THE

ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, FEBRUARY 19, 1914. NO. 13

HON. MR. JUSTICE MIDDLETON. JANUARY 14TH, 1914.

RE MINING LOCATIONS, D. 199, ETC.

5 O. W. N. 756.

Mines and Minerals—Supplementary Revenue Act—7 Edw. VII. c. 9 as Amended by 1 Geo. V., c. 17, s. 3—Summons under—Application to Make Absolute—Requirements of Notice—Co-owners—Who are—Dismissal of Application.

MIDDLETON, J., *held*, that a summons issued under the Supplementary Revenue Act, 7 Edw. VII., c. 9, as amended by 1 Geo. V., c. 17, s. 3, should specify the amount of taxes due upon the locations and the exact amount payable by the addressee, should require payment within three months, and should name a day after such three months when cause could be shewn before a Judge why the summons should not be made absolute.

That the statute only applies to co-owners and this does not cover the case of mortgagor and mortgagee.

Application by one A. M. Hay to make absolute a summons issued under sec. 20 (*a*) of the Supplementary Revenue Act (1907), 7 Edw. VII. ch. 9, as amended by 1 Geo. V. ch. 17, sec. 3.

E. W. Wright, for the applicant.

HON. MR. JUSTICE MIDDLETON: — The order served was made by my brother Lennox on 31st July last. I have spoken to him about the matter, and he tells me that an application was made before him for a summons under the statute, but that he is in no way responsible for the form the proceedings have taken.

The so-called summons is in the form of a mandatory order directed to the owners of the mining locations in question, directing them to "make payment of the taxes due under sec. 16 of the Supplementary Revenue Act 1907, as amended by 1 Geo. V. ch. 17, within three months from the service of a copy of this order."

Then follow provisions for service by posting up in the Land Titles office at Kenora, and for sending copies by registered mail. Clause 3 is: "And it is further ordered that the return hereto be made before the presiding Judge in Chambers at Osgoode Hall on or before the 13th day of January, 1914."

I do not think that this is in any sense a compliance with the statute. I think the summons should specify the amount of taxes due upon the locations and should specify clearly the precise sum to be paid by the respective persons to whom the summons is addressed. The summons should then require payment within three months, and name a day after the expiry of the three months when cause must be shewn before the Judge issuing the summons, to an application then to be made to vest the interest of the delinquent co-owner in the location.

There is another difficulty in the applicant's way. He does not bring himself within the statute; for the statute only applies when it is shewn that lands are held by two or more co-owners—an expression which is wide enough to cover the case of joint tenants, tenants in common, and co-partners.

Here the material put in shews, as to five parcels, that the lands are owned by the Cedar Island Gold Mining Company. Against them all, Ahn has registered a caution. Against the third there is a charge in favour of the Dominion Gold Mining and Reduction Company for the sum of $500, registered prior to Ahn's caution.

As to the sixth parcel, the land is shewn to be owned by one Engledue, and against it a caution has been registered by Hay, the applicant. This is supplemented by an affidavit by Mr. Hay, shewing that he had an agreement with Engledue, under which he was entitled to a one-third interest in the lease which Engledue had applied for with respect to this parcel.

As to the parcels owned by the Cedar Island Gold Mining Company, Hay claims to be the owner of eight thousand shares in the company, and to have paid all the taxes.

Both the Cedar Island Gold Mining Company and the Dominion Gold Mining Company have gone into liquidation. The nature of Ahn's claim is not disclosed.

Clearly, the statute cannot apply, save possibly as to the lots in which Engledue is interested, and it is doubtful if

it applies even there. A mortgagor and mortgagee are not co-owners. Certainly one summons should not be issued with respect to all the parcels.

The material filed does not shew what taxes were paid. The applicant contents himself by saying "all the taxes."

On this material, apart from the technical objections, the order sought cannot be made. To avoid difficulty in the future under this statute, I have supplied the Clerk in Chambers with a form of summons, which may be found of use.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 26TH, 1914.

BROOKS v. MUNDY.

5 O. W. N. 795.

Mechanics' Liens—Claim of Sub-contractor—Abandonment by Contractor—Owner not Indebted to Contractor — Mechanics' and Wage-Earners' Lien Act 7 Edw. VII., c. 69, s. 6, 10, 12—Retention by Owner—Effect of Non-Retention—Neglect to File Lien within 30 Days of Abandonment of Contract—Dismissal of Action—Appeal.

SUP. CT. ACT. (1st App. Div.) *held*, if a sub-contractor did not file a mechanic's lien against the lands for goods supplied within thirty days of the abandonment of a contract by a contractor, his right was barred even though the owner had not complied with s. 12 of the Act and retained 20 per cent. of the value of the work and materials furnished upon such contract for the period of 30 days from such abandonment.

Judgment of Local Master at Ottawa reversed with costs.

Appeal by the defendant Mundy from a judgment of the Local Master at Ottawa dated 11th November, 1913, in a mechanic's lien action.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX.

J. G. O'Donoghue, for appellant.

J. R. Code, for respondent.

HON. SIR WM. MEREDITH, C.J.O.: — The appellant employed his co-defendant Gagnon to build four tenement houses for $5,650, and Gagnon sub-let the plastering work to the

respondent. Gagnon abandoned the work on the 16th February, 1913, leaving the work he had contracted to do uncompleted, and it was afterwards completed by the appellant, whose outlay in doing so exceeded the amount of the contract price, which had not been paid to Gagnon.

The respondent had by the 1st February, 1913, completed the work he had undertaken to do, except such patching as it was his duty to do after the carpenters had completed their work, and on 18th April following he sent men to do this patching. The men did some little work, when they were stopped from continuing what they had been sent to do, by the appellant. The lien was registered on the 15th May, 1913.

The Master gave judgment for the respondent upon the ground that sec. 6 of the Mechanics and Wage Earners Lien Act (10 Edw. VII. ch. 69) gave to the respondent a lien for the price of his work on the land of the appellant; that this lien continued to exist until the expiry of 30 days from the completion of the respondent's work, that the work was not completed until the 18th April, 1913, and that the lien having been registered on the 15th May, 1913, was registered in due time.

The Master appears to have overlooked the fact that by sec. 10 the lien of the respondent did not attach so as to make the appellant liable for a greater sum that the sum payable by him to Gagnon, and that, as there is nothing owing by the appellant to Gagnon, unless the respondent is entitled to look to the 20 per cent. which by sec. 12 it was the duty of the appellant to retain, there is nothing upon which the lien can attach.

All that the appellant was required by sec. 12 to do was to retain for the period of thirty days after the completion or abandonment of the contract 20 per cent. of the value of the work, service and materials actually done, placed or furnished, as mentioned in sec. 6, such value to be calculated on the basis of the contract price, and at the expiration of thirty days from the abandonment by Gagnon of his contract the duty of the appellant to retain the percentage was at an end, unless in the meantime proceedings had been commenced "to enforce any lien or charge against" it. Sub-sec. 5.

The fact, if it be a fact, that the appellant did not retain any percentage of the value of Gagnon's work for thirty days cannot put him in any worse position than if he had done so.

The percentage which the appellant was required to retain was a fund to answer the liens of such of the sub-contractors and wage-earners as should take within the prescribed time proceedings to enforce their liens, but not to answer any other liens, and, not having taken proceedings to enforce his lien within thirty days after the abandonment of the contract by Gagnon, the appellant has no right to resort to the fund.

The appeal should be allowed with costs, and the judgment against the appellant should be reversed and judgment be entered dismissing the action as against him with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX, agreed.

HON. MR. JUSTICE MIDDLETON. JANUARY 23RD, 1914.

HAIR v. TOWN OF MEAFORD.

5 O. W. N. 783.

Municipal Corporations—Local Option By-law—Action to Restrain Council from Passing—Liquor License Act, s. 143a—Motion for Interim Injunction—Balance of Convenience — Terms—Speedy Trial.

MIDDLETON, J., granted an interim injunction until the trial restraining a town council from passing a local option by-law where the refusal of the injunction and a consequent passing of such by-law would have prejudiced plaintiff in his action.

Motion to continue *ex parte* injunction restraining passing by council of a local option by-law.

A. E. H. Creswicke, K.C., for plaintiff.

W. E. Raney, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON: — To avoid misunderstanding, I think it better to place in writing my reasons for the order made. A speedy trial under Rule 221 and injunction continued meantime.

A by-law was submitted in 1913 and did not receive the approval of at least three-fifths of the electors voting thereon, and the statute provides that no similar by-law shall be submitted for three years.

By a consent judgment in an action brought by a ratepayer it was declared that notwithstanding this statute a

similar by-law might be again submitted, this being based upon the theory that such irregularities took place in the election that had the by-law been passed in 1913 it would have been quashed.

This proceeding is attacked—it is contended that there is no legislative sanction for the exception sought to be grafted onto the statutory prohibition. The case seems to me to differ materially from cases in which an injunction has been refused when it has been suggested that a by-law if passed would be quashed by reason of irregularities.

The parties would not consent to turn this motion into a motion for judgment, and as a trial can easily be had before the council is called on to act, I thought the balance of convenience indicated an early trial as the best course, leaving the whole matter to be dealt with at the trial and without in any way determining the questions to be then dealt with, *inter alia,* the right of the plaintiff to an injunction.

To refuse the motion would be to usurp the functions of the trial Judge as the by-law would be passed in the interval and he could then do nothing.

The position of the plaintiff might be prejudiced as the very extraordinary jurisdiction conferred by sec. 143a might be held to attach even though there never was any right to submit the by-law at all. Indeed, it was stated by the plaintiff's counsel that the licenses had already been cancelled, presumably under this section, though no local option by-law has been passed at all, much less quashed on a "technical ground."

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 20TH, 1914.

LIVERMORE v. GERRY.

5 O. W. N 782.

Negligence—Master and Servant—Injury by Circular Saw—Findings of Jury—Contributory Negligence — Damages — Quantum of—Costs.

FALCONBRIDGE, C.J.K.B., dismissed an action brought by a workman against his employer for damages sustained by reason of the operation of a circular saw, upon the findings of the jury that the plaintiff was guilty of contributory negligence.

Action by workman for injuries caused by circular saw, tried at London. The jury answered questions as follows:—

"1. Were the injuries which the plaintiff sustained caused by any negligence of the defendants? Yes.

2. If so, wherein did such negligence consist? In not having the machine properly guarded.

3. Was the machine a dangerous machine so that it ought to have been, as far as practicable, securely guarded? Yes.

4. If you answer "Yes" to the last question, was it as far as practicable, securely guarded? No.

5. Was the plaintiff guilty of negligence which caused the accident, or so contributed to it that but for his negligence the accident would not have happened? Yes.

6. If you answer "Yes" to the last question, in what did his negligence consist? In not seeing that the machine was properly guarded.

7. Or, was the casualty which resulted in the plaintiff's injuries a mere accident for which no one is responsible? No.

8. At what sum do you assess the amount of compensation to be awarded to the plaintiff in case he should be held entitled to recover? The sum of $85."

N. P. Graydon, for plaintiff.

G. S. Gibbons, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Their answer to the sixth question amounts to a finding that there was at hand a "splitter" or "divider" which plaintiff could have used as a kind of guard for the saw, if he had been so inclined. There was abundant evidence to support such finding.

It is evident from the amount of damages which they have awarded, $85, being about half of the damage actually proved, that there was an effort on the part of the jury, unconsciously, to carry out the Quebec rule and make plaintiff bear part of his own damage, so that I should have been glad if I could have seen my way to carry out their apparent wishes in entering the verdict, but their answer to the question regarding plaintiff's negligence inexorably prevents any recovery by plaintiff under our law.

In any event it would have been a hollow victory for plaintiff as I could not have certified to prevent a set off of costs.

I therefore, dismiss the action with costs, if exacted.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JANUARY 19TH, 1914.

WINNIFRITH v. FINKELMAN.

5 O. W. N. 781.

Parties—Addition of Unwilling Plaintiffs Sought—Contract by Agent in His Own Name—Undisclosed Principal—Right of Agent to Sue as Real Plaintiff—Counterclaim—Right to Add Principal in —Dismissal of Motion.

MIDDLETON, J., *held*, that a plaintiff cannot be added in an action against his will, and that an agent with whom a contract is made in his own name is entitled to sue upon it, and is a real not a nominal plaintiff.

Murray v. *Wurtele*, 19 P. R. 288, distinguished.

Judgment of MASTER-IN-CHAMBERS, confirmed.

Appeal by the defendant against the order of the Master-in-Chambers refusing to add, as parties plaintiff, the National Trust Company and the Toronto Railway Co.

J. Grayson Smith, for the defendant.

F. McCarthy, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—In the form in which this motion is launched it is quite impossible for it to succeed. A plaintiff cannot be added against his will. The fundamental difficulty in the way of the applicant is an entire misconception of the situation.

A contract was made between the plaintiff and one Vandewater, by which Vandewater agreed to sell to the plaintiff certain property for $20,850. At Vandewater's request $1,000, part of this consideration, was paid to the defendants. Vandewater refused to give a deed, yet the defendants refused to give up the money; and this action is brought.

Upon the evidence there is no doubt that in entering into the contract the plaintiff was acting as agent for the National Trust Co., or its "client." Mr. Rundle, manager of the Trust Co., in effect so states in his letter of the 28th November. But where the contract is entered into with an agent in his own name he has a right to sue upon it. The fact that he is a mere trustee does not make him a nominal plaintiff in any real sense of that word. None of the cases cited in any way support the appellant's contention.

Where, as in *Murray* v. *Wurtele*, 19 P. R. 288, the plaintiff, pending litigation, parts with his entire interest in the

subject matter of the litigation to another, it is plainly contrary to the practice of the Court to allow that other to continue the litigation without himself coming before the Court and assuming responsibility for costs. But where the right of action is vested in the plaintiff, because the defendant's contract was made with him, the action cannot be stayed merely because it is shewn that he is in truth an agent for a principal, either disclosed or undisclosed.

Mr. Smith states his intention to counterclaim for specific performance. If he does so, he can, if he chooses, select his own defendants; and all parties then being before the Court, he can be protected from any injustice in the matter of costs when the facts are developed at the hearing.

The appeal will be dismissed with costs to the plaintiff in any event.

HON. MR. JUSTICE LENNOX. JANUARY 13TH, 1914.

RE WILSON AND HOLLAND.

5 O. W. N. 768.

Vendor and Purchaser—Application by Vendor for Declaration that Title Satisfactory—Further Evidence—Discharge of Mortgage—Costs.

LENNOX, J., *held*, in an application under the Vendors and Purchasers Act that the vendor, subject to the obtaining of certain further documents and evidence had made a good title.

Application by a vendor under the Vendors and Purchasers Act, for a declaration that he had shewn a good title as against the purchaser's requisitions.

H. D. McCormick, for vendor.

A. W. Greene, for purchaser.

HON. MR. JUSTICE LENNOX:—Upon the argument the only requisitions to which the purchaser's solicitor appeared to attach importance were numbers 2 and 8. As to 8, nothing was said beyond the fact that it was not abandoned. As to mortgages 2589 and 3085, there mentioned, it would appear to be proper that discharges of these should be obtained. The same is to be said as to number 3959 unless the title to the mortgage vested in Claude McLaughlin and

merged in the fee under 18962. No explanation was addressed to me so that this is a mere surmise suggested by the abstract. As to registration numbers 4002 and 18124 the vendor's answer (to 3 and 8) seems to be sufficient. Requisition number 9 was not spoken of at all, but if it has not been disposed of I think the vendor's answer as to this should be verified. Counsel for purchaser said he had not seen the declaration as to number 5. I have not seen it and so cannot make a declaration as to it. All questions as to the other requisitions except as to the possible title of Alexander Christie, had been satisfactorily met. Having regard to the length of time which has elapsed, the character of the property, and the nature of the occupation, I think requisition number 2 is sufficiently answered and the title should be accepted as to this. I do not detect anything vague or indefinite in Lamb's affidavit. I read the 4th paragraph of the vendor's affidavit as saying that he purchased "on the 30th day of December, A.D. 1913," with Shaver. This does not shew what this date should be. This affidavit should be amended and when the title is accepted and the transaction about to be closed, the purchaser will be at liberty to take the affidavits off the files—giving a receipt therefor—as vouchers for his title.

The vendor will pay the costs of this application.

HON. MR. JUSTICE MIDDLETON, IN CHRS. JAN. 14TH, 1914.

RE NORTHERN HARDWOOD LUMBER CO. & SHIELDS.

5 O W. N. 757.

Division Courts—Trial in County of Plaintiffs' Residence—Lack of Jurisdiction—Notice Disputing — Failure to Appear at Trial—Judgment and Execution—Motion for Prohibition—Good Defence Shewn by Material—Order Made—Costs.

MIDDLETON, J., *held*, that where an action was brought in a Division Court which had not jurisdiction and defendants, while filing a notice disputing the jurisdiction did not attend the trial, a judgment being given against them, that an order for prohibition should be granted as the dependants had disclosed in their affidavits a good *primâ facie* defence to the action on the merits.

Canadian Oil Cos. v. *McConnell*, 27 O. L. R. 549, distinguished.

Motion for prohibition to the first Division Court of the County of Grey. Argued 9th January, 1914.

F. Aylesworth, for the defendant.

T. L. Monahan, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Under a contract made at Alviston in the County of Lambton, the defendants, who reside at Mosa, in the County of Middlesex, contracted to sell certain lumber to the plaintiffs, whose head office is at Owen Sound. The lumber was not delivered. Action is now brought to recover $82.50, damages for this alleged breach of contract. A notice disputing the territorial jurisdiction of the Court was duly filed. Defendants, assuming that the action would be transferred, did not attend the Court. Judgment was given for the plaintiff, and execution was ultimately issued. The money has been paid into Court, but not yet paid over.

It must be conceded that the Owen Sound Court had under these circumstances no jurisdiction.

Upon the argument the usual cases were cited.

I do not desire to depart in any way from what I said in *Canadian Oil Companies* v. *McConnell*, 27 O. L. R. 549; but I think the case in hand differs from that in that here it appears to me to be sufficiently shewn that there is a real case to try.

Therefore, exercising the discretion that I have, I grant the prohibition; limited, however, in such a way as not to prevent an order being made to transfer the action to the proper Court, where it may be tried upon its merits.

The money in Court should remain as security for the plaintiff's recovery if they succeed at the trial; and, as the whole trouble has been brought about by the negligence of the defendants in not appearing at the hearing, I give no costs of the motion. I regret that I have not power to make the payments of costs a condition of the making of the order, though there is perhaps enough in the case to indicate that this would be unduly severe.

HON. MR. JUSTICE MIDDLETON. JANUARY 27TH, 1914.

RE WALKER. v. WILSON.

5 O. W. N. 802.

Division Courts—Motion for Prohibition—Lack of Jurisdiction—Motion Premature—No Motion for Transfer Made — Question not Dealt with in Division Court—Mere Irregularity—Dismissal of Motion.

MIDDLETON, J., *held*, that a motion to prohibit a Division Court upon the ground of absence of jurisdiction should not be made until a motion in the Division Court for a transfer has been made and refused or until the question of jurisdiction has been dealt with at the trial.

Watson v. *Wolverton*, 22 O. R. 586, and *Hill* v. *Hicks*, 28 O. R. 390, followed.

That prohibition will not lie for a mere irregularity in the proceedings in a Division Court.

Motion for prohibition to the Fourth Division Court of the County of Haldimand. Argued 20th January, 1914. The cause of action did not arise in this division. Neither defendant resides there, so the Court had no jurisdiction.

J. B. Mackenzie, for the defendant, Wilson.

J. H. Spence, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The defendant duly filed a notice disputing the claim and disputing the jurisdiction. The summons was for a Court sitting on the 7th January 1914. Without making any application to transfer, a motion for prohibition was launched by the solicitor for the defendant Wilson. On the return of the motion the absence of jurisdiction is admitted, the plaintiff expressing his intention to move before a Division Court Judge for transfer to a Court which has jurisdiction; but objection is taken to this motion as premature; the plaintiff contending that until the motion in the Division Court for a transfer has been made and refused or until the question of jurisdiction has been discussed and dealt with at the trial, a motion for prohibition cannot be made.

This is the effect of the judgment in *Watson* v. *Wolverton*, 22 O. R. 586 (note) and *Hill* v. *Hicks*, 28 O. R. 390.

It is manifestly most inconvenient that a motion of this type, where the expense is entrely disproportionate to the amount involved, should be launched where the Division

Court will, without expense, set the matter right. The proceedings in the Division Court are not entirely without jurisdiction, as the Judge has power to transfer the case to the proper Court.

Objection is also taken to the form of the summons. It is possibly not entirely accurate, but the defendant has waived this by entering his dispute. Besides, prohibition will not lie for a mere irregularity in the proceedings in the Division Court, and nothing more than an irregularity exists here. The motion is dismissed with costs.

HON. MR. JUSTICE MIDDLETON. JANUARY 27TH, 1914.

REX v. FRIZELL.

5 O. W. N. 801.

Criminal Law—Procedure—Conviction for Receiving Stolen Goods—Summary Conviction—Criminal Code, ss. 771, 781, 1035—Confusion with Sections Relative to Summary Trial of Indictable Offences—Quashing of Conviction in Part—Costs.

MIDDLETON, J., *held*, that s. 781 of the Criminal Code does not apply to summary convictions but only to the summary trial of indictable offences.

Motion by the defendant to quash a magistrate's conviction.

H. E. Rose, K.C., for Frizell.

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

HON. MR. JUSTICE MIDDLETON:—The magistrate has, I think, fallen into serious but not unnatural error in the construction of the Criminal Code. The accused was charged with receiving stolen goods, under sec. 401 of the Code, and became liable on summary conviction to the same penalty as a thief. Part 15 of the Criminal Code deals with summary conviction. It is confined to secs. 705 to 770. The magistrate has apparently thought that he was justified in acting under sec. 781, which is not applicable to summary conviction but relates only to the summary trial of indictable offences. That is plain by reference to the section itself. The words "summarily tried" and the reference to sec. 771 so indicate. None of the sections in part 16 have application to proceedings before Justices under part 15.

Section 1,035 clearly has no application, as this is confined to the summary trial of indictable offences under part 16 and the trial of indictable offences in the ordinary way.

The case is one in which the conviction should be amended by striking out the provisions relating to the fine of $100. There should be no costs. The apparent hardship of this is lessened when it is borne in mind that if the magistrate had known the true limitation of his powers he would probably have imposed a much more severe imprisonment.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JANUARY 23RD, 1914.

LEAR v. CANADIAN WESTINGHOUSE CO.

5 O. W. N. 769.

Negligence—Master and Servant—Negligence of Foreman—Fellow-Servant—Common Law Liability—Dismissal of Action.

SUP. CT. ONT. (2nd App. Div.) *held*, that plaintiff, a workman in defendants' employ could not recover at common law for injuries sustained by him through lifting a heavy plate under orders of a foreman, owing to the doctrine of common employment.
Young v. *Hoffman*, [1907] 2 K. B. 646, referred to.

Appeal by the plaintiff from the judgment of the senior Judge of the County Court of the County of Wentworth, in favour of defendants in an action for damages for injury sustained by the plaintiff while working for the defendants in their factory, in attempting to hold up a heavy plate, through the alleged negligence of the defendants.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR JOHN BOYD, C. HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE MIDDLETON and HON. MR. JUSTICE LEITCH.

C. W. Bell, for appellant.

S. F. Washington, K.C., for respondent.

HON. SIR JOHN BOYD, C.:—The plaintiff cannot recover at Common Law. There was no defect in the works or appliances; a crane was provided for the hoisting up of

large plates; the smaller ones were handled by men called in for the occasion from other work. It was left to the discretion of the foreman as to how many men should be employed in lifting the smaller plates, and if he erred in judgment or was negligent in putting on the men too heavy a load it was the fault of the foreman who was no more than a fellow servant, and so (as before the Workmen's Compensation Act) the master was not liable. The judgment should be affirmed. No costs.

Young v. *Hoffman*, [1907] 2 K. B. 646.

It would be well to verify the weight of the small plate: to the man who lifted and strained himself it seemed half a ton: to the foreman who looked on, about 300 pounds; the truth probably lies between.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE MIDDLETON, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE LENNOX. JANUARY 13TH, 1914.

LANGWORTHY v. McVICAR.

5 O. W. N. 767.

Husband and Wife—Validity of Alleged Marriage in Issue—Collaterally in Action—Right of Court to Enquire into—Chamber Order—Leave to Appeal Refused—Con. Rule. 507.

LENNOX, J., refused leave to appeal from an order refusing to strike out of certain defences herein an allegation that the applicant was not legally married to a testator holding that the Court had power to enquire into the validity of alleged marriages when it incidentally or collaterally became necessary to do so.

Re A. B. L. R. 1 P. & D. 559 and *Prowd* v. *Spence*, 10 D. L. R. 215, referred to.

Motion by defendant McVicar for leave to appeal from the order of HON. MR. JUSTICE MIDDLETON in Chambers, affirming an order of the Senior Registrar in Chambers refusing to strike out of the defences of each of the other defendants a clause whereby it was alleged that the applicant was not the wife of the testator, whose estate was in question.

J. Haverson, K.C., for the widow.

J. W. McCullough, for Christina Kains.

Featherston Aylesworth, for other defendants.

HON. MR. JUSTICE LENNOX:—No good purpose will be served by giving leave to appeal. It is true that this Court has no power to annul a marriage, but equally true that it is in the power and it is the duty of the Court to enquire into and determine as to the intrinsic validity of alleged marriages when it incidentally or collaterally becomes necessary to do so in determining rights of inheritance, rights of property and the like. *A. B.* (1868), L. R. 1 P. & D. 559; *Prowd* v. *Spence*, 10 D. L. R. 215.

The applicants are not injured by having timely notice of the issues to be raised. They have not brought themselves within Rule 507. There are no conflicting decisions and it certainly does not appear to me that there is "good reason to doubt the correctness of the judgment from which the applicants seek leave to appeal."

Application dismissed—no costs.

HON. MR. JUSTICE MIDDLETON. JANUARY 14TH, 1914.

RE ACHTERBERG.

5 O. W. N. 755.

Will—Construction—Life Interest—Gift of "Residue" on Death of Life Tenant—Power of Encroachment by Life Tenant on Corpus for Maintenance—Amount of Annual Payment Fixed by Consent.

MIDDLETON, J., *held*, that where a testator gives his property, mainly personal to his wife for life, the "residue" to others after her death, that the widow has power to encroach upon the corpus for her maintenance.

Re Storey, 14 O. W. R. 904 and *Re Johnson*, 27 O. L. R. 472, followed.

Motion for the construction of a will.

E. P. Clement, K.C., for executor and widow.

F. W. Harcourt, K.C., for infants, and also for representative of adults.

HON. MR. JUSTICE MIDDLETON:—The testator's estate is almost all personal. He gives the widow "the benefit and use of the rest of" his estate during her lifetime. This expression "rest" means the residue after payment of debts and legacies.

After his death the "residue" *i.e.*, what then remains, is to be divided. This brings the case within *Re Storey*, 14 O. W. R. 904, and *Re Johnson*, 27 O. L. R. 472, and indicates that the widow is entitled to encroach upon and use the money for her maintenance. At the request of the parties to avoid trouble in the future, I fix the amount proper to be used at $450 per annum.

Costs out of estate.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 19TH, 1914.

McLEOD v. ROREY.

5 O. W. N. 784.

Contract—Penalty—Liquidated Damages—Mortgage—Counterclaim—Costs—Set-off.

FALCONBRIDGE, C.J.K.B., allowed plaintiff $250 damages in an action upon a mortgage contract.

Action on a mortgage to recover the mortgage moneys and for a sale of the lands mortgaged.

G. N. Weekes, for plaintiff.

M. P. McDonagh, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — The $3 a day mentioned in the agreement ought to be considered as penalty and not as liquidated damages.

I allow the defendant $250 damages plus a sum sufficient to balance plaintiff's claim for interest; I deduct from plaintiff's claim of $500 defendant's set off or counterclaim of $250, leaving a balance of $250 due to plaintiff. I fix balance of costs of action on one side and of counterclaim on the other at $75 in plaintiff's favour.

Judgment for plaintiff for $250 and $75 costs.

Thirty days' stay.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JANUARY 28TH, 1914.

MEDCALF v. OSHAWA LANDS & INVESTMENTS LIMITED.

5 O. W. N. 797.

Fraud and Misrepresentation—Contract to Purchase Lands—Action to Set Aside—Representation as to Intention of Railway Company—Falsity not Proven—Representation not Inducing Cause of Purchase—Dismissal of Action—Appeal—Costs.

WINCHESTER, CO.C.J., dismissed an action brought for the cancellation of an agreement to purchase certain lands upon the ground of fraud and misrepresentation, holding that the representations made had not induced the contract.

SUP. CT. ONT. (1st App. Div.) *held*, that the representations made had not been proven false and that therefore plaintiff could not recover.

Per RIDDELL, J.:—A statement of the existing intention of a third party to do a certain act may well be a statement of fact" to Halbury's Laws of England p. 663, s. 1621: *Rex* v. *Gordon*, 23 Q. B. D. 354, at p. 360, referred to.

Appeal dismissed with costs as against defendant company, without costs as against defendant Newsom.

Appeal by the plaintiff from the judgment of WINCHESTER, Co.J. York, dismissing an action to set aside an agreement for the purchase of certain lands and the return of $504 paid by him to the defendant Newsom, on the ground of fraud and misrepresentation.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE MIDDLETON, HON. MR. JUSTICE LEITCH.

E. Coatsworth, K.C., for plaintiff.

N. W. Rowell, K.C., for defendant, Newsom.

H. C. MacDonald, for the defendant company.

HON. MR. JUSTICE RIDDELL:—The plaintiff sued the defendant company, the Oshawa Lands and Investments Limited, the writ being tested November 5th, 1912. The statement of claim sets out that these defendants, through their agent Newsom, agreed to sell to the plaintiff certain lots in Oshawa upon certain representations and on the terms in an agreement—and the plaintiff paid them $504

by way of deposit. The representation set out is that the defendants "submitted to the plaintiff a blue print of a plan of the said lots and other lots and adjoining the lots laid out on the said plan and situate on Station avenue named therein is a block marked Canadian Pacific Right of Way and Station Grounds, and the defendants marked for the plaintiff on the said plan the exact location where the station was to be placed. The defendants represented to the plaintiff that the said C. P. R. station was to be placed on the said grounds at the point indicated and stated that fact as an inducement to the plaintiff to buy the said lots." It is then alleged that had it "not been for the said plan shewing the said station grounds and the representations of the defendants in regard to the building and station of the C. P. R. at that point and indicating on the said plan the exact location of the said station, the plaintiff would not have" made an agreement to purchase at all. Shortly after, says the pleading, the plaintiff was informed that the C. P. R. did not intend to place its station at the point indicated to him—this would diminish the value of the lots he had agreed to purchase—thereupon he repudiated the purchase and demanded the return of his money, which being refused, he brought his action. He adds that "the said representations were the sole inducement to him to purchase the said lots."

I have been particular to set out the misrepresentation sued on by reason of what took place subsequently.

The defendant company pleading that Newsom bought the lots from the company and resold to the plaintiff, the plaintiff, February 26th, 1913, obtained an order making Newsom a party defendant: he made some verbal changes, but did not make any amendment in the claims of misrepresentation. What is complained of in the pleadings is a representation that the C. P. R. station was to be placed at a certain point and that was the sole inducement to the plaintiff to purchase.

The case came on for trial before Winchester, Co.J., without a jury, September 22nd, 1913; the learned trial Judge reserved judgment till November 18th, when he dismissed the action with costs as against the company and without costs as against Newsom.

The plaintiff now appeals.

At the trial it was made evident that the company had had no direct dealings with the plaintiff, but that Newsom had bought the lots in question from the company and had himself sold to the plaintiff, taking the covenant for payment of the remainder of the purchase money from the plaintiff direct to the company, while he, Newsom, assigned to the plaintiff his contract for purchase from the company.

This gets rid of any direct liability from the company to the plaintiff; but it is not wrong to retain the company a party to the record as the agreement of the plaintiff is attempted to be set aside. As against Newsom the claim is for the return of the $504 paid him (June 29, 1912). The agreement for sale is dated 3rd July, 1912, and provides for the payment of $10 per month per lot: September 4th the company wrote the plaintiff for $120, the amount due on the lots, and September 10th, he answered saying: "When I purchased the above property through your agent Mr. J. G. Newsom, he informed me that the new C. P. R. station would be erected on Station avenue, the adjoining property. During the last few days, I have been informed that the C. P. R. station will not be erected on the location pointed out to me . . . and in fact it is not publicly known where it is to be located. Therefore, I am of the opinion that this property has been misrepresented to me and I . . . notify you that I do not intend making any further payments and will ask you to please return to me the $504 I paid to your agent Mr. J. G. Newsom." September 12th the plaintiff wrote to Newsom: "On or about July 10th, I purchased from you as agent . . . 12 lots. When I looked over this property, you located the lots for me and also shewed me where the new C. P. R. station was to be erected. On the strength of your statement about this station being erected on the adjoining property . . . I purchased the property."

The fact of the matter was that Newsom had fallen out with the company—the learned trial Judge in his reasons for judgment makes the following findings, quite justified by the evidence:—

"He (Newsom) threatened the defendant company to injure them as much as he could, because of a refusal on the part of the agents of the defendant company to agree to some improper reduction in connection with other purchases. Subsequently Newsome came to him (the plaintiff)

and stated that the whole thing was a "bunco game," that he had misrepresented the land to him and that the company had misrepresented it to Newsome, that there was nothing done; the station was not going to be built, and he suggested to the plaintiff that he ask for a return of his deposit, and afterwards brought him to his own solicitor for the purpose of demanding the return of same. The defendant (Newsom) purposely called upon the plaintiff to bring an action against the defendant company for his own purposes and made false statements to him.

It will be seen that Newsom was indulging in the easiest of all penitential exercises, confessing the sins of others.

By reason of certain findings of the learned trial Judge, it was argued before us very strenuously that we must take account of other representations by Newsom.

What the learned trial Judge says is:

"The plaintiff contends that the defendant Newsom, while negotiating for the sale of the property to the plaintiff, falsely represented to the plaintiff that the C. P. R. intended to place their station on the property in question at a place specified on a plan produced and that it was to be built at once; and secondly, that a number of houses on certain specified lots were immediately to be erected and the streets on the plan were to be graded; that these representations induced the plaintiff to enter into the agreement and that they were falsely made and untrue to the knowledge of the defendant Newsom and were such representations as to vitiate the agreement. In my opinion the defendant Newsom made representations to the plaintiff with respect to the C. P. R. intending to build a station near the property in question, and also that a number of houses were to be erected and streets were to be graded.

It will be seen that the claim of the plaintiff that a representation was made that the station was to be built at once is acceded to by the learned Judge whose finding is in accord with the pleadings and with the letter written before suit.

Then as to the other alleged misrepresentations, it is obvious that they were of a very minor character. The plaintiff himself says: "The station was the principal one," and again:

"Q. As to the effect these statements were going to have on the transaction? A. Yes, that is why we went down on

the strength of that, because the station was going to be there and would make it that much more valuable because the station was there and the property I was purchasing was leading up to the station and if that station had not been brought up to me I would not have considered the purchase at all."

"Q. What is it (your complaint)? A. The complaint is that the ground is not as valuable in my estimation as if the station was being built there."

"Q. And that is the reason that you tried to break the contract? A. Because the station is not going there."

So too, Mrs. Medcalf says: "The station was the main thing."

There is no finding by the trial Judge that the plaintiff was induced by any of these representations: he himself says, as we have seen, that the station was the principal thing" and in the passage which comes nearest to stating the effect on his mind "if that station had not been brought up to me I would not have considered the purchase at all."

I think in view of the pleadings, of the letter before suit of the plaintiff, of the evidence and the Judge's findings, we should hold that the statement made by Newsom to the plaintiff inducing the contract was that in substance set out in the pleadings, that the C. P. R. station was to be built on adjoining property. There is no finding (but rather the reverse) that this was to be done at once—and I think it quite plain that had the plaintiff not been informed that the C. P. R. was not to be built upon the suggested site at all, he would not have attempted to break his contract.

A statement such as this—a statement of the existing intention of a third party to do a certain act, may well be a statement of fact: 20 Halsbury's Laws of England, p. 663, sec. 1621; *Rex* v. *Gordon* (1889), 23 Q. B. D. 345 at p. 360.

But for the plaintiff to succeed he must prove the falsity of the statement and that he has wholly failed to do—the only evidence he has is that up to a certain time the station had not been built, and that is wholly insufficient. Indeed, we are told on the argument that the station is already built, or building, on the stated site.

Even if the representation had been that the C. P. R. were at once to build the station, I do not think the plaintiff should succeed. It is common knowledge that railways often move with great deliberation—the Union Station has

more than once been about to be built, work to begin at once, without delay, &c., and it may well be that there was an intention to build at once, immediately, in Oshawa, which intention was changed after the plaintiff bought his lots.

I think the appeal should be dismissed with costs as in the Court below—the defendant Newsom has brought this litigation on himself by his own conduct.

HON. MR. JUSTICE LEITCH:—I agree.

HON. SIR JOHN BOYD, C.:—In cases of claims based on misrepresentations being made to induce a contract, the plaintiff should be held strictly to his pleadings as to what were the false statements he relied on. The Judge has not allowed an amendment to enlarge the allegations in the statement of claim.

But one point is relied on apart from the exhibition of blue prints and that is that it was stated that the C. P. R. station was to be placed on the grounds at a point indicated thereon. The place was marked on the plan (blue print) by the plaintiff in the office of the defendant company's agents before his purchase, as the contemplated site of the station, but there was at that time no representation of fact that the station would be built thereon. All the persons interested supposed, and were given to infer from the actions of the C. P. R., that the station would be on the Ritson property, and Newsom was so told before he dealt with plaintiff, by a C. P. R. engineer (p. 96).

I think the Judge rightly concluded that the plaintiff made enquiries and a general examination for himself and was content to buy, and did not rely on the alleged misrepresentations in the pleadings.

The appeal should be dismissed with costs as to the company, and no costs as to Newsom—who fomented litigation.

HON. MR. JUSTICE MIDDLETON:—I agree.

HON. MR. JUSTICE MIDDLETON. JANUARY 13TH, 1914.

FURNESS v. TODD.

5 O. W. N. 753.

Mortgage—Sale of Land Subject to—No Covenant by Purchaser—Assignment of Supposed Covenant — Assignment not to Pass Equitable Rights of Vendor — Lack of Notice to Purchaser—Effect of—Statement of Claim—Striking out of—Non-Disclosure of Cause of Action.

MIDDLETON, J., *held*, that where a purchaser of lands subject to a mortgage did not covenant to pay off the mortgage an assignment from the vendor to another of the supposed covenant of the purchaser is invalid to pass to the assignee whatever equitable rights the assignor possessed against the purchaser.

Credit Foncier v. *Lawrie*, 27 O. R. 498, followed.

Motion by defendants to dismiss action because the statement of claim disclosed no cause of action heard 11th January, 1914.

I. F. Hellmuth, K.C., for defendants.

A. Mike Macdonell, K.C., for plaintiff.

HON. MR. JUSTICE MIDDLETON:—On the 19th March, 1891, Peter Furness made a mortgage to Roberts *et al.* On 1st April, 1892, Furness sold the lands to the defendants, subject to the mortgage, $2,300, a portion of which the defendant "hereby assumes and covenants to pay off." There was in fact no covenant, and the defendant did not sign the conveyance. The statement of claim improperly describes the obligation of the defendant to pay the mortgage as being a covenant.

On the 13th December, 1893, an agreement was made between Furness and the defendant, wherein it is recited that the defendant had agreed to assume and pay off the mortgage in question to the extent of $2,300. This agreement, although under seal, would not operate so as to make the equitable obligation of the defendant a specialty debt: *Bank of Montreal* v. *Lingham*, 7 O. L. R. 164. It contains no covenant.

On the 20th March, 1912, by an assignment referred to in the pleadings, but which both counsel agreed should be produced and referred to, Furness, after reciting erroneously a covenant in the deed to the defendant, and his agreement to assign that covenant to the plainitff "doth hereby assign

to," the plaintiff, "all his right, title, benefit and advantage under said covenant in the said deed of land dated April 1st, 1892, and under the said agreement hereinbefore set out dated 13th December, 1892." Subsequently, on the 30th June, 1912, the mortgage in question was also assigned to the plaintiff.

This action is brought on the 5th November, 1913.

The motion is based upon the ground that the assignment is inoperative, because no notice of assignment was given to the defendant. It is admitted by both counsel that this is the fact.

No amendment should now be allowed, and no new action can be brought by reason of the lapse of statutory period, even assuming the liability is a specialty liability.

Upon the document produced it is clear, I think that the plaintiff cannot succeed. There is no covenant, and the assignment purports to be an assignment of a covenant and will not operate to pass an equitable obligation. The case in this aspect is entirely covered by credit: *Foncier* v. *Lawrie*, 27 O. R. 498.

Taking this view of the case, it is perhaps better that I should not determine the other question. Whether an assignment which cannot be brought within the statute 1 Geo. V. ch. 25, sec. 45, because no notice has been given to the debtor, can be regarded as an equitable assignment, and the question whether that statute ought to be confined to assignments of legal as distinct from equitable choses in action, ought, I think, to be left to be dealt with when necessary for the decision of the case. *Torkington* v. *Magee*, [1902] 2 K. B. 427, was reversed upon the facts in [1903] 1 K. B. 644; the Court declining to determine the question raised. *Hudson* v. *Fernyhough*, 61 L. T. 722, is not an authority on this point, as the motion there was to add an assignor. See also the discussion by my brother Riddell in *Sovereign Bank* v. *International*, 14 O. L. R. at p. 517.

Rule 85 may be held to get over the necessity of having the assignor before the Court. It may be that the only effect of the omission to give notice to the debtor will be that the assignee loses priority and that a subsequent assignee who gives notice will obtain precedence. See *e.g.*, *Lloyds* v. *Pearson*, [1901] 1 Ch. 865.

The statement of claim, therefore, discloses no cause of action, and the action ought to be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. JANUARY 27TH, 1914.

RE REBECCA BARRETT ESTATE.

5 O. W. N. 807.

Will—Construction — Gift to Daughters—"Out of" Rentals—Increased Rentals—No Increase in Gift—"Issue"—Limitation to Children — Estate Tail Negatived—Residuary Estate—Tenancy in Common.

A testatrix provided *inter alia*, "I give—out of the rents—of land on King St. the annual sum of six hundred and fifty-four pounds. The six hundred pounds to be divided equally between my daughters, the fifty-four pounds to Edith Emily for life." This was followed by a proviso that upon the expiry of the present lease, if the rent is increased, Edith Emily's share is to be $600 per year for life.

MIDDLETON, J., *held*, that this was a gift to the daughters of £600 and no more and that they did not take any increased rental after deducting the allowance to Edith Emily.

Re Morgan, [1893] 3 Ch. 222, and other cases referred to.

Motion by executors for construction of will of Rebecca Barrett, deceased.

H. S. White, for executors.

F. Arnoldi, K.C., for the daughter Mrs. Mossom.

W. N. Tilley, for the other daughters.

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

W. J. Boland, for Mrs. E. M. Russell, grand-daughter.

Argued on the 17th January, 1914.

HON. MR. JUSTICE MIDDLETON: — The testatrix died on the third of August, 1893, leaving her surviving her husband (who died 2nd October, 1913), five sons, and four daughters, who now survive. Another daughter has since the testatrix's death died, unmarried and without issue. The grand-daughter, Edith Emily, is now Mrs. Russell.

By the will of the testatrix, she first gave her husband a life estate in all her real and personal property. The difficulty arises in the clauses which operate upon his decease. These clauses are as follows:—

"I give and bequeath out of the rents and profits payable from all and singular the real estate at present owned by me, under and by virtue of the devise in that behalf contained in the will of my late father Lardner Bostwick, and consisting of fifty-two feet of land on King street in the said city of

Toronto wherein are erected the Adelaide Buildings, the annual sum of six hundred and fifty-four pounds. The six hundred pounds to be equally divided between my daughters, the fifty-four pounds to Edith Emily, daughter of my son Frederick Albert Barrett, for life, provided always that at the expiration of the present lease and when a new lease is granted that the rent, should the same be increased, Edith Emily's share shall be increased to six hundred dollars a year for life, free from the control of any husband they or either of them, my said daughters or grand-daughter, may at any time marry, for and during the term of their natural lives.

"And after the death of my said daughters or any or either of them, then to their lawful issue, such issue to take the share or shares of their respective mothers.

"And should any of my said daughters die without leaving lawful issue, then the share of such daughter or daughters so dying without lawful issue, to go to the survivors of my said daughters equally, for and during the term of their natural lives.

"And after the death of my said daughters or any or either of them, then to their lawful issue, such issue to take the share or shares of their respective mothers.

"And should any of my said daughters die without lawful issue, then the share of such daughter or daughters so dying without lawful issue, to go to the survivors of my said daughters equally, for and during the term of their natural lives, and after their or either of their death leaving lawful issue then to such issue absolutely. Provided always, that after the death of my dear husband, my household furniture of every description shall go and belong to such of my daughters as shall then be unmarried equally share and share alike, trusting to their love and generosity to give each brother some article as remembrance of their dear mother.

"And that all my dear children may live in peace and love, and as to the rest of my real estate and personal, whether in possession or expectancy, I give the same to each and every of my dear children, sons and daughters, to be equally enjoyed by them during the term of their natural lives, and after their death, to their heirs and assigns forever. And I direct as to the property at Victoria in the county of Welland, known as Bertie Hall, the brick residence on the corner of Niagara and Phipps streets, and furniture to the extent of one hundred and twenty feet frontage on Niagara street, and

extending back from the house fifty feet, shall be the share of my son Frederick Albert Barrett so far as the ten-acre lot is concerned, the balance of the said ten-acre lot to be divided equally among my other children, sons and daughters, subject to the conditions before mentioned."

The real estate mentioned in the first of these clauses was at the time of the making of the will under lease, the ground rental being $2,616.66 per annum. At the expiry of the then current term, 12th July, 1893, the lease was renewed at the rental of $5,367 per annum; and upon the expiry of this lease in the near future, further increased rental may be expected.

The question which arises upon this will is whether the gift to the daughters is of an annuity of six hundred pounds per annum charged upon the rents, or whether they take the property in fee tail.

The will is not easy to understand, and looks as if the testatrix had attempted to adapt for her own purposes some other will, adopting from it formal clauses which appear mingled with her own inartificial language. The original was produced from the Surrogate Court, and it appears to be entirely in her own handwriting.

Upon the argument of the motion some question was raised as to whether the probate follows the will with respect to the amount given to the grand-daughter Edith Emily. Some changes have been made in the will, to which effect is given in the probate. This is not a matter with which I am now concerned; I must take the probate as it stands. Counsel for Mrs. Russell desires that her position should not be prejudiced with respect to any application she may be advised to make in the Surrogate Court. I do not see how she could be prejudiced, but if any reservation is necessary it may be made.

The clause in question is so involved as to present greater difficulties than are found when it is analysed. The testatrix provides: "I give . . . out of the rents . . . of land on King street the annual sum of six hundred and fifty-four pounds. The six hundred pounds to be equally divided between my daughters, the fifty-four pounds to Edith Emily for life." This is followed by a proviso that upon the expiry of the present lease, if the rent is increased, Edith Emily's share is to be $600 a year for life.

The daughters' contention is that this is a gift to the daughters of the rental, less what Edith Emily takes; and,

as it is followed by the provision that after the death of the daughters their lawful issue take, they take an estate tail.

After very careful consideration, I cannot accept this. The whole argument is based upon the statement that this amounts to a gift of the rents. Assume that £654 is the then amount of rent. There is nothing but a gift out of these rents of the exact amount of the rent, not, as the amount of the rent, but as the named sum of £654. The daughters take the £600, and no more. The increased rental above that sum, and above the provision for Edith Emily, will pass to all the children, sons and daughters, under the residuary clause.

The testatrix evidently reckoned in pounds currency, for she treats the pound as equivalent to four dollars, and the £654 would then be $2,616, the amount of the rent except 66 cents. I am inclined to think that she ignored this small sum, and really thought that she was disposing of the whole amount of the then rental; but I think she had then present to her mind the probability of an increased rental being thereafter obtained, and that the use of the expression "out of the rental" was deliberate, and that what she intended to give the daughters and the grand-daughter was the amount of the then rental, leaving the amount of any increase to fall under the residuary clause. She then probably realized that while an increased benefit was being yielded to her sons and daughters, the grand-daughter not being named in the residuary clause, would not receive any increased sum; so she inserts in the first clause a proviso dealing with the share of Edith Emily in the event of an increased rental being obtained.

This I think was what was in the mind of the testatrix; and it explains all the clauses of the will and does not fail to give effect to the words "out of," which are evidently of prime significance.

The annuity given to the daughters is for the life of each daughter, and on the death of any daughter leaving issue—*i.e.*, children—the children will take the annuity for life. If the daughter leaves no children, then the surviving daughters and their children take the annuity for their life. "Issue" in this will is, I think, limited to children—as they take the share "of their respective mothers."

Subject to these annuities and the father's life estate, the property became vested in the sons and daughters as tenants in common under the residuary clause.

This is, I think, in accordance with *Re Morgan*, [1893] 3 Ch. 222, which is now the governing authority; and *Going* v. *Hanlon*, I. R. 4 C. L. 144, which gives the true effect of the words "out of." *Ward* v. *Ward*, [1903] 1 Irish 211, and *Re Smith*, [1905] 1 Irish 453, are of value as shewing that the annuity is not perpetual.

The costs of all parties will come out of the estate.

HON. MR. JUSTICE BRITTON. JANUARY 30TH, 1914.

BILTON v. MACKENZIE.

5 O. W. N. 818.

Negligence—Separate Contractors on Building—Death of Painter—Alleged Negligence of Servant of Carpentering Contractor—Temporary Passageway — Breaking of—Right of Deceased to be in Interior of Building—Licensee—Lack of Interest of Defendant in Work of Deceased—Knowledge of Intended User by Deceased —Findings of Jury—Disagreement with—Evidence.

Action by widow of one Bilton, a painter, for damages by reason of his death through the alleged negligence of defendant, a carpentering contractor. Deceased was in the employ of a painting contractor who had contracted to paint a building upon which defendant had contracted to do the carpentering work. An employee of the defendant's, to reach a window where he was installing certain weights placed some planks over the unfinished flooring of the second storey of the building and crossed on them to the window. The deceased being precluded by the weather from exterior work, attempted to cross such planks in order to paint the exterior of the building from such window, but the planks broke and he was thereby killed. The jury found the defendant's employee guilty of negligence and that he should have known that the planks in question would be used by other workmen.

BRITTON, J., *held*, that on the facts it was not to be expected by defendant or his workmen that the planks in question would be used by anyone than the carpenters, and the position of the deceased was no higher than that of a mere licensee, which precluded plaintiff from recovery.

King v. *Northern Navigation Co.*, 24 O. L. R. 643, approved, 27 O. L. R. 79, followed.

Heaven v. *Pender*, 11 Q. B. D. 503, distinguished upon the ground that the planks in question were not furnished by defendant for the work of deceased nor was he interested in any way in the same.

Action by the widow of James W. Bilton, deceased, on behalf of herself and her two children, to recover damages for his death, caused by the alleged negligence of defendant.

Tried at Toronto with a jury.

H. C. McDonald, for plaintiff.

Shirley Denison, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—The owner of land at the corner of King and Dufferin streets in Toronto was erecting a building thereon. The painting of the outside part of this building was given by contract to one Egle, and the deceased James W. Bilton was in the employ of Egle upon this work. The carpenter work was by the proprietor given by contract to the defendant. There was no contractual relations between Egle and the defendant or between the deceased and defendant.

On the 26th of November, 1912, the deceased, without the knowledge of the defendant, was sent to do some outside painting. About the time the deceased and another painter were ready to begin work, rain set in, so that the outside painting could not advantageously be done. The defendant had sent, with another carpenter, one George Hope to do some work in the second storey of the building. His work was to take the sash out and set the window by putting weights on. He reached the second storey by means of an elevator. The floor was being laid, but not wholly completed, from the elevator to the window, in reference to which he was to do the work, and in order to reach that window Hope placed boards or planks as they are called, across the girders, forming a passageway. He walked safely over this passageway to his destination.

Because of the rain the deceased decided to go to the second storey, and to do from the window some outside painting of the building. The deceased ascended by the elevator and attempted to walk upon the passageway Hope had provided, and as Hope had done, but one of the boards broke, and because of it, the deceased fell to the floor below and was killed.

The widow of the deceased brings this action on behalf of herself as widow and of her two children against the defendant MacKenzie.

At the trial I left the following questions to the jury, which were answered:—

(1) Was the plank or board which broke when deceased walked upon it, and caused the death of deceased, weak and defective, and entirely insufficient for the purpose? A. Yes.

(2) Was the workman, Hope, guilty of negligence in using that plank or board for the purpose for which it was used? A. Yes, but not intentionally.

(3) Was it, or ought it to have been, within the reasonable contemplation of the workman Hope, that the painters or others having work to do in or about the building, would or might be in the second storey, and would or might use the passageway made by the plank or boards placed on the girders by Hope? A. Yes.

(4) Was the deceased rightfully in the second storey of the building and rightfully from the inside of the building doing the painting on outside of window or frames? A. Yes.

(5) What damages do you find should be paid by the defendant to the plaintiff, the widow, and her children, in case the defendant is liable? If you like you can apportion the amount between the widow and children. A. We have assessed the damages at $1,000 to be apportioned by your Lordship.

I agree with the findings of the jury as to all these answers except that to the third question. The defendant personally did nothing. Hope did not know, nor did he have any reason to know, that the painter or anyone but the carpenters would be upon the second storey. The deceased did not need to go upon the second storey to do his work. It was expected that he would do his work from the outside of the building. He was never directly authorised to go inside nor was he prohibited. The highest right he had to be upon the second storey was that of a bare licensee. That, if nothing more, would bring the case within *King* v. *Northern Navigation Co.*, 24 O. L. R. 643, affirmed in appeal 27 O. L. R. 79, and the plaintiff would fail in this action.

There remains the question of whether or not the defendant is brought within the rule laid down by Brett, M.R., in *Heaven* v. *Pender*, L. R. 11 Q. B. D. 503; that rule is: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Cotton, L.J., and Bowen, L.J., did not think it necessary for the decision of the case to lay down so large a principle, for in their opinion there are many cases in which that principle was impliedly negatived. That case is a most interesting one. The headnote is: "The defendant, a dock owner, supplied

and put up a staging outside a ship in his dock under a contract with the ship-owner. The plaintiff was a workman in the employ of a ship painter who had contracted with the ship-owner to paint the outside of the ship, and in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured:"—

"Held, reversing the decision of the Queen's Bench Division, that the plaintiff, being engaged on work on the vessel in the performance of which the defendant, as dock-owner, was interested, the defendant was under an obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained."

The present case differs from the case cited. In that case the staging was, to the knowledge of the defendants, necessary in order to do the painting. It was to be used by the ship painter. In the present case the defendants' servant did not think that the painter would use the passageway, or that any person other than carpenters would use it. The defendant did not know that anyone other than the carpenters would be on the second storey until after the floors were laid, the laying of which was in progress when the accident happened.

In the case cited the defendant was interested in the work being done; in the present case the defendant had no interest whatever in the work the painter was doing or proposed to do when the board broke.

It is a most unfortunate thing for the plaintiff, but it seems to me I would be carrying the liability against the defendant further than it has yet been carried were I to render judgment in favour of the plaintiff.

See also the following cases: *Barnett* v. *Grand Trunk Rw. Co.*, C. R. [1911] 1 A. C. 345; *Gregson* v. *Henderson Roller Bearing Co.*, 20 O. L. R. 584; *Earl* v. *Lubbock*, [1905] 1 K. B. 253.

The action should be dismissed, but under the circumstances without costs.

Thirty days' stay.

HON. MR. JUSTICE KELLY. JANUARY 27TH, 1914.

GODKIN v. WATSON.

5 O. W. N. 811.

Trusts and Trustees—Accounting—New Trustees — Improper Intermingling of Trust Funds with Personal Assets or Trustee—Death of Trustee—Knowledge of Representative.

KELLY, J., gave judgment for the appointment of new trustees and an accounting where it was shewn that the assets of a trust estate and those belonging to the trustee had been intermingled.

Action for an account, the appointment of new trustees and other relief.

J. Jennings, and J. A. Rowland, for plaintiff.

H. E. B. Coyne, for defendant.

HON. MR. JUSTICE KELLY:—Defendant is the sole executor of the will of his father, George Watson, who devised all his estate to defendant, subject to the payment of $500 to another beneficiary.

The testator died on September 24th, 1909, and probate of his will was issued to defendant on October 7th, 1909.

George Watson was the surviving executor of the will of Robert Ford Lynn, who died on May 10th, 1890, and who, after making certain bequests, bequeathed the whole income arising from the balance of his estate to his three daughters, Agnes Lynn, Amelia Margaret Lynn and Lavina Russell Lynn, for their lives and the life of the survivor of them; on their death the capital from which such income is derived becomes divisible equally amongst the grandchildren of the testator. Plaintiffs are two of these grandchildren, and they sue on behalf of themselves and of all the other beneficiaries under the will. The three daughters above mentioned are still living.

A short time after the death of George Watson, proceedings were instituted in which defendant was required to bring in his account and the accounts of the estate of George Watson in respect of the Lynn estate for the purpose of having the same investigated. The investigation took place before the Judge of the Surrogate Court of the county of Simcoe, on February 14th, 1910, with the result that it was found that the balance of the assets of the Lynn estate then amounted to $5,439.41.

Following this, proceedings having been taken for the administration of the Lynn estate, negotiations were entered into between defendant and plaintiff for settlement by which defendant would pay the amount so found or secure it. These negotiations reached the stage where the documents necessary to carry out the proposed settlement were prepared, but at this point the defendant became indifferent, and the matter rested there.

The evidence shews that George Watson did not keep the assets of the Lynn estate, of which he was executor, separate from his own property, and the assets of the two were so mixed that it was not possible to separate them.

In his defence defendant sets up that he has no knowledge of the estate of Robert Ford Lynn or of the administration thereof or of the matters referred to in the statement of claim. This contention is absolutely without foundation. Apart from any other means of knowledge he may have, the records in the Registry office of the state of the title of certain lands with which the defendant has dealt since he assumed the office and responsibilities of executor of his father's estate, indicate clearly that the Lynn estate had some right, title or interest in these lands. That of itself was sufficient to have put him on enquiry. He has also set up that he is ready and willing to execute and deliver any conveyance that may be called for or necessary of certain property referred to in his statement of defence. But he has not delivered or tendered any such document.

The case is a flagrant one of mixing trust funds and trust assets with assets belonging to the trustee personally, and I entertain no doubt that much of the assets enumerated in the inventory of George Watson's estate filed on the application for probate of his will, belonged to the Lynn estate. I am equally clear that defendant had knowledge of this, and that there came to his hands assets in excess of the sum found by the Judge of the Surrogate Court. These he dealt with in a manner not satisfactorily explained in his evidence.

It is unnecessary to review the evidence or further comment upon it, but, to say the very least of it, there was a reckless disregard of the rights of the beneficiaries of the Lynn estate, both on the part of George Watson, the executor, and his son, the defendant, in their manner of dealing

with the assets of that estate. For this, both the estate of George Watson and the defendant are accountable.

Plaintiffs ask for the appointment of new trustees to the estate of Robert Ford Lynn. The defendant does not object.

There will be judgment for an account of the amount ($5,439.41) found by the Judge of the Surrogate Court, and a reference to the Master in Ordinary to take the account, including interest, the reference to include the appointment of new trustees of the estate of Robert Ford Lynn, they giving the usual security to the satisfaction of the Master, and for payment by defendant and the estate of George W. Watson to the new trustees of the amount which may be found by the Master.

Further directions and costs of the reference are reserved until after the Master's report.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 29TH, 1914.

LEMON v. GRAND TRUNK RW. CO.

5 O. W. N. 813.

Railway—Carriage of Goods—Contract for—Delivery to Consignee without Surrender of Bill of Lading — Damages Caused by—Liability for.

FALCONBRIDGE, C.J.K.B., *held*, that where a railway company delivered merchandise to a consignee without obtaining surrender of the bill of lading therefor they were liable to the consignor for any damage occasioned him by such wrongful act.

Tolmie v. *Michigan Central Rw. Co.*, 19 O. L. R. 26, referred to.

Action for damages for breach of a contract for the carriage of eggs, tried at Owen Sound.

W. S. Middlebro, K.C., for plaintiffs.

D. L. McCarthy, K.C., and W. E. Foster, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — On 14th February, 1913, the plaintiffs, produce merchants at Owen Sound, shipped 300 cases of eggs from that town by defendants' railway, consigned to the order of the Royal Bank, Toronto, for the Harris Abattoir Company. A bill of lading was delivered to the plaintiffs by the defendants' agent at Owen Sound, and this with draft on the Harris Co. was

sent to the bank. In the ordinary course the eggs should have arrived in Toronto on Saturday morning the 15th of February, but for reasons best known to themselves, the defendants placed the car containing the eggs on a siding belonging to the Harris Company, who found it there on Monday, the 17th. Thus the defendants delivered the eggs without obtaining surrender of the bill of lading, and of course without presentation of the accompanying draft on the Harris Company. The draft was presented to the Harris Company on Tuesday, the 18th, and acceptance thereof was refused.

In the meantime the Harris Company had unloaded the eggs and put them in the warehouse, and they claim that on inspection the eggs were not up to sample.

They reloaded the eggs on the car on or about the 3rd of March, and they remained there for two or three days, and then were put back into cold storage. The defendants then assumed to take steps under the provisions of the Railway Act to sell them, and did sell them, realizing the sum of $615.59, which sum they paid into Court.

I was very favourably impressed with the evidence of Frank McKee, who had charge of the cold storage eggs for the plaintiffs, and also of Morley D. Lemon, one of the plaintiffs, and I find that when the eggs were shipped by the plaintiffs they were in accordance with the sample which had been furnished to the Harris Company. The delivery by defendants of the eggs to the Harris Company without production and surrender of the original bill of lading was a breach of their contract with the plaintiffs, and the defendants are responsible for, or at least cannot set up as a defence, the alleged condition of the eggs on delivery.

There will, therefore, be judgment for the plaintiffs for $1,665, with interest from February 14th, 1913, and costs.

The plaintiffs may take out the money paid into Court and credit the amount on their judgment.

Thirty days' stay.

I refer to *Tolmie* v. *Michigan Central Rw. Co.* (1909), 19 O. L. R. 26.

HON. R. M. MEREDITH, C.J.C.P. JANUARY 30TH, 1914.

RE GODSON & CASSELMAN.

5 O. W. N. 814.

Vendor and Purchaser—Deed Containing Restraint on Alienation—Refusal to Force on Unwilling Purchaser—Leave Reserved to Renew Motion — Addition of all Parties Interested — Binding Judgment—Costs.

MEREDITH, C.J.C.P., *held*, that in the present state of the authorities a title based upon a deed containing a restraint on alienation should not be forced upon an unwilling purchaser, but that vendor might have leave to renew his motion, bringing all persons interested before the Court when a judgment in this matter binding on all parties could be made.

Motion by vendor under the Vendors and Purchasers Act for an order that he could make a good title to certain lands under a certain conveyance which contained a restraint on alienation.

Fisher, for the vendor.

J. H. Campbell, for the purchaser.

HON. R. M. MEREDITH, C.J.C.P.: — It seems to me to be plain enough that, having regard to the present state of the cases on the question of the validity or invalidity of conditions in restraint of alienation, the title in question in this matter should not be forced upon an unwilling purchaser, unless first adjudged good, in a proceeding in which a judgment in the vendor's favour would be binding upon all who might take the land if the vendor's deed would cause a forfeiture of her right to it by reason of the condition against alienation—contained in the will in question.

In more than one way such a binding judgment can be had. It may be in such a proceeding as this: see Consolidated Rule 602.

But it does not appear that all persons concerned in the question of the validity of the condition involved in this application are now before the Court.

Therefore, if the vendor desire it, the motion may be renewed, when such persons are all made parties to it, and have had due notice of it; otherwise the matter will be disposed of adversely to the vendor, and costs will go with the result.

If the application be renewed, it must be then distinctly and circumstantially proved who are the heirs-at-law of the testator; and the notice of motion, served upon them must plainly state that, if they fail to appear upon the motion, it may be adjudged, in a manner binding upon them, whether or not they have any estate, right, title or interest in or to the lands in question, which must be described plainly in the notice.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 27TH, 1914.

FELT GAS COMPRESSING CO. v. FELT.

5 O. W. N. 821.

Constitutional Law—Execution Act 9 Edw. VII., c. 47, s. 16—Constitutionality — Property and Civil Rights within Province—Patents of Invention—Assignment—Validity.

FALCONBRIDGE, C.J.K.B., *held*, that sec. 16. of the Execution Act 9 Edw. VII., c. 47 (Ont.) was constitutional and dismissed an action brought for a declaration that the assignments of certain patents of invention were of no effect.

Action for a declaration that the plaintiffs were entitled to certain patents for inventions and that the assignment thereof to the defendants passed no interest therein, tried at Toronto.

J. W. Bain, K.C., and M. L. Gordon, for plaintiffs.

W. S. Brewster, K.C., and A. E. Watts, K.C., for defendant Detwiler.

J. M. Ferguson, for defendant Brackin.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — This judgment has been delayed for a long time owing to causes beyond my control.

The arguments of all counsel have been extended with copious reference to the authorities, and so it is sufficient for me to say that I agree with the contentions advanced by defendants' counsel.

Neither the Minister of Justice nor the Attorney-General of Canada appeared, though notified in that behalf, to discuss the constitutional validity of sec. 16 of the Execution Act (9 Edw. VII.) c. 47 (Ont.)

I find in favour of the constitutionality of that section, treating it as being legislation in regard to property and a civil right in the province.

Action dismissed with costs.

Thirty days' stay.

HON. MR. JUSTICE KELLY. FEBRUARY 3RD, 1914.

RE SPINLOVE.

5 O. W. N. 832.

Infant—Illegitimate Child—Custody of—Right of Mother—Character of—Welfare of Child—Evidence.

KELLY, J., *held*, that in determining who is to have the custody and control of an illegitimate child the Court in exercising its jurisdiction with a view to the benefit of the child will primarily consider the interests of the mother.

Barnardo v. *McHugh*, [1891] A. C. 388, followed.

[See *Re C.*, 25 O. L. R. 218, Ed.]

W. A. Henderson, for the applicant.

R. G. Agnew, for Phoebe Spinlove.

HON. MR. JUSTICE KELLY: — Lauretta May Spinlove, for whose custody this application is made by her mother, was born on May 15th, 1908.

On October 2nd, 1903, the applicant, who in these proceedings appears under the name of Mabel Spinlove, was married at Berlin, Ontario, to one Charles H. Dahmer. After about one year of married life together they separated, and they have since remained apart.

A daughter was born of this marriage.

On May, 24th, 1907, the applicant went through the form of marriage (before a Justice of the Peace, she says) at the city of Buffalo, with one Benjamin Spinlove, then a resident of Toronto. From that time till about June 28th, 1911, they lived together as husband and wife, their place of residence being for part of the time in New York and part in Toronto.

Lauretta May Spinlove is the daughter of the applicant and Benjamin Spinlove. Their life together does not appear to have run altogether smoothly, and, if the applicant is to be believed, Benjamin Spinlove's mother, Phoebe Spinlove, was to some extent accountable for the trouble.

On June 15th, 1911, and while these parties were living together, Benjamin Spinlove took the child to his mother's house. He alleges in these proceedings that he did so because she had contracted pneumonia and bronchitis, and that she was not properly cared for and was neglected. The applicant objected to the child being left with Phoebe Spinlove, but obtained no satisfaction from Benjamin Spinlove about having her returned. On her applying to Phoebe Spinlove for the return to her of the child, which she did on more than one occasion, she was met with a refusal, given in a manner indicating determination on Phoebe Spinlove's part not only not to allow the child to return, but to prevent her mother from further seeing her.

On June 28th, 1911, the home of the applicant and Benjamin Spinlove was broken up, and he has not since contributed anything to the applicant's support. Soon afterwards she returned to her former calling as an actress, and has continued to make her living in that way. She has all along been anxious to obtain the custody and care of the child, and promptly made demands to that end both by herself and through her solicitors, but without effect.

There can be no question whatever of her right as against Phoebe Spinlove for as between them she is entitled to the custody of her daughter; and were it not for the attitude assumed by Benjamin Spinlove and the part he has taken in an attempt to support his mother's refusal to give up the child to the applicant, I would have been content to dispose of the application by granting the custody of the child to the applicant without further going into the matter.

It is quite apparent from his affidavit filed in opposition to the application that Benjamin Spinlove does not wish the applicant to obtain the custody of the child. A perusal of the evidence readily convinces one that little reliance can be placed upon him in his attempt to make out his mother's case. Many important statements made in his affidavit are effectively contradicted by the evidence of other deponents. Some of these statements he modifies in the cross-examination on his affidavit. His allegation that the child contracted pneumonia and bronchitis as the result of neglect by her mother is not borne out on his cross-examination; there he admits that the child did not have pneumonia.

The applicant denies that the child was neglected; and the evidence of Dr. Sisley, who examined her in June, 1911,

about the time when she was taken away by Benjamin Spinlove, corroborates the applicant's evidence. The doctor says that he found the child suffering from a cold, with some symptoms of bronchitis; and he adds that she was neatly dressed and appeared to be well cared for, and shewed no evidences of neglect or abuse. He also says that on other occasions when he called at the house professionally he noticed that the house was in a neat and clean condition, and that the applicant had every appearance of being a thoroughly respectable woman.

Benjamin Spinlove in his affidavit makes a further charge of the applicant having been seen, and of his having himself seen her, going around with men late at night in automobiles and travelling on the streets and conducting herself in a manner unbecoming to a decent woman. In his cross-examination this is all narrowed down to a single occasion, within one week prior to his cross-examination, which took place on July 5th, 1912, when he says he saw the applicant and others driving at night on King street, Toronto, in an automobile; but in respect of that he admits that he could not see very much, as he was on a street car when the automobile went by. What did happen on this occasion is satisfactorily explained by the applicant and another deponent who was in her company at the time.

As to the general charge of improper conduct the applicant has made specific denial. Spinlove's further allegation that during the time he and the applicant lived together she absented herself from her home during the day-time is also satisfactorily answered. In addition to this there is the evidence of others—one a neighbour—whose statements I have no reason to disbelieve, denying charges of intoxication and of the applicant's having neglected her household duties.

So far, therefore, as the statements and charges made by Benjamin Spinlove are concerned, reading the whole evidence together, I can only conclude that these were trumped up for the purpose of aiding his mother to resist the application. On the other hand, charges are made under oath by the applicant against Benjamin Spinlove which he has not denied, and which I would consider sufficiently grave to make his right to interfere with the custody of the child doubtful, even if he had otherwise that right.

The applicant says that when she went through the form of marriage with him he was aware that she was then a

married woman. He denies this; but, bearing in mind the lightness with which he has treated other statements of his under oath, I have difficulty in believing him. He admits, however, in his affidavit, that shortly after he went through the form of marriage with the applicant she told him she had not been divorced from Dahmer.

I have already stated that there can be no doubt as to the applicant's right as against Phoebe Spinlove. Had the latter any right such as she now sets up, I would hesitate to give effect to her claim in view of what the uncontradicted evidence shews her views to be in respect to the duties pertaining to maternity. A person expressing such views is not a proper custodian of a young girl.

So far, I have dealt with important facts brought out in the evidence. The principles to be applied on an application for the custody of an illegitimate child are enunciated clearly in *Barnardo* v. *McHugh*, [1891] A. C. 388. That was a case in which the applicant, the mother of an illegitimate child, was in a less favourable position than that occupied by the present applicant. She had given her full and willing consent to the child (a boy then between 11 and 12 years old) being taken by the party from whom sixteen months afterwards she sought to have him removed. Not only did she give such consent, but she entered into a written agreement by which she contracted that the boy should be given over to the custody and control of the other party for twelve years. It was stated in the judgment of the Court of Appeal that her habits were rough, her means of living slender and precarious, while for many years her life had been open to reproach. Prior to the application she had married a man not the putative father of the boy. The judgment of the Court of Appeal sustained the judgment of Lord Coleridge, C.J., who granted the mother's application, and an appeal was taken therefrom. The House of Lords declared that in determining who is to have the custody and control over an illegitimate child the Court in exercising its jurisdiction with a view to the benefit of the child, will primarily consider the wishes of the mother. In his reasons for judgment Lord Herschell, at pp. 398 and 399, discusses the case of *R.* v. *Nash*, 10 Q. B. D. 454, and says:—

"In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed

under the care of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by the mother, who was living with another man as his mistress. The Court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interests of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

In the same case Lord Halsbury, at p. 395, says:—

"It is clear further that the law has placed upon the mother of an illegitimate child obligations which ought to and, in my opinion, do, bring with them corresponding rights. Whether the right is, as Lindley, L.J., expresses it, a *prima facie* right to the custody of the child, or whether it be the settled view of the Court of Equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide, since I am of opinion that no misconduct is established against this mother which disentitles her to exercise her right to be considered in respect of the custody of this child."

There is nothing in the present case to deprive the mother of her right as against any rights of Phoebe Spinlove or indeed against any right of the putative father, or to shew that it is or that it will be to the advantage of the child to remain in Phoebe Spinlove's custody. The charges of neglect of the child and misconduct on the part of the applicant are not proven. The child was removed from her custody not only without her consent but against her will, and, as I believe, by a pre-arrangement between Phoebe Spinlove and her son, and she has been improperly withheld from the applicant contrary to her desires and against the requests of herself and her solicitors, for the child's return. The mother is in a position to properly bear the expense of the child's maintenance; she is earning from

$20 to $25 per week, while the putative father, who contributes to his mother towards the support of the child and —who, by the way, is no longer a resident of this province— earns $13 per week.

Criticism is aimed at the applicant's means of livelihood. While there are other walks of life which are in the minds of many people freer from objection, her present avocation does not deprive her of the right to indicate and have effect given to her wishes.

Having reached the conclusion that the applicant is entitled as against Phoebe Spinlove, I hesitate to permit her to take the child with her while she is travelling from place to place, following her present calling. Through her counsel on the argument an offer was made to have the child placed in the custody of the applicant's married sister or in a convent in Toronto, there to be cared for and maintained at the expense of the applicant. In the interests of the child I have given careful consideration not only to the present position of the applicant but to the suggestions for the child's care as well; and I think the best interests of the child will be served by having her placed for the time being under the charge of the Sisters of St. Joseph in Toronto, the mother carrying out her desire and intention of maintaining the child there, and having the right to visit her.

Should the applicant change her mode of life, or should other unforseen conditions arise, she may then make further application to have the child placed in her own personal custody and charge.

An order will go for the delivery over of the child by Phoebe Spinlove to the applicant's representative, to have her placed in charge of the Sisters of St. Joseph.

The applicant is entitled to the costs of the application.

HON. MR. JUSTICE LENNOX. FEBRUARY 3RD, 1914.

EDWARD H. BECK v. TOWNSHIP OF YORK.

5 O. W. N. 836.

Contract—Construction of Bridge for Municipality—Alleged Delay of Contractor — Attempted Dismissal of—Validity of—Requirements—Time for Exercising Forfeiture Clause—Strict Construction of—Penalty Clause—Time not Essence—Breach of Contract—Acquiescence—Quantum Meruit—Accounts—Evidence.

LENNOX, J., *held*, that a municipal corporation had no right to dismiss a contractor from work undertaken under a contract or because of alleged delay in proceeding when such delay was caused by the default of the corporation.

Lodder v. *Slowey*, [1904] A. C. 442 and other cases referred to.

That time is not of the essence of the contract where the contract reserves a penalty.

Lamprell v. *Billericay Union*, 3 Ex. 283, followed.

Time within which a clause of forfeiture can be exercised discussed.

Smith v. *Gordon*, 30 U. C. C. P. 553, referred to.

Action by a contractor for $2,000 damages for breach of contract and wrongful dismissal, or in the alternative upon a *quantum meruit* for work done and goods supplied and for damages for wrongful taking and using by defendants of plaintiff's plant and materials.

H. D. Gamble, K.C., and A. C. MacNaughton, for plaintiff.

J. R. L. Starr, K.C., and Grant Cooper, for defendants.

HON. MR. JUSTICE LENNOX: — I made some findings at the conclusion of the argument. I accept the plaintiff's contention as to the quantity of excavation he performed. The position of one of the wings was changed, and labour which had been performed on the coffer dam, or part of it, was wasted in consequence. Whatever the rights of the parties may be under par. 38 of the specification, there is no evidence to satisfy me that the item, "Loss on camp $596" is chargeable against the plaintiff, or that any loss was actually incurred. At all events it was not necessary to incur a loss in this connection. And in any event, whoever has to bear the expense, I am satisfied that, if the defendants' statement of expenditure is correct, in fact, it is grossly in excess of what it should have been, after allowing the defendants every latitude as to how they would complete the work. Upon no

reasonable hypothesis, whether by contract or day labour, could any such sum as is claimed by the defendants be honestly or intelligently expended. The evidence of Mr. Molliter, upon whom the defendants mainly rely, illustrates this. The men placed in charge were, I think, honest, well-meaning men, but they were inexperienced and could scarcely be said to be competent. The township, even after they took over the work (if in fact they ever did take it over) exercised no diligence in procuring supplies, and the work as a whole was carried on negligently and extravagantly.

I will not allow the $500 fee claimed by Mr. Barber "for supervising." He stipulated for an allowance in his letter to the plaintiff, and in this, as in many other matters, the plaintiff was foolish enough to acquiesce, but I will not allow it all the same. It was an improper and immoral demand—wholly inconsistent with the quasi judicial position of the engineer, and there is no consideration to support it as a contract.

If the defendants legally took over the work under par. 38 of the specification, the plaintiff is entitled to credit for a completed work upon the footing of contract prices and the defendants are entitled to set off against this what they have been called upon under this par. 38 to expend in doing what the plaintiff has not done. The defendants are not tied down as to just how they will do it, it need not be in every respect the most judicious expenditure, but it must be reasonable, and it must be honest. It would be convenient to take account of the defendants' expenditure and set it off against the plaintiff's claim, determined as aforesaid, and strike the balance. I cannot do this as even with the free hand which such a clause will sanction and even with the witnesses called by defendants to give it colour, I cannot accept defendants' account as shewing the actual money honestly expended under this clause. There is abundant evidence, however, and in the main I can take Mr. Molliter's figures for it, to shew me the utmost sum that could be honestly and legitimately expended for the whole work; and for this, less the work and material contributed towards it by the plaintiff, the defendants are entitled to credit for against the plaintiff's total claim above mentioned. It will be convenient at this point to ascertain what sum was put into the work by the plaintiff in labour and material. The items are set out in Exhibit 11. They include goods not returned and an item for damages.

They are:—

Items on page 1		$1,363 92
Less, not allowable		
Item 5	$22 50	
" 6	9 50	
" 10 and 11, ½ off	50 00	
" 21, 24, 25, 26 and 27	85 66	167 66
Net balance		$1,196 26
Plant not returned		114 85
Camp utensils not returned		12 40
Damage to gas engine		25 00
Total contributed by plaintiff		$1,348 51

The defendants got the benefit of these items. I attach a great deal of weight to the evidence of Lewis and Connor.

Leaving out gravel, sand and stone, I find that the actual total cost of this bridge—upon honest expenditure and with reasonable care—could not exceed $4,760.69; made up as follows:—

Mixing and placing 493 x 102 c.y. concrete @ $1.25	$743 75
Wet excavation 250 x 21 c.y. @ $1.20	325 20
Dry " 300 yds. @ 25c.	75 00
Lumber—used average of three times	160 00
Form work, 6,500 sq. ft. @ 4c. per foot	260 00
Steel, 9,000 lbs. @ 2¼c.	202 50
Teaming steel to site	25 00
Extra steel, 4,050 lbs. @ 2½c.	101 25
Placing and fabricating steel	45 00
655 bbls. cement delivered at bridge @ $1.65	1,080 75
Piling	987 24
Name plate	20 00
Inspector—10 weeks = 60 days @ $3.50	210 00
Extra for autumn or winter work	325 00
Contingencies	200 00
Total cost, exclusive of gravel, sand and stone	$4,760 69
Deduct the work done and materials contributed by and allowances to the plaintiff as above	1,348 51
Balance chargeable against plaintiff	$3,412 18

The contract being completed the plaintiff is entitled to recover for:—

Lump sum of tender	$2,400 00
Removing bridge	25 00
102 c.y. concrete @ $1.35	137 70
4,050 lbs. extra steel @ 4½c.	182 25
200 c.y. extra dry excavation @ 35c.	70 00
21 c.y. extra wet " @ $1.10	23 10
655 bbls. cement @ $2.00	1,310 00
Piling—cost plus 10%	1,085 96
Total payable to plaintiff	$5,234 01
Less expended by defendants	3,412 18
Balance owing to plaintiff	$1,821 83

The plaintiff is entitled to judgment for this amount at all events. I am very strongly of opinion that he is entitled to a larger sum.

I do not think the defendants were justified in taking the work out of the plaintiff's hands. They were not if the delay was theirs; and if I have not already said it I say now that it was unreasonable to expect the plaintiff to assemble a large force or begin work before the stone was upon the ground. Under such circumstances the defendants cannot avail themselves of the provision for dismissal. *Lodder* v. *Slowey*, [1904] A. C. 442; *Roberts* v. *Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310; *Holme* v *Guppy*, 3 M. & W. 387.

Here time was clearly not of the essence of the contract as the contract reserves a penalty. *Lamprell* v. *Billericay Union*, [1849] 3 Ex. 283; *Felton* v. *Wharrie*. Judgment of Lord Alverstone, L.C.J., reported in Hudson's Law of Building, 3rd ed., vol. 2, p. 455.

The right was not exercised until the time limited for performance had expired. This and whether the right to exercise has not ceased to be applicable are formidable questions confronting the defendant. *Smith* v. *Gordon* (1880), 30 U. C. C. P. 553, and cases referred to in the judgment of Mr. Justice Osler. Halsbury's Laws of England, vol. 3, p. 257; and "If that time has ceased to be applicable no

time is in existence with reference to which the rate of progress can be computed or on the expiration of which the work should be completed." *Walker* v. *London & North Western Rw. Co.* (1876), 1 C. P. D. 518.

A forfeiture provision is to be strictly construed. Halsbury, p. 256; and *Smith* v. *Gordon,* above quoted; also *Farrell* v. *Gallagher* (1911), 23 O. L. R. 130. I do not interpret what was done by the engineer as a compliance with clause 38. There was no certificate in writing or report of any kind to the municipal council or action by the municipal council determining that the plaintiff should be dismissed, and as I read it the plaintiff had a right to have the municipal council consider and pass upon the question, just as the contractor had the right to the special individual consideration of the owner in the *Farrell Case.*

The plaintiff, by acquiescence, has precluded himself from suing for damages for breach of contract, but if the right of forfeiture was not exercisable or was not properly exercised, the plaintiff is entitled to be paid for the work done and material used without reference to what it cost to complete the work; and he is, of course, entitled to payment for what the defendants appropriated or injured, and for the use of his plant by the defendants. Upon the basis of a *quantum meruit* I think some of the items struck out of p. 1, Exhibit 11, should be allowed to stand and the plaintiff would be entitled to something for profit or be paid upon the basis of 10 per cent. or 15 per cent. added as upon what is called "force account." This, with the proper allowance upon the other items set out in the statement of claim, makes a sum which the plaintiff would be entitled to, if my opinion upon this branch of the case is correct, somewhat greater than the balance above found in his favour. The difference, however, is not very great, and I therefore find that the sum to which the plaintiff would be entitled upon a *quantum meruit* basis is $1,821.83.

There will be judgment for the plaintiff for $1,821.83 with costs, and the counterclaim will be dismissed with costs to the plaintiff.

HON. MR. JUSTICE MIDDLETON. JANUARY 27TH, 1914.

RE ROBERT GEORGE BARRETT.

5 O. W. N. 805.

Will—Construction—Gift to Daughter—Moneys in Bank for Household Expenses—Large Sum in Bank at Death—Trust—Surplus—Resulting Trust—Sale of Devised Lands—Mortgages—Personalty—Claim of Devisees Disallowed—Mortgage on Wife's Property—Assumption of—Charge on Real Estate.

MIDDLETON, J., *held*, that a gift to the daughter of a testator of "whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping," where there was only a small sum in the bank at the date of the will but $17,200 at the time of the death of the testator, created a trust for the purpose expressed and all moneys not needed for that purpose belonged to the estate as a resulting trust.

Re West, [1901] 1 Ch. 84, referred to.

That where specific houses were afterwards sold and mortgages taken back, the devisees had no right or title to such mortgages.

Re Dods, 1 O. L. R. 7, followed.

[See *Re Beckingham*, 25 O. W. R. 564, Ed.]

Argued 17th January, 1914.

H. S. White, for executors.

F. Arnoldi, K.C., for the daughter, Mrs. Mossom.

W. N. Tilley, for the other daughters.

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

M. H. Ludwig, K. C., for Emily Barrett.

HON. MR. JUSTICE MIDDLETON: — The testator died on the 2nd October, 1913. His will is a long and very carefully prepared document. Upon its construction three questions are raised, two of them arising from the changes that have taken place in the condition of the testator's affairs between the date of the will, 25th November, 1901, and his death.

Under clauses 12, 13, and 14, the testator gave to his daughters Ada, Sarah, and Edith, each a house upon Bloor street, Toronto. After the date of his will he sold these houses, taking back from the purchaser a mortgage to secure part of the purchase-money. The daughters of course cannot now have the houses, but they claim to be entitled to the mortgage.

I do not think they can succeed in this. The sale of the property amounted to a conversion. The mortgage is person-

alty and must be dealt with accordingly. This is determined by the Chancellor in *Re Dods* (1901), 1 O. L. R. 7. *Re Clowes*, [1893] 1 Ch. 214, a decision of the Court of Appeal, not cited in *Re Dods*, is more exactly in point. *Re Slater*, [1906] 1 Ch. 480, though not on precisely the same point, throws light upon the section of the Wills Act which is applicable.

The second question arises under clause 26: "I hereby give to my daughter Sarah Frances Barrett whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease, for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping."

At the date of the will it is said that the testator had only a small sum to his credit in the bank; but quite apart from the Wills Act, the testator here speaks of the money to his credit at the date of his death. He then had to his credit $17,200. The question is, does this all belong to Sarah? She claims it.

Counsel did not refer me to any case like this, nor have I been able to find one. Had the gift been to the daughter for her own use, an expression of the motive or object or purpose of the gift would not interfere with her absolute title; but here the testator has expressed a purpose which is not personal to the daughter. It is, I think, more than mere motive; it amounts to a trust. The testator was maintaining a household. His daughter was living with him. On his death he did not contemplate an instantaneous scattering of the family living with him; and the money on hand, either as cash in the house, or on deposit in the bank, was given to his daughter "to meet the immediate current expenses in connection with housekeeping;" not merely his household debts, but all that could fairly be regarded as falling within that designation during a reasonable time after his death, pending the family reorganization. All money not needed for that purpose belongs to the estate as a resulting trust. *Re West*, [1901] 1 Ch. 84, collects the more important authorities.

The remaining question arises on the first clause of the will. Apparently Rebecca Barrett, the testator's wife, had borrowed sixty thousand dollars, and placed a mortgage for this amount upon her property. This was done for the accommodation of the husband. He was a life tenant of the

wife's property under his will, and it is to be presumed, kept down the interest upon the mortgage during his life tenancy. By the clause in question he charges all his real estate, including leasehold property, with the payment of the mortgage upon the wife's property, acknowledging that the mortgage was executed by the wife at his request to secure the debt due by him. The question submitted is, is the estate of Rebecca Barrett a creditor of the estate of the testator for the amount of the mortgage, or is the only effect of the charge and acknowledgment that the real estate of the testator is charged with the payment thereof? The wife during her lifetime was a creditor; upon her death her estate became and still is a creditor; the husband by the will acknowledges the debt, and in addition charges it upon his real estate.

This may be so declared. Other questions may arise in connection with this sum, but counsel stated that they were not yet ripe for determination, so that the present declaration will be limited as above indicated. Costs of all parties will come out of the estate.

HON. MR. JUSTICE MIDDLETON. JANUARY 27TH, 1914.

COWLEY v. SIMPSON.

5 O. W. N. 803.

Prescription — Evidence of—Action to Recover Possession of Lands Agreement—Corroboration.

MIDDLETON, J., *held*, that plaintiff was entitled to the ownership of certain lands in the possession of the defendant who was claiming under an alleged possessory title.

Judgment of GUNN, Co.C.J., affirmed.

Appeal by the defendant from the decision of Judge Gunn, to whom this action was referred for trial. The action was for the recovery of possession of certain lands.

J. E. Thompson, for the defendant.

W. J. Code, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Since the argument the cross-examination of the witness Desormier, upon his affidavit, has been put in. The affidavit and cross-examina-

tion of this witness so completely answer the evidence now sought to be adduced that a new trial upon this ground is out of the question. This is a typical instance of the class of case in which the well known rule as to the preference to be given to affirmative evidence can safely be applied.

The witnesses who so clearly remember the residence of Lavan in Arnprior some 40 years ago give evidence which is much to be preferred to the evidence of others, no doubt equally honest and reliable, who state that he did not live there at that time. They may not have known of his residence, or, more probably, knowing it at the time, have forgotten.

I see no reason why the evidence of Murphy as to the arrangement he claims to have made with Lavan, should not be accepted. The trial Judge has accepted it, and it is quite consistent with all the surrounding circumstances, and the probabilities of the case. If it is accepted, then Lavan became caretaker for the true owners, his possession was their possession and he did not acquire possessory title.

Two matters were forcibly presented by Mr. Thompson in his very careful argument. First, he says, that this is at most an acknowledgment of title and in order to prevent the statute running, the acknowledgment must be in writing. The defect in this is that the agreement made is not relied upon as an acknowledgment. If the agreement was made then Lavan had no possession which would avail him under the statute. The possession was changed. I think further that the evidence shews that Lavan was out of possession at the time of the making of the arrangement, and only resumed possession in his capacity of caretaker.

The other question is whether the evidence of Murphy, an opposite party, is sufficiently corroborated. I think it is, by the evidence of the witness Sheriff. He states in chief that Lavan said that he was in possession of the land as agent for Cowley and Murphy; and while it is true that in cross-examination he does not repeat this expression, he does say that Lavan stated that the land was Cowley & Murphy's, and he also states that he would report the cutting of the posts to them. Taking his evidence as a whole, and in view of the fact that on cross-examination his attention was not drawn to this point, I think the Judge was well warranted in finding that the story told by Murphy was sufficiently corroborated.

The appeal fails and must be dismissed with costs.

HIS HONOUR JUDGE ROGER. DECEMBER 6TH, 1913.

DICKINSON v. AUSTIN.

COUNTY COURT OF UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

Veterinary Surgeon — Counterclaim for Malpractice — Jury Notice Struck out.

ROGER, Co.C.J., *held*, that in malpractice actions against surgeons it is now a well established practice to strike out the jury notice, and the same practice should apply to actions against veterinary surgeons, and that as the case was set down for trial before the Judge, who heard the motion, it was better to dispose of the application in Chambers, rather than to wait for the trial.

Motion in Chambers for an order striking out jury notice served by the defendant, who counterclaimed for damages for alleged malpractice on the part of the plaintiff, who was a veterinary surgeon and who had sued in the Division Court for his fee. The defendant had applied for and obtained an order transferring the action to the County Court, and had filed and served a jury notice.

W. F. Kerr and *D. H. Chisholm*, for the plaintiff, relied on *Town* v. *Archer* (1902), 4 O. L. R. 389 and 390, and *Gerbracht* v. *Bingham* (1912), 23 O. W. R. 82, and contended that the test for a veterinary surgeon being the same as for a surgeon "*spondet peritiam artis*"—Beven on Negligence, 3rd ed., pp. 1131, 1171 and 1156, the practice should be the same as to trying the action with a jury, and that the application should be dealt with in Chambers and not wait until the trial: C. B. 398 (1).

F. M. Field, K.C., for the defendant urged that the matter was purely one of discretion, and that the Judge should not exercise his discretion by striking out the jury notice, and relied on *McNulty* v. *Morris* (1901), 2 O. W. R. 86, and *Kempffner* v. *Conerty*, cited therein and *Town* v. *Archer* (1902), 4. O. L. R. 390, contending that there were numerous facts in dispute which should be passed upon by a jury, and also contending that, in the case of an action for malpractice against a veterinary surgeon, the jury were better qualified than in an action against a surgeon, and that in the north west provinces the reports shewed that such

actions were tried with a jury, and also urged that the motion should be dealt with at the trial.

HIS HONOUR JUDGE ROGER:—The principle has become established that issues involving questions of negligence or of the exercise of due skill by medical men in the practice of their profession should be tried by a Judge without a jury and the same principle should be equally applicable in the case of a veterinary surgeon.

"A medical man ought not to be placed in peril with a jury when their discretion would involve the consideration of difficult questions in the region of scientific enquiry. Per Falconbridge, C.J., in *Town* v. *Archer* (1902), 4. O. L. R. 390.

"According to the now general rule when facts are not so much in dispute as the deductions of skilled witnesses upon the method of treatment disclosed by the facts I directed that the jury should be dispensed with." Per Boyd, C., in *Hodgins* v. *Banting* (1906), 12 O. L. R. 117.

Even if it were the case that there would be but one question and that a question of fact to try in addition to the damages I should still be of opinion that such a fact should be passed by a Judge." Per Riddell, J., in *Gerbracht* v. *Bingham* (1912), 23 O. W. R. 82.

So far as I can gather from the material before me this case runs along malpractice lines. Except that it involves the treatment of an animal instead of a human being. Neither in that nor in the peculiar facts of the case can I see any justification for departing from the now apparently well established practice in such cases. As the case is set down for trial before me at the regular sittings next week I would think it better for all parties that the matter should be disposed of now, and that the jury ought to be dispensed with.