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HIGH COURT OF JUSTICE.

BOYD, C. APRIL 24TH, 1911.

McLELLAN v. McLELLAN.

Donatio Mortis Causa—Gift of Cheque with Delivery of Bank Pass-book—Cheque not Presented in Donor's Lifetime—Cheque for Less Amount than Balance in Bank—Bank Protected in Payment—Invalidity as to Defendant—Doctrine of Donation—Object of Delivery of Pass-book—Intention of Depositor to Give Part Only of Deposit—Nuncupative Administration—Gift Coupled with Trust—Evidence—Costs—Bills of Exchange Act, secs. 127, 167.

Action by executors of John McLellan against the defendant to establish their claim to a sum of money paid into Court by the Sterling Bank under the circumstances mentioned in the judgment.

I. B. Lucas, K.C., and G. Robb, for the plaintiffs.
C. R. McKeown, K.C., for the defendant.

BOYD, C.:—This is a case of unique cast and of unwonted difficulty. The immediate origin of the litigation is to be traced to an error made by the Sterling Bank, who are not parties on the record, out of which complications have arisen that may not be ended by this suit.

On November 24th, 1910, a pass-book of John McLellan with the Sterling Bank at Alton, accompanied by a cheque for $2,750 purporting to be signed by him, was presented for payment by the defendant, which was honoured by the Bank. The defendant said he would leave the amount with the bank: he deposited another $250 and then opened two accounts, $2,000 in the savings department, and $1,000 in current account, and received two pass-books with corresponding entries. The original

depositor John had died on the 21st November and both the banker and the defendant knew this to be the case. Next morning the local officer asked the head office if he had done right, and one of the plaintiffs (executor of the deceased) complained of the bank's action, with the result that four days later the $2,750 was taken from the defendant's account and transferred to the account of the estate. The bank paid $250 to the defendant as part of the current account, but refused to honour his call for the $2,750. For this amount the defendant brought action against the bank, and the bank upon paying $2,750 into Court obtained an order from the Master in Chambers staying that action until the executors had an opportunity of making good their claim as against the defendant. Hence the present action, in which questions have been raised affecting the bank which I do not mean to deal with in any way to the prejudice of the bank. The parties have assented to the form of the Chamber order, but it seems to me a better course would have been to bring in the executors as parties to the first action, which has been stayed pending the result of this.

With this preface, a brief narrative of prior events may be given. The testator died of Bright's disease at three in the morning of the 21st day of November, 1910, aged 55 years. He had been living on his farm with his mother 89 years old and his sister aged 65, who attended to household matters and little else. He had made his will on the 29th January, 1910, and the value of the estate was about $9,000. Apart from this there was a life policy for $1,000 payable to his brother, one of the executors and plaintiffs. The farm had been sold for $6,900; he had received cash $2,000 and a mortgage at 4½ per cent. for the balance $4,900; this was the chief asset. He had also 3 sums of money, $2,866 in the Sterling Bank at Alton, $215 in the Bank of Commerce at Orangeville, and $118 at the Bank of Hamilton at Orangeville. During his last illness, he was attended by Mrs. Lemon as a nurse from the 16th October, 1910, till his death, with the exception of four days from the 13th to the 17th November. On the 17th November he moved from the farm (he had arranged for living there for a time after the sale) to Mrs. Lemon's house, where he was alive four days longer.

The defendant, a brother of the deceased, was living in Winnipeg, and in response to a letter, at the end of October came down to see his brother and then promised to stay with him, and he did so, taking care of him till the death. For four days between the 13th and the 16th November the only inmates

of the farm house were the two brothers, the sister and the mother.

The evidence shews that the deceased was in possession of all his faculties, of good memory and understanding, able to discuss business, though weak physically. This is the concurrent testimony of three respectable witnesses, Mrs. Lemon and her husband and her husband's cousin. Such was his condition to the last, and his death was unexpectedly sudden.

Now I will summarize what occurred according to the defendant's version of the facts. Some days before the testator left the farm he spoke to the defendant about the terms of his will, and said he wished to leave more to the defendant if he could remodel his will: on the 15th November they went over the amount of the testator's property and the defendant made it out to be $10,700. The testator said he did not think he had more than $9,000, and then they figured out how much interest might be realized, first on $10,000, and then on $7,500. The defendant said he did not care for any further benefit by a will, and testator said if he did not make a new will, he would not give it to the defendant except in cash. Next day, Wednesday the 16th November, the testator asked defendant to get the cheque book and write out a cheque, and after some figuring the amount was fixed at $2,750: the testator signed it and gave the cheque on, and the pass-book of the Sterling Bank, to the defendant the same night. He also dictated and signed a letter of the same date to be given to the plaintiff Richard Thomas, one of the executors. He left his house and went to Lemon's next day, and on Friday the 18th November, he signed a cheque on the Bank of Hamilton in blank and one on the Bank of Commerce in blank and gave these and the two pass-books of these banks to the defendant, in order to draw all the money with accrued interest therein deposited to the testator's credit. These three cheques and the letter to Thomas and the pass-books were all held by the defendant till the morning of the 21st November, when he presented the cheques and books at the different banks. The two cheques in blank were stamped of that date, the 21st November, and filled up for the amounts with the interest, the one for $215 and the other for $118, and these moneys were received by the defendant. The money obtained from the Bank of Commerce was, with some of his own money, deposited to his own account at the Sterling Bank as already stated, and the money from the Bank of Hamilton after being drawn out by him was soon afterwards returned to the same bank by the defendant and placed to the credit of the executors. The defendant says

that the testator told him to draw out this money from the Bank of Hamilton and have it transferred to the testator's account in the Sterling Bank at Alton. The defendant also says that the testator told him to take and keep the Bank of Commerce money in trust for his mother. In his pleading the defendant says that this sum of money was never part of the testator's estate, but was held by the testator in trust for his mother, and that he was therefore instructed by the testator to retain the same for the mother as being her property. This claim, as to the $215, is one of the matters now in controversy, being introduced as a supplemental cause of action in addition to the main one in respect of the $2,750 from the Sterling Bank. There is no dispute now as to the amount from the Bank of Hamilton which is under control of the executors. There is a dispute on the evidence as to whether the Bank of Hamilton knew of the death before payment, but this is not now of importance.

The defendant does not contradict the account given of the payment by the officer of the Bank of Commerce. Mr. Lugsdin says the defendant told me the depositor was very sick; that he was acting for him in changing the account, and that he was taking the amount down for that purpose to the Sterling Bank at Alton. The depositor had died at 3 o'clock that morning, of which the defendant had been advised early by a special messenger, and thereupon he visited the different banks that morning.

Quoad this bank this payment is protected by the Bills of Exchange Act, sec. 167, as notice of the customer's death is not brought home to the banker. But the receipt of the money by the defendant is invalid unless he can support his claim by invoking the doctrine of donation. The same situation exists as to the other sum of $2,750, save that the executors would have recourse for that to the bank as well as the defendant, for both were in pari delicto in the misapplication of the assets of the estate. The cheque of itself had no operation as an assignment of what it called for; that is now expressly declared by the Bills of Exchange Act, sec. 127, therefore to support a donation, it must be one mortis causa, and not inter vivos. The giving of a cheque and the pass-book therewith did not amount to a completed gift inter vivos—the attempted completion by payment after death was too late and therefore inoperative. The law is well settled that the delivery of the donor's cheque on his banker which is not presented before the donor's death is not a good donatio mortis causa, because the death is a revocation of the authority to pay. There may be special circumstances which

will satisfy the Court that though payment was not actually made before death, there was no revocation contemplated even if death did intervene, and of this an example may be found in Bouts v. Ellis, 17 Beav. 121, as decided on appeal in 4 DeG. M. & G. 249. But this contest is barren of any such evidence. Giving full credit to the claim made by the defendant and the documents he produces (and his claim rests entirely on his own testimony coupled with the documents), it just comes to this that the deceased drew a cheque on the Sterling Bank for $2,750 payable to the defendant, and handed him therewith the bank pass-book. This was to facilitate his getting the money, and nothing was said or done indicating expressly or implicitly that it was to be collectable only in the event of the donor's death. The essence of a gift mortis causa is, as expressed by Swinburne, Pt. 1, sec. 7, when any being "in peril of death doth give something, but not so, that it shall presently be his who receives it, but in case the giver do die." This is approved as correct by Lord Loughborough in Tate v. Hilbert, 2 Ves. 119.

Assuming the case of an ordinary pass-book being given; a case very close to the present is Re Beak's Estate, L.R. 13 Eq. 489, where it was held by Bacon, V.-C., that the delivery by a donor in his last illness of a cheque on his bankers, accompanied by a delivery of his banker's pass-book, was not a good donatio mortis causa—the cheque not having been presented till after the donor's death. It was admitted in the cited case that the delivery of a cheque by the donor, not presented till after his death, was not per se sufficient, but it was argued that the further circumstance of the delivery of the pass-book contributed what was lacking to constitute a valid donation. It was assumed by the Judge that though the pass-book was not evidence of any agreement on the part of the banker to pay a debt, yet it might amount to a representation by the intestate that there was a debt due to him out of which the cheque was to be paid. But it was held that the handing over of the pass-book was enormously different in legal effect from the delivery of a deposit note which conferred upon the donee the right to receive the money. Amis v. Witt, 33 Beav. 619, was the case of the deposit note, in which the Master of the Rolls merely gave effect to the decision of the same point at law in Witt v. Amis, 1 B. & S. 109. But in both the decision was really upon the question whether a policy of life assurance was the subject of a donatio mortis causa, and it appears to have been assumed that the deposit note for a different amount given at the same time

was not open to question. This note was for £400 made by the manager of the National Bank, whereby the bank acknowledged to hold that sum as moneys of the donor.

[Reference to Hewitt v. Kaye, L.R. 6 Eq. 200; In re Beaumont, [1902] 1 Ch. 894; Halsbury's Laws of England, vol. 15, p. 432 (*e*); Re Dillon, 44 Ch. D. 76; Re Weston, [1902] 2 Ch. 680; Re Andrews, [1902] 2 Ch. 396.]

The particular pass-books delivered by the deceased to the defendant have not been put in evidence. One received by him from the Sterling Bank in the savings department has been proved, and I may assume that the same form was used for the other account with the deceased. The printed regulations it contains shew that interest will be allowed on the monthly balance, and that the pass-book should be presented when any business is transacted, but that a cheque will be paid, without the pass-book, if it bears the number of the account and is properly signed. The testator's cheque did not indicate the number of the account, and for the payment of this cheque the production of the pass-book was essential. These terms as to interest and payment of the numbered account are essential to the proof of the contract, and this pass-book with these terms therein was delivered with the cheque. This would, therefore, according to the decisions be a document capable of being made the subject of a donatio mortis causa: Bruce v. Toronto General Trusts, 32 O.R. 319.

Now the decisions I have quoted are all to this effect, that the gift of a banker's deposit note or pass-book with the view of giving to the donee the whole sum secured by it is a valid donatio. But when the intention is to give, not the whole sum deposited, but only a part, and that part is indicated by some lesser sum expressed in a cheque on the banker signed by the donor, which is handed over together with the pass-book, a different question is presented. The book is then handed over, not for the purpose of constituting the donee the owner of the whole fund but for the purpose of facilitating the payment of the part mentioned in the cheque. The substantial gift in these circumstances is the cheque, and not the pass-book, which is merely ancillary to the main purpose of the part payment: that appears to be the view taken by Fry, J., in Re Mead, 15 Ch. D. 651, upon which comment is made by Cotton, L.J., in Re Dillon, 44 Ch. D. at p. 79, where he says as to Re Mead: "The donor never intended to give the deposit note and the money it represented, but only to give the donee a cheque upon it." The whole subject was much discussed, with conflicting opinions, in McDonald v. Mc-

Donald, 33 S.C.R. 145, wherein the authority of Re Mead is recognised as I have construed it: See also Re Farman, 57 L.J. Ch. 638.

As to the sum in the Bank of Commerce, the pass-book is produced and it contains the special terms of the contract with the bank in its saving branch, and there the cheque was for the whole amount including accrued interest. According to McDonald v. McDonald the cheque would be in this case controlled by the delivery of the pass-book, and there would be a valid donatio mortis causa, if nothing more appeared in the evidence.

Hitherto I have dealt with the undisputed evidence, and the side of the case as given by the defendant, supported by his documents. But an attack was made at the hearing upon the genuineness of the testator's signature to the letter and the cheque dated the 16th November, and also to his signature to the Bank of Hamilton cheque. It was admitted, however, that the Bank of Commerce cheque was authentic. This line of impeachment was not taken in the pleadings—it was an after thought, and only by way of concession did I allow the evidence of experts to be given. It is a strong point that one of the series is surely signed by the testator, and all the cheques were acted on and honoured by the different banks, and evidence of those who knew the testator's writing was favourable. The proof of the crime of forgery rests on the accusers, and on the evidence before me, I do not think the prima facie case as to the documents being real is displaced.

Nor do I think the defence is established that the testator was in a dying state and incapable of doing business or of managing his affairs. But the scraps of evidence given at different stages shew that the testator was minded to do something towards readjusting the disposition to some degree, it may be slight, of his property, and that he discussed the matter with the defendant. Yet I think that the defendant acted with over-astuteness, concealed the whole truth, and by his secret way of managing things has surrounded himself with suspicion which calls for very distinct and satisfactory proof to clear away. I cannot satisfactorily make out the very truth of the scheme, but I think the testator was moved by the representations of the defendant that too much of his estate was likely to go out in "fees and succession duties"; over $1,000 was spoken of as being so "wasted." He was advised not to change his will, but that the estate could be reduced by chequing out his ready moneys. He may have intended to give something more to the defendant,

but not to the extent apparent on the face of the three cheques. I think the plan hit upon, as understood by the testator, was that there should be a sort of administration of part of his estate, committed to the hands of the defendant, which would reduce the part left for the executors and yet would leave enough for one brother, the plaintiff, to administer without feeling that he had been slighted by the testator.

[The learned Chancellor illustrates this position by setting forth the scheme of the will known to both, the letter written by both, and the arrangement made by both, as traced in the evidence and proceeds]:

It thus appears suggestively, if not clearly, that the three accounts were to be consolidated in the name of the deceased, or it may be in the name of the defendant at the Sterling Bank, and to be dealt with for the purposes of the estate; funeral and preliminary expenses, some distribution among the brothers, and a defined portion held for the purpose of contributing to the maintenance of the mother, and to this extent in ease and aid of the son Homer who was expressly charged with that duty by the will. The scheme which was, I think, in the mind of the testator was to divide his estate in this manner, reduce the outlay for fees and succession duties, and provide for a dual system of administration; one part of which would be regulated by the law under the probate and the other conducted out of Court by the hands of the defendant. Of course this was all nugatory so far as escaping legal payments to the Government or the executors, or so far as it contemplated a nuncupative as distinguished from a legally authorised administration.

The law seems to be that property may be given by way of donatio mortis causa although the gift be made for a special purpose and coupled with a trust. There are not many cases and no recent ones; one of the latest is Hills v. Hills, 8 M. & W. 401, holding that the gift of money was valid though coupled with a trust that the donee should provide the funeral of the donor. That was a gift after payment of the expenses of the funeral, and there would still be something of beneficial balance to the donee. In this case as to trust for the mother it would all have to go to her, or for her benefit, and to personal representatives if there was any surplus at her death. But Parke, B., pointed out at pp. 403, 404, that the circumstance afforded a strong argument to the jury as to the construction to be put upon the expressions used by the deceased, and that a mere nuncupative will was meant of which the defendant was to be the executor . . . and he ends by saying: "I agree that

upon this particular trust a very strong argument arose that the deceased did not intend to make a donatio mortis causa, but as it were to make the defendant his executor under a nuncupative will." The circumstances in this case are still more cogent to induce the conclusion that a gift mortis causa, and all that in law is meant by that, was not in the mind of the deceased. A case worth consideration on these lines is to be found in Dole v. Lincoln, 31 Maine Rep.

The case of Solicitor to the Treasury v. Lewis, [1900] 2 Ch. 812 fortifies the conclusion to which I have come after the best consideration I can give to this complicated case.

In cases of intended donation where the gift fails of legal effect on some technical ground, or for some error or fault attributable to the deceased, the costs are sometimes given out of the estate, or no costs given against the disappointed donee; and I have gone over the evidence as I have done to clear the way also for the disposal of the costs. The Sterling Bank and the defendant both acted wrongly in cashing the large cheque, and, quoad the executors, should contribute equally to the costs, but the bank is not before the Court. The plaintiff failed on some of the issues of fact. The defendant acted fairly enough as to the two smaller cheques. But where he erred was in seeking to absorb the whole of the $2,750; part of it I am inclined to think the testator intended for him—but I can't say how much —he stayed by the deceased till the death and no doubt expended money in travel and otherwise—still, as the deceased said, he was overmuch "after the almighty dollar," and did not propose to respond fully to the trust placed in him by his brother. I think he should pay half the costs of this action (less the costs occasioned by expert witnesses).

The $2,750 and interest paid into Court and accrued interest, if any, should be paid out to the plaintiffs. The defendant should restore the $215 received by him from the Bank of Commerce and interest, which is to be held and dealt with as part of the estate of the deceased by the executors.

This judgment leaves operative the 7th section of the Chamber order, that if the executors are found entitled to the money, the costs of that motion shall be costs in the cause in McLellan v. Sterling Bank, proceedings in which were stayed till further order.

DIVISIONAL COURT. APRIL 25TH, 1911.

BROOM v. PEPALL.

Practice — Order Dismissing Action on Consent — Order not Authorised by Consent—Motion to Vary—When Court may Vary its Order—Con. Rule 358—Power of Appellate Court to Make Proper Order.

Appeal by the plaintiff from the order of SUTHERLAND, J., in Chambers, dismissing the plaintiff's motion to vacate the order of the Master in Chambers, varying his order dismissing the action.

The plaintiff was tenant of the defendant and there was some trouble about the landlord removing certain fixtures. On the 18th February, the plaintiff issued a writ and launched a motion for a mandamus to compel the defendant to replace the fixtures, and an injunction preventing the defendant from interfering with the plaintiff's rights, etc. A settlement having been suggested an agreement was arrived at on the 27th February between the parties and reduced to writing whereby the plaintiff was to give up possession on or before May 1st, he was upon giving up possession to be paid $30, and then the action was to be discontinued.

On the 13th March, the plaintiff went to the defendant and represented to him that he wished to have the action dismissed, and that for that purpose it was necessary for the defendant to sign a consent to the action being dismissed—produced a document which he procured the defendant to sign, and took it away with him. This document was styled in the cause and headed: "Application to dismiss action." "It is agreed between the parties above named, that on payment to the plaintiff by the defendants of the sum of thirty dollars ($30) together with the disbursements on this application, that this action be dismissed without further costs and that an order may be to that end forthwith." Nothing was said about the payment of $30, and this consent did not at all interfere with the previous agreement—the only effect being that now a dismissal, instead of a discontinuance, was provided for. Armed with this document, the plaintiff went to the Master and procured the Master to sign an order whereby it was provided that the action should be dismissed on payment forthwith to the plaintiff by the defendants of $30, and disbursements amounting to 70 cents, and that the said sum of $30.70 should be paid forthwith to the plaintiff by the defendants.

The order was served, but instead of moving by way of appeal, an application was made to the Master to vary the order. Against the protest of the plaintiff the Master varied the order by striking out the word "forthwith," and inserting a provision that the sum of thirty dollars and seventy cents be paid by the defendants to the plaintiff on delivery up by him of possession of the premises on or before the 1st day of May, 1911.

The plaintiff appealed from the Master's varying order, and contended that the two matters were quite distinct, and the two sums of $30 had no relation to each other.

Sutherland, J., dismissed the appeal, and the plaintiff appealed to the Divisional Court.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

The plaintiff, in person.

W. E. Long, for the defendant.

RIDDELL, J. (after stating the facts as above) :—An objection that no leave had been given to appeal was overruled at the hearing, and I think rightly. The order made by my learned brother confirming the order of the Master "finally disposed of the action or matter" within the meaning of Con. Rule 777 (1278, 1307).

I think that the Master had no power to vary the order made by him in the first instance. In cases in which the order as issued does not correctly state what the Court actually decided, such power exists: Mitchell v. Sparling, 15 O.W.R. 37, following Ainsworth v. Wilding, [1896] 1 Ch. 673. But where an order or judgment correctly sets out what the Court did actually decide and intend to decide, there is no power in the Court to vary the order, upon motion after the order has been formally issued. This was decided by a Divisional Court, 28th June, 1889, in Klinck v. Ontario Loan & Investment Co., not reported, but referred to in Holmested & Langton, p. 843, also by a Divisional Court (Boyd, C., and Ferguson, J.), in Spencely v. Peterborough W. Co., 15th June 1894 (not reported, but in which I was of counsel). These cases should be followed. The order varying the original order then is not justified and must be set aside. Consolidated Rule 358 is not broad enough to cover this case. The order made in the first instance was not an ex parte order. That term is applied only to such orders as the party obtains without the attendance of the other, without his consent and solely on his own shewing. Interim orders for injunction, order of ne exeat,

for production and the like may be mentioned—and many different kinds are known to the practitioner, some of which are to be found referred to in Muir Mackenzie (1891), pp. 754, 755. But an order obtained by one party upon the written consent of another is not an ex parte order in the true sense or in the sense of the Rule.

Nor did the defendant fail to appear on the application, through accident or mistake or insufficient notice; he gave the consent intending that the plaintiff should use it before the Master in his absence. The whole difficulty is that the Master failed to observe the terms of the consent, and so made an order not justified by it.

But where an order is varied in this way, the Court is not helpless. The Court in appeal from the order as varied has the power to make the order which should have been made in the first instance: Klinck v. Ontario Loan & Investment Co., *ut supra*. We should accordingly now make the order the Master in Chambers should have made in the first instance.

Upon the application of the plaintiff the Master was not justified in making any other order than that the action should be dismissed—and that order the plaintiff may have if he so desires—the defendant is not entitled to any order upon the consent of the 13th March unless and until he pays the sum of $30 and the disbursements of an order. If he is willing to pay the sum of $30.70 he may take out an order dismissing the action without costs. If not, he is not entitled to any order upon that consent.

Upon the consent of the 27th February he is entitled to an order for discontinuance—but that would probably be of little or no advantage to him. There is no reason why all trouble should not be avoided by both parties living up to the terms of the contract of 27th February.

There should be no costs—the plaintiff's wholly unauthorised and inexcusable proceedings are the *fons et origo mali*, and the proceedings of the defendant since have been contrary to the practice.

I am glad to say that the plaintiff has had charge throughout of his proceedings, and that no member of the bar or solicitor has been concerned with them.

FALCONBRIDGE, C.J.:—I agree.

BRITTON, J.:—I agree in the result.

MIDDLETON, J. APRIL 25TH, 1911.

NEAL v. ROGERS.

Distress for Rent—Seizure under Chattel Mortgages—Allegation that Nothing Due—Sale Without Proper Advertisement—Question of Account—Right of Mortgagee to Seize—Alleged Collateral Agreement—Reference at Trial—Questions of Fraud and Forgery First Raised Before Referee—Findings of Fact by Referee not Supported—Evidence—Damages—Further Directions—Costs—Proper Form of Report.

Appeal by the defendants from the report of an Official Referee to whom the case was by consent referred by Falconbridge, C.J.K.B., after an order of reference had been made at the trial by RIDDELL, J., to the County Court Judge, who declined to act on the reference.

C. A. Moss, for the defendants.
R. S. Robertson, for the plaintiff.

MIDDLETON, J.:—This action is brought to recover damages for the conversion of the plaintiff's goods by the defendants.

The plaintiff in his statement of claim alleges that the defendants pretend that they took possession of these goods by way of distress for rent and under certain chattel mortgages, when in fact there was no rent due, "nor was there any money due and owing by the plaintiff to the defendants or either of them in respect of any chattel mortgage," and in any event the amount due was trifling when compared with the value of the goods taken.

The plaintiff further states that the goods taken were sold without due advertisement and without any due effort to obtain a proper price.

In answer to this claim the defendants say that on the 18th November, 1908, the plaintiff made a mortgage to Anderson to secure $373, payable in three months with interest, and on the 14th May, 1909, he made a further mortgage to Rogers to secure $565.62, payable in three months with interest. On the 12th October, 1909, there being $241.67 due on the Anderson mortgage and $470.13 on the Rogers mortgage—in all $634.56—they took the goods under these mortgages and sold them, leaving still due $73.24 on the Rogers mortgage. On this issue was joined.

It may be well to explain here that Rogers owned a farm and Neal was his tenant. The first mortgage was taken to secure not only money due Rogers, but money due to the firm of Anderson & Rogers, and as between Anderson & Rogers the accounts were adjusted by charging the mortgage as cash paid to Anderson. Rogers was the actor when the mortgage became due, but he had Anderson's consent to what he did and Anderson signed the distress warrant. I hold both Anderson and Rogers liable. I cannot distinguish in any way between them—at the hearing no attempt was made to do so.

On this record the action came on for trial before Mr. Justice Riddell on the 22nd March, 1910. The taking being admitted the defendants were called upon to begin, and the two mortgages were put in without any objection. Rogers was called to prove default. Upon his cross-examination there was a long discussion as to how the amount secured was arrived at and His Lordship said (p. 12): "What is all this directed to? There is no attack here upon the mortgage. You do not take issue upon the execution of the mortgage apparently," and the plaintiff's counsel said that he was endeavouring to shew that it was understood that the mortgage was "to be held only as security and would not be used for the purpose of making any seizure," and "there was to be no seizure made at any time." "A collateral contract at the same time by which they agreed not to use the rights given under this one." All this was said with reference to the first mortgage. After further examination at some length, during which it developed that there were claims made by Rogers quite outside of the mortgage, the making of the second mortgage is discussed and Rogers produces a statement shewing how the amount is arrived at. Mr. Box, a conveyancer, is said to have drawn this mortgage. The witness says that the whole mortgage was not read, but he remembers distinctly the items, *i.e.*, the goods enumerated in the schedule being read over. The endorsement of a credit of $100 for a contra account for timber drawn is there discussed, and counsel proceed to examine as to the distress and sale, and at page 40 His Lordship remarks: "The seizure was justified—the difficulty may be as to the manner of sale; it seems to me a little extraordinary." $478 has been realized at private sale and $156 at an auction sale which it was said had been improperly advertised.

At the close of Rogers' evidence the trial Judge directed the plaintiff to just give his evidence upon the question as to the right to sign, saying that he has not made up his mind whether

he will try out or refer the question whether there was a proper sale.

The plaintiff then gave his version of the renting of the farm, differing from the defendants' account in two respects—the time when the rent was payable, and upon the question whether the landlord or tenant was to pay taxes, and then gave his account of the giving of the Anderson mortgage. The way the amount was made up was discussed and the articles put in the schedule were read over. The mortgage was supposed to be for eleven months. No evidence was given in any way substantiating the case indicated by his counsel that the mortgage was not to be enforced, and upon counsel proceeding to give evidence tending to shew that the credit on the second mortgage of $100 was not for as large a sum as the mortgagor was really entitled to for drawing the wood in question and counsel then proceeds to ask how the second mortgage came to be given. When the mortgagor starts to discuss the items, going into the account, the Judge asks the object, and counsel says that excluding certain debit items, and with certain credits, he hopes to shew the balance due was quite small. After some discussion all directed to the question of account, the Judge finally decides to refer the case, saying, "It is quite a different case from what it looked in the beginning. At first we were going to determine whether the man had a right to seize—then whether by reason of a collateral agreement made at the time when the documents were executed—but now you are going into a lot of accounts to see whether the moneys due were not paid off and then that something else would be wrong," and then counsel asking whether his Lordship would try the question whether there was the right to seize, the answer given: "I won't do that because in order to do that I have to go into a great many accounts."

The whole case was referred to the County Court Judge.

The County Court Judge (who is not the Local Master) declined to act on the reference, and the case being set down again on the 28th February, the Chief Justice of the King's Bench referred the action by consent to the Local Registrar as Official Referee.

The Official Referee made his report on the 16th March, 1911, finding:

(1) That the plaintiff's statement as to the terms of the lease should be accepted, and that the rent was payable at the end of each year (*i.e.*, April), and not in the fall, and the landlord and not the tenant should pay the taxes.

(2) That the Anderson mortgage was not read over and ex-

plained to the plaintiff and he did not understand it "and that in fact it was not his act."

(3) That the Rogers mortgage was not read over and the plaintiff did not understand it and "thought he was giving a lien of some sort." That "no rent was due" and it was not intended to accelerate the rent, "and that the so-called mortgage was intended to cover any balance due under the first mortgage."

(4) "There was no justification whatever for the defendants or either of them seizing and selling the plaintiff's goods."

(5) "After the execution of the Rogers mortgage the defendant Rogers without the consent or knowledge of the plaintiff, under circumstances which amounted to the crime of forgery, added words in the schedule to the Rogers mortgage as admitted by him in his evidence before me, and that for the purpose of cloaking his crime he gave evidence before me as appears by the notes of the evidence taken, which amounted to wilful and corrupt perjury."

These are not all the findings of the Referee, but are the most important.

He then fixes the face value of the goods at $1,502.42, and allows the mortgagees $415.07, leaving a balance of $1,087.35 due the plaintiff, and he then allows $500 further as damages, in all $1,587.35.

From this report an appeal is taken by the defendants.

Much of the evidence was taken in long hand and this is a very serious handicap in dealing with the appeal.

I appreciate to the full the rule that the Court is very slow to interfere with the finding of a Master upon a question of fact, particularly when the Master bases his conclusion upon the demeanour of the witness, and I can only state that my experience on the Bench has confirmed the view formed as counsel that, speaking generally, a trial Judge is far more apt to determine questions of fact rightly than any appellate tribunal. Yet it is equally clear that trial Judges and Masters may err upon questions of fact, and so long as the law gives a right of appeal upon such questions, the appellate forum is bound to consider all such appeals with extreme care, and when convinced of error to reverse.

In this case anxious consideration convinces me that there has been a most serious miscarriage of justice upon this reference, and giving full consideration to, and making all allowances for the advantages of the Master, and my disadvantages, I find myself unable to agree with him in any of the important matters involved.

I have referred to the trial proceedings at some length because I think they throw much light upon the matter. Had there been any such issue raised at the hearing as those dealt with by the Master, no Judge would have dreamed of a reference. The issues of fraud and forgery are not referred, and what took place before my learned brother at the trial makes it very plain that the whole matter had come to be a question of account, before the order of reference was made. The right to take the goods was not determined, because this right depended upon the account, but before the reference was ordered everything but the account had in the course of the trial been eliminated.

The statute authorising a reference is one which indicates that prolonged accounting is the foundation of the order, and though the reference to the registrar was by consent, this was intended to be, and was a substitute for the reference to the County Judge.

I do not propose to deal with the finding of the reference upon this narrow ground, but it is by no means without significance that the questions of fraud and forgery were not raised at the trial. Under the rules of pleading—lax as they are—these defences must be set up, and cannot be sprung upon the other litigant at the close of the case without any warning.

The position of the matter is such as to preclude my making any order directing a trial before a High Court Judge, the only usual and proper way, of the important issues that have been disposed of upon this reference.

Dealing first with the issue as to the forgery of the Rogers mortgage. The plaintiff has not set up either in his pleadings or evidence that which has been found by the Master, and all the evidence given by the defendant is diametrically opposed to the finding. Had the finding been that of a jury I would unhesitatingly pronounce it "perverse," in the secondary and popular sense of the term, and such as no twelve reasonable men apprehending the evidence could honestly make. The finding is based upon a suspicion arising from the appearance of the document, which upon a consideration of the circumstances can be shewn to be unfounded.

[The learned Judge then enters upon a detailed analysis of the evidence in the case, and states his conclusion as follows]:

The mortgages then standing as security for the amounts for which they were given, less payments on account, the mortgagees were quite within their rights when they distrained in

October, 1910. The defendant Rogers had lived up to his verbal promise not to crowd the mortgagor, and quite apart from his legal rights, had ample reason for thinking that if he were to recover his rent and advances he must act under the mortgages.

The mortgages being in default no question of reasonable distress can arise. The mortgagees were entitled to take all the property covered by them, and the mortgage gives the right to sell by private sale or by public auction as may be deemed proper by the mortgagee.

There was then due under the mortgages $707.80 (if I am wrong as to this figure counsel can speak to me) and the mortgagees realized by private sale $477.61, and by auction $156.95 (I am not quite sure of the figures).

Much complaint is made as to the mode of sale, and it is said that the goods were sacrificed. . . .

The inquiry before the Master proceeded upon an entirely erroneous basis. The mortgagee having taken the goods under his mortgage had the right to sell, and probably was bound to sell, but he must not sell in a reckless and improvident manner. If he does he is accountable not only for what he actually received, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor: Rennie v. Block, 26 S.C.R. 356. The sale here, so far as the articles sold by private sale (other than the growing crop) are concerned, seems to me to have been reasonably prudent. The auction sale does not seem to have been adequately advertised, but the Master has charged the mortgagee, not with what might have been expected to be realized at a duly advertised sale, but with the highest value suggested by the mortgagor. Manifestly no such price would have been realized at any forced sale. The crop was lost owing to the frost, but this was largely the result of the plaintiff's own refusal to aid in harvesting it. The amount charged against the mortgagee seems too great.

In one aspect of the case I ought to refer the whole matter back for consideration, but the general tenor of the report indicates that the Master would find it difficult to deal with the matter in what I deem the proper way, and I fear only evil could come from adopting this course.

I therefore attempt as best I can to assess the damages for all that I can see wrong in the mortgagee's conduct, and allowing what seems to me more than enough I assess the damages at $200. This brings out the account as follows:

Balance due on mortgage account....		$ 73.24
Damages allowed plaintiff.....	$200.00	
Repairs, etc.	169.00	
Balance due plaintiff		295.76
	$369.00	$369.00

Upon the question of costs, I do not give the plaintiff any costs, because of his improper and unfounded charges of fraud and forgery, and also because of the bringing forward of such charges at so late a stage.

The defendants being in the wrong cannot have any costs of the action. I allow them the costs of the appeal fixed at $80.00.

Judgment will therefore go for the plaintiff against both defendants for $115.76.

I feel compelled to draw attention to the form of the report in this case. Masters should remember that the report is a formal deliverance by the Court, and differs widely from reasons for judgment, resembling in its character a formal judgment settled by a registrar. . . .

The Master is paid for drawing his report at so much per folio, and the report ought to be a statement of the finding upon the various issues in as short and concise a form as is consistent with clearness, so that the Court can upon further directions or on appeal understand the Master's view.

Special findings of fact necessary to enable the matter to be dealt with upon further directions, when pleadings, judgment, and report alone can be looked at are proper, but such special findings are not necessary or proper for any other purpose.

I have pronounced judgment on further directions at the request of the parties, but if either party desires to carry the appeal further this must not preclude an appeal.

In allowing against the defendants the $169 for repairs, I do so with some hesitation. I cannot find in the defendant's evidence as recorded any denial of the claim. It may be that this arises from the way the evidence was taken, but if so the appellant must fail, as he must on the evidence as it stands satisfy me the Court below was wrong.

There is much in the circumstances connected with the giving of the second mortgage, and the discussion relative to the $100 credited on it, to indicate that the mortgagor had then no thought of any such claim.

MIDDLETON, J. APRIL 28TH, 1911.

RE FITZMARTIN AND NEWBURG.

Municipal Corporations—Local Option By-law—Motion to Quash—Vote of Clerk—Residence—What Constitutes—Hearsay—Ubi Uxor, Ibi Domus—Farmer's Son—9 Edw. VII. ch. 26, sec. 6(2).

Motion to quash local option by-law. The votes were 81 for and 54 against, so that the by-law was carried by the exact statutory majority.

J. B. Mackenzie, for the motion.

W. E. Raney, K.C., contra.

MIDDLETON, J.:—Four votes are attacked. All other objections were expressly abandoned.

(1) The clerk's vote. For reasons given at length in the Beaverton case, post, p. 1116, I think I am bound by Re Schumacher and Chesley, 21 O.L.R. 522.

(2) J. M. Denyes' vote. At the time the list was certified this man was a tenant—before the election he became a freeholder. He had the right to vote and had he been sworn could have chosen his oath: Sec. 116, Wilson v. Manes, 26 A.R. 398.

(3) Thomas Carr. This man, a tenant, resided in Newburg, but is said to have lost his right to vote because he did not reside therein for one month before the election. His tenancy continues. His wife and family reside upon the property leased. The man was a section-man. Wellbanks, the village clerk, examined 11th April, 1911, says he has not been at home for some time—thinks he was away on 2nd December, and then says: "I don't think he intended to come back. I think he and his wife separated." The thoughts or imaginations of a village clerk are not evidence upon which a vote can be disallowed. They are not evidence at all. The witness must state facts within his own knowledge, and the tattle of a village is hearsay of the worst possible kind. The man's wife is there, his home is there, and it is not shewn that his absence is not of a temporary nature, not amounting to an abandonment of his home as a place of residence. "Ubi uxor ibi domus" may well be applied.

(4) Henry Sutton. Farmer's son. The farm is situate as to 25 acres in Newburg, the house is in Camden. Does the son comply with sec. 86 (4) by "residing within the municipality?" If he was not resident within the municipality, he was not rightly

upon the voters' list; residence is an essential part of his qualification. This is not the question which as to tenants is open under the requirement of 86 (2), which requires residence within the municipality for a month prior to the election as a condition of voting, and merely tenancy as a condition of the name appearing on the list, and sec. 24 of the Voters' Lists Act makes the list final and conclusive evidence that the voter is entitled to vote. This, as I understand it, makes the list a final determination of all that is essential to entitle the voter's name to appear upon it. Applying that to this case, it is a determination that Sutton was a farmer's son "residing in the municipality upon the farm of" his "father" within sec. 86 (4). This residence has continued down to the election, and must be regarded as sufficient.

Residence is a word of very elastic meaning, and I have found many cases in which it is defined, but I have found no case dealing with the precise point. The "holding" or farm it appears to me cannot be subdivided, and it cannot be said that the farmer and his family reside in any one part of it. They reside on the whole farm. If the boundary ran between the bedroom and the dining room, would he reside where he slept or "where he usually took his meals"? If the boundary line subdivided his bed, as it usually stood, would one part of his body reside in one place and the rest in another? This goes to shew that the "residence" required by the statute is not governed by such narrow considerations, but is such a residence as can be fairly regarded as giving the voter the right to be regarded as a citizen of the municipality in question.

A very long and elaborate argument was based upon a singular misunderstanding of 9 Edw. VII. ch. 26, sec. 6 (2). This was not intended to do more than amend the form found in the schedule to the Voters' Lists Act by correcting a clerical error in the illustrations given. "Farmers' Sons" should appear in part 1, and by error an imaginary voter named in part 2, Edmund Burk to wit, was called a farmer's son; he now becomes a tenant.

The motion fails and must be dismissed with costs.

MIDDLETON, J. APRIL 29TH, 1911.

RE STURMER AND BEAVERTON.

Municipal Corporations—Local Option By-law—Voting—Motion to Quash By-law—Inquiry into Validity of Votes—Vote of Clerk—Residence—Abandonment of, What Constitutes—Irregularities—Curative Provisions of sec. 204 *of Municipal Act—Duty of Court to Ascertain how Bad Ballots Marked.*

Motion by Henry Sturmer to quash a local option by-law.

J. B. Mackenzie, for the motion.

W. E. Raney, K.C., for the respondent corporation.

MIDDLETON, J.:—This is a motion against a local option by-law upon many grounds. 169 votes were cast in favour of the by-law, 111 against, so that 166½ (equal to 167) votes were necessary to give the statutory majority, and it is claimed that the by-law should be quashed if it can be shewn that three votes were improperly cast.

(1) Charles A. Patterson, the clerk, voted. In Re Schumacher and Chesley, 21 O.L.R. at p. 525, it was held that the clerk could vote. In Re Ellis and Renfrew, 18 O.W.R. 703, 2 O.W.N. 837, a by-law was attacked, and in order to attack it successfully a large number of votes had to be declared invalid. Mr. Justice Garrow, after deducting nine votes (including the clerk's) which he thought were bad, held that the applicant failed as the by-law still had four votes over the statutory requirement. Sir Charles Moss and Mr. Justice Maclaren agree in the result. I have spoken to them and they tell me that this expression was used advisedly, and signifies that they agree in dismissing the appeal because the appellant had not successfully attacked a sufficient number of votes, and that they did not intend to express concurrence in the view that even nine votes had been well impeached, and that they did not determine this question. This leaves the Schumacher decision binding upon me.

(2) Frederick Tear and Samuel Madill. These men live near the boundary. When the evidence is examined it appears as a fact that they reside within the municipality, even assuming in the applicant's favour that residence is determined by the exact location of the dwelling house.

It is said that because marked on the assessment roll "N. R." this is conclusive. I find no warrant for this—nor

does the fact that the names are on part 2 determine the place of residence. All the list does determine is that these men are qualified to vote at a municipal election. The fact of residence is a matter to be determined under sec. 86 (2), as this is required beyond the appearing upon the roll, in the case of tenants, as a condition of voting. . . .

(5) Arthur Jones. The question is, has this man lost his residence? He is a railway employee. He was sent to relieve another employee who was temporarily disqualified and left Beaverton some time before the 10th December. On that date his wife and child followed him and continued to live with him at Whitby in a room rented there. Some few articles of furniture were taken, but he continued to maintain his house in Beaverton, having left the bulk of his furniture there, and manifestly regarded his abiding in Whitby as temporary only. Some poultry was left in Beaverton, and by an arrangement with a friend was cared for during this absence.

Re Voters' List of Seymour, 2 Ont. El. Cas. 69, a case upon a statute requiring continuous residence, is a sufficient answer to this objection. A series of cases not there cited lead to the same conclusion.

"The question is, what is the meaning of the word 'resides'? I take it that that word, when there is nothing to shew that it is used in a more extended sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink and sleep:" King v. North Curry, 4 B. & C. 958, per Bayley, J.

In Powell v. Guest, 18 C.B.N.S. 72 at p. 79, the doctrine laid down in Elliott on Registration is approved: "In order to constitute residence, a party must possess at least a sleeping apartment, but an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be liberty of returning at any time, and no abandonment of the intention of returning whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have a legal residence there."

The commission of crime justifying imprisonment is held to be a voluntary abandonment of the residence, but imprisonment for debt is not, because the debtor can at any time return on paying his debt. Nor is imprisonment pending a trial any abandonment of residence: Charlton v. Morris, 2 Ir. R. 541.

[Reference to Guardians of Holborn v. Guardians of Chertsey, 54 L.J.M.C. 53 per Hawkins, J.; the Northallerton Case, 1 O'M. & H. 170, 171, per Willes, J.]

(14) McGaskill. There was voting for school trustees and upon local option. Two ballot boxes were used—by some mischance the two ballots were placed in the one box. At the close of the poll this was opened first, and the ballot improperly there was removed and placed in its proper box without opening it, or disclosing how marked. This was a mere accident and the deputy returning officer acted quite properly, and this cannot avoid the election.

(15) Betsy McRae and Ann McTaggart. These were two old ladies who had not brought their glasses, and though able to read with them could not see well enough to mark their ballots unaided. Without any protest by either scrutineer they were aided by the deputy returning officer, in the presence of the scrutineers, to mark the papers. This does not invalidate the votes: Ellis v. Renfrew, supra. . . .

(18) The by-law dividing the municipality was not duly fyled. There was a de facto division. The by-law was operative as soon as passed, and cannot be attacked in this collateral way.

Those charged with the preparation of voters' lists must assume things to be de jure as they are de facto, and cannot constitute themselves a general inquest to determine the validity of all municipal or official acts leading up to the elections. They cannot ascertain the facts and may not know the law, and only confusion could arise if they were not allowed to assume the validity of all official acts not directly attacked. . . .

(23) There were some discrepancies between the by-law as printed and as finally passed. It is not shewn that these were in the by-law as read the 1st and 2nd times. The only one of any moment is in the naming of 11 a.m. as the hour for appointment of scrutineers instead of 10 a.m. No one was misled. No one knew of the hour named in the by-law read—even if it did name 10. The reeve attended and appointed scrutineers. True, the appointment was to attend the casting of ballots and not to attend the summing up—but this was assumed to be sufficient, and the scrutineers so appointed attended both the voting and summing up. This is well covered by sec. 204.

(24) The description of the polling place in Division as "Bruce's office, Mara St." is said not to be sufficient.

Beaverton is a small town. Bruce's office was well known—he had been Division Court Clerk for many years, and his

office was as well known as the post office. No one is shewn to have been misled, and the affidavits as to the opinion of certain deponents on this question are inadmissible, and if admitted I find them of no value. . . .

(26) By-law includes the harbour. This was not argued and was not abandoned. There seems to be nothing in the objection. The harbour may be, as a harbour, "within the jurisdiction of the Parliament of Canada," but is none the less, for purposes within the ambit of provincial legislation, within the jurisdiction of the province, and its legislatures, provincial and municipal.

As well argue that the Criminal Code did not run in the town because the municipality for municipal purposes was "within the jurisdiction of the Province." Both the Dominion and the Province have jurisdiction. When there is any clashing then one or other may have to prevail, but here there is no conflict.

(27) Two men voted and the poll clerk did not record their names in the poll book. Hence there were two more ballots found in the box than names marked off. I am satisfied this mistake was an honest one, and did not affect the result. The curative section covers this.

(28) An objectionable poster is said to have been displayed. There is much doubt whether this is so. It is singular that Walton alone seems to have seen it, and that others ready enough to point out errors, do not mention it in their affidavits.

This cannot, in any case, avoid the election.

(29) By supplementary notice: White is said to have voted after declining the oath. This is not so—he was qualified—was sworn and voted. He had his choice of oath: Wilson v. Manes, 26 A.R. 398.

In the result the attack fails and the motion is dismissed with costs.

I have not to consider the question raised by Mr. Raney whether, in the event of my finding that there were votes enough improperly cast to possibly affect the result, I should try to ascertain how these votes were cast. This would be an extension of the West Lorne case, ante, p. 1038, requiring very careful consideration. The Court has power to quash a by-law for illegality. Illegality is shewn when it appears that the by-law was passed upon the vote, not of qualified voters, but of the qualified voters plus certain persons having no qualification. In order to ascertain whether this affected the result the number of bad votes is compared with the majority. Must the Court then quash,

or can it enquire into the facts and ascertain how the bad ballots were marked? Voters alone are protected—at least so I thought in Re West Lorne—and not the man who has no right to vote. Some day this question must be dealt with. It does not seem right that the will of the duly qualified electors should be defeated by the action of one who had no right to vote, and who voted against the by-law. This may be the result if the Court finds itself so impotent as to be compelled in effect to give still greater weight to this vote by deducting it from those cast in favour of the by-law. In this way the bad vote is really counted twice—once on the actual count of the ballot papers and again on the motion to quash.

DIVISIONAL COURT. MAY 3RD, 1911.

FOUNTAIN v. CANADIAN GUARDIAN LIFE INSURANCE CO.

Life Insurance—Provision for Insured Taking Cash Value—Construction of Policy—Computation of Years—Application—Election—Waiver—Mistake.

Appeal by the plaintiff from the judgment of RIDDELL, J., ante, p. 431.

The action was to recover $1,420, alleged to be the cash surrender value of a policy of $4,000 in the defendant company on the life of the plaintiff. The defendants contended that $1,156 was the cash surrender value, and tendered that sum to the plaintiff, who refused the same as they allege, and they paid the sum into Court. At the trial the action was dismissed with costs, but with the provision that if he paid the costs of the action and a premium of $120, he might be reinstated in the company, as insured upon the same terms as though he had not made the default.

The appeal was heard by LATCHFORD, SUTHERLAND, and MIDDLETON, JJ.

B. N. Davis, for the plaintiff.

Shirley Denison, K.C., for the defendants.

LATCHFORD, J.:—Upon the case made by the statement of claim and the true construction of the policy, the learned trial

Judge was in my opinion clearly right in dismissing the action. The plaintiff throughout misconceived his position. He erred in thinking that because he had paid all premiums for the full term of eight years he was, when his application for the surrender value of the policy was made, entitled to receive the sum payable at the expiration of eight years from the date of the policy. The sum so payable does not appear in the contract, but may be computed from the table printed upon it. That the defendants knew the plaintiff was mistaken is manifest from their evasion of his plain request in his letter of March 22nd, that the defendants should state the amount due him. On June 1st he would, upon the true construction of the policy, be entitled to receive $1,420. He no doubt thought himself entitled to that amount when he wrote to the defendants two months before the eight years had expired, but his question indicates that he was not sure of the correctness of his computation. He asked—not what am I entitled to—that was the full surrender value as at the end of seven years—but what amount? To how many dollars and cents do you say I am entitled under my policy? The defendants could readily have answered the question. In their reply they promise that on receipt of a release which they enclose for execution, the directors will consider the matter, and the company's cheque for "the full amount of the cash surrender value that your policy entitles you to" will be forwarded. Then they answer the plaintiff's request for a statement of the amount payable to him as follows: "At the time your policy was issued the only tables that we had shewing the cash surrender values were those contained and printed on the 3rd page of each form. These you will be able to see by referring to your policy." The defendants thus deliberately evade the question of the plaintiff. There is an absence of candour, if not of common honesty, in this, and in making a totally irrelevant statement as to the only tables the company had when the policy was issued. One would think, however, that the release would, as is ordinarily the case, state the sum the company was paying. Had it mentioned the $1,156 the company intended to pay, there cannot be the slightest doubt that the plaintiff and his wife would not have executed it. But the consideration is covertly expressed to be "the cash surrender value on account of the above policy." The plaintiff had, however, made his election to accept this value and had not revoked it—if indeed he could even then revoke it—when the defendants, two days before the plaintiff would have been entitled, but for so electing, to claim the $1,420, legally made him a tender of

$1.156. I concur in the law applicable to the case as stated by my brother Middleton, and can only mark my disapproval of the conduct of the defendants by refusing to allow costs, while dismissing the appeal.

SUTHERLAND, J.:—I agree.

MIDDLETON, J.:—Upon the hearing we expressed our agreement with the construction of the clause in question placed upon it by the trial Judge, and only reserved judgment to consider whether the Court had any power to relieve the plaintiff from the election made by his letter of the 22nd March, asking for the surrender value of his policy. We were inclined to think that a case might be made out for relief from the election made to surrender, upon the ground of mistake, if the principles applying to elections under wills were applicable: on consideration this does not appear to be so. [Reference to Brown v. Royal Insurance Co., 1 E. & E. 858, 860; Scarf v. Jardine, 7 App. Cas. 360; Kerr on Fraud and Mistake, 4th ed., p. 544; Rogers v. Jones, 3 Ch. D. 688; Pickersgill v. Rodger, 5 Ch. D. 163; McLeod v. Power, [1898] 2 Ch. 295; Morel v. Westmorland, [1903] 1 K.B. 64, [1904] A.C. 11; Hammond v. Schofield, [1891] 1 Q.B. 453.]

BOYD, C. MAY 3RD, 1911.

RE RISPIN.

Will—Construction—Trust for Benefit and Advancement of Legatee—Directions given to Trustee as to Application—Sole Discretion of Trustee—Death of Beneficiary—Intestacy as to Undisposed of Residue—Next of Kin of Testator Entitled.

Motion by the executor of the will of Richard Rispin for an order construing the said will.

F. P. Betts, K.C., for the executor.

G. G. McPherson, K.C., for the executors of Luke Rispin, a son.

W. R. Meredith, for the Official Guardian.

BOYD, C.:—The will was made the 10th July, 1893, by which the testator gave to his son all his real estate and all the goods,

chattels and live stock now in his possession. After payment of all debts and funeral expenses, the rest of his cash and securities he gives to his executor: "And I authorise and request him to pay the interest in whole or in part to my son, and the principal in whole or in part as in the judgment of the executor may be prudent with reference to the habits and conduct of my son. My will and intention being that it shall be wholly in the discretion of my executor to pay the interest and principal in such amounts and at such times as he may think right, or to withhold the payment altogether."

The testator died in September, 1895: the son received various payments from the executor and died in November, 1910, leaving a will in which he assumed to dispose of the estate in the hands of the executor, amounting to about $15,000. The executor disclaims all interest beneficially, and asks to whom the fund shall be paid—under the will of the son, or to the next of kin of the testator as an undisposed of residue.

In Gude v. Worthington, 3 De G. & Sm. 389, the fund was set apart upon very much the same trusts as are found in this case, for the benefit of Mary Ann Seaman during her life, and should there be any of the fund at her death, undisposed of, upon trust for other persons. In this case there is no gift over and the trustee is living and the beneficiary is dead. In Gude v. Worthington the trustees were dead and the beneficiary was alive, and it was held by Knight Bruce, V.-C., that Mary Ann Seaman was absolutely entitled to the whole fund. It was contended that the discretionary power given by the will was at an end with the death of the trustees, being of a personal nature. The Court gave no reasons, but intimated that it was to be taken that the discretionary power had been waived, or had been declined to be exercised, and in either view the result was the same, *i.e.*, as I understand, that the primary intention of the testator was to benefit the person named, and that the death of the trustees without having disposed of the fund for her benefit was not to frustrate the manifest wish of the testator.

This decision has not been received with favour and has received various explanations, and it is certainly one that has gone to the verge of the law—particularly when the testator had made a gift over of the undisposed of residue. It has been spoken of by Stuart, V.-C., in Rowe v. Rowe, 21 L.J.N.S. 349, as a very remarkable decision and one which was not very elaborately argued.

Upon the language of this will it is plain that the testator gave no property in this fund to his son, but only a direction to

the executor to apply such part as he thought fit for the benefit of the son. Now, at the death of the testator, or at any other time, had the son a right to call upon the executor to pay him anything out of the fund? Manifestly, no. The whole benefit was contingent on the bona fide judgment and volition of the executor. The son had no interest in the fund to assign or to deal with by testamentary gift: see Regina v. Judge of County Court, 20 Q.B.D. 167, which was followed in the case of a will like this in Re McInnes and McGaw, 30 O.R. 38. Chitty, J., comments on Gude v. Worthington in Re Stanger, 60 L.J.N.S. (Ch.) 326, and says that it proceeded upon the construction that the beneficiary took under the earlier part of the will an absolute interest, with a subsequent discretionary power in the trustees which they had either waived or declined to exercise. I cannot read this will as shewing that the fund or any part of it was to pass to the son unless as a consequence of the action of the executor so to dispose of it.

The effect of Gude v. Worthington is somewhat considered in Sweet's edition of Jarman on Wills, 6th ed., vol. 1, p. 887: the trustees had paid part of the fund to the beneficiary and died without any other exercise of this power. Knight Bruce, V.-C., held that the living beneficiary was entitled to the whole fund, but directed a reference to approve of a settlement (the beneficiary having married) from which it would appear (says the author) that the Court undertook to exercise the discretion given to the trustees. But (he adds) "if the beneficiary had died before the trustees it seems clear that her representatives would have had no claim to the fund." That is in truth the present case; the beneficiary dead, and the trustee having during the life exercised his powers only as to the payment of certain amounts, and now having in his hands the undisposed of surplus now in question.

To the present will I think the true rule of decision is suggested by Lord Thurlow in Lewis v. Lewis, 1 Cox 162. This is not the case of a gift by the testator, but a power to others to give, and that confined to answer a particular purpose. Here the particular purpose has been fully answered by the provisions made by the trustee during the life of the testator's son, and what remains at his death does not belong to his estate, but to that of the father.

The subject was discussed by Romilly, M.R., in Cowper v. Mantell, 22 Beav., at p. 233, who marks the distinction between the cases where a legacy is given to a person for a particular purpose which fails, and yet he has been held entitled to the

legacy, and to those in which there is no gift of a legacy, but only a discretion is confided in trustees, which not having been exercised, the possible legacy fails altogether. The case before him was one in which the testator authorised his trustees to apply any sum not exceeding £600 in the purchase of a church preferment for A. A. died before any sum had been so applied, and it was held that the gift wholly failed. The reason in the last words (at p. 237) applies to the case in hand: "I am of opinion that A. could not himself have required payment of the sum of money, and therefore that it falls into the residue."

I do not think that Gude v. Worthington should be extended, and I prefer to adopt as correct, and applicable to this will, the dictum of a master of equity, Stirling, J., in Re Johnston, [1894] 3 Ch. 209. A sum was there given absolutely, but coupled with a direction that the trustees in whom it was vested should so deal with and husband it as to prevent it falling into unworthy hands. The like provision is contained in this will just as it was in the will under consideration in Bain v. Mearns, 25 Gr. 450. Stirling, J., held that the condition was repugnant to the gift, and then proceeded to point out that the testator might (if he had been well advised) have efficiently provided for the same object by making the gift entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustees in the absolute exercise of their discretion thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make, in some shape or form, a gift over so as to benefit others besides the sons, etc.

This will is drawn with apt words to carry out the first method pointed out by Stirling, J., and in this respect the testator was well advised. Re Eddowes, 1 Dr. & Sm. 395, supports the conclusion that there is an intestacy as to the undisposed of part of the fund in the hands of the executor.

My conclusion is that the undisposed of residue in the hands of the executor should be paid into Court for the benefit of the next of kin of the testator, and that it be referred to the Master at London to ascertain who they are, and to distribute the fund accordingly. The executor to pass his accounts and receive his costs and commission, and be discharged.

Costs of this application out of the estate.

The solicitor appointed to represent the unascertained next of kin to have the carriage of the matter in the Master's office.

TEETZEL, J. MAY 3RD, 1911.

RE PHIPPS ESTATE.

Settled Estates — Trust for Sale — Representation of Unborn Issue and Absent Adults—R.S.O. 1897 *ch.* 71.

Motion by the executors of the estate of John Phipps for an order construing the will of the said John Phipps.

D. Urquhart, for the petitioners.

F. W. Harcourt, K.C., for the absent adults, infants, and unborn issue.

TEETZEL, J.:—I think Re Cornell, 9 O.L.R. 128, is clearly applicable to this case, and that it may be regarded as falling within the scope of the Settled Estates Act.

Good reason is shewn for realising upon the property by sale, having regard to the state of repair, increased taxation, and impossibility of realising from rents a fair return, having regard to the greatly increased value of this property, which is situate at the corner of Yonge and Gerrard streets, in this city.

All the adults who have been found approve of the sale under the supervision of the Court, as does also the Official Guardian for the infants, and I direct that the Official Guardian shall also be appointed to represent the unborn infants, and the two adults whose residence the petitioners have not been able to discover.

The order will therefore go directing that the power of sale given to the executors may be proceeded with forthwith under the supervision of the Master, the purchase money to be paid into Court upon the trusts of the will. Costs out of the estate.

TELFER v. DUN—MASTER IN CHAMBERS—APRIL 27.

Libel—Discovery—Examination of Parties—Denial by Party that he is a Partner—Con. Rules 223, 224.]—Motion by the plaintiff for the examination of W. C. Matthews, as a partner of the defendants, for discovery in an action for libel. The writ was served on W. C. Matthews under Rule 223, but without the notice required by Rule 224, so that he appeared under protest, thereby denying that he is a partner. This was

specially alleged in his statement of defence. The other defendants delivered the usual pleadings found in these cases. THE MASTER (after stating the facts):—As appears from the report of the similar case of Boisseau v. Dun, 10 O.W.R. 751, the partners reside in New York, and Matthews was then, and apparently is still, only their agent for this province. No attempt was made in that case to join him as a partner, though the defendants were willing to have him examined for discovery and be bound by his evidence, so as to dispense with a commission to New York. This offer was not at that time accepted by the plaintiff, but the order afterwards made directing this to be done, though appealed against by the defendants, was affirmed on the 13th November, 1907, with costs to the plaintiff in any event. Inasmuch as Matthews denies that he is a partner, he cannot be examined for discovery except on this point, without the concurrence of the defendants, or without an order such as made in Boisseau v. Dun, supra. The present motion for an order for his re-attendance must therefore fail in view of the objection taken at the outset of the examination by his counsel. The parties will perhaps consider whether an order such as was made in the Boisseau case would not be in the interests of both, as this would save the expense of a commission to New York. If they cannot agree as to this, there will be a dismissal of the present motion with costs to the defendants in the cause. H. M. Mowat, K.C., for the plaintiff. T. P. Galt, K.C., for the defendants.

QUICKFALL v. QUICKFALL—LATCHFORD, J.—MAY 2.

Will—Devise—Competence of Testator—Undue Influence—Party giving Instructions Benefiting by Change in Will—Onus on, not Satisfied—Evidence.]—Action to set aside the will of the late R. M. Quickfall, of Berlin, dated the 8th November, 1910, and to establish a prior will, dated the 11th October, 1910, as the last will of the deceased. The learned Judge declined to consider the latter phase of the action, and the trial was restricted to the determination of the validity of the will of the 8th November last. The will was attacked on two grounds, (1) that the testator was not competent to make a will on the 8th November, and (2) that the will of that date was obtained by the fraudulent conspiracy and undue influence of his sons Allan and Albert. The testator had reached the age of 77, and was possessed

of an estate of about $19,000. He had three surviving children, Allan and Albert already mentioned, who were in easy circumstances, and Charles, who had not been prosperous, had made an assignment for the benefit of his creditors in 1905, and was recently employed by his brother Albert as a labourer. For some time before his death, the testator had been suffering from Bright's disease, and becoming seriously ill on the 8th October last, on the 10th October gathered his three sons about his bed so that he might arrange his estate before he died. He had some time before prepared an incomplete draft of a will, under which Allan and Albert were each to get $5,000, and Charles was to have the use of $5,000 as long as he lived, to be divided afterwards equally among his four daughters. At the bedside conversation each of the three sons read this draft and expressed his assent to it, although Allan said at the trial that he was not satisfied, and indicated this to his father by a "look." Instructions based upon this draft were given to a solicitor, and the will of the 11th October was prepared, but not executed till the next day, as the solicitor thought he was not in proper condition to execute it on the 11th. Under this will $5,000 was devised to Allan and Albert as trustees for Charles and his children, and the balance of the estate, about $14,000, was divided equally between Allan and Albert, thus effecting what was practically an equal division among the three sons, in view of previous advances made to them by their father. It was established by the evidence that Allan was much displeased with the provision made by his father for Charles and his daughters, and his views were sympathised in by Albert and other relatives who, with Allan, had constant access to the testator, who was residing with Albert at the time of his death. These persons swore that they did not urge the testator to lessen the bequest to Charles and his children, or even venture a suggestion that any change should be made in the will. On the 7th November, however, instructions were given to the solicitor by Albert to prepare a new will reducing the bequest to Charles and his family from $5,000 to $2,000, the difference going into the residue apportioned equally between Allan and Albert, thus increasing the share of each by $1,500. The new will, based upon these instructions was executed on the 8th November, and is the will the validity of which is questioned in this action. After a detailed analysis of the evidence, and review of the authorities, the learned Judge came to the conclusion that both Allan and Albert were parties to the instructions which were given for the new will, and that they had not discharged the onus which lay upon

them, as persons profiting by the change, to shew that the alleged will of the 8th November was the free and uninfluenced act of the testator. Judgment was accordingly given, declaring that the document of the 8th November is not the last will of the deceased. Costs of the plaintiff and the official guardian out of the estate. E. P. Clement, K.C., for the plaintiff. W. N. Tilley, for the defendants Allan and Albert Quickfall. A. Millar, K.C., for the official guardian.