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HON. MR. JUSTICE LATCHFORD. MAY 2ND, 1914.

RE JULIA GREENSHIELDS ESTATE.

6 O. W. N. 303.

Estates—Devolution of Estates Act — Undisposed of Residue—Collaterals — Half-blood — Whole-blood — Automobile—Ejusdem Generis, Doctrine of—"Any," as Equivalent to "Every."

LATCHFORD, J., *held*, that sisters and brothers of half-blood of mother of testatrix are under Devolution of Estates Act, R. S. O., c. 119, s. 30 entitled to rank as sole next of kin to the exclusion of descendants of brothers and sisters of the half-blood or whole-blood of the mother or father of testatrix: the fact that they are but of the half-blood not limiting their right.

Pett v. *Pett* (1701), 1 Salk. 250, 91 Eng. Rep. 220; *McEachren* (1905), 10 O. L. R. 199: and *Re Wagner* (1903), 6 O. L. R. 680: followed.

That, under rule of *ejusdem generis*, an automobile is not included in a bequest of "furniture, plate, linen, china, glass, books, pictures, works of art, musical instruments, and other articles of household use or ornament."

Re Howe, Ferniehough v. *Wilkinson*, [1908] W. N. 223; *Re Ashburnham, Gaby* v. *Ashburnham*, [1912] W. N. 234, and *Re Hall*, [1912] W. N. 175, followed.

That the word "any" in the devise of "any freehold or leasehold house," was used in the senses of "every."

New Haven Y. M. C. A. v. *New Haven*, 60 Conn. 32, 39, approved.

Motion by the executors of Julia Greenshields, late of the city of Toronto, spinster, deceased, by way of originating notice, for an order determining the following questions:

1. Are Geraldine Paterson, a sister of the half-blood, and Hartland St. Clair MacDougall, a brother of the half-blood of the mother of the said testatrix, Julia Greenshields, both of whom are living, the sole next-of-kin of the said testatrix, or are Dora Bell and others, children of brothers and sisters of the half-blood of the mother of said testatrix and children of brothers and sisters of the whole-blood of the mother and of the father of said testatrix, entitled to rank as next-of-kin of the said testatrix and entitled to share in the residue undisposed of of the estate of the said testatrix?

2. Is the legatee, Helen Grace Fleming (formerly Helen Grace Gillespie) entitled under the clause of the will of said testatrix numbered 3 to the motor car owned by the said testatrix at the time of her death, or does said motor car form a part of the undisposed of residue of the estate of the said testatrix?

3. Is the devisee, Helen Grace Fleming (formerly Helen Grace Gillespie) entitled under the clause of the will of the said testatrix numbered 7 to all the freehold and leasehold houses with the lands belonging to or held with the same in Canada which belong to the said testatrix at the time of her death, or is the said devisee, Helen Grace Fleming, put to an election in respect of the two leasehold properties and two freehold properties owned at the time of her death by the said testatrix.

Hamilton Cassels, K.C., for executors.

G. F. Shepley, K.C., and H. S. White, for Mrs. Fleming.

Glynn Osler, for Mrs. Paterson and McDougall.

J. F. Edgar, for Mrs. Dora Bell and the descendants of deceased brothers and sisters of the father and mother of Miss Greenshields.

HON. MR. JUSTICE LATCHFORD:—Miss Greenshields made her will on March 21st, 1902, and died on February 9th, 1914. James J. Greenshields, a brother of the testatrix, died on August 20th, 1913; and owing to his death an intestacy has arisen in respect to part of the estate, amounting to about $50,000. The first question to be disposed of is what persons are entitled to share in this undisposed residue?

The father and mother and all lineal ancestors of the testatrix had predeceased her, and no brother or sister, and no child of any brother or sister, survived the deceased.

Both the father and mother of Miss Greenshields had brothers and sisters of the whole-blood, and her mother had brothers and sisters of the half-blood; but all such uncles and aunts predeceased the testatrix. Several of them, however, left descendants, one of whom is Mrs. Bell. Mr. Edgar, who appeared for Mrs. Bell, was appointed by the Court to represent for the purposes of this motion the descendants of the deceased brothers and sisters of the whole and half-blood of both the parents of the testatrix.

Geraldine Paterson and Hartland St. Clair McDougall are respectively a sister and a brother of the half-blood of

the mother of Miss Greenshields. Do they take the undisposed-of residue to the exclusion of Mrs. Bell and other descendants of the deceased uncles and aunts of the testatrix?

Under sec. 30 of the Devolution of Estates Act, R. S. O. 119, personal property in such a case as that now before us "shall be distributed equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree; but there shall be no representation admitted along collaterals after brothers' and sisters' children. By sec. 3, sub-sec. 1, realty shall be distributed as if it were personalty.

The provisions of our statute as to the distribution of personalty upon an intestacy are based upon the old Statute of Distribution, 22 and 23 Car. 2 Ch. 10. In one of the early cases under that statute, *Pett* v. *Pett* (1701), 1 Salk. 250, 91 Eng. Rep. 220, the question for determination was whether the brother's grandson should have a share with the daughter of the intestate's sister. To quote the report:

"The words of the Act are, *Provided no representation be admitted amongst collaterals after brothers' and sisters' children*; and it was urged that this Act was a remedial law to prevent administrators sweeping away the whole personal estate of the intestate, and therefore to be taken largely; *sed non allocatur per Curiam.*"

The correctness of this decision has never been impugned.

In *Re McEachren* (1905), 10 O. L. R. 499, the intestate was an unmarried woman. There were two daughters of a deceased sister of the intestate's father, and sixteen or more grandchildren of deceased brothers and sisters of the intestate's mother. As in the present case, the intestate's father and mother were dead. The learned Chief Justice of the King's Bench held that there was no representation of collaterals and that the daughters of the deceased sister of the intestate's father took to the exclusion of the grandchildren of the deceased brothers and sisters of the intestate's mother.

The prohibition that there shall be no representation among collaterals after brothers' and sisters' children excludes all but Mrs. Paterson and her brother. That they are but of the half-breed does not limit their right. Under

the Statute of Distribution—which our state follows—the old rule of the common law (derived like many others from the Canon law) was superseded, and the degrees of relationship are reckoned from the intestate up to the common ancestor, and thence downward to the other parties. According to this mode of computation those of the half-blood are related to the propositus in the same degree as those of the full blood, as they are all of the same father or mother. Armour on Devolution, 246; Robins on Devolution, 354; *Re Wagner* (1903), 6 O. L. R. 680.

The question as to the automobile arises under paragraph 3 of the will, which, so far as material, is as follows:

"3. I bequeath to my cousin, Helen Grace Gillespie, free of duty, all my watches, jewellery, trinkets, lace, wearing apparel and other articles of personal use or adornment, furniture, plate, linen, china, glass, books, pictures, works of art, musical instruments and other articles of household use or adornment."

The deceased did not own a motor car at the date of the will; and unless the car which she owned at the time of her death passed to Mrs. Fleming under the words "and other articles of household use or adornment," it forms part of the residuary estate.

It will be observed that these words follow an enumeration beginning "furniture," and including "plate, linen, china, glass, books, pictures, works of art, musical instruments."

"Other articles" of household use or adornment must upon authority be held to relate to things *ejusdem generis* as those specifically mentioned; and an automobile cannot, in my opinion, be considered to be of the same genus as any of the articles enumerated. Everything particularly mentioned is an article for use or ornament within a house. The case is not one where there is a general bequest of all household goods and effects.

In *Re Howe, Ferniehough* v. *Wilkinson,* [1908] W. N. 223, the testator devised to the plaintiff, then Mrs. Tallyn, "My home, Thornleigh, and its appurtenances and surrounding lands and all furniture and effects (just as it now stands)." It was held on the authorities that the bequest was sufficiently wide to include three motor cars. But the words before me for construction "other articles of household use," following a specific enumeration of articles used

only within a house, are much more restricted in their application. In the Howe case it was clear on the will that the testator meant the plaintiff should have Thornleigh just as he and the plaintiff were living in it, and the learned Judge had no doubt the testator intended the motor cars to pass to the plaintiff, and so determined.

A similar case is *Re Ashburnham, Gaby* v. *Ashburnham,* [1912] W. N. 234. The words of the devise were "all my furniture and effects at present at Aubrey Lodge." A motor car in a garage at Aubrey Lodge was held to pass, although not at Aubrey Lodge when the will was made; the words "at present at Aubrey Lodge" being considered merely descriptive. *In re Howe* is referred to and approved because of the wide scope of the words "household furniture and effects," and because the will shewed a clear intention to give Mrs. Tallyn everything in Thornleigh.

No similar intention can be observed in the present case as to this particular bequest. Having regard to the "collocation of words," *Re Hall,* [1912] W. N. 175, in which occur the words, "other articles of household use or adornment," I am impelled to the conclusion that the motor car does not pass to Mrs. Fleming, but falls into the undisposed of residue of the estate.

The final paragraph to be considered is as follows: "7. I devise and bequeath to my said cousin, Helen Grace Gillespie, any freehold or leasehold house with the lands belonging to or held with the same in Canada which may belong to me at the time of my death."

At the date of the will the testatrix owned no freehold land in Canada, but held under separate leases two leasehold properties in Toronto, on which were erected two semi-detached houses, one occupied by the testatrix and the other by Miss Gillespie and Miss Gillespie's sister. The houses were at the time of Miss Greenshields' death connected by a doorway in the third storey. After the will was made Miss Greenshields bought two freehold properties, one at Port Hope—on which was her summer home—and the other nearby, at Bowmanville. Nearly half of the latter property was conveyed in the lifetime of the testatrix to Miss Gillespie, and a cottage erected upon it in which Miss Gillespie resided during the summer. On the remaining part Miss Greenshields erected a garage, where she kept her motor car when she visited her cousin, as she frequently did, spending a

day or two at a time, and then returning to her own summer residence at Port Hope.

I think it clear from the general terms expressed in this devise in relation to "any house" that the testatrix used "any" in the sense it frequently has of "every." There are numerous cases in which "any" has been so construed: 1. Words and Phrases, 412; 2 Cyc. 472; though when the context requires it the word may be taken in the sense it sometimes bears of one of several. *New Haven Y. M. C. A.* v. *New Haven,* 60 Conn. 32 at 39. Here, I think, there is a manifest intention to devise to Miss Gillespie every house which might belong to the testatrix at the time of her death, whether the same was held in connection with freehold or leasehold lands.

Accordingly, there will be a declaration that the leaseholds in Toronto and the freeholds in Port Hope and Bowmanville have passed by the will to Mrs. Fleming.

Costs of all parties out of the estate.

HON. R. M. MEREDITH, C.J.C.P. MAY 5TH, 1914.

REX v. TITCHMARSH.

6 O. W. N. 317.

Criminal Law—Practice and Procedure — Convictions, Quashing—Power to Make Rules in Criminal Matters—Existence of Court with—S. 576, Criminal Code—Judicature Act, s. 63—Magistrate and Justice of Peace.

MEREDITH, C.J.C.P., refused to quash conviction for crime, on contention that no Court, such as that authorized in s. 576 of the Criminal Code, to make rules respecting practice, exists now in Ontario, and therefore that the rules made in 1908 have ceased to have any effect; and that s. 63 of the Judicature Act is not applicable to the case in point, because it deals with convictions by a magistrate, and not a Justice of the Peace; but expressing doubt as to whether there was any power to make said rules, he gave leave to appeal.

Motion by the defendant, *ex parte,* for a writ of certiorari to remove a criminal conviction into the Supreme Court of Ontario, with a view to having it quashed.

J. B. Mackenzie, for the applicant.

HON. R. M. MEREDITH, C.J.C.P.:—Mr. Mackenzie's unflagging industry, in his searches for such purposes, has discovered two matters which, he contends, shew that there

has been a serious flaw in the practice, prevailing in this province, upon applications to quash convictions for crimes; and, as a consequence of his discoveries, he asks for a reversion to the older practice which prevailed for so many years before, and until, the adoption of the present practice in the year 1908, under rules of Court framed, in the first instance, by Mabee, J.

His points are: that no Court, such as that authorized, in sec. 576 of the Criminal Code, to make rules respecting the practice in criminal matters, in this province, now exists, and therefore that the rules made, at the time I have mentioned, have ceased to have any effect. And that sec. 63 of the Judicature Act is not applicable to this case, because it deals with convictions made by a "magistrate" only, whilst the conviction in question was made by "Justices of the Peace;" and this point is persisted in notwithstanding the meaning given to the word "magistrate" in the Interpretation Act, sec. 29 (m) and (r), and in the Interpretation Act, sec. 34 (15) because there is an interpretation of the words "Justice" contained in the Criminal Code, under which the conviction in question was made, and that interpretation, whilst it includes a "Police Magistrate," does not include magistrates generally: sec. 2 (18).

These contentions seemed, and still seem, to me to have no weight; but another point forced itself upon me during the argument, a point which seemed to me to be of sufficient weight to require further consideration before disposing of the application.

Regarding the points made by Mr. Mackenzie, it may not be at all necessary, for any general purpose, to repeat that which was said respecting them during the argument; but so that the applicant may be under no misapprehension respecting them, I shall do so.

If the rules of 1908 were well made, why should they fall, even if there were no Court now competent to make any such rules? There seem to be but two provisions contained in them that might be affected by such a state of affairs, if it really existed; the first is the rule numbered 1284, which provides that the motion to quash shall be made to a Judge of the High Court of Justice for Ontario, sitting in Chambers; and the other—rule numbered 1287—is that which gives a right of appeal, by leave, to a "Divisional Court."

There is no reason why the rules, as far as they are applicable, should not be applied by any Court in the province having power to quash convictions. Why should they cease to have force and effect any more than the Act itself should?

But it is quite erroneous to say that no such body, or that no such Court, now exists; the same body and the same Court exist, with the exception of the "Divisional Court," and they have existed all along, entitled to exercise and exercising the same powers, and performing the same duties; the name has been, in some respects, changed, and the manner of performing such duties, and exercising such powers, has been in some respects varied, but nothing more.

If, however, Mr. Mackenzie were quite right in his contentions, that quite a new Court had come into being, and that there are no rules, or practice, applicable to it, why should not such Court adopt as its practice the procedure embodied in the Mabee rules? Until some binding legislation, or rules, should be enacted, the Court, having jurisdiction to quash, could, and would, necessarily, be obliged to lay down some mode of procedure. See *Robinson* v. *Bland*, 1 W. Blackstone, 264.

Upon the other point there was no need of any deep study of the meaning of the word "Magistrate;" nor of the exercise of any ingenuity in a vain endeavour to overcome the plain words of the interpretation enactments; because, obviously, the provisions of the Judicature Act cannot apply to this case. Being a provincial enactment, it can have no effect on procedure in criminal matters; which a motion to quash a conviction of a crime must be; because such procedure comes within the exclusive legislative power of the Parliament of Canada, and is excluded from the legislative power of provincial legislatures: the British North America Act, 1867, sec. 91, sub-sec. 27; and sec. 92, sub-sec. 14.

So that Mr. Mackenzie's points seem to me to be, obviously, quite ineffectual.

But I still have some trouble with the question whether there was any power to make the rules of 1908.

They were made, in so far as they were to be applicable to criminal matters, under the section of the Criminal Code now numbered 576, which conferred all such power as was intended to be exercised in making the rules in these words:

"... May ... make rules of Court; ... (6) for regulating in criminal matters the pleadings, prac-

tice and procedure in the Court, including the subjects of *mandamus, certiorari, habeas corpus,* prohibition, *quo warranto,* bail and costs . . . and (c) generally for regulating the duties of the officers of the Court and every other matter deemed expedient for the better attaining the ends of justice and carrying the provisions of the law into effect . . .

The general words of the section are, I think, restricted by these words covering the very subject in question, and having regard especially to the words, "including the subjects of *mandamus, certiorari, habeas corpus,* prohibition, *quo warranto.*" I find it difficult to get out of my mind the doubt whether there was power to do more than regulate the practice in *certiorari* proceedings—the doubt whether there was power to abolish the *certiorari* altogether, and substitute another proceeding for it.

Abolition, as well as prohibition, is quite incompatible with regulation: you cannot regulate that which you have destroyed, or even prohibited. This is obvious; the one question is: Do these rules abolish "*certiorari?*" and that depends upon the question: What is *certiorari?*

What *certiorari* is is not in any sense uncertain. Everyone at all familiar with the practice of the Courts of Law knows that *certiorari* is, in such Courts, a writ; a writ issued out of a Court of law, having power to grant it, in the name of the Sovereign and tested by the Chief Justice, by virtue of that Court's superintending authority over all Courts of inferior criminal jurisdiction in the province, for the purpose of a supervision of any of their proceedings which may be investigated in such Superior Court. Except in such cases as legislation has provided for an appeal, the writ of *certiorari* is the only mode by which a revision of proceedings on summary convictions can be had in a higher Court.

Therefore, to abolish the writ of *certiorari* is to abolish "*certiorari;*" and having regard to the well-known, the unmistakable, meaning of the word, under a practice that has continued for hundreds of years, there can be no manner of doubt that Parliament, in making use of the word "*certiorari*" intended it to carry that plain meaning: that is made doubly certain by the use of the other technical words associated with it, "*habeas corpus,*" "*mandamus,*" "*quo warranto.*"

No reasonable person, having a knowledge of the subject, would contend that power given to regulate the practice on the subject of writs of *habeas corpus* in criminal cases, conferred power to abolish the writ altogether; and yet if there was power to do away with the writ of *certiorari* there was, equally, power to abolish the writ of *habeas corpus* and the other writs named in the legislation; quite too great a power to be acted upon if there were, at the most, even only a doubt as to the power; quite too much power to assume on doubtful language. Though I am strongly in favour of abolishing all writs, and all other unnecessary proceedings, and have long advocated it, that cannot rightly be done, in such a case as this, without clear legislative authority.

Parliament has not said unrestrictedly, that the provincial Court may create a practice in all criminal matters, nor that it may change the practice altogether; its language is quite restrictive in dealing with this subject; the Court may only regulate the practice in *certiorari;*" that is the familiar long continued practice under the writ of *certiorari*; it may not expressly even regulate the practice on motions to quash convictions but only in *certiorari.*

But the applicant has not relied upon this ground, and may not desire to do so, and as, ever since the making of the rules, the Courts have acted upon them, the better way to deal with this motion is to dismiss it, and give leave, under these rules, to the applicant, to appeal; an appeal which if taken, will also answer the purpose of determining whether there is any Court to which an appeal can be made now.

I have delayed disposing of this application so as to learn whether the question I have last dealt with was discussed at the time of the making of the rules; and am now informed that it was, and that the view, then entertained, was that the rules are *intra vires,* but, of course, that does not bind anyone; the appellant is entitled, if he desires to do so, to have the point judically determined.

The application is refused; and leave to appeal is given

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

LAURIN v. CANADIAN PACIFIC RW. CO.

6 O. W. N. 281.

Railway—Carriage of Goods—Stoppage in Transitu—Order for Re-shipment—Liability to Railway for Loss of Goods.

KELLY J., *held*, that where a railway receives orders for stoppage in transitu directing it to re-ship the goods to another point, via another line, and in violation of such order re-ships the goods over its own line, it is liable for loss of the goods and cannot set up a clause in original contract of shipment limiting their liability.

Action for value of goods delivered to the defendants for carriage, and lost or mislaid in the course of carriage.

T. N. Phelan, for the plaintiffs.

I. F. Hellmuth, K.C., and C. W. Livingston, for the defendants.

HON. MR. JUSTICE KELLY:—This action was commenced by the plaintiff, Laurin, on July 2nd, 1913, to recover from defendants $2,741.25 as the value of goods delivered to them on May 5th, 1913, for shipment over their road to Winnipeg; the goods, consisting of household furniture and effects and clothing, were made up in 71 packages or parcels. Shipping bills were made out, copies of which were delivered to Laurin, and there was a special contract under which defendants seek to limit their liability to a sum not exceeding $5 for any one of the packages or any one article not enclosed in a package. A further document was obtained from Laurin guaranteeing payment of freight and charges by the consignee at the destination of the goods. This guarantee, according to the evidence of Stewart, defendants' yard checker at Montreal, was obtained after the other papers were signed.

On May 8th Laurin and his family left Montreal for Winnipeg, arriving there on the 10th May. Soon after their arrival Laurin having changed his plans and decided to return to Toronto, instructed the defendants' agent to have the goods intercepted at Fort William, and arranged with Mr. Smith, defendants' freight agent at Winnipeg, that defendants should deliver the goods to the Northern Navigation Company at Fort William to be conveyed by

that company from Fort William to Toronto; he also made arrangements with the navigation company's representative at Winnipeg to carry them from Fort William to Toronto, and made a payment to him on the freight charges. At Smith's request Laurin then signed the following directions:

"Winnipeg, May 13th, 1913.

"Mr. George Smith, C. P. R. Freight Agent, Winnipeg.

"Dear Sir: Kindly return 74 pieces of household furniture in car No. 116908 from Fort William to the 'Northern Navigation Co.,' in Fort William, Ont., and oblige.

"Yours truly,

"A. Laurin."

74 was an error for 71.

On the same day Smith instructed the defendants' representative at Fort William to deliver the goods to the Northern Navigation Company, advising him that Laurin had made arrangements with that company to accept the shipment. The goods had not arrived at Fort William on May 12th, but on the 14th defendants' agent at Fort William advised Smith that the goods had then arrived there. Laurin and his family came on to Toronto, arriving on May 17th. Not finding his goods, he learned on enquiry that they had not been delivered to the Northern Navigation Company at Fort William, but had been forwarded from that point over the defendants' road to Toronto, the part of them which he afterwards received arriving here on the 29th or 30th. In the meantime defendants arranged with him that their charges for carrying the goods from Fort William to Toronto would be, not the regular rate by rail between these points, but the lower rate chargeable for transmission by lake and rail which would have been the charge had they been delivered to the navigation company.

When delivery was about to be made to Laurin in Toronto it was discovered that only 64 out of the 71 parcels or packages had arrived, and for the smaller number he gave his receipt. The missing packages have not been located.

The evidence is that all the missing goods were the property of Laurin except a persian lamb coat, and perhaps some other fur garments, the property of Marie Philomene Elma Lefebre, a cousin of Laurin, who for more than 10 years has resided with him practically as a member of his

family. Five days after the action was commenced Laurin assigned to Miss Lefebre his interest in the monies now claimed from the defendants. At the trial, with the written consent of Miss Lefebre, I added her as a party plaintiff.

Not a little evidence was given relating to the issue in Montreal of the shipping bill and the procuring from Laurin of the special contract limiting defendants' liability, and the guarantee of the freight rates; and it is contended for plaintiffs that these were issued under such circumstances that defendants are not relieved from liability for the full value of the missing goods. Perhaps something may be said in favour of this contention; but I do not dispose of the case on this ground, my opinion being that the breach committed by defendants was not of the contract to carry the goods from Montreal to Winnipeg, but of the new contract to deliver them, at Fort William, to the Northern Navigation Company for shipment to Toronto. This latter contract was entered into before the arrival of the goods at Fort William, and defendants' duty then was to deliver them to the navigation company on their arrival. This, however, they neglected to do, and notwithstanding the express agreement to so deliver, they forwarded them over their own line to Toronto.

The contract which aimed at limiting the amount of the defendants' liability has no application either expressly or impliedly to the new contract by which defendants bound themselves to deliver the goods to the navigation company.

They also contended that the evidence established that three parcels were not taken from their car on its arrival at Fort William and that therefore they should not be held liable for more than four parcles, if they are at all liable, and if it is held that the terms of the agreement limiting their liability are not to apply. They are not entitled to succeed upon that contention. Apart from any other consideration, it is shewn from the correspondence passing between representatives of the defendants that 71 packages or parcels were billed out of Fort William. Only 64 were delivered at Toronto, and I am clearly of opinion that the defendants are liable for the value of those not delivered.

The only direct evidence of the value of these is that of Laurin and Miss Lefebre. The greater part of the amount claimed is made up of expensive furs and rugs,

much of which was purchased—according to the evidence of the plaintiffs—not at fur stores, but from a travelling dealer at Laurin's premises. Others of considerable value were purchased at a time when Laurin's financial condition was declining, and it is argued for defendants that plaintiffs did not possess these goods, or that if they did, they were not of the high value now placed upon them. Circumstances surrounding the shipment corroborate the evidence of their existence and of their having been included in the shipment. At the time the goods were packed a list of the contents of each package was written out by Miss Lefebre in detail, with the number of the parcel or package in which the respective articles were placed. A complete record is therefore produced of everything that went into the shipment, from which it appears that the articles claimed for were placed in the packages now lost. Any suggestion of manufactured evidence as to the particular articles contained in these packages is sufficiently met. There could not then have been in contemplation the making of this claim, nor could it have been anticipated that there would be any such happenings as have resulted in this action.

I find on the evidence that the articles claimed for were those contained in the missing packages.

The evidence substantiating their value is that of the plaintiffs, supplemented by that of Mr. Clancy, called for the defence. The evidence of other witnesses to the effect that they had never seen in the plaintiffs' possession some of the expensive articles now claimed for and that they have no knowledge of Cherrier, from whom Laurin says he made some of the purchases, cannot prevail as against the positive evidence of the plaintiffs, supported as it is by the detailed lists made at the time the goods were packed for shipment.

Laurin in his evidence was inclined to exaggerate, and having regard to this, as well as to Mr. Clancy's evidence, and giving consideration to the character of the goods and to their having been in use and not new—from which their value necessarily suffered depreciation—I am of opinion that there should be a deduction of $527 from the claim made. The plaintiffs claim the value of the goods and damages for their wrongful conversion. These claims will be fully met by judgment in the plaintiff's favour for $2,214.25 and interest from May 30th, 1913, the date when

the remaining part of the consignment was delivered to Laurin.

I do not pass upon the validity of the assignment from Laurin to his co-plaintiff, leaving the judgment to be in their favour jointly.

HON. MR. JUSTICE MIDDLETON. MAY 2ND, 1914.

McLELLAN v. POWASSAN LUMBER CO.

6 O. W. N. 302.

Costs, Pretended Investigation for Determining—Sales to Common Purchaser—Vacating Registered Caution.

Where during the course of the present action, dealing with an alleged interference with the flow of water by defendant, both parties had sold their properties to a common purchasser.

MIDDLETON, J., *held*, that such sale made it unnecessary to determine the rights in litigation for purpose of awarding costs, and ordered that action be dismissed, and caution registered against property vacated.

Motion by the plaintiff for an order disposing of the costs of the action.

H. S. White, for the plaintiff.

E. D. Armour, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—These parties are not entire strangers in litigation. A former action between them, concerning the same property, is reported in 15 O. L. R. 67, in the Court of Appeal at 17 O. L. R. 32, and in the Supreme Court at 42 S. C. R. 248. That action concerned a certain alleged right of way.

This action deals with claims alleged with reference to the interference by defendants with the flow of water. The action, brought as long ago as the 4th February, 1909, was entered for trial at the Barrie sittings in May, 1911 and postponed to the sittings there in June, 1911. By arrangement between the parties the case was to be heard before Mr. Justice Teetzel in Toronto at some time that might be arranged. It was never brought on for hearing. The allegation is now made that the delay has been caused by the illness of Mr. Justice Teetzel; but as my brother Teetzel's illness only began in the autumn of 1912, the entire delay at any rate cannot be attributed to that cause.

In the meantime both the plaintiff and defendant have sold their properties to a common purchaser; the trans-

actions with this purchaser being quite independent. This would make any attempt to deal with the merits of the controversy over the water rights quite academic. It is true that at one time there was a claim for damages, but that claim was abandoned long ago.

It is now suggested that I should go into the pleadings and the documentary evidence, with the view of forming some opinion as to what the rights of the parties are upon the merits, and that I should award costs upon the view that I might thus form.

I do not think the Court should be asked to undertake this task. The parties by their action in selling the property have made it entirely unnecessary that the rights in the litigation should ever be determined. Costs are in truth incident to a determination of the rights of the parties, and ought not to be made themselves the subject matter of the litigation. When the merits for any reason cannot be determined, there ought not to be a pretended investigation of the merits for the purpose of awarding costs. The intervention of the Court has been rendered unnecessary by the conduct of the parties, and no order should now be made save that the action should now be dismissed, so that the caution registered against the property may be vacated.

This, I may say, is intended to be an exercise of "judicial discretion" and not to be a refusal to adjudicate upon the question submitted.

HON. MR. JUSTICE MIDDLETON. APRIL 29TH, 1914.

DICARLLO v. McLEAN.

6 O. W. N. 290.

Appeal—Supreme Court of Canada—Bond for Security—New Trial Directed—Practice as to Delivery up of Bond.

Where SUP. CT. CAN. ordered a new trial in favour of appellant, costs of former trial and appeals to abide by result of new trial.

MIDDLETON, J., *held*, that the bond filed by appellant for security of the appeal, should be retained until the ultimate disposition of the action, to answer any possible award of costs against appellant at the new trial.

Motion by the defendant for delivery up of bond filed by defendant upon appeal to the Supreme Court of Canada.

J. N. Adam, for the defendant.

Chitty (DuVernet & Co.), for plaintiff.

HON. MR. JUSTICE MIDDLETON:—The plaintiff recovered judgment at the trial. This was affirmed by the Appellate Division. On appeal to the Supreme Court a new trial was directed, the costs of the former trial and of the appeals to abide the result of the new trial. The new trial has not yet been had, but the appellant seeks to have the bond filed upon the appeal to the Supreme Court delivered up for cancellation. The bond filed is as security for the verdict and judgment already had and now set aside.

So far, there can be no liability, for the bond does not stand as security for any judgment yet to be recovered; but the bond is also security for costs awarded upon the appeal. These costs, while not directly awarded, have been directed by the Supreme Court to abide the result of the new trial, and if the judgment upon the new trial is in favour of the plaintiff, then these costs will become payable by the defendant and will be payable by virtue of the judgment of the Supreme Court, and will, I think, be within the term of the bond. It is perhaps premature to determine this, particularly as the motion is made not by the sureties, but by the defendant.

I think the bond must remain until the ultimate disposition of the action and until the plaintiff, if he recovers, has an opportunity of having any claim he may desire to make against the securities determined in a way that will bind them.

The motion is refused, and the costs may be in the cause unless otherwise directed by the Judge at the hearing.

MASTER-IN-CHAMBERS. APRIL 29TH, 1914.

REYNOLDS v. WALSH.

6 O. W. N. 310.

Costs—Increased Security—Costs Increased by Counterclaim—Admitted Balance due on Plaintiff's Claim.

MASTER-IN-CHAMBERS, *held*, that plaintiffs cannot be ordered to give increased security for costs, where the increased costs of trial are occasioned by reason of defendants' counterclaim.

Motion on behalf of defendants for increased security for costs.

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

H. D. Gamble, K.C., for defendants.

CAMERON, MASTER:—On the examination for discovery the following admissions were made by counsel.

The plaintiff's claim of $22,250.18 set forth in paragraph 2 of the statement of claim is admitted by the defendants and the defendants' claim of $14,296.01 set forth in paragraph 13 of the statement of defence and counterclaim and the defendants' claim of $2,730 set forth in paragraph 14 of the statement of defence and counterclaim are admitted by the plaintiffs.

This leaves a balance of $5,224.17 admitted by defendants as due to plaintiffs on their claim. This is clearly not a case to compel the plaintiffs to furnish additional security as the plaintiffs have a valid claim for the amount above mentioned against the defendants, even although the balance of their claim is disallowed at the trial.

The contest at the trial will be on the defendants' counterclaim and the increased costs of the trial will be occasioned by the counterclaim. The defendants, in addition to the amount of the security for costs already ordered, are protected as to costs to the extent of the admitted balance due on the plaintiffs' claim.

The motion will be dismissed with costs to the plaintiffs in the cause.

HON. MR. JUSTICE LATCHFORD. MAY 1ST, 1914

RE LAMBERTUS.

6 O. W. N. 300.

Legacies — Abatement of Will—Debts—Legacy in Satisfaction of Dower—Election—Specific Legacy—Instructions to Sell—Execution—Agents of Legatee.

Where an estate, over and above specific legacies is not sufficient to pay debts,

LATCHFORD, J., *held*, that legacy to wife in satisfaction of dower does not abate.

Koch v. *Hersey* (1894), 26 O. R. 87; and *Re Wedmore* (1907), 2 Ch. 277; followed.

That, where there was a specific legacy of chattels and the legatee instructed the executors to sell the same, such instruction made them his agents, and there was no abatement.

Motion by the executors of the will of the late Christopher Lambertus for the opinion of the Court as to what legacies shall abate—the estate, over and above what is specifically de-

vised to the widow and three of the testator's sons, Morgan, Augustine and Oswald, not being sufficient to pay debts.

W. Proudfoot, for executors.

M. G. Cameron, for widow.

C. Garrow, for other legatees.

HON. MR. JUSTICE LATCHFORD:—The testator directed that his farm be sold; that $1,500 be paid out of the proceeds to his wife in lieu of dower, and that the balance be divided equally between his sons Morgan and Augustine. The will put the widow to her election between the $1,500 and her dower.

The farm was sold, realizing $2,850. The widow elected to take her legacy instead of dower, and is entitled to it in priority to the other legatees. *Koch* v. *Hersey* (1894), 26 O. R. 87; Williams, Executors, 10th ed. 1904; Theobald, 6th ed. 810. The latest case I can find is *Re Wedmore*, [1907] 2 Ch. 277. At p. 280, Kekewich, J., says: "It must be taken to be established that a legacy given to a widow in satisfaction of dower does not abate.

Five horses and two cows were specifically bequeathed to the testator's son Oswald, who instructed the executors to sell them at the sale of the other chattels of the estate. They were so sold and realized $741.50, to which Oswald claims he is entitled. The total realized on the sales of the realty and personalty in excess of the balance of $1,350, after payment of the widow's legacy and the $741.50, is $548.55, while the debts amount to $847.72. There is a further legacy of $100 to the Rev. M. McCormack for Masses for the repose of the soul of the testator, and also $100 to the Rev. D. A. McCrea of Goderich. The sons of the deceased desire that there shall be no abatement of these two legacies.

The testator directed his executors to erect to the memory of himself and his first wife a monument at a cost not exceeding $250.

There will arise a deficiency of about $500.

The specific legacy of the horses and cows to Oswald should not abate. He was entitled to the particular animals mentioned in the will, and in selling them the executors acted not as such but as his agents. Oswald is accordingly entitled to the $741.50, subject to any proper claims the executors may have for their services in selling.

The burden of the deficiency accordingly falls *pro rata* upon the sons Morgan and Augustine. It will be lessened to some extent if the executors limit their discretion as to the cost of the monument, and expend upon it no more than $50— an ample sum in the circumstances. Costs of all parties out of estate.

HON. MR. JUSTICE LATCHFORD. MAY 4TH, 1914.

RE MITCHELL ESTATE.

6 O. W. N. 315.

Will—Construction — Estate—Corpus and Income of Annuities—Source of Payment of Life Estate—Intention of Testator.

Where testator's widow is to have under the will the benefit and use of all the real and personal estate during her life subject to payment by her of taxes, rates, and interest on encumbrances; and where by a first codicil, an annuity for life "to be paid from my estate," is given to another party, and the interest only of a certain mortgage is bequeathed to the wife of testator; and, by a second codicil, three annuities are given, without directions as to the source from which they are to be paid.

LATCHFORD, J., *held*, they are to be paid only out of the real property in which widow had life interest.

Motion by the widow of the late Thomas Mitchell for an order determining whether under his will and two codicils, certain annuities were to be paid out of the income or the corpus of the estate.

G. C. Thompson, for widow.

J. G. Farmer, K.C., for executors and class not served.

J. R. Meredith, for Official Guardian.

G. M. Willoughby, for Inspector of Prisons and Public Charities.

HON. MR. JUSTICE LATCHFORD:—The corpus consists of realty $2,900, and personalty $8,626.25. The testator's widow is to have by the will the benefit and use of all the real and personal estate during her lifetime "provided she pays all taxes, rates, interest on incumbrances and keeps the property in at least as good a state of repair at death." There is, however, a subsequent devise in fee of a parcel of land valued at $300 to a brother of the testator. On the death of his

wife there is a gift over of the "property" to relatives of the testator.

By the first codicil—omitting what is not material—the interest only on a certain mortgage is bequeathed to his wife and when the principal is paid it is to be reinvested and upon the wife's death is to pass into the residue of the estate. An annuity for life of $100 a year "to be paid from my estate" is given to a half-sister.

By the second codicil three annuities are given—two of $25 a year for 10 years, and a third of $50 a year for 10 years should the person benefited so long live. In none of these latter cases is any direction given as to what the annuities shall be paid from. There are also in this codicil legacies of personal belongings about which no question arises, except that they are excluded from the bequest to Mrs. Mitchell of the benefit and use to which she may put the personalty.

As to the bequest in the will the intention of the testator is plainly that his wife shall have the use for life of all the estate of the testator, subject only to the one provision as to the payment of taxes and the maintenance of the buildings on the realty in good repair. What is so bequeathed to her cannot be charged with any of the annuities unless an intention so to charge it can be deduced from the will or codicils. No such intention appears. To charge any annuity upon the mortgage would be to diminish the income from it. A charge upon the remainder of the personal estate to the benefit and use of all of which Mrs. Mitchell is entitled for life would limit beyond the terms of the will the "benefit and use" expressly granted to her. Only the real property which the widow has a life interest in remains, and it is out of this alone, in my opinion, that the annuities can be paid.

Costs of all parties out of estate.

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

TRUSTS & GUARANTEE CO. v. FRYFOGEL.

6 O. W. N. 308.

Cancellation of Instruments—Deed—Father to Son—Mental Incapacity—Duress—Order for Possesssion—Rents and Profits.

FALCONBRIDGE, C.J.K.B., *held* upon the evidence that conveyance by father to son was void, owing to mental incapacity, duress, and undue influence. Order made for delivery up for cancellation of said instrument, also for possession of land and recovery of rents and profits, with a reference as to improvements and repairs.

Action by the administrators of the estate of the late Peter Fryfogel to set aside a conveyance made by him to his son and for other relief.

Trial at Stratford.

R. S. Robertson, for plaintiffs.

J. M. McEvoy, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that at the time of the pretended execution of the conveyance to defendant (2 Sept., 1909), the mental capacity of Peter Fryfogel had become so impaired by old age and disease (arterial sclerosis) that he was incapable of understanding the nature of said conveyance or of making any disposition of his property. I rely to a considerable extent on the evidence of the medical man who accompanied the lawyer when Peter Fryfogel was induced to make his mark to said conveyance.

It is much to be regretted that the doctor holding this opinion as to Peter's want of mental capacity, permitted himself to sign the deed as an attesting witness. He was a young graduate at the time and doubtless acted without sufficient deliberation.

A codicil purporting to have been made about the same time has been set aside in the Surrogate Court of the county of Perth on the same ground. There was also undue influence of defendant, and the said Peter Fryfogel was so hedged about by defendant that it amounted to duress; and Peter Fryfogel had no independent legal advice.

Owing to his being so surrounded and to his want of mental capacity, he was never in a position to attack the deed in his lifetime had he desired to do so and he was entirely

unable to acquiesce in or confirm the transaction in any manner.

There will be a declaration that the said conveyance is void as not being the deed of the said Peter Fryfogel and as having been obtained by duress and undue influence and as improvident and an order that it be delivered up to be cancelled, with costs.

Also order for possession of the lands and recovery of rents and profits with interest as to which there will be a reference, in which defendant will be allowed for all sums expended by him in improvements and repairs of a substantial and permanent nature by which the present value is enhanced, with interest.

Further directions and subsequent costs reserved.

I was not at all favourably impressed by defendant or by his evidence, despite his remarkable memory in the citation of different portions of the Bible which he said he was in the habit of reading aloud to his father.

Thirty days' stay.

HON. MR. JUSTICE BRITTON, IN CHRS. APRIL 27TH, 1914.

REDDOCK v. BURT.

(RE CAN. ORDER OF FORESTERS.)

6 O. W. N. 307.

Insurance—Life—Benefit Society Certificate—Endorsement thereon of Name of Beneficiary—Trust—Subsequent Will.

Where the insured endorsed on his certificate of insurance a revocation of former directions as to its payment and directed payment to his wife.

BRITTON, J., *held*, that he hereby created a trust in favour of his wife which was not revoked by subsequent will, stating the bequest to be in consideration of board, lodging and nursing.

Application by Jane Reddock for payment out of insurance moneys paid into Court by the Canadian Order of Foresters.

W. A. Proudfoot, for Jane Reddock.

R. H. Parmenter, for Alexandrina Burt.

HON. MR. JUSTICE BRITTON:—Adam Reddock in his lifetime held a certificate of the Canadian Order of Foresters, dated 17th January, 1888, for the sum of $1,000, payable to the person, or persons, who should be named, subject to certain provisions and conditions. This certificate was first designated as payable to the executors or administrators of Adam Reddock, but on the 17th January, 1913, he endorsed on the certificate a revocation of the former direction and designation and directed payment to be made to his wife, the present claimant Jane Reddock.

On the 1st August, 1913, Adam Reddock made his will, thereby assuming to bequeath this sum of $1,000 to the claimant Alexandrina Burt, stating the bequest to be in consideration of her having provided him with board and lodging and nursing. He died on the 8th August following. The money was claimed by each of the claimants. The Canadian Order of Foresters then obtained an order for payment of the money into Court, and an issue was directed to be tried between Jane Reddock and Alexandrina Burt to determine which of the two is entitled to the money.

The parties now consent that the question shall be determined by a Judge in Chambers upon an application by Jane Reddock for payment out to her of this money. This is an application for payment out.

I am of opinion and so find that upon the death of the said Adam Reddock, the money in the certificate mentioned, became the money of Jane Reddock, and it should now be paid out to her. A trust was created by the said Adam in favour of Jane Reddock, and that trust was not revoked by the said Adam Reddock. Alexandrina Burt abandoned—or perhaps never set up, any claim except under Adam's will—and she should not be ordered to pay any costs. There will be no costs payable by her. The costs of Jane Reddock will be paid out of the money in Court.

The order will go for payment of the money in Court and all interest thereon to Jane Reddock.

HON. MR. JUSTICE KELLY. MAY 8TH, 1914.

McLARTY v. HAVLIN.

6 O. W. N. 330.

Bills, Notes and Cheques—Promissory Joint and Several Note—Action Against Fourteen Makers—Note Given to Cover Club Debt—Denial of Signatures—Allegations of Fraud.

KELLY, J., found that certain makers signed the note, but relieved certain other alleged makers from liability.

Action by the holder of a promissory note for $1,400 dated December 4th, 1911, against 14 defendants alleged to be the makers thereof. The action was discontinued as against defendant Havlin, and judgment in default of appearance was signed before trial against defendants Murphy and Whitely.

The action was then proceeded against the other defendants.

L. F. Heyd, K.C., for plaintiff.

T. N. Phelan, for defendants Munson, Flowers, Van Allen, Irving, Brown, Dixon, Bailey, Davis and Ansell.

R. G. Smyth, for defendant Walters.

G. F. Rooney, for defendant Lacey.

HON. MR. JUSTICE KELLY:—Defendants were all members of a body known as the Social Order of Moose, which had been established in Toronto. Defendant Havlin had come from the United States to act as organizer for this Lodge (or Herd as some of the members call it) of the Order; and in the fitting up of their club-rooms and otherwise, debts to the amount of several hundred dollars were incurred. Havlin, who for about two years previous to the making of the note sued upon, had an account in the Quebec Bank in Toronto, and who had at times discounted notes with the bank, went to the manager, Mr. Strickland, a short time prior to the making of this note and proposed to him that the bank advance to the Order $1,400 on the security of a promissory note to be made by the defendants, whose names he then submitted. The manager then had the note prepared by his stenographer, dating it on the date on which he was informed the meeting of the Order would be held, that is 4th December, 1911, and gave it to Havlin

to have it signed. The note was returned to the manager on December 5th, 1911, bearing what purported to be the signatures of the defendants, and their addresses. The note was in the following form:—

"Toronto, Ont., December 4th, 1911.

"Six months after date we, jointly and severally, promise to pay to the order of W. H. Havlin at the Quebec Bank here $1,400, one thousand, four hundred dollars, value received."

It was then discounted by the bank and the proceeds placed to the credit of Havlin, who immediately opened an account in the name of the Order and deposited these monies therein.

Some days before it became due notices were sent by the bank to the makers, drawing their attention to the approaching maturity. Walters, Brown, Munson, Dixon and Van Allen went to the bank and had an interview with the manager. There some of them at first repudiated, but afterwards admitted, their signatures; negotiations were then entered into with the manager for the giving of a renewal, and a form of renewal was prepared and given to them; and it was taken by them for the purpose of having it signed; it was not, however, signed or returned. Defendant Lacey also appeared at the bank in response to the notice and there repudiated his signature, as he continued to do afterwards. At the trial he swore that he did not sign the note nor authorize any person to sign for him, and he absolutely repudiated the signature. No direct evidence was given that he did sign, and notwithstanding the strong resemblance his name on the note bears to other proved signatures of his I am unable to find that he did sign the note sued upon.

Walter's signature has been amply established; no explanation is given to relieve him from liability. He did not appear or give evidence at the trial; and, if there were any necessity to further substantiate the claim made against him, the evidence of Humphreys is material to that end. I therefore hold him liable.

During the progress of the evidence for the defendants, Mr. Phelan admitted that the nine defendants whom he represented had signed the note, but still pressed his defence that the execution of it by these parties was obtained through fraud and misrepresentation on the part of defend-

ant Havlin, and that they never intended to sign and had no knowledge that they signed a note. As to defendants Munson, Flowers, Irvine and Dixon, who did not give evidence at the trial, there is nothing to support that contention or to relieve them from liability.

Defendant Van Allen at the time the note was signed held the position of inner guard of the Lodge and says he attended nearly every meeting of it. The financial condition of the Order was a matter of concern to the members, and Van Allen and the other defendants with whom I have yet to deal were not unaware of that condition. Van Allen says that Havlin asked him to sign his name to a paper which he did not take the trouble to read and which he says Havlin, in response to an inquiry as to what it was, said it was a good thing and that he would hear all about it in the lodge-room.

Bailey, who was trustee of the Lodge at the time, says that Havlin asked him to sign the paper and on inquiry of Havlin what it was, the latter said it was something for the good of the Lodge, and he then signed it; but he admits there was nothing to prevent him examining the document or learning what it was.

Ansell was at the time a director and trustee. His evidence is that at the Lodge meeting Havlin asked him to sign the paper, which was lying loose upon the table, and that Havlin stated that they were going to get rid of certain parties—members of the Lodge—and he says there was nothing to prevent his taking up the paper and reading it.

Brown's evidence is that he was asked by Havlin to sign, Havlin stating that he was re-organizing the Lodge and getting out the undesirable and that he asked Brown to join the re-organized body; that the paper was lying loose on the table, and that there was nothing to prevent him from reading it before signing.

Davis, who was the vice-president, says that when he signed the document it was on a file and that he thought it was for the purpose of a donation. He does not seem to have concerned himself sufficiently to read it, and his evidence is somewhat affected by an apparent weakness of memory on certain points.

Having regard to the evidence of the knowledge, which all these defendants had of the affiairs of the Order, its indebtedness, the necessity of paying accounts and of obtaining

money for that purpose, the official position which some of them held in the Order, and keeping in mind what took place at the bank at or about the time of the maturity of the note, I have difficulty in believing the explanations now given by these five defendants—Van Allen, Brown, Davis, Ansell and Bailey—in their attempt to so explain the signing of the note as to relieve themselves from liability. Moreover, the defendants who have contested the action were meeting regularly about the time the note was made; some of them, at least, were aware of its nature, the necessity for obtaining money, and that money was obtained from some source to a substantial amount, from which three at least of the defendants were paid accounts due them by the Lodge; and it is not unreasonable to assume that in their frequent meetings, with matters of importance relating to the financing of the Lodge before them, the defendants must have been fully aware of what was taking place, that the document was really a note and that it was given with the intention and for the very purpose of raising the money so much needed for the Lodge.

A further contention raised by Mr. Phelan is that if any of the defendants are to be relieved from liability the action must fail as against the others as well; that in the very nature of the transaction the liability of each maker is conditional on all the other makers becoming and remaining liable. I am unable to adopt that view in the case of a joint and several promissory note. I am not aware of any authority to substantiate this contention, and counsel admitted his inability to submit any such authority, but argued the point on what he contended was a reasonable and equitable view to be taken of such a transaction. There is no evidence of any express agreement that the note was made on any such condition.

From every view of the evidence and after a careful consideration of it, the action should be dismissed as against the defendant Lacey with costs, and judgment should go with costs against the other defendants except Havlin and except the defendants against whom judgment has already been obtained.

HON. MR. JUSTICE KELLY. MAY 8TH, 1914.

RE STEPHEN CARR.

6 O. W. N. 327.

Will—Construction—Income from Farm—Maintenance and Education of Daughter—Accumulations of Rent—Interest.

Where a testator directed his trustees "to pay the net income" (of a farm)" or so much of said net income . . .. for the support, maintenance and education of my said daughter during her minority" and "to pay such net income to my said daughter from the time she attains the age of 21 years for and during her natural life for her own use and benefit absolutely."

KELLY, J., *held*, that the daughter on attaining her majority was not entitled to accumulations of rent during her minority nor to accumulated interest thereon, but was entitled to interest on all such accumulations from the time she attained her majority.

Motion for an order determining certain questions arising in the construction of the will of the late Stephen Carr.

H. A. Ward, K.C., for the applicant, Alice Marcello Carr.

H. S. White, for Catherine Agnes Alexandria Carr.

W. F. Kerr, for Annie Grandy.

H. H. Chisholm, for the executors.

HON. MR. JUSTICE KELLY:—On the argument the question as to the widow's rights in respect of the dwelling house which testator contemplated purchasing was abandoned.

The next question is as to whether deceased's daughter, Catherine Agnes Alexandria Carr, who has now attained her majority is or is not entitled to the accumulated rentals of the farm in the Township of Hope, referred to in clause 6 of the will. The answer to that question must clearly be that she is not entitled to the rents which had accumulated prior to her attaining majority and which had not been paid to her or for her benefit. The testator's direction is that the trustees, to whom the farm is devised in trust, are "to pay the net income" (of this farm) . . . or so much of said net income as my trustees may deem necessary for such purposes, to my said wife for the support, maintenance and education of my said daughter during her minority" . . . and "to pay such net income to my said daughter from the time she attains the age of 21 years for and during her natural life for her own use and benefit absolutely." Not only is there no direction or provision

for payment to the daughter at any time of the income accumulated during her minority, but there is found later on in the will an express direction that on her death the trustees are to stand seized of the trust estate, lands, moneys, investments and all accumulated or unused income" in trust for other persons there designated. The intention of the testator is thus clearly indicated.

The next question submitted (and which was added at the time of the argument) is whether this daughter is or is not entitled to the accumulations from the moneys referred to in paragraph 5 of the will. The answer to this question must be the same as that to the previous one.

The third enquiry is whether the daughter, if found not entitled to the accumulations of rent, is entitled (a) to the accumulated interest on such accumulations of rent up to the time of her coming of age, and (b) to the interest on such accumulations after her coming of age. My opinion is that she is not entitled to the accumulated interest on the accumulations of rent up to the time of her coming of age, but that she is entitled to income from all such accumulations from the time she attained her majority. This is in accordance with the authorities as I have found them, and is not opposed to what is a reasonable view of the matter.

The costs of the parties are properly payable out of the capital of the estate.

HON. MR. JUSTICE BRITTON, IN CHRS. APRIL 27TH, 1914.

MOFFATT v. GRAND TRUNK RW. CO.

6 O. W. N. 308.

Judgment—Settling Minutes of Terms—Undertaking.

BRITTON, J., *held*, upon motion to settle minutes of judgment directed judgment for plaintiff for $3,000 with $200 costs, less $15 to be paid to Official Guardian.

Motion by the plaintiff to settle minutes of judgment herein.

Featherston Aylesworth, for plaintiff.

E. C. Cattanach, for Official Guardian for infants.

HON. MR. JUSTICE BRITTON:—This action was heard and disposed of at Sarnia on the 26th day of March last by HIS HONOUR JUDGE MCWATT, senior Judge for the county of Lambton, acting for me upon my request in writing.

In accordance with the views of His Honour, the trial Judge, I direct that judgment be entered for the plaintiff for the sum of $3,000, with costs fixed at $200, and that the said sum of $3,000 be paid to the plaintiff, less the sum of $15 to be paid out of said sum of $3,000 to the Official Guardian.

The undertaking mentioned by the plaintiff having been given by her, will be filed and noted so that it will be available in case the plaintiff or any one on her behalf should during the minority of her children make any application for any further application for any part of the money in Court for the maintenance of her children or either of them. Costs of this application to be paid by the plaintiff—the widow.

HON. MR. JUSTICE LENNOX. MAY 5TH, 1914.

FULFORD v. FULFORD.

6 O. W. N. 330.

Husband and Wife—Alimony—Action for—Evidence of Husband's Adultery and Ability to Pay.

LENNOX, J., gave wife alimony at rate of $450 per annum, judgment to be registered against husband's lands.

Action for alimony tried at Ottawa.

E. J. Daley, for plaintiff.

Defendant did not appear.

HON. MR. JUSTICE LENNOX:—The plaintiff and defendant intermarried on the 31st August, 1886, and lived together until the 15th of December, 1908, when the defendant deserted the plaintiff without justification or excuse. There were eight children issue of the marriage, of whom several are infants living with their mother. There is property in Ottawa standing in the name of the defendant worth $2,000. The plaintiff by her industry contributed to the payment of this property. The defendant is capable of earning $600 to $800 a year. He is living in adultery with another woman.

There will be judgment for payment of alimony by the defendant to the plaintiff at the rate of $450 a year—counting from the 16th of January, 1914, payable in equal instalments half yearly, and for the plaintiff's costs of action, and a certificate of judgment will be registered against the lands in the statement of claim mentioned.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MAY 12TH, 1914.

SNIDER v. CARLETON.

CENTRAL TRUST v. SNIDER.

6 O. W. N. 337.

Will—Construction—Election—Legacy to Niece—General Devise—Lands of Testator in which Legatee Had Half Interest — No Election—Intention—Evidence—Foreign Executors—Partition—Costs.

MIDDLETON, J., 25 O. W. R. 771; 5 O. W. N. 852, *held*, that to raise a case of election under a will it must be clearly shewn that the testator has attempted to dispose of property over which he had no disposing power, and that such intention must appear from the will itself.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Freemoult v. *Dedire* (1718), 1 Wms. 429, and *Van Grutten* v. *Foxwell*, [1897] A. C. 658, followed.

Appeal by the plaintiffs in the secondly mentioned action, who are defendants in the first mentioned action, and the American executors of Thomas A. Snider, deceased, and Harvey G. Snider, the plaintiff in the first mentioned action, who is a defendant in the secondly mentioned action, and the Canadian executor of the testator; appeal from the judgment of HON. MR. JUSTICE MIDDLETON pronounced 6th February, 1914, after the trial of actions before him, sitting without a jury at Toronto on the 26th January, 1914. The reasons for judgment of the learned trial Judge are reported 25 O. W. R. 771, and the material facts are there fully set out.

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

W. J. Elliott, for appellants other than Harvey G. Snider.

F. C. Snider, for appellant, Harvey G. Snider.

E. D. Armour, K.C., and B. N. Davis, for respondent, Carleton.

HON. SIR WM. MEREDITH, C.J.O.:—The conclusion of my learned brother was that the respondent was the owner of an undivided half-interest in the Bay street property, and that there was nothing to put her to her election to claim for or against the will in respect of that interest.

If, as my learned brother determined, the respondent was the owner of an undivided half-interest in the property, I agree with his conclusion that the respondent is not put to her election.

All that the testator purports to dispose of by the 7th paragraph of his will is "any real estate lands and premises that I may own at the time of my death in the city of Toronto, Canada."

There is nothing upon the face of the will to indicate that the testator intended to dispose of anything but his own property, and the settled rule now is that evidence *dehors* the instrument is not admissible for the purpose of shewing that a testator considered that to be his own which did not actually belong to him or was not under his disposing power. Jarman on Wills, 6th ed., pp. 541-2-3.

The question whether the respondent was the owner of an undivided half-interest in the Bay street property or whether the testator was not the owner of the entirety presents more difficulty.

The entirety had become vested in him by the conveyances from the respondent and her brother; the conveyance of the respondent's interest was made in pursuance of the arrangement evidenced by the letter of Mr. Irwin. That arrangement was that her interest was to be conveyed to the testator upon the agreement by him that one-half the rents of the property should be paid to the respondent during her life, and this, as the letter states, "we have made secure to you by the execution of a will on the part of your uncle, who devises the property to trustees in trust to continue the payment of one-half of the rent to you for life and at your decease to convey a one-half interest in the property absolutely to your heirs."

This letter and the will referred to bear date the 9th May, 1900, and the conveyance from the respondent to the testator bears date the 15th of the same month.

The statement of the letter as to the provisions of the will is not accurate. The devise to the trustee is to hold the land during the natural lives of the respondent and her brother and the natural life of the survivor of them, and upon the death of the survivor to convey to the issue of the respondent an undivided half-interest in it and to the issue of her brother a like interest, but if at the death of the survivor there should be no issue of either of them to convey the undivided half or halves in respect of which there should have been a failure of issue to the executors or administrators of the testator's estate in the United States of America, and the provision as to the rents is that the trustee is to pay over to the respondent and her brother each one-half of the net proceeds of the rents and profits during their respective lives, "provided neither the said Mabel Carr Snider nor the said Thomas Edward Snider shall have alienated or otherwise disentitled herself or himself to personally receive her or his half-share of the said proceeds. If at any time it shall appear to my said trustee that either the said Mabel Carr Snider or Thomas Edward Snider has alienated or otherwise disentitled herself or himself to personally receive her or his half of the said proceeds or any part thereof, or that she or he has incurred debts or done anything whereby a judgment or order of any Court of competent jurisdiction shall have been made or obtained, or any writ of execution or attachment issued, then I direct that all right under this will of the one so alienated or becoming disentitled or against whom such judgment, order or writ of attachment or execution shall have been issued shall absolutely cease and determine, and any sums in respect of such rents and profits accrued but not yet paid to such beneficiary shall be forfeited and I direct my trustees thereafter to pay over the share of the said proceeds so forfeited to the executors or administrators of my estate situate in the United States."

Mr. Irwin's letter also states that the will is so drawn that nothing that can happen will during your lifetime interfere with the payment to you of one-half of the rents of the property. This also, in view of the provisions of the will which I have quoted, is also an inaccurate statement of the effect of the will.

I have no doubt that having regard to the relations between the respondent and the testator, who stood in *loco parentis* to her, the age of the respondent, the want of any advice, independent or otherwise, to the respondent, and the other circumstances, especially the fact that no security was given to her for the performance by the testator of his part of the arrangement, the transaction would have been set aside if the respondent had been minded to repudiate it.

The subsequent events, and especially the fact that when the change in the arrangement was proposed to her through Mr. Hillock the respondent consulted a solicitor and elected to abide by the bargain which had been previously made, would probably have disentitled her to set aside the conveyance to the testator, and apparently the position taken by her throughout the present litigation has been that she stands by the original arrangement and insists upon her rights under it, and that she is bound by it is the position taken by the appellants.

What, then, is the position of the respondent under that arrangement? The effect of it was, I think, to constitute the testator a trustee for the respondent of the undivided one-half interest in the Bay street property which she conveyed to him.

In *Freemoult* v. *Dedire* (1718), 1 Peere Williams' the testator had covenanted before marriage to settle lands in Rumney marsh on his wife for life, and it was held by Lord Chancellor Parker that the marriage articles being a specific lien on the lands made the covenantor as to them but a trustee and that they were therefore during the life of the wife not affected by any of his bond debts.

Upon the authority of this case and other cases it is said in Lewin on Trusts, 12th ed., pp. 160-1:—

"Again, if a person agree for valuable consideration to settle a specific estate he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow."

It is, I think, immaterial for the purposes of the present inquiry whether the trust is for the respondent for her life and after her death for her heirs, or by force of the rule in *Shelley's Case* a trust for the respondent of the fee simple in the lands, though I think that it is the latter. The promise is to devise the land to trustees in trust to pay the one-half of the rent to the respondent for life and at her decease

to convey a one-half interest in the property to her heirs, so that both estates are equitable and the rule applies.

See *Van Grutten* v. *Foxwell*, [1897] A. C. 658, in which the limitations were not unlike those which according to the agreement in this case were to apply to the undivided half-interest in the Bay street property.

Upon the whole I am of opinion that the judgment of my brother Middleton is right and should be affirmed, and that the appeals should be dismissed with costs.

HON. MR. JUSTICE MAGEE:—Under the circumstances under which the deed was made by Mabel Snider, now Mrs. Carleton, to her uncle, of her undivided half-interest in the Toronto property, I have no doubt that she could have had it set aside. But for some years before his death she chose to act upon the terms of Mr. Irwin's letter upon the faith of which it was executed, and she now stands upon that letter—under which her uncle was not the absolute owner of the property but held it for a definite purpose, which must be taken to have been well known to himself. I agree with my Lord the Chief Justice that the devise in the will should not be read as applying to that half of the property and therefore that she is not put to elect between her interest and the bequest. I express no opinion as to whether she would in any case be entitled to more than a life interest which alone she would have to sacrifice to obtain the legacy.

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

CAMPBELL v. BARRETT & McCORMACK.

6 O. W. N. 360.

Vendor and Purchaser—Agreement for Sale of Land Outside of Province—Specific Performance—Title—Failure of Vendors to Acquire—Judgment for Return of Purchase-money—Stay of Execution to Enable Vendors to Make Title.

Where plaintiff had paid his purchase money in full for land in Sask. but vendors had not title.

MIDDLETON, J., *held* that order for specific performance would be useless, but gave plaintiff judgment for $1,500 with costs, but if the lands were transferred to purchaser within 60 days it should be a satisfaction of the judgment.

Action for specific performance of an agreement for the sale by the defendants to the plaintiff of certain lands in Saskatchewan, and, in default, for judgment of $1,500 paid

by the plaintiff, and for a declaration of the plaintiff's lien therefor upon the land.

W. B. Lawson, for plaintiff.

W. N. Tilley, K.C., for defendant Barrett.

R. A. Pringle, K.C., for defendant McCormack.

HON. MR. JUSTICE LENNOX:—The issues of fact in this action arise out of a conflict of evidence between the defendants. But there is an issue in law between the plaintiff and the defendant Barrett not dealt with in the argument of counsel, namely, whether the plaintiff is not entitled to substantiate the relief claimed even if the facts are as set up by the defendant Barrett.

I think he is. It is admitted on all hands that the plaintiff has paid his purchase-money in full, and, as against McCormack at all events, has done everything to entitle him to a conveyance. That at the time negotiations were opened up between the defendants only $500 of this purchase-money had been paid and the balance $1,000 was paid afterwards. That at this time a statement was prepared and submitted, and subsequently delivered to the defendant Barrett, shewing all sales made by McCormack, including the sale of the 5 lots in question to the plaintiff, the amounts paid by each purchaser, his post office address, the payments accruing due by each purchaser, including the plaintiff, and the dates at which the said several payments would become due. That at this time it was arranged and agreed between the defendants that the defendant Barrett would assume and take the entire direction and control of his co-defendants' business and affairs even to the extent of having the right to require McCormack to sell his automobile and the furniture of his office, adopt a reduced scale of expenditure and do his banking in the joint names of the defendants; and this was done. It is admitted on all hands, too, that as profit or consideration to Barrett for coming in, Barrett would not only have the entire receipts to the extent of $250 each from the sale of the 77 lots then remaining unsold, but would receive an absolute conveyance of McCormack's interest in 27 other lots upon which $1,800 had been paid; and, that notwithstanding the assignment to Barrett of the 77 lots to be sold and the 52 lots under purchase, including the plaintiff's lot, that the dealings between the defendants were to be kept secret, and the defendant Mc-

Cormack's interest in 27 other lots upon which $1,800 had ing the plaintiff, and get in the purchase-money as if no transaction had been effected between the defendants; and this was done, and part at least of the purchase-money subsequently paid by the plaintiff was applied in reduction of Barrett's liability to Mr. Kuntz and to increase the margin of value in the property he held and holds in Montreal under conveyance from McCormack.

A great many authorities have been cited, but none upon this specific question, and I need none to convince me that upon these admitted facts the plaintiff, having paid in full with the concurrence of Barrett, as he otherwise would not have paid, is entitled to his deed.

But it is proper that I should deal with the issues of fact as well. Both defendants are speculators and dealers in western land. The defendant Barrett is a dealer in fuel and lumber as well—if that makes any difference. I am satisfied that McCormack's object in entering into the arrangement with Barrett was, as he states, to protect the 52 men to whom he had sold lots—to secure deeds at once for those who had already paid up and for the others when they paid in full—and to this end he was willing to sacrifice the thousands he had paid on the Alta Vista lots. Part of the latter part of his cross-examination was unsatisfactory; he fenced quite unnecessarily; but I am far from believing that what he said even then was untrue. As to almost all the main points in dispute he is distinctly corroborated by Colin E. Smith, an intelligent, straightforward witness, whose evidence I feel no hesitation in accepting. On the other hand I can only believe that the defendant Barrett was candid upon the assumption that he has a very bad memory and that many of his statements are attributable to this.

This was only one of a long series of land deals between the defendants, all of which appear to have been profitable to Barrett. Contrary to his very often repeated declaration that he entered into this transaction from motives of benevolence or philanthropy, I come to the conclusion that he entered into it for gain; and it promised substantial gain at the time. I find that the bargain was that he was to get McCormack's interest in the 27 park lots and $250 out of each of the 77 lots when sold, and McCormack's assistance in selling, as consideration for enabling McCormack to protect the purchasers of the 52 lots already sold, and was to deliver or

procure conveyances to these purchasers when they paid in full, and for a few of them who had paid in full, right away; and that McCormack was to receive the balances of purchase-money on the 52 lots without account. There was no agreement to pay the $150 per lot for title as now claimed by this defendant.

I find that he arranged for the letters to Moss & Burgess, and read and approved of them before they were mailed. It matters not, then, it seems to me, to ascertain the exact status, by name, of these defendants in relation to each other. Partners they might well be regarded as, for they were entering into a joint adventure, with a joint bank account, with profits apportioned to each and with defined rights and supervision for each of them; each was bound by the other, within the scope of the undertaking, whether each proved faithful or not. Or whether the relation was that of principal and agent, with the defendant Barrett, as he claims, in supreme control. The name does not matter. Take it in any way you like, the defendant Barrett, with full knowledge of the plaintiff's position and rights at the time, apprised of the payments to be made and of their dates, and arranging for the facilitating their payment to his co-defendant without notice to the plaintiff, cannot escape the burden of the trust thrown upon him, and he must execute it. True, he did not get the whole of the purchase money, but he took an assignment of the plaintiff's lots and unjustly demands from him a further payment of $750.

Upon the facts, then, as well—the transactions between the defendants—the plaintiff is entitled to a conveyance as against both defendants.

It is idle to weigh the question as to my jurisdiction to order specific performance. The defendants have not got in the title, nor have their vendors. Judgment for specific performance would be useless.

There will be judgment against the defendants for $1,500 with costs; a stay of execution for 60 days; and if the land is conveyed or transferred according to the law of Saskatchewan within this time it will go in satisfaction of $1,500 of the judgment.

HON. MR. JUSTICE LENNOX. MAY 12TH, 1914.

COLE v. DESCHAMBAULT.

6 O. W. N. 359.

Trust—Purchase of Crown Lands—Payment of Share of Deposit—Agreement—Patent Taken in Name of Defendant—Declaration of Trust in Respect of Share of Plaintiff's Assignor—Amendment—Fraud—Right of Assignee for Benefit of Creditors to Sue—Reference—Costs.

Insolvent before making assignment for benefit of creditors paid ¼ share of deposit to government for purchase of an island.

LENNOX, J., *held*, that his interest in the island enured to the benefit of his estate, and was binding upon defendant who by ignoring and concealing the rights of the insolvent had induced the government to issue patent in defendant's name, whereby he *ipso facto* became a unwilling trustee of ¼ interest and to that extent he must account to the assignee for the receipts and profits from sale of timber and wood taken from the island.

Action brought for the benefit of the creditors of Cleophas Bordeleau, an insolvent.

H. H. Dewart, K.C., and C. A. Seguin, for plaintiff.

W. C. McCarthy, for defendant.

HON. MR. JUSTICE LENNOX:—Objection was taken that plaintiff was not authorised to take proceedings. This is not a defence to be encouraged, particularly where as here there will be substantial gain to creditors of the estate, and I am of the opinion that upon the facts disclosed at the trial the action is clearly maintainable.

I allowed the plaintiff to amend his statement of claim by alleging fraud in obtaining the patent of Petrie islands from the Government and these allegations are fully borne out by the evidence. The insolvent, before assignment, had paid his one-fourth share of the deposit made to the Government and an agreement between him and the defendant and others provided for an adjustment or equalisation of accounts in case any of the partners or associates paid more than his one-fourth share. This agreement enured to the benefit of the insolvents' estate and was binding upon the defendant when, ignoring and concealing the rights of the plaintiff as assignee, he induced the Government to issue the patent to him alone. Even if there were no writing at all the Statute of Frauds is not an obstacle in such a case. The doctrine that a trust

results in favour of the person who advances the purchase-money, or *pro tanto* in favour of the person advancing a share of it, is not interfered with by the statute. The defendant and those who assisted him obtained the patent by flagrant dishonesty—by deliberate concealment and misrepresentation —and I am satisfied that the Government would not have issued the patent to the defendant alone if the facts had been honestly disclosed. The result is that the defendant upon obtaining the patent to himself alone *ipso facto* became an unwilling trustee for the plaintiff, as assignee as aforesaid, of a one-fourth share in the islands in question.

Before and since issue of the patent the defendant cut and converted to his own use quantities of timber and wood upon Petrie islands. The plaintiff will have the right to further amend the statement of claim so as to include this ground of complaint, and subject to payment or allowance of $425—the balance of the plaintiff's share of the purchase money—upon the adjustment of the accounts, there will be judgment for the plaintiff in the terms of the prayer of the statement of claim, and for a reference to the local master at Ottawa to ascertain the plaintiff's one-fourth share of the defendant's net receipts and profits from the cutting and sale or disposed of timber and wood upon the islands. There will be judgment too for the plaintiff for the costs of this action, and the defendant's conduct having created the necessity for it, the costs of the reference in any event, except such costs, if any, as the plaintiff improperly causes or incurs; and as to these the question may be spoken to should a necessity for doing so arise.

HON. MR. JUSTICE KELLY. MAY 13TH, 1914.

RE KIRK ESTATE.

6 O. W. N. 346.

Appeal—Allowance by Surrogate Court Judge of Contested Claim Against Estate of Deceased Person—Surrogate Courts Act, R. S. O. 1914 ch. 62, sec. 69, sub-sec. 6—Right of Appeal by Administrators—Amount Involved.

KELLY, J., *held* that in determining whether an appeal lies from a judgment of a Surrogate Judge under R. S. O. (1914) ch. 62, s. 69 (6) the amount in dispute governs, not the amount of original claim.

Appeal by the administrators of the estate of the late Charles Thomas Kirk from an order of the acting Judge of the Surrogate Court of the united counties of Northumber-

land and Durham allowing the claimants $194 on a claim of $247.50 made against the estate.

The late Charles T. Kirk was tenant of certain property owned by plaintiffs Charles J. Goodfellow and Martha M. Goodfellow.

Kirk was burned to death in the house and plaintiffs brought action against the executors of Kirk's estate to recover $247.50 the difference between the amount recovered by them under an insurance policy and the value of the house, which was destoyed through the alleged carelessness of Kirk, he being intoxicated at the time.

The Surrogate Judge gave plaintiffs judgment for $194. Defendants served notice of appeal and plaintiffs immediately served notice that they abandoned all but the $194.

W. F. Kerr, K.C., for the claimants took the preliminary objection that no appeal lies, contending that under R. S. O. (1914) ch. 62, sec. 69 (6) what is here to be considered is the amount in dispute upon the appeal, and that amount not exceeding $200 there is not the right to appeal.

F. M. Field, K.C., for the appellants contended that sub-sec. 6 gives a right to appeal even in cases where the amount involved in the appeal does not exceed $200, if the amount of the original claim exceeded that sum.

HON. MR. JUSTICE KELLY:—The administrators in pursuance of 1 Geo. V. ch. 18, sec. 3 (R. S. O. 1914, ch. 62, sec. 69), served notice disputing the claim except in respect of the sum of $2, and the proceedings to determine the validity of the claim were taken under that section.

The question involved in this appeal is whether the appellants are liable for payment of $194. Should they succeed they would be relieved from payment of that sum; should they fail they would remain liable for it; so that what is in dispute, or as the statute puts it, what is contested (in the appeal), is their liability to pay $194.

In *Lambert* v. *Clarke*, 7 O. L. R. 130, the right to appeal under sec. 154 of the Division Courts Act, R. S. O. 1897, ch. 60, where the sum in dispute in appeal did not exceed $100 was discussed and dealt with; the line of reasoning there adopted can be applied here. But apart altogether from that authority and that reasoning, I am of opinion that upon the true construction of sub-sec. 6 an appeal does not lie in this case, and the motion should be dismissed with costs.

HON. MR. JUSTICE KELLY. MAY 15TH, 1914

MILES v. CONSTABLE.

6 O. W. N. 362.

Landlord and Tenant—Flooding of Demised Premises—Knowledge of Landlord—Concealment of Defect — Knowledge of Purpose for which Premises Leased—Liability in Damages—Assessment of Damages—Counterclaim.

KELLY, J., *held* landlord liable in damages where he leased premises to tenant knowing them to be totally unfit for the purpose for which they were built and for which tenant required them, notwithstanding that the unfitness was caused by defect in city's sewer, because landlord knew of that condition at the time the lease was made and he withheld that information from the tenant.

Action for damages for flooding of premises in the city of Toronto, leased by the defendants to the plaintiff for the purpose of a bakery. The flooding of the premises prevented plaintiff from carrying on his business.

T. F. Slattery, for plaintiff.

H. A. Reesor, for defendants.

HON. MR. JUSTICE KELLY:—On February 4th, 1913, defendant George W. Constable entered into an agreement with the plaintiff for the sale to him of the goodwill and fixtures of a bakery business at 1240 Bloor street west in Toronto, for $800, payable at the times stated in the agreement; at the same time arrangements were made for the granting of a lease of the premises by defendants to plaintiff. The lease bears date March 1st, 1913; it was not executed by plaintiff until after he had taken possession of the premises, which was on February 12th.

The premises were built for the purposes of a bakery and store, the bakeshop being in the basement. Soon after plaintiff took possession, dirty water and sewage found their way into the basement, causing interference with the plaintiff's operations in the bakery. This condition of things, however, soon passed away; but a few weeks later the trouble again appeared when the filthy water and sewage rose to a height of 6 inches or thereabouts, and so continued for some weeks, during which time the plaintiff was unable to carry on business in the bakery. Complaints were several times made to defendants or some of them, and on one occasion they sent

a plumber to remedy the trouble. Plaintiff was then able to resume his business, but only to be soon confronted again with the same conditions. The attention of the city medical health department was drawn to the premises, resulting in a notice being sent to the owners of the property, requiring that the premises be put in sanitary condition, and plaintiff was forbidden to make use of his goods then in the bakery.

It is unnecessary to review in detail the evidence of what then followed. Plaintiff down to September 10th, 1913, when the action was commenced, was much interfered with and at times altogether prevented from carrying on his bakery business in the bake shop. It is important, however, to determine on whom the responsibility rests for the condition of the premises. Defendants contend that there was no obligation upon them to remedy the trouble, that that was the duty of the plaintiff. The facts as I find them do not support that contention. Somewhat similar conditions arose in these same premises during their occupancy by a former tenant who, as a consequence, found it necessary to give up the premises and business, following which one of the defendants was in occupation until the time of the negotiations with the plaintiff.

Defendants knew of this condition at the time of plaintiff's agreement. In the interval between the making of the agreement and the execution of the lease by plaintiff, he became aware that some such trouble had previously existed, and, on mentioning it to one of the defendants, he was assured that any trouble of that nature had been remedied. Whatever misgivings the plaintiff may have had were removed by what that defendant stated to him, and accordingly the transaction was completed. The premises turned out to be totally unfit for the purpose for which they were built, and for which the plaintiff required them—that is for use as a bakery.

I have no difficulty in finding that he is entitled to relief. The measure of that relief is not so easily determined. Immediately on taking possession plaintiff began baking operations, and used parts of the premises other than the bake-shop as a store for the sale of the output of the bakery and goods of that class. He also leased to sub-tenants the upper part of the premises, which had been occupied by sub-tenants prior to his becoming tenant. His stock of goods, such as groceries, flour, etc., for use in the baking operations, be-

came valueless owing to the prohibition of the health department against their use, and damage was done by the water and sewage to the ovens and other articles in the bakery. His baking operations had to be altogether suspended, and he lost his sub-tenants by reason of the odors which emanated from the drain or the accumulation of foul matter and filthy water in the basement. The business carried on in the store is still being conducted, but in a small way, the supplies being obtained largely from wholesale houses and from another bake shop conducted by the plaintiff.

About May, 1913, when plaintiff was making these complaints, one of the defendants expressed a willingness or desire to have the plaintiff surrender his lease, but this he was not prepared to do. He had paid a substantial sum for the good will of the business, hoping to be able to develope a profitable trade; much of what he so paid would be a loss to him if he were deprived of the premises, and quite naturally he preferred to remain, and to have defendants put the premises into the condition he had a right to demand. He was not under obligation to vacate or surrender; he was entitled to have the property reasonably suitable for the purposes for which he intended to use it, the defendants being aware of that purpose they also had knowledge that water or other back-flow from the drain had previously been found in the basement, that the cause of this trouble had not been removed and that resort had been made to the device of plugging the inlet—the only remedy applied; all this knowledge they withheld from plaintiff. This same device—a very unsatisfactory one—they recommended to plaintiff when the basement became flooded in his time.

Defendants have taken the position that the source of all this trouble is a defect in the city's sewer which causes a backing up of water and sewage into the demised premises and that plaintiff's remedy is not against them but against the city. Assuming that to be the cause, I do not think defendants are entitled to be relieved on that ground in view of what I have said above about their knowledge of the conditions, their withholding of that knowledge from the plaintiff and their knowledge of the purpose for which he leased the premises.

For only a short part of the time between plaintiffs taking possession and the commencement of the action had he

the use of the bake shop; and except for that short time that department of the business was at a standstill.

The injury to and loss of goods I estimate on the evidence at $200

Loss of and disturbance to business, and for being deprived of the use of the premises (including any charge for loss of rent from sub-tenant) down to the commencement of the action 920

$1,120

For this amount plaintiff has established his claim.

In their defence and counterclaim, delivered on November 28th, 1913, defendants claim (1) payment of the instalments of purchase money overdue at that time on the sale of the good will and chattels to plaintiff and interest thereon; (2) $320 as rent of premises for eight months beginning April 1st, 1913, and interest thereon; (3) payment of taxes from February 14th to December 31st, 1913, and (4) possession of the premises.

The claim for rent to the commencement of the action on September 10th I allow, amounting to $213.33.

The contract for the sale of the good will and chattels was made by the defendant George W. Constable (the other defendants are not parties thereto) and any overdue payments thereon are due to him; I do not, therefore, now deal with that claim. The parties may, however, speak to it again if they so desire.

Under the circumstances detailed above, defendants have not established their right to possession and I therefore dismiss that claim.

I have not taken into account the taxes of the property which by the terms of the lease are payable by the plaintiff. So far as the evidence at the trial shews these taxes for the year 1913 were not then paid either by plaintiff or defendants. The manner in which I have arrived at the amount of the plaintiff's claim leaves him still liable for these taxes from the commencement of the term of the lease to the date of the issue of the writ, down to which time only I have dealt with the matters involved between the parties.

Defendants are entitled to have deducted from the $1,120 allowed the plaintiff the above sum of $213.33, thus leaving a balance owing of $906.67, and for this amount I give judgment in favour of the plaintiff with costs.

I have, as I have already said, dealt with these matters only down to the issue of the writ. I cannot but express regret that some reasonable effort was not made in the early days of the tenancy to remedy the unsatisfactory condition of the premises, especially in view of the continuing damage that would result from that condition.

HON. MR. JUSTICE LENNOX. MAY 15TH, 1914.

HALLETT v. ABRAHAM & FISHER.

6 O. W. N. 355.

Negligence—Buildings—Erection—Injury to Servant of Sub-contractor—Absence of Negligence on Part of Master—Findings of Jury—Workmen's Compensation Act, R. S. O. 1914 c. 146, s. 4—Person Owning and Supplying Ways, Works, etc.—"Workman"—"Contractor."

Where the jury found that a tender by an architect for the construction of a building had been accepted by the owner,

LENNOX, J., *held*, that the contractor-architect was the person owning and supplying the ways, works, etc. used for the purpose of executing the work, within the meaning of the Workmen's Compensation Act, R. S. O. (1914) c. 146, s. 4 and as such was liable to a servant of a sub-contractor who was injured as the jury found, through the want of a ladder.

Action for damages for injury sustained by the plaintiff, a carpenter, by falling from the roof of a house upon which he was working. The plaintiff was in the employment of the defendant Fisher; but the negligence alleged was that of the defendant Abraham, who was said to be the contractor for the work which the plaintiff was engaged upon.

The action was tried before HON. MR. JUSTICE LENNOX, and a jury, at Toronto.

Harcourt Ferguson, for plaintiff.

R. J. Gibson, for defendant, Abraham.

G. W. Holmes, for defendant, Fisher.

HON. MR. JUSTICE LENNOX:—There is no ground upon which I can direct judgment against Fisher. The jury acquitted him of negligence and I do not see that they could have done anything else. Their findings at all events are conclusive.

The defendant Abraham is not liable at common law. It is true that the negligence, if any, from which the plaintiff

suffered, was not negligence of a fellow servant, but of this defendant himself; but the plaintiff was in no sense his servant, but the servant of Fisher.

The doubts I expressed in charging the jury, as to the want of a ladder being the cause of the injury, have not been entirely removed from my mind, but in the face of charge emphatically favourable to the defendants, upon this point, they have come to the conclusion that it was the cause of the accident and I cannot say that there was not any evidence to support their finding.

Even with this question settled I have had a good deal of difficulty in coming to the conclusion that the defendant Abraham is liable, that is, that he owed any duty to the plaintiff. Outside of the statute he certainly did not. The main contest in the case was as to whether this defendant acted solely in the capacity of an architect, as he contended, or as a contractor, upon an accepted tender, doing the work and supplying the material for a specified sum. It ultimately turned upon whether McWilliams, the building owner, accepted Abraham's tender. The jury found that he did, and in this finding I entirely concur. This defendant then occupied the unique position of being at once contractor and architect—the builder and supervisor and judge. The sharp contrast between his evidence as first given, and his evidence in reply, when unexpectedly confronted by McWilliams, was not creditable to him, or calculated to win the sympathy or confidence of the jury. The plaintiff has to recover under sec. 4 of R. S. O. ch. 146, the Workmen's Compensation for Injuries Act, if at all. I think he can. It might be argued, perhaps, that this section is confined to the case only of the owner of the property who supplies "ways, works, etc.," but I think it is not necessarily so confined. A statute of this character is to receive a liberal interpretation. This defendant it was who contracted with Fisher, the plaintiff's employer. He was in sole charge and possession and as contractor and architect, was in exclusive control until the work was completed and passed. "The execution of the work was being carried out under a contract." He was the person owning and supplying the "ways, works, machinery, plant, etc., for the purpose of executing the work." The plaintiff was "a workman" of Fisher, "a contractor or sub-contractor" and "the defect," as found by the jury, "arose from the negligence of the person for whom the work is done."

There will be judgment for the plaintiff against the defendant Abraham for $2,500 with costs. I think it is the duty of a jobbing contractor, such as Fisher is, to know something of the conditions under which his men are working. The action as against Fisher will be dismissed without costs.

HON. MR. JUSTICE KELLY. MAY 16TH, 1914.

LOVELL v. PEARSON.

6 O. W. N. 357.

Covenant—Restraint of Trade—Agreement between Master and Servant—Sale of Goods—Prohibition Extending to Whole Dominion of Canada—Interim Injunction.

KELLY, J., refused an injunction until trial to restrain an ex-servant of plaintiffs from soliciting orders for or engaging in any business within Canada similar to the plaintiff's, holding that the effect would be to deprive defendant of his earning power, upon which he chiefly relied as a means of earning a livelihood and that this protection was not required by plaintiffs.

Allen Mfg. Co. v. *Murphy*, 23 O. L. R. 467 followed.

Motion by the plaintiffs for an order restraining the defendant until the trial of the action from soliciting orders for or engaging in or being interested in any business within the Dominion of Canada similar to that carried on by the plaintiffs, contrary to the defendant's covenant with the plaintiffs, as alleged.

The motion was heard by HON. MR. JUSTICE KELLY, in the Weekly Court at Toronto.

R. G. Agnew, for plaintiffs.

J. E. Jones, for defendants.

HON. MR. JUSTICE KELLY:—Defendant, who prior to January 3rd, 1914, had been in plaintiffs' employ as a travelling salesman, on that day entered into a written agreement with plaintiffs to serve for one year from that date in the capacity of a salesman of stationery merchandise. The agreement, which is in the terms of a printed form in use by plaintiffs, contains provisions of a somewhat exacting character, including one that the defendant "shall not during the continuation of his employment with the employer or within the space of 12 months after its termination, how-

ever determined, solicit orders within the Dominion of Canada for any other person or persons, firm, company or corporation carrying on or engaged in dealing in any business within the Dominion of Canada similar in whole or in part to that of the employer, or egage in or directly or indirectly become interested in any such business."

This application is to restrain him until the trial from so soliciting orders or so engaging or becoming interested in business.

Each party to the agreement had the right to determine the employment on thirty days' notice. Because of receiving notice from the plaintiffs, about a month after the commencement of the term of the employment, changing the scale of prices at which he was required to sell plaintiffs' goods, and which change he contends affected to his prejudice the amount of commission he would be able to earn, defendant gave one month's notice, of his intention to quit the employment, and he did accordingly sever his connection with the plaintiffs.

Granting the injunction asked for would have the effect of depriving the defendant of his earning power in selling goods of the class referred to, not in a limited territory, but any place in the Dominion of Canada. This occupation is the one with which he is best acquainted and upon which he chiefly, if not wholly, relies as a means of earning a livelihood for himself and those dependent upon him. I fail to see that the protection to plaintiffs' business requires that defendant should, pending the action, be deprived of this means of employment. Nor do I understand the law to go so far. The right to put restraint upon an employee after the termination of the term of the employment, and where he contracted not to continue in the class of business in which he served the employer, was considered in *Allen Manufacturing Co.* v. *Murphy*, 23 O. L. R. 467, where the Court of Appeal dealt with facts much similar to those here present and where a distinction was drawn between restraint in such cases and that which may be imposed in connection with the sale of a business or good-will, or the dissolution of a partnership. Much of what was there said is applicable here. Quite sufficient reasons were put forward in the argument in opposition to the motion to convince me that this application should not be granted, and I therefore dismiss it, the costs to be disposed of at the trial.

Defendant, through his counsel, was willing, on the argument, to be restrained from operating in certain territory in which he had sold for plaintiffs, but plaintiffs were not satisfied with that limited restraint, and refused the offer.

HON. MR. JUSTICE KELLY. MAY 18TH, 1914.

RE HARTWICK FUR COMPANY.
(MURPHY'S CLAIM.)

6 O. W. N. 363.

Company—Winding-up—Preferential Claims under Dominion Winding-up Act, s. 70—Commercial Traveller.

Re Merlock & Cline Ltd., 23 O. L. R. 165, *held*, that a commercial traveller is of the class of "clerks or other persons" mentioned in Dominion Winding-up Act, s. 70.

KELLY, J., *held*, that it makes no difference that the traveller is paid commission on his sales instead of a straight salary, he is still within the preferred class.

Appeal by the liquidator of the Hartwick Fur Co., Ltd., from an order of the Master-in-Ordinary, declaring that Harry Murphy was entitled under Dominion Winding-up Act, sec. 70, to rank for a preference for $837.47 for salary as a commercial traveller.

G. W. Adams, for the liquidator.

C. F. Ritchie, for the claimant.

HON. MR. JUSTICE KELLY:—On the reference before the Master-in-Ordinary in proceedings to wind up the Hartwick Fur Company, Limited, he declared that Harry Murphy is entitled to rank for a preference for $837.47 under the provisions of sec. 70 of the Dominion Winding-up Act.

The liquidator appeals against this decision on two grounds: (1) that the claimant does not come within the class of persons entitled to the preference given by sec. 70; and (2) that the money so allowed the claimant did not accrue to him in such manner and such time as to entitle him to that preference. In *Re Morlock and Cline, Ltd.*, 23 O. L. R. 165, it was held that a commercial traveller is of the class of "clerks or other persons" mentioned in sec. 70. Murphy, the claimant, is, it is in evidence, a commercial traveller. His engagement with the company was to sell furs and in the months during which he made the sales for making which he now claims, his whole time and services were to be given, and so far as the evidence shews, were given, to

the company. By the terms of the engagement he was to be paid, not a fixed salary or wages, but a commission on the amount of his sales. The contention is that the character of his services and the mode of payment adopted took him out of the class entitled under the statute to a preference. The only circumstances which might be argued as against the claimant's right is the payment by commission instead of by straight salary, but the adoption of that means of payment does not in my judgment affect the relationship of the parties towards each other or take the claim out of the class intended to be benefitted by the section referred to.

Nor do I think the right of the appellant to succeed can be established on the other ground. The sales for making which the claim has been allowed were made in the months of March and April, 1913—perhaps some trifling sales later. The agreement was that payment should be made after July 1st. The winding-up order, I am informed—it is not before me—was made on August 28th, 1913. The Master had sufficient evidence before him to find that the amount allowed was due under the terms of sec. 70 so as to give the preference, and he so found. I see no reason for disturbing that finding.

The appeal is dismissed with costs.

HON. MR. JUSTICE BRITTON. MAY 22ND, 1914.

REX EX REL. BAND v. McVEITTY.

6 O. W. N. 369.

Elections—Municipal—Mayor—Disqualification — Owing Arrears of Taxes—R. S. O. (1914) c. 192, s. 53 (s)—Collecting Cheque from City for Client.

Previous to his election as Mayor a solicitor owed the city taxes and the city owed him for professional services. He gave the city treasurer instructions to deduct any amount due the city and pay him the balance which he did, but it afterwards turned out that a mistake had been made and the solicitor still owed the city for taxes.

BRITTON, J., *held*, that, that was not owing the city arrears of taxes within the meaning of R. S. O. (1914), c. 192, s. 53 (s.)

That collecting a cheque from the city in favour of a client is not an act or thing in the client's proceedings against the city which would disqualify him from holding his office as Mayor.

Motion for an order declaring that Taylor McVeitty has not been duly elected and has unjustly usurped the office of Mayor of the city of Ottawa.

Tried at Ottawa Single Court, May 15th, 1914.

The grounds of attack were:—(1) That at the time of defendant's pretended election, he was indebted to the city of Ottawa in the sum of $170.61, or some other sum, for taxes.

(2) That at the time of said pretended election he was solicitor for one Thomas O'Connell, of Ottawa, who claimed from the city of Ottawa damages.

(3) That at the time of said election, the defendant was acting as solicitor for one Thomas Clarey, in a proceeding to have a by-law or by-laws of said city of Ottawa quashed.

(4) That the defendant since the election, has continued to act for the said Thomas Clarey in Clarey's proceeding against said city.

(5) That since the said election the defendant had and has claims against the said city for costs of the actions commenced by the said Thomas Clarey.

Other grounds are stated in the notice which were not insisted upon on the argument.

It is asked that the seat of the office of mayor may be declared to be vacant, and that the defendant, McVeitty, may be disqualified to sit in said office.

Pringle, K.C., for relator.

Beament, for defendant.

HON. MR. JUSTICE BRITTON:—As to taxes, R. S. O. (1914) ch. 192, sec. 53, sub-sec. s., is as follows: A person shall not be eligible to be elected member of a council or be entitled to sit or vote therein, who at the time of the election, is liable for any arrears of taxes, to the corporation of the municipality. Liable for, means "obliged in law or equity to pay." And that condition of things, in order to affect the qualification of the defendant, must have existed on the date of the election.

The sum of $170.61 mentioned in the notice of motion is made up as follows:

1906	Income tax	$37 11
1907	" "	37 07
1909	" "	61 29
1913	Interest at 5 per cent.	6 77
1913	Bal. on 2nd year of income tax	28 37
		$170 61

The defendant says he intended to pay and did in fact pay all the taxes for which he was liable down to and in-

cluding the year 1913. Special circumstances exist in reference to the taxes of 1910, 1911, and 1912, and 1913, which I will deal with later.

As to 1906, and 1907, considering what was done with the rolls, and the work of the collector and the letters written by the collector to the defendant, and the admission that the taxes for 1908 were paid, I think a fair inference from the evidence, apart from the testimony of defendant, is that these taxes are not a liability of the defendant to the city.

The evidence as to the taxes for 1910, 1911 and 1912, is that the defendant was to be paid a sum of $2,000 granted to him by the city, and $300, or thereabouts, for costs, salary or services.

The city collector, knowing that defendant was going away, sent in to the City Treasurer a bill or account for all —so thought, for all that the defendant owed to the city. This account was:—

City of Ottawa Municipal Collection Department, for the sum of.....$207 21
Less discount 58 28

Leaving $148 93

The tax account was, for the year 1913:—
Income $54 04
Int. dis. 1 35
Arrears, previous to year 191—

1911.....$59.24	Roll No. 49-11.
1910..... 61.10	Roll No. 32-12.
1913..... 65.30	Roll No. 36-10.
$185.64	

The treasurer, Corbett, presented these accounts to the defendant. The defendant states: "I told Mr. Corbett to deduct from money which he had in his possession belonging to me everything which I owed the city for taxes or for anything else, and I understood he did." . . . "I was leaving the corporation, and I was proposing to go away for a holiday, and I wanted to have everything in the City Hall,

so far as I was connected with it, disposed of, cleaned up." He states that he did not ask for any bills or to see them, or even for the amount, but that he told the treasurer to withhold whatever was necessary. The treasurer, instead of withholding the amount of the bills in his hands, deducted one-half from the income tax of 1913, apparently because that one-half would not fall due until the 3rd of December following. The treasurer knew nothing of arrears, if any, prior to 1910, and the defendant was apparently not careful enough to make enquiry, or even to enquire as to the amount or correctness of the bills the treasurer had. There was an abundance of money in the hands of the City Treasurer, the defendant was ready and willing to pay whatever was demanded, and the treasurer did in fact deduct from defendant's money the sum of three hundred and sixty 04-100 dollars.

The city collector, Mr. Robertson, was called and was not able to give much if any information beyond what appeared on the rolls. The taxes for 1906 and 1907 were not carried forward, and presented as a claim, and taxes for 1908 have been paid. That leaves the doubt as to taxes of 1909. There seems to have been no system—no accurate book-keeping as to arrears. The answer to Mr. Pringle's question: "So the rolls do not carry forward from year to year those arrears, but they are occasionally put in for the convenience of the collector?—was "Yes, that is it." In this matter of arrears, I cannot accept the rolls for 1906, 1907 and 1909 as sufficient proof of taxes in arrear.

In short, in a case like the present, when money sufficient in the hands of the treasurer to pay all taxes due by defendant, and where there was express authority to pay, and where the treasurer did keep back such a sum as defendant supposed was all, and where there was not after the settlement and before the election any intimation that a mistake had been made, and no notice or demand for payment of the alleged arrears, I am of opinion that the defendant was not at the time of the election liable for such alleged arrears of taxes, within the meaning of the section of the Act cited. Speaking further of the rolls; it appears upon the roll of 1909, that 1907 and 1908 were in arrear. Then there was a striking out of 1906. The collector said: "On the face of the rolls of 1909, 1910, it would lead anyone to believe that the taxes of 1906 had been paid."

The treasurer was called, and upon his evidence a judgment could not be given against the defendant for any arrears of taxes, as a debt.

The city collector desired to collect all that was owed by the defendant. And the bills supposed to be all that the defendant owed were handed to the treasurer for that purpose. The treasurer's evidence is that defendant stated "I do not want to owe the city anything, take it out." The treasurer, without being requested to do so, and without objection on the part of the defendant, deducted a portion not due and kept money for payment in full of the balance.

Upon the evidence I find that at the time of said election the defendant was not solicitor for Thomas O'Connell, who claimed damages from the city of Ottawa. The defendant had written a letter, but there was no retainer or employment for anything further. At the time of the election defendant was not in a position to give, and O'Connell was not in a position to claim, defendant's services.

The defendant was not at the time of election acting solicitor for Thos. Clarey in any proceeding then pending against the city of Ottawa.

What the relator complains of as an act by the defendant since the election for Thomas Clarey, was merely getting the cheque of the city in favour of Thos. Clarey cashed. There is no dispute about the amount. Clarey was entitled to get it. Defendant was entitled to his costs from Clarey, and Clarey allowed defendant to collect the cheque, defendant to account to Clarey. It was not any act or thing in Clarey's proceedings against the city—nothing in litigation or in contemplation of litigation or dispute between Clarey and the city.

The defendant had not at the time of the election any claim against the city for costs of the action commenced by Clarey. Defendant's claim, if any, was against Clarey; his claim did not in any way depend upon the result of litigation, and the litigation in which defendant's claim against Clarey arose was at an end.

The motion will be dismissed with costs. Judgment will be in favour of defendant.

The order will be drawn up and papers returned pursuant to secs. 177 and 178 of the Municipal Act.

HON. MR. JUSTICE MIDDLETON. MAY 22ND, 1914.

REID v. AULL.

6 O. W. N. 372.

Husband and Wife—Marriage—Nullity—Action for Declaration of Right of Attorney-General to Intervene.

MIDDLETON, J., *held*, that under R. S. O. (1914) c. 148, s. 37 the Attorney-General has the right to intervene in all actions seeking declarations of nullity of marriage.

Motion by the Attorney-General for an order dismissing the action or staying all further proceedings on the ground that the Court has no jurisdiction to entertain the action.

Edward Bayly, K.C., and Armour, for the Attorney-General.

Geo. H. Watson, K.C., for plaintiff.

No one appeared for defendant, Aull, although notified.

HON. MR. JUSTICE MIDDLETON:—Plaintiff, an infant now past 19 years of age, sues by her father, George P. Reid, alleging that a marriage ceremony which was performed on 25th July, 1913, is void, because it was procured by deceit and fraud and through wrongful influences and mis-statements of defendant, who had procured mastery of the mind and will of plaintiff so that she was incapable of exercising judgment and discretion; the ceremony, it is said, being performed while the plaintiff was under the influence of intoxicating drink which the defendant procured the plaintiff to take, by which she became and was incapable of reasonable thought and action. It is also alleged that the affidavit made for the purpose of obtaining the marriage license was untrue and that the license was wrongfully and illegally issued, and the ceremony was therefore illegally performed. It is asked that the Court declare the marriage to be null and void, and that the marriage license be also declared illegal, fraudulent and void. The defendant has filed a statement of defence to this claim, in which he denies all impropriety on his part and claims that the marriage was duly solemnized with the full and free consent of the plaintiff.

As no one appeared for the defendant on this motion, I am not aware whether the defendant has any intention of resisting the plaintiff's claim when the action actually comes to trial. Statements were made by the counsel for plaintiff which indicate that no defence will be offered.

The Attorney-General has been served with notice of trial pursuant to the Statute now forming part of the Ontario Marriage Act, R. S. O. 1914, ch. 148.

In the case of *Lawless* v. *Chamberlain*, 18 O. R. 296, my Lord the Chancellor stated that the Courts of this Province have jurisdiction to declare a marriage null and void *ab initio* where it is shewn to be void *de jure* by reason of the absence of some essential preliminary. In that case, it was held that there was no defect in the marriage, and the action was dismissed; and it has since been intimated in a series of reported decisions that this statement was a dictum only, and the contrary opinion has been more than once expressed.

The Attorney-General takes the view that our Courts have no jurisdiction to entertain an action brought for the purpose of declaring a marriage void which has been duly solemnized; unless the case can be brought under sec. 36 of the Marriage Act, and this motion is brought for the purpose of having that question determined.

The Attorney-General rests his right to intervene upon the provisions found in sec. 37 of the Marriage Act. The plaintiff now contends that this statute does not give the right of intervention claimed by the Attorney-General, save in cases falling under sec. 36. That section provides that where a form of marriage has been gone through between persons either of whom is under the age of eighteen years, without the consent of the parent or guardian, the Supreme Cort shall have jurisdiction in an action brought by the party who was under the stipulated age, to declare and adjudge that a valid marriage was not affected or entered into, provided that the parties had not after the ceremony lived together as man and wife.

This section had its origin in an Act passed in 1907. Two years later, in 1909, the Act was amended by adding as sub-section to the original of sec. 36 the provisions now found in sec. 37, in a slightly amended form. In their original form the operation of these added sub-sections was no

doubt confined to actions falling under the section itself; but in 1911 the Statute was recast, and the sub-secs. in question are removed from the original section and given the dignity of an independent statutory enactment. As they stand now the sub-sections commence by a wide provision, applicable not only to the statutory action provided for by sec. 36, but also any case in which the intervention of the Court is sought for the purpose of declaring a marriage void. "No declaration or adjudication that a valid marriage was not effected or entered into shall in any case be made or pronounced upon consent of parties, admissions, or in default of appearance or of pleadings, or otherwise than at a trial."

I cannot narrow this, as contended by Mr. Watson, and make it applicable only to cases where only one of the contracting parties was under age, leaving it open in all other cases to have the marriage declared to be invalid upon consent or upon default of defence. It follows that the sub-sections which are appended to this wide declaration are equally wide in their application, and confer upon the Attorney-General the right to intervene in all cases in which a declaration of the invalidity of a marriage is sought.

Nor can I yield to the alternative argument presented by Mr. Watson. Sub-section 4 provides that ten days' notice of trial shall be given to the Attorney-General; sub-sec. 5 that "The Attorney-General may intervene at the trial or at any stage of the proceedings, and may adduce evidence and examine and cross-examine witnesses in like manner as a party defendant." Mr. Watson's contention is that this right of intervention only allows the Attorney-General to intervene at the trial and does not allow the making of such an application as this to stay the action.

Two answers I think are apparent. In the first place there is nothing to restrict in any way the meaning to be attributed to the word "intervene." Mr. Watson contends that this litigation is the mere private concern of the parties litigant. The Legislature has thought otherwise. The public are concerned, and the Attorney-General, as representing the public, is authorized to intervene, that is, according to the meaning given that word in the Oxford Dictionary; "come in as something extraneous. . . come between, interfere so as to prevent or modify a result." This makes it the duty of the Attorney-General to intervene so as to

modify the result which would otherwise be obtained in this private litigation, if he thinks the public interest demands it. Moreover, the section itself provides that the intervention may be not only at the trial but at "any stage of the proceedings."

If the Court has no jurisdiction, it seems to me that that fact should be ascertained at the earliest possible stage of the action. Upon an application to have this case heard in camera, made to my brother Latchford, it was stated under oath that the plaintiff's health and condition was such that a cross-examination made in public might seriously affect her life or reason; and it is easy to conceive that the case made by the plaintiff in her pleadings is one which ought not to be paraded in open Court if there is any real doubt of the jurisdiction of the tribunal to entertain the action. No Judge ought to be asked to pronounce an opinion upon such a matter, affecting as it must the whole future of this unfortunate young woman, unless it is plain that he has jurisdiction to deal with the action. If the finding should be adverse to the plaintiff and it should afterwards be held that the Court had no jurisdiction, her position would be lamentable in the extreme. Scarcely better would be her situation if the finding upon the facts should be in her favour.

These considerations point to the propriety of separating the trial of the question of fact from the hearing upon the question of law. Speaking generally, the policy of our law of recent years has been entirely against the separation of the issues in law from the trial of the questions of fact; but the rules still provide for this, leaving it to the Judge in each case to determine whether the questions should be so separated. It appears to me that this case is one of the few in which the interests of the parties will be best served by determining this much debated legal question in the way suggested.

The fact that the latest reported decisions seem to be against the existence of the jurisdiction also points to the adoption of this course; because they render it probable that the Judge before whom the case comes for hearing would investigate the legal aspect of the case in the first instance, and if he considered himself bound by the reported cases he would not express an opinion upon the question of fact if he was satisfied that he had no jurisdiction, and a new trial

would almost inevitably result, as an Appellate Court would hesitate long before dealing with questions of fact of this nature, depending upon the weight to be given to the evidence of witnesses which it had no opportunity or seeing or appraising.

The merits of this legal question not having been discussed before me, I do nothing more now than to determine that the preliminary objection taken must be overruled and the motion must be heard upon its merits at some convenient day. Unless the parties agree otherwise, I fix Saturday 30th, at ten o'clock, for the continuation of the argument.

HON. MR. JUSTICE HODGINS. MAY 26TH, 1914.

RE ROOKE AND SMITH.

6 O. W. N. 382.

Vendor and Purchaser—Title — Building Restrictions—Run with Land—Release of Required.

Where original deed of land contained certain building restrictions, and deeds to subsequent purchasers of parts thereof contained covenants differing somewhat therefrom,

HODGINS, J.A., *held*, that the original covenants, as relating to user and occupation, ran with the land and might be enforced against a subsequent purchaser by original owner and those claiming under him, and that such purchaser was entitled to a proper release therefrom, a letter from original owner promising to take no action not being sufficient.

That if purchaser so desired, a reference might be had to the M.-in-O. to take evidence: otherwise order to go declaring that vendor, on obtaining release, could convey free from original covenants.

Motion by the vendor for an order, under the Vendors and Purchasers Act, declaring that vendor could make good title upon an agreement for the sale and purchase of land in question.

A. J. Russell Snow, K.C., for vendor.

W. A. McMaster, for purchaser.

HON. MR. JUSTICE HODGINS:—The only objection argued before me was that requiring a release of the building restrictions contained in the deed of a block of land on the south side of Bloor street in Toronto, from Moses H. Aikens, to

the York County Loan & Savings Company, dated 8th June, 1901.

These are as follows and are in the form of a covenant:

"And the said party of the second part for itself, its successors and assigns, covenants, promises and agrees to and with the said party of the first part, his heirs, executors, administrators and assigns in manner following, that is to say:—

(a) That no building shall be erected on the said lands hereby conveyed or any part thereof except buildings built of brick or stone or partly of brick and partly of stone or of some material equivalent to brick or stone.

(b) That no buildings shall be erected on the said lands hereby conveyed or any part thereof except buildings adapted and intended for and used as and for private dwelling houses only and for no other purpose.

(c) That no buildings shall be erected on the said lands hereby conveyed or any part thereof which shall cost less than $3,000; that is to say, each single dwelling house shall not cost less than $3,000 exclusive of outbuildings.

(d) That no manufacture or trade shall be carried on on the said lands hereby conveyed or any part thereof. Provided, however, that the above restrictions as to the use to which any buildings may be put shall be and remain in force for twenty years from the date and no longer and that the above restrictions as to the materials to be used in the erection of any buildings shall not apply to necessary outbuildings used in connection with said dwelling houses."

It is stated that the York County Company subsequently subdivided this block, exacting covenants from its purchasers differing somewhat from those in the Aikens deed and providing: "That the houses erected by them would be of a certain character and would cost not less than $3,500 each or thereabouts and that no trade or manufacture should be carried on on any of the lots and that the property purchased should be used for residential purposes only."

In the deed to the vendor there is the following covenant:

"And the said party of the second part for himself, his heirs, executors, administrators and assigns hereby covenants with the said party of the first part, its successors and assigns,

that he will not within the period of ten years from the date hereof erect or cause or suffer to be erected upon the said lands any dwelling house or houses to cost less than thirty-five hundred dollars each, nor any dwelling other than detached, and each dwelling so erected shall be on a portion of land not less than thirty feet frontage, but this restriction shall not apply to the Bloor street frontage to a depth of ninety feet (90′) on which stores may be erected."

The covenants in the deed from Aikens to the York County Loan and Savings Company run with the land as they deal with the occupation and user of the land. Consequently they may be enforced against the company or its purchasers, of whom the vendor is one, by Aikens or those claiming under him.

If Aikens chooses to release the vendor and his lands, he may do so effectually, but the letter signed by him promising to take no action is not sufficient to eliminate the covenants and the purchaser is entitled to a proper release from him.

But I see nothing in the facts as presented in the material filed, to indicate that any other purchaser is in a position to enforce those covenants.

Aikens, so far as disclosed, neither contemplated nor carried out any building scheme and there is nothing before me to suggest that any purchaser bought upon the footing that the restrictions were to ensure to his benefit.

Therefore the case may be reduced to the elements stated by the Master of the Rolls in *Reid* v. *Bickerstaff*, [1909] 2 Ch. at p. 320, thus: "A subsequent purchaser of part of the estate does not take the benefit of the covenant unless (a) he is an express assignee of the land, or (b) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser.

As there is no evidence that any subsequent purchaser can qualify in either respect, the question submitted, so far as it involves the rights of parties other than Aikens, may be answered in favour of the vendor.

I was not asked to deal with the rights arising out of the covenants, if any, exacted by the York County Loan and Savings Co., and do not do so.

While the incidence of restrictive covenants is properly the subject of an application under the Vendor and Pur-

chaser Act (e.g., *Re Nisbets & Potts Contract,* [1905] 1 Ch. 391, [1906], 1 Ch. 386), I ought to call attention to the propriety of fuller information than appears in this case being given to the Court. An affidavit by the solicitor is in most cases not enough evidence to enable the Court to pronounce upon questions involving possibly a large number of persons not before the Court whose rights may be founded upon a complicated set of facts. See per Parker, J., in *Elliston* v. *Reacher,* [1908] 2 Ch. at p. 384.

For this reason, if the purchaser desires it, the matter may be referred to the Master-in-Ordinary, where evidence may be taken. If not an order will go declaring that the vendor on obtaining a release from Aikens can convey the lands in question free from the restrictions in the Aikens deed.

It is not a case for costs.