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APPELLATE DIVISION.

JUNE 23RD, 1913.

*GOULD v. FERGUSON.

Solicitor—Bill of "Costs, Charges, and Disbursements"—Solicitors Act, sec. 34—Amount for each Service not Stated—Action for Amount of Bill—Charges for Conveyancing—Taxation—Effect of Judgment for Part of Bill.

Appeal by the defendant from the judgment of the District Court of the District of Nipissing in favour of the plaintiff, a solicitor, in an action to recover the amount of a bill of costs delivered by the plaintiff to the defendant for services rendered by the plaintiff to the defendant.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

R. McKay, K.C., for the defendant.

A. G. Browning, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The retainer is not disputed, nor is it disputed that an itemised statement of the work done and disbursements incurred was rendered more than one month prior to the commencement of the action.

The defence is, that, although an itemised bill of the services was rendered, the amount for each service is not stated, but a lump sum charged.

Upon the trial the Court declared that a proper bill had been delivered, and referred the taxation thereof to the clerk of the Court, reserving further directions and costs.

*To be reported in the Ontario Law Reports.

The Solicitors Act, R.S.O. 1897 ch. 174, sec. 34 (now 2 Geo. V. ch. 28, sec. 34), provides that no action shall be brought for the recovery of "fees, charges or disbursements" for business done by a solicitor, until one month after the delivery of the bill.

No doubt, full justice can be done under the judgment; but the question still remains whether the Act has been complied with.

The weight of authority, English and Canadian, is against the sufficiency of the bill as rendered. The fact that no tariff is provided for conveyancing, which forms the principal items of this bill, presents no obstacle to taxation: O'Connor v. Gemmell, 26 A.R. 27, at pp. 39, 40; Re Solicitors, 10 O.W.R. 951. . .

[Reference to Wilkinson v. Smart, 33 L.T.R. 573; Philby v. Hazle, 8 C.B.N.S. 647, 29 L.J.C.P. 370.]

Wilkinson v. Smart was followed in Black v. Hummell, 51 L.T.R. 430. It was also held in Black v. Hummell that, where a substantial part of a bill of costs is improperly set out and described, and a substantial part is properly set out and described, the whole bill is not bad, but the solicitor can recover upon those items that are properly described.

The plaintiff relied upon Re Johnston, 3 O.L.R. 1, but that case is quite distinguishable. . . .

See Re Mowat, 17 P.R. 180; Re Pinkerton and Cook, 18 P.R. 331; O'Connor v. Gemmell, 26 A.R. 27.

The items for disbursements were properly given, amounting to $49.12; and I was under the impression that the plaintiff might have judgment for this amount, with leave to deliver and tax a further bill, but my brother Riddell has drawn my attention to Re Davey (1865), 1 U.C.L.J. N.S. 213, and cases cited. The effect of giving judgment for the plaintiff for part of the bill would be to give judgment for the defendant for the remainder, so that no further bill could be rendered. If the plaintiff elects, he may have judgment for $49.12, subject to taxation, with costs here and below on the County Court scale, without set-off, which would be in full of his bill.

Otherwise, the appeal must be allowed with costs of appeal; no costs below.

Order accordingly.

[See Gundy v. Johnston, ante 788, 28 O.L.R. 121.]

JUNE 23RD, 1913.

*BADENACH v. INGLIS.

Will—Testamentary Capacity—General Paretic Insanity—Evidence—Jurisdiction of High Court—Judgment of Surrogate Court Upholding Will on Decreeing Probate—Judicature Act, sec. 38—Surrogate Courts Act, R.S.O. 1897 ch. 59, sec. 17—10 Edw. VII. ch. 31, sec. 19—Res Judicata—Parties.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 716, dismissing the action, which was brought by the brother of Edgar A. Badenach, deceased, to set aside two wills made by the deceased, one dated the 24th August, 1908, and the other the 10th June, 1909.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. H. Watson, K.C., and C. H. Porter, for the plaintiff.

A. F. Lobb, K.C., for the defendant, the widow and executrix of the deceased.

MULOCK, C.J.:—The will of the 10th June, 1909, purports to revoke all prior wills or testamentary dispositions of the testator. If, therefore, it is valid, it is unnecessary to inquire as to the validity of any earlier will.

The will of the 10th June, 1909, was signed by the testator on that day, and it is attacked on one ground only, namely, alleged testamentary incapacity; so that the only issue in respect of that will is, whether Edgar A. Badenach was, on the 10th June, 1909, competent to make a will. This is a question of fact.

. . .

[Reference to Wilson v. Wilson, 22 Gr. 39; Banks v. Goodfellow, L.R. 5 Q.B. 549.]

One question raised before us was, where the burden of proof lay. The will was admitted to probate in the Surrogate Court, after contestation by the testator's mother, who withdrew opposition to the will in consideration of a conveyance to her, by the executrix (the defendant in this action), of certain lands formerly owned by the testator; and the present plaintiff, the testator's brother, was not a party to the Surrogate

*To be reported in the Ontario Law Reports.

Court proceedings. Nevertheless, that Court granted probate of the will. . . .

[Reference to Sutton v. Sadler, 3 C.B.N.S. 87, 98; Smell v. Smell, L.R. 5 P. & M. 84.]

In this case, the defendant having given such proof of the testator's capacity as to satisfy the Surrogate Court, it is for the plaintiff now, who alleges incapacity, to prove it.

The plaintiff's contention is, that as early as the month of February, 1907, the testator was suffering from general paresis, and that he continued a paretic, deteriorating mentally, until his death, and was, in consequence, incompetent to make either of the wills in question.

Different classes of evidence were adduced at the trial, namely, evidence of experts as to the testamentary capacity of a paretic, and in regard to the testator's probable capacity, evidence of his actual capacity as exhibited by him in his business affairs, and evidence as to his general conduct and demeanour. . . .

[Summary of the testimony.]

I am of opinion that not only has the plaintiff failed to shew testamentary incapacity on the part of the testator, but the defendant has affirmatively established his capacity, at least as late as September, 1908; and there is no evidence shewing incapacity when the will of June, 1909, was executed.

If I entertained any doubt as to the weight to be attached to the medical testimony, that doubt would disappear in favour of testamentary capacity when the evidence furnished by the business dealings of the testator . . . was cast into the scale. Opinion evidence as to the testator's incapacity is unconvincing in the face of his capacity as proved by his actual conduct. . .

This appeal should be dismissed with costs.

CLUTE, SUTHERLAND, and LEITCH, JJ., concurred.

RIDDELL, J.:—. . . It was suggested before us, for the defendant, that the High Court has no jurisdiction in the premises. . . . I think that the express words of sec. 38 of the Judicature Act cannot be got over by any implication arising from the omission upon the last revision, in 1910—10 Edw. VII. ch. 31, sec. 19—of the final clause in R.S.O. 1897 ch. 59, sec. 17. The same section also disposes of the plea of res adjudicata, in the circumstances of this case.

A decree of a Court of Probate establishing a will is said to be a judgment in rem, binding all the world: Halsbury's Laws of

England, vol. 13, p. 328, sec. 460; Noel v. Wells, 1 Lev. 235; Douglas v. Cooper, 3 My. & K. 378; Beardsley v. Beardsley, [1899] 1 Q.B. 746; Emberley v. Trevanion, 4 Sw. & Tr. 197; Concha v. Concha, 11 App. Cas. 541. The statute, however, gives jurisdiction to the High Court to try the validity of wills, even after probate has been granted. The result, therefore, is, that the grant of probate is removed from the category of judgments ad rem. The plaintiff in this action was not a party to the proceedings in the Surrogate Court, and cannot be bound by the result. . . .

[Reference to Brigham v. Fairweather, 140 Mass. 411, 416.]

And he is not shewn to have taken any part in the proceedings in the Surrogate Court so as to raise any equity against him, even if any participation could have such effect.

The plain issue in this case is, whether the deceased had, at the time of making the two wills, or either of them, testamentary capacity—there is no charge in the pleadings of undue influence, and there is no evidence of anything of the kind. . . .

[Reference to Low v. Guthrie, [1909] A.C. 278, 281, 282, 283; Barry v. Butlin, 2 Moo. P.C. 480; Fulton v. Andrew, L.R. 7 H.L. 448, 461; Banks v. Goodfellow, L.R. 5 Q.B. at p. 565; Boughton v. Knight, L.R. 3 P. & M. 64, 72, 73; Cartwright v. Cartwright, 1 Phillim. 90; Harwod v. Baker, 3 Moo. P.C. at p. 290; Wilson v. Wilson, 22 Gr. at p. 83; Sproule v. Watson, 23 A.R. 692; Bannatyne v. Bannatyne, 16 Jur. 864; Mitchell v. Thomas, 7 Moo. P.C. 137; Dufaur v. Croft, 3 Moo. P.C. 136; Boyse v. Rossborough, 6 H.L.C. 2; Sefton v. Hopwood, 1 F. & F. 578; Lovett v. Lovett, 1 F. & F. 581; Wingrove v. Wingrove, 11 P.D. 81; Browing v. Budd, 6 Moo. P.C. 430. Summary of the evidence.]

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

JUNE 25TH, 1913.

EAGLE v. MEADE.

Master and Servant—Injury to Servant—Negligence—Common Law Liability—Workmen's Compensation for Injuries Act—Accident—Evidence.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 948.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. M. Godfrey, for the plaintiff.

G. C. Campbell, for the defendant.

LEITCH, J.:—Assuming that William Meade had the superintendence of the stable intrusted to him, the injury to the plaintiff was not caused by any negligence on his part whilst in the exercise of such superintendence.

The next question is, was the injury caused to the plaintiff by his conforming to any order or direction to which he was bound to conform and did conform? He was directed to put down the bedding for the horses. His injury was not due to this order or to anything he did in carrying it out. It was urged on behalf of the plaintiff that William Meade caused the injury by untying the horse and backing him or permitting him to back out of the stall in order to water him. This was not negligence. It was also stated that there was evidence that he turned the horse loose in the stall to enable him to go to water. Even suppose that he did, I do not think that that mode of managing a quiet horse, or a number of quiet horses, is negligence. It is a common every-day practice of people having the care and management of horses. I do not see that there was any evidence of negligence to submit to the jury, and the appeal should be dismissed. The defendant did not ask for costs.

CLUTE and SUTHERLAND, JJ., agreed.

RIDDELL, J., agreed in the result.

Appeal dismissed.

JUNE 25TH, 1913.

*VIPOND v. SISCO.

Costs—Successful Defendant Ordered to Pay Plaintiff's Costs of Action—Order Supported on Ground that Plaintiff Entitled on Merits to Succeed—Sale of Goods—Refusal to Accept—Justification for Refusal—Shipment f.o.b.—Effect of—Statute of Frauds—Amendment at Trial.

Appeal by the defendant from the judgment of the Judge of the County Court of the United Counties of Stormont, Dun-

*To be reported in the Ontario Law Reports.

das, and Glengarry, adjudging that the defendant should pay the costs of the action, although the action was dismissed.

The action was for the price of goods alleged to have been sold and delivered by the plaintiff, a wholesale merchant in Montreal, to the defendant, a merchant in Port Arthur. The plaintiff received the order for the goods through his traveller; by the order, the terms were "f.o.b. at Montreal against a sight draft." The goods were loaded on a ship at Montreal; the bill of lading was taken in the name of the plaintiff, and was by him endorsed in blank and sent to a bank, with a draft attached, and instructions to deliver the bill of lading to the defendant upon payment of the draft. When the shipment arrived at Port Arthur, the defendant found, by examination, that part of the goods, a case of cheese, was missing. He refused to pay the draft, and was not given the bill of lading. Some correspondence followed, the defendant declining to pay unless the cheese was forthcoming, but expressing his willingness to pay as soon as the shipment was complete. The bill of lading was returned with the unaccepted draft to the plaintiff; who then brought this action.

The County Court Judge held that, but for the Statute of Frauds, the plaintiff was entitled to recover $154.17 for damages for non-acceptance of the goods, but considered that the statute was an absolute bar; and, accordingly, dismissed the action, but ordered the defendant to pay the plaintiff all his costs. The Judge gave leave to the defendant to appeal upon the question of costs.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

C. A. Moss, for the defendant.

C. H. Cline, for the plaintiff, argued that he was entitled to costs, because the Judge might and should have given him judgment for his claim.

RIDDELL, J., delivered a written opinion in which he said that the Court was bound by previous decisions to hold that there was no power to direct the defendant to pay the costs of an action which failed; and also that an order against a successful defendant for costs might, without a cross-appeal, be supported if, on the evidence, the defendant should not have succeeded.

The learned Judge was also of opinion that the property in the goods had not, as the plaintiff contended, passed by the shipment. Discussion of the law as to shipment f.o.b.; and reference to Benjamin on Sale, 5th ed., pp. 388, 398; Wait v. Baker (1848), 2 Ex. 1; Van Castrel v. Booker (1848), 2 Ex. 691; Turner v. Liverpool Co. (1851), 6 Ex. 543; Browne v. Hare (1858-9), 3 H. & N. 484, 4 H. & N. 822; Stock v. Inglis (1884), 12 Q.B.D. 564, 573; Cowas-jee v. Thompson (1845), 5 Moo. P.C. 165; Ogg v. Shuter (1875), L.R. 10 C.P. 159, 1 C. P.D. 47; Mirabita v. Imperial Ottoman Bank (1878), 3 Ex.D. 164 (C.A.); Scott v. Melady (1900), 27 A.R. 193; Graham v. Laird (1909), 20 O.L.R. 11.

The learned Judge continued:—

Under the facts of this case, I think that there can be no question that the property did not pass to the defendant at any time. The action of the plaintiff, if any, must be for refusal to accept goods—and here his difficulty is twofold. He did not and could not tender the whole of the goods ordered, and the defendant was perfectly justified in declining to accept a draft for the whole order when part of it was not forthcoming. The other difficulty is, that there is no evidence of damage.

The result, in my opinion, is, that the learned County Court Judge was in error in holding that, but for the Statute of Frauds, the case was made out.

If the plea of the statute had not been raised at all, the defendant would have been entitled to a dismissal of the action.

As a rule, the costs should follow the result. It is not uncommon to treat the question of costs as unimportant—in my view, this is not proper. The refusal to award costs is, in no small number of cases, a refusal of justice. A defendant wrongfully brought into Court on a wholly baseless charge has double wrong done him when he is forced to pay for the luxury of being sued—if he has done nothing to invite the litigation or acted improperly in the litigation.

I can find nothing in this defendant but courtesy and an honest desire to carry out his contract; and he should have his costs unless the raising of the Statute of Frauds makes a difference.

When, at the trial, an application is made to amend by pleading the Statute of Frauds, a not unusual course is to permit the amendment upon payment of all costs theretofore incurred—and this is a wise course to pursue if that defence

puts an end to the action, as was the case in Wall v. McNab, referred to in 9 O.W.R. at p. 362; cf. Kendrick v. Barkey (1907), 9 O.W.R. 356. In other cases, the term of paying these costs may be relieved against if it turns out that there is a perfect defence dehors the statute.

In the present case the plea was allowed to be added without the imposition of terms—and I do not think that the defendant should be punished for raising the defence.

If the conclusion of the learned Judge was correct and the only defence the statute, I should not be disposed to allow an appeal if the judgment had gone without costs. Here, however, the disposition of costs is wholly wrong; the defendant has a perfect defence on the merits; and I can find no reason why he should not have his costs. In my opinion, the judgment dismissing the action should stand, but the plaintiff should pay the costs of the County Court and in this Court. . . .

SUTHERLAND and LEITCH, JJ., concurred.

CLUTE, J., agreed in the result.

Appeal allowed.

JUNE 25TH, 1913.

DIXON v. DUNMORE.

Vendor and Purchaser—Contract for Sale of Land—Formation of Contract—Execution of Deed—Reading Several Documents together—Statute of Frauds—Signature by Agent's Clerk—Objection to Title—Outstanding Mortgage—Parties—Specific Performance.

Appeal by the plaintiff from the judgment of WINCHESTER, Co.C.J., dismissing an action (in the County Court of the County of York) for specific performance of a contract for the sale of land.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. J. Gray, for the plaintiff.

S. H. Bradford, K.C., for the defendants.

CLUTE, J.:—The action is for specific performance of an agreement in writing made by the plaintiff with the defendant Dunmore through one Moffat, Dunmore's agent.

The defendant Taylor, it is alleged, had knowledge of this agreement, and, he having the legal estate, it was agreed by the parties that Taylor should convey direct to the plaintiff. Taylor signed the deed in question, and, in doing so, attempted to close the matter; but the plaintiff's solicitor objected that no plan had been filed, and that there was an outstanding mortgage. The defendants allege that the plaintiff's solicitor's refusal to close the transaction, and the deal was off.

The truth seems to be that both parties were ready to carry out the transaction, and there is no reason why it should not have been carried out if the parties and their solicitors had exercised a little more courtesy toward each other.

It is clear, however, that the plaintiff's solicitor never refused to carry out the deal, although he seems to have been abrupt when Taylor called to close the matter—the solicitor then being engaged with other clients.

The trial Judge was of opinion that the plaintiff, "by his agreement, bound himself to treat the agreement as being null and void in case the vendor was unable or unwilling to remove any valid objection to the title which the plaintiff made, and having raised the objection, and the defendant not having the fee simple free from incumbrance on the property, he is bound by his agreement, and it should be considered null and void. No deposit was ever paid to the defendant, and no purchase-money tendered to him before the matter was declared off between him and the plaintiff's solicitor. The defendant was unwilling to remove the objection raised by the plaintiff, although, no doubt, he could have compelled his vendor to remove it, had he been able to pay him the balance due under his agreement; this, apparently, he was unable to do, or at any rate was unwilling to do. The action, in my opinion, should be dismissed with costs."

The defendant Dunmore authorised Moffat to sell for him two lots on the south side of Victoria avenue; the number is not given. A formal agreement was drawn up between the defendant, Moffat, and the plaintiff, in which Moffat agreed to sell to the plaintiff 95 feet more or less, on the south side of Victoria avenue, in the village of Weston, at $7 per foot, cash. This agreement provides that the purchaser be allowed twenty days to investigate the title; and, if, within that time, he should furnish the vendor any valid objection to the title which the

vendor shall be unable or unwilling to remove, the agreement shall be null and void and the deposit returned to the purchaser; time to be of the essence of the agreement.

This agreement was not signed by Moffat, but was signed by one G. M. Frazer, who appears to have been a clerk in Moffat's office, or interested with him. A cheque for $25 was given upon the purchase, on the same date. The receipt given by Moffat to the plaintiff is as follows: "March 27th, 1912. Received from D. G. Dixon deposit $25 on 95 feet of land, more or less, on south side of Victoria avenue." It appears that Dunmore owned but one lot or 50 feet on the south side of Victoria avenue, in the village of Weston; and on the 29th March, 1912, Moffat wrote to Dunmore for the number of the lot, to which Dunmore replied as follows:—

"West Toronto, March 29th, 1912.

"In reply to yours of to-day, re ground at Weston, the number is lot 2. Yours faithfully, H. W. Dunmore.

"P.S. Dear Sir: Will you kindly let me know the full name of the purchaser, as I can have his name put on the deed, instead of mine, as it will save me a transfer. Yours, etc., H. W. Dunmore."

Dunmore had purchased lot 2 from the defendant Taylor on the 1st November, 1909, for $250, $25 down, and the balance in half-yearly instalments of $25 each, with the option to the purchaser of paying off the balance of the purchase-money at any time. The plan was afterwards registered. There was no difficulty as to the outstanding mortgage, as Taylor stated that he could get the land discharged from the mortgage at any time, and as a matter of fact the mortgage was discharged before this action was brought, so that there was no reason why the transaction should not have been carried out. If the contract was binding upon the defendant, an outstanding mortgage was no objection to the title, nor did the plaintiff raise the objection as one of title, but desired that before the purchase-money was paid the mortgage should be discharged.

It is also quite clear, I think, that the plaintiff, either by himself or his solicitor, did not relieve the defendant from completing the contract. The plaintiff, while admitting that the defendant could not convey to him the whole of the 95 feet, was willing to take what the defendant had to convey—that is, lot 2.

The sole question, therefore, remains, is there a contract binding in law? There is no question that the parties understood perfectly what was intended to be sold. I do not think that the

agreement of the 27th March is indefinite. It appears from the evidence of Mr. Gray, solicitor, that one Miles, who paid the deposit, wished to purchase the 45 feet, and that the plaintiff desired to purchase the 50 feet, being lot 2. The 45 feet was owned by Barker, and the deposit was paid upon both.

In the view I take of the matter, it is unnecessary to decide whether the agreement of the 27th March, 1912, is sufficiently definite or sufficiently signed to make a binding contract between the parties, because, after this instrument was executed, the matter was cleared up, the number of the lot was obtained, it was understood that the plaintiff should take the deed of lot 2, it was agreed by both defendants that such a deed should be given. This deed was prepared and executed by Taylor and his wife; and this deed, together with the agreement of the 27th March, the letter from Moffat to Dunmore and his reply, the cheque for the purchase-money, and the receipt, together form a sufficient memorandum in writing to satisfy the Statute of Frauds.

The defendant Taylor was properly made a party, because, having a knowledge of the agreement to sell, and having consented to make a conveyance direct to the plaintiff, and having that conveyance settled and approved by the plaintiff's solicitor and afterwards signed by himself, he had no right, independent of the other defendant, to declare such an arrangement off. I cannot accept the view of the defendants' counsel, in his able and ingenious argument, that there is any lack of mutuality in such a contract.

Dixon had signed a written agreement to purchase the 95 feet, and was entitled to take so much of it as the defendant had. Dunmore expressly recognised his obligation to convey the lot, by his answer to Moffat, and at the same time requested that the deed might be made direct to the plaintiff by Taylor.

Reading all the documents together, the intention of the parties is perfectly clear; and, but for the unfortunate differences that existed between the parties, the contract would have been carried out.

In my opinion, the plaintiff is entitled to succeed, and to have the contract specifically performed.

Reference may be made to the following cases: . . . Coles v. Trecothick, 9 Ves. 234, as to when there is sufficient evidence to satisfy the Statute of Frauds; it was there held that the vendor was bound by the signature of the agent's clerk; but clerks of agents, in general, have no authority to bind the principal: Gibson v. Holland, L.R. 1 C.P. 1. "Where there is a com-

plete agreement in writing, and a person who is a party and knows the contents, subscribes it as a witness only, she is bound by it, for it is a signing within the statute:" In re Hoyle, [1893] 1 Ch. 84. As to objections to title where there is an outstanding mortgage: Grieves v. Wilson, 25 Beav. 290, 75 L.T.R. 602. As to the right of amendment when the Statute of Frauds is not pleaded, see Brunning v. Odhams, in the House of Lords, 75 L.T.R. 602; McMurray v. Spicer, L.R. 5 Eq. 527. As to the right of the purchaser to take what the vendor has: McLaughlin v. Mayhew, 6 O.L.R. 174; Campbell v. Croil, 3 O.W.R. 862; Bradley v. Elliott, 11 O.L.R. 398.

The judgment of the Court below should be reversed, and judgment entered for the plaintiff, with costs here and below.

SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., agreed in the result.

Appeal allowed.

JUNE 25TH, 1913.

BINDON v. GORMAN.

Partnership—Establishment of—Oral Agreement to Divide Profits of Land Transactions—Validity—Evidence—Basis of Division—Costs.

Appeal by the defendant Gorman from the judgment of LENNOX, J., ante 839.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. F. Shepley, K.C., and J. J. O'Meara, for the appellant.

G. E. Kidd, K.C., for the plaintiff.

M. J. O'Connor, K.C., for the defendant Murray.

RIDDELL, J.:—The defendant Gorman is a man of some means, but a very defective memory, living in Ottawa; the defendant Murray is a land speculator; and the plaintiff, a common friend of these two.

In 1905, the defendant Murray was in need of money to enable him to go west to ply his business. Talking with the plain-

tiff in Ottawa about the "good many snaps" there were lying about in the west and his own need of money, the plaintiff suggested seeing Gorman. The two went to Gorman's office; Gorman lent Murray $300 on his note, and Murray told him that he would let him and the plaintiff know of "anything good," and that, if they cared to invest, he was sure they would make good profits. Murray says: "We talked over a division of profits; he said, if there was anything good, he would furnish the capital and divide up the profits . . . between Mr. Bindon, Mr. Gorman, and myself." Murray went west to Brandon and got an option on some property in Brandon which is now called Victoria Park. He wrote to Bindon and in answer got a telegram from Gorman: "I authorise you to invest ten thousand dollars in real estate and divide profits between Bindon, myself, and yourself." The property was transferred to a syndicate managed by Mr. Curry, of Toronto, and composed of Murray, Gorman, and three others. Gorman, who had gone to Kansas City and elsewhere, contributed some money to the scheme and ultimately made some profit. Murray had intended apparently to take up the option for Gorman, Bindon, and himself, but Gorman's money did not come soon enough, and so he applied to Curry to finance the scheme, with the result we have seen.

Afterwards, Murray became interested in the Kensington Park property in Montreal, and induced Gorman to take $10,000 stock in a company handling that property. This was brought about by Bindon writing Murray to come up to Ottawa and see Gorman; but there was no new bargain made about sharing profits. What happened, according to Bindon, was, that he drew Gorman's attention to the scheme and said it was a good investment; then he sent for Murray, who came up from Montreal; the plaintiff again recommended the investment; Gorman went to Montreal, saw the property, and did invest—nothing, however, seems to have been said about the plaintiff receiving any share in the profits. This statement of facts (except the last sentence) is derived from the evidence of Murray, whose manner of giving evidence particularly impressed the learned trial Judge: and a careful perusal of the evidence does not enable me to say that his faith in Murray was misplaced. We must accept the findings of fact. . . .

The pleadings are in rather a curious state. The plaintiff sues both defendants, claiming a partnership with them for the purpose of dealing in real estate in Brandon and elsewhere, alleging the receipt of profits by Gorman, and saying that

Murray is a member of the partnership and entitled to participate in the profits; the pleader asks for a dissolution of the partnership and a taking of the partnership accounts; Gorman denies everything and pleads the Statute of Frauds: Murray admits everything and "submits his rights under said partnership agreement to the consideration of this honourable Court." It is fairly manifest that Murray desired the advantage of a favourable issue of the plaintiff's claim without rendering himself liable for costs if it failed. At the trial, he sought to amend by asking for a share in the profits, and the case was thereafter treated as though the amendment had been made.

I am unable to agree with the learned trial Judge in his view of division of profits. He has either overlooked or discredited the evidence of the plaintiff that the profits were to be divided equally between the three. But, even if this be wholly eliminated, an agreement that the profits are to be divided, in the absence of other evidence, means that they are to be equally divided: Robinson v. Anderson, 20 Beav. 98, 7 D.M. & G. 239; Peacock v. Peacock, 16 Ves. 49; Webster v. Bray, 7 Ha. 159; Farrar v. Beswick, 1 M. & Rob. 527; Stewart v. Forbes, 1 Man. & G. 137; Copland v. Toulmin, 7 Cl. & Fin. 349; and see in the case of a bequest Peat v. Chapman, 1 Ves. Sr. 542; Ackerman v. Burrows, 3 V. & B. 54.

I can find no evidence to support any claim of the plaintiff or the defendant Murray to a share in the profits of the Montreal transaction, unless it was looked upon by all parties as in continuance of a previously existing relation.

Murray says that the conversation in the first instance was about him placing "the money up there," and that the agreement was, that Gorman would advance the capital. When the transaction "up there" was completed, I do not see that there was any new arrangement made. Murray did not say anything, but left it to Bindon; while all that Bindon says is, that he brought it to Gorman's attention, and, after talking the matter over, Gorman made his investment. Bindon, however, tells us that he had advised Gorman in other transactions which realised for him a great deal of money—"supplied brains" as he puts it—and it does not appear that he was a partner or a gainer in these transactions. I am unable to see that the purchase of stock in a joint stock company in Montreal was a continuation of any relationship which may have existed between the parties or any two of them in connection with lands in the west. The judgment, so far as it refers to the profits on the Montreal transaction, must be set aside.

As to the Brandon transaction, the case is not so clear. The transaction was to be "to invest amounts in the west," "Brandon or elsewhere," "in real estate" (so far, Bindon in direct examination), "invest in real estate in the west," "for Murray to go out to the west and invest in real estate," "investments in the west," "for Murray to go out to the west and to make a selection of lands for this new partnership," for Gorman "to put up money if suitable investments were got;" and the final arrangement was to invest $10,000 in those lands in Brandon—"there was no syndicate formed at the time he agreed to put up the $10,000 or when he sent the telegram to put up $10,000" (Bindon on cross-examination). Murray's account is not materially different.

What happened was, that Murray procured an option on certain lands and wrote Bindon. Bindon saw Gorman, and Gorman sent a telegram authorising Murray "to invest $10,000 in real estate." This, I think, meant, at the time, "invest $10,000 in real estate, obtaining the fee in the land," in other words, "invest $10,000 in buying land," not "in buying an interest in land." Had it not been for Gorman's not sending forward money promptly, it seems that the transaction would have gone through in the manner contemplated. But there was danger of the deal falling through, and Mr. Curry was appealed to, and he sent the money. Curry was insistent that other friends he had should come in; and, says Murray: "I insisted on Gorman coming in, as he had made this offer, and that he was a good capitalist in that way, and that we might want him for other deals, so Curry let him in." And "he was let in on a fifth of this deal." "He came in on the ground floor . . . but not getting the whole space." At this stage, there can be no doubt that Gorman might have withdrawn when he was informed of the arrangement: but he did not do so; on the contrary, he went into the syndicate of five who were to share equally in the profits.

The proposed transaction was an investment by Gorman of all the capital, with an agreement that he should have one-third of the profits, and Bindon and Murray each one-third: what did take effect was an investment by Gorman of part of the capital, with an agreement that he should have one-fifth of the profits, and Murray another fifth. This is so entirely different a scheme from that proposed that, unless Gorman and Murray were bound not to enter into any deal in real estate to the exclusion of Bindon, I do not see that Bindon can claim any share of the profit. It has not been argued that they could not have trans-

actions with each other to the exclusion of Bindon, nor, as I conceive, can it be so argued. No doubt the admission of Gorman into the syndicate would not have taken place if he had not been expected previously to finance the whole deal; but it was not as carrying out in whole or in part the original scheme that he came in, but on a new and different scheme.

Of course, this is not the case of a real estate agent suing for commission, where the rules are very broad; but of one partner suing another for profit unduly made in what is alleged to be a partnership transaction. Nor is it the case of a partner attempting to secure for himself a benefit which it was his duty to obtain, if at all, for the firm. If Murray had acted in bad faith, and, after securing the property for the three, had wrongfully turned it over to the syndicate, an action might have lain against him; but he is blameless in that regard; he could not do otherwise. And, if Gorman had wrongfully permitted to be abandoned a contract which he was in a position to enforce, and which would have procured the property and the profits for the three, it may be that an action would lie against him—but he could not do any better than he did. If Murray and Gorman had conspired to defraud Bindon out of his share and took this way of doing it, an action might have lain against them. But the fact seems to be that a joint deal for purchasing real estate for three in the profits of which the three were to share, because one was to furnish the money, another the work, and the third the brains, fell through from nobody's fault, and a new deal was made whereby five shared the expense and the profits. This is, in my view, not a partnership transaction of the three parties to this action.

If Bindon has any claim upon Gorman as a member of a partnership, he must have the same claim against Murray: and that he repudiates.

While the right should be reserved to both Bindon and Murray to bring any other action that they may be advised to bring, I am of opinion that this action wholly fails, and that the appeal should be allowed with costs payable by both the plaintiff and the defendant Murray—and, in view of the position taken at the trial, the action should be dismissed with costs payable also by these parties.

Appeal allowed.

JUNE 25TH, 1913.

SAUERMANN v. E.M.F. CO.

Settlement of Action—Interpretation of Written Memorandum—Enforcement—Repair of Vehicle Sold in Unsatisfactory Condition—Satisfaction of Referee—Time for Making Repairs—Return of Moneys Paid.

Appeal by the defendants from the judgment of MIDDLETON, J., ante 1137.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. A. Logie, for the defendants.

J. L. Counsell, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts):—I think it clear that all that took place before the 30th October may be left out of consideration, and the case treated as though that day had been appointed by Mr. Russell and agreed to by all parties as the day upon which he was to "pronounce."*

From an examination of the "consent minutes," I think the intention of all parties was, that the defendants, admitting that the car was not all it should be, were given an opportunity to put the car in complete repair; that, when they considered it was in such repair, Russell was to be called in as sole and final referee to decide whether they had succeeded; if, in his judgment, they had, the plaintiff took the car; and, if not, she was to get her money back. While there might not be any objection to Mr. Russell having been consulted by the defendants as to what would be required to be done in order that the car should be in perfect repair, either before the work was begun or when it was actually going on—on that I express no opinion—I think that the parties contemplated that, when the defendants had done what they could "to put the car in complete repair in every respect . . . to the satisfaction of Russell," he was to be called upon to "pronounce." I do not think that he could do anything else than "pronounce"—his duty was to act as judge,

*By the terms of settlement of a former action, the motor-car in question was to be put in order by the defendants to the satisfaction of Russell.

referee, arbitrator, on the particular car, as then submitted to him as "ready for inspection by the said Russell." I do not say that he might not then reserve his decision, but the decision was to be on the "car ready for inspection"—not the car as it might be some days after, when further repairs had been made.

The 30th October was, by the conduct of the parties, fixed as the day for inspection; and it was the car, as on that day, upon which the referee was to exercise his judgment and "pronounce." It may well be that Russell had the right and power to reserve his decision for a day or two, and for experiment upon other cars of the defendants' make, as seems to have been his first intention —but that decision must be upon the car as it was on that day.

The defendants, by their conduct, prevented him from giving such decision so as to be effective to enable the plaintiff to have the car upon which such decision should have been given—it is rendered impossible, by their changing the engine, for them to say that a car aproved by Russell on the 30th October, or as of the 30th October, is at the plaintiff's disposal. So that, even if what was done by Russell on and as of the 30th October is not a "pronouncing" by him in favour of the plaintiff (and I am inclined to think that it is), they have prevented a more formal "pronouncing" by their own conduct. They cannot set up, as against this plaintiff, as a condition precedent, the want of all effective "pronouncing" which they have themselves prevented: Thomas v. Fredericks (1847), 10 Q.B. 775; Hotham v. East India Co. (1787), 1 T.R. 638; Coombe v. Greene (1843), 11 M. & W. 480; Re Northumberland Avenue Hotel Co. (1887), 56 L.T.R. 833; and similar cases.

Appeal dismissed with costs.

JUNE 26TH, 1913.

*RE NICHOLLS, HALL v. WILDMAN.

Executors and Trustees—Liability for Loss on Investment—Retention of Bank Stock Held by Testatrix—Acting "Honestly and Reasonably"—62 Vict. ch. 15, sec. 1—1 Geo. V. ch. 26, sec. 33—Limitation of Actions—Setting apart of Stock to Answer Legacy—Evidence—Onus—Executors not Excused for Breach of Trust—Measure of Liability—Payment of Call on Shares—Responsibility—Executors to Retain Stock on Giving Indemnity—Lien of Legatee—Accounts—Costs.

Appeal by the defendant Mariana Wildman from the order of LATCHFORD, J., ante 930, upon appeal from the report of a Master

*To be reported in the Ontario Law Reports.

in an administration proceeding in which the executors of Ann Nicholls were plaintiffs.

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

H. T. Beck, for the appellant.

G. H. Watson, K.C., and L. M. Hayes, K.C., for the plaintiffs.

G. B. Strathy, for the Royal Trust Company.

The judgment of the Court was delivered by HODGINS, J.A.:— Ann Nicholls died on the 18th August, 1878. Her will was proved by the respondents, the executors, and devised all her estate, both real and personal, whatsoever and wheresoever situate, except as thereinafter mentioned, unto the respondents, upon trust "to invest the proceeds thereof in such manner as they should deem advisable." Apart from a devise of the dwelling-house, furniture, and chattels therein, and the lot upon which it stood, the testatrix disposed of her estate by leaving as legacies various sums of money upon which interest was to be paid, and by disposing of the sums so left after the death of the life-tenant or after the expiry of a certain time.

The first difficulty in the case arises from the following bequest: "I give devise and bequeath to Mary Jane Bryson the interest of six thousand dollars during her life, the rate of interest to be the same as my trustees may receive from my investments, said interest to be paid six months after my decease, and on the decease of said Mary Jane Bryson the said principal sum of six thousand dollars is to be paid to my niece, Mariana Kennin, one year after the decease of Mary Jane Bryson."

The testatrix directed the respondents to appropriate a sum not exceeding $600 to be expended for a monument, and directed them to pay, two years after her decease, one-third of the residue of the estate to two nieces and a nephew, the appellant Mariana Kennin, now Wildman, being one of the nieces.

From the statements filed before the Master it would appear that distribution of most of the estate was made on or about the 12th October, 1881. The estate originally consisted of six items: (1) cash in Ontario Bank, $1,132.92; (2) cash with Messrs. J. & J. Stewart, $2,025.22; (3) United States gold bonds, par value $14,500; (4) 50 shares Federal Bank stock, par value $5,000; (5) 125 shares Ontario Bank stock, par value $5,000; (6) real property in Brooklyn, valued at $28,500: total, $56,158.14. . .

[The learned Judge then referred to a written statement of

the executors made on the 12th October, 1881, which shewed 125 shares of Ontario Bank stock at 66, $3,300, and shewed a sum of $1,419.40 reserved for loss on Ontario Bank stock and for solicitors' charges. He also referred to other statements of the executors.]

I do not see that in any of the statements there is any appropriation of the Ontario Bank stock to the legacy of $6,000 to which the appellant claims to be entitled after the death of the life-tenant. . . .

The stock of the Ontario Bank was cut down on the 21st May, 1882, for the first time, by one-half, and the second time on the 31st May, 1896, it being then reduced by one-third; and the respondent Innes (one of the executors) says that he held shares at the time it was cut down. The respondents took no steps to realise upon the stock. They never put it on the market; never put it into a broker's hands; and are not able to say whether it ever reached a figure which would enable them to sell at 66 cents on the dollar net. The appellant does not seem to have been consulted as to its sale or retention. . . .

The learned Master has found that the respondents acted honestly; and I think that there can be no doubt that his finding is correct and entirely warranted by the evidence.

He has also found that they acted reasonably; but that holding is based upon the fact that they were advised by Robert Nicholls (brother of the testatrix) to hold the stock, and that Ontario Bank stock was, particularly by the citizens of Peterborough, looked upon as absolutely safe and good—a finding which relates to the original retention, rather than the continued holding from the year 1878 down to 1882, and later.

I cannot agree that this stock was ever set apart and appropriated for this legacy, so as to set up a trust for the appellant, as distinguished from the general trusts under the will in question. There is no satisfactory evidence given by the respondents of any actual, definite allocation. The contemporary statements negative this position; and in the accounts filed and in the affidavit of Hall for the purpose of obtaining the administration order, the legacy is dealt with as if payable out of the assets of the Ann Nicholls estate. Under the will in question the real and personal estate was devised to the trustees "upon trust to invest the proceeds thereof in such manner as they shall deem most advisable."

This is a similar power to that found in In re Smith, [1896] 1 Ch. 71, "to invest in such stocks, funds and securities as they

should think fit.'' Kekewich, J., read these words as not confined to such ''proper'' stocks, etc.; because ''to give them a narrow construction would be in effect to strike them out of the will.'' He treated them as meaning such securities as the trustees ''honestly thought fit'' to invest in; and held that the debentures, in the nature of a floating security, of a limited company, payable to bearer, were an investment within the power. The power to invest given in this will is equivalent to a power to retain such securities as they might invest in. . . .

[Reference to Ames v. Parkinson, 7 Beav. 379; Fraser v. Murdock, 6 App. Cas. at p. 877; In re Chapman, [1896] 2 Ch. 763; Rawsthorne v. Rowley, 24 Times L.R. 51, [1909] 1 Ch. 409; Buxton v. Buxton, 1 My. & Cr. 80; Marsden v. Kent, 5 Ch. D. 598.]

These cases seems to justify the view that, if the trustees ''acted in good faith and that their decision to retain this stock was an honest exercise of the discretion given to them by the will'' (per Lord Selborne in Fraser v. Murdock, ante), and if the will did in fact authorise retention—for this is the effect, I think, of National Trustees v. General Finance Co., [1905] A.C. 373; Davis v. Hutchings, [1907] 1 Ch. 356; Whicher v. National Trust Co., 22 O.L.R. 460, [1912] A.C. 377; In re Grindey, [1892] 2 Ch. 593; and Henning v. Maclean, 2 O.L.R. 169, 4 O.L.R. 666—their abstaining from selling, hoping for a better price, from 1878 to 1882, was fairly justified.

But in 1882 the stock was cut in half, and that which had been taken in as worth $3,300, i.e., 66 per cent. on $5,000, became worth no more than one-half of the par value.

As I have said, I see nothing in the evidence or documents filed to warrant the conclusion that there was any setting apart of this stock in 1881 to answer this legacy. . . . I think the conduct of the respondents must be judged in the light of this intention and of the reduction of the stock which occurred next year.

There is nothing to indicate the value of the stock immediately or shortly after the reduction. Probably it would approximate to fifty per cent. on the original par value, upon the belief that the reduction had ascertained and eliminated the total losses of the bank, and that the stock would be worth at least the amount to which it had been reduced.

The rule under the statute, stated in National Trustees v. General Finance Co., [1905] A.C. 373, is, that where the Court finds that the trustee has acted both honestly and reasonably,

there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances. This is approved in Davis v. Hutchings, [1907] 1 Ch. 356, and in this Court in Whicher v. National Trust Co., 22 O.L.R. 460.

This rule is, in the case of an honest trustee, to be applied, "carefully, no doubt, but not grudgingly:" per Rigby, L.J., in Re Roberts, 76 L.T.R. 479, 485; or, as put by Jessel, M.R., in Speight v. Gaunt, 22 Ch. D. 746, the Court should lean to the side of the honest trustee. . . .

There are none of the circumstances relied on as excusing the trustee in In re Chapman, [1896] 2 Ch. 763, and Rawsthorn v. Rowley (ante); and, while there is no legal evidence of sales of Ontario Bank stock, or of the prices at which it was sold except in 1896, there is evidence that sales and prices were being reported in the daily papers in 1882 after the reduction of the capital.

The case is not brought within the rule stated by Lord Romilly in Clack v. Holland, 19 Beav. 271, that the trustee will be exonerated "if there is reasonable ground for believing that, had he taken steps, they would have been ineffectual."

Under these circumstances, I come reluctantly to the conclusion that the trustees have not discharged the onus which is on them (In re Brogden, 38 Ch. D. 546, 567-8, 573-4-5); and I cannot see that they acted reasonably in not selling or endeavouring to realise, in and after 1882, or that, under all the circumstances, a case is made out for their protection under the statute. See Grayburn v. Clarkson, L.R. 3 Ch. 605.

The Statute of Limitations has no application; the appellant never became entitled to possession until 1910: In re Dove, [1909] 1 Ch. at p. 366, per Warrington, J. But the reserve fund or the amounts reserved may properly be treated as absorbed by the loss. There is no evidence that, unless sold at par as reduced, i.e., for $2,500, the $3,300 would have been realised. Under In re Salmon, 42 Ch. D. 351, the trustees are liable only for the loss where they are held liable for an authorised investment carelessly made; and I think that, while the respondents have not satisfied the onus in one direction, the appellant has failed to prove for loss accurately, and that justice will be done if the loss is measured by holding the respondents liable for the par value after reduction in 1882, $2,500, as being the amount that a sale after 1882 would, together with the amounts reserved, have realised.

This will also dispose of the reference back directed by Latchford, J., as the two sums of $600 and $319.40 (mentioned therein as $348.80) are the amounts previously referred to as reserve on Ontario Bank stock.

The Royal Trust Company, as liquidators of the Ontario Bank, have proved a claim in this matter, and have been allowed a claim on the amount ordered to be paid into Court. Payment of the call under that judgment constitutes a loss which flows directly from the act of retention; in other words, from the breach of trust. It seems to follow logically that the executors must make it good. . . .

[Reference to Grayburn v. Clarkson, L.R. 3 Ch. 605; Sculthorpe v. Tipper (1871), L.R. 13 Eq. 232.]

The investment in question here was an authorised investment, in respect of which the liability of the trustee is to make good the loss, which may be enforced without giving the trustee the option of taking the security: In re Salmon, 42 Ch. D. 351, 368, 371; In re Turner, [1897] 1 Ch. 536; but the better and more reasonable practice is, that, where the trustee pays the whole loss, he may take the benefit of the security: In re Lake, [1903] 1 K.B. 439. . . .

Upon payment, therefore, of the amount of $2,500 into Court, and indemnifying the trust estate against the payment of the judgment, the respondents may retain both the Ontario Bank stock, with the right to receive any refund and dividends thereon, as well as the Central Canada Loan Company stock. In the meantime the appellant will have a lien on them: In re Whitely, 33 Ch. D. 347, 12 App. Cas. 727.

I have carefully gone over the accounts, and am unable to see why the respondents should be required to credit therein as received the sum of $2,101.60. If it were so credited as a receipt, it would be on the assumption that the solicitor's receipt was equivalent to that of the respondents, who deny his authority to collect it. It never reached their hands; and, while they paid Miss Bryson sums as yearly interest which steadily lessened, because they had not received this interest, though not to the full extent of the shortage, that is her affair, and not that of the appellant. If now credited, it would, in effect, be charging the respondents with $2,101.60 on balancing their accounts, which I am not prepared to do upon the evidence given.

This $2,500 will, upon the finding that there was no proper appropriation of these shares to the appellant's legacy—the report not being disturbed as to the Peterborough Real Estate

Company's stock upon that point—be paid into Court. The respondents, as I have indicated, must indemnify the estate against the judgment held by the Royal Trust Company.

There should be no costs of the appeal; as the success is only partial and the case not free from doubt. The additional commission upon the $2,500 may be calculated and apportioned by the Registrar, and added to the commission mentioned in the schedule to the report, which is disturbed to the extent of adding this $2,500 and the consequent division of commission thereon, and by striking out of the order appealed from the direction for payment out of the moneys in Court.

Judgment accordingly.

JUNE 26TH, 1913.

*JOHNSON v. FARNEY.

Will—Construction—Gift of Estate to Wife—Expression of "Wish" as to her Disposition of Estate—Suggestion or Precatory Trust.

Appeal by the plaintiff from the judgment of BOYD, C., ante 969, in so far as it dealt with the construction of the will of the deceased husband of Anna Maria Johnson, also deceased.

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

J. H. Rodd, for the appellant.

H. E. Rose, K.C., for the defendants.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—We are of opinion that the judgment is right and should be affirmed.

As the Chancellor points out, the earlier cases on precatory trusts have been departed from, and a stricter rule now obtains. . . .

[Reference to In re Atkinson (1911), 80 L.J. Ch. 370, 372.]

What the Court has to do is to find out what, upon the true construction, was the meaning of the testator, rather than to lay hold of certain words which in other wills have been held to create a trust, although, on the will before the Court, it is satisfied that that was not the intention. . . .

*To be reported in the Ontario Law Reports.

[Reference to In re Adams and Kensington Vestry (1884), 27 Ch. D. 394; In re Atkinson, 80 L.J. Ch. at pp. 372, 373, 374, 375, 376.]

It is reasonably clear that the testator did not intend that the wish which he expressed as to the way in which his wife should dispose of her property should be mandatory, but intended that his wife should take beneficially, with a mere superadded expression of a desire or wish that she should dispose of it in the way indicated by him.

The expression of this wish is contained in a group of what may properly be termed suggestions which the testator makes as to his wife's future actions. These he begins with by counselling her "not to fret after" him, as he has left her in good circumstances, and with a little care she "can get along" without him; then follows an expression of his desire that she shall sell the store property and "go and live" with her mother or in her own house and get a lady companion to live with her. Then follows this expression: "Don't get married again, as you might get some one that will take all I have made for you." Then, after an exhortation to be good to her mother, his desire is expressed that she should keep "old Nellie until she dies or put her in good hands so that she won't be abused;" then follow some other recommendations which it is not necessary to quote; and then comes that which is relied on by the appellants as creating the trust; "I also wish if you die soon after me that you will leave all you are possessed of to my people and your people equally divided between them, that is to say, your mother and my mother's families."

Looking then at the will as a whole, and particularly at that part of it to which reference has just been made, it is impossible to conclude that the testator intended to make it obligatory on his wife to leave all she was possessed of in the way in which he wished that she should leave it; and the proper conclusion is that reached by the Chancellor, that his wish is "no more than a suggestion to be accepted or not" by his wife, "but not amounting to a mandatory or obligatory trust."

The language in which the expression of the wish is couched strongly supports that view; it is only if his wife "dies soon after" him that he wishes the disposition to be made. If it had been intended to impose an obligation on her to make the disposition, one would have expected more certainty as to the event in which his wish was to be carried out.

In addition to all this, it is not the property he leaves to her, but all the property she is possessed of, that he wishes her to dispose of in the way he points out. That circumstance alone is decisive against the appellant's contention: Eade v. Eade (1827), 5 Madd. 118; Lechmere v. Lavie (1832), 2 My. & K. 197; Parnall v. Parnall (1878), 9 Ch. D. 96; Theobald on Wills, Can. ed. (1908), p. 490.

Appeal dismissed.

JUNE 26TH, 1913.

*INGLIS v. JAMES RICHARDSON & SONS LIMITED.

Sale of Goods—Wheat in Elevator—Destruction by Fire—Loss, by whom Borne—Property Passing—Payment of Price—Contract—"Track Owen Sound"—Wheat Sold not Separated in Elevator—Payment of Charges—Notice to Bailee—Course of Dealing—Intention of Parties—Duty to Provide Cars—Unreasonable Delay—Negotiations with Insurance Companies—Vendors Treating Wheat as their own—Salvage Sale—Conversion.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 655.

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

W. D. McPherson, K.C., for the appellant.

J. J. Maclennan, for the defendants, the respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—The 3,000 bushels of grain in question were at the time of the fire in bin "B," with about 17,000 other bushels of the same kind; and, of course, no specific grain had been physically separated and appropriated to the appellant. What the appellant was entitled to get, when he chose to apply for it, was 3,000 bushels out of a larger quantity owned by the respondents; and his receipt and retention of the orders on the Canadian Pacific Railway Company agent did not in any way prevent the respondents from selling the rest of the grain.

*To be reported in the Ontario Law Reports.

If the property in this 3,000 bushels had passed to the appellant, then, subject to the situation created by the subsequent salvage sale, must bear the loss; whereas, if it had not, the respondents are bound to perform their contract or pay damages.

The course of dealing shews that everything in the way of appropriation by intention had been done, short of a physical separation of specific bushels of grain. The quantity and price were settled, and the latter was paid in full. The respondents gave the appellant orders addressed to the agent of the Canadian Pacific Railway Company, in whose elevator the whole quantity of wheat was stored, directing him, on presentation, to deliver the wheat. One of these orders was acted upon, and 1,000 bushels delivered under it. The respondents, upon giving the orders, deducted 3,000 bushels from the account in their books, shewing what they had in store in the elevator. They also notified their insurers, the effect of this being that insurance on this 3,000 bushels was automatically cancelled, as they put it. They had allowed, as a deduction from the purchase-price, the charges which the elevator had against this exact quantity of wheat; and, by so doing, and by giving the order, they delegated to the railway company's agent the duty of measuring out the 3,000 bushels, and to the appellant the duty of paying the charges due the elevator. From the previous course of dealing, from the receipt of the 1,000 bushels, and from the evidence in the case, it is clear that both parties treated the duty of the respondents themselves as at an end, and that the subsequent acts necessary to place the grain in cars were to be done by the railway company's agent, at the request of the appellant, but at the cost of the respondents. The allowance to the appellant of the elevator charges was, if assented to by him, equivalent to payment of this expense by the respondents (Coleman v. McDermott, 1 E. & A. 445); and the words "track Owen Sound," if treated as imposing a duty to deliver on the track, would not prevent the property passing, if, under all the other circumstances, it would do so: Bank of Montreal v. McWhirter, 17 C.P. 506; Craig v. Beardmore, 7 O.L.R. 674. Treated purely as a matter of intention, the property would pass if, in what was done, there was any unconditional appropriation of specific grain, but not if it were conditional, as by a bill of lading in favour of the seller, and not the buyer (Graham v. Laird, 20 O.L.R. 11). But there was not, nor could there be, any appropriation of separated bushels of grain, in the sense in which these words are used when dealing with specific goods. . . .

Upon the whole it may, I think, be taken as proved that the

agent of the railway company had always treated these orders, when presented, as requiring him to deliver the grain represented therein to the holder; and that, if the appellant had presented them promptly before the fire, they would have been honoured, and that the agent was aware of the various transactions, either through his intervention in placing the order, or by subsequent notice from the respondents. . . .

Intention is the test finally applied as determining the passing of the property; and there is authority for the position that when everything has been done that, having regard to the situation of the parties and the position of the goods in question, could be done, on the one hand to part with the dominion over the goods, and on the other to accept the right to demand the goods from a third party in lieu of actual present delivery, the intention to pass the property will be presumed. . . .

[Reference to Benjamin on Sale, 5th ed., pp. 312, 338; Swanwick v. Sothern, 9 A. & E. 895; Greaves v. Hepke, 2 B. & Ald. 131; Turley v. Bates, 2 H. & C. 200; Young v. Matthews, L.R. 2 C.P. 127; Whitehouse v. Frost, 12 East 614; Snell v. Highton, 1 Cab. & Ell. 95; Boswell v. Kilborn, 15 Moo. P.C. 309; Seath v. Moore, 11 App. Cas. 350; Coffey v. Quebec Bank, 20 C.P. 110; Coleman v. McDermott, 1 E. & A. 445; Bank of Montreal v. McWhirter, 17 C.P. 506; Wilson v. Shaver, 3 O.L.R. 110; Ross v. Hurteau, 18 S.C.R. 713; Box v. Provincial Insurance Co., 18 Gr. 280, 289.]

It would . . . seem that the Courts here have not advanced beyond the point of holding that an accepted order, or the proved assent of the warehouseman, will be a sufficient appropriation to allow the property to pass.

This accords with the judgment . . . in Cushing v. Breed, 96 Mass. 376 . . .

[Reference to Coffey v. Quebec Bank, 20 C.P. 110, at p. 550.]

On the facts of this case it is not a long distance to go to hold that the warehouseman assented to hold the 3,000 bushels for the appellant. One of the orders was presented and acted upon; and, while the subsequent order was not formally communicated, the evidence leads to the conclusion that either Simpson, the man in charge of the elevator, or Seaman, his clerk, were in constant communication with the respondents, and aware, through them, of the various sales and the amount thereof, as well as of the names of the purchasers.

In this case it also appears that the parties intended the price to be paid before the grain was delivered or put in a deliverable

state or appropriated; and this, in itself, affords a strong argument in favour of an intention by the parties that the property was to pass before the goods were in a deliverable state or appropriated.

It is further quite reasonable to conclude that, when the appellant paid for the goods, it was to his benefit that the property should pass; for, if the respondents had become insolvent, the appellant would, if the property had passed, have the goods as the security for his money. The respondents, so far as they could, parted with the dominion over the goods, deducted the 3,000 bushels from their account with the elevator, and allowed the appellant the elevator charges for delivery on the track. The appellant, in pursuance of a well-known course of dealing, acted upon one order, and left the rest of the wheat in the elevator; and, in the case where he presented the order, actively assented to the performance by the elevator man of the duty of delivery on the track. The appellant says that he ordered the cars up. The respondents state that they were not billed for this grain by the elevator man after the sale, which is important in view of the decision in Jenner v. Smith, L.R. 4 C.P. 270.

I think, therefore, that it is reasonable to hold that, under all the circumstances, the property had passed to the appellant before the fire.

But another view of the case makes the question of the passing of the property less important. Whatever the intention of the parties was, there can be no doubt of this, that the respondents intended to divest themselves of all dominion over the wheat, leaving it for the appellant to demand it from the elevator when he wanted it. It was obviously convenient to deal with the wheat in this way, so that, when the appellant resold it, he could ship it direct to his purchaser. The respondents had marked it out of their books and had ceased to insure it. If, then, it should be held that the risk was in the respondents, because the property had not passed, it would subject them to a liability, the duration and extent of which could only be determined by the length of time which the appellant took before he required delivery, and by the fluctuation of price during that period. . . .

[Reference to Martineau v. Kitching, L.R. 7 Q.B. 436; Pew v. Lawrence, 27 C.P. 402.]

All the number one northern wheat was in bin "B," and it was not, as stated by the learned trial Judge, destroyed, but only damaged. After the fire, the appellant demanded his wheat. He was met with a refusal both by the railway company's agent and by the respondents, the latter alleging that they had bought

it at the sale of the salvage by the insurance company. That sale vested no title to the appellant's wheat in the respondents. The appraisal of the loss had gone forward on the assumption, afterwards discovered to be erroneous, that the respondents alone were interested in all the wheat. The evidence is clear that the appellant did not assent to the proceedings to adjust the loss, was not notified, and was not a party to the sale. He is not in any way bound by its result. The insurers could not sell nor could the respondent buy the appellant's wheat.

In the view I take, the appellant's wheat, though damaged, was his own. He had paid for it, and was entitled to receive it, and the respondents were wrong in refusing to let him have it. Their mistake in law forms no justification for their conversion of it. They learned, during the adjustment of the insurance loss, that the appellant's grain was included; but, as they had a large amount involved, they went ahead and guaranteed the trustee who distributed the salvage.

The appellant swears that, after the fire, he tested the bin in which this wheat was, and that there was sufficient there undamaged, of which he produced a sample, to allow him to receive the 3,000 bushels he had bought. The respondents say that it was all damaged, partly by fire and partly by smoke. But at the trial the latter refused to disclose the price at which they had sold the salvage, which included this bin, although the trial Judge pointed out that it was material. If they had done so, there might have been sufficient evidence to have enabled this Court to assess the damages, or at all events to have offered the appellant the choice between accepting that price or proving his damages on a reference.

I think the judgment must be reversed, and that judgment should be entered for the plaintiff directing the respondents to pay him such damages as are found by the Local Master at Owen Sound, to whom a reference must be had.

The respondents should pay the costs of the trial and of this appeal and of the reference.

Appeal allowed.

JUNE 26TH, 1913.

*BELL v. GRAND TRUNK R.W. CO.

Railway—Highway Crossing—Injury to Person Using—Previous Accident—Absence of Knowledge by Railway Company—"Moving Train Causing Bodily Injury"—Railway Act, R.S.C. 1906 ch. 37, sec. 275, sub-sec. 4 (8 & 9 Edw. VII. ch. 32, sec. 13)—Speed of Train—Board of Railway Commissioners—Actual and Physical Cause of Accident—Impact—Statutory Warnings—Evidence—Findings of Jury—Misdirection—New Trial.

Appeal by the defendants from the judgment of LEITCH, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $4,600, in an action for damages for personal injuries and loss sustained by the plaintiff by reason of a collision of his waggon and a train at a highway crossing.

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

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

W. Laidlaw, K.C., and E. H. Cleaver, for the plaintiff, the respondent.

HODGINS, J.A.:—The point chiefly argued was the effect given by the learned trial Judge to the first part of sub-sec. 4 of sec. 275 of the Railway Act, R.S.C. 1906 ch. 37, added by 8 & 9 Edw. VII. ch. 32, sec. 13. . . .

[Reference to the terms of the section as it stood before the addition of sub-secs. 3 and 4 by the Act of 1909, and of sub-sec. 3, so added.]

Sub-section 4 prohibits a greater speed than ten miles an hour over any level highway crossing (irrespective of local conditions or population), "if at such crossing an accident has happened subsequent to the first day of January, 1900, by a moving train causing bodily injury or death to a person using such crossing, unless and until such crossing is protected to the satisfaction of the Board." The sub-section also prohibits a greater speed than ten miles an hour over a level highway crossing, where the Board's order providing protection for the safety and convenience of the public has not been complied with. . . .

*To be reported in the Ontario Law Reports.

[Reference to secs. 292 and 293 of the Railway Act.]

The view taken by the learned trial Judge was, that sub-sec. 4 prohibits a greater speed over a level highway crossing at which an accident has happened, provided a moving train was in some sense the cause, even where there was no notice to or knowledge by the train employees, from contact or otherwise, of the fact that such an accident has happened. As against this view, it is urged that the result of so holding must be that the railway company, without knowledge of the accident, may commit a breach of the statute on which would follow liability for damages and render its officials liable to a penalty, by running its trains at a speed over the crossing until it is protected to the satisfaction of the Board. The statute should not be construed so as to put the company in that position, and so as to throw responsibility, without knowledge, upon the Board, unless it is plain that such is the intention of the sub-section. . . .

[Reference to sec. 275, sub-secs. 1, 2, 3.]

The duty of the railway company and of the Board as to accidents is set out in secs. 292 and 293 . . . ; and, although sec. 292 does not include in its language persons using a railway crossing, it may well be that, under sec. 2, sub-sec. 21, a railway crossing is comprehended in the term "railway."

In view of these provisions, it would not be unnatural to conclude that sub-sec. 4 was intended to harmonise with the general scheme of report and inspection in case of railway accidents. That scheme is based upon the knowledge communicated to the head officials, and by them to the Board; and it is assumed in sub-sec. 4 that the Board shall act with knowledge of the conditions at the place of the accident. Unless, therefore, there is something in the sub-section itself which makes the prohibition dependent not on knowledge but on mere occurrence of an accident, the sub-section should not be so construed.

The words in it are, "if at such crossing an accident has happened . . . by a moving train causing bodily injury." Here is the conjunction of a train, moving, presumably in charge of a railway crew, and a person injured by it; and, therefore, knowledge or means of knowledge on both sides. The words are not "by reason of a moving train."

This Court has recently construed the words "by reason of" in Maitland v. McKenzie, ante 1059, as including an accident happening, not from impact, but from apprehension at the sudden discovery of a motor in the way.

In railway cases the words "by reason of the railway" have

been given a wide meaning. See Browne v. Brockville R.W. Co., 20 U.C.R. 202, and May v. Ontario and Quebec R.W. Co., 10 O.R 70, where they were held to extend to an injury sustained on the railway by reason of the use made of it.

The statute says that the accident must be caused "by a moving train;" and similar expressions are found in other sections of the Act, where obviously impact is necessary. See sec. 294, subsecs. 3 and 4, and sec. 295.

I think that the fair construction of the sub-section is, that the moving train must be the actual and physical cause of an accident which occasions bodily injury. It cannot be intended that accidents such as are mentioned in the judgment in Atkinson v. Grand Trunk R.W. Co., 17 O.R. 220, or that which was the subject of that decision, should operate to make the railway company liable, not only for damages, but for the penalties imposed by secs. 393 and 412, where the accidents are not known to the company or its servants.

In the case in hand the respondent merely proved that an accident had happened by a horse running away after crossing in front of a moving train, throwing the driver out, to his bodily injury. The driver (Lillicrap) told no one, he says; and, upon the evidence, the appellants had no notice of the accident; and the jury so found. . . .

I do not think that the intention of the sub-section was to include accidents other than those where knowledge is obvious, or reasonably probable, and where physical impact by a moving train causes bodily injury. To construe it otherwise would not advance the end in view, i.e., the improvement of conditions at level crossings, and would merely render the railway company liable in damages and put the Railway Board in the position of apparently neglecting their duty without knowing of its existence.

There was, therefore, no evidence, to my mind, to go to the jury of an accident such as the statute mentions having happened, if it is a question of fact. There was an accident, and it caused bodily injury; but, I think, it was the province of the learned trial Judge to rule whether the words of the sub-section meant and included such an accident as was proven and not disputed. There is, of course, no question of negligence in this antecedent point; it is a mere question of the sort or kind of accident. For this reason, the cases cited by the respondent, such as Grand Trunk R.W. Co. v. Sibbald, 20 S.C.R. 259, and Grand Trunk R.W. Co. v. Rosenberg, 9 S.C.R. 311, are not really helpful.

The ruling of the learned trial Judge at the outset on the case, having heard Lillicrap's evidence, was as follows: (p. 6): "I think I will rule, Mr. McCarthy, that there was an accident there by reason of the moving train, and that the responsibility was on you not to run more than ten miles an hour;" and he declined to reserve it as a preliminary question to be determined before the trial. Hence it became part of the respondents' case, and was so left to the jury.

The learned trial Judge also instructed the jury (p. 136): "There is another protection which the law casts upon people crossing tracks, and another obligation which it imposes upon railway companies; that is, that trains shall not be run through a thickly settled portion of a town or village at more than ten miles an hour." And again: "Now was the train running faster that morning than ten miles an hour through a thickly settled portion of the village. If it was, the defendants are guilty of negligence." This instruction was not limited or modified in any way, and was properly objected to.

The jury found that the appellants' negligence consisted of "excessive speed through thickly populated districts;" and added that they believed the bell was not ringing continuously.

I am of opinion that this direction was wrong in not qualifying the statement by the exception contained in sec. 275, that is, as to protection, and was not warranted by the Railway Act, as interpreted by Grand Trunk R.W. Co. v. McKay, 34 S.C.R. 81.

Upon these two points the jury were misdirected as to the law, and their finding of excessive speed cannot, therefore, stand.

Upon the rest of the answer, "We believe the bell was not ringing continuously," a curious error, pointed out by the appellants' counsel in his objection (p. 140) was made in the charge to the jury.

The respondent was injured at the Plains road crossing. Eighteen hundred feet east of it is Brant street crossing, which the respondent had travelled over earlier that morning. It is well established that the whistles were sounded at the latter crossing for the Plains road crossing. . . . This would be more than eighty rods off, and the statutory duty as to whistling for the crossing in question was, therefore, complied with. The bell is to "be rung continuously from the time of the sounding of the whistle" till the engine had passed the crossing. In his charge the learned Judge says: "That is what they were bound by law to do here—sound the whistle eighty rods from the *Brant street crossing.* . . . The evidence of Waller and

Robins goes to shew that the bell was not sounded for the *Brant street crossing*. . . . It is for you to say whether it was ringing or not, that is, whether it was ringing continuously up to the time that it struck this man."

The question was, whether, in fact, the statutory duty had been disregarded. That duty is limited to 80 rods before reaching the Plains road crossing; and the answer may, upon the charge, have reference only to the duty to ring prior to reaching the Brant street crossing. Breach of the statutory duty is not sufficient unless it is negligence causing or contributing with other causes to the accident or injury. See Canada Atlantic R.W. Co. v. Henderson, 29 S.C.R. 632. Either the question or the answer should be clear upon this point. Had no special objection been made at the trial, or had the respondent in any way attributed his mishap to the want of sounding the bell, or to its absence prior to the whistle he heard, it might have altered the case. But, where the whole verdict hangs upon the statement that the jury believed that the bell was not sounded continuously, I think the appellants have the right to insist upon the objection that the finding is ambiguous.

There should be a new trial. The costs of the appeal should be to the appellants in any event, and the costs of the last trial should be in the cause.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, C.J.O. (dissenting):—. . . I am . . . , with much respect, of opinion that the construction of the statute adopted by my brother Hodgins is too narrow, and will in some cases, at least, defeat the object which Parliament had in view in enacting it.

I see no reason why, where the horses a man is driving over a crossing at rail level, are frightened by a moving train, and run away, causing bodily injury to the driver, it cannot properly be said that "an accident has happened by a moving train causing bodily injury . . . to a person using the crossing."

New trial ordered; MEREDITH, C.J.O., *dissenting.*

JUNE 26TH, 1913.

SIMMERSON v. GRAND TRUNK R.W. CO.

Master and Servant—Injury to Servant—Negligence of Fellow-servant in same Grade of Employment—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Railway—"Person in Charge or Control of Engine"—Evidence—Findings of Jury—Inference.

Appeal by the defendants from the judgment of MIDDLETON, J., ante 1082.

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

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

W. S. McBrayne, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The facts are fully stated in the reasons for judgment of my brother Middleton, 4 O.W.N. 1082, and it is unnecessary to refer to them except as to one point.

My learned brother, in stating the facts, appears to have thought that a witness had testified that Bryant had given the signal to the engine-driver to reverse and go forward. In this he was in error. There was no direct evidence that it was Bryant who gave the signal. There was, however, ample evidence to justify the jury in drawing the inference that it was he who did so. It was Bryant's duty to give the signal; and, without it, the engine-driver would have been guilty of a breach of his duty in reversing and going forward.

As that inference was drawn by the jury, they were warranted in finding that Bryant was guilty of negligence in giving the signal without seeing that the respondent had reached the top of the car.

Upon that finding we agree that the respondent was entitled to recover, for the reasons stated by my learned brother.

Appeal dismissed with costs.

JUNE 26TH, 1913.

GOLDFIELDS LIMITED v. MASON.

Company—Agreement of Shareholder to Transfer Shares to Company to be Formed in Exchange for Shares of New Company—Right of Company, when Formed, to Sue for Breach of Agreement—Transfer of Shares—Registration—Prevention of—Damages.

Appeal by the plaintiff company from the judgment of CLUTE, J., of the 14th November, 1912, dismissing without costs an action for a declaration that the defendant was not and never had been a shareholder in the plaintiff company in respect of 41,000 shares of the stock of the Harris-Maxwell Company, which were transferred to the plaintiff company for an equal number of shares in the plaintiff company, and for delivery up by the defendant of his certificate for the plaintiff company's shares; or for damages for breach of contract.

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

G. H. Kilmer, K.C., for the plaintiff company.

W. A. McMaster, for the defendant.

The judgment of the Court was delivered by MACLAREN, J.A.:—I think that this appeal must be dismissed. The appellants did not give us any precedent for such an action as the present, and I have not been able to find any. The action is based upon the alleged violation by the defendant of a contract or agreement between the defendant and the other holders of a majority of the shares of two mining companies whereby they agreed to form a third company, to which they promised to assign the shares which they held in the two amalgamating companies, in exchange for an equal number of shares in the new company. This agreement bears date the 18th January, 1910. The charter was not granted to the new company (Goldfields Limited, the plaintiff company) until the 14th March, 1910.

The action was begun by one Mackay, who was a shareholder in one of the amalgamating companies, and a party to the agreement of the 18th January, 1910, and Goldfields Limited as co-plaintiff; but during the trial the name of Mackay was dropped, and the action continued by the company alone.

It is an elementary principle of law that no one can sue on a contract unless he be either an original party to it or the lawful assignee of an original party.

The plaintiff company was not a party to the agreement of the 18th January, 1910, the breach of which forms the basis of its present action, as it was not even in existence until nearly two months after that agreement was made. It does not claim to have any assignment from any of the original parties to the agreement in question of their claims against the defendant—if, indeed, such claims as it seeks to have enforced in the present action are susceptible of being legally assigned.

But, even if this objection were not a fatal one, the plaintiff company, as pointed out by the trial Judge, with full knowledge of all the circumstances, sought to enforce the registration of the shares in the Harris-Maxwell Company, transferred to it by the defendant, which it now seeks to compel him to take back and to return the equal number of shares in the plaintiff company which he received in exchange. I agree with the learned trial Judge that it is now too late for the plaintiff company to take this position.

As an alternative, the plaintiff company made a claim for damages; but no evidence was given on which such a claim could be based. It may be noted that the plaintiff company did not claim before us that there had been an implied agreement, when the defendant received the shares of the plaintiff company, that he should do nothing to prevent the registration of the Harris-Maxwell shares which he gave in exchange, and that he was liable in damages for preventing such registration and compelling the plaintiff company to purchase other shares to give it control of the Harris-Maxwell Company. Nor was there any evidence produced that the plaintiff company was obliged to pay more for such shares than they were really worth.

There being no evidence of damage, this branch of the plaintiff company's case fails also.

Appeal dismissed with costs.

JUNE 26TH, 1913.

*BEER v. LEA.

Vendor and Purchaser—Contract for Sale of Land—Option—Acceptance—Terms and Conditions—Oral Additions—Statute of Frauds—Time for Acceptance—"Thirty Days"—Computation—Fraction of Day.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 342.

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

E. F. B. Johnston, K.C., and S. W. McKeown, for the appellants.

A. W. Anglin, K.C., and H. A. Reesor, for the defendant Lea.

Glyn Osler, for the defendant Ogilvie.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . In the view I take, it is unnecessary to consider several of the questions argued at the bar, as, in my opinion, the action fails because no agreement sufficient to satisfy the Statute of Frauds was established.

The appellants' case is based on the theory that there was an acceptance by the appellant Doolittle of the offer of the respondent Lee of the 12th February, 1912 (exhibit 4), which constituted an agreement sufficiently evidenced to satisfy the Statute of Frauds.

It is beyond doubt that the letter of acceptance of the 13th March, 1913 (exhibit 7), was, in any view of the case, too late, as it was not received by the respondent Lea until the following day.

The appellants must, therefore, in order to succeed, establish the acceptance in some way, and that they attempt to do by the letter of the 13th March, 1912 (exhibit 6), which was handed by Doolittle to Lea on the same day, and by the verbal communications between them which took place on and before that day.

Assuming the correctness of the contention of the appellants that Doolittle was not required by the terms of the offer to pay the $10,500 within the thirty days for which the option was to

*To be reported in the Ontario Law Reports.

run—a contention with which I do not agree—one of the terms of the verbal agreement between the parties when they met in Toronto, was, that this payment should be $10,000, and that it should be made in three instalments, $5,000 in cash on the execution of the agreement (exhibit 13), $2,500 in sixty days thereafter, and $2,500 in six months from the date for payment of the second instalment; and that was manifestly a substantial change in the terms of payment contained in the option, and there were other important variations and additions discussed, and probably verbally agreed on. Among these was a provision that the purchaser should have the right to have any part of the land released from the mortgage which was to be given for the residue of the purchase-money, on payment of a sum on account of the principal which should be at the rate of $2,000 per acre, together with interest on that sum up to the date of payment, and there was also discussed a provision for Lea retaining possession of part of the property after the execution of the conveyance.

The acceptance of the 13th March, 1912 (exhibit 6), reads as follows:—

"619 Sherbourne St., Toronto, March 13, 1912.

"Joseph H. Lea, Esq.,

"Dear Sir:—I hereby accept the option I hold on your property at Leaside, and the payments will be made on execution of deed on the lines agreed on.

"Yours very truly,

"P. E. Doolittle."

It is plain, I think, that the reference to the "lines agreed on" is to the verbal arrangement as to the terms of payment which I have mentioned; and this is apparent, not only from the language used, but also from the fact that a tender was made of a marked cheque for $5,000, the amount of the first payment according to the terms of that arrangement.

This was not an unqualified acceptance of the offer, but an acceptance of it as modified by the verbal arrangement which had been made. If the verbal arrangement had passed beyond the stage of negotiation, and had resulted in a bargain, but for the Statute of Frauds that bargain might have been enforced; but, the statute being pleaded, it is not enforceable.

There was no unqualified acceptance of the offer, but, as I have said, an acceptance of it, with the modification I have mentioned as having been verbally made, as to the terms of payment of the purchase-money; and, therefore, no acceptance sufficient

to constitute a contract the terms of which were sufficiently evidenced by a writing signed by the respondent Lea to satisfy the Statute of Frauds.

The verbal communications relied on do not carry the case any further. They, at the most, evidence the readiness of the appellant Doolittle to accept the offer, subject to the modifications as to the terms of payment, and probably also as to the other matters which were discussed in connection with the carrying out of the sale.

In my opinion, the judgment should be affirmed and the appeal dismissed with costs.

I should not have made any further reference to the points discussed in argument and passed upon by my brother Middleton, but for his conclusion that the option expired at four o'clock in the afternoon of the last of the thirty days for which it was to run.

The view of my learned brother was that, as the option was given at four o'clock on the afternoon of the day on which it is dated, the thirty days expired at the same hour on the last of them.

I am unable to agree with that view. Cornfoot v. Royal Exchange, [1903] 2 K.B. 363, [1904] 1 K.B. 40, is, I think, distinguishable. . . .

The law applicable to the computation of time where an act is to be done on a certain day, or within a certain period, was fully discussed in Startup v. Macdonald (1843), 6 Man. & G. 593. Williams, J., stated the general rule to be, that, "wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day to perform their obligation" (p. 622). . . .

The statement of the law in Leake on Contracts, 5th ed., p. 597, is in accordance with the opinions expressed in Startup v. Macdonald, and I know of no case which is in conflict with it.

No doubt, the application of the general rule may be excluded by the terms of the contract, as in Cornfoot v. Royal Exchange, as well as in the other ways mentioned in Startup v. Macdonald, but there is no reason why it should not be applied in the case at bar.

In the view of my brother Middleton, there is no reason why the meaning which he gave to the option "should not be attri-

buted to the expression in all contracts," and "any attempt to give any other meaning would create difficulty." With that view I disagree. . . .

[Reference to Clayton's Case, 5 Co.R.1a.]

Appeal dismissed with costs.

JUNE 26TH, 1913.

RE BRIGHT AND TOWNSHIP OF SARNIA.

RE WILSON AND TOWNSHIP OF SARNIA.

Municipal Corporations—Drainage—Report and Plans of Engineer—Independent Judgment—Assessment—Cost of Work—Inclusion of Sum for Fees and Expenses of Solicitors and Engineers.

Consolidated appeals by Robert Bright, James Bright, Thomas Wilson, and Fred Wilson, from an order of the Drainage Referee, dated the 3rd March, 1913, dismissing an application by the appellants to set aside the report, plans, and specifications of A. S. Code, O.L.S. and C.E., and provisional by-law No. 10 D. of the Corporation of the Township of Sarnia, intituled "A by-law to Provide for the Improvement of the Cow Creek Drain in the Township of Sarnia."

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

R. I. Towers, for the appellants.

T. G. Meredith, K.C., and A. I. McKinlay, for the respondents.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—All of the objections raised by the appellants were dealt with upon the argument except two, viz.: (1) that the report, plans, and specifications and the assessment made by the engineer were not the result of his independent judgment; and (2) that the engineer included as part of the cost of the work upwards of $1,000 for fees and expenses of solicitors and engineers, and that there was no authority under the Drainage Act to assess them against the drainage area.

There is nothing to warrant the conclusion that the report, plans, specifications, and assessments were not the result of the independent judgment of Mr. Code, the engineer. He testifies that they were. The fact that he heard and considered the objections of the engineer employed by the Corporation of the Township of Plympton to the scheme which he had originally recommended, but which was referred back to him by the Council of the Township of Sarnia, and that he modified that scheme after consideration of these objections, is of no consequence if, as he testified, and there is no reason to doubt, his judgment was convinced that they were right to the extent to which he yielded to their objections. It is not necessary to say more on this branch of the case than that I entirely agree with the reasoning upon which the learned Referee proceeded in refusing to give effect to the contention of the appellants.

The other question was also fully dealt with by the Referee, and I agree with his conclusion as to it and the reasoning on which it is based.

Appeal dismissed with costs.

JUNE 26TH, 1913.

NEY v. NEY.
RE NEY.

Infants — Custody — Paternal Right — Welfare of Children — Order of Judge—Undertaking of Father to Furnish Suitable Home—Appeal.

Appeal by the plaintiff in the action, which was for alimony, from the order of BRITTON, J., made when giving judgment in the action, awarding to the defendant, the husband of the plaintiff, the custody of the two infant children of the marriage: ante 935, 937-939.

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

L. F. Heyd, K.C., for the appellant.

J. M. Godfrey, for the defendant, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The order in appeal was made by Mr. Justice Britton after

hearing the evidence in this action, which was brought for alimony. The motion on which the order was made had been referred to the trial Judge; and, although the writ of habeas corpus affected only the infant Marshall Ney, the order covers the case of both children, Marshall Ney and Dorothy Ney; the former now six years of age, and the latter now four and a half years.

The effect of the order is, that the father is given the custody of the children. The mother is to have access to them at reasonable intervals; and the children are to be maintained by their father in a home, where together they and their father will reside. The order is, therefore, one made after the learned trial Judge had seen and observed both the father and the mother.

In cases affecting the custody and welfare of the children, nothing is more important than the character and disposition of the parents; and I think the utmost importance should be attached to the view of an experienced Judge, who has had the advantage of seeing the parents, hearing them detail their complaints, and has listened to their explanations.

The evidence discloses a case of continual quarrelling, resulting in personal violence on both sides from time to time.

The position in which the children now are is the direct result of the desertion by the wife of the husband, which produced a situation the consequence of which is, that the husband now declines absolutely to take the wife back.

In the evidence reference was made to an offence committed by the husband after the separation in 1909, and to an event in the life of the mother, both of which were passed over lightly by counsel at the trial; yet they occupied the attention of the trial Judge, and, I have no doubt, influenced his decision.

In view of the evidence given, I should be disposed to think that this is peculiarly a case in which the welfare of the children should outweigh every other consideration affecting the parents, and that the order in appeal is the only order which could be made at this stage of the case.

In Re Hutchinson, 26 O.L.R. 601, 4 O.W.N. 777, 28 O.L.R. 114, the Court thought it necessary to stipulate that the father should at least undertake to procure a suitable house, with his sister in charge of it, before he obtained the custody of his child. In this case the order of the learned Judge has made a similiar provision; and I think the order is right, and should be affirmed.

Appeal dismissed.

JUNE 26TH, 1913.

MALCOLMSON v. WIGGIN.

Accord and Satisfaction—Purchase-money of Land—Acceptance of Person as Debtor in Respect of Part—Evidence—Acceptance of Certificate of Discharge of Mortgage—Payment of Balance of Purchase-money—Assignment of Interest in Mortgage.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth, of the 11th February, 1913, after trial without a jury, dismissing the action, which was brought to recover a balance said to be due upon the purchase by the defendant from the plaintiff of a house and lot.

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

J. G. O'Donoghue and M. Malone, for the appellant.

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

The judgment of the Court was delivered by MEREDITH, C. J.O.:—On the 1st April, 1912, the appellant sold to the respondent a house and lot in Hamilton for $4,450. In order to complete the purchase, it was necessary for the respondent to borrow on mortgage of the property $4,000, and arrangements were made to procure the loan from James E. Stedman, a client of Mr. Gauld, who also acted for the respondent in completing the purchase.

Stedman held a mortgage made to him by Francis S. Depew on property which the mortgagor had subsequently sold to a Miss Law. Upon this mortgage there was or was assumed to be owing $1,133, and this sum Stedman required to make up, with other money he had in hand, the $4,000 he was to lend to the respondent. A solicitor named Ogilvie acted for the appellant; and, as the learned Judge found, acting for Miss Law, received from her the $1,133 to pay to Stedman in discharge of the Depew mortgage.

The appellant and the respondent met at the office of Mr. Gauld to close the transaction; Ogilvie being also present, representing the appellant. Stedman had, in the meantime, signed and left with Mr. Gauld a statutory discharge of the Depew

mortgage, with instructions, when the money should be paid to him, to apply it to make up the amount to be lent to the respondent.

Mr. Gauld informed the appellant that until the Depew mortgage-money was received by Stedman there would not be money enough to enable Stedman to advance the $4,000 he had agreed to lend to the respondent, and the transaction could not be closed.

Ogilvie, without the knowledge of the appellant, had received from Miss Law the whole of the mortgage-money, and appropriated it to his own use; $300 of the principal having been paid to him on the 28th July, 1910; $350 on the 27th January, 1911; and the balance of the principal on the 9th February, 1912; the interest had also been paid to Ogilvie.

All the parties who took part in closing the purchase, except Ogilvie, were ignorant of the fact that these payments had been made, and believed that the $1,133 was still owing on the Depew mortgage, and that it would be paid by Miss Law on presentation to her of the certificate of discharge.

Ogilvie subsequently paid to the appellant part of the money he had received from Miss Law, but a balance is still unpaid; and the action is brought to recover that balance.

The learned Judge dismissed the action. His view was, that, when the transaction was closed, all parties knew that the $1,133 had been received by Ogilvie from Miss Law, and that it was agreed that Ogilvie should become the appellant's debtor for that sum, and that the respondent should be discharged from the payment of a like amount of the purchase-money.

I am unable to agree with that view, which could be supported, if at all, only on the hypothesis that the appellant knew that Ogilvie had received the $1,133; but there is no evidence of this; and, on the contrary, Mr. Gauld testified that, when the transaction was closed at his office, and Ogilvie said "We will take that," i.e., the certificate of discharge, Ogilvie said to the appellant, "I will have the money for that in a few days"—referring to the certificate.

It is impossible, upon the evidence, to hold that the appellant accepted the certificate of discharge in satisfaction of $1,133 of the purchase-money payable by the respondent. Putting the case for the respondent at the highest, it was no more than if Stedman had signed an order directing Miss Law to pay the money to the appellant; and what the parties contemplated was, that, on presenting the certificate to Miss Law, the money

would be paid, not that the appellant should become the assignee of the Depew mortgage or have to proceed against Miss Law for the recovery of the money payable on the mortgage.

The judgment of the Court below should, in my opinion, be reversed, and judgment should be entered for the appellant for the unpaid balance of the purchase-money . . . $125.75 . . . with costs.

The respondent must pay the costs of the appeal.

Upon payment of the judgment debt and costs, the certificate of discharge of the Depew mortgage is to be handed out to the respondent; and the appellant, if required, is to execute to him an assignment of any interest the latter may have in the mortgage.

Appeal allowed.

JUNE 26TH, 1913.

MARTIN v. COUNTY OF MIDDLESEX.

Highway—Improvement—Work Done by County Corporation—Interference with Watercourse—Defective Work—Ditches—Injury to Land by Flooding—Employment of Competent Engineer—Agent of Corporation—Action—Arbitration—Damages—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendant corporation from the judgment of SUTHERLAND, J., ante 682.

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

J. C. Elliott, for the appellant corporation.

P. H. Bartlett and T. W. Scandrett, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The learned trial Judge found that the work which was done by the appellant corporation, and which, according to the contention of the respondent, caused damage to the land, was defective in that the road was not carried to a sufficient height east of the cove, and that the ditch on the north side of the road, which the corporation constructed, led the water to the east, and

caused the two breaks in the road between the cove and the hill through which the water came which caused the damages to the respondent.

There was some evidence to support these findings, and, therefore, to fix the appellant corporation with liability for the damage caused to the respondent's land.

There was evidence, also, we think, to warrant a finding that the appellant corporation stopped up a watercourse which crossed the highway, through which the waters at flood-time passed; and that the result of this was to cause an accumulation of the waters to be penned back and ultimately to break through the embankment and cause damage to the respondent's land; and that was an actionable wrong.

Counsel for the appellant corporation argued that, as a competent engineer was employed to design the works which it constructed, and the corporation acted on his advice, no action lay, but that the respondent's remedy was to seek compensation under the Municipal Act; and, in support of his contention, counsel cited and relied on Williams v. Township of Raleigh, [1893] A.C. 540.

That case is clearly distinguishable. The work there in question was a drainage work, and was constructed under the authority of a by-law of the council. It was a preliminary requisite to the passing of the by-law that a report of an engineer should be procured recommending a plan to be adopted for carrying out the drainage scheme, which the council had been petitioned to undertake; and the decision proceeded upon the ground that, as the council, acting in good faith, had accepted the engineer's plan and carried it out, persons whose property was injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

In the case at bar, the work was not done under a by-law, and the appellant corporation was not required as a preliminary to doing the work to have a plan prepared by an engineer. The engineer employed was but the agent of the corporation, and for his acts it is as responsible as if the work had been done without the intervention of an engineer.

Appeal dismissed with costs.

JUNE 26TH, 1913.

VICK v. TOIVONEN.

Club Law—Unincorporated Society—Reception of New Members—Regularity—Resolution for Affiliation of Society to Organisation with Different Objects—Absence of Notice—Change of Constitution—Annual Meeting—Diversion of Property of Society from Purposes for which Acquired—Rights of Dissenting Minority—Ultra Vires Resolution—Injunction.

Appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Sudbury dismissing the action, which was brought by the plaintiff, on behalf of himself and the other members of the Copper Cliff Young People's Society, to restrain the society from joining the Socialist Party of Canada, and from diverting the assets of the society to the purposes of the Socialist Party of Canada.

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

R. McKay, K.C., for the plaintiff, appellant.

W. T. J. Lee, for the defendants, respondents.

The judgment of the Court was delivered by MACLAREN, J.A.:—The plaintiff was one of the twenty-five original members of the society, which was organised in February, 1903, and was an offshoot from the Finnish Christian Temperance and Fraternity Association of Copper Cliff, the members of the new society desiring to have more freedom than they had in the old society.

In their general rules they declare that, while "adhering to the principle of absolute temperance, they will work for the advancement of education amongst their nationality," and that "the members of the society shall have complete freedom to express religious as well as other opinions." To realise its purpose, the society was to "hold regular and special meetings, and prepare for lectures, discourses, educational courses, etc. Sub-societies for musical, singing, and sporting and other similar purposes were to be formed among the members, these to have their own rules, assented to by the society. They also provided for sick benefits for their members.

They erected a hall, which was a source of revenue, and

raised money by fees, bazaars, etc. The society prospered financially, so that, when the annual meeting for 1912, out of which the present difficulties arose, came to be held on the 7th February, the society had their hall, worth about $3,000, completely paid for, and $1,240 in cash. The society was not incorporated, but the property was held by trustees for it, the lease being to the "Trustees of Finland Temperance Hall."

The society appears to have been composed of about the same number of members until the annual meeting of the 7th February, 1912, when over seventy new members were received. There was a good deal of contradictory evidence as to whether the reception of these new members was regular. The rule on the question is number 4: "Every person who is ten years old and pledges himself to act in conformity with the rules of the society is entitled to become a member." Those under sixteen are exempt from dues and are not entitled to vote. The trial Judge held that these new members were regularly received; and I am of opinion that his decision on this point should be affirmed.

Later in the meeting, the object of the great influx of new members became apparent, when it was moved "that the Young People's Society join the Socialist Party of Canada."

After a stormy debate, this was carried on a ballot vote by 74 to 24. The secretary was instructed to apply for a charter, which he did, and one was issued to them as "Local Nuorisseura No. 31, Social-Democratic Party of Canada;" the charter under which the Copper Cliff local socialist branch existed up to that time being surrendered. The Young People's Society paid $12 for the new charter.

The plaintiff objected to the above resolution, on the ground that no previous notice had been given of it. The only rule of the society bearing upon this is number 25, which reads: "The rules cannot be altered, amended, or changed otherwise outside of an annual or semi-annual meeting." Nothing is said about notice. The resolution would, therefore, appear not to be invalid on this account.

There is, however, a more serious objection.

It is a well-settled principle of law that the property of a voluntary society like this cannot be diverted by a majority of its members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are alien to or in conflict with the fundamental rules laid down by the society, and the dissenting minority who adhere to these

rules are entitled to have them restrained from so doing. The question is, has this been done in the present instance?

It is quite evident that there has been a complete merger of the two societies. Their funds have been combined in a common fund. The officers of the Young People's Society are the officers of the Socialist Local No. 31. The treasurer, a witness for the defence, says that to become a member of the Young People's Society one must join the Socialist Party, and two members who wished to join the athletic association of the society would not be received because they would not become socialists or pay the socialist tax of 10 cents a month. The evidence is, that this applies to all the subordinate societies.

The rules shew that the leading principle of the Young People's Society was that of "absolute temperance" or total abstinence, and that they were to work for the advancement of education amongst the Finnish nationality; and this they were to seek to accomplish by the means already indicated. They were also to have complete freedom to express religious as well as other opinions—something suggested, no doubt, by what they considered the narrowness of the older society from which they had withdrawn, as stated in the preamble to the rules.

It can hardly be pretended that the proved objects and principle of the Socialist Party come within the scope of even the subsidiary objects of the Young People's Society. The mission of the party is stated in the charter issued to Local No. 31 in this case, to be "to educate the workers of Canada to a consciousness of their class position in society; their economic servitude to the owners of capital; and to organise them into a political party; to seize the reins of government, and transform all capitalistic property into the collective property of the working class."

Every applicant for membership must pledge himself to support the ticket of the party; and, if he supports any other party, he is expelled, or "kicked out," as one of the chief officers graphically puts it.

The original rules of the Young People's Society shew that its members, provided they kept their pledge of "absolute temperance," were to have perfect freedom to think and act on other questions as they saw fit, so long as they avoided "participation in low acts."

Without expressing any opinion as to the merits of the principles of the party to which the majority have decided to affiliate the society, I am of opinion that their compulsory and re-

strictive methods are at variance with the fundamental principles of freedom of opinion on which the society was founded; and those who contributed to the property and funds of the society for the propagation of these ideas have a right to complain when it is sought to divert these funds into another channel, and to prevent them from enjoying the advantages of the society and its property, unless they submit to restrictions inconsistent with the principles on which the society was founded.

The resolution of the 7th January, 1912, was, consequently, ultra vires of the Young People's Society, and the defendants should be restrained from diverting the property or moneys of the society to the Socialist Party or depriving the members of the society of any rights or privileges unless they join or contribute to the said party.

Appeal allowed with costs.

JUNE 26TH, 1913.

POULIN v. EBERLE.

Ejectment—Limitation of Actions—Title to Land—Possession—Evidence.

Appeal by the defendants from the judgment of the County Court of the County of Kent, in favour of the plaintiff, for possession of $2\frac{1}{8}$ acres of land, part of lot 87 south of the Talbot road west, in the township of Howard.

The judgment appealed from was given upon the second trial of the action. At the first trial, the action was dismissed; but a new trial was ordered by a Divisional Court of the High Court of Justice: Poulin v. Eberle, 3 O.W.N. 198.

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

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

W. E. Gundy, for the plaintiff.

The judgment of the Court was delivered by MAGEE, J.A., holding that, upon the facts in evidence, the findings and conclusions of the learned County Court Judge were right, and should be affirmed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J. JUNE 20TH, 1913.

*THOMSON v. STIKEMAN.

Banks and Banking—Mortgages to Bank to Secure Debt of Customer—Evidence—Absence of Duress—Bank Continuing to Make Advances—Interest—Stated Accounts—Application of Moneys Raised from Securities—Secured and Unsecured Debts—Appropriation of Payments—Balance Due on Mortgage—Suspense Account—Mortgagee in Possession—Conveyance of Equity of Redemption by Customer to Persons not Purchasers for Value—Rights of Grantees—Registry Act—Bank Act—Security for Future Indebtedness—Redemption.

Action by the son and son-in-law of Joseph E. H. Stratford, who was a customer of the Bank of British North America at Brantford and became indebted to the bank and gave security and continued to deal with the bank, against the defendants, as trustees for the bank, to compel the discharge of certain mortgages upon land made by Joseph E. H. Stratford to the bank, or for an account and redemption, the lands having been conveyed to the plaintiffs by Joseph E. H. Stratford, who, at the trial, was added as a party.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiffs.
W. N. Tilley and G. L. Smith, for the defendants.

MIDDLETON, J. (after setting out the facts at length):—Stratford complains that in all that he did he was not a free agent; that he acted under duress; and ought not to be held in any way accountable for his acts. There is not the least foundation in fact for this contention. . . . He was a debtor seeking for indulgence at the hands of his creditor, and grateful for the favours he received. No doubt, at times, possibly on many occasions, he had to subordinate his own views to the views of the bank and its advisers. This resulted from his unfortunate financial position. He knew the situation and appreciated it. If he did not fall in with the wishes of the bank as to realisation, at prices which the bank thought should be accepted, he could not expect the bank to stand still and do nothing. Throughout,

*To be reported in the Ontario Law Reports.

there was nothing in any way approaching duress or oppressive conduct on the part of the bank. It has "nursed" the account through a long period of stringency, and carried the properties, whilst the values have increased to a sum which makes them worth more than the amount claimed as due. The realisation has been only with respect to minor properties, and in each case Stratford himself made the conveyance, though the money was paid to the bank before it discharged its security. In all this the bank has acted in a way above reproach, and Stratford has every reason to regard himself as fortunate in having an exceptionally lenient creditor.

In fact, a letter from Stratford to the local manager as late as the 31st December, 1908, indicates not only the situation, but Stratford's sense of the generosity of the bank. He writes: "I'm making that little deposit this morning to cover account. Permit me to thank you for your many kindnesses during your incumbency. I was often among the poor and needy, and you took me in. My appreciation you are sure of, if there is any doubt about my prayers;" and this letter by no means stands alone; the sentiment is repeated time and again.

Stratford now says that he knew that the effect of the mortgage was to entitle the bank to six per cent. simple interest, and that all the statements, etc., that he signed, were signed by him with a mental reservation, which he thought was sufficiently expressed in some instances by the letters "E. & O. E." preceding his signature.

The case falls, as to this, within the principle of Stewart v. Stewart (1891), 27 L.R. (Ir.) 351, where it is said "that, inasmuch as accounts were regularly stated and settled by S., with full means of knowledge of his rights, and considering the fact that, if S. had insisted upon these rights and refused to pay compound interest at the bank rate on the whole debit balances, the bank might have closed the account, it would be inequitable to allow the executors of S. to open up the settled transaction."

I do not believe Stratford when he says that he intended all along to reopen the question of interest. I think that he was then too honest to sign the statements save as an acknowledgment of the debt, and that his present position is accounted for by the fact that he has now, in advancing years, become the tool of the younger and less scrupulous plaintiffs, who are carried away by the hope of gain, and fail rightly to understand the real nature of the contention they put forward.

In this case, quite apart from the principle indicated, the proper inference from the facts proved is, that there was an

agreement by Stratford to pay interest in the way in which it was charged.

Assuming that the mortgage is good for the past debt, and is not security for any debt arising after its date, can the bank now apply the money received by them in satisfaction of the unsecured debt? The transactions which are in the nature of cross-entries may be regarded as quite outside of this inquiry.

In Griffith v. Crocker, 18 A.R. 370—a case where it was contended that Clayton's case compelled payments credited in a running account to be credited on an earlier secured account so as to leave the balance unsecured—the Court of Appeal held that "appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness."

Similarly in City Discount Co. v. McLean, L.R. 9 C.P. 692, where there was a guaranty of an account for two years, and the account ran beyond the two years, it was held that "the presumption that where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date, in the absence of other appropriation, may be rebutted by circumstances of the case shewing that such could not have been the intention of the parties."

. . .

[Reference also to Cameron v. Kerr, 3 A.R. 30; Cory v. The Mecca, [1897] A.C. 286.]

In the latter case Lord Macnaghten said: "It has long been held, and it is now quite settled, that the creditor has the right of election 'up to the very last moment.'" Election was allowed in the witness-box in Seymour v. Pickett, [1905] 1 K.B. 705.

If that is still the law, there is little trouble with the case in hand. Stratford says that the running account was not communicated to him (see his affidavit in reply); and the statement signed by him shews the assent of both parties to the money being so applied as to leave the balance due on the mortgage.

But it is said that Deeley v. Lloyds Bank, [1912] A.C. 756, has changed all this. I do not so read the case. The holding there was not an affirmance of the old and rejected view that

Clayton's case had established an inflexible rule, but that the rule "was not excluded by the conduct of the parties," in that case. The facts, as I understand them, are in no way similar to the facts here; and this case falls rather within the decision of the Lords in 1897: "Clayton's case is not a rule of law to be applied in every case, but rather a presumption of fact, and this presumption may be rebutted in any case by evidence going to shew that it was not the intention of the parties that it should be applied:" per Lord Atkinson in Cory v. The Mecca, [1912] A.C. 771.

Apart from the fact that I think there is ample evidence to shew that it never was intended to apply the money in discharge of the mortgage-debt, but, on the contrary, that it was intended to keep it on foot, I can see no reason why the same rule should not apply as in cases of merger, and that an intention beneficial to the holder of the securities should not be implied, when there is nothing in the facts shewing any express intention—e.g., if the case did not go beyond a mere entry in the bank books.

An attempt was made to shew an application of payments by reason of entries made in "Suspense Interest Account." This account was one kept for the bank's own purposes, and was not in any way communicated to the customer.

Dividends could only be paid by the bank to its holders out of earnings. So long as the security is ample, the interest charged to this account might be regarded as "earnings" for the purpose of dividends. Stratford's account was not regarded as beyond question; so the bank carried to this suspense account the interest charged, and did not credit it to the earnings of the branch. When money was received resulting from the sale of part of the land held as security, the head-office insisted that this should be placed to the credit of capital rather than interest in the accounts of the branch, so that if, in the end, there was a loss, this loss would be borne by the "earnings," and not be cast upon the bank's capital. This was no application of payment as between the bank and its customer, but was an adjustment as between capital and income in the accounts of the branch of the bank, which was required to keep the capital intrusted to it intact.

Then it is said that the bank must account as a mortgagee in possession. The bank never was in possession. All the sales were made by Stratford, and he signed the conveyances. True, the bank insisted on receiving and did receive the purchase-

money; and, no doubt, insisted on Stratford realising as the price of the delay granted; but all this did not make the bank responsible for the sales.

Rent was paid by the tenants of the property to the bank; but this was not because the bank was in possession. Stratford was in possession, made the leases, sold the timber, etc. The bank insisted on this money being paid into Stratford's account by the tenants. Stratford fully assented. He was allowed to retain possession and control, on the terms that the tenants should pay the rent into the bank. It was all part and parcel of the same scheme. Stratford was allowed to nurse his property, on the terms of applying the income to the debt. His letters from time to time shew this. . . .

At the trial, the original plaintiffs took the position that they had better rights by virtue of the Registry Act than Stratford, the mortgagor, himself had. In this I think they were wrong. The sole effect of the Registry Act is to render invalid a prior unregistered conveyance as against a subsequent registered conveyance. The purchaser from the mortgagor, where the mortgage is registered, takes subject to the true state of accounts as between the mortgagor and the mortgagee. The Registry Act affords him no protection. He is bound by any stated accounts, and has no greater or other rights than the mortgagor himself has.

Quite apart from this, these young men (the plaintiffs) are not bonâ fide purchasers for value without notice, in any sense of the word. Their deed is in escrow; their note is in escrow; and the whole transaction between Stratford and them is plainly a scheme by which they thought to obtain some position of vantage in this litigation.

This is probably enough, and more than enough, to dispose of the case; but the bank presents another contention upon which it asks findings of fact. What the Bank Act has rendered ultra vires is the lending of money or the making of advances upon the security, mortgage, or hypothecation of lands. Such lending is, by an independent section, made penal, and so may be regarded as illegal: Brown v. Moore, 32 S.C.R. 93. The bank, however, contends that what was done here is not the thing prohibited by the statute; that the indebtedness of Stratford to the bank was a debt due to the bank in the course of its business, and that the distinction suggested by Chief Justice Robinson in Commercial Bank v. Bank of Upper Canada, 7 Gr. 423, is sound.

I do not feel called upon to discuss this legal question; but, if that distinction can be drawn, then I find as a fact that the mortgage in question here was not taken for the purpose of enabling the bank to make a loan upon real estate, but for the purpose of securing the indebtedness of Stratford to the bank, and was in no sense a colourable and collusive scheme for the purpose of defeating the restriction imposed by the Act. The whole idea, at the time of giving the mortgage, was to secure the large past-due indebtedness, and such further indebtedness as might arise in connection with the working out of the account, which it was the intention both of Stratford and the bank to reduce and not to increase, save as any increase might be incident to the carrying of the security and the small allowance contemplated to Stratford for his actual maintenance.

On all grounds, I think the action fails, and should be dismissed with costs, save in so far as redemption is sought. The amount due to the bank should be fixed in accordance with Mr. Watt's computation, and the costs of the action should be added.

MIDDLETON, J., IN CHAMBERS. JUNE 23RD, 1913.

CORNISH v. BOLES.

Appeal to Appellate Division—Leave to Appeal from Order of Judge in Chambers Striking out Jury Notice—Discretion—Con. Rule 1322—*Non-appealable Order.*

Motion by the defendant for leave to appeal from an order of FALCONBRIDGE, C.J.K.B., striking out the defendant's jury notice.

M. L. Gordon, for the defendant.
R. R. Waddell, K.C., for the plaintiff.

MIDDLETON, J.:—Mr. Gordon is, no doubt, right when he says that this action is one which could well be tried by a jury; but this is not the question. The action can equally well be tried by a Judge; and, under the Judicature Act, the trial Judge or a Judge in Chambers may, in his discretion, direct the action to be tried without the intervention of a jury.

The Rule recently passed (Con. Rule 1322) requires the Judge in Chambers, upon an application being made to him, to exercise the same discretion as he would if presiding at the hearing. Brown v. Wood, 12 P.R. 198, determines that at the trial

the Judge has absolute control over the mode in which the case shall be tried, and that his discretion will not be interfered with upon an appeal to a Divisional Court. The same principle is applicable to the exercise of discretion by the Judge in Chambers; and I do not consider that the matter is one which is properly the subject of appeal.

Clearly, the case is not brought within the provisions of the Rules regulating appeals from Chambers orders. The application is, therefore, dismissed, with costs to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS. JUNE 23RD, 1913.

ANTISEPTIC BEDDING CO. v. GUROFSKY.

Evidence—Foreign Commission — Application by Defendant—Delay of Trial—Refusal to Impose Terms.

Appeal by the plaintiffs from the order of the Master in Chambers, ante 1309, directing the issue of foreign commissions, at the instance of the defendant.

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

Featherston Aylesworth, for the defendant.

MIDDLETON, J.:—I do not think that this case possesses any of the special features calling for the imposition of terms, as in Hawes v. Gibson, 3 O.W.N. 312, 1078, 1229, and Re Corr, 3 O.W.N. 1177, 1442. The defendant has a right to present his case as he pleases, unless the Court is satisfied that his conduct is vexatious or primâ facie unreasonable. I am not so satisfied in this action.

The plaintiffs assert that Gurofski, their agent, is liable for the loss of goods by fire, because he undertook to place and failed to place insurance; that he collected the premiums from the plaintiffs, but failed to pay them over; and the policies were cancelled. What the defendant seeks to establish is, that the premiums were, by consent of the insurance companies, taken into account and dealt with in such a way as to amount to payment; and that, therefore, the cancellation which the insurance companies made or attempted was wrongful, and can impose no liability upon him.

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

FALCONBRIDGE, C.J.K.B. JUNE 24TH, 1913.

RE VINING.

Will—Construction—Legacies—Vested Interests of Legatees on Death of Testator—Disposition of Residue—Death of Residuary Legatee during Life-tenancy.

Motion by the executors of the will of Alonzo Vining, deceased, under Con. Rule 938, for an order determining certain questions arising upon the construction of the will.

The motion was heard at the London Weekly Court.

J. Vining, for the executors.

C. G. Jarvis, for the surviving children of the testator.

W. R. Meredith, for the Official Guardian, representing the infant grandchildren, and for Mrs. Mallory.

FALCONBRIDGE, C.J.:—The testator died on the 23rd May, 1895, leaving a will dated the 21st September, 1894.

By paragraph 3, the testator devised the income of all his property, both real and personal, to his wife for life.

By paragraph 4, he directed that, after the decease of his wife, all his property was to be converted, and out of the proceeds he bequeathed the following legacies, amongst others: to his daughter Amelia Brown $400; to his daughter Hannah Vining $800.

By paragraph 5, he directed "that all the rest and residue of my estate both real and personal that I shall own after the payment of the legacies" should be divided between all his sons and daughters equally; and, should any of his sons and daughters be dead, he directed that the share of one so dying be divided between his or her children.

The widow died on the 26th January, 1913. Amelia Brown died intestate on the 21st January, 1913, leaving her surviving her husband and several children, who have assigned their interest to their father. Hannah Vining died, unmarried and intestate, on the 18th January, 1899. Elizabeth Knapp died, a widow and intestate, in 1892, leaving her surviving several children and children (infants) of a deceased child.

The questions for determination, in the events which have happened, are:—

(1) Is Lorenzo Brown, husband of the late Amelia Brown, entitled to the legacy of $400 and also to a share of the residue?

(2) Are the next of kin of Hannah Vining entitled to the legacy of $800 and also to a share of the residue?

(3) Are the next of kin of Elizabeth Knapp entitled to a share of the residue?

With regard to the legacies, I think that each of the legatees had a vested interest on the death of the testator, and not an interest conditional on surviving the tenant for life.

With regard to the residue, the children of Amelia Brown are clearly entitled to the share which would have gone to their mother, had she survived the tenant for life; and it seems also clear that the share of Hannah Vining, who died unmarried, lapses, and is divisible among the others entitled.

There is more difficulty in regard to Elizabeth Knapp; but, I think, the authorities compel me to hold that, as she died before the date of the will, she could not be capable of taking under it; and, although she left children living at the time of the death of the life-tenant, these could not take in substitution for her: Christopherson v. Naylor (1816), 1 Mer. 320; Butter v. Ommaney (1827), 4 Russ. 73; In re Webster's Estate (1883), 23 Ch. D. 737; In re Musther (1890), 43 Ch. D. 569.

I think the questions should be answered as follows:—

(1) Alonzo Brown, as husband and as assignee of his children's share, is entitled to the legacy of $400 and to the share of the residue to which Amelia Brown would have been entitled had she survived the tenant for life.

(2) Hannah Vining's estate is entitled to the legacy of $800, but not to any share in the residue.

(3) Elizabeth Knapp's estate has no interest under the will.

Costs to all parties out of the estate.

MEREDITH, C.J.C.P. JUNE 24TH, 1913.

*SYKES v. SOPER.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim by Assignee to Goods Seized by Sheriff under Execution and Subject of Interpleader Issue Delivered but not Tried when Assignment Made — Sheriff's Sale under Order of Court—Preference—Priorities—Assignments Act, sec. 12—Creditors' Relief Act, sec. 6.

Interpleader issue, tried at the Brockville non-jury sittings on the 3rd June, 1913.

*To be reported in the Ontario Law Reports.

See Soper v. Pulos, ante 1258.

B. N. Davis and M. M. Brown, for the plaintiff.
J. A. Hutcheson, K.C., for the defendant.
C. C. Fulford, for the Sheriff.

MEREDITH, C.J.C.P.:—The difficulties of this case are not solved, but indeed are accentuated, by the ruling, and the expressions of opinion, in Henderson's case (Re Henderson Roller Bearings Limited, 22 O.L.R. 306, 24 O.L.R. 365; Martin v. Fowler, 46 S.C.R. 119).

In that case the facts were different in some very substantial respects from those of this case. It would have been a hard case if the assignee had succeeded. As I remember the facts, the active spirit in the assignment which was made, and in the cause which failed in all the Courts, was a creditor who throughout opposed the judgment creditors, and resorted to the assignment proceedings only after all other attempts to withhold the property from the creditors had failed.

This case is one of an assignment made in good faith for the purposes of putting all creditors on an equal footing.

In Henderson's case the assignment was not made until after failure on the interpleader issue, as well as in all other expedients to defeat creditors.

In this case the assignment was made soon after the interpleader order was made, and some time before the interpleader issue came on for trial; and quite without any inconsistent conduct on the part of those who seek to share in the proceeds of the insolvent estate.

If the rulings in Henderson's case had been in favour of the assignee, that case would have been conclusive of this case; no such question as that which has now to be solved could reasonably have arisen: the assignment would, as the one enactment plainly provides, have taken precedence over the executions, which are, of course, the foundation of the execution creditors' rights—take the execution away and what is left of their claims?

But the judgment in that case—the final judgment, I mean of course—affords no means of determining at what stage in the proceedings upon the executions, or in the interpleader, the right of the execution creditors take precedence over the right of the assignee. In Henderson's case there had been judgment in the interpleader issue in favour of the execution creditors;

and there are some indications, in some of the opinions of the Judges, that their rights arose out of that fact; but there is no decision upon the point, the decision in truth creates the difficulty; and I have no right to shelter myself behind anything but that which was decided in that, or in any other, case; and so the duty falls upon me to lay down, for the first time, the point of beginning of the rights of execution creditors under the 6th section of the Creditors' Relief Act over the rights of an assignee under the 12th section of the Assignments and Preferences Act.

Some things bearing upon the question can hardly be controverted: the Legislature in passing these enactments was sailing as close to the wind of an insolvency or bankruptcy law as it was deemed it lawfully might, "bankruptcy and insolvency" being expressly excluded from its legislative powers. It, therefore, omitted the most prominent features of such a law, compulsory bankruptcy or insolvency and a discharge of the bankrupt or insolvent from his debts; but, in case of a voluntary assignment, applied to it substantially all the features of the federal Insolvent Act which had been in force for a good many years, but had been repealed; and, in cases in which a voluntary assignment could not be obtained, provided for something in the nature of a distribution of a bankrupt's or insolvent's estate through the proceeding in the Sheriff's office, as set out in the Creditors' Relief Act. There were the two cases to be dealt with; the one, that in which a voluntary assignment could be obtained, and to which, short of a discharge of the debtor, in all substantial matters the estate was brought under the repealed insolvent laws, the very words of those repealed being largely employed; and the other, that in which no assignment could be procured, and so a special method of giving equality between creditors had to be devised.

And so it seemed to me that once the assignment was obtained, once there was a person duly empowered to deal with all the estate of the insolvent, it was right and proper, and intended by the Legislature, that the assignee alone should wind up the estate, superseding the Sheriff, and putting an end, not only to two windings-up of the one estate, with substantially two assignees, but also putting an end to the cost and formality of proceedings in the Sheriff's office or otherwise in the Courts. That it was only when an assignment could not be obtained that the much more cumbersome methods of the Creditors' Relief Act should continue—a sort of necessary evil. And so full effect

might be given to each enactment without modifying the language of either: the Creditors' Relief Act necessary, and given full effect to, where, as perhaps in the greater number of cases, no assignment was procured; the other Act taking effect the moment the assignment was made. And, that being so, and the spirit of the enactment being equality among creditors—as near to bankruptcy or insolvency as possible—and being bound by the expressed injunction of the Legislature to treat these enactments as remedial, and to give to them such fair, large, and liberal construction as would best ensure the attainment of the objects of the Acts according to their true intent, meaning, and spirit, I had no difficulty in reaching the conclusion that the words "shall take precedence of executions not completely executed by payment" should be given their liberal meaning. How erroneous that opinion must have been appears from the fact that not one of the other Judges who expressed an opinion in Henderson's case was of the like opinion. And yet these things must not be lost sight of in dealing with this, or with any other, case arising under the enactment.

The rights of the execution creditors in Henderson's case were finally rested upon the 6th section of the Creditors' Relief Act; when, then, does the 4th sub-section of that section come into play so as to override the 12th section of the Assignments and Preferences Act? One answer must be, after a judgment in their favour in the interpleader; because Henderson's case says so. But does it at any earlier stage?

My answer must be, no. And I am led to that conclusion from the following considerations, in addition to those I have already mentioned pointing that way. The purpose of the enactment is equality among creditors; to do away, largely, with the advantages of having the first execution or indeed any execution. The benefits of the 4th sub-section are not for the first execution nor for any execution; any creditors may come in under sub-section 6, if allowed by the Judge, and time may be given to enable them to place executions, or certificates, the equivalent of executions, in the Sheriff's hands. So that it seems to me to be quite plain that until judgment in the interpleader issue, at all events, no execution creditor has a right which excludes any other creditor; the purpose of the enactment, equality among creditors, yet holds good and may be given effect to. Then, that being so, an assignment is made under which the assignee represents all creditors alike; and, acting for those who are not yet barred, asks for equal rights for them, rights which, if they

could apply for them themselves, would doubtless be granted. Again, under the 12th section of the Assignments and Preferences Act, the right to attack the chattel mortgage in question is exclusively that of the assignee; he insists upon that exclusive right; and the question has not yet been tried, at the instance of execution creditors, and determined in their favour, as it had been in Henderson's case. On what ground can his right, under this section, to prosecute the issue as to the validity against the creditors of the chattel mortgage in question, be denied; indeed how can that issue be duly tried in his absence? All these things lead me irresistibly to the conclusion that execution creditors' rights against an assignee, under the ruling in Henderson's case, cannot arise, at all events, until they have a judgment in their favour in the interpleader, or in some other binding way.

Something was said about "salvage;" but we are not dealing with mere equitable rights, or even mere common law rights, we are dealing with plain words of recent enactment, and must give effect to them, not to that which might be the law if we were at liberty to make it to get each case according to our individual notions. But is the word "salvage" applicable to such a claim as the execution creditors make? . . .

Nor can I see anything in the other points so much urged in the argument before me. The obvious fact that the mortgage, if made in fraud of creditors, is in a sense not void, but voidable, can surely make no difference. But it may be needful to point out that it is voidable, not void, in this sense, and only, because of the necessity, in almost all cases, that the creditor must reach out his hand to take the benefit of the law, must do some action shewing an election, as it were, to avoid it. It is not the judgment of any Court that makes the transaction void; it is the enactment or the common law; the transaction is absolutely void because of the fraud; the Courts do but find the fact and give judgment accordingly. It may be that in most cases litigation is necessary or advisable; but none the less a Sheriff, or other person having authority, may take the property as that of the fraudulent debtor; he needs no authorisation of any Court. If sued for trespass or in trover, he must succeed if the plaintiff's case depends upon a transaction vitiated by fraud on creditors. It is true that the 12th section of the Assignments and Preferences Act mentions only the right of suing; but, assuredly, if the assignee can obtain possession of the fraudulently transferred

property in any other lawful way, he may take it and deal with it as part of the estate assigned to him. . . .

I must find the issue joined in favour of the assignee, who should also have his costs, from the other parties to the issue, throughout.

MEREDITH, C.J.C.P. JUNE 24TH, 1913.

PULOS v. SOPER.

Chattel Mortgage—Non-compliance with Act—Seizure of Goods under Execution — Claim by Chattel Mortgagee — Interpleader Issue—Parties—Assignee for Benefit of Creditors of Execution Debtor—Costs.

Interpleader issue, tried at the Brockville non-jury sittings on the 3rd June, 1913.

See Skyes v. Soper, the case immediately preceding this.

B. N. Davis and M. M. Brown, for the plaintiff.

J. A. Hutcheson, K.C., for the defendant.

C. C. Fulford, for the Sheriff.

MEREDITH, C.J.C.P.:—In this issue, which came on for trial after the other, counsel for the plaintiff asked that the trial be postponed, because no trial would be necessary if the assignee succeeded in the other issue. But I see no good reason for any further delay.

The assignee should, I think, be made a party to this issue; it is only fair to the parties and to the Courts that the rights of all concerned should, where possible, be determined in the one trial, if that can be done conveniently.

Upon that being duly done, judgment should go in his favour, with costs, on the admission made, at the trial, that the mortgage cannot be supported by reason of failure to comply fully with the provisions of the Bills of Sale and Chattel Mortgage Act.

The execution creditors should have, out of the estate, their costs, as between solicitor and client, up to the time that the assignee becomes a party; payment of which should be a condition precedent to the exercise of his right to be made a party, and have judgment in his favour.

KENNEDY v. KENNEDY—MASTER IN CHAMBERS—JUNE 23.

Discovery—Production of Documents—Affidavits—Information Obtainable on Examination of Parties—Con. Rules 469, 1224.]—Motion by the plaintiff for better affidavits on production by the defendants, the two former affidavits having been held insufficient. The action was brought to set aside conveyances of lands from the defendant R. Kennedy to his wife, the co-defendant, as fraudulent. The affidavit of the defendant R. Kennedy stated that he had now no documents relating to these transfers, as they were all handed to his co-defendant when the conveyances were made to her. The defendant Janette Kennedy's affidavit was objected to as not being sufficiently definite, because paragraph 4 read: "I have had to *the best of my recollection,* but have not now," etc.; and paragraph 5 read: "The last-mentioned documents, or *as many of them as were in my possession,* were last in my possession," etc. It was also objected to this paragraph that the statement, "Instrument No. 6 (a mortgage from the Purity Springs Water Company to the deponent) was turned over to the Bank of Toronto some months ago," should have been amplified; also that paragraph 6, which stated that this mortgage was held by the Bank of Toronto as collateral to a loan, was not full enough, and that it should have been said to whom the loan was made and when, and whether or not the mortgage had been assigned, as it might be necessary to make the bank a party defendant if the transaction was subsequent to the commencement of the action. It was argued in answer to the motion that the affidavits were sufficient on their face, and that there was no unwarrantable departure from the form as given under Con. Rule 469, which does not use the word "shall," but says that such affidavit "may be according to form No. 19." The Master said that the variations did not seem to affect the sufficiency of the affidavits, considering the nature of the action. See Con. Rule 1224. Any further and more precise information as to the mortgage and the lost deed could be obtained when the defendants were examined for discovery. See as to this MacMahon v. Railway Passengers Assurance Co., 26 O.L.R. 430. At present the plaintiff seemed to have all the information that was really necessary, at this stage at least. The motion was, therefore, dismissed, without prejudice to its being renewed for good cause; costs in the cause. E. D. Armour, K.C., for the plaintiff. O. H. King, for the defendant Janette Kennedy. J. C. M. Macbeth, for the defendant R. Kennedy.

CRUCIBLE STEEL CO. v. FFOLKES—MASTER IN CHAMBERS—JUNE 24.

Judgment Debtor—Examination of Transferees—Con. Rule 903—Action pending to Set aside Transfers.]—Motion by the plaintiffs, judgment creditors, under Con. Rule 903, for an order for the examination of two transferees of the judgment debtor. An action was commenced on the 28th March, 1913, to set aside the transfer of certain lands by the judgment creditors to the transferees now sought to be examined. In that action, of necessity, these transferees were defendants. The transfer attacked was said, in the endorsement on the writ of summons, to have been made on the 30th May, 1910, as shewn by the production of a copy of the certificate registered in the Land Titles office on the 2nd June, 1910. No part of the debt in respect of which the plaintiffs recovered judgment was incurred before the 9th November, 1910, as shewn on the endorsement of the writ issued on the 22nd May, 1911, in the action in which the plaintiffs obtained judgment. These facts were not in dispute. It was argued by counsel for the transferees that there was no power to order an examination under Con. Rule 903, when it was clear that the transfer was made before the liability which was the subject of the action had accrued. In answer Ontario Bank v. Mitchell, 32 C.P. 73, was cited. The Master said that that case did not assist. It was also said—in answer to the argument that, as these transferees were defendants in the pending action, this was an attempt to get discovery before the time—that an examination under Con. Rule 903 would have wider scope than an examination for discovery. The Master said that the language of the Rule itself, at the close, seemed to negative that suggestion. Such an examination should naturally precede an action such as was now pending. When the judgment creditor had issued his writ, it seemed idle to have the examination sought for here. There was no record of any such order ever having been made; and that is generally a proof that it cannot be made. Motion dismissed, with costs as in Smith v. Clergue, 14 O.W.R. 31. Wright (Millar & Co.), for the plaintiffs. J. A. Worrell, K.C., for the transferees.

ST. CLAIR v. STAIR—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JUNE 24.

Pleading—Statement of Claim—Leave to Amend—Charging Acts in Furtherance of Conspiracy.]—Appeal by the defendants from the order of the Master in Chambers, ante 1486, allowing the plaintiff to amend his statement of claim. The Chief Justice dismissed the appeal. R. McKay, K.C., for the appellants. W. E. Raney, K.C., for the plaintiff.

RE IRWIN, HAWKEN, AND RAMSAY—FALCONBRIDGE, C.J.K.B.—JUNE 24.

Arbitration and Award — Valuation — Appeal — Costs.]—Motion by Hawken by way of appeal from or to set aside an alleged award. The learned Chief Justice said that he was clearly of opinion that what the documents contemplated, and what the valuers did, was a valuation, and not in the nature of an award on an arbitration. Therefore, this application could not be entertained: Re Carus Wilson and Greene, 18 Q.B.D. 7. No costs except that, as the trustees of the Irwin estate seemed to have been unnecessarily brought before the Court, Hawken munst pay their costs, fixed at $5. L. F. Heyd, K.C., for Hawken. C. A. Moss, for Ramsay. J. T. White, for the trustees of the Irwin estate.

RE IRWIN AND CAMPBELL—MIDDLETON, J.—JUNE 26.

Arbitration and Award—Appeal—Valuation.]—Application by the trustees of the Irwin estate by way of appeal from or to set aside the award or valuation of three valuators or arbitrators. It was objected that what was appealed from was not an award upon an arbitration, but merely a valuation under a provision in a lease, and, therefore, no appeal lay. MIDDLETON, J., referred to the decision of FALCONBRIDGE, C.J.K.B., in Re Irwin, Hawken, and Ramsay, supra, and said that the Chief Justice had construed a precisely similar lease, and held that it contemplated a valuation, not an arbitration; and it was necessary and proper to follow his decision, without expressing an independent view. Application dismissed with costs. W. N. Ferguson, K.C., for the appellants. N. W. Rowell, K.C., and George Kerr, for Campbell.

GASCOYNE v. DINNICK—MASTER IN CHAMBERS—JUNE 27.

Discovery—Examination of Defendants—Relevancy of Questions — Pleading — Amendment.]—This action was brought to recover $10,000 as due under an agreement for the sale of lands by the plaintiffs to the defendants, under an agreement dated the 1st November, 1912. The defendants by their statement of defence alleged that the plaintiffs had not a good title; and counterclaimed for the return of their deposit of $500. The plaintiffs replied that the defendants had accepted the plaintiffs' title to the lands, and raised no objection within the time limited by the agreement for so doing. The defendants, on examination for discovery, refused to answer certain questions deemed relevant by the plaintiffs, who moved for an order requiring the defendants to attend for further examination. It appears that an offer of purchase made by the defendants on the 30th October, 1912, contained terms as to payment more favourable to them than the agreement of the 1st November, 1912, which supplemented or superseded it. A letter from the defendants' solicitors of the 30th December, 1912, to the plaintiffs' solicitor, said that this agreement was afterwards changed "by the parties." Ward, who was the nominal purchaser, on his examination for discovery said that he had nothing to do with this last change, but that Mr. Somers Cocks was acting for the purchasers. The Dinnicks had since been made defendants, instead of Ward; and the plaintiffs feared that they could not use Ward's depositions as evidence. They desired to know who "the parties" were, as they thought that this would assist them in proving acceptance of title, so as to bind the real parties in the transaction, as alleged in the reply. The Master said that the allegation in the reply was probably too indefinite: it was in fact a conclusion of law, from facts of which presumably the plaintiffs had knowledge; in which case those facts should be alleged in the pleadings. See Carter v. Foley-O'Brien Co., 3 O.W.N. 888, at p. 889. However, no objection was taken to the reply; and the defendants had since obtained leave to amend their defence, and the plaintiffs were to be allowed to amend as they might be advised. It was, therefore, unnecessary to make any order at present. When the pleadings should be again closed, the examinations might be resumed, and it might well be that what was not relevant now would become so on a different record. Motion dismissed; costs in the cause. B. N. Davis, for the plaintiffs. Grayson Smith, for the defendants.

McPHERSON v. FERGUSON—MIDDLETON, J.—JUNE 27.

Assessment and Taxes—Tax Sale—Action by Purchaser to Recover Possession of Land — Defence—Tender—Redemption — Mortgages—Appointment of Guardian or Committee for Defendant—Settlement of Action.]—Action to recover possession of land, tried at Hamilton. The learned Judge said that it was quite clear that no defence was disclosed. The land in question was sold by the Sheriff under a fi. fa., and the plaintiff became the purchaser on the 16th May, 1903. The defence upon the record was, that, prior to the sale, the defendant (the execution debtor) paid or offered to pay to the Sheriff the money due under the fi. fa. This defence was not made out. The tender was in the year after the sale.—The mortgages upon the land were upheld as valid in the former action of Ferguson v. McPherson. At the suggestion of the learned Judge, the plaintiff in this action—a daughter of the defendant—agreed to accept less than the amount due to her upon the mortgages and in respect of the purchase-money, and to allow the land to be redeemed. The plaintiff stated her readiness to accept $2,000, although the amount due was some $300 more than this. The land had so increased in value recently that it was now worth more than $5,000. The defendant refused to listen to this suggestion; seeking to go back of the former judgment.—From what took place at the trial, the learned Judge was satisfied that the defendant, by reason of brooding over her troubles and from other causes, was not in a position properly to protect her own interests; and, before judgment could be given in this action, she must be represented by a guardian or committee. He accordingly directed that the case should stand over until the necessary application could be made. The case seemed to be one in which the statute 1 Geo. V. ch. 20 (O.) might well be resorted to. If, upon a guardian being appointed, he should think that the plaintiff's offer ought to be accepted, then application might be made for judgment upon that basis; or he should have liberty to tender further evidence if he should so desire.—The learned Judge added that, as he was given to understand that the action was brought only for the purpose of preventing the Statute of Limitations from running, and so barring the plaintiff's title, he would suggest that a settlement might be worked out by which the defendant would be allowed to remain in possession of the land during her life, and upon her death some benefit might be secured to the younger daughter, who was now living with her mother. M. J. O'Reilly, K.C., for the plaintiff. The defendant in person.

GIBSON v. CARTER—KELLY, J.—JUNE 28.

Contract—Principal and Agent—Agent's Commission—Breach of Contract—Damages—Report of Referee—Appeal—Judgment—Costs.]—On a reference to Mr. J. A. C. Cameron, an Official Referee, he found: (1) that the plaintiffs were entitled to recover from the defendants $2,700 in respect of commission; (2) that the plaintiffs were not entitled to any damages in respect of the matters alleged in their statement of claim; (3) that the defendants were not entitled to damages against the plaintiffs in respect of the matters set forth in the counterclaim. The action and counterclaim were in respect of transactions between the plaintiffs and defendants under an agency agreement. The defendants appealed against the report in so far as the findings were in favour of the plaintiffs; and the plaintiffs moved for judgment upon the report and for costs. KELLY, J., said that, after a careful perusal and consideration of the voluminous evidence (some hundreds of pages) and the exhibits (almost two hundred in number) which were submitted to the Referee, and weighing the evidence carefully, without going into a detailed review of all of it, he could not disagree with the opinion formed by the Referee, except in respect of one claim of small amount, viz., $10 for moneys said to have been advanced by the defendants in September, 1910, to the plaintiff Robert Gibson. This item should be allowed to the defendants, and the $2,700 found due to the plaintiffs should be reduced by that amount. Order made dismissing the defendants' appeal with costs. Judgment for the plaintiffs upon the report (as varied by the deduction of the $10) for $2,690, dismissing the plaintiffs' claim for damages, dismissing the defendants' counterclaim, and requiring the defendants to pay the plaintiffs' costs of the action and reference. R. S. Robertson, for the defendants. Glyn Osler, for the plaintiffs.

GELLER v. BENNER—FALCONBRIDGE, C.J.K.B.—JUNE 28.

Costs—Mortgage—Redemption—Payment into Court—Mortgagees in Possession.]—Motion by the plaintiff for judgment on

further directions and as to costs. The Chief Justice said that the order under which the sum of $750 was paid into Court did not provide, and it was not the intention of the learned Judge who made the order that that sum should furnish, any criterion or standard by which the question of costs should be adjudged. The defendants were rightly in possession, the mortgagors being in default, and the defendants were entitled to their costs of action and reference, which, under all the circumstances, should be fixed at the sum of $75. E. V. O'Sullivan, for the plaintiff. Gideon Grant, for the defendants.