The
Ontario Weekly Notes

VOL. XIII. TORONTO, FEBRUARY 8, 1918. No. 21

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 28TH, 1918.

*HARRISON v. HARRISON.

Husband and Wife—Alimony—Action for—Defence—Award of Alimony by Arbitrators—Acceptance of Money by Wife—Waiver—Bar to Action—Objections to Award—Right of Wife to Contract.

Appeal by the plaintiff from the judgment of MASTEN, J., ante 245, dismissing an action for alimony.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

Gideon Grant, for the appellant.

Daniel O'Connell, for the defendant, respondent.

THE COURT dismissed the appeal without costs.

SECOND DIVISIONAL COURT. JANUARY 29TH, 1918.

*SUPERIOR COPPER CO. LIMITED v. PERRY.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Declaration of Right to Make Calls on Company-shares—Rule 25 (1) (h)—Construction and Meaning—Assets in Ontario—Good Cause of Action upon a Contract—Shares Partly Paid for—Conditional Appearance—Jurisdiction of Supreme Court of Ontario—Appeals—Costs.

Appeal by the defendant Sutton and cross-appeal by the plaintiffs from the order of CLUTE, J., ante 96, refusing to set

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

aside the service of notice of the writ of summons on the defendants out of Ontario, but allowing the defendants to enter a conditional appearance.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

M. L. Gordon, for the defendant Sutton.

A. W. Langmuir, for the plaintiffs.

RIDDELL, J., in a written judgment, said that the plaintiffs' appeal against the permission to enter a conditional appearance could not succeed. A foreigner not resident in Ontario is not subject to the jurisdiction of our Courts prima facie. It is for the plaintiff to make out conclusively that such a person falls within one of the classes referred to in Rule 25 before he can be debarred from setting up that he is not subject to our Courts. If he enter an appearance in the usual form, he is held to have attorned to the jurisdiction—so far as Rule 25 is concerned—and he cannot set up the objection in his statement of defence or at the trial: Grocers' Wholesale Co. v. Bostock (1910), 22 O.L.R. 130; Tozier v. Hawkins (1885), 15 Q.B.D. 650, 680. This, however, does not conclude the jurisdiction of the Court except the territorial jurisdiction: Wilmott v. Macfarlane (1896), 16 C.L.T. Occ. N. 83, 32 C.L.J. 129. There was no reason why a foreigner should not be allowed to dispute the jurisdiction; and the plaintiffs' appeal should be dismissed.

The defendant Sutton contended that the case did not come within Rule 25 (1) (*h*), because the plaintiffs had not shewn "a good cause of action against the defendant upon a contract." The Rule also says that the defendant must have "assets within Ontario of the value of $200 at least which way be rendered liable for the satisfaction of the judgment," i.e., the judgment to be obtained in the action. Only such actions as can result in a judgment upon which the $200 of assets in Ontario can be applied are in contemplation in Rule 25 (1) (*h*). The judgment sought in the present action was a mere declaration, upon which no assets could be applied. It was true that these assets might be applicable for the satisfaction of a judgment for costs; but costs are merely adventitious, not a part of the substantive claim in an action.

Moreover, the action was not really an action against the defendants upon the alleged contract, but only an action to determine whether there was a contract. An action against any one upon a contract must be an action against such person

to enforce the alleged contract against him or to obtain damages for its breach.

No injustice or inconvenience would accrue to the plaintiffs from this interpretation of the Rule. There was nothing to prevent them making a formal call on the shares and suing for the amount.

The defendant Sutton's appeal should be allowed and the service upon him set aside, with costs here and below.

ROSE, J., was of opinion, for reasons stated in writing, that the order giving leave to effect service out of Ontario should not have been made. There were no assets which could be rendered liable for the satisfaction of the judgment, even if the cause of action was upon the contract (and, semble, it was not).

But the power to allow a conditional appearance should be exercised only where it is doubtful if the plaintiff can bring himself within the Rule by reason of the facts being in issue: Standard Construction Co. v. Wallberg (1910), 20 O.L.R. 646, 649; and this case, where the facts were admitted, and the only matter to be determined was the meaning of the Rule, did not come within the doubtful class.

The service of the writ should be set aside, and the plaintiffs should pay the costs of the motion and appeals.

LENNOX, J., agreed with ROSE, J.

MEREDITH, C.J.C.P., read a dissenting judgment. He was of opinion that the service out of the jurisdiction was properly allowed, but that leave to enter a conditional appearance should not have been granted.

In the result the defendant Sutton's appeal was allowed and the service was set aside; on the plaintiffs' appeal no order was made except that the plaintiffs pay the costs; and costs of the motion and appeals were ordered to be paid by the plaintiffs.

SECOND DIVISIONAL COURT. FEBRUARY 1ST, 1918.

KIDD v. NATIONAL RAILWAY ASSOCIATION LIMITED.

Principal and Agent—Agent's Commission on Sale of Company-shares—Rate of Commission—Evidence—Finding of Referee——Scope of Agency—Sales during Certain Period—Sales Made before Commencement of Agency—Appeal—Divided Court.

Appeal on behalf of the defendant association (by the liquidator) from an order of MIDDLETON, J. (26th September, 1917), allowing an appeal by the plaintiff from the report of an Official Referee by increasing the commission allowed to the plaintiff, and refusing to allow credit for $2,105.50, alleged to have been paid by the association to the plaintiff.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. D. Moorhead, for the appellant.

I. F. Hellmuth, K.C., and J. H. Cooke, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that three questions were involved in the appeal: (1) whether the plaintiff was entitled to a commission on sales of stock made between the 15th and 18th April; (2) whether he should be charged with money received by him on sales made by him before he became the association's agent; and (3) whether his commission should be calculated at 12 or 7 per cent.

On the second question Middleton, J., affirmed the report of the Referee; on the other two questions the findings of the Referee were reversed.

The terms upon which the plaintiff was employed seemed to the learned Chief Justice to have been broad enough to entitle the plaintiff to a commission in respect of the moneys involved in the first question.

The second question was wrapped in much uncertainty. At first sight it was difficult to understand why the matters between the plaintiff and his former employers should come into account between him and the association; but at the trial the association were made liable in respect of some of these matters, in respect of moneys which came to their hands out of these matters. No provision for liability on the part of the plaintiff to the association in respect of such matters was so made; and the Referee could

not rightly impose any. Whether justice had been done in this respect or not, the Court could not interfere.

But on the last and main ground the appeal should be allowed and the Referee's finding restored.

The plaintiff was to be allowed a commission of 12 per cent., or such other commission as was paid by the association to similar agents similarly employed. Competent witnesses, upon the reference, testified that other similar agents were similarly employed and were paid 7 per cent., and accordingly the Referee calculated the plaintiff's commission at that rate. In the face of such testimony, not contradicted by any witness, the Referee could not have come to any other conclusion than that the commission should be computed at that rate.

In this respect, the appeal should be allowed.

RIDDELL, J., agreed with the Chief Justice.

ROSE, J., in a written judgment, said that he agreed with Middleton, J. He thought that the association had failed to prove that, except one Mitchell, the association had at any time any agents similar to Kidd (the plaintiff) and similarly employed. As to Mitchell: if, while Kidd was still employed, Mitchell was a similar agent similarly employed, which was doubtful, it was only for a very short time and in the closing day's of Kidd's employment; and it was not the fair intendment of the judgment of Hodgins, J.A. (see 6 O.W.N. 710), that the scale of Kidd's remuneration was to be cut down because just before Kidd's dismissal some one else was found willing to do work similar to Kidd's for less pay.

The appeal should be dismissed.

LENNOX, J., agreed with ROSE, J.

MEREDITH, C.J.C.P., said that, as the members of the Court were equally divided in opinion, upon one ground, according to the practice of the Divisional Court in cases such as these, where a further appeal would lie, the appeal should be altogether dismissed, and costs should follow the event.

Order accordingly.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JANUARY 28TH, 1918.

*ERICKSON v. McFARLANE.

Costs—Security for—Rule 373 (b)—Plaintiff Ordinarily Resident out of Ontario, though Temporarily Resident within—Discretion.

Appeal by the defendant McFarlane from an order of a Local Master dismissing an application by the appellant for an order requiring the plaintiff to give security for costs.

G. C. Campbell, for the appellant, contended that the plaintiff was ordinarily resident out of Ontario, though he might be temporarily resident within Ontario: Rule 373 (*b*).

A. A. Macdonald, for the plaintiff, supported the Master's order.

MIDDLETON, J., in a written judgment, said that the plaintiff was born in Sweden, and came to the United States some years ago. He was unmarried, and had no relatives except an aunt, who lived in Dayton, Oregon. For a time, he worked in Oregon, and joined a Lodge in Dayton. In January, 1917, he was employed by a lumber company operating in Northern Ontario, and came to Ontario. He was injured and taken to an hospital. This action was brought against D. C. McFarlane and others for malpractice, the plaintiff alleging that he was negligently treated in the hospital.

On his examination for discovery, he spoke of Dayton as his home. He now said that that was because he was a member of the Lodge there. He was not examined as to his residence or intention as to the future; but in his affidavit in answer to the motion for security for costs he swore that he was not here temporarily, but intended to reside permanently in Ontario.

The mischief sought to be remedied by Rule 373 (*b*) was the law as declared in Redondo v. Chaytor (1879), 4 Q.B.D. 453.

When, in good faith, a foreigner comes here with the intention of staying, and, after he has taken up residence here, suffers an injury for which he seeks redress, the case is not within the Rule. Here was shewn an actual and bona fide change of residence from without Ontario to a place within Ontario, before the cause of action accrued.

Kavanaugh v. Cassidy (1903), 5 O.L.R. 614, distinguished.

If the order is discretionary, as said in McTavish v. Lannin and Aitchison (1917), 39 O.L.R. 445, it should be refused.

The appeal should be dismissed, with costs to the plaintiff in the cause against the appealing defendant.

MIDDLETON, J., IN CHAMBERS. JANUARY 28TH, 1918.

*REX v. CARSWELL.

Ontario Temperance Act—Magistrate's Conviction for Having Liquor on Premises other than "Private Dwelling-house"—6 Geo. V. ch. 50, sec. 41 (1)—Duplex House—Separate Entrances—Sec. 2 (i) and clause (i.)

Motion for an order quashing a conviction of the defendant, by a magistrate, for having intoxicating liquor in a place other than the private dwelling-house in which he resided, contrary to sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V ch. 50.

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

MIDDLETON, J., in a written judgment, said that the liquor was in one section of a "duplex house"—i.e., a house in which there were two dwellings under one roof, the lower flat constituting one and the upper flat the other. There was no inside communication between the flats; each had its separate front and back doors—the doors of the upper flat being reached by outside stairs.

The situation was not covered by Rex v. Purdy (1917), ante 205.

It was contended for the Crown that the dwelling was not a "private dwelling-house" because it was a "house or building the rooms or compartments in which are leased to different persons:" sec. 2 (*i*), clause (i.), of the Act. But this clause does not, merely because the different dwellings have different tenants, destroy the character given to the duplex house as "a private dwelling-house" by the main provision, "'Private dwelling-house' shall mean a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence:" sec. 2 (*i*).

Order made quashing the conviction and directing that the fine imposed shall be refunded, with costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 28TH, 1918.

*HENNEFORTH v. MALOOF.

Slander—Defence—Justification—Particulars Delivered not Complying with Former Order—Particulars Set aside with Liberty to Deliver New ones Verified by Affidavit—Postponement of Trial.

An appeal by the defendant from an order of the Master in Chambers requiring the defendant to give further and better particulars under a defence of justification in an action for slander.

The defamatory words complained of were, that the plaintiff "is a common whore and prostitute."

The particulars were ordered by CLUTE, J.: see ante 292.

The defendant also moved to postpone the trial.

The appeal and motion were heard in Chambers.

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

J. M. Ferguson, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the particulars given were not, as they stood, a compliance with the order made; and the better course was to set them aside, with liberty to the defendant to give new particulars within a week.

If the defendant intended to shew that the plaintiff acted as a common whore and a prostitute, giving access to all comers, it might well be that this was given with sufficient particularity, when the places and times were given; but the allegation should then be in such form as to cast the onus on the defendant of proving this misconduct during the whole of the period charged.

If the immorality relied upon was misconduct with individual men, the dates, places, and names should be given; and where, in any case, these exact particulars could not be given, the defendant should state under oath that the particulars given were the best that he was able to give upon the information he now had.

The plaintiff was entitled to know enough to enable her to defend herself against the charges made.

For the order of the Master should be substituted a general order setting aside the particulars delivered, with liberty to the defendant to deliver new particulars within a week; such particulars to be verified by the oath of the defendant that these are, to the best of his belief, true, and as full and accurate as he can make them, in view of the knowledge he now has.

If the defendant would not accept this, the order of the Master should stand—the defendant had not complied with the order of Clute, J.

Costs of the appeal to the plaintiff in the cause.

The trial must be postponed, as the case could not well be ready for trial during the present sittings. The costs of the motion to postpone to be costs in the cause.

MIDDLETON, J., IN CHAMBERS. JANUARY 28TH, 1918.

*HENSTRIDGE v. LONDON STREET R. W. CO.

Costs—Taxation—Fee for Solicitor Attending Trial—Per Diem Allowance Fixed by Tariff (Item 14)—Computation of "Day"—Separate Actions Tried together—Separate Fee in each Action.

Appeal by the defendants from a ruling of a local Taxing Officer upon taxation of the costs of two actions, brought respectively by a mother and daughter, who were hurt in the same accident, and sued the defendants for damages for their respective injuries. The actions were brought in the Supreme Court of Ontario, and each of the plaintiffs recovered an amount within the County Court jurisdiction. No order was made to prevent set-off. The plaintiffs' costs were taxed on the County Court scale, and the defendants' excess costs on the Supreme Court scale. In the defendants' bills, a charge was made in each action for the attendance of their solicitor at the trial. The actions were tried together. The trial began at 3 p.m. on a Monday, and lasted till noon on the following Wednesday. The Taxing Officer ruled that the trial lasted three days, and allowed $60—holding that this must be apportioned between the two actions, or could be allowed in one only, because the actions were tried together.

H. S. White, for the defendants.

E. C. Cattanach, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that the Taxing Officer was not right in either ruling.

Under item 14 of the tariff, the fee allowed to a solicitor for

his attendance at the trial is $20; but, "if the trial lasts more than one day, then for each additional day $20."

This trial in fact lasted more than one day but less than two days. The first day begins at the hour of the opening of the case and ends 24 hours thereafter; and so with the second day.

But the fact that the two cases were tried together did not debar the plaintiff from being allowed a fee in each. Where the quantum of the fee is discretionary, the trial of two cases together is an element to be considered; but where the quantum is fixed the fee provided must be allowed: Price v. Clinton, [1906] 2 Ch. 487; Petrie v. Guelph Lumber Co. (1885), 10 P.R. 600.

In each action $40 should be taxed, or $80 in all. In the result, $20 should be added to the $60 taxed.

No costs of the appeal.

MIDDLETON, J. JANUARY 28TH, 1918.

RE MCGRATH.

Executors—Passing Accounts—Payment to Widow out of Personalty of Lump Sum in Lieu of Dower in Land Devised to Son—Allowance to Executors as Compensation for Services—Charge of Part of Sums Paid on Land—Exoneration of Personalty pro Tanto—Costs.

An appeal by the Official Guardian, representing infants interested in the estate of one McGrath, deceased, from rulings of the Judge of the Surrogate Court of the County of Lennox and Addington upon the audit of the accounts of the executors.

The appeal was heard in the Weekly Court, Toronto.

E. C. Cattanach, for the Official Guardian.

W. A. Grange, for the executors and the son of the testator.

MIDDLETON, J., in a written judgment, said that the testator gave his land to his son, and legacies payable out of personal property to his daughters. He gave his wife certain money in lieu of her dower. She seemed to have elected against the will, and to have claimed her dower, and also money lent her husband.

The son was an infant, and during his minority the income from the land was to be treated as being part of the personal estate.

The executors had paid the widow a lump sum for her dower; and this, as well as the executors' compensation for their care of

the land, had been allowed out of the personalty—so the son got the land free from the dower and from the money allowed as compensation.

This was obviously wrong; but the whole sum paid for dower should not be charged on the land, as the rental should bear some part of it. There should be disallowed the executors as against the personalty the sum of $450, which sum would be a charge on the lands. The executors, no doubt, acted in good faith, and should not be visited with costs; but the Official Guardian should have his costs out of the $450.

The son, being a party to this appeal, was bound, and would, no doubt, pay the amount charged without putting the executors to an action to recover it out of the lands conveyed to him.

MIDDLETON, J. JANUARY 28TH, 1918.

RE MONTGOMERY AND MILLER.

Vendor and Purchaser—Agreement for Sale of Land—Title—Incumbrances—Building Restrictions—Alteration in Character of Neighbourhood—Effete Covenant—Possessory Title.

Application by the owner of certain land, who had agreed to sell it, for an order declaring invalid the purchaser's objections to the title. The application was made under the Vendors and Purchasers Act.

The application was heard in the Weekly Court, Toronto.

H. S. Steele, for the vendor.

J. Singer, for the purchaser.

MIDDLETON, J., in a written judgment, said that there were building restrictions upon the land under an agreement made in 1856. The whole character of the neighbourhood had changed, and it had become suited to factory buildings or warehouses only. Under these conditions the reasoning in Sobey v. Sainsbury, [1913] 2 Ch. 513, applied, and the objection based on these restrictions could not be sustained.

The title given was a possessory title; and, as the learned Judge was at present advised, the covenant would not run against such a title, but he did not rely upon this.

MIDDLETON, J. JANUARY 28TH, 1918.

FOX v. PATRICK.

Promissory Note—Accommodation Maker—Liability to Endorsee who Advanced Money upon Security of Note—Note Made Payable to Bank—Title to Note—Holder in Due Course.

An action upon a promissory note.

The action was tried without a jury at London.
T. G. Meredith, K.C., for the plaintiff.
P. H. Bartlett, for the defendant.

MIDDLETON, J., in a written judgment, said that the note sued on was made by the defendant, dated the 25th August, 1909, payable to the order of the Standard Bank, Lucan, 2 months after date, and endorsed without recourse to John Fox, the plaintiff, by the bank. The note was endorsed to Fox about the 12th October, 1915. The action was begun on the 18th October, 1915. In answer to the specially endorsed writ, an affidavit was filed stating that the note was given to the bank as accommodation for one J. H. Patrick, a brother of the defendant, and that money had been sent to the bank which ought to have been applied to discharge this note, and that the plaintiff, who was the local manager of the bank, had acquired the note after maturity and payment. The suggestion was made that the plaintiff, as manager, had allowed money sent to the bank to pay this note to be used by the brother for other purposes.

In reply, after all the evidence had been given looking to the defence outlined, the true facts first appeared.

Fox had been a private banker at Lucan, and sold out to the bank, becoming its local manager. He found it hard to conform to the strict instructions of head office, limiting advances to those who has been customers under the old regime, and was tempted to give credit exceeding the permitted amount.

The defendant and his brother were young men in whom Fox had confidence and whom he desired to aid. The brother bought horses in Lucan, and sent them to the defendant in Utah for sale there. It is said that there was no partnership, and that the transactions between the brothers were sales. The money needed by the Lucan brother had to come from the defendant in Utah; and, as it was slow in materialising, the defendant signed notes which he sent to his brother, not as payment but as an accommodation to be used by him in financing.

The note in question was one of these, and was made payable to the bank. When the brother sought to discount it with the bank, Fox was unable to grant the accommodation, as the line of credit granted by the head office had been exceeded, and he was already in trouble. Fox, however, had enough confidence in the ultimate worth of the two Patricks to make an advance himself to the brother, and he advanced $1,500 out of his own funds, receiving the note as security.

The defendant had no knowledge of this, and the brother probably did not care whether the money came from the bank or from the bank-manager.

The deposit of the note with Fox gave him no title to it. It was an offer to the bank to become surety to it for an advance, but the defendant never became liable to the plaintiff.

Nor did the defendant become liable to the bank, for it never made any advance upon this note, and never acquired any title to it; and so, when the bank endorsed the note to the plaintiff, some six years after the advances, it could not confer any title upon him, for it had none itself.

The action failed because the plaintiff never was the holder of the note.

On the issues raised by the defendant, the finding should be against him; and, as the expense of the trial was almost altogether in relation to these issues, the dismissal of the action should be without costs.

MIDDLETON, J. JANUARY 30TH, 1918.

*RE CARTER.

Will—Bequest of Fund to Provincial Treasurer for Investment and Payment of Interest in Perpetuity to Charity (Hospital)—Ontario Statutes 9 Edw. VII. ch. 26, sec. 42; 10 Edw. VII. ch. 26, sec. 47; 5 Geo. V. ch. 20, sec. 25.—Effect of—Treasurer Made Trustee—Application of Rule that Gift of Income in Perpetuity is Gift of Corpus.

MOTION by the executors of the will of James Irving Carter, deceased, for an order determining a question arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.

A. Weir, for the executors.

R. H. Parmenter, for the Hospital for Sick Children.

J. T. White, for the Provincial Treasurer.

MIDDLETON, J., in a written judgment, said that, after certain specific devises and bequests, the testator directed that all his estate, save that specifically dealt with, should be converted by his executors and the proceeds paid to the Treasurer of the Province of Ontario under the provisions of the Ontario statute 9 Edw. VII. ch. 26, sec. 42, as amended by 10 Edw. VII. ch. 26, sec. 47, "for the permanent endowment of . . . a charitable object as hereinafter directed." The residue of the estate (about $30,000), after payment of a legacy of $100,000 for an educational object, was to be paid to the Treasurer "for the purpose of being invested by him in Ontario Government stock as by the aforesaid Acts directed, and the whole of the interest thereon shall be paid over as it matures in perpetuity to the Hospital for Sick Children."

The enactments referred to were repealed in 1915, by 5 Geo. V. ch. 20, sec. 25, and thereby re-enacted in an amended form; but for the purpose in hand there was no material difference.

There was in this case nothing to take the bequest out of the general rule that a gift of the income in perpetuity is in effect and in law a gift of the corpus.

Reference to Mayor etc. of Beverley v. Attorney-General (1857), 6 H.L.C. 310, 318.

The statutes made no difference—they merely constituted the Treasurer a trustee, and the effect of the trust declared must be ascertained upon the ordinary principles.

Order declaring the Hospital entitled to receive the fund from the executors.

Costs of all parties out of the estate.

MIDDLETON, J. JANUARY 30TH, 1918.

*ENGLAND v. LAMB.

Executors and Administrators—Action by Administrator to Recover Damages for Death of Intestate—Claim not within Fatal Accidents Act—Cause of Action—Trustee Act, sec. 41—New Right of Action not Given—"Torts or Injuries to the Person"—Survival of Right of Action—Funeral Expenses—Promise to Pay before Appointment of Plaintiff as Administrator—Absence of Consideration.

MOTION by the defendant for an order dismissing the action, on the ground that the statement of claim disclosed no cause of action.

The motion was heard in the Weekly Court, Toronto.

F. H. Snider, for the defendant.

M. Wilkins, for the plaintiff.

MIDDLETON, J., in a written judgment, said that it was alleged in the statement of claim that the defendant, driving his automobile on a public highway, negligently ran into one George England and killed him; that the plaintiff was appointed administrator of the estate and effects of the deceased; and that the plaintiff was one of three brothers of the deceased, who also left two surviving sisters. The plaintiff claimed $148 paid for funeral expenses; $100 for time and trouble and other expenses; and $2,000 damages for the death of the deceased. The plaintiff sued as administrator.

It was also alleged that the defendant had promised to pay the $248; but that was before the appointment of the plaintiff as administrator; and there was no consideration.

It was admitted that the action could not be maintained under the Fatal Accidents Act, the survivors not being within the limited class named in it.

It was contended that a right of action was given by sec. 41 of the Trustee Act, R.S.O. 1914 ch. 121; but that enactment was for the purpose of preventing a wrongdoer escaping liability by reason of the death of the person injured, and not for the purpose of creating a new right of action. Obviously no living person could maintain an action by reason of his death or for his funeral expenses.

If the rule "actio personalis moritur cum persona" is abolished (save as to actions of libel and slander), as stated in Mason v. Town of Peterborough (1893), 20 A.R. 683, this leaves unaffected the great obstacle in the plaintiff's way, the principle laid down in Baker v. Bolton (1808), 1 Camp. 493: "In a civil court, the death of a human being could not be complained of as an injury."

See Admiralty Commissioners v. S.S. Amerika, [1917] A.C. 38; Osborn v. Gillett (1873), L.R. 8 Ex. 88; Clark v. London General Omnibus Co., [1906] 2 K.B. 648.

Action dismissed with costs.

MIDDLETON, J. JANUARY 30TH, 1918.

RE KONKLE.

Will—Construction—Direction to Sell Land and Divide Proceeds among Uncles and Aunts and their Heirs and Assigns—Share of Uncle Surviving Testator, but Dying before Time for Sale and Division—Share Taken as Personalty—Devolution as upon Intestacy, Will of Uncle not Disposing of Personalty.

Motion by the executors of the will of Anson A. Konkle, deceased, for an order determining a question arising as to the disposition of a part of his estate.

The motion was heard in the Weekly Court, Toronto.

A. W. Marquis, for the executors of Anson A. Konkle.

A. C. Kingstone, for Phœbe Konkle and Phœbe Martin.

F. W. Harcourt, K.C., Official Guardian, for the infant children of Phœbe Martin.

MIDDLETON, J., in a written judgment, said that Anson A. Konkle died on the 24th May, 1888. By his will he gave his lands to his wife Catharine for life, and directed that upon her death the lands should be sold and the proceeds divided share and share alike "among all of the own brothers and sisters of" his "father who were living at the time of his decease their heirs and assigns for ever."

Catharine, his wife, married again, and lived until the 27th January, 1916. The lands had been sold, and a question arose as to the share of John Konkle, one of the father's brothers, who died on the 22nd February, 1896.

John Konkle by his will directed his debts to be paid out of his personal estate, but made no other disposition of it save as to some articles given to his wife. His residuary realty he gave to his daughter, now Phœbe Martin, for life, and on her death the realty and the real and personal estate given the wife for life are to go to Phœbe Martin's children.

The will of Anson directed that the land to which he died entitled should be sold and the proceeds divided. John Konkle would thus take his share as personalty; and, as John has not disposed of this, it would pass to his wife and daughter as upon an intestacy, and would not go to the daughter and her children after her as land under the will.

The children of Phœbe were not parties to the motion; and, as they had an interest, notice was given to the Official Guardian, who admitted that the result indicated must follow.

Order declaring accordingly. Costs of parties, including Official Guardian, out of the estate.

MIDDLETON, J. JANUARY 31ST, 1918.

*RE JONES.

Will—Perpetual Trust for Care of Grave—Legislative Sanction—Cemetery Act, R.S.O. 1914 ch. 261, secs. 2 (c), 14.

MOTION by the executors of the will of one Jones for an order determining a question as to the disposition of a part of the estate.

The motion was heard in the Weekly Court, Toronto.

J. H. Naughton, for the applicants.

MIDDLETON, J., in a written judgment, said that under a provision in the will the executors were "to retain $500 to be deposited in a chartered bank or invested in sound securities, the yearly interest to be devoted to the care of my grave."

Apart from statutory provisions, this created a perpetual trust; and, as the purpose was not charitable, the trust was void.

But by the Cemetery Act, R.S.O. 1914 ch. 261, sec. 14, the "owner" of a cemetery may receive such a bequest; and, by sub-sec. 4, personal representatives or trustees may pay over moneys in their hands which they are directed to apply for or toward the purposes mentioned in the section, i.e., "preserving and maintaining . . . in perpetuity any particular lot . . . or enclosure in such cemetery." This is implemented by sub-sec. 5.

Thus legislative sanction is given to this particular form of perpetual trust.

The executors may pay over the $500 to the "owner," i.e., the person owning, controlling or managing a cemetery (sec. 2 (c)), and should make an agreement with him (or them) as contemplated by the statute.

Judgment accordingly. Costs out of the estate.

MIDDLETON, J. JANUARY 31ST, 1918.

RE HAGERMAN.

Will—Validity of Devise and Bequests—Perpetual Trust for Care of Graves—Validation by Cemetery Act, sec. 14—Devise of Farm—Restraint on Alienation—Invalidity of—Devise to Church—License in Mortmain—Gift of Interest on Money "forever"—Absolute Gift of Fund.

Motion by the executor of the will of Abaline Hagerman, deceased, for an order determining certain questions arising in the administration of the estate of the deceased.

The testatrix by her will gave "$5 a year to take care of my grave and my mother's and sister's and brother's graves."

Then there was this clause: "The First Baptist Church shall have the interest on my money in the banks but none of the principal as the money is to remain in the banks in my name forever. The First Baptist Church . . . are to have the use of my farm my house and barns forever but never to sell give nor will away nor deed it away. If they should ever attempt to dispose of any of my property in any way they shall lose control of it forever. . ."

The motion was heard in the Weekly Court, Toronto.

G. G. Paulin, for the executor.

D. Urquhart, for the church trustees.

MIDDLETON, J., in a written judgment, answered three of the questions submitted, as follows:—

(1) The gift of $5 per annum to take care of the graves should be upheld under the Cemetery Act, R.S.O. 1914 ch. 261, sec. 14: see Re Jones, ante.

(2) The attempted restraint on alienation was void, and the Baptist Church took the land in fee subject to obtaining a license in mortmain, but must sell the land within the time limited by the statute.

(3) There was an absolute gift of the money to the said Church.

Costs out of the fund.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 1ST, 1918.

*RE BANKS.

Insurance (Life)—Policy Payable to Wife—Foreign Divorce Obtained by Wife—Change in Beneficiary by Will of Insured—New Beneficiaries not of Preferred Class—Invalidity of Divorce—No Right in Wife to Set up—Wife Ceasing to be of Preferred Class—Right of Insured to Divert to Beneficiaries not of Preferred Class.

MOTION by the widow of William Banks, deceased, for payment out of Court of moneys representing an insurance upon the life of the deceased.

W. Lawr, for the widow.

J. A. O'Brien, for those claiming under the will of the deceased.

MIDDLETON, J., in a written judgment, said that on the 22nd August, 1893, the deceased obtained a policy for $1,000, payable to "Lillie May Banks, wife." He died on the 2nd August, 1917, and by the will gave one-third of this insurance money to his son, one-third to his brother, and one-third to his sister. The right of the son to this third was not disputed, but the wife contested the right of the brother and sister—as they are not within the class of preferred beneficiaries.

The wife, some time after the date of the policy, left her husband and obtained a divorce in Chicago. She now suggested that this divorce was not valid. That was not open to her: Swaizie v. Swaizie (1899), 31 O.R. 324; In re Williams and Ancient Order of United Workmen (1907), 14 O.L.R. 482.

When she obtained the divorce, she ceased to be in law the wife, and so ceased to be within the preferred class, and so the insured might, at his will, divert to one not of the preferred class.

The divorce alone would not defeat the wife's right, but the subsequent will was operative, for the reason given.

The money must go as directed by the will. No costs.

LENNOX, J. FEBRUARY 2ND, 1918.

*WATSON v. TORONTO HARBOUR COMMISSIONERS.

Municipal Corporations—Expropriation by City Corporation of Land for Park Purposes—By-law—City Limits—Extension—Proclamation—Defect—Remedy by 6 Geo. V. ch. 96, sec. 2 (O.)—Waiver—Estoppel—Conveyance to Harbour Commissioners—Bona Fides—Municipal Act, 1903, sec. 576—Control by Corporation—Agreement Validated by 5 Geo. V. ch. 76, sec. 1 (O.)—Costs.

Action to recover possession of two water-lots just east of the Humber river and south of the Lake Shore road, in the city of Toronto.

The action was tried without a jury at Toronto.

J. W. Bain, K.C., Peter White, K.C., and M. L. Gordon, for the plaintiff.

A. C. McMaster and J. H. Fraser, for the defendants.

LENNOX, J., in a written judgment, said that the paper-title under which the plaintiff claimed was not in dispute. The Municipal Council of the City of Toronto, on the 12th June, 1911, passed a by-law, No. 5755, expropriating the plaintiff's lots and other lands on the lake front and south of the Lake Shore road, "for park purposes." By by-law 5778, passed on the 6th July, 1911, the city engineer and other officials of the municipality were directed to enter upon and take and use this land for park, play-ground, and other purposes.

The defendants were incorporated in 1911 by 1 & 2 Geo. V. ch. 26 (D.); by 1 Geo. V. ch. 119, sec. 4 (O.), the Corporation of the City of Toronto were authorised to convey lands to the defendants; and by a deed in fee simple, dated the 26th December, 1911, the city corporation conveyed these and many other parcels of land along the water-front and in the harbour to the defendants. The deed contained the usual statutory covenants; and the defendants covenanted not to sell, convey, lease, or mortgage the land conveyed without the approval and consent of the city council.

Three of the five Commissioners (defendants) are appointed by the city council.

In November, 1912, the city council passed by-law 6269, expropriating other lands of the plaintiff, and the question of compensation under the two by-laws was the subject of an arbitra-

tion. The arbitration proceedings as to the water-lots, however, had not been completed.

The plaintiff contended that the arbitration could not be further proceeded with; that by-law 5755 was inoperative and invalid; that the defendants were wrongfully in possession; and that neither this by-law, the proceedings taken under it, nor a payment made to the plaintiff, barred his right to recover possession.

The main questions for decision were:—

(1) Was by-law 5755 passed in the bona fide exercise of powers conferreed by sc. 576 of the Municipal Act, 1903, or was it merely a colourable scheme or device adopted for the purpose of acquiring the land for and vesting it in the defendants for harbour development and commercial and utilitarian purposes only, and with the object of determining the compensation to be paid therefor by a method not open to the defendants?

(2) Was by-law 5755 invalid or inoperative by reason of a defect in the Proclamation of the Lieutenant-Governor, defining the extended area of the city, made in 1903; and, if so, has this been remedied by the Ontario Act 6 Geo. V. ch. 96, sec. 2?

(3) If the defect existed in the Proclamation and had not been cured, was the plaintiff—having actual knowledge of the defect—estopped or precluded from objecting, by failure to give notice before entering upon the reference, or by express waiver after the reference was commenced, or by applying for and obtaining a payment on account of the total compensation to be awarded, or by any other act or circumstance?

The learned Judge, after a review of the evidence, stated his findings as follows:—

By-law 5755 was passed in pursuance of a well-considered, definite plan for park extension and construction, upon the lines, generally, set out in the report of Mr. Wilson (10th January, 1910), in the bona fide exercise of the powers conferred by sec. 576, and with the intention of administering and permanently using this and other land embraced in the park area for the purposes in that section defined.

The council did not abandon its purpose or lose its control by the conveyance to the defendants, and is morally and legally bound to make good the title it purported to convey in pursuance of a combined scheme of park and harbour improvements.

The lots in question and lands in the neighbourhood of the Humber generally are not required for or adapted to and cannot be utilised for harbour development or improvement in a commercial sense.

Before and at the time of the execution of the deed to the defendants, it was intended by the parties thereto that the city

corporation should retain or resume effective control of the lots in question and other lands at the mouth of the Humber and easterly to Woodbine avenue as park lands. This is effectively secured by the agreement executed in pursuance of this purpose on the 26th November, 1914, and validated by 5 Geo. V. ch. 76, sec. 1 (O.), in which, amongst other things, it is declared that "the said parties are hereby authorised to do all acts necessary to carry out the provisions" of that agreement.

If the Proclamation of 1903 was defective, the defect was remedied retrospectively by 6 Geo. V. ch. 96, sec. 2 (O.), so as to read as if the omitted line on the west had been delimitated therein, The land in question was, therefore, properly located and described in the by-law and legally expropriated.

At all events, after all that had occurred and had been done, to the knowledge and with the concurrence of the plaintiff, including possession and expenditure of money upon the property, the plaintiff could not now be heard to object.

The agents of the council, by a series of blunders, had afforded some excuse for this litigation, and the defendants should have no costs. Substantially the defendants and the city corporation were identical.

Action dismissed without costs.

MOND NICKEL CO. v. DEMOREST—MIDDLETON, J.—FEB. 1.

Boundaries—Evidence—Position of Post—Finding of Fact of Trial Judge.]—Action for a declaration of the true boundary-line between lots 5 and 6 in the township of Levack, in the district of Sudbury. The action was tried without a jury at Toronto. MIDDLETON, J., in a written judgment, said that the sole question was one of fact: Did Bowman, the original surveyor, plant a post 40 chains east of the boundary-post on the 2nd concession to indicate the boundary between lots 5 and 6, or was this post planted at 40 chains west of the boundary-post 4-5. The two posts 6-7 and 4-5 were well-established and 93 chains apart instead of 80, and the difference, 13 chains, was the bone of contention. The learned Judge accepts the evidence of the witnesses Boland and Wallace as to a post being at a point contended for by the defendants, i.e., 40 chains east of 6-7, in 1900, and the evidence of Demorest as to the finding of the mound in 1915 and the evidence of Stull and Morris that the mound so found was an original mound. Action dismissed with costs. J. M. Clark,

K.C., and R. U. McPherson, for the plaintiff. W. N. Tilley, K.C., for the defendants Demorest and Black. R. S. Robertson, for the defendant Jefferson.

CARROLL v. EMPIRE LIMESTONE CO.—FALCONBRIDGE, C.J.K.B. —FEB. 1.

Landlord and Tenant—Expiry of Lease—Recovery of Possession —Right of Tenant to Set up against Landlord Title Derived from Crown.]—Action by a landlord to recover possession of land from the defendants, whose lease had expired, but who set up a right under a patent from the Crown. The action was tried without a jury at Welland. The learned Chief Justice, in a short written judgment, said that he agreed with the contentions of the plaintiff's counsel, and that there should be judgment for the plaintiff with costs. Wallace Nesbitt, K.C., and H. D. Gamble, K.C., for the plaintiff. W. M. German, K.C., for the defendants.

WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO.—LENNOX, J.—FEB. 2.

Negligence—Death of Plaintiff's Husband by Falling from Bridge—Evidence—Findings of Jury—Contributory Negligence—Intoxication.]—Action by the widow of William Walsh to recover damages for his death by falling from the International Bridge. The plaintiff alleged negligence on the part of the defendants. The action was tried with a jury at Fort Frances. Upon questions submitted to them, the jury found all the issues in favour of the plaintiff, and assessed the damages at $5,000. LENNOX, J., in a written judgment, said that there was evidence upon which the jury could reasonably find that the defendants were guilty of negligence causing the fatality. The whole structure (the bridge) was owned and operated by the defendants for profit. The deceased was a patron or customer of the defendants, and they were bound to exercise reasonable care for his safety. The jury were right in negativing contributory negligence. The deceased had been drinking, but was not in a condition to be dangerous to himself; and drunkenness is not in itself contributory negligence. Counsel for the defendants repudiated any question of suicide. It was a case of res ipsa loquitur. Judgment for the plaintiff for $5,000 with costs. The damages will be apportioned among the plaintiff and her children when she files an affidavit giving particulars. C. R. Fitch, for the plaintiff. A. G. Murray, for the defendants.

HELPS v. CHARETTE—LENNOX, J.—FEB. 2.

Promissory Note—Action on, by Payee—Absence of Consideration—Dismissal of Action—Delivery up of Instrument.]—Action upon a promissory note made by the defendant in favour of the plaintiff for $2,548.75 and interest. The action was tried without a jury at Ottawa. LENNOX, J., in a written judgment, said that the note was made by the defendant in consequence of certain speculations carried on by the plaintiff, in his own name, in "futures" on the Chicago grain market. The defendant was employed by the plaintiff. The learned Judge found that the debt or obligation in respect of which the note was alleged to have been given was the plaintiff's only; that there was no consideration for the note; that the defendant should not have signed it; and was not liable upon it. There was no counterclaim for a balance of wages retained by the plaintiff, said to be $300, and it was not considered in this action. Judgment dismissing the action with costs, without prejudice to the defendant's rights as to wages. The defendant will be entitled to have the promissory note sued on delivered out to him after the time for appeal has expired, if there is no appeal. A. E. Fripp, K.C., for the plaintiff. Gordon Henderson and W. C. Greig, for the defendant.