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## COURT OF APPEAL.

MAY 31ST, 1911.

## RAY v. WILLSON.

*Promissory Note—Incomplete Instrument—Delivery—Holder in Due Course—Bills of Exchange Act, secs.* 31, 32—*Fraud —Suspicion—Duty to Inquire—Ratification—Estoppel.*

Appeal by the plaintiffs from the judgment of CLUTE, J., 1 O.W.N. 1005, dismissing their action to recover $1,004.98 alleged to be due by the defendant on a promissory note given by him to one John Thompson by whom it was endorsed over to the plaintiffs.

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

J. Bicknell, K.C., and M. L. Gordon, for the plaintiffs.

H. E. Choppin, for the defendant.

MACLAREN, J.A.:—This is a most unsatisfactory case. The only witnesses examined were the two plaintiffs and the defendant, each on his own behalf. One of the former was merely called to formally prove the signature of the payee as endorser. The evidence of the other plaintiff and of the defendant are both self-contradictory, and unsatisfactory, and to add to the confusion the latter was examined *de bene esse* at his home in Newmarket some days before the trial, so that we have not the benefit of observation by the trial Judge as to his manner, demeanour and condition.

The trial Judge took special pains to get at the real facts of the case and adjourned the trial until the afternoon, in order that the books of the plaintiffs, who are private bankers at Fort William, might be produced. He found upon the evidence that the defendant had signed his name upon a blank promissory note form and had delivered it to one John Thompson, not that

the latter should convert it into a note, but that he should hold it until the defendant, in case he had not money to pay the bills for repairs in his houses in Port Arthur, should instruct Thompson to fill it up for the amount of the repairs and discount it, but that Thompson had, without such instructions, fraudulently filled it up for $1,000 payable on demand, and had delivered it to the Union Bank as collateral security for his own debt. He further found upon the evidence that the plaintiffs were not holders in due course, and that when they took the note they had reason to suspect, and did gravely suspect, the bona fides of Thompson, and he consequently dismissed the action.

The first question to be considered is whether this case falls within section 31 of the Bills of Exchange Act which provides that "where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount," etc.

The only evidence on this point is the testimony of the defendant who being in his seventy-sixth year, and having been ill for a couple of years, was said by his physician to be unable to go to the trial at Port Arthur. He had been formerly a bailiff for some twelve years; some of his answers are bright and intelligent; others have no connection with the particular question, and his memory appears to have been particularly defective as to the order of events in point of time.

His testimony, so far as material, is to the following effect:— Some two or three or four years before his examination (June 10th, 1910), he went to Port Arthur and through his friend Thompson bought some lots, on one of which were two buildings. Thompson was to get needful repairs done, and send the bills to him. If he had the money he was to send it; in case he should not have the money he left with Thompson some blank printed forms of notes signed, but with nothing more. The bills for repairs were sent to him and he says he sent the money by return mail. About the 6th November, 1909, he received a letter from the plaintiffs dated the 3rd November, 1909, stating that they held a demand note of his in favour of John Thompson for $1,000, of which they demanded payment. A few days later he received a notarial notice of protest of the note, dated the 11th November, 1909, and shortly after another letter from the plaintiffs dated the 16th November, 1909, threatening suit if the note was not paid. He did not answer or pay attention to any of these.

From admissions made to the defendant by Thompson who visited Newmarket shortly after these notices were received by the defendant, and from the evidence of the plaintiff Jarvis, it appears that Thompson had fraudulently filled up one of the blank notes for $1,000 payable on demand, dated the 20th June, 1908, to himself as payee and endorsed and gave it to the Union Bank at Fort William as collateral to his own indebtedness there. In March, 1909, he opened an account with the plaintiffs and soon falling behind was being pressed for payment. He told Jarvis that the Union Bank held a demand note of the defendant's as collateral security for over $100 due by him (Thompson), and were pressing him for payment. Jarvis agreed to advance the necessary money, and Thompson brought the note now in question to Jarvis and gave it to him as collateral security for his then indebtedness of over $600 and for any future indebtedness.

The trial Judge held, on the first point, that as the defendant had delivered the note to Thompson merely as a custodian, and not to "be converted into a note," section 31 of the Bills of Exchange Act did not apply, and on the authority of Smith v. Prosser, [1907] 2 K.B. 735, he dismissed the plaintiffs' action.

The plaintiffs did not in their reasons of appeal or in the argument before us question the evidence of the defendant as to the terms upon which the note was delivered to Thompson, or the fact that he had fraudulently filled it up and used it for his own purposes, and they could not very well have done so. This ground was fully set out in the statement of defence, and in the evidence of the defendant taken as above stated some days before the trial, and it does not appear that the plaintiffs took any steps to procure the evidence of Thompson at the trial to contradict him, nor did they bring any other evidence to contradict or discredit the defendant as to any other portions of his evidence, which might have been disproved if untrue. While on some other points the memory of the defendant did not serve him, yet as to the terms of the delivery of the blank notes, his memory was quite clear and his several answers, repeated both in his examination-in-chief and in his cross-examination, were uniformly consistent and emphatic that Thompson was given no authority to fill up or issue the note unless he, the defendant, on receipt of the bills for the repairs should not have the money to pay them and should so inform Thompson, which brings the case fully, so far as the facts and terms of delivery are concerned, precisely within the case of Smith v. Prosser. While in that case it was said that the Act did not apply, on

account of the blank promissory note form not being stamped, it was held by the English Court of Appeal that the Act had not in this respect altered the law, and it was followed in our own Courts in Hubbert v. Home Bank, 20 O.L.R. 651, where the facts were substantially the same as in the present case.

By section 39 of the Act every contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto. In Smith v. Prosser the Court held that there had been no delivery to give effect to the instrument, but that it was delivered to Telfer, as a mere custodian, until he should receive further instructions, and that it was not delivered in order that it might be converted into a bill, so that section 31 would not apply.

In the reasons of appeal, and before us, it was claimed that Smith v. Prosser was not in point, because the bill was subject to what is our section 32, and was not enforceable, because not filled up in accordance with the authority, and because Smith was not a holder in due course, as the note was not complete and regular when first shewn to him, and he had notice that it was being completed pursuant to a limited authority. This is quite true, but the action was not dismissed on that account, but because it had never been delivered by Prosser to be completed as a bill, and consequently could not become a bill binding upon him.

It is argued that here the plaintiffs can recover as holders in due course under the proviso of section 32 which provides that "if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filed up within a reasonable time and strictly in accordance with the authority given." It will be observed that this applies only "to any such instrument," that is, to such an instrument as is mentioned in section 31, and one which has been "delivered by the signer in order that it may be converted into a bill," and does not apply to an instrument like this, delivered merely to be held to a bailee or custodian until further instructions are received from the signer. It is not pretended that such instructions were ever given, so that the instrument never became a note, for want of a proper delivery.

It was also argued before us that the defendant was liable on the ground of ratification. This was based solely upon the statement in the defendant's evidence that when Thompson came to Newmarket after the defendant had received the letter from the plaintiffs and the notice of protest, Thompson informed him that he had filled up the note for $1,000, but that

he had paid $600 on it and would pay the balance. The defendant says that he did nothing then as there was nothing he could do. This falls far short of a ratification, even if a forgery such as this could be ratified.

Further, it was claimed that the defendant was liable on the ground of estoppel, for not notifying the plaintiffs that the note was a forgery, when he received their letter of the 3rd November, and the notice of protest about the 14th November, and Ewing v. Dominion Bank, 35 S.C.R. 133, [1904] A.C. 806, is cited in support. This case is not at all in point. The defendant would receive the plaintiffs' first letter about the 6th November, and if he had replied by return mail the plaintiffs would not have received it before Thompson made the assignment to the plaintiff Jarvis on the 9th November, and the notice of protest came only a week after the assignment. The plaintiffs according to their evidence and the entries in the books paid Thompson nothing after May 18th and closed his account on June 30th, months before the defendant received any notice or became aware of the existence of the note; and there is no evidence or suggestion that they could have suffered any loss between the time that the defendant became aware of the existence of the note, and the time of their bringing the action and becoming aware of the defence of forgery, so that there is no foundation for any estoppel. In the Ewing case the Dominion Bank paid out $1,355 of the proceeds of the forged note, which it would not have done if Ewing had advised of its being a forgery on getting the notice from the bank.

The plaintiffs further urge that they should succeed as having acquired the note from the Union Bank, a holder, they say, in due course. As already pointed out it is only a note that has been duly delivered to be converted into a note that is, by the proviso of section 32, validated as a note; but there is a further weakness in the plaintiffs' contention, namely, the want of evidence to prove the fulfilment of any of the necessary conditions. Section 58 provides that when it is admitted or proved that the issue of a bill is affected with fraud or illegality, the burden of proof that he is a holder in due course shall be upon the holder, unless and until he proves that, subsequent to the fraud or illegality, value in good faith had been given by some other holder in due course. Here admittedly there was fraud and illegality on the part of Thompson and the note was a forgery. It became necessary therefore to prove that the Union Bank took the note when it was regular and complete on its face, in good faith and for value without notice of any defect in the

title of Thompson: sec. 56. The onus is upon the plaintiffs to prove each of the foregoing facts affirmatively; until they do so, the presumption is against them. Now, there is not a tittle of evidence as to when or how the bank acquired the note, or whether it was complete or regular on its face when it was taken, or that the bank gave value for it in good faith, or that it had no notice of the defect in Thompson's title. The only evidence on any of these points, if it can be called evidence, is that Thompson told the plaintiff, Jarvis, that the bank held such a note as collateral security to his indebtedness of over $100, and that when Thompson brought the note to the plaintiffs it had the stamp of the Union Bank upon its face. There can be no pretence that the Union Bank was proved to have been a holder in due course.

But, even if it had been proved that the Union Bank was a holder in due course, the plaintiffs under the evidence in this case did not become such, or entitled to recover anything upon this note. The learned trial Judge who saw the plaintiffs and heard them give their evidence before him, and who examined their books relating to the transaction, made this finding: "Thompson had been in straightened circumstances; either insolvent or on the eve of insolvency for some time; he had his account with the plaintiffs who were familiar with his financial circumstances and standing. From their intimate knowledge of Thompson's affairs, I am of opinion that they had reason to suspect, and did gravely suspect the bona fides of Thompson as the holder of this note. They made a very small advance upon receiving it; they gave no notice to the defendant that they held it as collateral until long after the period that they had received it. The result of the evidence upon my mind was to lead me to the conclusion that the plaintiffs, having a suspicion, as I find they had, of the fraudulent holding of Thompson, were guilty of negligence in not putting themselves on enquiry as to the validity of the alleged note."

[The learned Judge refers to what he terms the "abundant evidence to support these findings," and proceeds:]

As I have already stated the case is a very unsatisfactory one, especially on account of most important material facts not being proved, but the burden of proving these facts was almost wholly on the plaintiffs and they should bear the consequences. I do not find sufficient to lead me to reverse the trial Judge on any of his findings, especially as to those where he had the witnesses before him, and which are quite sufficient, standing alone, to support his judgment dismissing the plaintiff's action.

In my opinion the appeal should be dismissed.

MOSS, C.J.O., and MAGEE, J.A., concurred in dismissing the appeal, for reasons stated by each in writing.

MEREDITH, J.A., dissented from the judgment of the majority of the Court, and for reasons stated by him in writing, was in favour of allowing the appeal.

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JUNE 6TH, 1911.

## DOMINION LINEN MILLS CO. v. LANGLEY.

*Contract—Sale by Liquidator of Stock in Trade of Insolvent Company — Reorganisation — Purchase of Goods by New Company—No Active Part in Sale Taken by Liquidator—Goods Sold "Free from Encumbrance," and "Subject to Shorts and Longs"—Illegal Sale of Goods for Bleaching Charges.*

Appeal by the defendant from the judgment of MACMAHON, J., 1 O.W.N. 262.

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

A. W. Anglin, K.C., for the defendant.

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

MAGEE, J.A.:—An incorporated company called Dominion Linen Mills, Limited, was in business at Bracebridge manufacturing linen cloth in 1905. It was in the habit of sending cloth of its manufacture to a firm of Lumsden & McKenzie in Scotland to be bleached and returned. In January, 1906, the company got into financial difficulties. All its assets, excepting some smaller claims against contributories, and possibly a very few small items, were held by its largest creditor, the Crown Bank of Canada, as security for its debt to that bank, and the company had made an assignment for the benefit of its creditors.

On January 30th, 1906, an order was made under the Winding-up Act that the company should be wound up. By another order of the same date the defendant Langley was appointed provisional liquidator and ordered to enter into such an arrangement and agreement with the Crown Bank, who, the order

states, were then in possession of the company's assets under the security held by the bank against the same, as to enable the business of the company to be carried on and maintained by the bank or otherwise as a going concern.

Some arrangement would seem to have been made, and subsequently, it is stated, when the defendant was appointed permanent liquidator an order was made, with the bank's consent, that the liquidator should carry on the business until a sale could be effected.

That company, the Dominion Linen Mills, Limited, consisted of five persons, Messrs. Nesbitt, Kloepfer, McKenzie, Vandusen and Dodds—and they were guarantors personally to the Crown Bank. The four last named were desirous of getting rid of their colleague. It is stated by the solicitor who had charge of the winding-up proceedings that the object of the winding-up was a reorganisation to hand it over to a new company as a going concern without shutting it up, and the whole proceedings were consented to by the Crown Bank which financed the operation and advanced the money to let the business be run, and the legal advisers of the bank took the most active part in settling the advertisements for sale. For the old company the manager was Mr. Caldwell, and the assistant manager Mr. Morrow. There appears to have been absolutely no change in the staff nor any interference by the liquidator with the business beyond the fact that he sent his clerk to the works.

It was the directors of the insolvent company who made the bargain with the liquidator as to his remuneration, and it was the four last named of them who eventually supplied more capital, and became the shareholders of the new company, which subsequently acquired the assets and carried on the works, and is the plaintiff in this action. It is, I think, manifest that the liquidator would not be expected, and was not expected to take any active part. The assets were not expected to sell for enough to pay the Crown Bank. Those directors were the only parties really interested, as there was practically nothing to be realized over expenses of liquidation for anyone but the Crown Bank, to which as guarantors they would be ultimately responsible in case of deficiency.

On 6th February, 1906, an inventory of "cloth in stock" was made out and furnished by the company's manager to the liquidator, the total being $14,103.30. In that inventory were included under the heading "at bleach" ten items amounting to $2,373.49, no indication being given as to where they actually were. It is the last four of these items comprising 67 pieces and

amounting to $1,084.94 which are the subject of this action. These 67 pieces were then in fact in the hands of Lumsden & McKenzie in Scotland, having been sent them before January, 1906, to be bleached. The liquidator, however, had no knowledge that any of the goods in the list as being "in stock" were out of the country. I take it from the evidence that the goods in the other six of the ten items "at bleach" were then lying in the Customs warehouse at Orillia on their return from Scotland.

On the 17th February, 1906, the liquidator advertised for tenders to be received on 3rd March for purchase of the assets "as per inventory." Nothing came of this, and I only refer to it to say that the advertisement, which is said to have been well discussed before being settled, does not throw any different light upon the question here involved. As the incumbrances were to be adjusted out of the prices tendered, the liquidator would not receive the money.

Then we find another inventory prepared by the company's officers and furnished to the defendant, dated 13th April, 1906, in which under the heading "cloth in stock" amounting to $10,283.52, are included as "at bleach" the same ten items as in the inventory of February 6th, and again without any intimation as to where they were.

On the following day, 14th April, 1906, the liquidator entered into an agreement with L. C. Todd whereby he agreed to sell to Todd all the assets of the company for certain prices or amounts: Parcels 1 and 2 at stated prices; "Parcel 3 being all the company's raw material goods in process of manufacture, and manufactured goods as per inventory, at the price of 80 cents on the dollar on the inventory value shewn in the office of the liquidator, subject to shorts and longs." All the properties to be free from incumbrance except a certain lien, if it existed, which the purchaser assumed. The purchaser, it was thereby stated, paid $5,800 to the liquidator on account of purchase money, and the remainder was to be paid the Crown Bank within 30 days from 12th April on the completion of the purchase. The stock was to be immediately taken and price payable in respect of parcel 3 was to be immediately ascertained by agreement between the purchaser and the liquidator, and possession of the property was then to be delivered on sufficient security being given for the use of the premises pending the completion of the purchase, and the purchaser was to assume all the expenses from the time of receiving possession. He was to have the privilege of assigning his rights to a company to be formed. This agree-

ment was by assignment of 26th April, 1906, transferred by Todd to the plaintiff, the Dominion Linen Manufacturing Co., Limited, which in the meantime was incorporated. Todd was in fact only a nominee of the real purchasers. Messrs. Kloepfer & McKenzie guaranteed to the liquidator that his purchase would be carried out. He was a clerk in the office of the solicitors then and now acting for the purchasers. So that there was in fact no change of management: the works went on. The old company's manager and assistant manager continued. The only difference was that Mr. Nesbitt had not an interest.

That the new proprietors considered themselves as throughout in possession is, I think, manifest from the letter of the plaintiff company to the defendant of 21st April. Mr. Langley had asked an explanation of an apparent discrepancy of over $9,000 between the inventories of February and April, and on 21st April the plaintiffs wrote in justification of a reduction in prices, and refer to both inventories as made by them for the liquidator. Indeed, it would seem that they assented very readily to an increase of the April inventory instead of standing by the rights of Mr. Todd as purchaser under it: all going to shew if that be so that the question of price was not a matter of moment to them as between them and the Crown Bank. That letter also shews that the plaintiffs then considered themselves in possession of their purchase.

The letter of 27th April from the solicitors then and now acting for the plaintiff purchasers to the defendant shews that possession, so far as the liquidator was concerned, had been handed over to the purchasers and that they so considered it, and in that letter they asked him so to write the Crown Bank and to pay to that bank the deposit he had received, and they pointed out that he had a guarantee and indemnity from Messrs. Kloepfer & McKenzie. Thereafter the plaintiffs went on making payments to the Crown Bank, and, so far as appears, took no more notice of the liquidator in connection with the purchase. On the 30th April the liquidator wrote the solicitors that pursuant to their letter he was paying to the Crown Bank the $5,800 deposit on the understanding that the purchasers would hold him harmless in so doing, and this letter was acknowledged the following day. Thus the defendant was at the plaintiffs' request, and on their authority, parting with the very money, out of which any charges for bleaching or allowance for shorts or deficiencies should be paid if the purchasers were not to pay them themselves.

There is no attempt by the plaintiffs to shew that the prices at which the goods in question were entered in the inventory in-

cluded the cost of any increase of value by the bleaching. That they did not, and that the purchasers took them on the basis of unbleached goods, and expected to pay any bleaching charges in addition to the purchase price is I think manifest from the evidence. Mr. Morrow, the plaintiffs' assistant manager, says the inventory price is the cost price, the manufacturing price, by which I understood him to mean the cost at the mill before sending to Scotland. Being asked whether it had occurred to him between the date of the purchase and the end of May that perhaps he should see how Lumsden & McKenzie's account stood and pay them he answered, "I was watching that and just as soon as ever we had the money I sent them a cheque for these goods—for the bleaching." And he goes on specifically to shew why it was in his mind, because he had a sale in view and he says he was just waiting to accumulate enough money to pay the bleaching account. He is the plaintiffs' witness and their officer, and makes not a suggestion that these bleaching charges should be paid by the liquidator, or out of the moneys going to the Crown Bank. Again when on 29th May the plaintiffs sent Lumsden and McKenzie a bank draft for their account, there is no suggestion that it was considered that the liquidator or the Crown Bank should pay it, or that it was even charged against either. If the Crown Bank had to pay it, the answer very likely would have been a further demand upon the guarantee. At that stage it could make no difference to the liquidator or the bank, whatever the rights between the plaintiff company and its component shareholders might be.

Again there were other goods of those inventoried as "at bleach," lying in the Customs charge at Orillia on their way back from Scotland. The plaintiffs had to pay the Customs duties upon these: (see their letters to the liquidator of 30th May, and 27th April, 1906), and yet no suggestion even in this action that they should be repaid the Customs charges. All makes it clear, I think, that the plaintiffs were to take and did take the goods as *in situ* wherever they might be, whether at the factory or in Orillia or in Scotland, and accepted delivery and took these goods as unbleached goods upon which they had to pay the bleaching charges. Such being their position, let us see what was done with reference to and by Lumsden & McKenzie. On 14th February, 1906, the latter firm wrote the liquidator saying that the Dominion Linen Mills owed them £87 10s. 10d., per their account of 4th January, of which they enclosed a copy, and that against it they held 67 pieces of goods bleached, finished, packed and ready for sale, the value of which exceeded the claim; and asking him, if he did not elect to pay their ac-

count and take the goods, to give them authority to dispose of them, and they would remit any surplus or rank as creditors for any deficiency. The account contained items of July and August and September, 1905, amounting to £60 1s. 2d., and one item of 4th January, 1906, for £27 9s. 8d.

The liquidator, whose advertisement for tenders was then running, acknowledged this letter on 26th February, stating he would advise them later. On 11th April they wrote that they were awaiting further advices as to disposal of goods. That letter would of course be received by the liquidator after the sale to Todd, and on 2nd May he wrote them that the assets had been sold to a new company and the proceeds would barely satisfy the secured claim of the Crown Bank—and there was small prospect of any dividend for unsecured creditors; then he added, "I as liquidator have no objection to your disposing of the goods in the highest market, applying the proceeds of such sale on your claim, and advising me accordingly." On 14th May, they acknowledged receipt and stated that "as instructed by you we are taking offers for the goods which we trust will leave a balance to the credit of the estate." The next day, 15th May, they wrote for detailed invoices of the goods shewing the accounts of the different pieces in case they had difficulty in getting buyers to take them without that. This letter seems to have been received by the liquidator on 29th of May, and on that day he forwarded from Toronto to Mr. Caldwell, the plaintiffs' manager at Bracebridge, a copy of this request and asked for such information as would enable him to reply. On that same 29th May the plaintiffs were writing to Lumsden & McKenzie enclosing a bank draft for £87 10s. 10d. to square their account, and also forwarding other goods for bleaching. The letter makes no reference to having heard from the liquidator, and so far as can be seen was written, not in consequence of his letter of that day, and possibly before its receipt. It is not likely they would have received his letter in time to procure a bank draft, even if received at all that day. They do not acknowledge it until the next day, 30th May, when they inform him that these goods in Scotland had been taken in the inventory, and they had sent Lumsden & McKenzie a draft and another lot of goods "which keeps them all right." The liquidator says this was his first knowledge that the goods in the inventory included any goods in Scotland. There would have been no difficulty if Lumsden & McKenzie had waited for a reply to their letter of 15th May, but they did not do so. On 8th June they wrote the liquidator advising him of "having effected the sale of the Dominion

Linen Mill goods," and of having taken offers from several buyers and accepted the highest. They added: "we were obliged to undertake to lap the goods in order to effect a sale, as all goods are sold here lapped. Owing to this there has been some little delay in getting the goods despatched, but we hope to be able to send you a statement shortly." On 10th July they wrote the liquidator that they had a complete statement ready, and asked whether it with the balance was to be sent to him, or if they were to deal with the new company; and on 13th August they sent the liquidator a statement of their account and a bank draft for the surplus proceeds of sale. Two years afterwards, on 17th November, 1908, in reply to inquiry as to dates of the sales, they wrote the liquidator's solicitor that "the goods were sold in two separate lots, the respective dates of the sales being 13th and 22nd June, 1906." The parties went to trial on this statement as being the correct dates of the sales. But the plaintiffs at the trial pointed out that these dates do not agree with the letter of 8th June which spoke of the sales as already effected, and desire that they should have an opportunity of correcting the mistake.

We have no means of knowing when the property in the goods passed, or when each purchaser selected the pieces he was to get. The vendors were to lap them, and therefore they were not bought in the condition in which they were, and it would seems probable that this lapping had not been done even on June 8th. It may be that the property did not pass till 13th or 22nd June.

However, on 8th June, 1906, Lumsden & McKenzie wrote the new company that they had been instructed by the liquidator to dispose of the goods, and pay their own account out of the proceeds, remitting any balance to him—and on 11th June, 1906, they acknowledged the receipt of the new company's letter of 29th May enclosing draft for £87 10s. 10d.

That letter to the plaintiffs of 8th June was inaccurate in two respects—the liquidator had not instructed them to dispose of the goods nor to remit him the surplus proceeds. But it is upon the basis of that letter being true that the plaintiffs brought their action.

It is admitted that by the law of Scotland, Lumsden & McKenzie had no right to sell the goods without the authority of a Court or the consent of the owners, but that they had a right to retain the goods until paid for their work upon them.

The liquidator had in his letter of 2nd May told Lumsden and McKenzie that the assets of the old company had been

sold to a new company. Therefore Lumsden & McKenzie were made aware that neither the old company nor the liquidator was the owner of the goods. Having told them this, he goes on to say, "I as liquidator have no objection to your disposing of the goods, applying the proceeds on your claim and advising me accordingly." But that was not an instruction to sell, much less to sell illegally. He had in fact given up possession in April and had no further control over the assets. He was in effect only saying to Lumsden & McKenzie, so far as I am concerned now when the assets belong to other people, I do not object to your taking any steps which the law allows.

This falls far short of instructions to sell or convert, and no case has been cited which would hold it to be a conversion.

The judgment in the plaintiffs' favour proceeds upon the basis of a breach of contract, and not upon conversion. But it is significant that the plaintiffs themselves brought their action for wrongful conversion, and only at the trial added a claim for breach of contract. They did not consider or assert that they had not had delivery of these goods, but went upon the mistaken supposition that Lumsden & McKenzie's letter to them was correct. The learned trial Judge refused to give effect to the claim as originally made.

Then on the basis of contract, it is upon the evidence, in my view, clear that the plaintiffs in April accepted these goods as in the bleachers' hands; and as having full control over them, it was their recognized duty to pay the bleachers' charges which were not encumbrances in their eyes from which the goods were to be free, that they deliberately put off paying for those charges more than a month, and had in April specially required the defendant to pay over to the Crown Bank the very money out of which he could have paid those charges if he was to pay them, and they the purchasers were to hold him harmless in so doing. Then, too, if the liquidator had known of and paid these charges, there would have been so much less to go to the Crown Bank and so much more to be paid by the guarantors—the plaintiff company's proprietors.

It would be a great injustice to the defendant if he were now to be held responsible for the illegal act of the firm in Scotland in selling for a debt which the plaintiffs should have paid. No doubt he acted thoughtlessly in writing the letter of 2nd May and not informing the plaintiffs of it, but he has had in return the anxiety of this litigation.

In my view the appeal should be allowed with costs.

MOSS, C.J.O., gave reasons in writing for arriving at the same conclusion.

GARROW and MACLAREN, JJ.A., concurred in the judgment of MOSS, C.J.O.

MEREDITH, J.A., dissented from the judgment of the majority of the Court, giving reasons in writing.

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## HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 16TH, 1911.

### SHEAHEN v. TORONTO R.W. CO.

*New Trial—Absence of Counsel for Defendants at Trial—Plaintiff Electing to Proceed—Verdict for Plaintiff—Setting Aside—Circumstances of Hardship—Terms—Costs.*

Action for damages for injuries sustained by the plaintiff while a passenger on a car of the defendants.

The action was entered for trial at the Toronto spring assizes, and was reached on the 16th March, when it was stated that the defendants' counsel, who had been in England, was expected to return in a day of two, and the presiding Judge was requested to put the case on the list for the following Monday, the 20th March, for the purpose of being spoken to, and a day fixed for the trial. The learned Judge thereupon directed that the case should be placed on the list for the 20th.

On Monday the 20th March, the defendants' counsel having returned to Toronto, the case was spoken to, and it was arranged that the jury should be dispensed with, and the action tried on the following Friday, the 24th instant. The learned Judge reserved the whole of that day for the trial.

On Friday morning the plaintiff, with her counsel and witnesses, was in attendance and ready to proceed, when the defendants' junior counsel stated that his senior was engaged on a case at Hamilton assizes, and asked for a postponement. The plaintiff's counsel said that the preparation had been a great strain on the plaintiff, and her condition was such that a postponement and prolongation of the litigation would seriously affect her chances of recovery, and further that, owing to the circum-

stances surrounding the case, an unusual amount of trouble and expense had been expended in getting ready for trial, and the defendants' counsel should not have entered upon a case at the Hamilton assizes late on the previous afternoon, which rendered it impossible for him to appear at the present trial. The learned Judge stated that he had fixed a day for trying the case, with the consent of all parties, and that the trial should proceed. The defendants' junior counsel thereupon withdrew from the case, the evidence of the plaintiff and her witnesses was then taken, and a verdict for $15,000 damages rendered.

The defendants thereupon applied for a new trial.

The motion was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

Wallace Nesbitt, K.C., for the defendants. The defendants' counsel was unavoidably detained at the Hamilton assizes, but in any case the defendants should not be held responsible for their counsel not having appeared at the trial, there having, in point of fact, been no trial.

H. E. Rose, K.C., for the plaintiff. The granting of a new trial would be a very great hardship to the plaintiff, whose condition has become much worse owing to the strain and excitement of the last trial, and her doctor's affidavit shews that her chances of recovery will be greatly diminished if she is forced to undergo the ordeal of a second trial. There was no excuse whatever for the defendants not being represented. The case had stood over to meet the convenience of the defendants' counsel, and he should not have accepted a brief in a case which commenced late in the previous afternoon. In the majority of cases costs would be a compensation, but in the present case there are no compensations.

The Court held that there should be a new trial of the action, and that the question of terms was the only one to be considered.

The only conditions that could be imposed were in regard to costs, and the Court reserved the disposition of costs; counsel stating that an agreement as to costs would probably be made between the parties.

BRITTON, J. MAY 30TH, 1911.

## GARLAND v. EMERY.

*Will—Devise of Land Subject to Legacies—Releases from Legatees Proved but not Produced—Alleged Condition in Releases—Evidence—Corroboration.*

Appeal by the plaintiff from report of the Master at Ottawa, allowing each of the defendants $350 and interest, part of the legacy of $500 to which each claimed to be entitled under the will of John Garland. The Master found that no part of these legacies had been paid, but that $150, part of each, was barred by the Real Property Limitation Act.

Colin McIntosh, for the plaintiff.
R. G. Code, K.C., for the defendants.

BRITTON, J., (after stating the nature of the case as above) :— It is not necessary to refer to any other of the many matters involved in this action, than these legacies.

John Garland owned lot 5, in the 10th Concession of Goulburn which, with all the rest of his estate, real and personal, he devised to his son Nicholas, subject to the payment of certain legacies, including $500 to his daughter Eliza Garland, now the defendant, Eliza Murphy, payable $50, an amount payable out of the estate of James Garland, in one year after the death of the testator; $100 in 6 years; $100 in 11 years; $100 in 14 years; $100 in 17 years; and $50 in 20 years: And to his daughter Mary Garland, now the defendant Mary Emery, $500, payable $50 out of estate of the late James Garland, in one year after the death of the testator; $100 in 7 years after death; $100 in 12 years; $100 in 15 years; $100 in 18 years; $50 in 20 years.

John Garland died on the 26th January, 1890, Nicholas Garland died on the 20th March, 1909, intestate and without issue. The defendant Mary Emery is the administratrix of Nicholas Garland. This litigation is between the widow and the sisters of Nicholas.

The plaintiff and her husband lived together, but, unfortunately, she was absent from home when her husband died. She had been absent from home for about two months. She saw the releases in question in this action. These releases were in her husband's possession. He kept them in a "grip" or small valise in his bed-room. She also states that these defendants were paid

in cash, $150 each, and that she saw receipts to her husband for these sums. It is perfectly true that the plaintiff's evidence is not upon the whole clear and satisfactory as to the wording of the releases or of the receipts. She says the husbands of the defendants also signed the receipts, and in this she is flatly contradicted by the husbands. That papers purporting to be releases were in existence is clear, and the defendants admit signing such. These releases have not been produced. Why? It is open to suspicion that the papers in the grip came into the possession of some person or persons hostile to the plaintiff. It is also open to suspicion that some one in the interest of the plaintiff may have found these, and has not produced them.

I must assume that these releases, which the defendants admit signing and delivering to the deceased, were complete instruments and intended to completely release their brother from the charge created by the will. If they intended to look to him to give them a note, or to rely upon his promise to pay, they could do so. Giving a release would be a good consideration for the promise, but would not cut down the release itself. If the plaintiff had not seen the releases, but was obliged to rely wholly upon the admission of the defendants, then the admission would require to be taken as wholly one statement, and should be accepted without corroboration.

In this case, however, it is different. Releases are proved. The defendants admit execution, but in explanation say that they were conditionally given—that they were only given for a purpose, and that they were not required for the purpose named. I think the explanation as against the deceased requires corroboration, and the evidence of each husband as to his wife does not corroborate the wife upon the material point as to the release being conditional.

It is impossible to say that Nicholas Garland did not, relying upon these releases, do something in dealing with his father's estate that he would not have done had the releases not been executed.

The appeal should be allowed with costs, and the report varied so as to disallow the legacies to the defendants.

TEETZEL, J. JUNE 5TH, 1911.

## ROSS v. FLANAGAN.

*Statute of Limitations—Part Payment—Part of Claim Statute-Barred—Inferred Promise.*

Appeal by the plaintiffs from the judgment of the Local Master at Cornwall, to whom the action was referred for trial.

The action was to recover the amount of an open account, and the Master found that the bar of the Statute of Limitations was fatal to all the plaintiffs' claim prior to July, 1906, except $3.76.

R. A. Pringle, K.C., for the plaintiffs.

C. H. Cline, for the defendants.

TEETZEL, J.:—The plaintiffs had for many years prior to 1906, sold quantities of lumber and other building supplies to the late John Bergin (whose executors the defendants are), and in July or August of that year, they rendered a detailed statement of their claim, and $100 was paid by Bergin on account; but whether the payment was before or after the statement was rendered, the learned Master finds that it is not possible to satisfactorily determine, and I agree in this view.

At whatever date the $100 was paid, I think the evidence establishes, as the learned Master has found, that at the time, the plaintiffs' claim consisted of over $500, which was clearly barred by the Statute of Limitations, and $103.76 which was not barred. The Master also found that the plaintiffs have failed to prove that the $100 was paid on account of the statute-barred debt.

There is certainly nothing in the evidence to shew that Bergin expressly made the payment on account of the statute-barred debt, and I can find nothing disclosed in the evidence to warrant a finding that such an intention should be implied.

Mr Pringle contended that the evidence shewed that when the $100 was paid all the items which were not barred had been previously settled between the parties. I am unable to find any satisfactory evidence to support such a conclusion.

The plaintiffs were most unsystematic in their methods of keeping and rendering accounts, and if in the result they have been defeated in a just claim by reason of the statute, this misfortune is chargeable to their own carelessness.

The position being that the plaintiffs' claim at the time of

the payment having consisted of items barred, and items not barred, and the statute having been pleaded, the law applicable is clearly expressed in In re Boswell, Merritt v. Boswell, [1906] 2 Ch. 359, cited by the learned Master. At p. 366, Kekewich, J., in discussing whether from a payment made by a debtor, where the claim against him consisted of items barred and others not barred by the statute, there is to be inferred a promise to pay the items barred by reason of such payment, says: "As I read the authorities, the promise was only to pay so much as was not then statute-barred, the rule being that, in order to give the payment a more extensive operation, it must be shewn to have been made expressly on account of the statute-barred debt."

The burden is therefore upon the plaintiffs to shew that the payment made by Bergin was expressly, or by necessary implication, made with reference to the earlier items of the account, and in the absence of any such proof it must be treated as having been made with reference only to the items not then barred.

The appeal must therefore be dismissed with costs.

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RIDDELL, J. JUNE 6TH, 1911.

## RE CURRAN.

*Will—Co-Trustees under—One Trustee "Going to Reside Abroad"—No Appointment made in his Place—Right of Emigrant Trustee to Act—Claim of Life Tenants to Manage Property—Inconsistent with Power of Sale Vested in Trustees.*

Motion by Alfred Curran, executor of the will of James Curran, for the advice of the Court as to the matters referred to in the judgment.

W. D. McPherson, K.C., for the applicant, Alfred Curran.
L. F. Heyd, K.C., for Walter Curran.
D. Urquhart, for Albert E. Curran.
R. B. Henderson, for the children of Albert E. Curran.
F. W. Harcourt, K.C., for the infants, children of Mrs. Spice.

RIDDELL, J.:—There are three features involved upon the present application. I passed upon one of these upon the hearing and now deal with the others.

James Curran made his will in 1896, whereby he devised and bequeathed "all the real and personal estate . . . of which I may die possessed or in any way entitled to, unto my executrix, executor, and trustees hereinafter named upon" certain trusts. . . .

"5. (1) As to . . . Numbers 118, 120 and 122 St. Patrick Street, Toronto, after making due provision for the payment of all charges upon or against said part of my estate, to pay over the residue of the rents and profits of said part of my said estate to my son Walter for his life, and after his death to his lawful children, if any, share and share alike, and if he leaves a lawful wife or children him surviving who attains, or any of whom attain, the age of twenty-one years, then to convey absolutely unto such child or children, share and share alike, the said premises 118, 120 and 122 St. Patrick Street, but if he dies without leaving any lawful child or children, or if he dies leaving a child or children, and said child or children, or some or one of them, do not attain the age of twenty-one years, then my will is that the said premises be dealt with in the same way as my residuary estate is hereafter provided to be dealt with."

(2) A similar devise to his son Albert Edward of street numbers 114 and 116 St. Patrick Street.

(3) A similar devise to his daughter Lavina Spice of street numbers 110 and 112.

(4) A similar devise to his son Alfred.

7. Residuary clause, devising and bequeathing "unto my executrix, executor, and trustees, to be divided by them among my sons Alfred, . . . Albert Edward, . . . and Walter Curran, and my daughter Lavina Spice, and my grandson, E. J. P., share and share alike, and if any of my said sons, or my said daughter, or my said grandson, should die without leaving lawful issue, then my will is that all which under my will should have gone to said son or daughter or grandson, so dying as aforesaid, shall form part of my residuary estate and be divided among my surviving children as the case may be, share and share alike" . . . "I hereby authorise my executrix, executor, and trustees, to sell such portions of my said estate as and when they shall deem wise, and to hold the proceeds thereof upon the trust hereinbefore imposed in respect of the various parcels of my said estate."

"10. And I declare that if the parties hereby appointed or any of them shall die in my lifetime, or if they, or any of them, or any future trustee or trustees of this my will shall die, or go to

reside abroad, or shall desire to retire from, or refuse or become incapable to act in the trusts of this my will before the same shall be fully performed, then and in every such case it shall be lawful for my said wife during her life, and after her decease, for the continuing trustees or trustee for the time being of this my will, or if there shall be no continuing trustee or trustees, then for the retiring or refusing trustee or trustees, or the executors or the administrators of the last acting trustee, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing or becoming incapable to act as aforesaid, with liberty upon any appointment to alter the number of trustees, but so that immediately after such appointment the number shall not be less than two, and upon every such appointment the trust premises shall be so transferred as to have become vested in the new trustee or trustees or solely as the case may be, and every new trustee, as well before as after the trust premises shall have become vested in him or her, shall have all the powers or authority of the trustees for whom he or she shall be substituted.

"I hereby nominate and appoint my dear wife Ann and my friend, Dr. William Harley Smith, to be the executrix and executor and trustees of this my will."

Ann Curran and Dr. Smith received letters of probate, July, 1896; by order of the High Court of Justice of June, 1897, Dr. Smith was discharged from his executorship and Alfred Curran and Walter Curran were appointed "co-executors and co-trustees of the said estate of said James Curran . . . in conjunction with . . . Ann Curran;" and all the estate was by the same order vested in "the said Ann Curran, Alfred Curran, and Walter Curran, as co-executors and co-trustees upon the trusts contained in the will of the said James Curran."

Walter Curran left the province for the United States in 1900, remained there for about four years, removed to British Columbia in 1904, and there remained until a few weeks ago when he returned to Toronto.

In July, 1908, Ann Curran died, and since that time Alfred Curran has been acting as sole trustee of the estate. Walter Curran now claims to be a trustee also.

This is the first question.

Alfred Curran has been managing the properties of which his brothers are entitled for life to the rent (except such part as they themselves occupy), and without reference to them or their wishes. They wish to have the management of these prop-

erties—which they call their properties—without the intervention or interference of the brother.

And this is the second question, (as I have said, the third question was disposed of at the hearing).

Whatever be the other effects of the order made appointing Walter, it certainly made him a trustee of the will—he therefore is a "future trustee . . . of this my will," and so answers the description in these words under clause 10 of the will. When he went to the United States to live he did "go to reside abroad." I cannot accept the view that "abroad" means "beyond the seas," so that he would be "abroad" if he were in England, and not abroad if he were in the United States. "Abroad" is simply "in foreign parts:" O'Reilly v. Anderson, 8 Hare 101 at p. 104. And that means in any place out of Ontario, whether under the British Flag or not.

But the mere fact of "going to reside abroad" does not ipso facto cause the trustee to lose his office under this will. There have been cases in which such language was employed as that the vacancy in the office came about automatically, e.g., In re Moravian Society, 26 Beav. 101, but that is not so in the present will. When a trustee goes to reside abroad the remaining trustee may appoint one in his stead, but until that is done the emigrant remains trustee. No appointment having been made in the place of Walter, he is still a trustee. I do not think it necessary to express any opinion as to the power of Alfred to make such an appointment now. I hope it may not become necessary to decide that matter, at least so long as Walter remains in Ontario.

The life tenants seem to be irritated by their brother, the trustee, managing the property instead of his allowing them to do so. They seem to think that the property is theirs, and that they should have full control of it. Of course, they have only the property which is given them by the will, and have no ground for complaint if they are not permitted to exercise any dominion over the land beyond what the will provides.

It is argued that they have a life estate in the several properties. No doubt from a very early period in the history of our law, the bequest of the rents and profits of real estate was construed as a devise of the estate itself—and such was the case even when the rents and profits were given only for life, in which case the beneficiary took an estate for life. And the rule was not altered by the fact that such rents and profits were to be given to the beneficiary by the executors. In South v. Alleine, 1 Salk. 228, J. S. devised all the rents and profits of certain

lands to S. E., wife of W. B., during her natural life, to be paid by the executors into her own hands, and after her death unto and amongst J. B., M. B., and R. B. This was held by Rokelby and Eyre, JJ., to give S. B. the lands for life, Holt, C.J., strongly inclining to the contrary opinion.

See also Baines v. Dixon, 1 Ves. Sr. 41. In Bignall v. Rose, 24 L.J. Ch. 27, Kindersley, V.C., says, p. 29: "I think there is equally a gift to him of the leasehold house by the terms 'rent of the house.' An undefined gift of the rents of the property is, according to the general rule, a gift of the absolute interest."

[Reference to Mannox v. Greener, L.R. 14 Eq. 457, at p. 462, per Malins, V.C.; Bunbury v. Doran, Ir. R. 9 C.L. 284; cases in Jarman, 6th ed., pp. 1296, 1297; Blann v. Bell, 2 D. M. & G. per Lord Cranworth, at p. 781.]

But here there is not a bequest of the rents and profits simpliciter. The testator seems to have contemplated that there would be some encumbrance upon the several parcels of land, and he provided that the trustees should see to the payment of all charges against each portion of the estate, and then pay the residue to the beneficiary. If there were in fact any encumbrance, it could scarcely be argued that the trustees were ousted from the management of the property, and I do not think that the circumstance that no encumbrance (except taxes, etc.) exists, changes the title: [Reference to Going v. Hanlon, Ir. R. 4 C.L. 144.]

But there is another difficulty in the way of the beneficiaries. The will provides for sale by the trustees, "as and when they shall deem wise," of any portion of the estate. This it seems to me necessitates the trustees retaining full disposing power over all the estate. There is no saying when a state of affairs will arise when for the interest of those in remainder the trustees may think it wise—and justly think it wise—to sell. The power to sell is inconsistent with the life estate claimed in the land itself.

The consent of the children of these beneficiaries does not affect the legal estate and rights of the trustees—although it might justify the trustees in allowing the life beneficiaries to manage the property if they felt so inclined. I can only declare the rights of the parties—the Court has no jurisdiction to compel them to act in a common sense way and to lay aside personal feeling in a business matter.

No attempt has been made to attack the good faith or honesty of the acting trustee; nor is any application made to remove him.

Success being divided, the applicant Alfred Curran will

have half his costs out of the estate, the official guardian will be paid costs ($10.) out of the estate, and the other parties will bear their own costs.

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BEATH v. TOWNSEND—FALCONBRIDGE, C.J.K.B.—JUNE 1.

*Mining Company—Action to Recover Shares in—Evidence.*] —Action by plaintiff, vice-president and director of the Golden Rose Mining Co., to recover from defendant, president and director of the company, 10,000 shares of stock in said company and $325 of moneys claimed as due from defendant to him. The learned Chief Justice stated that it was only the able conduct of the defence which induced him to reserve judgment in this case, as the preponderance of evidence in the plaintiff's favour is overwhelming. The plaintiff to have judgment for 9,000 shares of the defendant's stock in the Golden Rose Mining Co., with full costs of action. The claim of $325 had been settled, and the plaintiff was not entitled in this action to any sum in respect of the brick of gold extracted from the mill run. R. R. McKessock, K.C., and J. S. McKessock, for the plaintiff. W. R. Wadsworth, for the defendant.

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BLACK v. TOWNSEND—FALCONBRIDGE, C.J.K.B.—JUNE 1.

*Agreement — Action for Breach.*] — Action to recover $3,019.30 for moneys and expenses of plaintiff, paid at defendant's request, damages for breach of agreement, etc. The learned Chief Justice said that he accepted the testimony of the plaintiff and his witnesses as against that given for the defence. The plaintiff did what he was required to do under the agreement up to the time that he found it was useless to go any further. The agreement is binding on the defendant, and was not executed or delivered in escrow, as the defendant contends. Judgment for the plaintiff with costs, with reference to the Master to find and report as to the moneys paid and expenses incurred by the plaintiff, and other claims as set out in the statement of claim, and as to damages for the breach of the agreement. Further directions and costs reserved. R. R. McKessock, K.C., for the plaintiff. W. R. Wadsworth, for the defendant.

SHEPARD v. SHEPARD—DIVISIONAL COURT—JUNE 5.

*Will—Construction—Line of Division of Farm—Intention of Testator.*]—Appeal by the defendant, Albert James Shepard, from the judgment of LATCHFORD, J., ante, 1012. The members of the Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) were unable to agree with the view of the learned trial Judge as to the division of the farm, which he had arrived at with some hesitation, and gave written reasons allowing the appeal, thus giving effect to the appellant's contention, which was that the testator's intention was to divide his farm into two parts equal in area, and that Joseph should take the north half, and Albert James the south half of the land in this lot owned by the testator. W. E. Raney, K.C., for the appellant, Albert James Shepard, A. G. F. Lawrence, for the plaintiffs. S. C. Smoke, K.C., for the defendant, Helen Shepard. E. C. Cattanach, for the infants.

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ECKERSLEY v. FEDERAL LIFE ASSURANCE CO.—MIDDLETON, J.—JUNE 7.

*Life Insurance—Homans Plan—Alleged Misrepresentation—Costs.*]—Action by a policyholder in the defendant company for rescission of the contract on the ground of fraud or misrepresentation. The policy was on what is known as the Homans plan, by which the assessments increase from year to year during its currency. MIDDLETON, J., said that he had read very carefully all the correspondence and considered the evidence given by the plaintiff and had come to the conclusion that there was no fraud or misrepresentation inducing the contract. The policy must be construed as it is written and both parties are bound by its terms. After explaining the nature of the Homans plan and its difference from the ordinary level premium insurance, and the proper construction of the policy in question, the judgment proceeds: "I can see no course open save to dismiss the action, and in doing so I do not give costs, not because of any unfair conduct of those now in charge of the company (they appear to have been both fair and frank), but to shew my disapproval of the original form of policy, which seems to me to be tricky and calculated to deceive. I think the rates should have been carried on so as to shew the great and prohibitive cost when the insured lives beyond seventy." J. H. Ingersoll, K.C., and A. C. Kingstone, for the plaintiff. G. H. Watson, K.C., and T. C. Haslett, for the defendants.

MUIR v. CURRIE—MIDDLETON, J.—JUNE 7.

*Will—Interest in Business—Partnership Account.*]—Action by devisees of Alexander Muir, who owned a one-half interest in a shipbuilding business in the village of Port Dalhousie, against the executors of Alexander Muir, the owner of the other half interest, for $745.32, claimed to have been received by them out of the estate as executors of Alexander Muir. Judgment: "What the testator disposed of was his interest in the business; he could only deal with what was his own, i.e., the net balance coming to him on an accounting in which he would necessarily be charged with the amount due by him to the firm, and his partner would in like manner be charged with the balance due by him. I understand that on this footing $47.91 would be due the plaintiffs, and judgment may go for this sum, without costs. The defendants may have their costs out of the testator's estate. J. H. Ingersoll, K.C., and A.C. Kingstone, for the plaintiffs. A. W. Marquis, for the defendants.

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RE PEPALL AND BROOM (OVERHOLDING TENANTS' ACT)—RIDDELL, J., IN CHAMBERS—JUNE 7.

*Landlord and Tenant—Overholding Tenant—Prohibition.*]—Application by a tenant for prohibition to the Judge of the County Court of the county of York, on the alleged ground of want of jurisdiction. RIDDELL, J., said that on the evidence he could not find that it had been proved that the Overholding Tenants' Act did not apply, and dismissed the application, the dismissal to be with costs unless the parties have otherwise agreed. The applicant, Broom, appeared in person. E. G. Long, for the landlord, Pepall.

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RE PEEL—RIDDELL, J., IN CHAMBERS—JUNE 7.

*Lunacy—Petition for Declaration of—Issue Directed—9 Edw. VII. ch. 37, sec. 7(1).*]—Petition by Charles Alfred Peel, that John James Peel be declared a lunatic, and supplementary petition to appoint a committee of the person and estate of the said John James Peel. RIDDELL, J., thought the case came within the statute 9 Edw. VII. ch. 37, sec. 7(1), and without commenting upon the evidence, thought an issue should be directed to try the alleged insanity, as it is not the policy of the Court to

discourage applications of this character where good ground exists even for serious suspicion of the soundness of mind of any one, and on the other hand, the Courts are very careful not to make an order declaring any one a lunatic without practically conclusive evidence. The issue will be prepared by the applicant (who will be plaintiff) under sec. 7 (5), the defendant will be the alleged lunatic, whose defence will be with the privity of the official guardian. The issue will be tried by a Judge without a jury (subject to the provisions of sec. 8 of the Act) and at the next sittings of the Court for trials at Lindsay (subject to further order). Costs of this application to be disposed of by the trial Judge, or upon application in Chambers, after the final disposition of the issue. This order to be without prejudice to an application under the Act of 1911, 1 Geo. V. ch. 20, either before, at the time of, or after the trial of the issue. A. J. R. Snow, K.C., for the applicant. G. H. Watson, K.C., and F. D. Moore, K.C., contra.

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## NOTE.

In Northern Crown Bank v. International Electric Co., ante 1200, it should have been stated that the judgment of Meredith, C.J.C.P., is reported in 2 O.W.N. 286, and 22 O.L.R. 339. The judgment of the Divisional Court will be reported in the Ontario Law Reports.