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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 2ND, 1918.

SULLIVAN v. CANADIAN NORTHERN R.W. CO. AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Railway—Embankment—Bridge—Injury to Property below by Flooding—Evidence—Trial—Jury—Statements of Counsel—Prejudice—Damages.

Appeal by the defendants from the judgment of the County Court of the County of Hastings in favour of the plaintiff for the recovery of $175 damages with costs.

The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

Angus MacMurchy, K.C., for the appellants.

E. J. Butler, for the plaintiff, respondent.

The judgment of the Court was read by LATCHFORD, J., who said that the plaintiff's claim was for damages resulting during the winter of 1916 from the flooding of a house which he then occupied north of the defendants' railway embankment, and west of the mouth of the Moira river, in the city of Belleville, and from the flooding of a slip, south of the railways, in which lay two boats owned by the plaintiff, and the freezing of the flood-water around, in, and over his boats.

The defendants admitted liability to the extent of $25 for the inconvenience occasioned to the plaintiff by the flooding of the house north of the embankment which he occupied at the time.

For injury to his boats they contended that they were in no way liable. They alleged that such damage, if any, was caused by the flooding of the slip in which the boats lay, not by water which flowed into it from the north, through a culvert, but by water which flowed south of the embankment in a westerly direction and into the slip at the mouth, or from the property lying to the east.

The attempt of the defendants to shew that the damage was caused not by their bridge, but by natural causes, such as the accumulation of frazil on a line north of the bridges, failed. It was based wholly on theory.

Upon the argument of the appeal, much criticism was directed to the statement made at the trial by counsel for the plaintiff to the effect that the defendants had settled a claim for similar damages by one Allen, whose coal-yard lay east of the slip in which the plaintiff wintered his boats. It was also urged that, in his address to the jury, the plaintiff's counsel made statements calculated to prejudice and influence them against the defendants and prevent a fair trial of the action.

In the opinion of the learned Judge, the statements objected to were not of such a character as prevented a fair trial of the action: Sornberger v. Canadian Pacific R.W. Co. (1897), 24 A.R. 263, and the cases there cited, especially Bradlaugh v. Edwards (1861), 11 C.B.N.S. 377.

There was no miscarriage of justice; and, the damages being reasonable, a new trial should not be granted.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 2ND, 1918.

DIAMOND v. WESTERN REALTY LIMITED.

Vendor and Purchaser—Agreement for Sale of Land—Cancellation by Vendor—Evidence—Waiver of Right to Cancel—Counterclaim—Money Lent.

Appeal by the plaintiff from the judgment of BRITTON, J., 12 O.W.N. 226, dismissing the action and directing judgment to be entered in favour of the defendant the Western Realty Limited on its counterclaim for $400.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., LATCHFORD, J., and FERGUSON, J.A.

A. Cohen, for the appellant.

A. C. McMaster and D. C. Ross, for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that the action was for breach of an agreement between the parties, dated the 6th November, 1914, whereby the defendants agreed to sell and the plaintiff agreed to buy, for the purpose of resale as a subdivision, certain lots in or near the city of Niagara Falls, Ontario, and also for an injunction restraining the defendants from committing certain acts alleged to be done or intended to be done in violation of the agreement.

The action was founded on the assumption that the agreement was, at the time the action was begun, a valid, binding, and subsisting agreement. The defence was that the agreement had been terminated; and the defendant company's counterclaim, is so far as allowed by the trial Judge, was for a sum of money advanced by the company, at the request of the plaintiff, for the purpose of laying down water-mains.

After stating the effect of the evidence, the learned Judge said that he was convinced by it that the plaintiff, if he had not prior to the cancellation legally abandoned his rights under the contract, had in fact at least intended to abandon the property in so far as carrying on an active selling campaign was concerned. The learned Judge could not, in all the circumstances, agree with the contention that the plaintiff sought and obtained a waiver, or that the defendant company did any act whereby, between the 31st May and the 19th July, it waived its right of cancellation; and there was nothing in the evidence that made it unfair or inequitable to leave the parties to their strict legal rights, or on which the plaintiff could base a valid and enforceable claim for equitable relief.

The plaintiff appealed also against the judgment in favour of the defendant company on its counterclaim, which was allowed in respect of one item of $400. The plaintiff could not, on the evidence, escape liability as to this.

By the notice of appeal the plaintiff attacked the judgment of the trial Judge in so far as it dismissed the action against the individual defendants. On the evidence, there was no reason to differ from the findings on that part of the case.

In all respects the judgment of the trial should be affirmed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL, 2ND, 1918.

*YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

*DANNACKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

Fraud and Misrepresentation—Agreements to Purchase Land—Evidence—Rescission of Agreements—Return of Money Paid—Damages for Deceit—Judgment against one of two Joint Wrongdoers—Release of other—Judgment Pronounced on Motion—Return of Moneys Paid—Rules 35, 220, 354-358.

Appeals by the defendant MacPherson in each case from the judgment of SUTHERLAND, J., 12 O.W.N. 410.

The appeals were heard by MACLAREN, MAGEE, HODGINS, AND FERGUSON, JJ.A.

R. T. Harding, for the appellant.

R. S. Robertson, for the plaintiffs, respondents.

FERGUSON, J.A., reading the judgment of the Court, said, after stating the facts, that the appellant, with the intention of inducing the plaintiffs to purchase certain lots, and so that he might earn a commission of 20 per cent. of the purchase-price, took upon himself either to make statements that he knew to be untrue or to assert his belief and knowledge in reference to matters on which he had no real belief or knowledge; in other words, these representations were made with a reckless disregard as to whether they were true or false, and without caring whether they were true or false, so long as they served the purpose of securing the plaintiffs' contracts to purchase. Viewing the appellant's conduct in the most favourable light, he took upon himself to warrant his own belief in that which he asserted, in reference to which he was entirely ignorant, and he should be held as responsible as if he had asserted that which he knew to be untrue: Derry v. Peek (1889), 14 App. Cas. 337, and cases in Halsbury's Laws of England, vol. 20, pp. 688 to 694.

It was argued that the judgments recovered by the plaintiffs against the defendant company precluded the prosecution of these actions against the defendant MacPherson, the appellant—that the recovery was upon the claim for deceit, and that the taking

* This case and all others so marked to be reported in the Ontario Law Reports.

of judgment against one of two joint wrongdoers releases the other: cases collected in Holmested's Judicature Act, 4th ed., p 384. But our Rules differ from the English Rules: Holmested, p. 864. In this case the Court should, as in Goldrei Foucar and Son v. Sinclair (1917), 34 Times L.R. 74, treat the judgments against the defendant company as being entered upon motions for judgments on the claims for the return of moneys had and received, and not on the claims for damages for deceit. The plaintiffs by their statements of claim claimed the return of moneys had and received without consideration or on a total failure of consideration. The defendant company neither appeared nor pleaded; and it was quite open to the Court to pronounce judgments in favour of the plaintiffs for the return of the moneys paid: Rules 35, 220, 354 to 358, (Holmested, p. 862). Judgments were in fact directed to be entered against the company for sums equal to the moneys paid and interest, and it was also directed that the judgments should not prejudice the plaintiffs' right to proceed further against the defendant MacPherson. These judgments were pronounced in the presence of the defendant MacPherson, and he did not then appeal against the declaration that the plaintiffs' rights against him should not be prejudiced by the judgment; and he could not now question the authority of that pronouncement.

Appeals dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1918.

McNAIRN v. GOODMAN.

Fraudulent Conveyance—Action to Set aside—Evidence—Intent—Knowledge of Grantee—Claims of Creditors—Costs—Interest—Oppressive Bargain—Findings of Fact of Trial Judge—Appeal.

An appeal by the defendant Rachel Goodman from the judgment of CLUTE, J., 12 O.W.N. 374.

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

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

G. H. Watson, K.C., and S. J. Birnbaum, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. APRIL 11TH, 1918.

*MARSHALL v. HOLLIDAY.

Division Courts—Right of Appeal—"Sum in Dispute"—Division Courts Act, R.S.O. 1914 ch. 63, sec. 125.

An appeal by the defendant from the judgment of the First Division Court of the County of Norfolk.

The appeal came on for hearing before MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

T. J. Agar, for the plaintiff, respondent, took the preliminary objection that an appeal did not lie, the "sum in dispute" in the action being less than $100.

Section 125 of the Division Courts Act, R.S.O. 1914 ch. 63, provides that "an appeal shall lie . . . (*a*) in an action . . . where the sum in dispute exceeds $100."

The action was on a promissory note for $94.31; in the particulars endorsed on the summons, the sums of $94.31 and $4.71 interest were claimed. At the trial, the Judge added a further sum of $1.17 as interest, by way of damages, and gave judgment for $100.19 and costs.

J. E. Jones, for the defendant, appellant, contended that the appeal lay.

The Court held that the words "sum in dispute" meant "sum in dispute in the action," and that an appeal was not competent.

Appeal quashed with costs.

RIDDELL, J., IN CHAMBERS. APRIL 10TH, 1918.

*CANADA BONDED ATTORNEY AND LEGAL DIRECTORY LIMITED v. G. F. LEONARD.

Judgment—Settlement—Recovery by Plaintiffs of $100—Costs of Action—Scale of—Set-off—Rule 649—Costs of Appeal—Costs of Settling Judgment.

Settlement of the minutes of the judgment of the Second Divisional Court of the Appellate Division, 13 O.W.N. 437.

A. C. McMaster and E. H. Senior, for the plaintiffs.
J. P. MacGregor, for the defendant.

RIDDELL, J., in a written memorandum, said that—the parties not having been able to agree on the judgment—he had consulted his colleagues and gone over the matter again with care.

The judgment for the plaintiffs should be for $100 only, without a reference. As to costs, the defendant should have the costs of the appeal, and the plaintiffs should have Division Court costs of the action with a set-off of Supreme Court costs to the defendant: Rule 649.

The defendant should have the costs, fixed at $15, of settling the minutes.

FERGUSON, J.A., IN CHAMBERS. APRIL 12TH, 1918.

MAPLE LEAF LUMBER CO. v. CALDBICK AND PIERCE.

Costs—Execution for—Appeal to Supreme Court of Canada by one Plaintiff—Enforcement of Execution against Non-appealing Plaintiffs—Stay upon Payment of Amount into Court to Abide Result of Appeal—Costs of Application—Forum—Judge of Appellate or High Court Division—Supreme Court Act, R.S.C. 1906 ch. 139, sec. 76.

Motion by the plaintiffs to stay the execution issued by the defendant Pierce against the plaintiffs Reamsbottom and Edwards for the costs taxed under a judgment of the Appellate Division, dated the 26th October, 1917 (40 O.L.R. 512), whereby the action was dismissed, and the plaintiffs were ordered to pay to the defendant Pierce his costs of the trial and appeal.

The plaintiffs the Maple Leaf Lumber Company had appealed to the Supreme Court of Canada; the plaintiffs Reamsbottom and Edwards did not join in the appeal, but were made parties thereto.

The appeal of the plaintiff company had been perfected, and the execution against the company thereby stayed; but the defendant Pierce claimed the right to enforce his execution for costs against the plaintiffs Reamsbottom and Edwards.

J. A. McEvoy, for the plaintiffs Reamsbottom and Edwards.
P. E. F. Smily, for the plaintiffs the Maple Leaf Lumber Company.
J. Y. Murdoch, for the defendant Pierce.

FERGUSON, J.A., in a written judgment, said that counsel for Reamsbottom and Edwards offered to pay the amount of the execution to the solicitors for Pierce on an undertaking to return in case the order for payment of costs is reversed by the Supreme Court of Canada, or to pay the money into Court to abide the result of the pending appeal, or to give a satisfactory bond. The defendant Pierce refused to make any agreement or to accept the terms offered, insisting on his right to collect and retain, as against Reamsbottom and Edwards, the costs awarded by the judgment, contending that the order for payment of costs could not be affected by the pending appeal of the plaintiff company.

As costs are awarded as an indemnity, and not as a debt due from the losing party to the successful party, if the plaintiff company should be successful in their appeal the award of costs against Reamsbottom and Edwards would be satisfied or the order therefor rescinded; and therefore the right of the defendant Pierce to these costs must depend upon his ultimate success in the Supreme Court of Canada—if he loses, the result arrived at in Challoner v. Township of Lobo (1901), 1 O.L.R. 292, and Lindsay v. Imperial Steel and Wire Co. (1910), 21 O.L.R. 375, must follow.

An order should go directing that, upon payment into Court by the plaintiffs Reamsbottom and Edwards, to abide the result of the pending appeal, of sufficient to satisfy the execution, the execution be stayed pending that appeal.

This application was made to a Judge of the Appellate Division under sec. 76 of the Supreme Court Act, R.S.C. 1906 ch. 139; and, as the appealing plaintiffs joined in the application, there was jurisdiction under that section—see Mitchell v. Fidelity and Casualty Co. of New York (1917), 38 O.L.R. 543—to make the order; but it might also be made by the same Judge acting as a Judge of the High Court Division on the request of the Judge assigned for the week.

The plaintiffs to pay the defendant Pierce forthwith the costs of this application, fixed at $25.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. APRIL 2ND, 1918.

*COLE v. BRITISH-CANADIAN FUR AND TRADING CO.

Company—Winding-up—Action against Company Commenced before Winding-up Order—Liquidator Authorised to Continue Defence in Name of Company—Action Allowed to Proceed—Addition of Liquidator as Party Defendant—Order Set aside—Personal Liability of Liquidator for Costs.

Motion by the liquidator of the defendant company to set aside an order adding him as a party defendant.

The motion was heard in the Weekly Court, Ottawa, as in Chambers.

M. G. Powell, for the liquidator of the defendant company.

C. J. R. Bethune, for the plaintiff.

MIDDLETON, J., in a written judgment, said that one Reid carried on business as D. M. Chambers & Co. On the 27th June, 1917, he made an assignment for the benefit of his creditors to Cole, the plaintiff. On the 1st May, 1917, Reid had made a chattel mortgage to the defendant company for $10,111.78; and this action was brought for the purpose of having it set aside as fraudulent and preferential. The action was at issue on the 12th December, 1917.

On the 28th December, 1917, a winding-up order was made under the Dominion Act, placing the defendant company in liquidation, and Paul Turgeon was appointed liquidator. The order was pronounced by the Superior Court of Quebec.

On the 2nd February, 1918, that Court made an order allowing the liquidator to intervene and continue the defence of this action; and on the 15th February, 1918, at the instance of the plaintiff, the same Court made an order allowing him to continue this action against the company in liquidation.

On the 6th March, 1918, the Local Master, on the application of the plaintiff ex parte, made the order adding the liquidator as a party defendant.

When a winding-up order is made, the company does not cease to exist. Its property remains vested in it. It ceases to remain under the management of its directors and under the control of its shareholders, and is placed under the control of the

Court and of the liquidator, who is an officer of the Court for the purpose of liquidation. All actions by and against it are stayed as the effect of the liquidation; but, when it is deemed proper that the right of the company should be determined in the pending litigation rather than in the liquidation, the action is allowed to proceed. In such an action the liquidator may sue or defend either in his own name or in the name of the company. Here the Court (*i.e.*, the Court of Quebec, which has control of the liquidation) has authorised the liquidator to continue the defence of this action in the name of the company. That is, the Quebec Court has declared that, in its view, the rights of the contesting parties should be determined in the litigation pending in the Ontario Court.

There is no more right to add the liquidator as a party defendant in this action than there would have been to add the general manager or the board of directors before the winding-up. The decision in this litigation will bind the liquidator because he is the representative and executive officer of the company in liquidation.

An award of costs against the company would not be nugatory. When a company is in liquidation and is in process of being wound up, the liquidator, if unsuccessful in litigation which he is carrying on, will pay the costs out of the assets of the company being wound up, and these costs have priority over the liquidator's costs of the winding-up: In re Pacific Coast Syndicate Limited, [1913] 2 Ch. 26; In re Wenborn & Co., [1905] 1 Ch. 413.

Where for any reason the liquidator sues or defends in person, he makes himself personally liable for costs, but no such personal liability should be imposed upon him, for he is an officer of the Court, and is only discharging his official duty.

The order should be set aside, with costs to be paid by the plaintiff in any event of the action.

MIDDLETON, J. APRIL 2ND, 1918.

*RE NEWCOMBE.

Will—Construction—Specific Pecuniary Legacies—Out of what Property Payable—Whether Charged on Land Specifically Devised—Whether Payable out of Money Deposited in Bank—Residuary or Specific Bequest of "All Other Property which I Possess in Canada."

Motion by the executor of the will of James Kivelle Newcombe, deceased, for an order determining a question as to the meaning and construction of the will.

The motion was heard in the Weekly Court, Toronto.

J. H. Bone, for the executor.

G. C. Campbell, for the administrator of the Barrick estate.

W. G. Thurston, K.C., for Jack Carr Newcombe and Arthur Newcombe.

R. H. Parmenter, for pecuniary legatees.

F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that the testator died on the 19th March, 1917, in England. His will, dated the 5th February, 1914, had been admitted to probate in England and in Ontario.

The estate consisted of: (1) cash in a bank in Toronto, $17,807; (2) cash in a bank in England, $320; (3) money in England, $243; (4) plot in a cemetery in Toronto, $50; (5) five stores in Toronto, $50,000: total, $68,420.

The testator appointed Henry Mason executor, and gave him $1,000 as a memento of his friendship.

The testator then gave his cousin Annie, who predeceased him, an annuity of $600, to be provided from the rents of the five stores—"my nephews to whom (as shewn below) I bequeath that said property contributing this charge in such proportion as they shall mutually agree or failing their agreement as my executor shall deem just." The testator then gave to the same lady all his property in England. Then followed a legacy of $5,000 to his niece Catharine Newcombe, and "subject to the above-mentioned charges I give and bequeath to my nephews Jack Carr Newcombe and Arthur Newcombe my real property in Church street" that is, the five stores, two to Jack and three to Arthur. "All other property than the above-mentioned which

I possess in Canada" he divided equally among his sister, his brother's widow, and Catharine Newcombe, save that the burial-plot was given to Dr. Barrick.

On this will a question arose as to how the pecuniary legacies were to be paid. Three views were propounded:—

(1) That the legacies were charged upon the lands given to the nephews.

(2) That the legacies failed, as the English money was required to pay debts, and the last gift was specific.

(3) That the last gift was in its nature residuary, or was of what remained of the Canadian assets after payment of the legacies.

The pecuniary legacies were not in express terms charged upon the lands in Ontario. It was argued that the use of the word "charges" not "charge," in the gift "subject to the above-mentioned charges," had the effect of charging the legacies, as well as the annuity, on the lands. But the annuity was made a charge, and the legacies were not. The change to the plural was not enough. No intention that the stores should be the source of payment of the legacies could be found in the will.

The $17,807 on deposit in a bank in Toronto was the only other available source. The small sums in England were given as specific legacies.

The question then arose, whether the $17,807 was also the subject of a specific legacy so that it had as a matter of law priority over the pecuniary legacies.

There was no other residuary gift; and, if this legacy, which was wide enough to cover any residue, for it was of "all other property than the above-mentioned," was to be regarded as specific, it was because the testator had added the words "in Canada." But, as he had property only in Canada and in England, and had already given the English property to the English cousin, the addition of these words had no effect unless they made the legacy specific.

The absence of any other residuary gift, the generality of the terms used, the failure of gifts which the testator must have intended to be effective if this fund was not available, the use of the word "other," all convinced the learned Judge that the gift was essentually residuary in its nature.

The words "in Canada" were not added with the view of making the gift specific, but simply because all in England had already been given.

A residuary gift may have limitations: Mason v. Ogden, [1903] A.C. 1.

Reference also to In re Balls, [1909] 1 Ch. 791; In re Woolley, [1918] 1 Ch. 33.

Order declaring that the pecuniary legacies of $1,000 and $5,000 are payable out of the fund of $17,807; costs out of the estate.

LENNOX, J. APRIL 2ND, 1918.

RE HODGKINS.

Will—Construction—Gift of Residuary Estate—Life-estate—Enjoyment in Specie—Right to Encroach upon Corpus—Gift over on Termination of Life-estate.

Application by the executor of the will of Albert E. Hodgkins for an order determining a question as to the meaning and construction of the will.

The motion was heard in the Weekly Court, Ottawa.

J. Ogle Carss, for the executor.

A. C. T. Lewis, for the Official Guardian.

LENNOX, J., in a written judgment, said that, after directing payment of debts and funeral and testamentary expenses and making certain specific pecuniary bequests, the testator by his will provided:—

"The residue of my estate including money real estate and personal property I give to my sister Mrs. Sarah Warren during her lifetime and any balance at her death to be divided equally between her two youngest daughters. My sister Mrs. Warren to have the privilege of taking any of my household effects that she desires and the balance to be sold by auction. My real estate to be sold to the best advantage at any time after my decease and the proceeds from the sale of my real estate and personal property to be paid over to my sister Mrs. Sarah Warren with the request that any balance at her decease she is to divide equally between her two youngest daughters."

The learned Judge, after a discussion of the authorities, stated his conclusion that Sarah Warren takes a life estate only in the residuary estate of the testator, with the right to enjoy it (including the proceeds of the real estate) in specie, and in trust for the ultimate beneficiaries—with a possible right to encroach upon the corpus. Subject to this, the two youngest daughters of Sarah

Warren take the residuary estate absolutely at the death of their mother in equal shares under the will.

Among other cases, the following were cited: Re Miller (1914), 6 O.W.N. 665; Re Cathcart (1915), 8 O.W.N. 572; Constable v. Bull (1849), 3 DeG. & Sm. 411; Bibbens v. Potter (1879), 10 Ch.D. 733; In re Sanford, [1901] 1 Ch. 939; Osterhout v. Osterhout (1904), 7 O.L.R. 402, 8 O.L.R. 685; Re Johnson (1912), 27 O.L.R. 472; In re Walker, Lloyd v. Tweedy, [1898] 1 I.R. 5.

Order declaring accordingly. Costs of all parties, to be taxed as between solicitor and client, out of the estate.

MIDDLETON, J. APRIL 6TH, 1918.

RE BOYER.

Will—Construction—Absolute Devise to Son, Subject to Payment of Legacies—Clause Providing for Event of "Heirs" of Testator Dying Leaving No "Heirs"—"Heirs" Construed as Meaning "Children"—Clause not Applicable to Devise to Son—"Portion or Sum so Bequeathed"—Application to Legacies only.

Motion by the executors of the will of Elias Boyer, a deceased son of Henry Boyer, also deceased, for an order determining the meaning and effect of the will of Henry Boyer.

The motion was heard in the Weekly Court, Toronto.

T. R. Ferguson, for the applicants.

V. A. Sinclair, for the surviving brother and sister of Elias Boyer.

MIDDLETON, J., in a written judgment, said that Henry Boyer died on the 26th August, 1879, having made his will on the 12th May, 1879. Henry Boyer left him surviving his widow and his sons John, Elias, and Henry, and his daughters Lena, Mary, Barbara, and Catharine. He devised to Elias, "his heirs executors administrators or assigns when he shall come of age on 21st May 1882 after paying the legacies hereinafter specified the north half of lot 37 in the 2nd concession . . . " Then followed legacies to be paid by Elias, $600 to John, $500 to the widow, and $400 to Lena. In similar terms, the south half of the same lot was given to Henry, charged with $600 to Barbara, $600 to Catharine, $600 to Mary, and $200 to Lena—Lena getting $600

in all. If Elias did not accept the land given him, on the terms stated, the executors were empowered to sell and give Elias $1,200 and pay the legacies charged on that parcel, and give the widow any surplus.

Then followed this clause: "In case any of my said heirs shall die and leave no heirs the said portion or sum so bequeathed to any one of them to be divided equally among the other heirs herein mentioned."

Elias accepted the land and paid the legacies; he died on the 23rd February, 1918; he was married, but left no issue. By his will he gave his widow his goods, $800 cash, his live stock, and $2,000 out of the proceeds of his farm, which his executors are to sell. The residue of his estate is then to be divided among his nephews and nieces living at his death and the daughter of a deceased nephew.

The daughter Mary and son John, the only children of Henry who survived Elias, contended that they took under the clause quoted.

Manifestly, "heirs" was not, in that clause, used in its technical sense; it was intended to mean "children;" and the clause would then read: "In case any of my said children shall die and leave no children the said portion or sum so bequeathed to any one of them to be divided equally among the other children herein mentioned."

Cowan v. Allen (1896), 26 S.C.R. 292, makes it plain that, if the clause applies to the devise to Elias, it is a valid executory devise. The same case shews that In re Parry and Daggs (1885), 31 Ch.D. 130, has no application.

The learned Judge was, however, of opinion that the clause had no application to the devises to the sons. What was to go over was not the land devised, but the "portion or sum so bequeathed," and this was to be divided equally among the other heirs. The clause must be read as applicable to the sums given in money, which alone could be called portions or sums," and they could readily be divided. The clause, thus construed, refers to death without issue before payment of these sums, and not to death at any time.

When there is, as here, a gift in terms clearly sufficient to give an absolute title, the gift can be cut down only by finding a clear intention to cut down expressed in the will. Such an intention could clearly not be found in this will—indeed nothing was further removed from the testator's mind, as it was revealed in the will.

Order declaring that Elias took the fee simple in the land.

There being no estate of Henry Boyer, no order as to costs.

MIDDLETON, J. APRIL 8TH, 1918.

RE TAYLOR AND TOWN OF PORT STANLEY.

Municipal Corporations—By-law of Town—Sanitary Requirements—Municipal Act, sec. 500—Portions of By-law Exceeding Powers of Municipality—Distinct and Separate Clauses—Quashing Part of By-law—Costs.

Motion by C. F. Taylor for an order quashing by-law 444 of the Town of Port Stanley.

The motion was heard in the Weekly Court, London.

W. B. Doherty, for the applicant.

J. S. Robertson, for the Corporation of the Town of Port Stanley.

MIDDLETON, J., in a written judgment, said that the by-law was passed under sec. 399, sub-secs. 10, 11, and 12, of the Municipal Act. Sub-section 10 relates to the passing of a by-law regulating the construction of water-closets, earth-closets, privies, etc., and the cleaning and disposal of the contents.

Sub-section 11 empowers the council to require the use of earth-closets.

Sub-section 12 enables the council to require that the cleaning of closets and disposal of the contents shall be done exclusively by the municipality.

And this section further enacts that the expense shall be recoverable in the manner provided by sec. 500 of the Municipal Act.

This by-law had a number of distinct clauses. Clause (1) related to the construction and disinfection of closets; (2) to the employment by the corporation of an officer whose duty it should be to remove the contents; (3) required all closets to be constructed in accordance with certain requirements looking to a sanitary condition; (4) fixed certain sums to be paid by owners for the services of the officer in the removal of the contents of closets; (5) required a statement of these charges to be prepared, and provided for the payment of the prescribed amounts with the taxes; (6) provided against the deposit of refuse in closets; (7) provided penalties for breach of the by-law.

All the provisions of this by-law except clauses 4 and 5 were good and warranted by the Municipal Act.

Clauses 4 and 5 were bad. The provisions of sec. 500 only enable the actual cost to be charged against the particular premises, and do not enable the municipality to fix a sum to be charged by

it for the services. As pointed out on the argument, this is not practicable.

The clauses are quite distinct from the valid provisions of the by-law, and they should be quashed, leaving the valid provisions operative.

The effect of this is that the town council has now passed a by-law requiring sanitary closets, and for the appointment of an officer to remove the contents, but his remuneration must be provided from the general rates of the municipality, and not by a fixed charge upon the separate premises.

As success is divided, no costs.

FALCONBRIDGE, C.J.K.B. APRIL 8th, 1918.

*McCALLUM v. COHOE.

Husband and Wife—Liability of Wife on Promissory Note and Agreement Executed by her for Benefit of Husband—Lack of Consideration and of Independent Advice—Duress—Threats—Agent of Person in whose Favour Documents Executed—Evidence.

Action against a man and his wife to recover a sum of $500, and for a mandatory injunction directing the defendants to execute and deliver to the plaintiff a mortgage on all real estate owned by them or either of them.

The action was tried without a jury at Woodstock.

A. H. Boddy, for the plaintiff.

R. N. Ball, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that Cohoe had been buying wheat for the plaintiff on a commission basis; from time to time Cohoe drew on the plaintiff for amounts supposed to represent what he had to pay for the wheat; it was found, after a time, that Cohoe had considerably overdrawn; and it was agreed between the plaintiff and Cohoe that there should be an arbitration to determine the amount of the latter's indebtedness. Before the arbitration, Cohoe and his wife both signed a promissory note payable on demand to the order of the plaintiff for $1,500—as an evidence of good faith, it was said. The wife also signed a submission to arbitration whereby

it was recited that the plaintiff agreed, in case the arbitrators should find Cohoe and his wife or either of them indebted to the plaintiff in a greater amount than $1,500, he would accept $1,500 in full satisfaction of the indebtedness; and it was provided that, if the indebtedness should exceed $500, that sum should be payable forthwith after award; and the defendants further agreed to give a mortgage for the balance of indebtedness. The arbitrators found that Cohoe was indebted to the plaintiff in a sum greater than $1,500. No money was paid, and no mortgage was given; and so this action was brought.

Cohoe had no defence, and judgment should go against him with interest and costs.

As to the wife, who was not in any way connected with the business between her husband and the plaintiff, the learned Chief Justice finds that she had no legal and independent advice when she signed the note and the submission to arbitration; that there was no consideration to her for signing; that she signed by reason of a threat that the plaintiff would cause her husband to be arrested if she did not do so. The threat was made by one McLachlin, a bank manager, who went to the Cohoes with the note. McLachlin, according to his own evidence, said to the wife, "McCallum told me he would have Cohoe arrested if he did not settle." McLachlin afterwards told the plaintiff, what he (McLachlin) had said to Mrs. Cohoe; and the plaintiff, after receiving the information, never repudiated or disavowed the transaction. McLachlin was thus an agent of the plaintiff so as to bring the case within the rule stated in Anson on Contracts, 6th ed., p. 174, that the threat must be by the other party to the contract or else by some one with his knowledge for his advantage.

Moreover, the other facts found in favour of the wife were sufficient to establish her defence: Bank of Montreal v. Stuart, [1911] A.C. 120; and other cases.

Action dismissed as against the wife without costs.

MEREDITH, C.J.C.P., IN CHAMBERS. APRIL 9TH, 1918.

SMITH v. TOWNSHIP OF TISDALE AND BRINTON.

SMITH v. TOWNSHIP OF TISDALE AND CHARETTE.

Appeal—Leave to Appeal from Orders of Judge in Chambers—Security for Costs—Rule 507 (3) (b).

Motions by the defendants, under Rule 507, for leave to appeal from orders of MIDDLETON, J., in Chambers, made upon appeals by the plaintiff from orders of a Local Judge requiring the plaintiff to give security for the costs of the two actions.

In the Charette action, MIDDLETON, J., discharged the order for security. In the Brinton action, he allowed the appeal to the extent of extending the usual time for giving the security until after the trial or other final disposition of the Charette action.

A. G. Slaght, for the defendants.
J. M. Ferguson, for the plaintiff.

MEREDITH, C.J.C.P., in a written judgment, after setting out the facts and circumstances of the cases, said that, in his opinion, important questions were involved in the proposed appeals and there was good reason to doubt the correctness of the orders: Rule 507 (3) (*b*).

Leave to appeal should be granted; and the costs of these motions should be costs in the action to the defendants only in any event.

LENNOX, J. APRIL 9TH, 1918.

RE McCALLUM.

Will—Construction—Provision for Widow, whether in Lieu of Dower—Election between Dower and Benefit under Will—Allowance to Widow for Board and Lodging—Amount of—Devise Subject to Charge on Land—Duty of Executor where Devisee Fails to Accept or Reject Devise.

Motion by the executor of the will of Peter J. McCallum, deceased, upon originating notice under Rule 600, for an order

determining certain questions as to the meaning and effect of the will.

The motion was heard in the Weekly Court, London.
C. St. Clair Leitch, for the applicant.
R. L. Gosnell, for the widow.
J. D. Shaw, for the devisees of the real estate.

LENNOX, J., in a written judgment, said that the testator died on the 21st December, 1915, having made a will dated the 23rd April, 1915, and a codicil thereto dated the 4th June, 1915.

The property of the testator at his death consisted of a farm with dwelling and buildings thereon, worth $6,500, and personal estate of about the value of $4,400.

The testator, by the will, devised the farm to his two nephews equally, subject to the following charges: $500 each to two nieces, to be paid to them by the devisees "out of my real estate within one year from the date of my death;" the devisees "shall also pay to my wife . . . $175 per year for and during . . . her . . . life and shall allow her the use of the dwelling-house on my farm so long as she lives." To his wife he also bequeathed all his household goods and furniture, money, securities for money, and other personal estate, absolutely.

By the codicil, the testator directed that his wife should be provided by the two devisees with a home instead of having the use of the house on the farm; and, if she preferred to live elsewhere, the devisees should pay her board and lodging in a place that should be satisfactory to her; and he made this a charge on the land.

The learned Judge said that, on the evidence, the farm should rent for about $250 a year and taxes and statute labour. The charges on the land in favour of the widow would amount to $400, putting her board and lodging at $225; and, after reviewing the authorities, he said that he was clearly of opinion that the widow was not entitled to dower in addition to the provision made for her by the will, and was put to her election.

The principal cases referred to were: Becker v. Hammond (1866), 12 Gr. 485; Westacott v. Cockerline (1867), 13 Gr. 79; Marriott v. McKay (1892), 22 O.R. 320; and Re Allen (1912), 4 O.W.N. 240.

(2) There was no evidence before the learned Judge which would enable him to determine what would be a fair allowance to make to the widow for board and lodging.

(3) The question was asked: "The devisees not having taken possession of the property devised, or accepted or rejected the

devise, what course should the executor pursue?" The learned Judge answered this by saying that if the devisees and executors did nothing in the meantime, the land would be vested in the devisees at the end of three years. If they renounced or refused, the executors could obtain the assistance of the Court in disposing of the land and making provision for the money charged upon it.

Order declaring accordingly; costs of all parties out of the estate—on a solicitor and client basis to the executor.

FALCONBRIDGE, C.J.K.B. APRIL 9TH, 1918.

MOORE v. NIAGARA ST. CATHARINES AND TORONTO R.W. CO.

Negligence—Collision between Automobile and Street-car—Negligence of Street Railway Company—Evidence—Excessive Speed—Failure to Sound Bell or Whistle—Contributory Negligence—Ultimate Negligence.

Action for damages for injury to the plaintiffs' automobile by collision with a street-car of the defendants. The plaintiffs alleged negligence on the part of the defendants' servants operating the street-car.

The action was tried without a jury at St. Catharines.

A. C. Kingstone and F. E. Hetherington, for the plaintiffs.

A. J. Reid, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that he preferred the evidence of the plaintiffs' witnesses as to the high rate of speed of the defendants' car, and found also that the whistle was not sounded—admittedly no bell was rung.

Mr. Rutherford's measurements and estimates of the distance at which the plaintiff Darwin Moore could and ought to have seen the approaching street-car were accepted by the plaintiffs; and the Chief Justice visited the locus, accompanied by both counsel. The result was that he found that Darwin Moore was guilty of contributory negligence, disentitling the plaintiffs to succeed, in attempting deliberately to cross the track, in front of the street-car.

No case of ultimate negligence on the part of the defendants was made out.

The action should be dismissed—in all the circumstances without costs.

Reference to Grand Trunk R.W. Co. v. McAlpine, [1913] A.C. 838; Beven on Negligence, 3rd ed., pp. 140, 141; McEachen v. Grand Trunk R.W. Co. (1912), 2 D.L.R. 588, 3 O.W.N. 628.

LATCHFORD, J. APRIL 11TH, 1918.

FORSYTH v. WALPOLE FARMERS MUTUAL FIRE INSURANCE CO.

Insurance (Fire)—Contents of Barn—Hay Piled outside Barn not Included—Limitation of Liability—Provision in Application—Insurance Act, R.S.O. 1914 ch. 183, sec. 156 (3)—Mutual Insurance Company—Membership in, of Assured—By-law—Actual Cash Value of Property Destroyed.

Action upon a policy of insurance issued by the defendants to the plaintiff on the 26th August, 1916, insuring him against loss by fire on the "ordinary contents" of a barn to the extent of $1,600 and on certain live stock to the extent of $600.

The action was tried without a jury at Cayuga.

R. S. Colter, for the plaintiff.

T. J. Agar, for the defendant.

LATCHFORD, J., in a written judgment, said that on the 11th December, 1916, during the currency of the policy, the barn was burned. Its contents were then, it was admitted, of the actual cash value of $850.

The plaintiff contended that the defendants were liable to him for the damages which he sustained by reason of the burning of certain stacks of hay, about 100 tons in all, not in the barn, but piled near it. His contention was based on what he understood the defendants' agent to have represented, that hay stacked as this was, within 80 feet of the barn, was to be regarded as covered by the policy.

This part of the plaintiff's claim should be rejected. Hay stacked outside the barn could not be considered to be included in the word "contents."

The defendants did not deny liability, but said that it was limited to two-thirds of the value of the property destroyed.

They based this limitation on a term in the application printed on the form signed by the plaintiff on the 10th July, 1916, in the following words: "Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise."

The policy referred to the application as forming part of the policy.

By sec. 156 (3) of the Insurance Act, R.S.O. 1914 ch. 183, the application shall "not as against him be deemed a part of or to be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insured was induced to enter into the contract."

It was not pleaded or proved that the application contained any misrepresentation whatsoever.

The case therefore was to be considered upon the terms of the contract expressed by the policy.

No proof was given that $1,600 was more than two-thirds of value of the contents of the barn at the time the insurance was effected.

The defendants had the right, under the application, to limit their liability to two-thirds of the amount of the loss.

The insurance was against loss or damage by fire, "such loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen and shall not exceed the said amount insured, nor the value of the interest of the assured in the said property."

The contract, instead of placing a two-thirds limitation on its liability for loss, expressly fixed that liability at the "actual cash value of the property destroyed," and that value, it was conceded, was $850.

Although not pleaded, it appeared that, by signing a premium note, when applying for the insurance, the plaintiff became, under sec. 123 of the Act, a member of the defendants as a mutual insurance company. No by-law of the company was proved. An extract from a by-law, not verified in any way, and not admitted as authentic by the plaintiff, had recently been sent to the learned Judge. It stated, like the application, that "not more than two-thirds of the value of any building or other property will be insured by the company." There was no evidence that not more than such value was insured. Then again the defendants were confusing the value of the property insured with the loss which they agreed to pay.

The actual cash value of the contents of the barn destroyed by fire being $850, there should be judgment for the plaintiff for that amount, with costs on the High Court scale, without set-off.

LENNOX, J. APRIL 12TH, 1918.

*McFADDEN v. McFADDEN.

Husband and Wife—Alimony—No Allowance for Period before Day of Commencement of Action—Allowance from that Day—Reference—Costs.

Motion by the plaintiff for judgment on the statement of claim, in default of defence, in an action for alimony.

The motion was heard at a sittings for trials at Sault Ste. Marie.
T. E. Williams, for the plaintiff.
The defendant did not appear.

LENNOX, J., in a written judgment, said that the plaintiff in the statement of claim alleged marriage, desertion, ability of the defendant and his neglect to support or provide for the plaintiff, and claimed alimony and interim alimony, which was the claim endorsed on the writ of summons, and also "six years' back alimony."

The plaintiff and defendant were married in 1872. The defendant, without cause or justification, abandoned the plaintiff about 22 years ago, and since that time had not supported or provided for her, and had lived in adultery with another woman.

There was some evidence of the defendant's means, but not sufficient to enable the Judge to fix the amount of alimony.

The alimony adjudged could not cover any part of the period before the day of the commencement of the action. But it should run from that day.

Robinson v. Robinson (1728), 3 Lee Eccl. R. Appx. 593, explained and distinguished.

Reference to Coombs v. Coombs (1866), L.R. 1 P. & D. 218; Madan v. Madan and De Thoren (1867), 37 L.J.P. & M. 10, 17 L.T.R. 326; Soules v. Soules (1851), 3 Gr. 113.

The plaintiff should have her full costs of suit: Soules v. Soules.

Judgment for alimony, with a reference to the Master at Sault Ste. Marie to fix the amount. Costs of the plaintiff of the action, motion for judgment, and reference, to be taxed on a solicitor and client basis and paid by the defendant.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. APRIL 13TH, 1918.

REX v. ROSARRI.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41(1)—Having Liquor in Place other than Private Dwelling-house—Evidence—Sec. 88 of Act—Question for Magistrate—Motion to Quash Conviction.

Motion to quash a conviction of Francesco Rosarri, by a magistrate, for an offence against sec. 41(1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, by reason of the defendant having intoxicating liquor in a place other than his private dwelling-house.

G. H. Pettit, for the defendant.
J. R. Cartwright, K.C., for the Crown.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that Rex v. Le Clair (1917), 39 O.L.R. 436, was conclusive in a case like this. Under sec. 88 of the Ontario Temperance Act, it was "a question for the magistrate; and his decision cannot be reviewed upon a motion to quash." The magistrate may not have believed the defendant—the Court could not accept statements of what the magistrate said as to this—or he may have thought that, as the defendant did not say that he paid duty on the liquor, his possession could not be lawful.

Motion dismissed with costs.

LENNOX, J. APRIL 13TH, 1918.

*CITY OF TORONTO v. TORONTO R.W. CO.

Street Railway—Agreement with City Corporation—Construction—55 Vict. ch. 99, sec. 25 (O.)—Claim of City Corporation to Recover Moneys Expended in Removing Snow and Ice from Railed Streets of City—Liability of Street Railway Company—Jurisdiction of Court—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, secs. 21, 22—63 Vict. ch. 102, sec. 5 (O.)—4 Edw. VII. ch. 93, sec. 3 (O.)

Action to recover $14,391.47 which the plaintiff, the Corporation of the City of Toronto, alleged it was compelled to expend in

removing snow and ice from certain streets of the city in consequence of a breach of contract and negligence on the part of the defendant company, and to recover interest on the sum named.

The action was tried without a jury at Toronto.

W. N. Tilley, K.C., and C. M. Colquhoun, for the plaintiff corporation.

D. L. McCarthy, K.C., for the defendant company.

LENNOX, J., in a written judgment, said that the plaintiff corporation relied mainly upon conditions 21 and 22 of an agreement of the 1st September, 1891, between G. W. Kiely and others and the plaintiff corporation, as interpreted and settled by sec. 25 of the Act incorporating the Toronto Railway Company, 55 Vict. ch. 99 (O.)

After setting out sec. 25 and conditions 21 and 22, the learned Judge said that the defendant company came to trial upon the defences: (1) that it had carried out all obligations imposed upon it in regard to the removal of snow and ice, and the alleged expenditure by the plaintiff corporation, if made, was voluntary; (2) that, if the expenditure was made, it was not made bona fide, but was recklessly and wastefully made for purposes other than those alleged in the statement of claim.

At the opening of the trial, the defendant company was allowed to amend by setting up the absence of jurisdiction of the Court and the exclusive jurisdiction of the Ontario Railway and Municipal Board, under the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, particularly sec. 22; and the plaintiff corporation was allowed to reply denying the exclusive jurisdiction of the Board, and setting up that, if it purported to confer exclusive jurisdiction, it was ultra vires.

As to the question of jurisdiction, the learned Judge said that, under sec. 22, the jurisdiction of the Board was very wide—"exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act;" but, upon a careful reading of sec. 21, it did not appear that the plaintiff corporation was compelled to make an "application" to the Board for redress in respect of something that the defendant company ought to have done and failed to do, thereby occasioning loss to the plaintiff corporation. The learned Judge was not prepared to say that the plaintiff corporation was limited to the Board as the tribunal from which redress must be sought.

Reference to an Ontario Act "respecting certain matters pertaining to the City of Toronto," 63 Vict. ch. 102, sec. 5, and an

Ontario Act "respecting the Toronto Railway Company," 4 Edw. VII. ch. 93, sec. 3.

Assuming jurisdiction, the learned Judge then construed sec. 25 of 55 Vict. ch. 99 and conditions 21 and 22 of the agreement referred to, and concluded against the defences set up.

He added that, if damage had been occasioned to any one using the streets by reason of their condition as to snow and ice, amounting to negligence, both city corporation and company would have been liable; and, if the city corporation alone was sued, the company would be liable over: Toronto R.W. Co. v. City of Toronto (1895), 24 S.C.R. 589.

There should be judgment for the plaintiff corporation for $14,391.47, with interest from the date of the commencement of the action and with costs.

PRESTON v. BARKER—BRITTON, J.—APRIL 12.

Parent and Child—Sum of Money Handed by Father to Daughter —Loan or Gift—Evidence.]—Action by Anthony Preston against Samuel Barker to recover $2,000 which the plaintiff alleged was borrowed from him by his daughter, who was the wife of the defendant, and who died in April, 1916. The action was tried without a jury at Brockville. BRITTON, J., in a written judgment, said that the action was against the defendant personally and as administrator of the estate of his deceased wife. It appeared that the plaintiff handed the money to his daughter, who gave it to the defendant; the defendant used it to pay part of the purchase-price of a farm, the conveyance of which he took in his own name. The question was, whether the $2,000 was a loan or a gift. The learned Judge reviewed the evidence, and found that it was a gift. Action dismissed without costs. H. A. Stewart, for the plaintiff. W. A. Lewis and Fitzpatrick, for the defendant.

HOWIE v. HOWIE—FALCONBRIDGE, C.J.K.B.—APRIL 12.

Partnership — Account — Reference — Receiver — Security — Receiver to Carry on or Sell Business.]—Motion by the plaintiffs for an order of reference to take partnership accounts; heard in the Weekly Court, Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that it seemed to him that the plaintiffs were more anxious to embarrass the defendant (who happened to be their father) than in good faith to protect their own interests. There should be a reference to the Master at Brantford to take the accounts. The defendant was the proper person to be appointed receiver. The Master should settle the amount of security to be given by the receiver, the Chief Justice suggested, at the lowest amount necessary to protect the plaintiffs' interests. The receiver ought to be at liberty to carry on the business or to sell it out and pay the purchase-money into Court, as he might be advised. Costs in the cause. A. M. Harley, for the plaintiffs. W. S. Brewster, K.C., for the defendant.