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HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. DECEMBER 9TH, 1910.

RE McLEAN STINSON AND BRODIE LIMITED.

Company — Winding-up — Right of Appeal from Interlocutory Order in Chambers—Practice—Winding-up Act, R.S.C. 1906 *ch.* 144, *secs.* 101, 104, 110.

Motion by the Rimouski Fire Insurance Company, who were the creditors petitioning for an order for the winding-up of McLean Stinson and Brodie Limited, for leave, under Con. Rule 1278 (777), to appeal to a Divisional Court (or for leave to appeal to the Court of Appeal) from the order of RIDDELL, J., in Chambers, ante 294, dismissing the applicants' motion to set aside an appointment issued by one Stinson, president of the McLean company, for the cross-examination of one Alphonse Audet, assistant-manager of the petitioning company, upon his affidavit filed in support of the petition, and directing Audet to answer a certain line of questions upon examination.

A. H. F. Lefroy, K.C., for the applicants.
I. F. Hellmuth, K.C., for Stinson and the McLean company.

MIDDLETON, J., dismissed the motion with costs, holding that, in winding-up matters under the Dominion Act, R.S.C. 1906 ch. 144, the sole right of appeal is that conferred by that statute. Where no right of appeal is there given, the decision is final. See Re Sarnia Oil Co., 15 P.R. 182, 347. The right of appeal exists only in cases falling within sec. 101 of the Winding-up Act. The practice upon any such appeal is regulated by sec. 104. When a reference is made under sec. 110, there is an appeal from a decision of the Referee to a Judge. There is no provision for any interlocutory determination as to matters of procedure only, save as may be permissible under sec. 110.

[Note: By sec. 110 "the practice of the Court in like cases" is made applicable, but that is "after a winding-up order is made." *Quære*, whether, before a winding-up order, the ordinary practice of the High Court would apply, e.g., as to cross-examination upon affidavits, which was in question upon the application before RIDDELL, J., in this matter, ante 294. The Editor is informed by counsel that that point was not raised before RIDDELL, J.]

TEETZEL, J. DECEMBER 23RD, 1910.

*RE MONARCH BANK.

Banks and Banking—Powers of Provisional Directors—Payment of Commissions on Sales of Shares—Impairment of Capital—Bank Act, secs. 12, 13—Shares Issued at a Premium—Misfeasance or Breach of Trust—Liability in Winding-up Proceedings under sec. 123 of the Winding-up Act—Director not Liable for Expenditure by Co-directors not Directly Authorised by him.

Appeal by Ostrom and others, provisional directors of the bank, from the judgment and report of J. A. McAndrew, an Official Referee, upon a reference for the winding-up of the bank, that the appellants were liable for breach of trust or misfeasance under sec. 123 of the Winding-up Act.

A. B. Morine, K.C., for the appellants Ostrom, Graham, and Livingstone.

H. E. Rose, K.C., for the appellants Kerr, Mackenzie, and Perfect.

C. A. Masten, K.C., and M. C. Cameron, for the liquidator.

TEETZEL, J.:—The appellants were provisional directors of the Monarch Bank, which was incorporated on the 20th July, 1905, by 4 & 5 Edw. VII. ch. 125 (D.); the time for obtaining the certificate under sec. 14 of the Bank Act was extended until the 20th July, 1907, by 6 Edw. VII. ch. 127 (D.)

The acts for which the learned Referee found the appellants to be liable were the payments of money received by them

*This case will be reported in the Ontario Law Reports.

by or on behalf of the bank without any statutory or other authority for such payments.

The provisional directors succeeded in collecting from subscribers for stock about $70,000, and made disbursements for general organisation expenses and for commissions of $10 per share to one Gordon, under what was styled an underwriting agreement, and the like sum per share to several agents who canvassed subscribers for stock, and a further $1.50 per share to the appellant Ostrom in respect of a large number of shares. The total expenditures, including commissions paid, amount to about $39,000, of which sum the learned Referee held that $22,574.07 was unauthorised, and that the appellants were liable to repay the same to the liquidator. About $21,000 of the latter sum was made up of commissions above-mentioned, and the balance consisted of directors' fees and legal expenses in connection with obtaining the charter and organisation, and the ruling as to these was not contested in the appeal. The balance of the $39,000 appears not to have been objected to by the liquidator, and was, therefore, allowed by the learned Referee.

In the prospectus issued and form of subscription agreement submitted to the prospective shareholders by the provisional directors, provision was made for issuing the shares at a premium of $25. The amount actually paid in on account of premiums on the stock subscribed for was in fact less than the amount of expenses which the learned Referee allowed as properly disbursed by the provisional directors.

The substantial question involved in the appeal is, whether the payments of $10 and $1.50 per share as commission for obtaining subscriptions were within the powers of the provisional directors under the Bank Act, R.S.C. 1906 ch. 29, the learned Referee having held that they were not.

The Act incorporating the bank was in the form set forth in schedule B. of the Bank Act, and, while it named the provisional directors, conferred no special powers on them; but sec. 9 of the Bank Act enacts that "an Act of incorporation of a bank, in the form set forth in schedule B. of this Act, shall be construed to confer upon the bank thereby incorporated all the powers, privileges, and immunities and to subject it to all the liabilities and provisions set forth in this Act."

The powers of the bank, and of its provisional directors acting for it, must, therefore, depend entirely upon the provisions of the Bank Act.

The powers of provisional directors of a bank under our Bank

Act do not appear to have been heretofore judicially considered. . . .

[Reference to Michie v. Erie and Huron R.W. Co., 26 C.P. 566, 576, as to the powers of provisional directors of a railway company; Monarch Life Assurance Co. v. Brophy, 14 O.L.R. 1; Re North Simcoe R.W. Co. and City of Toronto, 36 U.C.R. 101; the Bank Act, secs. 8, 11, 12, 13, 14, 16, 19.]

As regards the respective powers of provisional directors and shareholders' directors, the scheme of the Act clearly is, that the powers of provisional directors are to be strictly limited to those specifically granted for the purpose of getting the bank started as a business concern; and, except under contract with the subscribers, they have, in my opinion, no right to make or enforce payment of calls, nor, as pointed out by Mr. Justice Maclaren, in his treatise on Banking, 3rd ed., p. 20, have they any express power of excluding subscribers in default from taking part in the organisation of the bank.

For all that appears in the Act, it is assumed that the whole $250,000 shall be paid voluntarily. The only case cited as an authority for provisional directors making calls on stock was North Sydney Mining Co. v. Greener, 31 N.S.R. 41, but that case furnishes no assistance in determining the powers of provisional directors under the Bank Act. . . .

From the limited powers conferred upon the provisional directors under the Bank Act and the absence of any express authority to apply money paid by subscribers to any purpose except paying the $250,000 to the Minister, it is not unreasonable to assume that, when a petition is presented to Parliament for the incorporation of a bank, the legislature, in granting the privilege, intended only to grant the same for the purpose of enabling the petitioners (presumably men of substance) and their financial friends who, in the words of sec. 12, "desire to become shareholders," to establish a banking corporation. It cannot be assumed that the legislature intended, in passing an Act incorporating a bank, merely to furnish enterprising but impecunious promoters and their friends the means of exploiting the general public for subscriptions, with the absolute right, without consent of any one interested in the moneys paid, to deduct therefrom $10 or more per share as a reward for their enterprise, and with only an off-chance that a new banking institution may be established.

Nor can it be supposed that the legislature intended that, if $500,000 should be subscribed and $250,000 paid in, the bank

should start business with its capital impaired or with a liability to the extent of over $50,000 for commissions on stock subscriptions. Much less could it have been contemplated that, if only a few thousand dollars were actually paid in, the same should be absorbed at the will of the provisional directors in commissions and other promotion expenses. If either of such deplorable results is possible under the present legislation, it is high time for a change to be made in the law. . . .

[Reference to Weir's Law of Banking, p. 53.]

The Bank Act is full of most exacting restrictions upon the powers and privileges granted by the legislature, for violation of which severe penalties are imposed. Having regard, therefore, to the whole scope and purpose of the Bank Act, and to the limited powers expressly conferred on provisional directors, I cannot think that the legislature intended to empower provisional directors to enter into contracts which, assuming that no other expense or liability was incurred in the process of organisation, if the organisation were successful, would involve the bank in a liability of over $50,000 for commissions upon the minimum subscription of $500,000 provided for in sec. 13. . . .

[Reference to Attorney-General v. Great Eastern R.W. Co., 5 App. Cas. 473; Small v. Smith, 10 App. Cas. 119, at p. 129.]

Now, the main purpose to be attained by the provisional directors being to organise the bank as a business enterprise, can it be said that either the general or special powers expressly given them are sufficiently explicit to include the power in question in this appeal, within the natural meaning of the language conferring those powers; and, if not, can it be brought in as incidental to the main purpose and as reasonably and properly to be done for effectuating it?

For the reasons before pointed out, and having regard to the objects of the Act, I think it is plain that such a power is not within the natural meaning of the language of secs. 12 and 13. . . .

In the absence of any authority to solicit or to canvass for subscriptions at the expense of the bank, I think it is impossible to say that an authority to impose upon the bank, without the consent of the subscribers, a liability of $10 or more per share can be implied, or, in the language of Lord Selborne, "brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it."

Then, it appears to me that another difficulty in the appellants' way is that, though what was done is not expressly prohibited, it is so contrary to the express and unreserved author-

ity conferred upon the shareholders' directors as to be impliedly prohibited or excluded from the powers of the provisional directors. . . .

There is nothing in the form of the contract signed by the subscribers which creates any charge upon the moneys or gives any right either to the bank or to the provisional directors to deduct any sum for commission.

I think that, if the provisional directors find it impossible to get the minimum amount subscribed except by hiring canvassers or paying commissions, it is their plain duty to pledge their own credit for this purpose, and submit the question of being reimbursed to the bank after its organisation is complete, instead of themselves, in the first place, without authority, appropriating the funds of the bank for that purpose.

But even the authority of the shareholders' directors to pay commissions for selling shares or obtaining subscriptions for stock under the Bank Act, in its present form, is, to my mind, open to grave doubt. . . .

[Reference to Halsbury's Laws of England, vol. 5, p. 93; Palmer's Company Precedents, 10th ed., p. 250; Metropolitan Coal Consumers v. Scrimgeour, [1895] 2 K.B. 604.]

The appellants endeavoured to justify the expenditures because a premium of $25 was agreed to be paid on each share. Whether, if there had been enough premiums collected to meet all the expenditures of organisation, they would have been entitled to have the commissions paid out of this fund, it is not important to consider, because, as stated above, the other expenditures allowed by the Referee more than exhausted all that was collected for premiums, so that the commissions could not be paid without impairing the capital.

Another argument urged for the appellants was that, under the subscription contract, the provisional directors were trustees of the money for the subscribers and not for the bank, and, therefore, were not liable to the liquidator for breach of trust. It is impossible to adopt that argument, in view of the contract itself, which was made with "the incorporators of the bank, with the bank itself, and with every other subscriber for the stock of the bank . . . to accept the shares applied for, or any lesser number that may be allotted;" and also in view of the fact that the shares subscribed for appear by the minutes kept by the appellants to have been allotted to the respective subscribers; and also in view of the fact that, while under the contract the moneys are at the disposal of the provisional directors, such moneys were received by them in the capacity of agents of the

bank, and, when received, they held the same in trust, not for the persons paying the same, but for the corporation whose agents they were. . . .

[Reference to Great Eastern R.W. Co. v. Hunter, L.R. 8 Ch. 149, at p. 152.]

The appellants are, therefore, liable to pay the liquidator all money which they paid or directed to be paid for commissions.

As to the appellant Perfect, I think that, with the exception of $700, the evidence does not warrant a finding that he paid or directed to be paid any sum for commissions. At most he was aware of payments being made by his co-directors; and, while there is a minute of a resolution moved by him on the 11th May, 1906, authorising such payments, he swears he was not a party to the resolution and that the minute is not true, and there is no satisfactory evidence to discredit him. He also indorsed some cheques for the purpose of deposit to the credit of the provisional directors, but it does not appear that he paid or directed to be paid any money for commission, except a cheque for $700, which, with other provisional directors, he signed, and which on its face is said to be "an account of commissions."

I think Young v. Naval, etc., Co-operative Society, [1905] 1 K.B. 687, following Cullerne v. London and Suburban Building Society, 25 Q.B.D. 485, and holding that a director was not personally liable for moneys unlawfully expended by his co-directors, excepting to the extent that he had signed cheques for that purpose, covers Perfect's case, and, therefore, that the amount for which he is held liable jointly with the others will be reduced to $700.

Subject to the question of the amount for which the appellants Kerr and Mackenzie are liable, and which may be spoken to before me again, if not settled, the appeal of all the appellants except Perfect will be dismissed with costs, and as to him the judgment appealed from will be varied by reducing his liability to $700, with no costs of the appeal.

DIVISIONAL COURT. DECEMBER 23RD, 1910.

*ALLEN MANUFACTURING CO. v. MURPHY.

Covenant—Restraint of Trade—Agreement by Servant not to Engage in Business of a Similar Kind to that of Master—Engaging in one of two Departments of Business Carried on by Master—Breach of Contract—Restriction Extending to the whole of Canada—Validity—Interests and Requirements of Business of Covenantees—Knowledge of Improved Methods and Trade Secrets—Freedom of Contract—Public Policy—Injunction—Profits—Reference.

Appeal by the plaintiffs from the judgment of MULOCK, C.J. Ex.D., dismissing the action, which was brought for an injunction and damages in respect of an alleged breach by the defendant of his contract or covenant not to engage in a business in competition with the plaintiffs' business, for three years after leaving their employment.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

H. M. Mowat, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and H. H. Shaver, for the defendant.

BOYD, C.:—The plaintiffs' company was incorporated in 1902, and was authorised to "manufacture and deal in apparel and pressed goods of all kinds, in the machinery, raw material, ingredients, utensils, and appurtenances necessary to such manufacture, and to carry on a general laundry business, and to manufacture and deal in the machinery, appurtenances, and ingredients pertaining thereto." This was a compound business —manufacturing of whitewear and the laundering of it, and a general or custom laundry business. Laundering was common to both departments or branches of the one corporate business, in which were employed for the particular and the general laundering the same plant and machinery, the same premises, and the same employees, at the headquarters, in Toronto. The manufacturing part is not complete without the laundry for the finishing of the goods; and the laundry is, besides, a valuable adjunct for the utilisation of the special plant and machinery required for a large business. Both departments were

*This case will be reported in the Ontario Law Reports.

extensive and profitable. Evidence was more specially directed to the extent of territory which supplied material for the custom laundry; and it appears that the company did business from the Pacific to the Atlantic provinces of the Dominion—chiefly, I infer, along the line of the Canadian Pacific Railway. It is in evidence that in connection with the laundry work there are fifty or sixty agencies in different parts of Canada. . . . The washing of all custom work is done in Toronto, and the parcels of clothing and furnishings are collected at the various branches with horses and waggons. . . .

Thus there would appear to be an extensive and widespread business, which is able, by present railway facilities, to do profitable trade all over Canada, and its business generally appears to be on the increase.

Lately, however, the defendant has commenced a rival business in the laundry line, in the city of Toronto, and has seriously affected the business of the company and drawn off many of its largest customers. And the question is, whether this can be restrained under the restrictive clause contained in the agreement of the 21st February, 1904, by which the defendant, for good consideration, became bound, for three years after leaving the employment of the plaintiffs, that he would be "neither directly nor indirectly interested or employed in any way, by himself, or with, by, or through any other person, in any business of a similar kind to that carried on by the plaintiffs, within the limits of the Dominion of Canada."

The Chief Justice dismissed the case on the ground that the custom laundry business entered into by the defendant was no breach of his engagement not to enter "into any business of a similar kind" to that carried on by the plaintiffs. That is, the defendant, having been educated in the improved methods of business in the plaintiffs' laundry and intrusted with their secrets, is to be at liberty to cut into that very profitable part of their business by a competitive laundry in the same city. . . . The defendant is invading one moiety of the business, and has entered into serious competition with the plaintiffs, by means of his former position in their laundry, and through confidential communications derived from his former employment. The very statement of the position should carry its own condemnation. I cannot read any exculpation in the defence, "My business encroaches only on half of your business, and the rest I do not disturb."

Nor is the relation between these parties barren of authority. The test whether the business is of a similar kind to that of the

defendant is, whether it is sufficiently like it to compete with it seriously: Drew v. Guy, [1894] 3 Ch. 25. As put by Kekewich, J., in Watts v. Smith, 62 L.T.R. 453, the covenant means that he should not go and do that which he had theretofore been doing when in the employment of the plaintiffs, i.e., managing their laundry department. And this language, I think, applies even though the laundry conducted by the defendant be an entire business, and not one department of a larger business. This defendant carries on the laundry trade, which is essentially the trade embraced in the words "a similar kind of business," even though the plaintiffs' laundry may be regarded as auxiliary to their manufacturing—all is the one business, of compound and cognate nature, a material part of which the defendant has injured. See the converse case of Buckle v. Fredericks, 44 Ch.D. 244.

The question raised on the pleadings and more earnestly argued by the defendant was that the covenant was unenforceable because too wide in its restrictions, covering the whole of Canada. . . .

[Reference to Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, 548, 556; Moenich v. Fenestre, 61 L.J. Ch. 737, 741.]

Now, the burden rests on the defendant to shew that the contract is invalid, and that it is plainly and obviously clear that the protection extended beyond what the plaintiffs' interests required. That is the expression used by Fry, J., in Rousillon v. Rousillon, 14 Ch.D. 351, at p. 365; and, following that case, Chitty, J., held, in Badische Anilin und Soda Fabrik v. Schott Segner & Co., [1892] 3 Ch. 447, that if the restriction is not greater than can possibly be required for the protection of the covenantee, it is not unreasonable.

In this case the business of the plaintiffs as a whole clearly extends over all parts of Canada: as to the laundry branch, it extends over the greater part of Canada. . . .

There is an additional element in this contest which must not be disregarded. The plaintiffs have made changes for better working in the laundry machinery and plant that other laundries know nothing about: by means of expert workmen, the machines are improved by various attachments which are in the nature of trade secrets. The defendant was employed in the laundry department (which he selected) in a confidential position, and was instructed in all the details of the business, and thus became cognizant of these improved methods applied and used

by the company in the laundry department. It was his special business to look after and direct the laundry work, including the custom work, as well as the finishing of the manufactured goods, which were all put through the laundry processes in this one business. As to this, I refer to Leather Cloth Co. v. Lorsont, L.R. 9 Eq. 345, and Haynes v. Doman, [1899] 2 Ch. 13, 30.

"If," says Sir George Jessel, in Printing and Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, 465, "there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that these contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice." Bearing this salutary rule in mind, and weighing the sort of evidence given in this case, it appears to me that the defendant has failed to make a defence sufficient to relieve him from his engagement. . . .

[Reference to E. Underwood and Son Limited v. Barker, [1899] 1 Ch. 300; Rousillon v. Rousillon, 14 Ch.D. 351; Lamson Pneumatic Tube Co. v. Phillips, 91 L.T.R. 363; White v. Wilson, 23 Times L.R. 469; Dowden and Pook Limited v. Pook, [1904] 1 K.B. 45; Henry Leetham & Sons Limited v. Johnstone-White, [1907] 1 Ch. 322, 327.]

The defendant left the business of the plaintiffs on the 2nd June, 1910, and he should be inhibited for three years from that date from violating his engagement complained of in the pleadings.

I understand that the operation of the interim injunction was suspended on the undertaking to keep an account of profits. These profits should be investigated by the Master and paid over to the plaintiffs, who are also entitled to their costs of action and appeal.

I agree with the learned Chief Justice that the original contract as to the restrictive clause remains in force, though there was a further arrangement as to the increase of salary afterwards made.

LATCHFORD and MIDDLETON, JJ., agreed; the latter stating reasons in writing.

DIVISIONAL COURT. DECEMBER 23RD, 1910.

*ATKINSON v. CASSERLEY.

Trusts and Trustees—Assignee for Benefit of Creditors—Sale of Estate of Insolvent—Purchase by Others as Agents and Trustees of Assignee—Finding of Fact—Evidence—Appeal—Fraud—Account—Profits on Resale—Sale of Portion of Property—Remedy—Actual Value of Property—Costs—Evidence—Depositions of Deceased Defendant—Examination of Witness de bene Esse—Depositions not Read at Trial.

Appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff, a creditor of one George P. Hughes, in an action against M. J. Casserley, assignee of Hughes for the benefit of creditors, James Campbell, and the executors Thomas Q. McGoey, defendants, for an account of the rents and profits of the property of Hughes conveyed by the defendant Casserley to the other defendants, for damages for conspiracy and fraud, and for the removal of the defendant Casserley from the office of assignee.

The appeal was heard by MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.

G. Lynch-Staunton, K.C., and A. E. H. Creswicke, K.C., for the defendant Casserley.

D. L. McCarthy, K.C., for the defendant Campbell and the defendants the executors of McGoey.

G. H. Watson, K.C., and J. Fraser, for the plaintiff.

MIDDLETON, J.:— . . . Upon the evidence as a whole, the conclusion that McGoey and Campbell purchased as agents and trustees for Casserley is abundantly justified. Clearly the finding of the learned Judge, upon the evidence, cannot be reversed.

The legal effect of the finding, in the circumstances shewn, was not discussed at the trial; and we find ourselves unable to agree with the result in all respects.

McGoey, after the purchase, resold to Wright the house bought in his name, and a small parcel bought, it is said, from Campbell for $200, for $1,600, a sum which we accept as the real value. Upon the findings, this was really a sale by Casserley.

*This case will be reported in the Ontario Law Reports.

The $200 may be taken fairly to represent the value of the additional parcel, so that the profit on the transaction was the difference between the original price, $1,080, and $1,400—$320. The measure of liability in respect of the transaction would then be the amount of the profit on the resale, $320: Fox v. Mackreith, 2 W. & T.L.C. 709. Interest, occupation rent, and improvements, etc., may be set off against each other. We think that for this sum both Casserley and McGoey are liable. McGoey received this sum, and, knowing it was trust money, was bound to see that it reached its proper destination; and, when he paid it to Casserley (if in fact he has yet paid it) in his personal capacity, he was guilty of wrong-doing. Upon the evidence, it was in his hands when the action was begun, and his executors are answerable.

With reference to the parcel bought in Campbell's name, the solution is more difficult. Part of this property has been sold for $200. Had none been disposed of, the plaintiff's remedy would have been to have it declared that the property still remained subject to the trust, and to have an account on that footing; or he might have had a resale ordered, taking the increased price realised and holding the defendants to the purchase if no more was realised. The defendants are ready to submit to this, but contend that the Court cannot force them to retain the property at a price which may now be found to have been the actual value at the time of the transaction complained of—this being the remedy granted by the trial Judge.

Authority upon the question is extremely meagre. Godefroi, 3rd ed., p. 416, says: "If the estate, or any part of it, has been resold to a purchaser without notice, the trustee is ordered to pay the value of the estate and the profit made by him on the resale, with interest at four per cent." For this are cited: Hall v. Hallett, 1 Cox Eq. 134; Ex p. Reynolds, 5 Ves. 707; Randall v. Ettington, 10 Ves. 423; and Armstrong v. Armstrong, 7 L.R. Ir. 207. Lewin, 11th ed., p. 573, does not mention the case where part only has been sold, but gives as alternative remedies the right to compel the trustee to account for the difference in price or "the difference between the sum the trustee paid and the real value of the estate at the time of purchase"—citing for this Hardwicke v. Vernon, 4 Ves. 411 . . . where Lord Chancellor Loughborough said that "the plain rule of justice is, that he should be charged with the actual value of the estate."

It may be that this measure of relief bears hardly upon the trustee, but it must be kept in mind that he is the wrong-doer. The sale of a portion of the property, which prevents restitution,

is his act; and, inasmuch as it was his duty to have sold, any change of circumstances arising from depreciation of the property while in his hand ought to be borne by him rather than by the *cestuis que trust*.

The exact amount to be charged against the defendant has given much anxiety—$3,125 is probably much more than would have been realised at an honest sale, but we cannot, on the evidence, reduce the "actual value" below that sum. . . .

We can see no reason upon which the judgment against Campbell can be upheld. True, he has lent himself to a fraud, but no profit has reached his hands. His position in this respect differs from that of McGoey. He was a necessary and proper party to the action, and should answer along with Casserley for the plaintiff's costs.

The judgment should be varied as indicated. The plaintiff recovers against Casserley and the estate of McGoey, $320, and against Casserley alone the further sum of $1,525. So far as the McGoey estate is concerned, having regard to the amount recovered, it should only be liable for half of the taxable costs of the action. Casserley and Campbell should be liable for the costs of the action.

In view of the part success of the appeal and of the fact that the amount of which Casserley is held liable may be more than would have been realised at a forced sale, justice will probably be done by giving no costs of the appeal.

The plaintiff will have a lien upon the amount recovered for his costs.

We do not deal with the rights of the defendants as between themselves.

Upon the hearing we expressed our concurrence with the rulings of the trial Judge refusing to admit in evidence, on behalf of the executors of McGoey, his depositions upon his examination for discovery, and refusing to compel the plaintiff to read an examination de bene esse taken at his instance, and which he did not desire to read. We think it fair to give the costs of the examination to the defendants, as it should be regarded as an unsuccessful experiment on the part of the plaintiff for which he should pay. These costs will be set off pro tanto.

SUTHERLAND, J.:—I agree.

MEREDITH, C.J., with some hesitation, on grounds stated in writing, agreed in the result.

DIVISIONAL COURT. DECEMBER 23RD, 1910.

*APPLEBY v. ERIE TOBACCO CO.

Nuisance—Odour from Tobacco Factory—Local Standard—Evidence—Injunction—Suspension—Opportunity to Abate Nuisance—Costs.

Appeal by the plaintiff from the judgment of BOYD, C., at the trial, dismissing an action brought to restrain the defendants from continuing a nuisance.

The appeal was heard by MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.

J. H. Rodd, for the plaintiff.

A. H. Clarke, K.C., for the defendants.

The judgment of the Court was delivered by MIDDLETON, J.:—The nuisance complained of is the odour arising from the manufacture of tobacco in the defendants' premises. At the trial two other matters were complained of—dust arising from the alley and interference with certain shutters. The dust from the alley was described as "the important part of this action." Upon the hearing we expressed our agreement with the learned trial Judge in dismissing the action as to these two claims.

The odour from the tobacco arises chiefly from the processes of steaming, steeping, and stewing which it undergoes, and the boiling of sugar, licorice, and other ingredients with which it is mixed before it is reduced to "plug tobacco" ready for the market. These odours cannot be prevented if the manufacture is to go on; and, upon the evidence, the defendants appear to be doing their best to prevent injury to their neighbours.

Many witnesses were called for the plaintiff, who describe the odour as a "most sickening smell," "a very bad smell," "very, very offensive," "very nauseating." Some say that it produces vertigo and dizziness; others, nausea and headache. Some do not find any evil result beyond that incident to the disagreeable nature of the odour.

The defendants produce a number of witnesses, many of whom say the odour is "not unhealthy;" others say that it "does not affect" them; and one enthusiastic lover of the weed describes it as "just splendid."

*This case will be reported in the Ontario Law Reports.

Upon the whole evidence, there can be no doubt that there is a strong odour that to many, if not most, is extremely disagreeable. . . .

[Reference to Flemming v. Hislop, 11 App. Cas. 686; Walter v. Selfe, 4 DeG. & S. 315.]

It is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district—but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances. . . .

[Reference to Colls v. Home and Colonial Stores, [1904] A.C. at p. 185; Rushmore v. Polsue, [1906] 1 Ch. 237, [1907] A.C. 121; Reinhardt v. Mentasti, 42 Ch. D. 685; Sanders v. Grosvenor Museum, [1900] 2 Ch. 373; Attorney-General v. Cole, [1901] 1 Ch. 205; Drysdale v. Dugas, 26 S.C.R. 20.]

It is plain in this case that the defendants' manufactory does constitute a nuisance. The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, making all possible allowances for the local standard of the neighbourhood.

The remaining question is, must an injunction follow?

Both parties are tenants. Since the argument, it is said, the plaintiff has purchased the reversion in the defendants' property. Upon the application to admit this evidence, counsel said that, in their view, this made no difference in the legal rights of the parties. The fact that the defendants are tenants cannot give them any greater right to commit a nuisance, and may be at once dismissed from consideration.

Nuisances fall into two classes—those which interfere with the comfort and enjoyment of the property, and those which interfere with the value of the property. The occupant may sue in respect of the former. In such suit an injunction may well be awarded, as damages cannot be an adequate remedy: Jones v. Chappell, L.R. 20 Eq. 539. The working rule stated by A. L. Smith, L.J., in Sheefer v. City of London Electric Co., [1894] 1 Ch. at p. 322, as defining the cases in which damages may be given in lieu of an injunction, shews that here an injunction is the proper remedy. No one should be called upon to submit to the inconvenience and annoyance arising from a noxious and sickening odour for a "small money payment," and the inconvenience and annoyance cannot be adequately "esti-

mated in money." The cases in which damages can be substituted for an injunction sought to abate a nuisance of the first class must be exceedingly rare.

The injunction should, therefore, go, restraining the defendants from so operating their works as to cause a nuisance to the plaintiff by reason of the offensive odours arising from the manufacture of tobacco; the operation of the injunction to be stayed for six months to allow the defendants to abate the nuisance, if they can do so, or to make arrangements for the removal of that part of the business causing the odour. As success is divided, there should be no costs of the action. The plaintiff should have the costs of the appeal.

MULOCK, C.J. EX. D. DECEMBER 24TH, 1910.

RE URQUHART.

Will—Construction—Bequest to "my Nephews and Nieces"—Whether Nephews and Nieces of Testator's Wife Included—Oral Evidence—Inadmissibility—Absence of Ambiguity—Widow's Dower—Benefits under Will not Inconsistent with—Mixed Fund of Personalty and Realty—Election not Required.

Motion by the executors of the will of Kenneth Urquhart for an order declaring the proper construction of the will so as to determine questions arising as to the disposition of the estate.

F. Stone, for the executors.

O. L. Lewis, K.C., for the testator's widow.

W. Proudfoot, K.C., for the testator's nephews and nieces.

J. G. Kerr, K.C., for the nephews and nieces of the testator's wife.

H. Cassels, K.C., for the Presbyterian Church in Canada.

J. A. Walker, K.C., for the First Presbyterian Church, Chatham.

MULOCK, C.J.:—The Court is asked to construe the will of the testator. Some of the questions raised were disposed of during the argument, and I have now to deal only with those upon which judgment was reserved.

One of the reserved questions is, whether the nephews and nieces of the testator's wife are entitled to share in the residue.

After disposing of part of his estate, the testator by his will proceeds as follows: "I give devise and bequeath all the rest and residue of my estate . . . unto my executors . . . upon trust that they . . . shall . . . pay all my just debts . . . and shall permit my said wife to hold use and enjoy my said library during her natural life, and from and after her death shall, as equally as may be in their discretion, give and divide the same to and among all her relations and mine, including nephews and nieces surviving, and as to the residue of my said real and personal estate I direct that my said trustees shall stand seised and possessed of the same upon trust" (to collect and get in, etc.), "and to pay to my said wife . . . and I direct that my trustees shall stand possessed of my personal estate . . . and of such residuary estate upon trust to pay transfer and assure the same to my nephews and nieces and to pay to each his and her respective equal share, and so that the issue of any one shall receive equally between them the share of their deceased parent . . . and upon the further trust that they, my said trustees," (shall sell certain lands), "and I direct that my said trustees shall stand possessed of and interested in the surplus moneys to arise from the sale of my said lands and of the intermediate rents and profits . . . upon trust to divide the entire corpus equally between all my said nephews and nieces and to pay to each his and her respective equal share, and in such manner that the issue of any one shall receive equally between them the share of their deceased parent, and I nominate and appoint my trusty nephews, Kenneth Campbell . . . and Archibald B. McCoig . . . the executors of this my last will and testament . . . ."

Kenneth Campbell was the testator's nephew by blood; Archibald B. McCoig, the other executor, was his nephew only by marriage, being a nephew of the testator's wife; and one question is, whether not only Archibald B. McCoig, one of the testator's wife's nephews, but all of her nephews and nieces, are included in the words "my nephews and nieces," and as such entitled to share in the residue.

It was sought to shew by parol evidence that the testator addressed and treated many of his wife's nephews and nieces as his own nephews and nieces, and that his feelings towards them indicated a probable intention to benefit them. Such evidence, however, is not for the purpose of removing a latent ambiguity, and, therefore, is, I think, inadmissible.

In construing a will the question is, not what the testator probably intended, but what intention he has by his will expressed: Delamere v. Robello, 1 Ves. 415; Grant v. Grant, L.R. 5 C.P. 724; Sherratt v. Mountford, L.R. 8 Ch. 928.

"Nephews and nieces" means prima facie the children of brothers and sisters of the testator: Grieves v. Ralley, 10 Hare 63. If there is anything in the language of the will which shews that the testator has used the words in the more general sense, the Court will give that construction to his words; In re Blowers Trusts, L.R. 6 Ch. 358. . . .

[Reference to James v. Smith, 14 Sim. 214; Smith v. Liddiard, 3 K. & J. 252; Sherratt v. Mountford, L.R. 8 Ch. 928; Grant v. Grant, L.R. 2 P. & D. 8, L.R. 5 C.P. 724; Wells v. Wells, L.R. 18 Eq. 504; In the Goods of Ashton, [1892] P. 86; In re Joddrell, 44 Ch. D. 605, [1891] A.C. 304.]

Counsel for the nephews and nieces by affinity urged that the law is as declared in Grant v. Grant, and that by the authority of that case a latent ambiguity exists as to whom the testator intended to include in the classes of nephews and nieces mentioned in his will, and that, therefore, parol evidence is admissible to remove such ambiguity.

Looking at the whole will, I am of opinion that no latent ambiguity exists. The first reference in the will to "nephews and nieces" is in the paragraph disposing of his library, which, on his wife's death, is to be divided "among all her relations and mine, including nephews and nieces surviving;" then, after making certain directions for his wife's benefit, he gives a portion of the residue to "my nephews and nieces;" then, after disposing of certain moneys, he directs his realty to be sold and the proceeds of certain personalty to be divided equally between "all my said nephews and nieces;" then, after making certain gifts to charity, he appoints "my trusty nephews Kenneth Campbell . . . and Archibald B. McCoig" executors.

The testator's language in disposing of his library shews that in making his will he had in mind two classes of relations, one being his own relations, including his own nephews and nieces by consanguinity, and the other being his wife's relations, including her nephews and nieces by consanguinity; and each class thus expressly refered to is to share in the library. But in the disposition of the residue of his estate he speaks of one class of nephews and nieces only, namely, "my nephews and nieces," as distinguished from those of his wife, to whom he had expressly referred in the former part of the will. I, therefore, think that

in disposing of his residue the testator meant by the words "my nephews and nieces" his own nephews and nieces . . . only . . . .

But it was argued that the testator's reference to Archibald B. McCoig as his nephew in the appointment of . . . executors, indicated an intention to include, not only Archibald B. McCoig, but also all other of the wife's nephews and nieces in the class of those who were to share in the residue. . . .

[Reference to In re Joddrell, 44 Ch. D. 605, [1901] A.C. 304.]

Now, in what sense did the testator refer to Archibald B. McCoig as his nephew? . . . Whatever argument may be advanced in behalf of McCoig, there is no real ground, I think, for the contention that the reference to him as a nephew lets in the other nephews and nieces by affinity. They have already been expressly excluded from sharing in the residue, and there is nothing in any part of the will which, in my opinion, indicates that they are to be regarded as nephews and nieces for the purpose of sharing in the residue. Nor do I think that the testator intended McCoig to share therein. To include him amongst the testator's nephews and nieces is in conflict with the testator's previously expressed intention that his own nephews and nieces should take . . .

The next question is, whether the wife is required to elect between dower and the benefits given her by the will. . . . . It was contended that the gift to the widow of the "remainder of the net proceeds of the rents and profits of the said residue during the first year immediately following my decease" was inconsistent with her claim for dower. Before a widow can be put to her election, it must be clear beyond reasonable doubt that the testator positively intended to exclude her from claiming dower: Gibson v. Gibson, 1 Dr. 42. The testator has given to her a portion of one year's rents and profits of the residue of his estate. The "residue" here referred to does not, I think, include the interest of his wife as dowress, but only such estate as was his own property. The "rents and profits" of such "residue" are only the rents and profits of his own interest; and what he gave her by his will is a share of these rents and profits, leaving her entitled to dower in the realty. I see no inconsistency in her claiming dower and also sharing in the rents and profits of the remainder of the property.

But, even adopting the view that the "residue" of his estate out of which she takes includes the wife's dower, she would not, I think, here be bound to elect, for the provision in her behalf is

payable out of a mixed fund arising from personalty and realty, in which case it is not in lieu of dower: Laidlaw v. Jackes, 25 Gr. 299.

Costs out of the estate.

RIDDELL, J. DECEMBER 24TH, 1910.

ST. MARY'S AND WESTERN ONTARIO R.W. CO. v. TOWNSHIP OF WEST ZORRA.

Railway — Township Bonus — Agreement — Conditions — Fulfilment — Completion of Acquisition of Right of Way — Completion of Construction—Placing of Station—"Village," Meaning of — Unincorporated Hamlet — Acquiescence — "Proper Facilities for Shipping Cattle" — Waiver — Station-agent.

Action to recover $2,003.61 under an agreement.

The plaintiff company, incorporated by 4 & 5 Edw. VII. ch. 155 (D.), applied for assistance to the defendants, a township municipality. The defendants agreed to pay $15,000, 25 per cent. on the completion of the surveys and "the completion of the purchase or other acquisition of the necessary right of way therefor, and the balance or the remaining 75 per cent. upon the completion of the construction of the said railway . . . upon the terms and conditions hereinafter mentioned: (A) that the construction of the said railway shall be completed on or before the 1st day of July, 1908; (B) that . . . there will be placed at a point in the said company's line nearest the village of Bennington a freight siding and flag station, with a proper platform for the accommodation of passengers, and cattle yards with proper facilities for loading cattle. . . ."

The railway was completed and in good running order and in operation on the 1st July, 1908, although there were some parts not quite as they would be desired to be permanently.

The defendants agreed to pay $15,000, and had paid $12,996.39; the plaintiffs claimed the balance.

C. A. Moss, for the plaintiffs.

W. T. McMullen, for the defendants.

RIDDELL, J.:—The defendants say, first, that the purchase or other acquisition of the necessary right of way has not been com-

pleted, and point to two instances: (*a*) the Murray land. This was bought by the plaintiffs from the owner, who agreed to accept an order on the defendants for the purchase-price—the plaintiffs to build a cattle pass, which they did. He does not complain. The order was given and notice to the defendants. There can be no doubt that this is a complete purchase. (*b*) The Horseshoe Quarry: This land was taken possession of by the plaintiffs with the assent of the owner and the railway built thereon. The parties not being able to agree upon the purchase-price, an arbitration under the Railway Act was had; the plaintiffs are appealing from the award, and have the money to pay in case the appeal goes against them. This right of way I hold to have been completely acquired by them.

Then it is asserted that the station at Bennington is not at the nearest point to that village on the railway's line. In order to substantiate this proposition, it was necessary for the defendants to contend that the point from which the measurement was to be made was the "four corners." Bennington is not an incorporated village, but a hamlet. The station is a few feet further away from the "four corners" and post-office than another point on the railway line; and the defendants set up a breach of condition. Where there is no incorporation, it is not easy to say what is meant by "village." One definition which has been suggested and which is at least as good as any other makes the village to include all the houses from and to which a conversation can be carried on without undue raising of the voice. No assistance is to be obtained from the English cases. . . .

[Reference to Anon. (1700), 12 Mod. 546; Co. Litt. 1156; Rex v. Showler (1763), 3 Burr. 1391; The King v. Horton (1786), 1 T.R. 374; Waterpark v. Fennell (1859), 7 H.L.C. 650, 663, 678; Blackstone, vol. 1, p. 114; The King v. Morris, 4 T.R. 550; Fortescue De Laudibus Legum Angliæ, C. 24.]

In Illinois Central R.R. Co. v. Williams, 27 Ill. 48: "Any small assemblage of house for dwellings or business or both, in the country constitutes a village, whether they are situated upon regularly laid out streets and alleys or not." See also Toledo, etc., R.R. Co. v. Chapin, 66 Ill. 504; Toledo, etc., R.R. Co. v. Spangler, 71 Ill. 568. The definition given by the Illinois Court agrees with the modern colloquial use in England and the use in Ontario. But that definition does not enable us to determine accurately in all cases the precise limits of a village. Certainly the village contains all the houses in the "assemblage"—the distance to which the "assemblage" reaches is often the difficulty. I know of no better rule to lay down than that first

mentioned. With this definition, the railway station is in the village; and no point on the line could possibly be nearer. If, however, we take, as might be reasonable, the houses or buildings which would be expected to furnish the most freight for the railway, the station is the nearest point to these. It is not to be forgotten that the defendants, through their officers, knew that the plaintiffs were building at this point to carry out their agreement, and no objection was raised. On the whole, I think the station is properly placed.

A complaint is raised as to the facilities for shipping cattle. No objection is made to the buildings—indeed, these have been approved by the defendants—but it is contended that "proper facilities for shipping cattle" includes the permanent appointment of a station-agent, from whom to order cars, etc. As things exist, cars must be ordered from an adjoining station, the plaintiffs keeping no station-agent at Bennington. But it is clear that "facilities for shipping cattle" denotes the physical structures on the spot, and has nothing to do with the ease or difficulty of procuring cars.

Then it is said that the sheds here were not built by the 1st July, 1908. Assuming that the contract contemplated these being built by the 1st July, 1908, the counsel waived this term, as they might validly do.

A "flag station" does not as a rule have a station-master, and the complaint that no station-master is placed at Bennington has no force as a defence. If the defendants had desired a station-master, they should have stipulated for one.

The whole defence, it is quite clear, is unconscientious—it (as one of the witnesses said) is a bit of municipal politics.

The plaintiffs should have judgment for the amount sued for, interest, and costs.

MEREDITH, C.J.C.P. DECEMBER 24TH, 1910.

HAY v. DOMINION MILLING CO.

Sale of Goods—Orders for Future Delivery of Grain—Condition Alleged by Purchaser—Finding of Jury—Contract—Statute of Frauds—Memorandum in Writing—Correspondence—Refusal to Accept—Time of Breach—Damages.

Action for damages for the breach of two alleged contracts for the purchase of wheat by the defendants from the plaintiffs.

The first contract was alleged to have been made on or about the 8th December, 1909, in respect of 2,000 bushels of No. 2 Northern, sold at $1.03\frac{3}{4}$ per bushel on the track at Point Edward, for shipment in January, 1910, and 3,000 bushels of No. 2 Northern, sold at $1.04\frac{3}{4}$ per bushel on the track at Point Edward, for shipment in February, 1910, and 10,000 bushels of No. 2 Northern, at $1.03\frac{1}{2}$ per bushel on the track at Fort William, for shipment in May, 1910; and the second contract was alleged to have been made on or about the 18th December, 1909, in respect of 5,000 bushels of No. 1 Northern, sold at $1.12 per bushel on the track at Point Edward, and 5,000 bushels of No. 2 Northern, sold at $1.10 per bushel on the track at Point Edward, the purchasers to pay carrying charges.

It was not disputed by the defendants that they had "placed" verbal "orders" with the plaintiffs for the whole of this wheat, at the prices and on the terms alleged by the plaintiffs; but it was contended by the defendants that it was a term of both orders that, if they should not be in a position to take the wheat at the times named for delivery, they should not be bound to take it, but the plaintiffs would take it off their hands.

H. B. Morphy, K.C., for the plaintiffs.
W. G. Richards, for the defendants.

MEREDITH, C.J.:—A jury was sworn in order that I might avail myself of its assistance for the determination of any question of fact that might arise in the course of the trial; and I left to the jury the question whether the orders were placed subject to the condition alleged by the defendants; and in answer to questions submitted to them, they found against the contention of the defendants.

The defendants also relied upon the Statute of Frauds, which they were allowed to plead, though it had not been set up in their statement of defence.

Upon the findings of the jury and the admitted or undisputed facts, the plaintiffs are entitled to recover, unless the Statute of Frauds is a bar to their recovery.

I am unable to find that as to the first order there is any note or memorandum in writing of the bargain sufficient to satisfy the Statute of Frauds, and there was admittedly no acceptance and actual receipt of any part of the wheat, and no earnest to bind the bargain or part payment; and the action, therefore, fails as to that branch of the case.

There was, as to the second order, sufficient to satisfy the statute. The correspondence which was put in at the trial contains a sufficient note or memorandum in writing of this bargain, and there was undoubtedly an acceptance and actual receipt of part of the wheat; and the plaintiffs are, therefore, entitled to recover in respect of that order.

A further question arose at the trial as to the time when the breach of this contract, by the refusal of the defendants to take the wheat, occurred. The defendants alleged that between the 10th and 15th January, 1910, they informed the plaintiff John Hay by telephone that they would not take the wheat and told him to sell it, and that Hay said he would do so. This was denied by the plaintiffs, and the jury determined this question also adversely to the defendants.

The correspondence shews, and I find as a fact, that the plaintiffs were continuously pressing the defendants to take the wheat, from the beginning of the year down to June, and the defendants were putting them off by requests for delay, and finally, on the 14th of that month, the defendants repudiated the contract. The plaintiffs had on the 7th June telegraphed to them that they would sell the wheat unless shipping instructions were sent that day, or a deposit of $1,000 was made.

The plaintiffs on the 7th or 8th June sold 1,000 bushels of the No. 1 Northern, and seek to charge the defendants with the loss on this quantity, $253.68, which is made up by debiting them with the contract-price and the carrying charges and deducting the sum realised on the sale. On the 16th or 17th of the same month a further sale of 1,000 bushels of No. 2 Northern was made, and the loss on this, made up in the same way, amounted to $245.56, which forms the second item of the plaintiffs' claim. The plaintiffs also claim $529.27 for the loss on the remainder of the No. 1 Northern, 2,300 bushels, the market price of which they place at 94½ per bushel; and the plaintiffs further claim $467.35 for the loss on the remainder of the No. 2 Northern, 2,000 bushels, the market price of which they place at 92½ cents per bushel.

The variation in the market price between the 8th and 14th June was fractional, and the prices at which the wheat was resold, and the price with which the defendants are credited in respect of the remainder, against the contract prices with the carrying charges added, seem to agree with the market prices.

The plaintiffs are, therefore, entitled to judgment for the four items of their claim which I have mentioned, amounting together to $1,495.86, with costs; and the remainder of the claim, that is, in respect of the first order, is disallowed.

DIVISIONAL COURT. DECEMBER 24TH, 1910.

*FOWELL v. GRAFTON.

Negligence—Sale of Air-gun to Minor—Injury to Person—Duty — Liability — Criminal Code, sec. 119 — Jury — Judge's Charge.

Appeal by the defendants from the judgment of BRITTON, J., 20 O.L.R. 539, 1 O.W.N. 647, in favour of the plaintiff, upon the findings of a jury, holding the defendants, who sold an air-gun to a boy of thirteen, liable to the plaintiff, who was injured by a shot fired from the gun in the hands of the boy, for their negligence in selling it to a minor under sixteen.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

G. Lynch-Staunton, K.C., for the defendants.

J. L. Counsell, for the plaintiff.

MEREDITH, C.J.:— . . . It appears from . . . the considered judgment of the learned Judge, 20 O.L.R. 639, that he was of opinion that, apart altogether from the question of negligence, as the air-gun was sold to the boy in contravention of the provisions of the Code, sec. 119, the defendants were liable to answer in damages to the plaintiff for the injury which he sustained, the unlawful act being, in his opinion, the proximate cause of the injury.

The object of the provision of the Code was, undoubtedly, I think, the prevention of such accidents as that which happened to the plaintiff, and, that being the case, the view of the learned Judge is supported by the following statement of the law by an eminent commentator; "The commission of an act specifically forbidden by law . . . is generally equivalent to an act done with intent to cause injury, where the harm that ensues from the unlawful act is the very kind of harm which it was the aim of the law to prevent:" Pollock on Torts, 8th ed., pp. 26, 27.

But, however that may be, I am of opinion that there was evidence for the jury that the plaintiff's injuries were caused by the defendants' negligence, and that there was no misdirection. . . .

[Reference to Dixon v. Bell, 5 M. & S. 198.]

*This case will be reported in the Ontario Law Reports.

The air-gun was sold to the boy, as the jury might very properly infer, for the purpose of his using it as he afterwards did, and it was, I think, open to the jury to find that this constituted negligence on the part of the defendants. The air-gun, though in itself harmless when the boy received it, would become a dangerous instrument in his hands when he had obtained the bullets and loaded it with them; and that he would do this was in contemplation of the seller as well as of the boy.

I think, also, that the learned Judge was right in telling the jury, as in effect he did, that the fact that the danger to the public of an air-gun or ammunition being in the hands of a minor under the age of sixteen was deemed by the legislature of so serious a character as to render it proper that it should be made a criminal offence to sell or give either the air-gun or ammunition for it, was a factor they might take into account in determining whether the defendants were guilty of the negligence with which they were charged. . . . Blamires v. Lancashire and Yorkshire R.W. Co., L.R. 8 Ex. 283.

Appeal dismissed with costs.

TEETZEL and CLUTE, JJ., concurred; the latter giving written reasons.

CLUTE, J. DECEMBER 27TH, 1910.

JACKSON v. CITY OF TORONTO.

Highway—Nonrepair—Injury to Pedestrian—Sidewalk Slightly Raised at Crossing—Dangerous Place—Continuance of Condition for Long Period—City Corporation Affected with Notice—New District Taken over by City—Municipal Act, 1903, sec. 609—Negligence—Liability—Damages.

Action for damages for injuries sustained by the plaintiff on the 31st March, 1910, from a fall upon a sidewalk, alleged to be in an unsafe condition.

The plaintiff was walking south on Davenport road, between 10 and 11 o'clock at night, and, observing a car, hurried forward, walking rapidly, to take it, when she stubbed her toe against an obstruction and fell. The place where this occurred was at a private crossing, where two inch planks were laid lengthwise of the walk, and at the time of the accident were an inch and a half higher than the sidewalk. The ends of the planks had not been champered off, but were left square, causing an obstruc-

tion an inch and half high, at right angles with the level walk. The sidewalk was of boards laid crosswise of the walk; it had been put down two years before by the Corporation of the Township of York. The district had been brought within the jurisdiction of the Corporation of the City of Toronto on the 10th January, 1910. The city foreman took charge of this district on the 10th March, 1910. He and the foreman under him stated that the sidewalks in this district were in poor condition when the district was taken over.

I. F. Hellmuth, K.C., and E. C. Cattanach, for the plaintiff.
H. L. Drayton, K.C., and H. Howitt, for the defendants.

CLUTE, J. (after stating the facts as above) :—I find as a fact that the sidewalk was in the condition above described for at least six months before the accident. The month of March was unusually mild; no snow of any consequence falling during the month. . . . If a reasonably careful inspection of this sidewalk had been made, its condition must have been discovered. It was apparent to any one whose duty it was to examine its condition.

I find that the sidewalk was not in a reasonably safe condition at the time of the accident and for several months prior thereto, and that the defendants were aware, or by reason of the length of time it was out of repair should have been aware, of such condition.

The plaintiff contends that under sec. 609 of the Municipal Act, 1903, the defendants are responsible for the condition of the sidewalk when they received it from the township corporation, and I understood Mr. Drayton to accept this position.

Upon taking over a new district, it became the duty of the defendants to ascertain the condition of the roads and sidewalks, and they should be held responsible for any neglect in so doing.

Mr. Drayton urged, however, that, having regard to the remote location and the reasonable requirements of this district, the sidewalk was not out of repair within the meaning of the statute, but was in a reasonably safe condition. . .

[Reference to Anderson v. City of Toronto, 15 O.L.R. 643; Ewing v. City of Toronto, 29 O.R. 197; Ray v. Corporation of Petrolia, 24 C.P. 74; Ewing v. Hewitt, 27 A.R. 291, 299; McNiroy v. Town of Bracebridge, 10 O.L.R. 360; Rice v. Whitby, 25 A.R. 192; Derochie v. Town of Cornwall, 23 O.R. 87, 21 A.R. 279, 24 S.C.R. 201; Hall v. Port Hope, tried before Clute, J., in May, 1906, and verdict for the plaintiff sustained by a Divisional

Court on the 3rd October, 1906, not reported; Weisse v. Detroit, 63 N.W.R. 423; Burroughes v. Milwaukee, 86 N.W.R. 159; Johnson v. Lansing, 80 N.W.R. 8; Glantz v. South Bend, 106 Ind. 305; Corson v. New York, 78 N.Y. App. Div. 481.]

I entertain no doubt that an obstruction such as the one in question renders the sidewalk unsafe for pedestrians at night, and that where it is continued for a length of time, as in the present case, the corporation are guilty of negligence, the walk is not in a reasonably safe state of repair, and they are liable. . .

[The learned Judge then considered the evidence as to the plaintiff's injuries. She sustained a fracture of the cap of the elbow.]

The plaintiff's doctor's bills and medicines, which were not disputed, amount to $467. After a careful consideration of the question of damages, I think that, in addition to this amount, the plaintiff is entitled to $1,300, making in all $1,767, with costs of action.

RIDDELL, J. DECEMBER 28TH, 1910.

RE REX v. GRAHAM.

Justice of the Peace—Information—Failure to Proceed upon—Criminal Code, sec. 655*—Amendment by* 9 *Edw. VII. ch.* 9, *sec.* 2*—New Procedure.*

W. H. McFadden, K.C., for the magistrate, shewed cause to the order nisi granted by RIDDELL, J., ante 326.

J. B. Mackenzie, for Titchmarsh, the applicant.

RIDDELL, J.:—Counsel for the magistrate first argued that no crime is charged in the information. That I have already disposed of: ante, at p. 327.

The magistrate swears that he took the information and told the prosecutor that he would consider the matter, and that he afterwards considered the matter, and, having regard to the information and what was alleged by the informant, he came to the conclusion that the case was not a proper one for investigation, and that there was no likelihood of a jury convicting Graham of the offence charged, and he consequently decided not to proceed any further upon the same. He says that the prosecutor wrote him several letters, and that he answered one, saying he had not yet decided, but thought he would not proceed

on the information—he does not say that he informed the prosecutor when he did make up his mind.

From what took place upon the argument, it is, I think, fairly clear that the magistrate is not inclined to do more than he is compelled to do for this prosecutor as against Graham. It may be that the prosecutor is troublesome, and Graham is most respectable; but magistrates should bear in mind the absolute necessity of their maintaining impartiality—and, what is almost of equal importance, of shewing their impartiality in a manner that all may see and recognise that they are impartial. I think the latter has been lost sight of by the magistrate in this case.

Both parties were wrong, in my view, because of the want of observing the amendment of sec. 655 of the Criminal Code by 8 & 9 Edw. VII. ch. 9, sec. 2. This provides that, "upon receiving any . . . information, the justice shall hear and consider the allegations of the complainant, and the evidence of his witnesses, if any, and if of opinion that a case for so doing is made out, he shall issue a summons or warrant . . ." Sub-section 3 gives power to subpœna witnesses for such an inquiry, and subsec. 4 provides for the manner in which the evidence is to be given.

In the present case the magistrate made up his mind (if he bonâ fide did make up his mind) without hearing any witnesses—but, on the other hand, no request to summon witnesses was made—as I have said, all parties overlooked the new law.

I, therefore, do not at present make an order, but retain the motion to enable the prosecutor to furnish and have subpœnæd his witnesses, and the magistrate to pass upon the matter in the light of the evidence. The motion will be adjourned sine die to be brought on at any time by either party on one clear day's notice.

MULOCK, C.J.Ex.D. DECEMBER 28TH, 1910.

RE HOLMESTED AND TOWN OF SEAFORTH.

Municipal Corporations—By-law Authorising Town Corporation to Guarantee Payment of Debentures of Industrial Company—Bonus—Assent of Ratepayers—Municipal Act, 1903, *secs.* 366*a*, 384, 591*a*.

Application by Francis Holmested to quash a by-law of the Municipal Corporation of the Town of Seaforth authorising the

corporation to guarantee the payment of certain debentures of the Robert Bell Engine and Threshing Company Limited.

W. C. Chisholm, K.C., for the applicant.
W. Proudfoot, K.C., for the town corporation.

MULOCK, C.J.:—One objection is, that the by-law is intended to create a debt or liability on the part of the corporation, but provides no way of paying the same. The applicant's argument on this point is, that, under the provisions of 3 Edw. VII. ch. 19, sec. 591*a*, the guarantee in question is a bonus in aid of a manufacturing industry, and that sec. 366*a* of the same Act declares that to render valid a by-law authorising the granting of a bonus the same shall receive the assent of the ratepayers, and that sec. 384 requires that the by-law so submitted to the ratepayers must settle a certain sum annually to be raised for the payment of the interest during the currency of the debentures, and also a certain other sum to be raised annually for payment of the debt. The by-law in question does not settle any sum to be levied in payment of either the interest or the principal.

I think sec. 384 applies only in case of the municipality being the primary debtor, not, as here, where it is only guarantor, and may never in fact be required to pay. The debentures referred to in sec. 384 are debentures to be issued by the municipal corporation, and the debt is the actual debt of the corporation, and not a mere liability that may never become an actual debt.

Mr. Chisholm argued that, because the guarantee is, by sec. 591*a*, declared to be a bonus, the procedure to be followed in the case of by-laws creating debts must here be followed. Section 591*a* enumerates many things that are to be deemed bonuses, and amongst them a gift of land by a municipality. Such a gift creates no debt. Manifestly the legislature did not in that case intend that the provisions of sec. 384, as to an annual assessment being levied upon the ratepayers, should be observed. They are wholly inapplicable. The section must be construed reasonably. It applies to some and not to other of the "bonuses" enumerated in the section. It is inapplicable to a gift of land, and it is inapplicable to a guarantee such as that in question. Therefore, the objection fails.

The other objections were disallowed during the argument, and this application is dismissed with costs.

RIDDELL, J. DECEMBER 28TH, 1910.

DIXON v. DIXON.

Will—Construction—Gift to Daughter—Gift over to Testator's Heirs-at-law upon Daughter Dying without Issue—Heirs to be Determined as of Date of Testator's Death—Foreign Law—Evidence.

An action for a declaration as to who are the heirs-at-law of Thomas Dixon.

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

J. T. Small, K.C., F. W. Harcourt, K.C., G. Larratt Smith, R. B. Henderson, and R. H. Greer, for the several defendants.

RIDDELL, J.:—Thomas Dixon, a citizen of the United States and domiciled in Boston, Mass., died in 1849, having made his last will and testament, whereby (amongst other provisions) he devised and bequeathed to trustees certain property to pay the net receipts therefrom to his daughter Harriet for life, "and at and upon the decease of my said daughter then upon further trust to convey and transfer said trust property to the child or children (if any) then living and to the issue then living of any deceased child or children of my said daughter. But in case my daughter shall die leaving no issue living at her decease, then on trust to convey and transfer said trust property to my heirs-at-law to hold the same to them, their heirs and assigns, forever."

The daughter died without leaving issue; and the point for decision is simply: at what time are the heirs of Thomas Dixon to be determined—at the time of his death or at the time of his daughter's?

It is admitted that the will must be construed according to the law of Massachussetts, that being the domicile of the testator.

Several members of the Bar of Massachussetts—all of high standing—were examined upon the matters, and they agree that by the law of Massachussetts the heirs-at-law must be the heirs-at-law at the time of the testator's death. They refer to certain cases in the Courts of the State, and, upon perusing them, I find that the opinions expressed are fully justified by the decisions.

The law is the same as in England and in Ontario; and I so declare.

Costs of all parties out of the fund.

TEETZEL, J. DECEMBER 29TH, 1910.

RE DAVEY.

Will—Construction—Devise to Wife for Life—Power to Use and Enjoy "Corpus"—Remainder to Others—Implied Power of Sale.

Motion by the widow and executrix of Richard James Davey, deceased, for an order declaring the construction of his will so as to determine certain questions arising in the administration of his estate.

U. A. Buchner, for the applicant.
C. G. Jarvis, for the brothers and sisters of the testator.

TEETZEL, J.:—The clause of the will in question is in these words: "I give devise and bequeath all my property of every nature and kind to my wife for her use and benefit so long as she lives with full power to use and enjoy the same and such corpus of the estate as she may require or desire to use for her own benefit during her life, and should any part of my estate remain unused at her death then such part so remaining is to be divided equally among my brothers and sisters, and my wife is not to be required to account for my estate or any part thereof."

He appointed his wife sole executrix, and directed payment of his debts and funeral and testamentary expenses.

The estate consisted of a farm, valued at about $5,000, and about $500 in personal property, after providing for payment of his debts, etc., besides a life insurance of $1,000.

The question for decision is as to what title the widow has in the farm.

Mr. Buchner argued that she has a title in fee simple, while Mr. Jarvis argued that she has only a life estate without power of disposition, and that she must be confined to the use of the different portions of the estate in specie. Many authorities were cited by both counsel, all of which and many others I have perused.

As has often been observed by Courts, the construction put upon the different words in other wills affords, as a general rule, but little help in the efforts to construe a particular will. In In re Blantern, [1891] W.N. 54, the Court of Appeal in England said: "The proper rule for construing a will is to form an opinion apart from the cases, and then to see whether the cases re-

quire a modification of that opinion; not to begin by considering how far the will resembles others on which decisions have been given;" or, as put by Lord Ellenborough, in Doe dem. Wright v. Jesson, 5 M. & S. 95, at p. 97, "we are not to draw the sources of our judgment from the mere language or construction of other wills differently compounded, but from the language and intention of the testator in the will before us, or, as it is sometimes expressed, ex visceribus testamenti."

The first step is to ascertain from the whole will, by giving to the language used its grammatical and ordinary meaning, what the intention of the testator was, and then to determine whether the language used is sufficient to effectuate that intention, without contravening the law or any established rule of construction.

I think in this case it is plain that the scheme which the testator had in his mind, and what he intended to give effect to, was that his wife should have a free hand to use and enjoy during her life as much of his estate as she might, not merely from necessity require, but what she might desire to use for her own benefit, and that she should not be restricted to the income merely, but might resort to the corpus, without being called upon to account during her lifetime for his estate or any part of it which she might expend for her personal use and benefit; and that should any part of his estate remain unused by her at her death it should be divided equally between his brothers and sisters, but that she should not have the right by will to dispose of any part that might remain unused at her death. Nor do I think he intended she should in her lifetime make any disposition of any part of the corpus except such as she might desire to dispose of in order to make provision for her own personal use and enjoyment thereof.

Such being, I think, his clearly expressed intention, the next question is whether the legal effect is to vest in the widow an estate in fee simple in the farm, notwithstanding his intention to benefit his brothers and sisters, or whether her estate is limited to a life estate with the rights and powers above stated.

Even if the effect of the former part of the will standing alone would be to give the fee simple to the widow, one cannot disregard the clear intention of the subsequent part to give what remains unused to the brothers and sisters, for it is a general rule of construction to prefer the posterior of two inconsistent clauses in the will as evidencing a change of mind by the testator. Hence, as is stated in Jarman, 5th ed., p. 436: "It is obvious that a will can seldom be rendered absolutely void by mere repug-

nancy. For instance, if a testator in one part of his will gives to a person an estate of inheritance in lands or an absolute interest in personalty, and in subsequent passages unequivocally shews that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly."

This general rule is consistent with another general rule, which is, that a will should be so construed as to give effect to every word and every part thereof without change or rejection, and the several clauses should be made to harmonise, and effect given to all, provided the effect is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument: Am. & Eng. Encyc. of Law, 2nd ed., vol. 30, p. 664.

Applying these rules, I think the proper construction of this will is that the widow is entitled to a life estate, with a right to use such of the corpus as she may desire for her own enjoyment, and not to the mere use of the farm in specie, which would limit her to the rents and profits; and whatever may remain unused goes to the brothers and sisters.

For the purpose of giving effect to her right to use the corpus, I think she has, by necessary implication, a power to sell and convert the farm into money. Without this power effect could not be given to her right to use the corpus.

No technical or express words are necessary either in a deed or will to create a power: Farwell on Powers, 2nd ed., p. 48.

There are three requisites to the valid creation of a power, namely, sufficient words to denote the intention, an apt instrument, and a proper object: Sugden on Powers, p. 102.

I think these three essentials exist here. The fact that the widow is expressly authorised to use the corpus clearly shews the testator's intention that there must be a conversion of specie the corpus of which is not capable of being used except after conversion into money, and, as she is both the executrix and beneficiary, I think it clearly follows that, unless a main purpose of the will is to be defeated, a power of effectuating such purpose by sale must of necessity be implied. As to implied powers, see Farwell, 2nd ed., p. 48 et seq.; Theobald, Canadian ed., pp. 442-3; Smith v. Small, 10 App. Cas. 119, at p. 129.

Upon the general question, in addition to the cases cited, reference may be had to In re Rowland, Jones v. Rowland, 86 L.T.R. 78; In re Pounder, Williams v. Pounder, 56 L.T.R. 104; and Knapp v. King, 15 N.B.R. 309.

Order accordingly. Costs out of the estate.

KENNY v. BARNARD—SUTHERLAND, J.—DEC. 23.

Mortgage—Sale under Power—Action to Set aside—Notice of Sale—Defects in—Reasonable Efforts to Prevent Sacrifice—Sufficiency of Price Obtained.]—Action by a second mortgagee to set aside a sale made by the first mortgagee under the power of sale contained in his mortgage deed, in the usual statutory short form, and for redemption, etc. The first ground of attack was that the terms of the power did not warrant a sale, and that the terms were not complied with. The clause was: "Provided that the said mortgagee on default of payment for one month may on giving one month's notice in writing enter on and lease or sell the said lands." The learned Judge finds that default was made for more than one month, and more than one month had elapsed from the time the notice of exercising the power was served before the sale took place. The notice itself was, apart from clerical errors and omissions, appropriate and sufficient, and, unless the errors and omissions were fatal, the first mortgagee was warranted in selling, and had duly complied with the terms of the power. One error alleged was, that the notice was directed to the plaintiff personally, instead of as executor of one Morris, in which capacity he took the mortgage. On this point the learned Judge referred to and distinguished Bartlett v. Jull, 28 Gr. 140, and said that this error was not fatal, the plaintiff not having been misled, and no harm having resulted. Again, it was said that the notice served on the plaintiff was defective and misleading in that it referred to a mortgage dated the 26th October, 1909, and registered on the 10th November, as that under which the notice was given, and as a fact no such mortgage existed, "1909" being a clerical error for "1906." Held, that, as the plaintiff had notice of the mortgage when he took his own, and was not misled, the notice as to him was sufficient. It was also said that the notice served on the mortgagor was defective, and that the plaintiff could complain on that score. Held, that the notice served on the mortgagor would be sufficient, were he complaining on his own behalf; but he was not, and the plaintiff could not complain for him, having himself received sufficient notice.—It was also complained by the plaintiff that the defendant Barnard exercised the power oppressively and vexatiously, and did not take proper care to protect the interests of the mortgagor and the plaintiff, and sold the property at a grossly inadequate price. On this the learned Judge referred to Latch v. Furlong, 12 Gr. 303; Richmond v. Evans, 8 Gr. 508; Warner v. Jacobs,

20 Ch.D. 220; Kennedy v. DeTrafford, [1897] A.C. 180; and said that the mortgagee had taken reasonable means to prevent a sacrifice of the property and of obtaining the best available price; and the evidence did not shew that the price was inadequate. Action dismissed with costs. E. A. Cleary, for the plaintiff. A. H. Clarke, K.C., for the defendant Barnard. E. S. Wigle, K.C., for the defendant Holland.

TASKER v. MCDOUGALL—DIVISIONAL COURT—DEC. 23.

Sale of Goods—Refusal to Accept—Inferiority—Abatement in Contract Price—Costs.]—Appeal by the plaintiff from the judgment of the County Court of Halton dismissing the action, which was brought to recover the price of hay shipped to the defendant at Toronto, and refused by him as not being of the quality contracted for. At the conclusion of the argument, the Court came to the conclusion that the defendant was entitled to have an abatement from the contract price of the difference in value between the hay as contracted for, i.e., number one timothy, and the hay actually delivered, i.e., hay containing an admixture of an inferior grade. No evidence was given upon this point, and, with the consent of counsel, the case was referred back to the County Court Judge to report upon this question. The Judge reported the difference to be 40 cents per ton; and this made the balance due to the plaintiff $129.55. The Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.) allowed the plaintiff's appeal and directed judgment to be entered for him for $129.55; but, in view of the fact that the plaintiff was partly at fault (while the defendant was also at fault), fixed the plaintiff's costs at $75. W. Laidlaw, K.C., for the plaintiff. W. C. Hall, for the defendant.

WILKINSON v. HAMILTON SPECTATOR CO.—WILKINSON v. MAIL PRINTING CO.—MASTER IN CHAMBERS—DEC. 23.

Libel—Newspaper—Pleading—Justification — Particulars — Practice.]—Motions by the plaintiff for particulars of a paragraph in each of the statements of defence in actions for alleged libels published in newspapers. The paragraph contained the well-known plea of justification which was in question in Crow's Nest Pass Coal Co. v. Bell, 4 O.L.R. 660. *Held*, that under such a plea the facts alleged to be true must, according to strict practice, be set out in the plea itself; but, if not so set out, particulars

must be given. Reference to Zierenberg v. Labouchere, [1893] 2 Q.B. 183, 188, 189; Hickenbotham v. Leach, 10 M. & W. 361, 363. Orders made for particulars; costs to the plaintiffs in any event. James Hales, for the plaintiffs. J. B. Clarke, K.C., and Featherston Aylesworth, for the defendants.

FERGUSON v. HAYWARD—MEREDITH, C.J.C.P.—DEC. 24.

Annuity — Arrears — Payments — Evidence — Interest — Charge on Land — Report — Appeal — Further Directions — Costs.]—Appeal by the plaintiffs and cross-appeal by the defendants from the report of the Local Master at Woodstock, and motion by the plaintiffs for judgment on the report. Action to recover the arrears alleged to be due in respect of an annuity of $225 which William Hayward, under whom the defendants claimed, by deed dated the 21st June, 1894, covenanted to pay to his father, Alfred Hayward, whose personal representatives, the plaintiffs were. The Master found that the amount due to the plaintiffs was $1,565.64. MEREDITH, C.J., after referring to the evidence of payments, etc., said that substantial justice would be done, so far as it was practicable to do justice in the peculiar circumstances of the case, if the amount found due by the report was increased to $2,000; and he ordered the report to be varied accordingly. As to items disallowed by the Master for which the defendants claimed credit, the Chief Justice saw no reason to differ from the Master; and he, therefore, dismissed the defendants' cross-appeal. The Chief Justice also agreed with the Master that the plaintiffs were not entitled to interest. It has long been settled law that the arrears of an annuity do not bear interest; and the fact that the annuity was the consideration for the conveyance of the land to William Hayward, and was charged upon the land, made no difference. No costs of appeal or cross-appeal. Judgment for the plaintiffs for payment by the defendants of the $2,000 and the costs provided for by the original judgment and for the subsequent costs (not including the costs of the appeals), and in the usual form for sale of the lands in default of payment. W. M. Douglas, K.C., for the plaintiffs. W. C. Chisholm, K.C., for the defendants.

CAIRNS v. HUNTER BRIDGE AND BOILER CO.—DIVISIONAL COURT—DEC. 24.

Master and Servant—Death of Servant—Negligence—Defective System—Dangerous Place—Questions for Jury—Nonsuit—

New Trial.]—Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, withdrawing the case from the jury and dismissing the action, which was brought by the widow and infant children of William Cairns, to recover damages for his death, caused, as they alleged, by the negligence of the defendants, both under the common law and the Workmen's Compensation for Injuries Act. The deceased was engaged under Armstrong, a foreman in the employment of the defendants, in assisting in jacking up part of a bridge which had "canted over" owing to the subsidence of one end of one of its supporting piers. The bridge was about 356 feet long, and the pier, the up-stream end of which was pointed, was situate about the centre of it. The deceased and one Ruxton were working a jack on the top of that part of the pier which was outside the railing of the bridge. This part of the pier had a flat surface of about 20 inches by 4 feet 10 inches, and, owing to the subsidence of the pier, there was a dip in the 4 feet 10 inches of this surface of about an inch to the foot. The deceased was working at the outer end of the pier, when, owing to some cause not fully explained . . . the two men were thrown into the river and drowned. Part of the space upon which the deceased and Ruxton had to stand was occupied by the jack and part of it by a 20-inch piece of timber used in the operation of jacking up the bridge. The judgment of the Court (MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.) was delivered by MEREDITH, C.J., who said that there was evidence upon which the jury might not unreasonably find that the place where the deceased and Ruxton were working—having regard to the work they were doing—was a dangerous place, and that in doing that work they were exposed to very considerable danger. It was clear from what happened afterwards that it was practicable to minimise, if not entirely to do away with, that danger, by placing a guard around the pier and a rope around the men. There was, therefore, evidence upon which a jury might not unreasonably find that the system adopted for doing the work was a defective and dangerous one, and one which exposed the deceased to unnecessary danger. The question whether the deceased voluntarily incurred the risk knowing and appreciating the danger, and the question whether at the time of the accident he was in the employment of the defendants, were, upon the evidence, questions for the jury. Appeal allowed and new trial directed; the defendants to pay the costs of the last trial and of the appeal. G. H. Kilmer, K. C., for the plaintiffs. J. H. Scott, K.C., for the defendants.

RE SMITH—RIDDELL, J.—DEC. 27.

Will—Devise to Wife for Life or Widowhood—Dower—Election.]—Motion by the widow of Alfred Smith for a summary order determining the question whether she was put to her election between dower and the benefit given to her by the will of her late husband, in the following clause: "I give and devise my farm unto my wife for and during her natural life or so long as she remains my widow and does not marry again, and, after her death or marriage again, I give and devise same unto my children equally and absolutely." The learned Judge said that Westacott v. Cockerline, 13 Gr. 79, was conclusive against the widow's claim; and she must elect. Order accordingly; the widow to pay the costs of the application. Grayson Smith, for the widow. F. W. Harcourt, K.C., for the infants.

RE O'BYRNES AND SWAN—FALCONBRIDGE, C.J.K.B.—DEC. 27.

Will—Construction—Trust or Power to Sell Land—Intention—Exercise of Power—Vendor and Purchaser.]—Petition by Wilmer O'Byrnes, the vendor, under the Vendors and Purchasers Act, for an order declaring that he has a good title under the will of John Heney, deceased, and a conveyance from the executor of Heney, to land which he has contracted to sell and convey to Swan, the purchaser. The learned Chief Justice says that the will contains rather a trust for sale than a power; but, whether regarded as a power or a trust, it depends on the intention of the testator as collected from the will; and the principle that powers expressly given are not to be cut down unless that intention is perfectly clear, applies. The intention here clearly is that the power can be exercised. The vendor, therefore, can make a good title, which the unwilling purchaser must accept—his objection not being entitled to prevail. No costs. W. J. Code, for the vendor. W. Greene, for the purchaser. H. Fisher, for the executor of John Heney, deceased.

MCPHAIL V. MCKINNON—BRITTON, J.—DEC. 27.

Executors—Claims against Estate of Deceased Person—Services—Wages—Parent and Child—Implication from Circumstances—Absence of Corroboration—Promissory Note—Forgery—Evidence.]—Action against the executors of the will of the plaintiff's father to enforce certain money and other demands.

The plaintiff alleged: (1) that his father agreed with him, in consideration of his remaining at home after he became of age and working for his father upon the farm, to pay him $200 a year or to devise the farm to him, neither of which had been done; (2) that the plaintiff lent the deceased $210, for which the deceased gave his promissory note dated the 9th April, 1908, at one year, with interest at six per cent., which remained unpaid; (3) that the plaintiff pastured certain live stock for the deceased for which he ought to be paid; and (4) that the plaintiff with his team did certain work for the deceased, for hire, for which the deceased did not pay. At the close of the trial at Walkerton, the learned Judge dismissed the claim for wages or in the alternative for the farm, on the ground that there was no corroboration of the plaintiff's own evidence. As to claims (3) and (4), the learned Judge is of opinion that the circumstances in which the pasturing and work were done did not raise any presumption that the father was to pay the plaintiff for either. The promise of the deceased to pay was not proved other than by the plaintiff, so these claims also failed for want of corroboration. As to the note, the defence was forgery. A sister of the plaintiff believed the signature to be the handwriting of the deceased. Experts in handwriting pronounced it a forgery. The learned Judge said that the weight of the evidence was that the signature was not that of the deceased; there were circumstances of suspicion connected with the alleged giving of the note and the alleged borrowing of the money; and on this claim his finding must also be against the plaintiff. Action dismissed with costs. O. E. Klein, for the plaintiff. D. Robertson, K.C., and C. S. Cameron, for the defendants.

McDONALD v. MURPHY—DIVISIONAL COURT—DEC. 27.

Master and Servant—Injury to Servant and Consequent Death—Machinery and Appliances—Duty of Master—Negligence—Contributory Negligence—Jury.]—Appeal by the defendant from the judgment of MULOCK, C.J.Ex.D., upon the findings of a jury, in favour of the plaintiffs, the widow and children of John McDonald, in an action for damages for the death of McDonald, alleged to have been caused by the fall of a derrick in the defendant's quarry, where the deceased was employed. The jury found for the plaintiffs with $1,000 damages, and judgment was given for that sum with costs. MIDDLETON, J., delivering the judgment of the Divisional Court (MEREDITH, C.J.C.P., TEETZEL and MIDDLE-

TON, JJ.), said that the common law obligation of the master is to maintain a suitable and safe place, machinery, and appliances for the work to be done, and to warn the servant of all dangers known or which ought to be known to him—unless already known to the servant. The jury have found that the master was negligent in removing the third guy from the derrick without first making the boom fast by anchoring it, and so securing the stability of the whole until this was brought about by the placing of the "stiff legs." This was the cause of the accident. The jury have found that there was no contributory negligence. The deceased was lawfully upon the premises, and the fact that, at the time the derrick fell, he was climbing the mast, is a mere incident, unless his so doing amounted to contributory negligence. The appeal should be dismissed with costs. M. Wright, for the defendant. W. S. Morden, K.C., for the plaintiffs.

DURYEA v. KAUFMAN—RIDDELL, J., IN CHAMBERS—DEC. 28.

Pleading—Particulars—Statement of Defence—Patents for Invention—Infringement—Invalidity.]—Appeal by the plaintiff from the order of the Master in Chambers, ante 336, so far as by it he refused to strike out the part of the statement of defence of the defendant company attacking the validity of certain patents. RIDDELL, J., said that the pleadings were much as when the case was before him on a former application: 21 O.L.R. 166, 1 O.W.N. 773. There were two matters which appeared to be distinct: (1) the patents for modified starch and for maltose; and (2) the glucose processes. (1) As to the modified starch and maltose patents, the plaintiff in his statement of claim says (paragraphs 2, 3, 4) that he owns them; (paragraph 9) that the company were manufacturing by these processes during the currency of the agreement; and now (paragraph 14) claim to have acquired the Canadian commercial rights under the maltose patent, and that they are entitled to use the same, but this the plaintiff denies ; and (paragraph 32) the company have since the 1st January, 1909, in violation of the rights of the plaintiff, made use of and sold to others modified starch made and manufactured according to and by using the plaintiff's processes and special personal confidential methods, and intend to do so; (paragraph 40) they since the 1st January, 1907, manufactured and still are manufacturing modified starches and glucose according to the plaintiff's patented processes and special personal confidential methods, though, if entitled so to manufacture,

which the plaintiff does not admit, the company are under obligation to pay royalties to the plaintiff. The prayer is for an injunction restraining the defendants from manufacturing modified starch according to the plaintiff's processes and special personal confidential methods, or, in the alternative, for royalties. This cannot be read as meaning anything else than a charge of infringing the patents (coupled indeed with the aggravation that special personal confidential methods were also used) and a claim for an injunction. On this pleading the defendants may deny the validity of the patents under and according to the process of which the defendants are said to be manufacturing—the defendants may also counterclaim to get rid of the patent as against them. (2) As to the secret processes, there is much said, but the matter does not arise on the notice of appeal. Particulars may be given of the defences, etc., on these patents. Costs to the defendant company in any event. Casey Wood, for the plaintiff. D. L. McCarthy, K.C., for the defendant company.

RE ONTARIO BANK—RIDDELL, J.—DEC. 29.

Bank—Winding-up—Contributories.]—An appeal by Collins and others from the order of George Kappele, an Official Referee, upon a reference for the winding-up of the bank, placing the names of the appellants on the list of contributories. The learned Judge agreed with the conclusions of the Referee, and dismissed the appeal with costs. C. A. Moss, for the appellants. J. Bicknell, K.C., for the liquidator.