daughter and the trustee—a Detroit trust company—were to be at liberty to vary the trusts and provisions of the will as they might agree. The will was proved in Michigan, and ancillary letters probate were granted in Ontario. The widow and daughter and trustee made an agreement dealing with the estate, and an order was made by the Judge of the Probate Court of the County of Wayne purporting to approve the agreement.

The motion was heard in Chambers but was treated as a Court motion.

W. N. Tilley, K.C., and Christopher C. Robinson, for the Secretary of State of Canada.

Glyn Osler, for the National Trust Company, ancillary administrator with the will annexed of the estate of the deceased in Ontario.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that he was of opinion that the Countess Matuschka was an alien enemy, to whom the War Measures Act, 1914, and the orders in council made thereunder applied; that there was in her, at the time of the death of her father, at least a beneficial interest which came under the scope and operation of the orders, and which had not been dealt with and transferred by what had been done elsewhere so as to escape therefrom. No theory of the comity of nations, which implies usually a favourable consideration and adoption by foreign Courts of judgments or orders granted in the Courts of domicile, could or should be carried so far as to require this Court to decline to make the order asked, in the circumstances of this case. Any such theory is subject to the essential modification or restriction that, if it runs counter to high public policy, effect cannot be given to it. What had been done in the State of Michigan came into conflict with public policy of great importance so far as Canada was concerned: Westlake's Private International Law, 15th ed. (1912), pp. 55, 308.

An order should be made in the terms suggested by the applicant.

If an appeal lay by virtue of the Judges' Orders Enforcement Act or otherwise, and if leave to appeal were desired, leave should be granted.

There should be no costs of the application.

SUTHERLAND, J., IN CHAMBERS. JUNE 26TH, 1919.

REX v. O'DONNELL.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Keeping Intoxicating Liquor in Place other than Private Dwelling House—Evidence—Question for Magistrate.

Motion to quash the conviction of the defendant, by the Police Magistrate for the Town of Mount Forest, for a second offence against the Ontario Temperance Act, viz., the unlawful keeping of intoxicating liquor upon his premises, not being his private dwelling house, contrary to sec. 41 of the Act.

P. Kerwin, for the defendant.
J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J., in a written judgment, said that the defendant had been, on the 30th September, 1917, convicted of unlawfully keeping liquor for sale in a house in the town of Mount Forest, then occupied by his mother, with whom he was living. She had since died, and her daughter, May O'Donnell, the sister of the defendant, had occupied the house since her death.

The defendant was the owner of another building in the town, and the charge upon which the second conviction was based was that of unlawfully keeping liquor in that building, being a place other than his dwelling house.

Upon the trial he admitted the ownership of the building where the liquor was found, and the finding of it there.

The magistrate came to the conclusion, on the whole evidence, that the building was not, as the defendant testified, a private dwelling house and occupied by him as such. He accordingly convicted the accused as charged, and, this being his second offence under the Act, imposed a penalty of imprisonment in the common gaol at the city of Guelph, at hard labour, for 12 months.

The defendant moved to quash the conviction, upon the ground that there was no evidence that he had liquor in a place other than the private dwelling in which he lived, and that it was proved that the house referred to was the private dwelling in which he lived.

There was ample evidence to warrant the finding of the magistrate that the building was not the private dwelling house of the defendant, even if an alleged error in the taking down of his testimony were corrected as he suggested it should be. The magistrate chose to believe others rather than the defendant, and their

testimony was sufficient, if believed, to warrant the finding. The building was, as used, a place other than a private dwelling house. The defendant was in fact not residing there, but elsewhere.

The conviction was right and should not be disturbed.

Motion dismissed with costs.

MASTEN, J. JUNE 26TH, 1919.

RE RYAN.

Will—Distribution of Estate Postponed for "15 Years from this Date"—Republication of Will by Codicil three Years after Execution of Will—Effect of, as to Date of Distribution.

Motion by the executors of the will of Margaret Isabella Ryan, deceased, for an order declaring the true interpretation of the will and a codicil thereto.

The motion was heard in the Weekly Court, Toronto.

E. L. Middleton, for the executors.

R. S. Robertson, for two adult beneficiaries.

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

MASTEN, J., in a written judgment, said that by clauses 11 and 12 of her will the testatrix provided as follows:—

"11. The rest and residue of my estate not above disposed of my trustees shall hold for 15 years from this date for my children who may survive me and pay them the income in equal shares during such 15 years if they so long live the issue however of any such child of mine who may die to stand in the parent's place.

"12. At the expiration of said 15 years my trustees shall distribute the said rest and residue of capital of my estate among my children equally the issue of any deceased child to take the share of my child who may so die."

This will was executed on the 25th April, 1903. On the 24th April, 1906, the deceased executed a codicil to the will as follows:—

"The house and premises 621 Jarvis street Toronto I hereby give to my daughter Isabel Margaret Ryan absolutely, this gift to take effect at once on my death.

"I hereby give to my sister Catharine Ryan widow of the late William Ryan the sum of $1,000 and to my half-sister Emily Thompson the sum of $1,000.

"My said will is varied as above and in all other respects is confirmed."

The suggestion was that, the codicil having been executed on the 24th April, 1906, and the will having been republished of that date, the period of 15 years mentioned in the will runs from the 24th April, 1906, and not from the 25th April, 1903.

The learned Judge said that it was perfectly clear on the cases referred to in the argument that for many purposes the republication of a will may affect the property to which a devise or bequest in the will applies; but the principle established by these cases does not affect the question raised or go far enough to accomplish the suggested result.

To hold that the 15 years runs from 1906 would be to defeat the testatrix's intention. It is not certain that such a result would have eventuated even if the testatrix had provided for the distribution of the rest and residue of the capital of her estate "at the expiry of 15 years from the date of this my will." But, when she directs that such distribution shall take place "15 years from this date," she says, in effect, that the distribution shall take place on the 25th April, 1918; and the republication of the will by the codicil does not alter the date of distribution.

If this view is not correct, In re Park, [1910] 2 Ch. 322, at pp. 327 and 328, shews that it is not compulsory in considering a will to treat it for all and every purpose as having been made at the date of the codicil. The extraordinary results which may flow from such a holding are well illustrated in that case; but, for the reason stated above, it is not necessary to resort to the reasoning of In re Park in order to support the view that distribution should take place on the 25th April, 1918.

An order should go answering the questions propounded in the manner indicated. Costs of all parties out of the estate.

ROSE, J. JUNE 26TH, 1919.

STOTTS v. STOTTS.

Will—Testamentary Capacity—Due Execution—Evidence—Undue Influence—Burden of Proof.

An action to recover possession of land.

The action was tried without a jury at a Toronto sittings.

E. D. Armour, K.C., H. W. Mickle, and James McCullough, for the plaintiffs.

T. F. Slattery, for the defendants.

ROSE, J., in a written judgment, said that the surviving sons and daughters of W. W. Stotts, deceased, brought this action to recover possession of land of W. W. Stotts, which was held by the defendants, who were the sons of a deceased son of W. W. Stotts. The defence was that the land passed to the defendants under the will of the widow of W. W. Stotts, who had acquired title as against all the plaintiffs by possession, and as against some of them by deed; and the question to be determined was whether that will was valid.

The issue as to the testamentary capacity of the testatrix must be decided in favour of the defendants. The evidence as to the state of mind of Mrs. Stotts during her last illness—which, it was true, began very shortly after the making of the will—did not weaken the effect of the evidence of one Fitzpatrick, a law-student, who was sent by the solicitor who drew the will to see to its execution, and who said that, on the occasion of the signing of a will which was defectively executed, only a few days before the will in question, and which, because of such defective execution, was replaced by the will in question, the testatrix told him that she desired the land to go to her son, the father of the defendants, for life, and then to his children—which was the result under the will. It was argued that if, on the occasion of the signing of the first will, Mrs. Stotts had understood the effect of the document when it was read to her, she would simply have expressed herself as satisfied with it, and would not have made the statement mentioned as to what her desire was. That would not necessarily be so; but, even if it was so, the question was not whether she understood the document signed on that occasion, but whether she was of sound and disposing mind; and her ability to express her wishes clearly on that day was strong evidence of testamentry capacity on the day of the execution of the will in question, in the absence of any evidence of any change having occurred during the short intervening time.

The issue as to the manner of execution of the will, including the reading of it to the testatrix and her apparent understanding of it, must be decided in favour of the defendants, upon the evidence of one Whitehead, who was an attesting witness.

The testatrix was old, illiterate, crippled, and in feeble health: she lived with her son Charles, now deceased, and his two sons, the defendants: the defendant George Stotts gave the instructions for the will; and the first will (the one which was defectively executed) was drawn before any communication was had between the testatrix and the solicitor—indeed the solicitor had no communication with her except through Mr. Fitzpatrick.

The circumstances being as stated, the question for determination was, whether these defendants, who claimed under a

will which was prepared on the instructions of one of them, had done all that they were required to do when they had proved, as they had, that the testatrix was capable of making a will, that the will was duly executed, and that the testatrix understood that the document which she executed gave effect to the wishes which she had expressed to Mr. Fitzpatrick, or whether they must go further and prove that there was, in fact, no exercise of undue influence.

According to the judgment of the Appellate Division in Wannamaker v. Livingston (1918), 43 O.L.R. 243, the result of the cases upon this point is that, when persons propounding a will, in circumstances such as exist in this case, have proved what I take these defendants to have proved, the onus is shifted, and it is for those claiming against the will to establish that there was in fact the exercise of undue influence. That had not been done, and there should be judgment in favour of the defendants with costs.

WALKER v. MORRIS—FALCONBRIDGE, C.J.K.B.—JUNE 27.

Vendor and Purchaser—Agreement for Sale of Land—Specific Performance.]—Action for specific performance of an agreement for the sale of land, tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that there was no defence to the action. The only point suggested at the trial was not pleaded, and, if it had been, would not have constituted a defence. Judgment for specific performance with costs. P. H. Bartlett, for the plaintiff. J. M. McEvoy, for the defendant.

HEYD v. GROSS—SUTHERLAND, J.—JUNE 27.

Lien—Advances Made and Services Rendered in Respect of Real Property—Evidence—Conflict—Findings of Trial Judge—Lien for Advances, Costs, and Commissions—Judgment for Payment and in Default Realisation by Sale—Reference for Ascertainment of Amount Due—Costs.]—Action by Norman G. Heyd and Louis F. Heyd against Gussie Gross, Hyman Gross, and Samuel Rosenberg, to recover moneys alleged to have been advanced by the plaintiffs at the request of the defendants and remuneration for services performed by the plaintiffs for the defendants. The action was tried without a jury at a Toronto sittings. SUTHERLAND, J., in a written judgment, said that the action arose out of dealings by the parties with a property known as 54 and 56 Kensington avenue, in the city of Toronto. After setting out the facts and reviewing the evidence, the learned Judge said that the documents in evidence were numerous, and it was well-nigh impossible to understand or reconcile them. The oral testimony also was conflicting.

He had come to the conclusion that the testimony given by the plaintiff Norman G. Heyd was in the main to be accepted and relied upon, and that wherever he was contradicted by other witnesses his evidence was to be preferred. The plaintiffs should have judgment against the defendants for all advances made in respect to the property referred to, and for costs and commissions in respect of services rendered since the 15th January, 1915, with interest at 10 per cent. per annum, less amounts received for rents collected. There should be a reference to take the accounts if the parties cannot agree. Upon the amount being ascertained, the defendants are to pay the same forthwith; until payment the plaintiffs are to have a lien upon the property, subject to the existing mortgages; in default of payment, the plaintiffs are to be at liberty to sell the property, subject to the mortgages; the plaintiffs are to have their costs of the action against the defendants. D. O. Cameron, for the plaintiffs. W. J. McWhinney, for the defendants Gussie and Hyman Gross. J. H. Hoffman, for the defendant Rosenberg.

GLIDDON v. MCKINNON—SUTHERLAND, J.—JUNE 28.

Parent and Child—Conveyance of Land by Father to Daughter—Action to Set aside—Allegations of Incompetence, Undue Influence, and Improvidence—Failure to Substantiate upon Evidence at Trial—Covenants of Daughter in Deed—Direction that Daughter Execute Deed—Rectification of Insurance Policies—Dismissal of Action—Costs.]—In this action the plaintiff, a man of 78 years of age, sought to set aside a conveyance of land made by him on the 30th April, 1918, to his daughter, the defendant McKinnon. The action was tried without a jury at Barrie. SUTHERLAND, J., in a written judgment, said that the plaintiff alleged that he was physically and mentally unfit to transact business at the time the conveyance was made and unable to protect himself in the transaction; that he executed the deed while under the influence of the defendant McKinnon; and that the transaction was an improvident one. The learned Judge, upon a review of the evidence, found against these allegations of the plaintiff; but was of opinion that the defendant McKinnon should have executed the conveyance, as she was bound by the terms of it to make certain payments, etc., and also that she had not complied with the terms of the conveyance in respect of certain policies of fire insurance. Upon the defendant McKinnon making the insurance policies conform to the covenant contained in the deed, and executing the deed, so as to put beyond all doubt the question of her being bound by the covenants therein contained, the action should be dismissed with costs (if asked). W. A. J. Bell, K.C., for the plaintiff. J. MacInnes, for the defendants.