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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. FEBRUARY 4TH, 1920.

ANDERSON v. NOWOSIELSKI.

Assignments and Preferences—Action by Assignee for Benefit of Creditors of Insolvent to Set aside Mortgage to Creditor Made by Insolvent—Evidence—Preference—Chattel Property Transferred to Creditor—Claim of Creditor against Estate—Account—Costs —Appeal.

Apeal by the defendant Lavoie from the judgment of SUTHERLAND, J., 16 O.W.N. 379.

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

E. S. Wigle, K.C., for the appellant.

F. D. Davis, for the plaintiff, respondent.

A. B. Drake, for the defendant Nowosielski, respondent.

THE COURT dismissed the appeal with costs (the respondent Nowosielski's costs fixed at $20), without prejudice to the rights (if any) of the appellant to prove a claim upon the insolvent estate for $450, said to be part of the consideration for the sale of an automobile, and with a declaration that the sum of $800 to be paid to the plaintiff is to be dealt with according to the rights of the respective parties to the action.

SECOND DIVISIONAL COURT. FEBRUARY 6TH, 1920.

*RE DOMINION PERMANENT LOAN CO.

Company—Winding-up—Contributories—Holders of Shares Partly Paid-up—Companies Act, R.S.O. 1897 ch. 205, sec. 15 (3)—Acceptance by Shareholders of another Company of Shares of Company in Liquidation—Issue of Full $100 Share where Person Entitled to Fraction of Share—Liability for Balance Due on Shares—Creditors.

Appeal by the liquidator of the company from the judgment of LENNOX, J., 16 O.W.N. 295.

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

J. W. Bain, K.C., and M. L. Gordon, for the appellant.

I. F. Hellmuth, K.C., and J. J. Maclennan, for Edward Acheson and others, respondents.

MIDDLETON, J., read a judgment in which he said that, under the agreement of the 2nd April, 1902, which he assumed to be valid and effectual, the shareholders of the "Provincial" accepted shares in the "Dominion" paid-up by the transfer of assets; "but, in case the amount of stock . . . to which any shareholder is entitled is for a fraction of a share or a number of shares and a fraction, then in either of such cases the stock to be issued for such fraction shall be one share with the amount of such fraction paid-up, and the shareholder to whom such stock is allotted shall have the privilege of paying up the balance of such share of stock so issued."

The shares spoken of were shares of $100 each of permanent stock.

Pursuant to this agreement, certificates were issued for the "fractions" in this form:—

"Permanent Stock Certificate $100 share.

"This is to certify that A.B. is the registered holder of one share, numbered ———, of the permanent stock in the above-named company, subject to the by-laws thereof, and that the sum of $——— has been paid on the said share."

These certificates were signed by the president and general manager of the company and sealed with its corporate seal.

What the learned Judge regarded as of vital importance was that no attempt was made to constitute the shareholders of the

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

"Provincial" holders of fractions of shares or of fully paid-up shares for uneven amounts; but, by the terms of the agreement, these shareholders became holders of shares for $100 on which the named amount was paid.

Under the Loan Corporations Act then in force, R.S.O. 1897 ch. 205, sec. 15, sub-sec. 3, "no shareholder shall be liable for or chargeable, in respect of permanent shares, with the payment of any debt or demand due by the corporation, save only to the extent of the amount unpaid on the shares in the capital stock of the corporation."

The case is covered by the reasoning of the House of Lords in Ooregum Gold Mining Co. of India v. Roper, [1892] A.C. 125. See also Welton v. Saffery, [1897] A.C. 299.

What was done in this case was to issue $100 shares upon which a certain sum was paid-up. These shares were accepted; and, even if the unpaid balance could not have been called in by the company, by reason of the wording of the agreement, which gave the privilege of payment to the shareholder, the shareholder would remain liable to the creditor by virtue of the statute until the full amount was paid. The possibility of a company precluding itself by agreement from making a call while the shareholder would remain liable to the creditors, is suggested by Lord Herschell in the Ooregum case; but here the insolvency was so great that the creditors could hope for a dividend only.

The appeal should be allowed and the order of the Master making the respondents liable as contributories should be restored.

RIDDELL and LATCHFORD, JJ., agreed in the result, for reasons stated by each of them in writing.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal allowed (MEREDITH, C.J.C.P., *dissenting.*)

HIGH COURT DIVISION.

ROSE, J. FEBRUARY 3RD, 1920.

*RE BEAVER WOOD FIBRE CO. LIMITED AND AMERICAN FOREST PRODUCTS CORPORATION.

Arbitration and Award—Scope of Submission—"Any Dispute Arising under this Contract"—Award of Damages for Breach of Contract—Evidence before Arbitrators—Enlargement of Submission—Jurisdiction of Arbitrators—Right of Party to Arbitration to Object—Motion to Set aside Award.

Motion by the Beaver Wood Fibre Company Limited to enforce, and cross-motion by the American Forest Products Corporation to set aside, an award of arbitrators, dated the 6th December, 1918.

The motions were heard in the Weekly Court, Toronto.

Peter White, K.C., Alfred Bicknell, and A. Bristol, for the Beaver Wood Fibre Company Limited.

A. G. Slaght, for the American Forest Products Corporation.

ROSE, J., in a written judgment, said that, by an agreement in writing, dated the 27th March, 1916, the American Forest Products Corporation agreed to sell and the Beaver company agreed to buy not less than 10,000 nor more than 15,000 cords of pulpwood, cut during the winter and spring of 1915-16. Terms as to shipment, measurement, piling, etc., were set out; the contract was declared to be "made subject to strikes, fires, and contingencies beyond the control of either party;" and there was a provision that "in case of any dispute arising under this contract" it should be settled by a board of three arbitrators.

The sellers did not make deliveries at the times stipulated, and did not deliver the full quantity of wood contracted for; and arbitrators were appointed, who awarded that the sellers should pay to the buyers $39,333.70, together with the costs of the reference and award.

It appeared to the learned Judge that, upon the materials originally before the Court, no conclusion could have been reached other than that the dispute which had arisen and had been referred was a dispute as to whether or not the sellers had, in the circumstances of the case, done all that the contract required them to do, or, if not all, what part; and that the award of damages for breach of the contract—if there was held to be a breach—was not something submitted to the arbitrators. If the case were to be disposed of upon the materials first presented, the award must be set aside: Re Green and Balfour Arbitration (1890), 63 L.T.R. 97, 325 (C.A.)

The case, however, was not disposed of upon the original materials; leave was given to the Beaver company, the buyers, to put in a transcript of the notes of the evidence adduced before the arbitrators; the transcript was put in; and the case was re-heard.

Before the arbitrators, the buyers gave evidence as to damages from breach of the contract. The sellers adduced no evidence as to damages, but directed their efforts to an attempt to shew that the non-delivery of the wood was due to fires and contingencies beyond their control. The award did not deal specifically with the issue presented by the sellers.

The learned Judge was of opinion that, unless what was done upon the reference had the effect of enlarging the submission or of

depriving the sellers of the right to contend that the question as to damages was not referred, the award must be held to be upon a matter which was outside the scope of the reference.

Parties may, by the use of appropriate language, agree to submit the question whether a particular dispute is within the terms of the submission; and, if they do so agree, they will be bound by the decision of the arbitrators upon that question: Willesford v. Watson (1873), L.R. 8 Ch. 473; Russell on Arbitration and Award, 10th ed. (1919), p. 94. But, except where such a question is submitted, the arbitrators cannot acquire jurisdiction by erroneously deciding that what they affect to determine is within the submission: Produce Brokers Co. Limited v. Olympia Oil and Cake Co. Limited, [1916] 1 A.C. 314, 327, 329; Re Green and Balfour Arbitration, supra. These cases did not affect the actual decision in Woodward v. McDonald (1887), 13 O.R. 671; while a dictum therein may be considered to be overruled by them.

In this case, the evidence seemed to the learned Judge to fail to shew that any controversy had been raised and submitted, other than one as to whether any failure to make deliveries was excused by fires or contingencies beyond the control of the sellers. Therefore, in awarding as to the consequences of such failure as there may have been, the arbitrators travelled beyond the matter in dispute; and the award must be set aside unless there was something which precluded the sellers from questioning it.

Were the sellers precluded from raising the point that the award dealt with a matter that was not submitted? Their mere failure to object to the opening statement of counsel for the buyers as to the matter to be determined was not fatal to their right to raise the question of jurisdiction now.

Reference to Russell on Arbitration and Award, 10th ed., pp. 418-424; Davies v. Price (1862), 6 L.T.N.S. 713; affirmed (1864), 34 L.J.Q.B. 8; Ringland v. Lowdes (1864), 33 L.J.C.P. 337; Faviell v. Eastern Counties R.W. Co. (1848), 2 Ex. 344; Halsbury's Laws of England, vol. 1, p. 450; Borough of Thetford v. Norfolk County Council, [1898] 1 Q.B. 141.

The motion made by the sellers must succeed, the award must be set aside, and the matter must be remitted to the arbitrators so that they may make their award upon the questions submitted to them. The buyers must pay the costs of the motions.

MIDDLETON, J. FEBRUARY 3RD, 1920.

*LAZARD BROS. & CO. v. UNION BANK OF CANADA.

Banks and Banking—Assertion by Bank of Lien upon Shares for Money Due by Person in whose Name Shares Stood on Register—Bank Act, sec. 77—Equitable Title to Shares in Third Person—Fraud—Failure to Disclose Lien—Duty—Interest—Estoppel by Silence—Title to Shares.

Action to establish the claim of the plaintiffs to 200 shares of the capital stock of the defendant bank, standing in the name of the late E. E. A. DuVernet. These shares DuVernet agreed to deposit with the Union Trust Company, as trustees for the plaintiffs, as security for an advance; and, if the plaintiffs were entitled to succeed, the balance due exceeded the value of the shares.

The action was tried without a jury at a Toronto sittings.

Glyn Osler and G. R. Munnoch, for the plaintiffs.

Hamilton Cassels, K.C., and C. P. Wilson, K.C., for the defendant bank.

D. W. Saunders, K.C., for the defendant Clarkson, administrator of DuVernet's estate.

MIDDLETON, J., in a written judgment, said, after setting out the facts, that there was no question as to the right of the plaintiffs as against DuVernet; the difficulty was occasioned by the assertion by the bank of its right to a lien for money due to it by DuVernet, under sec. 77 of the Bank Act.

There was no doubt of the right of the bank, as against DuVernet, to a lien for an amount almost equal to, if not exceeding, the value of the shares.

The real question was, whether the bank could assert its lien upon those shares against the plaintiffs, in view of the circumstances.

The learned Judge then set out the details of the transactions.

After doing so, he said that he had no hesitation in finding that there was a duty upon the part of the bank to disclose its lien, and that the failure to disclose was fraudulent, in the sense that it was intended to allow the plaintiffs to assume the liability incident to the acceptance of the bills, without the security they thought they had. The real enormity of what was done was probably not apparent to the bank officials at the time, for they assumed that Mr. DuVernet could and would meet his obligations. Mr. DuVernet's insolvency and death now made it plain that one of the contending parties must lose.

The bank asserted its statutory right to its lien, and the learned Judge applied the principle stated by Lord Macclesfield in Savage v. Foster (1723), 9 Mod. 35: "When anything in order to a purchase is publicly transacted, and a third person knows thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser." See also Nicholson v. Hooper (1838), 4 Myl. & Cr. 179, 186; Re Shaver (1871), 3 Ch. Chrs. 379.

Since those cases there had been much discussion concerning estoppel by silence; but there could be no doubt of the application of the principle when there was an interest in the carrying out of the transaction, a clear duty to speak, and a wilful maintaining of silence to the prejudice of the other.

There must be a declaration of the plaintiffs' title to the shares and an order for payment over of the dividends retained by the bank and interest thereon.

The bank should pay the costs of the plaintiffs. There should be no order as to the costs of Clarkson.

MIDDLETON, J. FEBRUARY 3RD, 1920.

*RE ROGERS.

Will—Construction—Specific Devise of Land Described by Metes and Bounds—General Residuary Devise—Possession Taken by Testatrix, after Date of Will, of Parcel Adjoining Land Described—Will Speaking from Immediately before Death—Wills Act, sec. 27—Application of—Acquisition of Statutory Title by Executors Retaining Possession—Appurtenance—Gift Free from Ambiguity.

Motion by the executors for an order determining certain questions arising in the administration of the estate of the late Mary A. C. Rogers, who died on the 22nd September, 1910. Probate was duly issued to the executors, the National Trust Company, of the will dated the 28th May, 1907, and a codicil bearing date two days later.

The motion was heard in the Weekly Court, Toronto.

R. H. Greer, for executors and certain beneficiaries.

W. A. McMaster, for Jennie Baker and Estelle B. Richards.

G. W. Holmes, for Mrs. Fletcher.

MIDDLETON, J., in a written judgment, said that the testatrix, by clause 5 of the will, directed that her "house on Simcoe street" is to be held by her trustees, to whom she has devised all her property, in trust for her husband during his life and after his death in trust for Jennie Baker, his daughter, for life, and upon her death to be conveyed to her grandchildren Marion, Stella, and Howard, or the survivors, as joint tenants. The will added: "The said Simcoe street house is more particularly described as follows;" then followed a description taken from the deed under which the testatrix obtained title, describing the property by metes and bounds, and giving a frontage on Simcoe street of 25 feet and a depth of 100 feet.

The will and codicil dealt with a number of other parcels in a similar way.

There was a residuary clause under which the residuary estate, real and personal, was to be sold and the proceeds divided among the children and grandchildren per capita.

Simcoe street being parallel to University avenue and distant 120 feet from it, the owner of a large block fronting on Simcoe street, without making any registered plan, sold portions of this land as lots fronting on Simcoe street, having a depth of 100 feet, thus leaving a strip of land between the rear of the land sold and University avenue, having the appearance of a lane; it was not described as a lane, and no rights over it were given in any of the conveyances. The parcel described in the will was the most southerly of these parcels sold, and south of it was a 20-foot strip running east from Simcoe street to University avenue, appearing to be a lane, affording access to the other strip of land and serving as a lane to lots fronting on Queen street. This was the situation on the ground when the testatrix bought in 1886.

Some time after this, the occupant of the land to the north of this property took possession of this 20 feet to the rear of his place, and built on it a house fronting on University avenue. This left the 20 feet to the rear of the testatrix's property useless; and, after the making of this will, and about a year before her death, she took possession of this land, and her son, who lived with her, built a garage on this small parcel, 20 x 25 feet.

Alexander Rogers, the husband of the testatrix, died on the 29th May, 1912, and the family then moved out of the premises. Some claim relating to the erection of the garage was then made by the son, but was adjusted by the executors by allowing him to remain in possession a short time rent free. Since then the executors had rented the house and the garage, sometimes as separate tenements, sometimes together, and had paid the rental to Mrs. Baker.

Recently the executors had sold the whole parcel, 25 x 120, for $15,000, and the purchasers had accepted the title.

The question which arose was, whether this small parcel, 20 x 25, passed under the devise of the Simcoe street house or formed part of the residuary estate.

Counsel had consented on behalf of all parties to affirm the sale and claim the purchase-money as standing in place of the land.

The testatrix, having at her death possession of the land, no doubt had an interest in it which would pass under her will; and the real question was, whether it passed under the specific or the residuary devise. The possession of her executors had now caused her possession to ripen into a statutory title, held in trust for the person entitled under the will.

Cases where the testator, after using general words sufficient to constitute a good devise of property which he owned, followed them by a particular description which by some error did not cover the property, afforded no assistance here, as this testatrix owned both parcels; and, while it might be conceded that the general words used were capable of meaning either one or both, the particular words indicated one parcel only. The cases which shew that to avoid an intestacy the Court will give the largest possible meaning to the words used had no application, for there was a residuary devise.

The case, in the opinion of the learned Judge, turned upon the effect of sec. 27 of the Wills Act, R.S.O. 1914 ch. 120, enacting that a will shall be construed, with reference to the real and personal estate comprised in it, as though executed immediately before the death of the testator, unless a contrary intention appears by the will.

The contrary view was that this section did not aid in a contest between the specific and residuary devisees—see per Lindley, J., in In re Portal and Lamb (1885), 30 Ch. D. 50; but this seemed unduly to narrow the section.

If, however, the will must be construed as of its date, property to which the testatrix had no title, and of which she had no possession, was not included.

If the statute applied, and the will was to be read as though made just before death, the testatrix had controlled the general words by the particular description. She had said: "I give my Simcoe street house, by which I mean the parcel I bought, 25 x 100." Reference to Re Ingram (1918), 42 O.L.R. 95, and Re Rutherford (1918), 42 O.L.R. 405.

Then it was said that this parcel was appurtenant to the larger parcel, and would of necessity pass with it. But, where the devisee takes under the will as a volunteer, he takes only what is given and no more, and this gift was free from all ambiguity.

McNish v. Munro (1875), 25 U.C.C.P. 290, and Hill v. Broadbent (1898), 25 A.R. 159, shew that one parcel of land will not pass under a conveyance of another by virtue of the general words of the Conveyancing and Law of Property Act; and a fortiori it will not pass under a will. An easement, no doubt, will pass: Phillips v. Low, [1892] 1 Ch. 47.

Order declaring accordingly; costs of all parties to be paid out of the residue.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 4TH, 1920.

BUCHANAN v. BUCHANAN.

Husband and Wife—Alimony—Action for—Claim for Custody of Child——Wife and Child Living with Husband while Action Pending—Examination of Husband—Discovery Confined to Matters Relevant to Issues to be Tried—Refusal to Allow Examination as to Matters Justifying Wife in Leaving Husband.

An appeal by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion to compel the defendant to attend for re-examination for discovery and to answer certain questions which he refused to answer when examined.

C. W. Plaxton, for the plaintiff.
J. Jennings, for the defendant.

MIDDLETON, J., in a written judgment, said that the action was for alimony. The wife was, at the time the motion was made, living with her husband in his house, and was maintained by him. The daughter, a child of 12 or 13, was living with them.

The plaintiff and defendant did not agree, but for over 20 years had lived together in greater or less discord. The plaintiff now sued for alimony, and set up many things, more or less serious, extending over many years. The defendant denied all these, and stated that he had always maintained his wife, and was in fact doing so now; that, for the sake of the child, he was ready and willing to do so; and that, if what he was doing was not sufficient, he was willing to pay such sums as the Court should direct; and, if the plaintiff was not content to remain in his house, he was willing that she should live apart; and, in that event, he was ready to pay such alimentary allowance as the Court should determine, but would claim the custody of the child.

The plaintiff, in her action, claimed the custody of the child, and a declaration that she was the owner of the house.

The plaintiff now sought a cross-examination of the defendant as to his whole married life, with the view of obtaining information which would go to support her in leaving him if she had left him. The defendant objected, and said that, in view of the admitted fact that the wife was not living apart and was being maintained by him in his residence, the attempt to examine him was vexatious and could result only in a situation very prejudicial to him and his child.

The plaintiff wholly misconceived her rights. Alimony is an allowance payable, by the husband to the wife while living separate and apart from him, in circumstances which justify the separation. A wife must put up with much that is disagreeable if she contracts an unfortunate marriage. She cannot leave her husband unless his misconduct amounts to such cruelty as causes danger, or reasonable apprehension of danger, to life, limb, or health, so as to render cohabitation impossible—cohabitation meaning in this connection the living under the same roof. The question as to the existence of such a state of affairs can admit of but one answer when the wife is during the action living with her husband.

The situation is not one-sided, as the husband is bound to maintain his wife even if her conduct is highly reprehensible and objectionable.

The same reasoning applies to the claim for the custody of the child. The husband and wife may no longer be one in the eye of the law; but, when they are living together, they have joint custody of the child, and the mother cannot then seek separate custody. The statute has no application when the husband and wife are living together.

Shortly, the wife cannot try the experiment of a law-suit to determine in advance what her rights might be in the event of a separation which has not taken place. She can neither sue for alimony nor for the custody of her child while she is living with her husband. Both rights are predicated upon the existence of a justifiable separation.

The learned Judge does not suggest that the wife can better her situation by now leaving her husband and renewing her attack. Any such action would be fraught with peril, so far as she is concerned, no matter what his conduct in the past, unless he is guilty of some new act; for she has, by remaining with her husband until now, shewn that it is possible to remain with him.

Ordinarily, the learned Judge would hesitate to restrict the right to examine before trial; but here the abuse of the right seemed so plain that no order ought to be made to allow that to be done which might occasion serious prejudice to the husband,

and others not party to this litigation, without any advantage to the wife.

The principle is, that discovery is confined to matters relevant to the issues to be tried. A defendant can always narrow the right of examination by so pleading as to narrow these issues.

The order should be affirmed; no costs.

SUTHERLAND, J. FEBRUARY 4TH, 1920.

RE BARNES.

Will—Construction—Bequests to Wives and Children of Testator's Sons—Assignments of Children's Shares to Mothers—Division of Property—Account—Discretion of Executors.

Motion by the executors and trustees under the will of Philander Barnes, deceased, for an order determining certain questions arising in the administration of his estate as to the meaning and effect of portions of the will.

The motion was heard in the Weekly Court, Toronto.

R. W. Treleaven, for the executors and trustees.

J. S. Lundy, for Elizabeth Barnes, Eliza J. Barnes, and Percy P. Barnes.

A. L. Reid, for Nicholas Kupper.

SUTHERLAND, J., in a written judgment, said that the testator, after providing for the payment of debts and certain bequests, (1) directed his executors to sell and convert all his residuary estate, both real and personal, into money, and out of the proceeds to set apart one-third and invest it and pay the income to the testator's wife, Elizabeth Barnes, during her natural life, in lieu of dower. Clause 2 was as follows: "I give devise and bequeath the remaining two-thirds of my residuary estate to my said executors to be by them divided as follows: I direct my said executors to divide the same into three equal parts and they shall give the same as follows: (a) one-third part thereof to be given to the wife and children of my son Ebenezer Barnes in such shares as my executors or a majority of them may think proper; (b) one-third part thereof to be given to the wife and children of my son John Barnes in such shares as my executors or a majority of them may think proper."

The testator died on the 24th September, 1911.

At the death of the testator, Ebenezer Barnes was living, and also the latter's wife, Eliza J. Barnes, and their three children,

Percy, Richard, and Lottie (wife of Nicholas Kupper). On the 29th December, 1912, Lottie died without issue; her husband survived her. Richard died in December, 1917, leaving a widow, but no children. In the lifetime of Richard, he and Percy signed a release and transfer of their interests under the will to their mother. Percy now consented that his share should go to his mother. It appeared from the material filed that Lottie in her lifetime also agreed that the whole of the legacy under clause 2 (a) should be paid to her mother, but never signed any actual release. Nicholas Kupper refused to sign one, and now contended that his wife took a vested interest under clause 2 (a), and that he had an interest through her. The widow of Richard had not been served.

It appeared that in 1914 the executors paid to Eliza J. Barnes $1,000 on account of the one-third part referred to in clause 2 (a). Apart from this, the income derived from the respective parts referred to in clause 2 (a) and 2 (b) had been paid to the widows of Ebenezer and John respectively. (No question arose under clause 2 (b)). The executors appeared to have acted upon the opinion and belief that, in the circumstances, the whole of the moneys should be paid to the two widows.

In the learned Judge's opinion, Nicholas Kupper and the widow of Richard were not entitled to any interest in the one-third part referred to in clause 2 (a), and that part should now be paid to Eliza J. Barnes. The one-third part referred to in clause 2 (b) should now be paid to the widow of John. An account should be taken as of the date when the real estate was sold. As between the two widows, the $1,000 paid to Eliza J. Barnes must be taken into account.

Order declaring accordingly; the executors to have their costs as between solicitor and client out of the estate; the two widows to have their costs out of the estate; no costs to Kupper.

SUTHERLAND, J. FEBRUARY 4TH, 1920.

ELLIOTT v. ORR GOLD MINES LIMITED.

EMMONS v. ORR GOLD MINES LIMITED.

Company—Proposed Sale of Assets—Fraud on Minority Shareholders—Inadequacy of Price—Non-disclosure of Actual Transaction to Minority—Qui tam Actions by Shareholders—Injunction.

The plaintiff in each action sought a declaration that a proposed sale of mining claims was a fraud upon him and the shareholders

of the defendants the Orr Gold Mines Limited, other than the defendants the Kirkland Porphyry Gold Mines Limited, and for an injunction restraining the defendants from carrying out the proposed sale and from passing any resolution or by-law for that purpose.

The actions were tried without a jury at a Toronto sittings.
R. S. Robertson, for the plaintiff Elliott.
Strachan Johnston, K.C., for the plaintiff Emmons.
Daniel O'Connell, for the defendants.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that, in his opinion, the agreement between one Wettlaufer and the defendant Kirkland company was one which in its terms was unfair and oppressive to the minority shareholders of the defendant Orr company, and one which the Kirkland company, holding the majority of shares in the Orr company, could not properly make and should not be allowed to carry out. Wettlaufer was not a party to either of these actions. The sale proposed to be made by or in the name of the Orr company of its substantial assets in the manner and for the consideration proposed was one which was in effect a fraud upon the minority shareholders of that company; and the Kirkland company and those in control of it, in attempting to use the majority holdings in the Orr company as proposed, were acting in a manner oppressive to the minority shareholders; the result of carrying out the sale would be that the minority shareholders would not be fairly or impartially dealt with and would not get as much for their shares as the majority shareholders would get. The majority shareholders could not be permitted thus to use their power to dispose of the substantial assets of a company for their own purpose and benefit: Menier v. Hooper's Telegraph Works (1874), L.R. 9 Ch. 350.

The proposed price was altogether inadequate: In re Consolidated South Rand Mines Deep Limited, [1909] 1 Ch. 491; Clinch v. Financial Corporation (1868), L.R. 5 Eq. 450; Cook v. Deeks, [1916] 1 A.C. 554.

As to the right of the respective plaintiffs to sue on behalf of themselves and the shareholders of the Orr company other than the Kirkland company, there could be no doubt: Baillie v. Oriental Telephone and Electric Co., [1915] 1 Ch. 503.

The actual transaction, so far as the records or the evidence shewed, was not disclosed to the minority shareholders.

The plaintiff in each action was entitled to a judgment perpetually restraining the defendant companies from carrying out the proposed sale, with costs.

CLUTE, J. FEBRUARY 5TH, 1919.

C. C. ROBBINS INCORPORATED v. ST. THOMAS PACKING CO.

Company—Extra Provincial Corporation—Extra Provincial Corporations Act, R.S.O. 1914 ch. 179, secs. 7, 16—Action Brought by Unlicensed Company—License Obtained pendente Lite—Effect of—Warehousemen—Negligence—Loss of Goods Stored—Findings of Trial Judge—Damages.

Action for damages for the loss of 95,000 lbs. of fish stored with the defendants, owing, as the plaintiffs alleged, to the negligence of the defendants.

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

John Jennings, for the plaintiffs.

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

CLUTE, J., in a written judgment, said that the question was, whether the fish stored were injured in such a way as to entitle the plaintiffs to recover the value, or any part thereof, from the defendants.

The learned Judge, after reviewing the evidence, found that the injury to the fish and their depreciation in value and loss to the plaintiffs was owing entirely to the conditions in the defendants' storehouse and the failure of the defendants to keep the temperature low enough.

The defendants contended that the fact that the plaintiffs, an extra provincial corporation, had obtained no license under the Ontario Extra Provincial Corporations Act, R.S.O. 1914 ch. 179, was a bar to the action.

The action was begun in 1918 or 1919, and the trial was begun on the 18th and 19th March, 1919. The evidence was then taken; but the further trial was adjourned to give the plaintiffs an opportunity to apply for a license.

A license was granted on the 16th January, 1920, and was brought before the Court on the 28th January, 1920, after which argument was heard.

Section 7 of the Act prohibits the carrying on of business without a license. Section 16 (1) imposes a penalty for carrying on business without a license, and declares that so long as an extra provincial corporation "remains unlicensed it shall not be capable of maintaining any action or other proceeding in any Court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with busi-

ness carried on contrary to the provisions of said section 7." Sub-section 2 of sec. 16 provides: "Upon the granting or restoration of the license or the removal of any suspension thereof such action or other proceeding may be prosecuted as if such license had been granted or restored or such suspension had been removed before the institution thereof."

The learned Judge was of opinion that sub-sec. 2 enables the plaintiff company to prosecute the present action "as if such license had been granted before the institution thereof." The prohibition was for the purpose of preventing default in obtaining a license—to compel compliance with the Act. The Legislature had thought proper to treat the granting of a license after action brought as equally efficacious with one granted before action brought.

There should be judgment for the plaintiffs for $6,650, less the sum paid to the defendants by the express company, to be settled by the Master at St. Thomas if the parties should disagree. There should be no order as to costs.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 7TH, 1920.

*MORROW v. MORGAN.

Practice—Action by Mortgagee for Possession of Mortgaged Lands—Judgment Signed for Default of Appearance—Irregularity—Rule 43—Absence of Affidavit Required by—Motion to Set aside Judgment—Leave to File Affidavit nunc pro tunc—Jurisdiction of Master in Chambers—Failure to Prove Service of Amended Writ of Summons—Allowance of Costs—Ex Parte Taxation—Excessive Costs.

Appeal by the defendants from an order of the Master in Chambers dismissing their application to set aside a judgment signed for default of appearance in an action to recover possession of certain lands situate in the city of Toronto.

A. C. Heighington, for the defendants.
T. R. Ferguson, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the plaintiff was mortgagee of the lands, and there was no doubt that the mortgagee was in default. The defendants were endeavouring to arrange for a new loan for an amount sufficient to meet the plaintiff's claim, and said that they were now in a position to pay the plaintiff off.

The motion before the Master was to set aside the default judgment, upon the ground, among others, that the part of the judgment allowing the plaintiff costs was not warranted by the practice, Rule 43 providing that the plaintiff in an action for the recovery of land shall not be entitled to costs unless he files an affidavit shewing that the defendants at the time of the commencement of the action were in actual adverse possession of the land, or obtains an order allowing him to sign judgment for costs. No affidavit was filed, and no order had been obtained, yet the Local Registrar who signed the judgment allowed costs which were taxed at $73.28 and $20 for discharge of mortgage and solicitor and client costs. The Master in Chambers condoned this irregularity, by allowing the affidavit to be filed nunc pro tunc. His order also provided that, upon payment of principal, interest, and costs, within 7 days, the action should be dismissed, and there should be no costs of the motion before him. It was from this order that the appeal was taken.

The learned Judge was of opinion that it was not competent for the Master in Chambers to permit the affidavit to be filed nunc pro tunc; and that his discretion should not have been exercised in favour of the plaintiff. Costs should have been allowed to the defendants as against the plaintiff in any event of the cause. In the absence of any evidence of the service of the amended writ of summons (amended pursuant to an order of a Judge in Chambers), the judgment was irregular and improper. The costs, too, were taxed at an excessive amount—the plaintiff was not entitled to more than $34.25.

The allowance of costs not taxable under the practice is oppressive in the extreme, and tends to bring the Court and the administration of justice into disrepute.

In all the circumstances, the learned Judge allowed the appeal and vacated the judgment and extended the time for the entry of appearance to 10 days from this date, so as to allow the defendants an opportunity of paying the debt, without the incurring of any further costs. The costs of the motion before the Master and of this appeal should be paid by the plaintiff to the defendants in any event of the action, and if necessary should be set off pro tanto against the mortgage-debt. The costs of the proceedings under the power of sale appeared to be extraordinarily large, and these ought to be taxed if the defendants desired. If this taxation should occasion any delay, the proceedings should be stayed for a further time, upon the terms that the principal money and interest due upon the mortgage be in the meantime paid to the plaintiff.

MIDDLETON, J. FEBRUARY 7TH, 1920.

RE SOLICITOR.

Solicitor—Undertaking of Person (not Client) with Solicitor to Pay Costs in Connection with Certain Proceedings—Taxation of Solicitor's Bill—Scope of Undertaking—Quantum of Allowance—Appeal from Taxation.

An appeal by the "client" from the taxation by a Local Master of a bill of costs rendered by the solicitor.

The appeal was heard in the Weekly Court, Toronto.
G. T. Walsh, for the appellant.
J. M. Ferguson, for the solicitor, respondent.

MIDDLETON, J., in a written judgment, said that the circumstances surrounding this taxation were quite unusual. The relationship of solicitor and client did not in fact exist. The solicitor was retained to take proceedings in a large number of matters pending in the Division Court at Haileybury, concerning the enforcement of liens claimed by workmen upon logs under the Woodmen's Lien Act. A motion had been made for prohibition, and, as ancillary to it, proceedings had been taken in all these actions to bring about a stay pending the hearing of the motion. The gentleman who had been designated as "client" was interested in the logs in question, and intervened for the purpose of having the proceedings stayed, and entered into an agreement with the solicitor that, in consideration of the application for prohibition being withdrawn, and the sale of the logs being allowed to proceed, he would pay the costs incurred by the solicitors in connection with the prohibition proceedings.

Both parties were quite capable of taking care of themselves, and the agreement was in writing.

In pursuance of the agreement, the prohibition proceedings were abandoned; and, the solicitor asking for payment of his costs, a dispute arose as to the amount payable. The question raised was, whether the undertaking to pay costs was intended to apply strictly to the costs of the motion, or whether it included the costs of the obtaining of the stay of proceedings in the Court below. The Taxing Officer had held in the solicitor's favour.

The intention of the agreement was that, upon the proceedings being abandoned, so that the judgments might be enforced, the solicitor should be paid all the costs of the "prohibition proceedings." It was significant that what was to be dropped was called "the application for prohibition." It was not intended that the

solicitor should be left to resort to his clients for costs of the preliminary application for a stay of proceedings. The whole bill was to be assumed and paid by the present appellant. If it had been intended that any part of the costs should be excepted from what was to be assumed and paid, this exception would have clearly appeared upon the face of the document signed. It may well be that the amount claimed turned out to be much larger than contemplated, but this might have been guarded against by the terms of the agreement. It was extraordinary that the agreement was made in these vague terms, instead of being an agreement for payment of a definite sum.

It was not seriously suggested that the learned Judge should interfere with the quantum of the allowance made. Unless there is an error in principle the Judge should not interfere upon an appeal.

While the appeal failed and must be dismissed with costs, these costs should be fixed at $25, which would be less than what would be allowed upon a taxation, for the amount involved was not large.