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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 15TH, 1909.

LETCHER v. TORONTO R. W. CO.

Street Railway—Injury to Passenger—Negligence—Contributory Negligence—Findings of Jury.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B , ante 59, in favour of the plaintiffs, upon the findings of a jury.

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

D. L. McCarthy, K.C., for the defendants.

Alexander MacGregor, for the plaintiffs.

The judgment of the Court was delivered by MULOCK, C.J.:—The controversy . . . arises out of the answers of the jury to the 3rd and 5th questions:—

"3. Or were the injuries sustained by reason of her own negligence or want of care? A. No.

"5. Could the plaintiff Julia Letcher, notwithstanding any negligence of the defendants, by the exercise of ordinary care have avoided the accident? A. Yes, possibly by taking hold of the hand-rail."

If the record had stood as left with the answer to question 3, there would have been an unqualified finding that the plaintiff was not guilty of any want of care. But the defendants say that that answer should be interpreted as applying to a certain part of the plaintiff's conduct only, and not to her conduct generally in connection with the accident.

The trial Judge reviewed the case fully, and, although he made some brief observations in connection with question 3, he did not

give the jury to understand that its language was to be construed as meaning other than what it expresses. . . . When the jury, after listening to a lengthy review of the case, retired with certain written questions before them to answer, it is not reasonable to suppose that they construed question 3 as intended to elicit from them other than a complete finding whether, upon the whole facts of the case, the plaintiff had been guilty of contributory negligence disentitling her to recover. . . . The almost casual remarks of the trial Judge in connection with question 3 . . . fall far short, in our view, of what would be required in order to cut down the generality of the plain question to something less, and the answer here should be interpreted as meaning precisely what it says. . . .

It was argued that the answer to question 5 cannot be reconciled with that to question 3; but an examination of the answer to question 5 shews that it is not an unqualified finding of contributory negligence. The word "yes" loses its force when its meaning is stated by the jury as being "possibly by taking hold of the hand-rail" she might have avoided the accident. They do not say that taking hold of the hand-rail would have prevented the accident, but only "possibly," which here implies nothing more than "perhaps." All other suggestions of negligence on her part, according to Andreas v. Canadian Pacific R. W. Co., 37 S. C. R. 1, are negatived, so that, reading the two answers together, the jury's finding in substance is "that the plaintiff was guilty of no want of care, though perhaps taking hold of the hand-rail might have prevented the accident, but we do not say that it would." This leaves to the plaintiff the full benefit of the unqualified answer to question 3.

It also appears to us that the answer to question 5 has no bearing upon the issue here. It is admitted that the car was at rest when the plaintiff arose to leave, and the jury found that when she had reached the edge of the platform the car was at a standstill. She then continued her progress towards alighting, and it is suggested that, at some stage between her reaching the edge of the platform and stepping upon the ground, she could have taken hold of the hand-rail. When she was at the edge of the platform . . . the car was at rest. So long as it remained at rest, no useful purpose would have been served by her taking hold of the hand-rail.

Further, there was no duty cast upon her to take hold of the hand-rail when the car was at rest, in anticipation of any negligent starting of the car. There is no standard of duty requiring a passenger to do something to guard against possible injury

that might arise in case a railway company should be guilty of some act of negligence not then apparent. . . . Perhaps it may be suggested that when the car started she should have changed her plans and remained on the car. But was it practicable for her to have done so? The jury negatived such suggestion when they found that she was not guilty of negligence or want of care in alighting as she did. . . . We fail to see how seizing the hand-rail would, under the circumstances here, have enabled her to alight in safety. The jury evidently took this view when they gave a mere speculative guess as to whether taking hold of the hand-rail would have saved her. They do not make a positive finding that it would; but, even had they so found, we are of opinion that such a finding would have to be disregarded, there being no evidence to support the contention that taking hold of the hand-rail would have prevented the accident.

The last act of negligence, according to the jury's finding, was the negligent starting of the car, which was the causa causans, and there is no evidence to shew that, after that negligent act, it was possible for the plaintiff to have done anything to have averted the accident.

Appeal dismissed with costs.

BOYD, C. DECEMBER 16TH, 1909.

RE CARTER.

Will—Construction—Bequest of Residue to Children—Substitution of Grandchildren in Event of Death of Child before Period of Distribution—Estate not Vested in Child—Advance to Child — Grandchild Representing Child — Share Subject to Abatement in Respect of Advance—Moneys of Infant—Payment to Surrogate Guardian—Payment into Court.

Motion by the executors of the will of James North Carter, deceased, for an order determining questions arising in the distribution of the estate.

W. E. Middleton, K.C., for the executors and three beneficiaries.

C. A. Moss, for Mrs. Jennie Irwin.

McGregor Young, K.C., for Mrs. Shannon, mother and guardian of the infant claimant.

F. W. Harcourt, K.C., for the infant claimant, Raymond Stuart Carter.

BOYD, C.:— . . . The testator's will was dated in 1887, and he died in April, 1897. The infant grandchild now making claim was born in November, 1897; that child's father, Harry, son of the testator, died in August, 1898, and the testator's widow (the life tenant) died in August, 1908.

The will provides for payment of specified legacies to the children, which have been paid, and as to which no question arises. The residue of the estate is to be turned into money, invested by the executors, the income paid to the widow, and on her death the direction is "that all the residue of my estate is to be equally divided among all my children living at that time" (the death of the widow) "and the lawful issue of such as may be dead, per stirpes."

The testator also provided that the shares to go to Harry and James are to be dealt with according to the discretion of the executors. . . . The only point made here is that he speaks of *the shares to go to* these sons.

It is admitted that the son Harry was advanced to the extent of about $4,000 in his and his father's lifetime, and that it was agreed between them in writing that these advances were to be deducted from Harry's share of the father's estate. The other children also received advances on the same terms.

Thus the situation presented is: advances to the son Harry of moneys which are to come out of his share of the estate (the residue); the death of the son before the period fixed for division, leaving an infant; and the death of the widow, which occasions the final distribution of the estate. The infant claims the share of the estate which the father would have taken, without bringing the advances into account; the children of the testator contest this, and contend that the infant's share should be allotted in the same manner as the other shares, subject to diminution according to the amount of the advances. . . .

As I read the will, there was no vesting of the residue or any share of it till the death of the mother. The whole was kept in the hands of the trustees till then, and only then were the recipients to be ascertained. It was then, and not sooner, to go to the children who should be living and to the issue of those who died before that event. The vesting at an earlier period is not helped by the use of the word "share" in paragraph 10 of the will. The words there used are "in regard to the shares *to go to* my sons," not "the shares of my sons." The reference is to the portion that was about to go to him if he survived his mother.

Taking it then as a share of the residue which first vests in the infant, does he take it as an independent gift or not? Is he

in a better position than his father, had his father survived? The cases are in conflict. . . .

[Reference to and analysis of Rose v. Rogers, 39 L. J. Ch. 791, and In re Scott, [1903] 1 Ch. 1. In the latter case, Kekewich, J., followed Rose v. Rogers, but his decision was reversed by the Court of Appeal, and the Chancellor is of opinion that Rose v. Rogers should not be followed.]

In this case the testator, by the expression used, "per stirpes," shews that he was considering the issue of a deceased son in their representative capacity. It is not as if he had given it over on the death of the son to a stranger . . . but it is given to the issue as representatives of their father. That there is only one child does not affect the construction of the word. That is the point of contest between the opposing counsel in discussing Rose v. Rogers in Re Scott, the one contending that the daughter representing the father was under the same liability; the other that the daughter does not take the father's share under the will, but in substitution for him. The view of the Judges (Court of Appeal in Re Scott) on the point would indicate that if the gift on the son's death was to a stranger, it would be a substitution, but if to his issue as such, it would be as his representatives.

If the claimant in this case takes as the representative of his father, he must take the share intended for the father subject to any drawback for advancement. Indeed, only in this way could there be equal distribution of the residue as the testator intended; all the children who take it must account for moneys received from the testator by way of advancement, and the claimant must share the equality in that respect, because standing (so to speak) in the shoes of his father.

The share of the claimant must, therefore, be reduced by the amount so advanced to the father. See Re Lewis, 29 O. R. 609, which was, however, a case of intestacy.

Upon the other matter argued, it seems to me clear and according to the settled policy of the Court not to sanction the payment out of some $30,000, the share of the infant, to his Surrogate guardian—even though she is the mother and of ample means. She has married again, and the interest of the infant will be better protected, at all events to the satisfaction of the Court, and probably with less expense and more profit, by being paid into Court, than by being left to the risk and chances of an investment carrying more than 4 per cent.

The costs will come out of the estate.

BOYD, C. DECEMBER 16TH, 1909

BEARDMORE v. CITY OF TORONTO.

Constitutional Law—Ontario Acts 8 Edw. VII. ch. 22 and 9 Edw. VII. ch. 19—Intra Vires—Actions Impeaching Validity of Contracts between Municipal Corporations and Hydro-Electric Power Commission—British North America Act, sec. 92 —Power of Legislature to Vary Contract — Power to Stay Pending Actions.

Action for a declaration that a certain contract between the defendants and the Hydro-Electric Power Commission and a by-law of the defendants were invalid, and for consequent relief. See the similar case of Smith v. City of London, 13 O. W. R. 1148, and post 280.

E. F. B. Johnston, K.C., and H. O'Brien, K.C., for the plaintiff.

H. L. Drayton K.C., and H. Howitt, for the defendants.

J. R. Cartwright, K. C., for the Attorney-General for Ontario.

BOYD, C.:— . . . The terms of the contract here executed and operative are materially different from those submitted to the electorate, and, did the matter so rest, the intervention of the Court to stay proceedings, or in order to provide for the submission of the changed proposition to another vote, might well be sought. But at this point special legislative intervention appears in the statute of 8 Edw. VII. ch. 22, by which the by-law in question is declared to be in form and substance a sufficient compliance with the requirements of the former Act, and the by-law is confirmed and declared to be sufficient, legal, valid, and binding for the purposes thereof (sec. 1). This was followed by another confirmatory Act of retrospective force in 9 Edw. VII. ch. 19, in which it was enacted that the validity of the varied contract should not be open to question and should not be called in question on any ground whatever in any Court, but should be held to be binding on all the corporations (including this city). And further, by sec. 8, every pending action attacking or questioning the jurisdiction or power to do what has been done was perpetually stayed, by whomsoever such action was brought (which includes this action).

The Court so far invaded these provisions as to entertain the action in order to have the point of legislative competence dis-

cussed and determined. The terms of the statute cannot inhibit the examination of that question.

These statutes purport to be passed in pursuance of the right to legislate as to municipal institutions in the province: British North America Act, 1867, sec. 92 (8). That gives the right to create a legal body for the management of municipal affairs (as said by Lord Watson in Attorney-General for Ontario v. Attorney-General for Canada, [1896] A. C. 364). And, by necessary consequence, that implies a right to define what duties and what range of subjects shall be intrusted or delegated for regulation and control to the local subordinate body. It is open, therefore, for the proper understanding of the constitution to regard what had been done under provincial laws before and after the establishment of the federal government of Canada. . . .

[The Chancellor then briefly sketched the history of municipal self-government from 1793 to 1849, when it took its present form.]

In short, it may be said that the law regarding the municipal institutions of this province had received a staple form and body prior to Confederation, and it does not seem necessary to follow the matter in more detail in the present judgment. This I have endeavoured to do in Smith v. City of London, post, which was argued before I had fully considered my judgment in this case. I have said so much as to the introductory facts and circumstances to shew that at a certain stage this litigation is identical with that in the London case.

I cannot distinguish the legal and constitutional aspects of the questions submitted for adjudication in each case; they are identical; and for this reason I forbear to labour the details further. I would be bound by the decision of the Divisional Court in the London case, and I am willing to adopt the conclusion there arrived at without further elaboration. The single point of difference, in that there is an existing electric light company in Toronto, is not a material difference.

Whether with or without competition, the object of the legislature and of the city authorities must be to secure an adequate supply of electric service for the needs of all at a fair and reasonable rate of compensation. This point as to competition is dealt with in a controversy not unlike the present by Mr. Justice Shiras in the Federal Court of the United States in Thompson-Horton Co. v. City of Newton, 42 Fed. R. 723.

The judgment will be in the same terms as in Smith v. City of London.

DIVISIONAL COURT. DECEMBER 16TH, 1909.

SMITH v. CITY OF LONDON.

Constitutional Law—Ontario Acts 8 Edw. VII. ch. 22 and 9 Edw. VII. ch. 19—Intra Vires—Actions Impeaching Validity of Contracts between Municipal Corporations and Hydro-Electric Power Commission—British North America Act, sec. 92—Power of Legislature to Vary Contract—Power to Stay Pending Actions.

Appeal by the plaintiff from the judgment of RIDDELL, J., 13 O. W. R. 1148.

The plaintiff by the action sought to annul the contract entered into by the defendants with the Hydro-Electric Power Commission, as authorised, amended, and validated by the following Ontario statutes: 6 Edw. VII. ch. 15, an Act as to electrical power; 7 Edw. VII. ch. 19, superseding the former, except as to contracts already entered into; 8 Edw. VII. ch. 22 and 9 Edw. VII. ch. 19, both providing for the validation of by-laws and contracts made under the former Acts.

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

E. F. B. Johnston, K.C., and J. M. McEvoy, for the plaintiff.

E. E. A. DuVernet, K.C., and A. H. F. Lefroy, K.C., for the defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

BOYD, C.:— . . . It would appear that both by-law and contract would be open to successful attack in the Courts, but for their legislative validation by 7 Edw. VII. ch. 73, sec. 2; 8 Edw. VII. ch. 22, sec. 4; and 9 Edw. VII. ch. 19, sec. 4. In the schedule to this legislation appears for the first time the contract which was executed by the defendants and the Commission. The legislative change was made in April, 1908, the contract signed on the 9th June, 1908, and this action begun on the 16th June of that year. The final piece of legislation recites that doubts had been raised as to the validity and binding character of the contract. . . . It then enacts that the contract as varied shall be valid and binding according to the terms thereof, and shall not be called in question on any ground whatever in any Court, but shall be held and adjudged to be valid and binding on the corporation—which shall be conclusively deemed to have entered

into a contract with the Commission within the meaning of the statutes. And, by sec. 8, every action theretofore brought and then pending wherein the validity of the contract or by-law is attacked, by whomsoever brought, shall be forever stayed. The Act was passed on the 29th March, 1909, and is levelled at this particular action and any other then pending.

The legislation contained in this series of Acts is questioned in this appeal, on the special ground that it is ultra the provincial law-making power. And in this aspect I take it that it is open to the Court, notwithstanding the wide language used as to staying proceedings, to take cognizance of the legislative competence to deal with the whole subject-matter. If the provisions of the statutes in question are found to be beyond the powers of the provincial legislature, it is the duty of the Court, under the scheme of the British North America Act, 1867, so to adjudicate and determine.

The controversy was presented under many aspects, but the solid residuum of objection left at the close of the argument is within a narrow compass. It may be thus put: electric current is a commodity, and as such the subject of "trade and commerce;" this is an attempt to engage in municipal trade; and the law, rightly construed, does not permit a municipal body to interfere with the rights of individual inhabitants as to private lighting. Something also was suggested as to the undertaking savouring of monopoly and claiming exclusive rights, unfavourable to free trade and self-government. It was urged also that the electors, even by unanimous vote, could not warrant such legislation. It is admitted (perhaps reluctantly) that, as to supplying light to public buildings and streets and the like, the legislation is permissible. . .

These Acts, upon their faces, by their very titles, claim to be classified under the heading of "Municipal Institutions in the Province:" B. N. A. Act, sec. 92 (8). The main Act is intituled "to provide for the transmission of electrical power to municipalities:" 6 Edw. VII. ch. 15; and the rest to validate by-laws and contracts made under the former. They are all in pari materia. They deal with the transmission of electricity from Niagara Falls through and to various municipalities, making it available for all municipal corporations who apply. The installation of electric plant in the city of London would be per se "a local work or undertaking," "a matter merely of local or private nature in the province:" ib. sec. 92 (10) (16). Such legislation in England always falls under the heading of "Local Acts." . . .

[Reference to Lord Durham's Report (1839); 22 Vict., 1st sess., ch. 99; C. S. U. C. 1859 ch. 54; "The Liquor Prohibition Appeal of 1895" (bound volume in the Osgoode Hall Library), pp. 35, 44, 45, 51 ([1896] A. C. 348); 29 & 30 Vict. ch. 51, secs. 2, 3, 4; C. S. C. 1859 ch. 65; Clifford's History of Private Bill Legislation (1885), vol. 1, p. 232 n.; The English Electric Lighting Act, 1882, secs. 7, 8, 27; Lord Courtney's Working Constitution of the United Kingdom (1890), pp. 242, 243.]

The supply of light, whether by gas or other illuminant, is a proper function of municipal administration. So to hold does not at all infringe upon the meaning of "trade and commerce," as used in the B. N. A. Act, where exclusive power is conferred upon the Dominion to legislate as to the regulation of trade and commerce (sec. 91 (2)). These words would point to political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and the like, as indicated in Citizens Insurance Co. v. Parsons, 7 App. Cas. 110. . . .

[Reference to "The Liquor Prohibition Appeal of 1895," pp. 104, 115; Hull Electric Co. v. Ottawa Electric Co., [1902] A. C. 237, 247.]

Whether or not the distribution of electricity to private persons at a fixed price can fairly be called "trading," it is not needful to consider. . . .

But it is, perhaps, well to deal with the proposition advanced that the supply of house light is a purely private matter, and that no public body can interfere with the right of a man to use any kind of light he pleases, and that there is no right to tax him for the supply of special light to other people. . . . In regard to electric light from Niagara Falls, these considerations enter into the question: the individual cannot procure his own supply of electricity; it has to come to him by means of material conveyance over private and public property—streets and highways—which cannot be used without a right of franchise or expropriation. The transmission and storing of electrical energy necessitate a system of control and regulation for the interests of public and private safety. . . . These desiderata exclude the undertaking from the area of private enterprise and ordinary business. It is removed within the range of Municipal Institutions. The proper user and enjoyment of such a service affects the citizens as a community, and not merely as individuals. . .

[Reference to opinion of the Justices to the House of Representatives (1890), 150 Mass. at p. 597.]

I have no difficulty in deciding as to the main . . . question . . . as to the power of the defendants to engage in the business of acquiring and distributing electric energy, that it is one of the incidents of municipal government, whether or not in competition with private concerns is of no material significance in the constitutional aspect of this legislation.

The provincial legislature has power to establish electrical works as a local work or undertaking, under another clause of the Confederation Act—sec. 92 (10). Consequently it has power to delegate this undertaking to a competent municipal body. . .

Has the plaintiff, as a ratepayer of the city, a right to be heard in seeking relief after the validation of the contract and by-law? He starts with a good cause of action. The terms of the contract being changed after the vote, prima facie the vote has been cast away, and there is no valid contract which binds the ratepayers, and the levy of rates based on contract and by-law is illegal. But comes the special Act as the deus ex machina, with double aspect, not only to validate everything, but to close the Court against the aggrieved ratepayer. . . .

The legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary, and . . . no Court can change the situation. The legislative action is, no doubt, a violation pro tanto of the principle of local self-control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But, whatever be its character or effect, the investigation is not for the Courts, but for the politician or the elector. . . . When the provincial legislature exercises exclusive plenary power within the constitutional limits of the Imperial Confederation Act, any statute so enacted is not to be revised or supervised by the judicial body. . . .

[Reference to Bl. Com., p. 91, and note by Christian; Logan v. Burslem, 4 Moo. P. C. 296; Toronto and Lake Huron R. W. Co. v. Crookshank, 4 U. C. R. 309, 317; Commissioners for Special Purposes of Income Tax v. Pemsel, [1891] A. C. 549; Garland v. Carlisle, 46 Cl. & F. 705, 706; Labrador Co. v. The Queen, [1892] A. C. 123; The English Vexatious Actions Act, 1896; Dash v. Van Kleeck (1811), 7 Johns. 505; Ervine's Appeal, 16 Pa. St. 266.]

Respecting the section of the statute which stays the actions pending, it is plainly enough expressed to that effect, and the only comment the Court can make is to quote these words from Lord Watson's judgment in Young v. Adams, [1898] A. C. 457, 476: "A retrospective operation ought not to be given to the

statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language. . . . The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act and to deprive the person injured of the remedy which the law then gave him."

The short result is, that no ground of interference appears, and that the legislation is within provincial competence. There may be a declaration to this effect, but no further order. It is not a case for costs.

DIVISIONAL COURT. DECEMBER 17TH, 1909.

MACKENZIE v. MAPLE MOUNTAIN MINING CO.

Company—Services of President—Remuneration—General By-law — Confirmation by Shareholders — Resolution Fixing Amount—Companies Act, 7 Edw. VII. ch. 34, sec. 88.

Appeal by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing the action, which was brought to recover $525 alleged to be due to the plaintiff for his services as president of the defendant company.

CLUTE, J., held that there had been no compliance with the provisions of sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34.

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

J. W. Bain, K.C., for the plaintiff.

R. C. Levesconte, for the defendants.

FALCONBRIDGE, C.J. (after stating the facts):—It appears that, instead of a by-law having been confirmed at a general meeting, the initiative was taken at the meeting of shareholders, and then the directors assumed to pass a resolution pursuant to the resolution of the shareholders.

The question has been elaborately discussed and dealt with by my brother Riddell in Beaudry v. Read, 10 O. W. R. 622, and I am in entire accord with his opinion as set out on p. 625. . .

A further objection to the plaintiff's recovery is raised, in that there is no by-law nor any contract under seal determining the amount of the remuneration—nothing in fact but a series of resolutions, with the exception of the general by-law, which my

brother Clute rightly holds to be ultra vires: Lindley's Law of Companies, 6th ed., p. 269; Dunston v. Imperial Gas Co., 3 B. & Ad. 125; Young v. Leamington, 8 App. Cas. 517.

Appeal dismissed with costs.

SUTHERLAND, J.:—I agree with the judgment of the Chief Justice, for the reasons stated by him.

BRITTON, J., dissented, being of opinion that the statute was virtually complied with. There was a by-law for payment to the president of an amount to be afterwards fixed; that by-law was ratified by the shareholders; the shareholders themselves fixed the amount, and the directors then, in terms of the by-law, and as to amount in accordance with the expressed wish of the shareholders, fixed the amount of the remuneration.

RIDDELL, J. DECEMBER 18TH, 1909.

RE BINT.

Will—Construction—Distribution of Residuary Estate—"Principal of this Money"—Division per Stirpes.

Motion by Eva Awford for an order for distribution of money in Court, representing the residuary estate of Mary Alice Bint, who died in 1907, having made her will a few days before.

In the will, after certain specific legacies, the following provisions were made:—

"III. To Miss S. A. S. I give the house we are now living in and the furniture. . . . She is not to refuse Roy Dixon a shelter in that house during her lifetime. To S. A. S. I give also the interest in the proceeds of one-third of my remaining estate.

"IV. To Roy Dixon I give the interest on two-thirds of the proceeds of my estate as mentioned before.

"I further stipulate that interest mentioned shall be paid in yearly sums to Roy Dixon and S. A. S. At their death or the death of either of them the principal of the money shall be divided between the members of the Marr family who would be my natural heirs. This principal shall be placed on deposit in the chartered banks of Canada and interest drawn therefrom by cheque."

The executors passed their accounts, and, by leave given by order of a Judge of the High Court, paid $748.48, the amount

of the residuary estate, into Court—the interest thereon to be paid out half-yearly to Roy Dixon and S. A. S., in proper proportions.

S. A. S. died on the 19th August, 1909.

The applicant asked that the whole of the money in Court should be paid out to the members of the Marr family.

G. G. Plaxton, for the applicant.

W. H. Irving, for other members of the family.

J. E. Jones, for Roy Dixon.

Riddell, J.:—I was asked to allow evidence to be given that Roy Dixon was entirely dependent upon the fund, and that he was peculiarly the object of the bounty of the testatrix. I refused the evidence, as I think the will should be interpreted by itself.

The whole question will depend upon the meaning to be given to the words "the principal of this money."

It will be seen that the gift to each of the two legatees is not an aliquot part of the interest upon the whole of the residuary estate, but the whole of the interest upon an aliquot part of the estate: e.g., Roy Dixon does not get two-thirds of the interest upon the residuary estate, but the interest upon two-thirds of this estate. There are, that is, two principals formed and not one.

I think, therefore, that the testatrix, in speaking of the principal at the death of either of them, is referring to the principal upon which during life the defunct drew interest—so that, in the event which has happened, the principal to the interest of which S. A. S. had been entitled, viz., one-third of the residue only, has been released, and is to be divided—the remaining principal (not properly speaking being the remainder of a principal, but a different one, and that remaining after the destruction by distribution of the other) still goes on to produce interest for Roy Dixon.

I do not find any case which binds me to hold the contrary, and none has been cited.

A second question arises, i.e., whether the division is to be per capita or per stirpes. It seems that the latter is the correct method: Jarman on Wills, 4th ed., p. 96; Theobald, Can. ed., p. 326, 563 (*a*); Hawkins, 2nd ed., p. 123; Coatsworth v. Carson, 24 O. R. 185.

The order will go accordingly.

Costs of all parties out of the fund ordered to be paid out, leaving that of Roy Dixon intact.

TOWNSHIP OF HAY v. BISSONNETTE—DIVISIONAL COURT—
DEC. 15.

Highway—Dedication—Municipal By-law.] — Appeal by the defendants from the judgment of CLUTE, J., 14 O. W. R. 279, in favour of the plaintiffs in an action for a declaration that certain streets laid down upon a plan were public highways. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.), dismissed the appeal with costs. W. Proudfoot, K.C., for the defendants. M. G. Cameron, K.C., for the plaintiffs.

RE SPURR AND MURPHY—DIVISIONAL COURT—DEC. 15.

Mines and Minerals — Mining Commissioner — Appeal.]—Appeal by Spurr and Penny from a decision of the Mining Commissioner declaring the claims of the appellants invalid. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.), held that it was not necessary to invoke the rule enunciated in Bishop v. Bishop, 10 O. W. R. 177, because the preponderance of evidence was clearly in favour of the Commissioner's finding. The rule laid down in Re Cashman and Cobalt and James Mines Limited, 10 O. W. R. 658, as to the status of the appellants, applied. The Commissioner first proceeded to find that there was no bona fide or sufficient discovery of valuable mineral by the appellants, and then he proceeded also to destroy the applications of the respondents. The validity of both sets of claims was attacked and placed before the Commissioner for adjudication. Appeal dismissed with costs. McGregor Young, K.C., for the appellants. R. McKay, for the respondents.

KASTNER v. MACKENZIE—TEETZEL, J.—DEC. 18.

Sale of Goods—Refusal to Accept.]—Action for damages for the defendant's refusal to accept part of a consignment of onions which he agreed to purchase at 7½ cents per lb. TEETZEL, J., found, upon conflicting evidence, that the onions did not comply with the terms of the agreement, and the defendant was justified in rejecting them. Action dismissed with costs. G. G. McPherson, K.C., for the plaintiff. R. S. Robertson, for the defendant.

RASCH V. HECKLER—DIVISIONAL COURT—DEC. 20.

Principal and Agent—Husband and Wife—Mining Claims.]—Appeal by the defendants from the judgment of MACMAHON, J., 14 O. W. R. 441, in favour of the plaintiff for the recovery of $212.50 in an action for remuneration for services rendered to the defendants in discovering two mining claims and for the fees paid for recording the same. MACMAHON, J., held that both the defendants, husband and wife, were liable, it being assumed that the husband had authority to act for the wife. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.) held that the wife was not liable merely because the husband directed the plaintiff to record in her name, and there was no evidence of agency. With a declaration that the wife holds the claims as trustee for the husband, her appeal was allowed and the action dismissed as against her without costs. Appeal of the husband dismissed without costs. A. McLean Macdonell, K.C., for the defendants. E. Meek, K.C., for the plaintiff.

McCALL V. KANE & CO.—DIVISIONAL COURT—DEC. 21.

Particulars.]—The orders of the Master in Chambers, ante 95, and of RIDDELL, J., ante 151, were affirmed by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ. W. Laidlaw, K.C., for the defendants. W. E. Middleton, K.C., for the plaintiff.

GOODALL V. CLARKE—DIVISIONAL COURT—DEC. 22.

Contract—Shares.]—An appeal by the defendant from the judgment of RIDDELL, J., ante 95, was dismissed by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ. G. H. Watson, K.C., and W. R. Wadsworth, for the defendant. H. Cassels, K.C., for the plaintiff.