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APPELLATE DIVISION.

JANUARY 14TH, 1915.

*GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.

Life Insurance—Benevolent Society—Contract of Insurance—Life Expectancy Benefit Fund — Beneficiary Fund—Payment to Member on Attaining Certain Age—Change in By-laws—Validation by Statute — Death Benefit — Increased Assessment Premiums—Agreement of Member to be Bound by Amendments—Right of Member as Creditor.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 461, 6 O.W.N. 489.

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

J. E. Jones and N. Sommerville, for the appellants.

I. F. Hellmuth, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The amendments of 1914 have provided no age at which the yearly payments were to commence, so far as the respondent is concerned. If, therefore, he elects to accept option B, he gets nothing; while, under clause 4 of the amendments, if he rejects the option, he is shut out from all benefits. This amounts to confiscation of his rights, which the respondent claims had accrued to him when he became 70. No doubt this was not the intention, but the Court has to deal with his rights as affected by the clause as enacted. That being so, the appellants must shew that their powers of amendment are extensive enough to warrant what they have done.

*To be reported in the Ontario Law Reports.

The powers relied on are three: first, the Friendly Societies Act, R.S.O. 1877 ch. 167, sec. 4; secondly, the powers mentioned on p. 36 of the constitution; and thirdly, those in the Act of 1903, now R.S.O. 1914 ch. 183, sec. 185.

Those given by the Friendly Societies Act, under which this Society was incorporated, are limited to what is necessary for the government and control of the affairs of the society, and do not permit an alteration of the fundamental declaration: this appears from Bartram v. Supreme Council of the Royal Arcanum (1905), 6 O.W.R. 404.

The powers given by the constitution on p. 36 are limited to the alteration of the constitution and laws which begin at p. 11 of exhibit 3, and do not include authority to alter the original incorporation declaration by which (p. 5, clause 5) members are entitled to half of the amount of their beneficiary certificate on attaining the expectancy age. This age having been reached, and the respondent having complied with all the lawful requirements of the Order, he became entitled to one-half of the amount of the beneficiary certificate, subject to the change sanctioned by the Act of 1903.

Then, looking at the powers under that Act, it would appear that the change which had been made in 1897 became thereby valid, the payment of $100 being made payable yearly, instead of, as originally provided for, in a lump sum at the expectancy age. There is no power under that Act to postpone or change the expectancy age already fixed, as the amendment of 1914 purported to do.

Mr. Sommerville relied upon a number of cases, both English and Canadian, as indicating that a member was bound by any change in the laws and regulations which might take place after he became a member, although they affected materially the rights which he had acquired. All these cases depend, in the end, upon the consent of the member arising from his express or implied agreement to be bound by any changes in the laws, rules, or regulations.

In the case of In re Ontario Insurance Act and Supreme Legion Select Knights of Canada (1899), 31 O.R. 154, chiefly relied upon, the constitution and laws were made part of the original declaration; therefore, the powers of amendment were held to apply to that original declaration. That is not the case here, where there is no such consent. In the respondent's application he agreed to abide by the constitution, laws, rules, and regulations then in force, or which might thereafter be enacted.

A reference to the book, exhibit 3, shews that the original declaration is not included within the scope of that agreement. He did not agree to a change in the fundamental declaration, which in fact remains in force, save as altered under the authority of the statute of 1903.

In the beneficiary certificate the only reference is to the laws, rules, and regulations—the same wording as in the application, except that it leaves out the word "constitution." There is no agreement as to changes, and no reference to the fundamental declaration.

None of the cases cited seem to affect the right of a member after he has become a creditor, having complied with the regulations, and being entitled thereby to a certain sum of money, his right to which arises independently of his remaining a member of the Order; and we think a right had accrued to the respondent which made him a creditor, and therefore entitled to enforce his rights by action before the amendment of 1914 was made.

No case has been cited enabling a society, when it has become a debtor, to forfeit or impair its creditor's right to his debt, or to postpone its payment, or to make that payment conditional upon further payments by the creditor.

Mr. Jones argued that, at all events, the judgment should be varied by providing that payment to the respondent should be made out of a fund called the "Life Expectancy Fund." In view of the amendment of 1897, which made the "Beneficiary Fund" the fund out of which life expectancy benefits were to be paid, it is impossible now to cut down the respondent's rights by declaring that they are limited to payment out of a part of that fund, or out of a fund which exists apart from it. He is entitled to be paid the amount as declared by the judgment, without discrimination as to its source.

For these reasons, we think the appeal should be dismissed with costs.

HIGH COURT DIVISION.

CLUTE, J., IN CHAMBERS. JANUARY 11TH, 1915.

CANADIAN LAND INVESTMENT CO. v. PHILLIPS.

Jurisdiction of Supreme Court of Ontario—Foreign Lands—Action by Judgment Creditor to Set aside Conveyance of, as Fraudulent — Parties Resident in Ontario — Pleading — Statement of Claim—Cause of Action.

Motion by the defendants to strike out the plaintiff company's statement of claim, on the ground "that it discloses no reasonable cause of action."

P. Kerwin, for the defendants.
E. E. Wallace, for the plaintiff company.

CLUTE, J.:—All parties reside in the Province of Ontario. The plaintiff company recovered judgment against the defendant William John Phillips on the 13th June, 1914, for $1,162.52, and on the same day caused a writ of fieri facias against goods and lands to be issued thereon and placed in the hands of the Sheriff of the County of Dufferin, where the debtor resides, which has been returned nulla bona.

The action is to set aside an alleged fraudulent conveyance from the defendant William John Phillips to his mother, the defendant Frances Phillips, of certain lands in the town of Saskatoon, in the Province of Saskatchewan, as voluntary, fraudulent, and void, and made to defeat and delay the plaintiff company in the recovery of its debt. The plaintiff company asks to have the conveyance or transfer declared fraudulent and void as against it. The plaintiff company also seeks to recover a certain sum of $600 transferred by the defendant William John Phillips to his co-defendant, alleging that the same was made without consideration and was fraudulent and void as against the plaintiff company.

It does not appear in the statement of claim or from the papers filed on this motion, whether the conveyance of May, 1914, sought to be set aside, was executed by the parties in this Province or in Saskatchewan.

The defendants ask that the statement of claim be set aside

on the ground that this Court has no jurisdiction to give the relief asked.

In Gunn v. Harper (1899-1901), 30 O.R. 650, 2 O.L.R. 611, it was held that an action will not lie in this Province for a declaration that, under a transaction entered into outside Ontario, land situate beyond the limits of the Province is held by the defendants as mortgagees, and for redemption, even though the defendants reside in the Province. . . . In that case it will be observed that the relief sought had relation to a contract between the parties.

In Henderson v. Bank of Hamilton (1893-4), 23 O.R. 327, 20 A.R. 646, 23 S.C.R. 716, it was held . . . that a creditor who has recovered judgment in Manitoba, and who has, by virtue of an Act of that Province, a lien on the lands of the judgment debtor there, cannot maintain in the Courts of Ontario an action for redemption against the mortgagee of the lands in Manitoba which are subject to the lien.

In Burns v. Davidson (1892), 21 O.R. 547, it was held that an action will not lie in this Province by a judgment creditor to set aside as fraudulent a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province.

No case directly applicable to the present was cited.

It is charged in the statement of claim that the Sheriff is prevented and hindered by the transfer of the moneys and lands from executing and realising upon the said writ. As to the lands, this obviously is not so, as the Sheriff's writ does not extend beyond the County of Dufferin.

The judgment, so far as the lands are concerned, if obtained, would not help the plaintiff company in realising upon its claim. I think that the statement of claim, so far as it has relation to land without the Province, shews no cause of action. It should be set aside. The plaintiff company may amend and proceed with its claim as to the $600, if so advised. As the motion has partly succeeded and partly failed, there should be no costs.

MEREDITH, C.J.C.P., IN CHAMBERS. JANUARY 12TH, 1915.

*RE ADKINS INFANTS.

Infants—Maintenance out of Funds in Hands of Guardian—Encroachment upon Capital—Powers of Court—Infants Act—Rules of Court—Summary Application—Order Authorising Guardian to Pay Moneys to Mother of Infants.

Motion by the mother of the infants for an order authorising the guardians to continue an allowance to the applicant out of the infants' moneys for their education and maintenance.

The application was heard as in Chambers at the London Weekly Court on the 19th December, 1914.

F. P. Betts, K.C., for the applicant and the guardians.

W. R. Meredith, for the Official Guardian.

MEREDITH, C.J.C.P.:—In substance this is an application, on the part of all concerned, for maintenance and education of infant children, largely out of the corpus of property belonging to them, the income of it being quite insufficient.

In form the application is, by notice of motion, to a Judge at Chambers, on behalf of the mother of the infants, with whom they live, for an order that the guardians of the property of the infants, such guardians being also administrators of the property of the father of the infants, who died intestate, shall pay to the applicant a sufficient sum for such maintenance and education.

So that really that which is sought is authorisation by the Court of payment out of the corpus.

The case is one of the simplest character, involving only elementary questions on the subject of maintenance; and it is made the more simple because already the matter has been dealt with by a Judge of this Court at Chambers, and an order made directing such payments: but an order which covered only a limited number of years, and they have passed; and so the need for this second application.

It does not, of course, follow that, because an order was made before, another should be made now. Circumstances may

*To be reported in the Ontario Law Reports.

have changed so as to require a refusal of this application, or the making of some order different from the order which was made: it was just because of this that that order was limited as to the time during which it should be effective. Yet in regard to any matter in which the circumstances are not changed—in which the principle involved is the same—I would feel bound by the former rulings, whatever might be my own view of any question covered by them, notwithstanding the case of In re Hambrough's Estate, Hambrough v. Hambrough, [1909] 2 Ch. 620, decided in England, where there is not, as far as I am aware, any such legislation as that upon the subject contained in the Judicature Act of this Province.

Therefore, having no doubt of the regularity of the application or of the propriety of making such an order as would give effect to the wishes of all parties to it, an order which would be quite in accordance with the settled practice of this Court, I should not have had any hesitation in making it, but for the doubt thrown upon that practice in the case of Re Carnahan (1912), a brief report of which appears in 4 O.W.N. 115: a doubt which I am quite sure was not expressed until after a very careful and anxious consideration of the subject and examination of the cases bearing upon it: an expression of doubt which called for hesitation, in this application, in order to obtain a fuller knowledge of the reasons upon which it was based, and to reconsider carefully the subject, with a view to a reference of the matter to a Divisional Court, under the legislation before mentioned—the Judicature Act, R.S.O. 1914 ch. 56, sec. 32—should I be able then to share in that doubt.

But further consideration prevents me sharing in it; and convinces me that the practice is right and should be followed, as indeed it was in Re Carnahan. . . .

The power of this Court to enforce the duty, of any guardian or other trustee, to maintain and educate infant children according to their needs and means is one of those elementary things about which there can be as little doubt as there can be of the fact that infant children ought to be maintained and educated according to their needs and means. Nor can there be any doubt of the wide powers of this Court over the person and property of an infant; nor that that power ought to be freely exercised for the benefit of the infant, whenever necessary: see Simpson on Infants, 3rd ed., pp. 222-3.

Some stress seems to have been put upon the fact that the infants' money was not, in the case of Re Carnahan, as also it is

not in this case, in Court: but I quite fail to perceive any substantial difference, in principle, that that can make. If infants are not lawfully entitled to have it applied for their maintenance and education, the Court should no more direct its misappropriation to that purpose in the one case than the other. If lawful and right that it should be so applied, the Court should enforce such an application of it by others just as well as to apply it if in its own hands.

Neither exercising the power of parens patriæ, nor otherwise, has the Court power to dispense infants' property as if its own: it has no power to be bountiful; it has power to give effect to legal and equitable rights only.

So, too, it is manifest that this application is regularly made at Chambers, by way of originating notice of motion: and that would be equally so whether the guardians were assenting or dissenting: there being no question involved respecting the power of the Court, or the right of the infants to the property in question. The statute so expressly provides: the Infants Act, R.S.O. 1914 ch. 153, sec. 31 (2). Actions for maintenance went out of vogue, very properly, many years ago: see Ex p. Starkie (1830), 3 Sim. 339, and In re Christie (1840), 9 Sim. 643.

Where, as in the case of In re Lofthouse (1885), 29 Ch. D. 921, there is a substantial question, as to the right of the infants to the property, to be tried, it may be quite proper to refuse to try the question other than in the ordinary mode of trial. . . .

I cannot imagine any good reason for considering that sec. 2 of the Infants Act does not cover such a case as this; but if it did not, under the Rules of Court, which have the effect of statutory enactment, the application would be quite regular by way of originating motion, and as the difference between a Judge sitting in Court and sitting at Chambers has now grown to be even something less than gowned or not gowned, any technical objection on that score ought to be quite short-lived: see Rules 600 and 605. . . .

It is not whether the trustee approves of or objects to the application; it is whether the opposition to it, by whomsoever offered, raises a question which ought to be tried in the ordinary way, and one which the party objecting desires to have tried in that way.

Nothing then of a formal character stands in the way of this application. . . .

The infant children own absolutely, the one, about $1,700, and the other, about $1,900; their shares, or what remains of

them, of the estate of their father: the one child is 18, and the other 16, years of age: they both live with their mother, who, since their father's death, has kept the family together, there being also a third child—a daughter also—who has come of age and has received her share of the estate. The mother is said to be without means, except such as may remain of her share of her husband's estate. Mother and daughters desire to continue to live together as one united family, as in the past; and that plan carried out until the present time seems to have proved, as one would naturally expect, the best possible for all of them. The daughters have no means of providing for their own maintenance and education except in the small fortune which each, as I have mentioned, has. Nor have they any present practical means of earning their own living; and each is old enough to appreciate the folly of reducing their small means more than reasonably can be avoided. . . .

The expenditure should be for that only which is reasonably needed: and it is not needed when otherwise provided: or can, and should be, earned by the infant.

Taking into consideration the fact that mother and children have been enabled to continue to live together as one family; and that the education of these two children is being carried on with a view to better fitting them for desirable positions in life, no fault, based on experience, can be found with the order that was made three years ago; and no fault is found by any one with the way in which the moneys received under it have been expended; and, having regard to the proposed continuance of past satisfactory methods, and to the desire of every one concerned that they should be continued, there should be no hesitation in doing anything, within the power of the Court, to continue them, as long as the like circumstances continue, until, as to the share of each, she comes of age or marries.

And in doing that the Court is doing no more than could be accomplished without its aid, in this way. If not applied for, or if refused, the infants could contract with their mother to pay her for their maintenance and education: the contract, being for necessaries, would be valid and enforceable. The difference in the two methods being merely in that course the waste of more of the infants' money in law costs; a thing as inexcuseable as would be the waste of costs of an action to authorise or enforce that which can be as well done in a motion such as this.

The order to be made, on this application, should be that the Court is of opinion that the guardians should continue to pay

for the maintenance and education of each of the infants the same annual sum of money as they have, under the order before mentioned, been paying: that is, $300 for the older and $250 for the younger, so long as past conditions as to maintenance and education continue, up to the time of each, respectively, attaining the age of 21 years or marrying: and an order may go accordingly, upon the additional affidavits specified during the argument being filed: costs out of the funds—one-half from each.

MEREDITH, C.J.C.P. JANUARY 12TH, 1915.

BRITISH AND FOREIGN BIBLE SOCIETY v. SHAPTON.

Will—Construction—Gift of Whole Estate to Wife Subject to three Gifts Following it—Legacies Payable out of Real Estate after Wife's Death—Gift of Personal Estate Unexpended at Wife's Death to Charities—Reference to Ascertain Amount "Unexpended"—Judgment for Administration of Estate—Rights of Heirs at Law after Payment of Legacies.

Motion for judgment on the pleadings and admitted facts in an action for the construction of a will and for other relief.

The motion was heard in the Weekly Court at London on the 19th December, 1914.

J. MacPherson, for the plaintiffs.

F. W. Gladman, for the defendant.

MEREDITH, C.J.C.P.:—Care should be taken, in all such cases as this, to adhere to the cardinal rule: that is, to give effect to the will-maker's will; to avoid converting it, under the guise of interpretation, into a court-made will: and that task is, in this case, not a difficult one.

That which the testator meant he seems to me to have made plain enough in the words he used to express that meaning.

At the outset he naturally provided for his wife's welfare after his death: he gave all he possessed to her, but not absolutely. His gift to her he expressly made subject to the three gifts following it: $500 to his wife's niece, $500 to one of his own nieces, or to another, or to the children of his brother, according

to certain events, and the residue of his personal estate unexpended at his wife's death to the plaintiffs for charitable purposes.

The will is, in its general scope, but a typical one, of many commonly made in this part of the world. Husband and wife, beginning with little or no means, have saved, through a long life of industry, frugality, and other provident habits, enough, and sometimes some to spare, for the "rainy day" of old age; beside bringing up a family; and, adhering to old-fashioned ideas, the savings are all the husband's. His will is made, generally, with the wife's approval: a will making provision ample for her in view of settled habits of frugality and saving: and the rest is given to the varying objects of the man's bounty. I give this testimony from experience in the locality, as a practising solicitor for many years; and treat it as common knowledge.

Although, in this case, the wife lived for nearly nine years after the husband's death, the provision made for her, in the will in question, proved ample; indeed, a large portion of the property, or its proceeds, remained "unexpended" at her death: and it is in regard to that surplus that this litigation is carried on; litigation which is said, by the parties to it, to be necessary to remove doubts as to the meaning of the will. But the widow seems to have had no doubt about its meaning: she made no will: she did only that which, I have no doubt, she knew the will meant: that is, she used as much of the personal property as she needed, and left the rest of it to the operation of her husband's will.

Nor can I very much doubt that, if he or she had been told, or if any ordinary layman were now told, that there is doubt about the meaning of the will, the answer would have been, and would be: "Well, if there is, it would take a Philadelphia lawyer to find it:" and, being obliged to confess a want of the qualification, once so commonly ascribed to that keen-witted, but somewhat mythical, personage, find myself among the doubters of any such doubt.

The will seems to me to be simple and plain. The wife was to have the personal estate as long as she lived, with power to spend as much as she saw fit; and all that remained of it, "unexpended," at her death, was to go to the charity, for the benefit of the souls of the heathen, as well, doubtless, as that of the giver.

The scope of the will is simple: so like what might be expected having regard to the man's circumstances and his general

intentions disclosed in it: all to the wife; subject to this, so much of the personal estate as remained, at her death, to charity, and to the two other legacies: these two other legacies necessarily payable out of the real estate, because not payable until after the wife's death, at which time all that was unexpended of the personal estate went to the charity.

Thus, and thus only, can effect be given to all that the testator willed: thus, and thus only, can all the objects of his bounty receive benefactions; and receive all of that which he intended each of them should have: thus, and thus only, can there be any hope of the souls' benefits intended: and thus, and thus only, can that, to me, abomination, a court-made, or a court-mutilated, will, be avoided. So it seems to me.

But "the cases" are very much relied on: cases which may be divided into two classes: (1) those which decide that a clear absolute gift is not to be cut down by subsequent uncertain words: a rule that every one can subscribe to, for it is no more than a chip of the same block that requires effect to be given to the testator's intentions shewn by the words used. No such conditions affect this will: there is no absolute gift in the first place: the gift is expressly subjected to the charitable legacy, as well as to the other two legacies. The will is in the first place made uncertain expressly, to be made certain by the "following legacies." And (2) cases in which it has been decided that a gift of what is left is void for uncertainty: but against them may be set off those cases in which effect has been given to such gifts: see Green v. Harvey (1842), 1 Ha. 428, and Bibbens v. Potter (1879), 10 Ch. D. 733: an instance on each side.

I find it difficult to perceive how there can be any uncertainty as to the meaning of the words "all of my personal estate that may be left unexpended after the death of my wife;" what is meant is quite plain. There may, or there may not, be some difficulty in finding what is, or represents, personal estate unexpended, but that cannot obscure the meaning of the testator or prevent the charity from having that which can be proved to be or represent personal estate "left unexpended." Things that may have seemed, in earlier days, to be mountains of difficulty, in this way, may, perhaps, in these days of "chartered accountants," to right and to left of us, of computing machines, and of complicated business transactions, bewildering to the untaught, made systematic and simple, in regard to charges against capital account or against income, among many other complicated sub-

jects, as well as of other modern methods, be proved to be but molehills.

I know of no law which prevents the making of a gift for life, with the power to expend or otherwise dispose of or to appoint, generally or limitedly, with a gift over of all that is not so disposed of: see Surman v. Surman (1820), 5 Madd. 123; and In re Thomson's Estate (1880), 14 Ch. D. 263.

In regard to the two cases mainly relied upon by Mr. Gladman, it is enough to say that the will which here is in question is not the will that was under consideration in either of them. But, it may be added, very much that is said in In re Jones, [1898] 1 Ch. 438, as to general principles, I have endeavoured to apply in this case. There can be no doubt about such principles; the question generally is, whether they have been properly applied to the particular case. The learned Judge who decided that case thought it distinguishable from Bibbens v. Potter; so too in this case there are distinguishing features, but only such as, I think, make this a stronger case for reaching a conclusion in accord with the judgment in the Bibbens case than the Jones case was for the conclusion reached in it: here the gift to the wife is not in the first place unlimited, it is expressly limited to the extent of the subsequent legacies.

And I cannot think that, in the other case, Re Miller (1914), 6 O.W.N. 665, the learned Judge who decided it meant to say, as Mr. Gladman contended he did, that there could be no estate for life with a power to spend the principal, and a gift over of the unexpended part, such as the will in question contains. But in any case I could not give effect to any such view of the law, the judgment in that case not being, as I have said, one binding in this.

The Master of the Rolls, of Ireland, in the case of In re Walker, [1898] 1 I.R. 5—another case much relied upon by Mr. Gladman, but, no report of it being available at the time of the argument, I was obliged to retain this case until now in order to get the full benefit of it—laboured hard to give effect to that which he believed were the testator's real intention. I am performing the same task in this case, glad to follow him in that which he did, if not in all that he said: glad too that my task is one so much plainer and easier than his was. It is not so important a matter by what road the right point is reached; one may not take the shorter and most direct way; one may indeed trespass on forbidden grounds: yet, if the proper conclusion be come to, that is all that the particular case needs; and of less

importance than the way are observations by the way, especially when brought out by the stress of the journey. That case is not like this case: however I might decide this case, it could not be said that the decision is covered by the decision in that case. The decisions, however, are quite alike in this, that the Judge professed and endeavoured only to give effect to the testator's real intentions.

If the parties cannot agree upon what is "left unexpended," there may be, at the defendant's choice, a reference in this case, to the proper local officer, to ascertain that, and judgment may be entered in accordance with his finding, costs of both parties out of the testator's estate; or a judgment for the administration of his estate, which, in view of questions affecting the other legacies and the fund out of which they should be paid, as well as affecting the heirs at law of the testator and the heirs at law and next of kin of the widow—who are represented in this case by the defendant—may, unless the parties can agree, as I have mentioned, prove to be the better mode of procedure.

In any case, proceedings will be stayed for 30 days, unless the parties otherwise agree, before formal judgment is entered.

It may be that the heirs at law of the testator might, if their attention were directed to the matter, contend that there is an intestacy in regard to part of his estate; but it does not now seem to me that there would be enough in that contention to justify a stay of proceedings at this stage of the case, so that they might be made parties and heard, if they should desire to be heard in it now. The judgment directed to be entered now does not preclude or prejudice any such question, if any of them should at any time be advised that there is enough in it to warrant litigation raising it, and should act upon such advice. See In re Walker, [1898] 1 I.R. 5.

MEREDITH, C.J.C.P. JANUARY 15TH, 1915.

DYET v. TRUESDALE.

Judgment—Reference—Order for Payment in Accordance with Referee's Finding — Practice — Necessity for Motion for Judgment on Report—Judicature Act, secs. 64, 65—Rule 772—Form 75.

Motion by the plaintiff for judgment on the report of a referee.

The motion was heard in the Weekly Court at Toronto.

W. S. MacBrayne, for the plaintiff.

No one appeared for the defendant.

MEREDITH, C.J.C.P.:—According to the now prevailing practice, the local officer should give effect to the "judgment" and "report" in this case; any further judgment or order is unnecessary.

The judgment made at the trial orders payment in accordance with the referee's finding, forthwith after confirmation of his report.

In substance nothing more could be done now; in form more apt words might be used, but they are not essential.

The Legislature of this Province, in enacting the provisions of the Judicature Act, R.S.O. 1914 ch. 56, secs. 64 and 65, upon the subject, plainly departed from the practice in England, which requires that "every referee to whom a cause or matter shall be referred for trial shall direct how judgment shall be entered," and that "such judgment shall be entered accordingly by a Master or Registrar as the case may be;" and, it may be, contemplates a hearing on further directions in all cases of reference; but it made no provision, expressed or by implication, to that effect; and so, to obviate the delay and cost of such a motion, the practice of giving final judgment by anticipation, in the order of reference, has grown up, and is now commonly followed; and no appeal, as far as I am aware, has ever been taken to raise any question of the power to make any such judgment; and I am unaware of any incompetency in the Courts to make it; though the form in which it is sometimes made is plainly capable of improvement.

I may add that this practice—intentionally or unintentionally, probably the latter—has encouragement in the forms contained in the appendix to the present Rules of Court—form 75; that form having been taken word for word from form 123 of the Rules of 1897, but which has probably greater effect now under the present Rule 772.

It has been my practice, in cases which seemed to me suited to it, to direct the finding of the proper amount by the proper officer before the entry of final judgment. The distressful difficulties which sometimes arose in appealing against a judgment in which there had been a reference, by reason of the judgment of reference being sometimes considered an interlocutory judgment only, was a strong incentive to invent some method to overcome such difficulties and the uneven-handed justice that they caused; difficulties which are, I trust, now removed by legislation.

Perhaps the time may come when the quicker, simpler, and less expensive method adopted in England can be applied to this Province; for if, by anticipation, the trial Judge can give effect to a referee's finding, without any further hearing, what reason can there be for preventing the doing of the same thing without putting into operation any such expedient?

In the case of Murphy v. Corry (1906), 12 O.L.R. 120, referred to by Mr. MacBrayne, the form of the order must have been quite different from that in question here; there could not have been any anticipatory judgment for payment in accordance with the referee's findings.

Nor order will be made; these reasons will ensure the enforcement of the combined judgment and report by the ordinary methods. The sum which, the plaintiff admits, should be deducted from the amount payable under the judgment and report, can be credited to the defendant in the directions to the Sheriff on any writ that may be issued, or in any payment or settlement of the judgment, between the parties.

FOSTER v. RYCKMAN—CAMERON, MASTER IN CHAMBERS—JAN. 8.

Discovery—Production of Documents—Examination of Defendant—Postponement of Discovery until Liability to Account Established.]—Motion by the plaintiff for an order directing that the defendant Ryckman file a further and better affidavit on production, setting forth all the documents relating to the properties in question in this action, and directing him to attend for further examination for discovery and answer questions in regard to these documents. The Master said that the production and discovery asked for by the plaintiff should be postponed until after the liability of the defendant Ryckman to account to the plaintiff had been established. He referred to Bedell v. Ryckman (1903), 5 O.L.R. 670; Evans v. Jaffray (1902), 3 O.L.R. 327. Motion dismissed with costs. E. C. Cattanach, for the plaintiff. R. McKay, K.C., for the defendant Ryckman.

CANADIAN GENERAL ELECTRIC CO. v. DODDS—CAMERON, MASTER IN CHAMBERS—JAN. 8.

Summary Judgment—Rule 62—Action Begun by Specially Endorsed Writ—Motion for Judgment before Appearance.]—Motion by the plaintiffs for judgment under Rule 62 in an action begun by a specially endorsed writ, before appearance. The plaintiffs suggested several reasons for urgency; but the Master said that the material filed did not support the contentions; and that he was bound by the decisions in Lake of the Woods Milling Co. v. Apps (1897), 17 P.R. 496, Leslie v. Poulton (1893), 15 P.R. 322, and Molsons Bank v. Cooper (1894), 16 P.R. 195, to refuse the motion and allow the action to proceed in the ordinary way. Motion dismissed with costs to the defendant in any event. G. F. McFarland, for the plaintiffs. M. Macdonald, for the defendant.

GARRETT v. FISCHER—FALCONBRIDGE, C.J.K.B.—JAN. 14.

Promissory Notes—Purchase-price of Company-shares—Rebate—Credit on Notes—Counterclaim—Recovery of Balance Due on Notes—Damages.]—Action to recover $4,009.49 rebate on the purchase-price of the stock of an industrial company, with a guaranty by the defendants of the producing capacity of the plant; or, in the alternative, for payment of that sum as damages for alleged fraudulent misrepresentations; for the return of 15 promissory notes, aggregating $11,000, given by the plaintiff in payment of the balance of the purchase-price of the stock; and for the transfer by the defendants to the plaintiff of 140 shares of the stock. The learned Chief Justice finds that the test of the company's plant was honestly made; that the plant is not capable of producing more than the minimum amount (15,000 per day) on the average; and that in order that good bricks shall be produced, they must be steamed for 48 hours. Some of the items in paragraph 14 of the statement of claim seem to be properly recoverable by the company, and as to these the plaintiff undertakes to get a discharge from the company or otherwise indemnify the defendants. The plaintiff is entitled to be credited on the notes with the sum of $4,009.49, with costs of suit. As to the counterclaim, the defendant is entitled to the balance due on the notes after crediting the above sum of $4,009.49. If the plaintiff fails, within 30 days, to supply a mortgage for the amount over $7,000 at 6 per cent., or otherwise to satisfy the defendants in respect of the matters complained of in paragraph 1 of the counterclaim, there will be a reference to the Master at Berlin to ascertain the damages due to the defendants in respect thereof. The defendants will have costs of the counterclaim. G. Lynch-Staunton, K.C., and E. W. Mackenzie, for the plaintiff. R. McKay, K.C., and J. C. Haight, for the defendants.

CORRECTION.

In TORONTO BRICK CO. v. BRANDON, ante 648, 4th line from bottom, for "bring" read "buy."