The
Ontario Weekly Notes

Vol. II. TORONTO, APRIL 5, 1911. No. 28.

COURT OF APPEAL.

MARCH 24TH, 1911.

STRONG v. VAN ALLEN.

Contract—Trading Company—Sale of Shares, Business, Assets, Stock, and Goodwill—Assumption of Liabilities by Purchaser—Salary of Manager—Transfer of Property before Action—Costs.

Appeal by the defendant from the judgment of a Divisional Court, 1 O.W.N. 539, and cross-appeal by the plaintiffs in respect of two items upon which the Divisional Court decided adversely to them. The facts are fully stated in the report cited.

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

G. Lynch-Staunton, K.C., for the defendant.

N. W. Rowell, K.C., for the plaintiffs.

MOSS, C.J.O.:—The contest between the parties arises out of an agreement in writing between the plaintiff Strong and the defendant for the sale by the latter of the assets, property, effects, business and goodwill of Eli Van Allen & Co., Limited, the terms of which are fully set out in the pleadings and the opinions of the learned Judges, and need not be repeated.

The form in which the transaction was consummated was by a transfer to the plaintiff Strong or his nominees of all the shares of the capital stock of the company, but the substance was as above stated.

As I read the offer contained in the letter of the 30th November, 1906, addressed by the defendant to the plaintiff Strong, and accepted on the 5th of December following, taken in connection with the option or offer of the 1st of November therein referred to, and in the light of the surrounding circumstances,

the defendant became bound to hand over to the plaintiff Strong transfers of all the shares, thereby effecting a delivery of all the property, assets, effects, business and goodwill of the company as a going concern as they subsisted at the date of the letter.

The question, what was the plaintiff to get in substantial property or value in taking over the shares, was of course an important one. Its solution depended largely upon the value of the property, assets and effects, and the extent of the charges or claims against them, in other words, the debts or liabilities. For the ascertainment of these, the defendant in the letter refers the plaintiff to the last stock-taking on the 31st of August, 1906, the date of the termination of the company's fiscal year, and to the liabilities of the company as they stood on the books on that day, and the ordinary running expenses and liabilities of the company incurred since that date. The payment of whatever sums fell within the description of these two items, and the sum of $230,000 to the defendant was to be the full cost of the entire purchase. This is in effect the representation contained in the defendant's letter, and doubtless was a material inducement to the plaintiff in concluding to purchase.

It is scarcely open to doubt that the final payment to the defendant of $180,000 was made upon the faith that the liabilities of the company up to the 31st of August, 1906, appearing on the statement of assets and liabilities given or exhibited to the plaintiff Strong on the 17th of November, 1906, shewed all that required to be met on that account. If before making the payment to the defendant, the plaintiff had become aware that there were other liabilities to be met in addition to those shewn on the stock-taking of the 31st August, he could, and no doubt would, have exercised the usual right of a purchaser to pay off anything that was a charge against the property purchased, or retain the amount required for the purpose and pay only the remainder to the vendor.

I agree with the trial Judge and the Divisional Court that the defendant is liable to make good the sums properly paid in excess of what were shewn as liabilities on the stock-taking at the end of the company's fiscal year, provided the payments so made were in respect of what were properly liabilities at that time.

And I also agree in the main with their conclusions upon the items. There are, however, two of these which, with deference, I am of opinion should not have been allowed against the defendant. I refer to the Martin & Andrew account of $94.56,

which I think should be disallowed altogether, and to the Hamilton Cataract Power, Light & Traction Co.'s account which, agreeing with the learned Chief Justice of the Common Pleas, I think should be reduced to $50, thus making a deduction of $128.81 from the amount allowed on this account by the learned trial Judge.

As to the Martin & Andrew account, the testimony is not very clear or satisfactory. It appears, however, to have been an account for plumbing incurred before the 31st of August, and it was not shewn among the liabilities on stock-taking. The learned trial Judge is reported as saying in his judgment that this was paid on the 29th September. But the evidence of Miss Carroll, the then secretary-treasurer of the company, who was examined as a witness on behalf of the plaintiffs, is that a cheque was issued for this account on the 29th August, and, since the argument of the appeal, the learned trial Judge has at my request been good enough to refer to his notes of the evidence. It there appears that he noted that the account was paid on the 29th of August. The amount does not appear to have been charged up until the 29th of September. It appears in the building account under that date. There is no explanation why it was not entered before. The defendant's statements with regard to it shed no light. Miss Carroll's statement stands as to the issue of the cheque on the 29th of August, and doubtless it was presented and paid before the 31st. That being so it was properly omitted from the liabilities on the stock-taking. And the mistake of charging it to the building account on the 29th of September, instead of on the 29th of August, should not prejudice the defendant.

As to the other item, it was for the plaintiffs to establish that the sum ($224.42), claimed by them in respect of the account paid to the Hamilton Cataract Power, Light & Traction Co. was clearly attributable to the period before the 31st of August.

And I agree with the learned Chief Justice of the Common Pleas that this was not established. The account covered a period commencing in 1905 and extending until after the defendant left the company's employ. No person was called to shew that as a matter of fact the amount claimed for up to 31st August was actually supplied before that date.

The defendant's testimony is that the meter was not properly set when placed in the company's building, that the account was always disputed, and that not more than $50 was properly chargeable for the period before the 31st of August. Upon this I think the defendant ought not to have been charged with more than $50.

I think the defendant was not entitled to a salary exceeding $3,000 a year. That was what he was receiving while acting as managing director. Although there were negotiations, no agreement was come to for an increase. The defendant refused to accept an offer of $5,000 for the current financial year as he wished to leave himself free to sever his connection at any time. As a matter of fact he did sever his connection within a week or ten days afterwards.

I agree with the trial Judge and the majority of the Divisional Court that under the circumstances no satisfactory grounds appear for allowing him for the time he remained in the plaintiffs' service a greater rate than his former salary.

An objection was taken that the plaintiff company had before action sold or transferred all its property and rights, including the right to recover from the defendant, to another company. The learned trial Judge in declining to give effect to the objection reserved leave to the plaintiffs to add the other company if necessary. It does not appear that any notice of such an assignment had been given to the defendant by the other company. It had not, therefore, put itself in a position to sue, even if the assignment was such as to pass the right. And there is no reason why the plaintiffs jointly should not be entitled to sue as trustees for the parties beneficially interested: Pringle v. Huston (1909), 19 O.L.R. 652, at pp. 655, 657, and cases cited.

As to the cross-appeal, I agree with the learned trial Judge and the Divisional Court. The item of $437.17 has given me some concern, but upon consideration, I am not prepared to differ from the conclusion reached by my learned brothers.

In my opinion, the judgment should be varied by deducting the two items of $94.56 and $128.81, making together the sum of $223.37; but in view of the defendant's contentions upon the whole case this should not affect the costs of the appeal.

With the above variation in the judgment the appeal should be dismissed, and the cross-appeal should also be dismissed, both with costs.

MACLAREN, J.A., and MAGEE, J.A., agreed.

MEREDITH, J.A., dissented in part, for reasons stated in writing, being of opinion that a further deduction should be made, and that there should be no costs of the appeal or cross-appeal.

MARCH 24TH, 1911.

REX v. LEE.

Criminal Law—Gold and Silver Marking Act—Guarantee of Lasting Quality—Authority of Parliament and of Provincial Legislature—Overlapping of Legislation—Ultra Vires.

Case stated by one of the Judges of the County Court of York, by whom the defendant was convicted of a breach of the Gold and Silver Marking Act, 7-8 Edw. VII. ch. 30 (D.).

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

G. Waldron, for the defendant.

E. Bayly, K.C., for the Crown.

J. Jennings, for the Minister of Justice.

MOSS, C.J.O.:—The defendant was charged before J. H. Denton, Esquire, one of the Judges of the County Court of the County of York, under the provisions of the Criminal Code relating to speedy trials of indictable offences, that he, being a dealer in gold plate ware or the like, applied a mark to certain articles, to wit five rolled gold or gold-filled or electroplated watch cases, guaranteeing or purporting to guarantee by such mark that the gold in such article or part thereof will wear or last for a specified time, contrary to the terms of the Gold and Silver Marking Act, 7-8 Edw. VII. ch. 30 (Dom.). Being so charged the defendant elected to be tried by the Judge without a jury and pleaded not guilty. In course of the trial the defendant by his counsel waived all defences except the objection that sub-sec. (b) of sec. 16 of the Gold and Silver Marking Act was ultra vires the Parliament of Canada and that therefore he could not be convicted of the charge. Counsel for the defendant stated that the defendant was not seeking to evade the Act, but desired to obtain a decision as to the validity of the legislation, and there is no reason to doubt his good faith in this respect.

The learned Judge found the defendant guilty of the charge and pursuant to an order of this Court stated a case and submitted for its opinion the following question:—

Is sub-sec. (b) of sec. 16 of the said Act ultra vires the Parliament of Canada? Sections 16 and 17 of the Act appear under the heading of "Offences and Penalties." They are the cul-

mination of a series of provisions comprising secs. 9, 10, 11, 12, 13, 14, and 15, manifestly designed for the protection of purchasers, intending purchasers, and the public generally, against imposition or deception as to the quality, fineness, grade or description of the articles therein specified. Broadly stated, the means adopted are (1) to render obligatory the application of certain marks, and (2) to prohibit the application of certain other marks to articles of the kind made, sold or brought into Canada by a dealer, the governing purpose being the prevention of the use of false or misleading indicia.

Section 16 reads as follows: "Everyone is guilty of an indictable offence who being a dealer within the meaning of this Act—(a) contravenes any provision of secs. 9, 10, 11, 12, 13 or 14 of this Act; (b) makes use of any written or printed matter or advertisement or applies any mark to any article, of any kind referred to in sec. 13 or in sec. 14 of this Act, or to any part of such article, guaranteeing or purporting to guarantee by such matter, advertisement or mark that the gold or silver on, or in such part thereof, will wear or last for any specified time." Section 17 prescribes the penalties to be imposed in case of conviction.

The objection made to sub-sec. (b) is that it assumes to render penal what is nothing more than the mere warranting in writing or by means of a mark the lasting quality of the article, a matter of contract or representation, not within the realm of criminal law. But assuming that to be the case, it by no means concludes the matter. It does not follow that there is not resident, either in the Parliament of the Dominion or in the Provincial Legislature, the power to declare such an act an offence and to provide punishment therefor. That the Imperial Parliament possesses the power is beyond question. And it has exercised it on much the same lines as in the Act in question here.

In the division of legislative power between the Parliament of Canada and the Legislatures of the Provinces effected by the British North America Act many fields of legislation are left within the competence both of the Parliament and of the Legislatures. And, as more than once remarked, in one way of dealing with a particular subject it may be within sec. 91, and in another way, or for another purpose, it may fall within sec. 92: Citizens' Insurance Co. v. Parsons, 7 App. Cas. 107, 108; Hodge v. The Queen, 9 App. Cas. 130, per Osler, J.A., in Regina v. Wason (1890), 17 A.R. 221, at p. 244.

The exclusive legislative authority conferred by sec. 91 upon the Parliament of Canada in relation to the criminal law, including the procedure in criminal matters, does not deprive the

Provincial Legislatures of the right to legislate for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade: Regina v. Wason, supra.

But, on the other hand, the right of the Provincial Legislatures to so legislate does not deprive the Parliament of its powers in relation to criminal law.

In the case referred to, Osler, J.A., said, p. 244: "I suppose it will not be denied that the Parliament may draw into the domain of criminal law an act which has hitherto been punishable only under a Provincial statute": a fortiori where the field has not been already occupied by the Provincial Legislature.

In Grand Trunk R.W. Co. v. Attorney-General of Canada, [1907] A.C. 65, Lord Dunedin delivering the judgment of their Lordships of the Judicial Committee, said, p. 67: "The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894, viz., Attorney-General of Ontario v. Attorney-General of Canada, [1894] A.C. 189, and Tennant v. Union Bank of Canada, [1894] A.C. 31, seems to establish these two propositions: First, that there can be a domain in which Dominion and Provincial legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." See also La Compagnie Hydraulique de St. Francois v. Continental Heat and Light Co., [1909] A.C. 194.

In Regina v. Stone (1892), 23 O.R. 46, the late Mr. Justice Rose dealing with an Act of the Dominion Parliament, 52 Vict. ch. 43, to provide against frauds in supplying of milk to cheese factories, said, p. 50: "I am of opinion that the passing of a provincial statute within the powers of the legislature cannot in any wise take away from Parliament the right to legislate respecting the same matters, and to prohibit them, and to enforce the prohibition by such punishment by way of fine or imprisonment as may be deemed best."

In this case—to use Lord Dunedin's expression—the field is clear and no question of conflicting legislation arises. And although in one way the sub-section may appear to interfere with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of

methods whereby the public are, or may be exposed to deception and imposition.

The question should be answered in the negative.

MEREDITH, J.A., agreed in the result for reasons stated in writing.

GARROW, MACLAREN, and MAGEE, JJ.A., also concurred.

HIGH COURT OF JUSTICE.

CLUTE, J. MARCH 23RD, 1911.

RE ELLIOTT.

Will—Construction—Gift to "Surviving Children"—Relation to Period of Distribution.

Motion for construction of a will.

A. H. Backus, for Hamilton W. Howell.

A. M. Harley, for executors, and for the children of the testator.

CLUTE, J.:—The testator by his will bequeathed to his wife, Elizabeth Ann Elliott, in lieu of dower, for her use during her natural life or so long as she should remain his widow, the whole of his personal property and real estate, his said wife to support and educate the children of the testator under age, and to provide for his unmarried daughter Cecelia as long as she should remain unmarried, and in the event of her marriage to provide her with a reasonable outfit, and to pay all claims against the said property.

The will then provides that upon the marriage or death of his said wife, the personal and real property "shall be sold and appropriated as follows: If my said wife, Elizabeth Ann Elliott should cease to be my widow, $2,500 out of the proceeds of the sale of my said property shall be invested and the interest thereof in lieu of dower shall be paid to the said Elizabeth Ann Elliott during her natural life, and as soon after my decease as possible my executrix and executor shall pay to each of my sons, Wellington Elliott, Orlin Smith Elliott, Nelson Elliott, Alpheus Elliott and Oliver Elliott the sum of $150 and to my daughter Cecelia Elliott $100, and to my daughter Cornelia

Elliott $50, said legacies not to be paid to my younger children until they attain the age of 21 years. And after the payment of all my just debts and the before-mentioned legacies, the remainder of my said property shall be divided between my surviving children, share and share alike."

The testator died leaving his widow and the children above mentioned. The widow did not marry again. The legacies were paid. Cecelia, after the testator's death, married Hamilton W. Howell, and pre-deceased her mother, the widow of the testator. The widow of the testator then died. The said Cecelia Howell made her last will and testament, whereby she bequeathed all her real and personal estate to her husband, the said Hamilton Wesley Howell.

The question for decision is as to whether the words "surviving children" in the last paragraph of the will above quoted have relation to the testator's death, or to the date of distribution.

The husband of Cecelia claims that the words have relation to the death of the testator, and that his wife had a vested interest as one of the children of the testator and that he is entitled to that interest. The other children of the testator claim that the words "surviving children" have relation to the date of distribution, and that they only are entitled to the property, to the exclusion of Cecelia and her representative.

In Re Miller, 2 O.W.N. 782, Middleton, J., stated the rule that "when there is a gift to A. for life, and after his death to others, and any words are used in connection with the gift in remainder indicating survivorship, these refer to the period of distribution and not to the death of the testator;" see also Cripps v. Walcott, 4 Maddock 11; Naylor v. Robson, 34 Beav. 571; Marriott v. Abell, L.R. 7 Eq. 478; Re Garner, 3 O.W.R. 584.

This case seems to fall precisely within that rule. But apart from the rule, it seems to me clear that the meaning of the will is that the remainder of the property is to be divided between the children surviving at the time of the distribution. The husband, as representing Cecelia, is not entitled.

The other children at the time of distribution are entitled to the remainder. Costs of all parties out of the estate; the executors' as between solicitor and client.

BRITTON, J. MARCH 23RD, 1911.

ROBINS v. HEES.

Sale of Land—Principal and Agent—Introduction of Purchaser —Right to Commission.

Action to recover a commission for the sale of certain property in Parkdale, in the circumstances mentioned in the judgment.

J. G. O'Donoghue, for the plaintiffs.

W. N. Tilley, for the defendants.

BRITTON, J.:—The facts as I find them are as follows:—

Some time, prior to the 15th January, 1909, Mr. Hees, for the defendants, spoke to Mr. F. B. Robins concerning the sale of the defendants' valuable Parkdale property. On the 15th January, 1909, defendants wrote to Mr. F. B. Robins, enclosing a sketch for use in endeavouring to effect a sale. On the same day Mr. Hees and Mr. Robins met, and the plaintiffs were given the exclusive agency for 60 days to sell at a price.

It was understood that the plaintiffs were real estate agents, that they were acting for the defendants, and that if this sale went through, the plaintiffs would get a commission of two and one half per cent. That exclusive authority to sell lapsed. After its expiry Mr. Hees told the plaintiffs that the exclusive option was at an end, and that the defendants were at liberty to deal with any other real estate agents, and that the first one who brought to the defendants a person who would purchase, at a price which the defendants would accept, would be given a commission. The plaintiffs assented to this.

In November, 1909, the plaintiffs thought they could find a tenant, if the defendants would rent, and the defendants on the 10th of November, 1909, gave to the plaintiffs for 10 days from that date, an option to lease on terms stated. That expired.

On the 21st December, 1909, the defendants gave to the plaintiffs another option for their clients, at the price of $55,000. This expired on the 4th January, 1910. There was then no contract subsisting between these parties, that the plaintiffs would continue their efforts to find a purchaser. They were not bound to do so—the defendants did not ask plaintiffs to do so, but there was the offer of the defendants that if a real estate agent, the plaintiffs, or any other agent, introduced to the defendants a person who would purchase, and if the defendants sold to such person, they

would pay to the introducing agent the commission. The plaintiffs did endeavour to find a purchaser and they found Mr. Orville Moore, manager of the company that afterwards purchased the property.

Mr. Frankish, a gentleman in the plaintiffs' employ, took Mr. Moore to see the property, but Mr. Moore did not agree with the plaintiffs to buy, nor did he make any offer.

Shortly after the plaintiffs had Mr. Moore in hand, another real estate agent found Mr. Moore, introduced him to the defendants, and a sale was made to Mr. Moore's company.

The plaintiffs did not introduce Mr. Moore to the defendants, did not inform the defendants of their negotiation with Mr. Moore, and the defendants knew nothing of Mr. Moore, nor of the plaintiffs' efforts with him, until after a binding contract had been made:—

1st, with Mr. Moore's company for the sale of the property; and 2nd, with F. H. Ross & Co., real estate agents, for the payment of commission to them.

There was not under the circumstances any contract by which the defendants are obliged to pay any commission for what the plaintiffs actually did. I think both parties were acting in perfect good faith. The defendants wanted to sell, the plaintiffs wished to earn their commission. The mistake on the part of the plaintiffs was that they did not, immediately after their negotiation with Mr. Moore began, notify the defendants of it, and if possible secure another option, or have an understanding that would prevent another agent from stepping in and "reaping where he had not sowed."

The case differs from Sager v. Sheffer, 2 O.W.N. 671, in this —that there, the parties were brought together by the act of the plaintiff, there the plaintiff notified the defendant that he, the plaintiff, had taken the purchaser to see the property. "The continuity was not broken"—the purchaser was first introduced by the plaintiff to the owner. Here, the plaintiffs, after the contract of sale, but before the commission was paid over to other agents, told the defendants that the plaintiffs had introduced Mr. Moore to the property, but that is not sufficient to create liability for commission.

In Munsell v. Clements, L.R. 9 C.P. 139, the contract with the plaintiffs, who were house-agents, was, that the plaintiffs were to receive a commission of 2½ per cent. if they found a purchaser, but one guinea only for their trouble, if the premises were sold "without their intervention," and the question was one of fact, viz., whether the purchaser had become such

through the plaintiffs' intervention, in other words, whether the plaintiffs had proved themselves entitled under the very words of the contract.

That case does not help the plaintiffs in the present case.

The sale in this case, to entitle the plaintiffs to recover a commission, must be a sale to a purchaser, introduced by the plaintiffs to the defendants. It was not sufficient, under the contractual relation existing between the plaintiffs and defendants, to accompany to the property the person who ultimately bought.

The case most relied upon by the plaintiffs was the recent case of Burchell v. Gowrie, [1910] A.C. 614, but that case does not apply, having regard to the contract between the parties. I am obliged, upon the evidence, to find as a fact that the plaintiffs did not bring the actual purchaser into relation with the defendants before a sale honestly made by the defendants through other real estate agents, and without any knowledge that the plaintiffs had seen the purchaser.

I have looked at the other cases cited, especially those given in Evans' Remuneration of Commission Agents, 2nd ed., pp. 107, et seq., and I can find no authority for the allowance to the plaintiffs of the commission, or of any sum upon quantum meruit, in this case.

The action will be dismissed with costs.

DIVISIONAL COURT. MARCH 23RD, 1911.

RE ANGUS AND WIDDIFIELD.

Corporation—By-law Passed by Electors—Application to Quash—Consent by Parties—Limitation of Power of Court to Quash—Jurisdiction.

Appeal of M. Angus from the order of MEREDITH, C.J.C.P., refusing to quash a by-law of the township of Widdifield to raise $33,000 for the purpose of improving streets and sewers.

The appeal was heard by BOYD, C., LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellant.

W. H. Irving, for the township.

BOYD, C.:—By-law 150 of the township of Widdifield was for the raising of $33,000 for the improvement of streets, sewers,

etc., and was voted on by the electors and a sufficient majority of votes cast in its favour.

An application was made to quash the by-law on various grounds, which being heard before MEREDITH, C.J.C.P., was dismissed without costs.

An appeal was taken from that order to the Divisional Court, and on the matter being reached, counsel appeared for both sides, applicant and corporation, and consented to the by-law being quashed.

The by-law being passed upon by the electors cannot be repealed by the independent action of the council, and if so, the council cannot validly consent to its being quashed by the Court.

The summary power of intervention given to the Court is to be exercised according to the directions of the statute. The power to quash is given when the by-law appears to be illegal, either on its face or by extraneous evidence. In this case the by-law has been declared valid, and the consent to quash is not based on any concurrence of opinion on the part of counsel that the by-law is illegal, but only for the reason that it is now considered to be inconvenient or undesirable to prosecute in actual operations. But these considerations and this consent do not give jurisdiction to quash the by-law as invalid when it does not appear to be so in fact or in law.

Neither a corporation nor a company can do what is beyond its legal powers, by simply going into Court and consenting to a judgment which orders that the thing shall be done: see Great North-West Central R.W. Co. v. Charlebois, [1899] A.C., at p. 124.

The appeal may be struck off the list, but no other order should be made on this application.

LATCHFORD and MIDDLETON, JJ., agreed.

DIVISIONAL COURT. MARCH 23RD, 1911.

KAISERHOF v. ZUBER.

Mortgage—Power of Sale—Duty of Mortgagee—Alleged Sale at Undervalue—Withdrawal of Bid—Advertisement and Conditions of Sale.

Appeal by the defendants Zuber and Roos from the judgment of CLUTE, J., setting aside the sale of certain property to Roos.

The appeal was heard by BOYD, C., LATCHFORD, and MIDDLETON, JJ.

G. H. Watson, K.C., for the appellants.

M. Secord, and H. White, for the plaintiffs.

BOYD, C.:—The learned Judge has by taking the mortgagee as a trustee for the mortgagor put him in a more difficult and responsible position than is provided for in the mortgage contract. I quote the words of Lindley, L.J., in Kennedy v. De Trafford, [1896] 1 Ch. at p. 772: "A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor; that is all."

The sale resulted in a disposal of the property for its fair value, perhaps even for its full value according to the evidence, and this was hardly questioned on the argument. There is a remarkable concurrence between mortgagor and mortgagee as to the value of what was being sold. The reserved bid fixed by the vendor (which was kept secret) was $39,000. The secretary of the plaintiff company was instructed to bid about $40,000. His only bid was $39,000. The place was sold for $39,500. This being so, the reasons for interfering with the sale must be cogent, and established by clear and satisfactory evidence. If the sale is at an undervalue, slight evidence of collusion may suffice to invalidate the proceeding, and in this case, to my mind, the evidence in that direction is of the slightest character. I would dismiss as of minor importance all the complaints as to the manner and form of advertising, and as to the framing of, and changes in the conditions of sale. These have been in effect passed upon already in the application for injunction, and have not been deemed of sufficient importance to invoke the intervention of the Court. Lord Herschell in the appeal of Kennedy v. De Trafford, [1897] A.C., at p. 185, approved of the language I have quoted, and said it was all covered really by saying that the mortgagee should "exercise the power in good faith." In this case the mortgagee acted through a reputable solicitor who prepared the papers and framed the conditions. One matter was much commented on, that originally, the conditions provided that no bid should be retracted, but that after the injunction motion this was changed by deletion. Now I notice it is said in the latest publication dealing with this subject that it is doubtful if the condition against withdrawal of a bid (be-

fore the fall of the hammer) can be enforced. Like every other offer, the bid may probably be withdrawn before acceptance, even though it is otherwise stipulated in the conditions of sale. Encyc. of Forms, vol. 12, p. 276 (*g*) 1907. Such a restrictive condition in the standing conditions of the Court is operative to bind the persons who consent to the sale and their agents: Freer v. Rimner, 14 Sim. 391; Williams on Vendor and Purchaser, ed. of 1903, vol. 1., p. 18.

The decision in effect rests ultimately on the finding that, while there was no bargain, there was a tacit understanding between Roos and Zuber (*i.e.*, the purchaser and the mortgagee) by which Roos might either rent or buy after he was the purchaser, and that was understood by both before the sale.

Upon the facts in proof this would seem to be a very roundabout way of carrying out what is said to be the uppermost matter in Zuber's mind, that of getting the property. The land was not really worth the amount of incumbrances upon it, and the process of foreclosure would have been a simple way of extinguishing the equity of redemption. Unless the evidence goes to establish the conclusion that the sale was a sham and that Roos bought the property for the mortgagee, it falls short of what is needed for the success of the plaintiff—however much one may conjecture of trickery and collusion.

I should say, on the evidence, that the sale was openly and fairly conducted and a good price obtained for the land; there is no evidence that the sale was damaged or in any way prejudicially affected by the advertising or the conditions, which were adversely commented on at the trial and in the judgment. As a matter of fact, persons interested in the equity of redemption, or in the interest of the mortgagor company, attended at the sale and made mock biddings to swell the price, and in truth to create the difficulty and confusion which is now relied on as evidence of collusion between Roos and Zuber.

The property was run up to $43,500 by a bidder called Fish, but he was an unknown person and the auctioneer stayed the sale at this point of highest bidding to ascertain Fish's competency to pay the deposit of 20 per cent. Fish undertook to get the money, and this he failed to do after a reasonable time had been allowed. The sale had been adjourned for half an hour for this purpose, and, Fish having disappeared, the property was again put up. The auctioneer proposed to do so at the next highest figure, but Roos withdrew his bid, and afterwards when the property was put up at large he bid $39,500, at which it was knocked down to him. This was $3,500 less than his former re-

tracted bidding but was still a good price according to the evidence. This miscarriage is to be attributed rather to the eagerness of the parties interested in the equity of redemption than to any supposed collusive scheme between Roos and Zuber, as to which the evidence is uncertain and elusive.

What is relied upon as evidence are some admissions made respectively by Roos and Zuber. The witness Weber saw Zuber on the day after the sale and asked about the sale of the Walker House, and Zuber said, "This trip I get it." Zuber's account is that what he referred to was his money, that the place had been sold to a man Roos who could pay the price.

The other bit of evidence is a conversation of Roos with Mr. and Mrs. Cardy. They fix the date as in August—it is proved beyond reasonable doubt that it was in November, after a letter to Roos from Gordon which was dated November 19. This was read to Mr. Cardy and it was about buying the place by Gordon from Roos. Cardy wanted to leave the Walker House and he says Roos said, "I would not at the present time; I did not buy it for myself; I bought it for another party, but you can go and see Mr. Zuber because we would like to have you here." Mrs. Cardy heard part of the conversation and, according to her version, Roos said he had bought the Walker House for some one not for himself. He said that Zuber would not want it for himself, that he would be likely to lease it to some one, and to go and see him.

Zuber says there was no talk with Roos before the sale, but that afterwards Roos said that he would give Zuber the first chance of leasing the property. Roos says he did not say to Cardy, or in presence of Mrs. Cardy, that he did buy the Walker House for himself, or that he had bought it for Zuber, but that he told Cardy he could go and see Zuber who had the promise of the lease.

It is very unlikely that in a talk where the Gordon offer to buy from Roos was being spoken of to Cardy, and the letter read, that Roos should volunteer the statement that he had not bought for himself. It is very easy to see how the Cardys may have misunderstood what was said, viz., that Roos had not bought the house with the view of going into it or running it himself but with a view of renting it to some one, and that he had given Zuber the first chance to rent. I have no reason to doubt the distinct evidence on this head of Zuber and Roos, confirmed as the latter is by his book-keeper, Illidge (who, however, as Mrs. Cardy did not hear the whole conversation). The evidence in my estimation falls far short of proving that Roos was merely

a nominal purchaser, and that he was acting for Zuber in the acquisition of the property.

The case cited of Roberts v. Bozon, 3 L.J. Ch. 113 (1825), to shew wrong conduct in the sale, depends on the conditions of sale there imposed, and it was the case of a trustee proper. The condition was that the vendor shall be at liberty "to put up the property" as and from the bidding immediately preceding the bidding of the defaulting party. The Chancellor thought that by the conditions the parties stipulated with each other that, if the person who is declared the best bidder did not make good his offer, and if they at the same time proceed to another sale, the property shall be put up at the next best bidding; and it was not competent for any one to bid downwards from the next best bidding, and his opinion was that the Court would not carry out a sale when the next best bidder had been allowed to purchase at a lower price. This is not the decision but it is reported as "*semble.*" But giving it full weight, here, there was no acceptance of any restrictive condition as to the manner of sale, there is the intervention and disturbance caused by mock bidding, there is no application to the Court to inhibit the completion of the sale, and there is no breach of trust by the trustee failing to realise the best price. . . .

My conclusion is that the action fails and should be dismissed with all costs to be paid by plaintiff.

LATCHFORD and MIDDLETON, JJ., concurred.

MIDDLETON, J. MARCH 24TH, 1911.

RE McEWEN.
McEWEN v. GRAY.

Will—Construction—Provision for Widow—Partial Intestacy—Election—Trust for Conversion—Real or Personal Estate—Devolution of Estates Act—Right of Widow to Share in Surplus.

Motion by the executors of the estate of C. McEwen for an order construing the will of the testator.

J. Harley, K.C., for the executors.
W. M. McEwen, for the widow.
W. C. Chisholm, K.C., for James G. McEwen, a son.
J. R. Meredith, for the infant.

MIDDLETON, J.:—The testator, who died 9th June, 1897, by his will dated 7th June, 1897, gave his wife $1,000 in lieu of dower and, after certain other legacies, including $1,000 to each of his two sons on attaining majority, directed his executors to convert his real and personal estate into money and to invest the same after payment of his debts and legacies, other than the legacies to his sons, and to use the income for the maintenance of his sons during minority, and upon their attaining majority to pay them their legacies.

One son is now of age and the other is still an infant.

The lands have been sold and after payment of all debts and legacies some $6,000 still remains.

The testator died intestate as to this.

The widow claims to be entitled to share in this sum, notwithstanding her election to take under the will. This election is by instrument of 30th November, 1897.

The questions that arise are most interesting and important.

I do not think it necessary to go behind Pickering v. Stamford (1797), 3 Ves. 332. In that case the testator made certain provision for his wife in bar and satisfaction of any and all claims out of his realty and personalty. The residue was given in trust for charity, but so much as was invested in real securities, by reason of the mortmain acts, could not be taken by the charities. The question was, could the widow take her third, notwithstanding the will and her election. Sir R. P. Arden, M.R., determined in favour of the widow on the strength of an unreported decision of Lord Cowper, basing his decision upon this principle: "Where a testator has given his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow." The Master of the Rolls was then reversing his former opinion in deference to Lord Cowper's views, and it is clear that he was not wholly converted, as he says: "If a man devises his real estate from his heir after giving his widow a provision in lieu, satisfaction and bar of dower, and the devisee dies in the life of the devisor, is there any doubt that the heir would take the estate and bar the widow of dower? That is not doubted, and yet it is extremely difficult not to argue in favour of the widow in that case, as in this it is argued against the next of kin . . . , but there are distinctions. . . . The testator must be supposed to mean it in favour of his real estate at all events and into whosesoever hands it shall come." This distinction so attempted to be drawn, and

this refusal of the Master of the Rolls to fully accept the consequences of the doctrine of Lord Cowper have been the occasion of much controversy.

In Leake v. Robinson (1817), 2 Mer. 363, at p. 394, Sir W. Grant, who was one of the counsel in Pickering v. Stamford, in a similar case takes "the widow's right to be settled by Pickering v. Stamford." Lord Eldon, who was also of counsel in Pickering v. Stamford, in Garthshore v. Chalie (1804), 10 Ves. 1, a case upon a settlement, refers to the "doctrine upon a will" as "very well stated in Pickering v. Stamford and agreeing with that case which is an authority, that the widow is not barred in such a case because the intention was to bar her from her thirds, for the sake of persons under that instrument to take the residue," and then proceeds to discuss the case in hand.

In Lett v. Randall (1855), 3 Sm. & Giff. 83, the whole matter is again discussed by Stuart, V.C., and a distinction is suggested, based upon the argument of counsel in Pickering v. Stamford, between cases in which property actually disposed of by the will becomes distributable by reason of some unforeseen accident, and cases in which the testator does not in any way deal with some portion of his property.

Attention is also drawn to the form by which the testator excludes from participation in his estate, and cases in which the testator attempts to exclude all his heirs or all his next of kin without making any disposition of his estate are shewn to stand by themselves, as the only way in which a man can avoid the consequences of intestacy is by making a will disposing of his property. The result is well summed up in the last paragraph: "The exclusion by declaration of one or some only of the next of kin, if it is valid, must enure to the benefit of the rest and has the same effect as a gift by implication to them of the share of those who are excluded . . . , but if by will, certain terms or a certain condition, be annexed to a gift, those terms as much bind the object of the gift who accepts it as if he contracted to abide by the terms or conditions. This is an essential element in the law of election. As there is found in the present case an intestacy upon the face of the will, with language excluding the widow in absolute and comprehensive terms from any further share of the testator's property in whatever way it may accrue, I can find no authority to justify the Court in holding that having enjoyed the annuity she or her representatives are entitled to any share of the property now to be distributed."

The editors of this report in a note say: "How this is to be reconciled with the course of reasoning of Lord Alvanley and

Lord Loughborough in Pickering v. Stamford, where both these great Judges express themselves so strongly against looking into the will to find the intention in such a case, it is not easy to see unless upon the view pressed in the argument of Sir William Grant as to the difference in such a case of the testator not making a complete disposition, and making a disposition that by an unforeseen accident totally fails, the argument being that in the latter case the exclusion is meant merely in favour of the persons to whom the will expressly gave the whole of the rest of the property. . . . If that be the principle of the decision in Pickering v. Stamford, it cannot apply to a case where on the face of the will there is an intestacy as to a great part of the estate."

In 16 R.R. 187, in a note by one of the editors to Leake v. Robinson, after discussing Pickering v. Stamford, it is said: "It may be observed that the law as thus settled does not prevent a testator from effectually bequeathing property to his wife in bar of her claim to her distributive share in his undisposed of personal estate. For if a testator thus contemplates a partial intestacy, and clearly shews that such a testamentary provision is intended to operate in favour of her next of kin claiming under such intestacy, the widow may be put to her election, or such a provision may even operate as an ultimate disposition of the residue in favour of the next of kin to the exclusion of the widow." The latter paragraph is justified by a decision of V.C. Hall in Bund v. Green, 12 Ch. D. 819, where a testator said in so many words that A. & B., two of his next of kin, in consideration of certain provisions were to be excluded from the distribution of any personal estate as to which he died intestate.

[Reference to Davidson v. Boomer, 18 Gr. 475.]

In Hamilton Trustees v. Boyes (1898), 25 R. 899, sub nomine Naismith v. Boyes, [1899] A.C. 495, principles are laid down that, it appears to me, must govern the question. By his will the testator made certain provisions for his wife and children which were "to be in full of all claims by them for terce, jus relictæ, legitim, or otherwise." Owing to unexpected events there was a partial intestacy—the question was, did this provision exclude the wife and children from sharing, and though this case might have been determined upon the principle above indicated that a testator cannot prevent his heirs and next of kin taking when there is an intestacy, Lord McLaren says this: "I think we must apply to this clause of exclusion the ordinary and time-honoured principle of construction that such clauses are intended to enable full effect to be given to the testator's testamentary dispositions by

putting all persons who take benefits from the will under a disability to put forward legal claims which would have the effect of withdrawing something from the estate disposed of. As regards all that remains over when the provisions of the will are satisfied, in this case the whole residue, the law of intestacy takes effect just as if it had been formally excepted from the will." This statement is accepted without modification by Lord Halsbury and, with some qualification, by Lord Watson, who points out that there is not a strict analogy between the English and Scotch law.

Lord Shand quotes Pickering v. Stamford, and accepts as law Lord Cowper's earlier decision and shews that the difference between the right of the widow under English and Scotch law can make no difference, as the question arises on the will. Lord Davey quotes from Pickering v. Stamford the passage from Lord Alvanley's judgment extracted above and says that it expresses the doctrine of English law, though he concurs in the view that in the case in hand the testator elected to die intestate with the usual result. The quotation of these two conflicting statements by different Lords, without comment or attempt at reconciliation, does not clear the situation.

In the result, I think, this testator intended to prevent his wife asserting dower in the lands in question to the prejudice of the scheme of his will, i.e., an immediate sale of the lands, and that having elected to accept the benefit offered by the will she cannot assert any claim against the lands, but, as to the proceeds of the lands not disposed of, he died intestate, and that the widow has the same right in the surplus as if the testator on the face of his will had declared that it was to be so distributed.

Whether this surplus descends as realty or personalty is a question of difficulty. The will contain an imperative direction to sell, and a sale was clearly necessary for the working out of the scheme of the will. It is not the case of an asset not being dealt with by the will, but of failure of the testator to deal with the proceeds resulting from the conversion. At one time the executors might have taken beneficially, but now there clearly is a resulting trust in favour of either the heirs at law or next of kin.

The cases shew that though this fund is personalty the heir at law takes. The testator did not intend to divert the land from his heir and prefer his next of kin, and so, though the heir must take as personalty, he and not the next of kin, takes: see, for example, Re Richerson, [1892] 1 Ch. 379.

I have been unable to find any case dealing with the right of the widow, but cannot see why this fund should not be dealt with

as though it were land and quite apart from any provisions in the will, as the will has not in any way dealt with it. The widow can elect under the Devolution of Estates Act to take a third of this fund.

If I am wrong, and this is personalty, then the widow on the intestacy takes a third.

If regarded from the standpoint of election, the testator by his will has said to his widow: "I will give you $1,000 if you bar your dower on the sale by my executors of this land, and the proceeds are then (subject to the legacies and charge for maintenance) to be divided between you and my sons as the law directs." And to this the widow has assented, and I can find nothing indicating an intention on the testator's part to exclude her from participating in this distribution.

The instrument of election was drawn so as to release the right the widow had to share. It was conceded that it could not stand as a bar to the widow's right (if she had any such right) to share in the estate. To remove it from the way and so enable the question to be considered upon the merits, the action of McEwen v. Gray was instituted and in it judgment may go vacating that instrument so far as it purports to deal with the right of the widow to elect under sec. 4 of the Devolution of Estates Act, or in so far as it in any way affects her rights to the fund in question, but allowing it to stand as an election to take under the will and as a bar of dower.

The costs of all parties and of the Official Guardian, both of the motion and action, should be paid out of the estate. Executors' as between solicitor and client.

DIVISIONAL COURT. MARCH 25TH, 1911.

CLARKSON v. ANTIPITSKY.

Contract—Agreement for Remuneration—Conflict of Evidence—Question of Fact—Function of Appellate Court.

Appeal by the plaintiff from the County Court of York to recover $300, being balance alleged to be owing from the defendants to the plaintiff.

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

A. McGregor, for the plaintiff.

A. F. Lobb, for the defendants.

FALCONBRIDGE, C.J.:—This is a mere question of fact. The alleged agreement for remuneration was not repugnant to, and need not necessarily have been embodied in, the writings.

I am not prepared to say that, on the perusal of the evidence and exhibits, I should have arrived at the same conclusion as did the learned trial Judge.

But he saw the witnesses, and gave credit to the defendant's testimony, and it is not a case in which it can be said that he drew the wrong inference from facts not in dispute as in Beal v. Michigan Central R.R. Co., 19 O.L.R. 502.

The appeal must be dismissed with costs.

BRITTON and SUTHERLAND, JJ., agreed in the result, giving reasons in writing.

BANK OF COMMERCE v. FITZGERALD—MASTER IN CHAMBERS—MARCH 23.

Pleading—Statement of Claim—Colourable Sale at Undervalue by Mortgagee—Parties.]—The plaintiffs brought an action, asking to have it declared that certain assets belonged to the defendant, their debtor, and should be applied in payment of his debts. The defendant then moved before pleading to have the mortgagees of the property added as parties defendant, or to have struck out so much of the statement of claim as alleged that sales were made at an undervalue to the defendant's wife. CARTWRIGHT, M.C. (after setting out the facts):—It is to be observed that no relief of any kind is being asked against the mortgagee companies. They are not being asked to account for selling at an undervalue. It would therefore be impossible to have them added as parties. It is scarcely necessary to say that a plaintiff cannot be obliged to take action against those whom he does not wish to attack—subject to this proviso, that his action will not be defective without their presence before the Court. It was strongly urged by counsel for the defendant that plaintiffs should not be allowed to give proof of a sale at an undervalue unless the mortgagees were parties to the action. But this position, though at first it may seem not unreasonable, cannot be maintained. The statement of claim, looked at as a whole, as it must be on a motion of this kind, states in conformity with the rule the material facts on which the plaintiffs rely to prove their case. After Millington v. Loring, 6 Q.B.D. 190, and

such cases in our own Courts as Stratford Gas Co. v. Gordon, 14 P.R. 407, the defendants cannot object that too much is stated in their adversaries' pleading. What the statement of claim does, as I understand it, is to set out in chronological order, and with perhaps more than ordinary fulness of detail, the various links in the series of events which, as the plaintiffs allege, shew that within less than two years after the recovery of their judgment (which at that time must have exceeded with interest and costs $61,000), the defendant, their debtor, devised and carried out a scheme by which he got back possession of all his assets through sales to his wife by the mortgagees, and which have now under the terms of the two trust deeds executed by her been in effect put under his dominion. Then if all this be so and can be proved to the satisfaction of the Court, the relief asked for must be granted. As the pleading stands it does not seem to be open to objection. Had the details been omitted which the defendants now ask to have excised, there would probably (if not certainly) have been a demand for particulars shewing, for instance, why it was claimed that the sales to Mrs. Fitzgerald were only colourable and that the assets were held by her in trust for her husband, etc. The motion will be dismissed with costs to the plaintiffs in the cause. The defendants may have eight days further to plead if desired. W. R. Meredith, for the motion. F. Aylesworth, contra.

TURCOTTE v. FINKELSTEIN—MASTER IN CHAMBERS—MARCH 24.

Place of Trial Named in Writ—Notice of Trial at Different Place—Motion to Set aside—Costs.]—Motion by the defendant to set aside notice of trial under circumstances stated in the judgment. CARTWRIGHT, M.C.:—On 12th August, 1908, the usual order was made under Rule 162 for issue and service of writ and statement of claim on defendant at Winnipeg. Service was effected on 10th September. The statement of claim, as served, did not name any place of trial, though the writ named Toronto, improperly. Afterwards, on September 2nd, the statement of claim was filed, and in this North Bay is named as the place of trial. In the copy of writ served on defendant North Bay had been first written, but this was struck out and Toronto given instead. Toronto alone is named in the original writ. The defendant appeared, but the pleadings were afterwards noted against him for default of defence (too soon as the practice now is). This was afterwards set aside on his application, March,

1909. The proceedings then went on. A statement of defence was delivered and affidavits on production made on both sides. Joinder of issue was delivered on 17th March, 1909, and jury notice served a few days later. No further steps were taken until on or about 9th March inst., the plaintiff gave notice of trial for the jury sittings at North Bay on 3rd April next. And a week later the defendant moved to set this notice aside because the only place of trial named by plaintiff in the papers served on defendant was Toronto, assuming that this was validly done by being named in the writ. I think the motion is properly conceived. After all that has been done by defendant since the action began he could not successfully move against the statement of claim as irregular. But he cannot unreasonably allege that he is now taken by surprise by the attempt to have a trial at North Bay. The best disposition of the matter now would seem to be to allow the plaintiff to amend by naming North Bay as the place of trial and consent to strike out the jury notice so that the case can go to the May non-jury sittings. If he does not choose to do this, then the order will be merely to let him amend the statement of claim and let the notice of trial stand, with liberty to defendant to move to postpone if unprepared for trial as is probably the case; in which event he may possibly have costs of that motion as well. As the whole difficulty has arisen through the fault of plaintiff, the costs of this motion must be to defendant in any event. J. H. Spence, for the defendant. J. P. MacGregor, for the plaintiff.

HIGGINS v. CONIAGAS REDUCTION CO. AND ONTARIO POWER CO.—MASTER IN CHAMBERS—MARCH 24.

Change of Venue—Alleged Inconvenience to Business.]—Motion by the defendants to change venue from Cayuga to Welland or St. Catharines. The plaintiff sued as administrator of F. Egester, who was killed on 1st June last, when in the employment of the Ontario Power Co., through neglect on the part of one or both defendants to shut off the electric current from a line which deceased was instructed to repair or handle. The deceased apparently left neither widow nor children. The action was only begun on 28th February, and is brought on behalf of his parents. The delay is stated to have arisen from the difficulty of getting into communication with the parents, and obtaining the necessary renunciations and authority for

the issue of letters of administration. CARTWRIGHT, M.C. (after stating facts as above):—The father has not yet been located. The mother resides in Manitoba and is sworn to be now on her way to give evidence at the trial on the 4th April next as to the support received by her from the deceased. She is also said to be over 60 years of age and without means to pay the expense of another journey to and from Manitoba if the case is postponed, as it would be if this motion succeeds. The possibility of losing material evidence of other necessary witnesses in such an event is also pointed out. The defendants base their application on the inconvenience to their business which will be occasioned by taking their 6 or 7 witnesses to Cayuga. The difference in expense as between that place and Welland would not be sufficient for success. Indeed, it was not even suggested on the argument. But the inconvenience of witnesses is not of weight unless in the case of public officers. If the absence of these witnesses will really be injurious to the defendants they will no doubt be able to make such an arrangement as will largely, if not altogether, prevent any serious damage. The patent fact that unless the trial goes on now at Cayuga it cannot be had until the next Assizes is sufficient, under the other facts deposed to on both sides, to preclude me from granting the motion. The notice also stated that the defendant company could not prepare for trial at Cayuga on 4th April. This is repeated in one of the affidavits, but without any reasons being given. It was not mentioned, or if so, was certainly not pressed on the argument. The motion is dismissed with costs in the cause. H. H. Collier, K.C., for Coniagas Co. R. J. McGowan, for the other defendants. T. F. Battle, for the plaintiff.