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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DECEMBER 18TH, 1919.

*TORONTO R.W. CO. v. CITY OF TORONTO.

Constitutional Law—Order of Dominion Railway Board for Payment by Provincial Railway Company of Part of Cost of Bridge for Carrying Highway with Tracks of Provincial Company thereon over Tracks of Dominion Railway Companies—Powers of Dominion Parliament—British North America Act, sec. 92—Dominion Railway Act, R.S.C. 1906 ch. 37, secs. 59, 237, 238 (8 & 9 Edw. VII. ch. 32)—Interest of Provincial Railway Company in Works—Making Order of Railway Board a Rule of Court—Railway Act, sec. 46—Intra Vires—Appeal to Judicial Committee—Special Leave to Appeal Directly from Orders of Railway Board—Prerogative of Crown—Court of Record—Petition for Special Leave—Long Delay in Applying—Innocent Misrepresentation as to Reason for Delay—Power to Rescind Special Leave.

An appeal by the Toronto Railway Company (by special leave of the Judicial Committee) from three orders.

The first of these orders was made on the 3rd July, 1909, by the Board of Railway Commissioners for Canada, and directed that the Toronto Railway Company should bear a certain proportion of the cost of the construction of a bridge which the Corporation of the City of Toronto was by the order authorised to construct for the purpose of carrying the highway of Queen street east, Toronto, with the tracks thereon of the Toronto Railway Company, a provincial railway, over the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Railway Company, all three Dominion railways.

The second order was dated the 30th November, 1917, and by it the Railway Board directed that the Toronto Railway Com-

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

pany should make a payment of $80,000 on account towards the cost of construction.

The third order was dated the 4th February, 1918, and was made by MIDDLETON, J., in the Supreme Court of Ontario, refusing a stay of execution against the Toronto Railway Company: Re City of Toronto and Toronto R.W. Co. (1918), 13 O.W.N. 414, 42 O.L.R. 82.

The appeal was heard by VISCOUNT FINLAY, VISCOUNT CAVE, LORD SUMNER, and LORD PARMOOR.

Sir John Simon, K.C., and D. L. McCarthy, K.C., for the appellants, contended that the order for payment of part of the cost of construction was not authorised by the Railway Act of Canada.

G. R. Geary, K.C., and Irving S. Fairty, for the city corporation, respondents, argued: first, that special leave to appeal from orders of the Railway Board could not be granted; secondly, that the order for special leave to appeal in the present case ought to be rescinded, on the ground that the relevant facts were not correctly stated in the petition; and, thirdly, that the order for payment of part of the cost of construction, made against the appellants, was authorised by the Act and could not be impeached.

The judgment of the Judicial Committee was read by VISCOUNT FINLAY, who, after stating the facts, said that the petition to the Judicial Committee for special leave to appeal was presented in July, 1918, nine years after the date of the principal order appealed against. The petition contained a paragraph (19), which had reference to the great lapse of time that had taken place. This paragraph stated that since 1909 the whole question involved had been in dispute between the petitioners (the Toronto Railway Company) and the city corporation; that until 1917 the petitioners were unaware whether and to what extent the city corporation would press for payment; and that after the judgment given in British Columbia Electric R.W. Co. v. Vancouver Victoria and Eastern R.W. Co., [1914] A.C. 1067, the petitioners hoped that no further attempt would be made to enforce payment.

Their Lordships, after full consideration, had arrived at the conclusion that the Railway Board was not exempt from the prerogative of the Crown to grant special leave to appeal. That Board is not a mere administrative body; it is a Court of Record; and it may be of importance that in some special cases its decisions on points of law should be taken, on special leave, direct to His Majesty in Council. The power, however, is one which, in the case of the Railway Board, should be very sparingly exercised.

Their Lordships proceeded to consider the case upon its merits, first quoting and discussing secs. 59, 237, and 238 of the Railway Act. R.S.C. 1906 ch. 37. Sections 237 and 238 stand as found in the amending Act of 1909, 8 & 9 Edw. VII. ch. 32.

The first objection to the order for payment of part of the cost of the bridge was that the railway of the Toronto Railway Company is a provincial railway, and that any enactment giving power to throw upon it the cost of works would be ultra vires of the Dominion Parliament: sec. 92 of the British North America Act. It was also urged that the provincial railway company was not interested or affected by the works in question. Both of these objections were answered by Toronto Corporation v. Canadian Pacific R.W. Co., [1908] A.C. 54.

The Vancouver case, above cited, was chiefly relied upon by the appellants. Their Lordships distinguished that case.

Their Lordships were of opinion that sec. 46 of the Railway Act, R.S.C. 1906 ch. 37, was not ultra vires, and that the objection taken to the procedure followed in making the order a rule of Court failed. On this point they were content to refer to the judgment of Middleton, J.

The appeal failed on the merits.

The substantive order to appeal against which leave was obtained was made so long ago as July, 1909. The two subsequent orders were merely subsidiary. The fact that so long a period had elapsed since the order was made was one which would militate strongly against the granting of special leave. It appeared to their Lordships that the allegations in paragraph 19 of the petition were not borne out by the documentary evidence. They were unable to find anything in the correspondence that could lead the petitioners to doubt that the city corporation would press for payment.

It is incumbent on the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Judicial Committee; and if, at any stage, it is found that there has been failure to do so, the leave may be rescinded.

Reference to Mohun Lall Sookul v. Bebee Doss (1861), 8 Moore Ind. App. 193, 195; Mussoorie Bank v. Raynor (1882), 7 App. Cas. 321, 328, 329.

Owing to the course which the case had taken, it was not necessary now to deal further with this point, but their Lordships thought it proper to say that, if the occasion had arisen for deciding on this objection, it would have been a matter for their grave consideration whether the leave should not be rescinded, however innocent the misrepresentation.

The appeal should be dismissed with costs.

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 13TH, 1920.

*REX v. FRECHETTE.

Criminal Law—Theft—Evidence Given on Behalf of the Accused by Alleged Accomplices—Necessity for Corroboration—Judge's Charge—Misdirection—Substantial Wrong or Miscarriage—Criminal Code, sec. 1019—New Trial.

Case stated by the Chairman of the Court of General Sessions of the Peace for the County of Hastings.

The indictment upon which the prisoner was convicted charged him with the theft of a quantity of whisky, the property of the Grand Trunk Railway Company. He was an engine-driver on the railway. It was alleged—and evidence was given to prove—that several others were concerned with him in the commission of the offence.

One of these alleged accomplices, named Nicholson, a fireman on the prisoner's engine, gave evidence on behalf of the Crown; and two others of them, Summers and Logan, who were separately indicted, were called for the defence. At the trial, the propriety of requiring the evidence of the accomplice who was called by the Crown to be corroborated was recognised, and the learned Chairman instructed the jury in that regard.

Summers and Logan, testifying for the prisoner, denied, as did the prisoner, that any part was taken by themselves or him in the theft of the liquor, several cases of which had been stolen from a car of the railway company.

In the stated case it was said that counsel for the Crown, in addressing the jury, argued that the two witnesses for the defence were accomplices, and that it was necessary that the evidence of each should be corroborated. Counsel for the prisoner objected that they were not properly proven to be accomplices. The Chairman then ruled against the objection; and, in his charge to the jury, explained to them the point taken by the counsel for the Crown, and told them that, if they considered that the three witnesses were accomplices, they ought not to accept their evidence without corroboration, and one accomplice could not corroborate another.

Afterwards the Chairman, after objection taken when the jury had retired, recalled them and told them that the evidence of an accomplice ought not to be accepted in itself, but the jury might accept it if they chose to do so and might found their verdict on it, but the rule of law was that it ought not to be accepted unless it was corroborated.

The prisoner was found "guilty." Several questions were stated by the learned Chairman for the opinion of the Court. The second question was this:—

"Was I right in overruling the objection of counsel for the prisoner and in explaining to the jury as I did how they might determine who is an accomplice and the necessity for corroboration?"

The case was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

E. G. Porter, K.C., for the prisoner.

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

MAGEE, J.A., delivering the judgment of the Court at the conclusion of the hearing, said, after stating the facts, that the second question must be answered, as to the necessity for corroboration, in the negative.

There is no rule applicable to the evidence of accomplices, or alleged accomplices, who are called as witnesses on behalf of the accused person, such as the rule of practice and experience which exists relative to the evidence of accomplices against him, which requires that the jury be warned against the danger of convicting on such evidence without corroboration. It is well and proper to call the attention of the jury, in criminal as well as civil cases, to the possible interest of any witnesses on either side and the necessity of the jurymen applying their own judgment and common sense to the weight to be attached to the testimony of such witnesses; but that is very different from instructing them that the rule as to corroboration is the same as to both.

In this case there was some corroboration of Nicholson's evidence against the prisoner; and the jury, upon the instructions given to them, might very well have considered that, Nicholson being corroborated, and the other two not (in the jury's judgment), they should not pay attention to the evidence of the latter in the prisoner's favour.

Counsel for the Crown, before this Court, submitted that the verdict of "guilty" was well warranted by the evidence, and that it should not be disturbed unless some substantial wrong or miscarriage had been occasioned: Criminal Code, sec. 1019. But, as the Court could not say that the jury may not have been affected to the prejudice of the prisoner by the instructions given to them, the Court was not assured that there was no substantial wrong.

The conviction should be quashed and a new trial ordered. The prisoner should be admitted to bail in a substantial sum.

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

*ROXBOROUGH GARDENS OF HAMILTON LIMITED v. DAVIS.

Company—Agreement by—Sale of Lands—Resolution Authorising—Dispute as to Passing of Resolution—Evidence—Minutes of Meeting—Purchase by Syndicate—Officers and Agents of Company Members of Syndicate—Conveyance of Property of Company en Bloc to New Company—Conflict of Interest and Duty—Replacing Parties in Original Positions—Action to Set aside Conveyance.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., ante 36.

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

C. S. Cameron, for the appellants.

G. Lynch-Staunton, K.C., for the defendants, respondents.

FERGUSON, J.A., read a judgment in which he said that the action was brought to set aside a grant by the plaintiff company of all its lands to the defendant company, the Dufferin Land Corporation. The conveyance was dated the 5th January, 1918, and was drawn by the defendant Petrie, then acting manager and solicitor for the plaintiff company, and was executed on behalf of the plaintiff company by the defendants Davis and Henry, as respectively president and secretary-treasurer. The consideration was not stated in the conveyance; but it was said to have been executed in pursuance of an oral agreement for sale entered into by the plaintiff company, through the agency of Davis and Henry, acting under authority conferred upon them by one of two resolutions passed on the 16th October, 1917, at a special general meeting of the shareholders of the plaintiff company. Though there was a dispute as to who was the purchaser, it was clear that these three men, Davis, Henry, and Petrie, represented the purchaser in the making of any contract that was made.

The minutes of the meeting referred to purported to set out the two resolutions. The first was, that the president and secretary-treasurer be authorised to sell the whole holdings of the company at the price of $65,000 and to pay a commission not exceeding 10 per cent. of the sale-price. The second resolution was, that the president and secretary-treasurer be authorised, in

the event of failure to sell on the terms of the preceding resolution, to sell any lots or groups of lots at the price of $6 per foot and to pay a commission of not more than 10 per cent. It was under the second resolution that the three men proposed to act. The correctness of the minutes was disputed.

The learned Judge said that a very careful perusal and consideration of the evidence had led him to the following conclusions: that there was at the meeting referred to some discussion of a sale of a portion of the lots at $6 per foot; that Petrie, who wrote the minutes after the meeting from notes taken at the meeting and afterwards destroyed, in good faith concluded that the majority if not all of the shareholders present approved of sales of a portion of the lots at $6 per foot and the payment of 10 per cent. commission on such sales, if made in the ordinary course of business, and that he endeavoured to express that authorisation in the resolution which he recorded, but that neither he nor those who took part in the discussion intended by the second resolution to authorise a sale en bloc with a 10 per cent. commission; that some of the shareholders present did not appreciate or understand that such a resolution was before the meeting or was passed; but, in view of the finding of the trial Judge, it could not be said that a majority did not consider and pass a resolution to the effect above indicated.

Unless the defendant company could take and hold the position that it was an innocent purchaser, which dealt with the accredited officers of the plaintiff company, and was not concerned in or fixed with notice of matters affecting the internal management of the plaintiff company, the transaction attacked could not be justified or supported either on the resolution actually passed or on the resolution recorded.

The defendant company could not plead innocence. The agents of the plaintiff company were the agents, officers, and shareholders of the defendant company; the same men negotiated for both the buyers and the sellers; Petrie was acting manager and secretary of the plaintiff company and director and secretary of the defendant company and was solicitor for both; Davis and Henry were directors and agents of the plaintiff company and interested agents of the defendant company.

Upon a review of the evidence, the learned Judge was of opinion that a syndicate, which included the plaintiff company's agents and officers, were the purchasers.

The Court will not allow a trustee, agent, or other person holding an office or place of trust and confidence, to put himself in a position where his interest conflicts with his duty, or without disclosure to make a profit out of his agency. Reference to Bowstead on Agency, 6th ed., paras. 48 to 53; Palmer on Com-

panies, 10th ed., pp. 192, 193; Cook v. Decks, [1916] 1 A.C. 554; Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co., [1914] 2 Ch. 486.

The appeal should be allowed; and, upon the plaintiff company undertaking to assume and carry out such agreements for the sale of lots as had been made by the defendant company and to pay to the defendant company all moneys which it had properly expended in payments on the registered incumbrances, in taxes, in putting the property in shape for sale, and in selling lots that had not been repaid by sales, the property and the agreements should be vested in the plaintiff company. If the parties cannot agree upon the amount, there must be a reference to the Master at Hamilton for inquiry and report. The defendants should pay the costs of the action and of the appeal. In the event of a reference, further directions and subsequent costs should be reserved.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

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

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

*RE UNION NATURAL GAS CO. AND TOWNSHIP OF DOVER.

Assessment and Taxes—Income Assessment of Oil and Gas Company—Method of Assessment—Deductions from Gross Income—Sums Paid by Way of Royalty to Land-owner—Cost of Operating—Losses in Previous Years—Capital Expenditure—Assessment Act, sec. 2 (c), 40 (1), (5), (6)—"Income"—"Mine or Mineral Work"—Assessment of each Well as Separate Entity—Cost of Drilling Wells.

Appeal by the Union Natural Gas Company from an order of the Ontario Railway and Municipal Board dismissing an appeal by the appellant company from the decision of the Junior Judge of the County Court of the County of Kent confirming (with a reduction) the assessment of the company for 1919 by the Corporation of the Township of Dover in respect of income.

The appeal was heard by MEREDITH, C.J.O., MAGEE, J.A., MIDDLETON, J., and FERGUSON, J.A.

J. G. Kerr, for the appellant company.

J. M. Pike, K.C., for the township corporation, respondent.

MEREDITH, C.J.O., in a written judgment, said that the assessment was for the taxable income, including Government bonus, from two oil and gas wells numbered 1 and 7, and the amount of the assessment was the same as to both wells—$35,000. On appeal to the Judge of the County Court, the assessment was reduced to $62,376.81, and the assessment as so reduced was confirmed by the Board.

The method adopted by the County Court Judge was to find the gross income derived from the operation of the two wells and to deduct from it what was paid by way of royalty to Myers, the owner of the land, under the terms of his lease to the appellant company, and the cost of operating the wells.

The appellant company contended that there should also be deducted from the gross income what was spent in drilling the wells and other wells on property leased from Myers, and the expenditure of the company in 1917, which exceeded the revenue in that year by $67,839.14.

The learned Chief Justice agreed with the contention of the appellant company that so much of the product of the wells as was represented by the value of the oil or gas in situ was not, for the purpose of the assessment, income, and that the value of it should be deducted from the revenue derived from the wells. In the absence of other evidence of its value, it must be taken that it was represented by the royalty paid to the owner of the land; and that had been deducted from the gross revenue.

The learned Chief Justice then quoted the Assessment Act, sec. 40 (1), (5), and (6).

Each gas or oil well—being a mine or mineral work—is to be treated as a separate entity, and the income from it is to be separately assessed.

The meaning of "income," as defined by sec. 2 (*c*), as applied to "a trade or commercial or financial or other business or calling," is the profit derived from it, and includes the profit or gain from any source.

It is not the income from the business carried on, but the income from the mine or mineral work, that is to be assessed.

If the learned Chief Justice had come to a different conclusion, he would have agreed with the view of the County Court Judge and the Board that the losses in the appellant company's operations in a former year or years and the cost of drilling other wells ought not to be deducted from the gross income from wells 1 and 7—the only producing wells in 1918. The losses in previous years were losses of capital; and, though it would be quite proper, in

determining what (if anything) was available for dividends, to restore the lost capital out of income, they were none the less capital expenditures.

The cost of drilling wells, whether they prove to be producing wells or dry wells, is also a capital expenditure.

The appeal should be dismissed with costs.

MIDDLETON, J., and FERGUSON, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A. (dissenting), was of opinion that the appellant company should be allowed to deduct from their receipts in 1918 the losses incurred in their business in that year, including the outlay upon dry holes, but not including the cost of new wells which were producing and gradually repaying the outlay upon them. The appellant company should have the costs of the appeal.

Appeal dismissed (MAGEE, J.A., *dissenting.*)

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

RIELLY v. BARRETT.

Damages—Trespass to Land—Cutting Timber beyond what was Authorised by Owner—Quantum of Damages—Evidence—Value of Timber Cut—Injury to Inheritance—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., at the trial, in an action to recover $1,200 damages for trespass and cutting timber on the plaintiff's land. The judgment was for the recovery by the plaintiff of $200, the amount paid into Court by the defendant, with costs on the County Court scale, subject to the usual set-off of the defendant's costs incurred in the Supreme Court in excess of County Court costs.

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

J. Lorn McDougall, for the appellant.

J. R. Code, for the defendant, respondent.

MEREDITH, C.J.O., in a written judgment, said that the only question upon the appeal was as to the damages awarded for the wrong done by the respondent.

In cutting the timber the respondent did not intentionally trespass upon the land of the appellant: the trespass was committed either through the disregard, by the person whom the respondent employed to cut the timber he was entitled to cut on other parts of the land, of the respondent's instructions, or his misapprehension or forgetfulness of the instructions he had received.

The trial Judge made an allowance, in addition to the value of the timber, to cover any damage that had been done to the inheritance.

There was no reason for differing from the view of the trial Judge that $200 was full compensation for the injury done to the inheritance, including the value of the timber cut.

It was doubtful whether the property would, but for the cutting of the timber, have been used as a summer resort or for summer cottages, and still more doubtful whether, if so usable, the cutting of the timber had rendered the property less valuable for such purposes.

It was also contended that the estimate of the number of trees cut down and the quantity of logs or cordwood they would have produced, upon which it was said the allowance for the value of the timber cut was based, was unreliable—that the number and quantity were much greater than as shewn by the estimate. But this contention was not borne out by the evidence.

The respondent, in order to be on the safe side, paid $200 into Court.

The view of the trial Judge was that the claim for damage to the inheritance was not made out; but he said that, in his opinion, the $200 for the wood actually taken, with the allowance of a little for "slashing over and having some regard to the lowered contingencies as to a park or as to a sale for cottages and all that," would answer all purposes; and the argument for the appellant had not convinced the Court that in so deciding the trial Judge erred.

The appeal should be dismissed with costs.

MACLAREN, J.A., also read a judgment. For reasons given, he was of opinion that the appeal should be dismissed with costs.

MAGEE, and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A., agreed with MACLAREN, J.A.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

*RE BAILEY COBALT MINES LIMITED.

Company—Winding-up—Order under Dominion Winding-up Act—Offer to Purchase Assets—Terms of Offer—Payment by Allotment of Shares in Purchasing Company to be Incorporated—Power of Court to Accept Offer—Winding-up Act, sec. 34 (c), (h)—Expediency of Accepting Offer—Terms—Control of Majority Shareholders after Winding-up Order—Approval of Court—Rights of Creditors—Ontario Companies Act, sec. 23 (m).

Appeal by the liquidators from the order of SUTHERLAND, J., ante 221.

The appeal was heard by MEREDITH, C.J.O., MAGEE, J.A., MIDDLETON and LENNOX, JJ.

R. S. Robertson, for the appellants.

William Laidlaw, K.C., for Davenport and other shareholders, respondents.

Frank Arnoldi, K.C., C. W. Kerr, G. H. Sedgewick, and G. R. Munnoch, for other shareholders and creditors.

MIDDLETON, J., read the judgment of the Court. He said that the sole question upon the appeal was as to the power of the Court to deal with the assets of the company in the manner proposed and the desirability of accepting the offer made by A. J. Young on the 11th October, 1919.

The learned Judge referred to the provisions of the Winding-up Act, R.S.C. 1906 ch. 144, sec. 34 (*c*) and (*h*), and said that these provisions, with immaterial and trifling verbal differences, were identical with the provisions of sec. 95 of the English Companies Act of 1862, considered in Re Cambrian Mining Co. (1883), 48 L.T.R. 114.

The decision in that case had never been questioned, was referred to in text-books of high authority as establishing the practice, and should be taken as justifying the view that the Court had power to sanction the offer under consideration.

It remained to consider whether the offer should be accepted. In substance it provided for the turning over of all the assets to a new company, which will pay the creditors in full, the largest creditor limiting his claim to a fixed amount; shares in the new company will then be given to the shareholders of the company in liquidation. The creditors welcomed the offer, as it procured them payment in full, when they expected a loss. The shareholders other than the respondents were anxious to accept. The

minority—putting the matter bluntly—sought to prolong litigation in the hope that some one might be forced to buy them off.

When a very large majority of the shareholders desire that the offer should be accepted, it is the duty of the Court to give effect to their wishes: see the case cited above.

Then, should terms be imposed? There is nothing in our statute analogous to the provisions which guided Kay, J., in the case cited. On the contrary, there is the provision in the Ontario Companies Act, R.S.O. 1914 ch. 178, under which the company was incorporated, by which the company had power to "sell or dispose of the undertaking . . . or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company," if authorised by the vote of two-thirds of the stockholders: sec. 23 (*m*).

This ought to be the guide, if there is to be any guidance by analogy, rather than a provision of an English Act not found in our own.

The shares were always subject to this control by the majority, and the liquidation did not destroy this charter provision, but made it subject to the approval of this Court and the superior rights of creditors.

The appeal should be allowed, and the matter should be referred back to the Master to carry out the sale. The liquidators should have their costs out of the assets. No other order should be made as to costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

POTOPCHUKE v. FRIEDMAN.

Contract—Rectification—Specific Performance of Contract as Rectified—Conveyance of Land—Restrictive Covenant—Declaration of Trusteeship—Account—Onus—Evidence—Findings of Fact of Trial Judge—Reversal on Appeal.

Appeal by the defendants from the judgment of KELLY, J., ante 40.

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

I. F. Hellmuth, K.C., for the appellants.

T. L. Monahan, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said, after stating the effect of the pleadings and the findings of the trial Judge, that there was a direct conflict of testimony at the trial. After reviewing the evidence, he said that the trial Judge had accepted the respondent's account of the transaction and found that the appellant A. Friedman agreed to purchase the property for the respondent, and that he represented to him that all he was receiving out of the transaction was $200 as remuneration for his services in making the purchase for the respondent. By the judgment directed to be entered it was declared that any interest which the appellant Minnie Friedman might have in the property under an agreement between her and Perron was held by her in trust for the respondent, subject to the terms of the agreement; that in negotiating with Perron for the purchase of the property the appellant A. Friedman was the agent of the respondent, and that the respondent was entitled to the benefit of the agreement of purchase and to a conveyance of the property on payment of the $3,000 agreed to be paid to Perron according to the terms of the agreement with him, and the further sum of $200 to A. Friedman as commission; that the respondent was entitled to the conveyance free from all restrictions as to carrying on any kind of trade or commerce on the property; and that the respondent was entitled to have repaid to him any amount he might have paid in excess of what he should have paid according to these declarations—taking into account and deducting therefrom any mortgage incumbrance on the property and the $200 for commission.

It was contended that the findings of fact of the learned Judge were not warranted by the evidence.

In order that the respondent should succeed, expecially if reformation of the agreement were necessary to his success, it was incumbent on him to present clear and satisfactory evidence in support of his case, and that a perusal of the whole of the evidence on both sides should leave no reasonable doubt as to the transaction between him and Friedman being what the respondent alleged it to have been.

The learned Chief Justice said that, having in mind that the onus of proving the case the respondent was endeavouring to make, rested upon him, and the necessity in order to his success that the evidence should be clear and satisfactory, and having regard to the testimony adduced, the conclusion was clear that the respondent's case was not made out, and that his action should have been dismissed.

If the learned Chief Justice had been of a different opinion as to the respondent having made out his case, he would have had difficulty in affirming that part of the judgment which de-

cleared that the property was to be conveyed by the appellants without any restriction such as that contained in the agreement as to the businesses that were not to be carried on upon it. The respondent admitted that it was a term of the agreement with Friedman that the respondent should enter into such a covenant, and confined his objection to the fact that the period during which the covenant was to be operative, as he alleged, was 3 years, and not 10 years, as the agreement provided.

In that contention he entirely failed, and provision should have been made for his entering into the covenant for which the agreement provided.

The part of the judgment which adjudged reformation of the agreement and specific performance of it as reformed should not have been included. It has long been settled that the Court will not do that: May v. Platt, [1900] 1 Ch. 616. The provision was, however, unnecessary. All that was needed to give effect to the rights of the respondent, as the trial Judge determined them to be, was provided by the adjudication as to the trusteeship of the appellants and the accounting and conveyance in accordance with that adjudication.

The appeal should be allowed and the action dismissed, both with costs.

MACLAREN, HODGINS, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed in the result.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

*M. LINDALA v. CANADIAN COPPER CO.
*J. LINDALA v. CANADIAN COPPER CO.
*DAVID v. CANADIAN COPPER CO.
*GIROUX v. CANADIAN COPPER CO.
*ARTHURS v. CANADIAN COPPER CO.

Nuisance—Noxious Vapours from Smelting Works—Injury to Crops—Evidence—Testimony of Scientific Experts—Findings of Fact of Trial Judge—Appeal—Costs.

Appeals by the defendants from judgments of the District Court of the District of Sudbury in five actions by farmers to

recover damages for injury to crops during 1916 by noxious vapours or fumes from the defendants' smelting works. The judgments were for the recovery of various sums as damages, with costs.

The appeals were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

D. L. McCarthy, K.C., and Britton Osler, for the appellants.

J. H. Clary, for the plaintiffs.

HODGINS, J.A., read a judgment in which he said that in these cases there was not only the scientific evidence of the kind referred to by Bowen, L.J., in Fleet v. Managers of the Metropolitan Asylums District, "The Times," 2nd March, 1886, but the testimony of those immediately concerned in the growing of crops on their farms and knowing the climatic and atmospheric conditions, quality of soil, the resultant yield, that of other years, and other matters necessary to be considered here. Many facts were adduced on both sides, some of which came in conflict with the scientific evidence of what was or ought to be the case.

The District Court Judge found that sulphur smoke streams did reach these lands, as described by those who said they saw them, and also that the plaintiffs in each case suffered damage by injury caused to their farms. The witnesses who spoke of what they had seen and felt were to be preferred to those who spoke from signs that they had seen and observations they had made after the events had happened.

In coming to this conclusion the District Court Judge had dealt with the scientific and other evidence properly and in accordance with the rule laid down in Goldsmid v. Tunbridge Wells Improvement Commissioners (1866), L.R. 1 Ch. 349, 353; see also Liverpool Corporation v. H. Coghill & Son Limited, [1918] 1 Ch. 307, 319.

Upon the whole, the learned Justice of Appeal was not satisfied that the conclusions of the experts, urged as undeniable and conclusive, went quite that far. They were, no doubt, accurate statements of opinions formed after careful investigation and experiment. But, as applied to the conditions existing near Sudbury, he was not entirely satisfied that they had deprived the respondents of any claim. The appellate Court must be satisfied in cases such as this that the judgment appealed from is wrong. The learned Justice of Appeal was himself not so satisfied; nor was he indeed quite persuaded that the amounts allowed by the trial Judge were as large as might well have been given on the conflicting evidence adduced. No such ground had been taken, however.

The appeals should be dismissed. The costs below were given upon the proper scale—no question of title as such was involved.

MACLAREN, J.A., in a brief memorandum, said that he was of opinion that the District Court Judge adopted the proper principle in the assessment of damages; and, he having seen and heard the witnesses, and there being evidence which, if believed, would justify each of the judgments appealed from, all the appeals should be dismissed with costs.

MAGEE, J.A., agreed with HODGINS, J.A.

FERGUSON, J., agreed that the appeals should be dismissed. He was not able to say that the District Court Judge had erred in principle, and saw no reason for disturbing the results.

Appeals dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 19TH, 1920.

TAILLIFER v. CANADIAN COPPER CO.
CLARY v. MOND NICKEL CO.
OSTROSKY v. MOND NICKEL CO.

Nuisance—Injury to Crops and Soil by Vapours from Smelting Works—Evidence—Onus—Assessment of Damages—Costs—Findings of Fact of Trial Judge—Appeal.

Appeals by the plaintiffs and cross-appeals by the defendants the Mond Nickel Company from the judgment of MIDDLETON, J., 12 O.W.N. 243; and appeal by the plaintiffs from the order made by MIDDLETON, J., as to costs on the 14th March, 1918.

The appeals and cross-appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. H. Clary, for the plaintiffs.

J. M. Clark, K.C., and R. U. McPherson, for the defendants the Mond Nickel Company.

D. L. McCarthy, K.C., and Britton Osler, for the defendants the Canadian Copper Company.

MEREDITH, C.J.O., read a judgment in which he said that the actions were brought to recover damages for injuries alleged

to have been sustained by the respective plaintiffs from smoke and fumes from the roast-beds and works of the companies against which the actions were brought.

On the part of the plaintiffs it was contended that the condition of the various crops in respect of which damages were claimed, which was admittedly bad, was due to the action upon them and upon the soil in which they grew or were planted of the smoke and fumes from the works of the companies. It was also asserted that injury was occasioned to the plaintiffs' horses and pigs from eating the vegetable products and the grass that had been injuriously affected by the smoke and fumes; and that the use of the waters of streams upon the plaintiffs' lands, owing to their having been impregnated with the deposits from the smoke and fumes became injurious to man and beast.

The contention of the companies was, that the condition of the crops was not due to the effect upon them, or upon the soil in which they grew, of smoke and fumes from their works, but to other causes for which the companies were in no way responsible—the principal causes being bad farming, insufficient and bad cultivation, want of drainage, and disease.

After a very careful review of the evidence, the learned trial Judge reached the conclusion that much, if not the most, of that which the plaintiffs said was caused by the smoke and fumes, was not so caused, but was the result of disease, not induced probably, but aggravated, by the other conditions; and, if the expert testimony adduced by the companies was to be relied on, there was no escape from that conclusion. The trial Judge regarded that testimony as reliable, and he accepted and acted upon it, and there was no ground upon which the Court would be justified in reversing that finding of fact.

The onus of proving that injury to the soil was due to the smoke and fumes rested upon the plaintiffs, and that onus was not satisfied.

Although the disposition that was made of the costs by Middleton, J., was somewhat unusual, the Court could not say that it was not one which, in the exercise of his discretion, it was competent for him to make; and, that being the case, in the absence of leave from him, which had not been obtained, the order was not open to review.

The Court agreed with the view of the trial Judge that the claims put forward by the plaintiffs, if the injury complained of had been due to smoke and fumes from the works of the companies, were grossly exaggerated—so much so that, although they succeeded to some extent, the trial Judge would have been justified in depriving them of costs.

The cross-appeal of the Mond Nickel Company also failed: there was evidence to warrant the conclusion that the plaintiffs Clary and Ostrosky suffered damage from the smoke and fumes from the works of that company, and it could not be said that the damages awarded were excessive.

The appeals and cross-appeals should be dismissed with costs.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

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

Appeals and cross-appeals dismissed.

FIRST DIVISIONAL COURT. JANUARY 20TH, 1920.

VOSKOBOINIK v. DYKE.

Contract—Sale of Goods—Breach of Contract—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 125.

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

E. F. Raney, for the appellant.

H. S. White, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JANUARY 20TH, 1920.

GRANT v. CHATHAM WALLACEBURG AND LAKE ERIE R.W. CO.

Infant—Death Caused by Shock from Electric Wire—Car Left Standing on Track—Action by Mother under Fatal Accidents Act—Evidence—Allurement—Knowledge of Danger—Ability to Appreciate—Trespasser—Negligence.

Appeal by the defendants from the judgment of LOGIE, J., upon the findings of a jury, in favour of the plaintiff.

The action was brought by the mother of a boy who was killed by an electric shock, to recover damages for his death. The boy came in contact with a trolley wire of the defendants, which was said to have been placed lower than was lawful. Playing with other boys, he climbed to the top of a car of the defendants, which was standing upon the track, and so touched the live wire above the car.

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

W. N. Tilley, K.C., and J. G. Kerr, for the appellants.

J. M. Pike, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., delivering judgment after the argument, said that it was a very unfortunate case; but, in the opinion of the Court, only one result could follow.

In order that the doctrine of cases of allurement may be applied, it must be shewn that the thing that caused the injury was an allurement to children; that they were in the habit of frequenting the place where the thing was; and that that was known to the people who had put it there.

There was no finding of that kind here, and no evidence that would warrant such a finding. Therefore the plaintiff must fail.

Speaking for himself, the learned Chief Justice said, he felt quite clear that the boy knew of the danger. He was old enough; he was employed in a mill near by, earning $1.75 a day. The other boys who were there knew of the danger of touching this wire, and the only proper conclusion upon the evidence was that this boy also knew it.

The appeal should be allowed without costs, and the action dismissed without costs, costs not being asked.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A., said that he concurred for the reason that he was of opinion that it was not shewn that the boy, who was a trespasser, had not sufficient intelligence to take him out of the class of adult trespassers, and there was no finding that he was of a tender age or lacked intelligence to appreciate either that he was a trespasser or the danger of the situation.

Appeal allowed.

HIGH COURT DIVISION.

LENNOX, J. JANUARY 19TH, 1920.

S. WANDER AND SONS CHEMICAL CO. INCORPORATED v. BRENNAN.

Contract — Sale of Goods — Formation of Contract — Correspondence—Intention of Parties not to be Bound until Formal Agreement Executed.

Action for damages for refusal to accept goods alleged by the plaintiffs to have been the subject of a contract of sale and purchase. The defendants denied that there was any contract.

The action was tried without a jury at Ottawa.
W. L. Scott and G. D. Kelley, for the plaintiffs.
J. F. Orde, K.C., and M. G. Powell, for the defendants.

LENNOX, J., in a written judgment, said that two questions arose in this action. The first was, whether a letter written by the plaintiffs on the 1st November was an unqualified acceptance of the defendants' offer of the 30th October. The learned Judge was of opinion that it was not. The other question was: Did the parties intend to be bound by what occurred before the 14th November without more, or did they intend only to be bound by and upon the execution of a formal agreement of the character from time to time submitted and referred to in the correspondence between them? The learned Judge was of opinion that neither party contemplated or intended that either party should be committed or bound to a contract of any kind unless or until a formal agreement embodying all the terms settled upon was executed in the manner in the correspondence referred to.

After a review of the authorities, the learned Judge said that the plaintiffs had failed to make out a case. There was no completed contract.

LOGIE, J. JANUARY 19TH, 1920.

RE BURK.

BURK v. CLARKSON.

Will—Proof in Solemn Form—Mutilation of Part of Document by Tearing since Death of Testator—Severance of Signature of Testator from Signatures of Witnesses—Obliterations, Alterations, and Interlineations—Wills Act, sec. 24—Evidence of Due Execution—Document Admitted to Probate—Costs.

A dispute having arisen in the Surrogate Court of the District of Thunder Bay as to whether the testamentary document propounded for proof therein by Evangeline Medora Burk was in fact the last will and testament of David Francis Burk, deceased, the cause or proceeding testamentary therein depending was, by order of a Judge in Chambers, removed into the Supreme Court of Ontario.

The cause was heard at a non-jury sittings in Toronto.

T. R. Ferguson, for Evangeline Medora Burk, the applicant for letters probate.

Hamilton Cassels, K.C., for Kathleen Clarkson and Annabella Burk, who opposed the grant, respondents.

E. C. Cattanach, for the Official Guardian, representing infants.

LOGIE, J., in a written judgment, said that the applicant was one of the executrices named in the document dated the 11th January, 1917, now offered for proof in solemn form. All parties who would have been entitled in distribution to the estate of the deceased in case he had died intestate were represented.

The document purporting to be the will of the deceased was typewritten upon two sheets of paper. No part of the first sheet, though it shewed signs of wear, was torn off. Approximately three-fourths of the second sheet was completely severed at a fold in the paper, so that the portion containing what purported to be the signature of the deceased was separate from that which contained the signatures purporting to be those of the witnesses. It was quite evident from the indentures in the severed parts that the one was the complement of the other, and that the two together formed the second sheet of the document. Evidence was given and not contradicted that the second sheet was intact, after the death of the deceased, when the document was sent to Port Arthur for probate. It did not appear how the parts had become separated. It was sufficient to say that the tearing was not done by

the deceased nor by any person in his presence and by his direction with the intention of revoking the document.

Upon the first sheet there appeared certain obliterations, alterations, and interlineations, initialled "D.F.B." It was conceded by all parties that these were invalid under sec. 24 of the Wills Act, R.S.O. 1914 ch. 120, and that the document should be considered as if the obliterations, alterations, and interlineations had never been made; and the learned Judge so found and directed.

By the evidence of one of the attesting witnesses, Albert Burnese, a law-student in the office of A. W. Burk, a practising solicitor and a brother of the deceased, the learned Judge was satisfied that the two sheets of typewritten paper, one of them torn as above described, contained the last will of the deceased; and he so found.

The learned Judge further found that the will was duly executed by the deceased, and that he was mentally competent when he executed it.

The learned Judge directed that the will as originally typewritten should be admitted to probate, and that letters probate should be issued to the executrices named therein—"Evangeline Medora Anderson and Annabella Ida Burk," the latter to be described as the widow of the testator.

The learned Judge was of opinion that there were circumstances which justified the respondents in the action which they took; and he directed that the costs of all parties be taxed as between solicitor and client and paid out of the estate.

MIDDLETON, J. JANUARY 22ND, 1920.

*SMITH v. UPPER CANADA COLLEGE.

Statutes—Operation of—Statute of Frauds, R.S.O. 1914 ch. 102, sec. 13 (6 Geo. V. ch. 24, sec. 19, and 8 Geo. V. ch. 20, sec. 58)—Requirement as to Writing in Case of Agreement to Pay Commission on Sale of Land—Agreement Made before Date when Statute Came into Operation, but not Enforceable until afterwards—Action for Commission Brought when Statute Operative—Bar by Statute—Remedial Legislation.

An action for the recovery of an agent's commission on the sale of land.

The case was set down for hearing upon a point of law raised by the pleadings: Rule 122.

The case was heard in the Weekly Court, Toronto.
A. G. F. Lawrence, for the plaintiff.
Frank Arnoldi, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff, a land-agent, alleged that on or about the 20th September, 1913, he was employed by the defendants to effect a sale of certain land, and that as the result of his endeavours the property was sold to the Suydam Realty Company for $1,125,000, and that it was agreed that he should receive from the defendant a commission of $25,000, to be paid to him proportionately as the defendants received the purchase-money for the property; that he had received by way of commission $6,100; that, upon the maturity of the contract for purchase, new and substituted agreements were entered into between the defendants and the purchasers, without the privity of the plaintiff; and that he was now entitled to receive the balance of the $25,000.

The defendants alleged that the agreement sued on was not in writing, as required by sec. 13 of the Statute of Frauds, R.S.O. 1914 ch. 102, as enacted by (1916) 6 Geo. V. ch. 24, sec. 19, and amended by (1918) 8 Geo. V. ch. 20, sec. 58, and that for this reason the action should be dismissed.

There were other defences, but this was that which raised the question of law submitted for determination.

The agreement made in 1913 was prior to the passing of the statute, and no action could have been brought until after the statute became operative, as, under the terms of the agreement, the payment of the commission was postponed at any rate until the money became payable by the purchasers, a date subsequent to the operation of the statute.

The plaintiff contended that the statute had no effect upon the validity or operative effect of the contract.

The defendants contended that the statute in terms prohibited the bringing of any action, after the date when the statute came into force, upon such a contract as this.

The question of the effect of a statute upon an existing right is not to be determined by any arbitrary rule or set of rules. The subject-matter of the legislation and the terms of the statute must be carefully considered.

The fundamental doctrine is found in Gardner v. Lucas (1878), 3 App. Cas. 582, 601.

The enactment now under consideration prohibits the maintenance of the action unless the contract upon which it is founded is evidenced by writing. This is not in the strict sense a matter of procedure, but it is analogous to it. It is a command by the Legislature to the Courts rendering it necessary that certain

evidence shall be produced before the relief sought can be granted. The contract is not destroyed, the vested right is not annulled, but prospectively the Court is required to hold its hand unless the evidence rendered necessary is produced.

Reference to Towler v. Chatterton (1829), 6 Bing. 258; Grantham v. Powell (1853), 10 U.C.R. 306; Moon v. Durden (1848), 2 Ex. 22; Crooks v. Crooks (1854), 4 Gr. 615; Gillmore v. Shooter (1679), 2 Mod. 310; Leroux v. Brown (1852), 12 C.B. 801; Morris v. Baron and Co., [1918] A.C. 1; Maddison v. Alderson (1883), 8 App. Cas. 467, 474.

This statute "bars the legal remedy by which the contract might otherwise have been enforced," and so affords an answer to this action, not by any retrospective effect, but because it speaks from its date and prohibits the action.

The learned Judge pointed out that the delay in the coming into operation of the Act did not mitigate the hardship in such a case as this, where the commission was not due, and so could not be sued for, before sec. 13 became operative. The Legislature can, if it sees fit, relieve against the effect of the Act, even though the rights of the parties have been determined by a judgment. Care would then be necessary in framing the relieving enactment: see Grainger v. Order of Canadian Home Circles (1918), 44 O.L.R. 53.

Action dismissed with costs.

MIDDLETON, J. JANUARY 22ND, 1920.

OLIVER v. FRANKFORD CANNING CO. AND PRESQ'ISLE CANNING CO.

Practice—Notice of Motion—Name of Court—Action in County Court—Motion Made to Judge of Supreme Court to Set aside Judgment—Want of Jurisdiction—Summary Judgment Granted under Rule 62—Right of Appeal in Action in Supreme Court—Rules 505, 506—Forum for Motion for Judgment—Court or Chambers—Rules 205 et seq.—"Urgency"—Scope of Rule 62—Parties—Alternative Claim against two Defendants—Judgment Entered against both.

Motion by the defendants to set aside a judgment entered in a County Court action.

The motion was heard in the Weekly Court, Toronto.

H. J. Smith, for the defendants.

E. D. O'Flynn, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the notice of motion was headed, "In the High Court of Justice," ignoring the Law Reform Act of 1909 and the Judicature Act of 1913. This might be overlooked; but it appeared that the action was in the County Court of the County of Hastings. No amendment could cure that; and a Judge of the Supreme Court of Ontario had no jurisdiction in County Court actions.

The motion was to set aside as irregular a judgment of the County Court Judge in the County Court action. On the argument the case was treated as though the County Court Judge had given a judgment in an action in the Supreme Court, under Rule 62, which applies to an action commenced by writ specially endorsed, where "some special reason for urgency is shewn." Had the action been in the Supreme Court, the motion to set aside the judgment should have been by way of appeal under Rule 505 or Rule 506, and it should have been brought within the time limited by these Rules.

It was argued for the defendants (first) that the motion under Rule 62 was improperly made in Chambers, and reliance was placed upon a note to that effect in Holmested's Judicature Act, 4th ed., p. 411. But, under the present Rules, jurisdiction is throughout conferred upon the Court; and Rules 205 et seq. must be consulted to ascertain whether the motion should be made before a Judge in Court or a Judge in Chambers or the Master in Chambers. Rule 207 (8) expressly provides that a motion under Rule 62 may be disposed of in Chambers; and by Rule 208 the Master in Chambers is empowered and required to deal with all Chambers motions not enumerated as excepted from his jurisdiction.

The second objection was, that the only allegation of urgency was the plaintiff's own statement that she needed the money. Rule 62 contemplates urgency arising from some conduct on the part of the defendant, such as an attempt to defeat an expected execution, or some exigency arising from circumstances which would go to shew that recovery of the claim was jeopardised by allowing the law to take its ordinary and more leisurely course.

The third objection was, that the contract sued on was made by one defendant only, the plaintiff did not know by which, and so, under Rule 67, sued both. Without any attempt to ascertain which was really liable, judgment was given against both.

In the circumstances, no order could be made and no costs could be given—the defendants being left to make any motion they might see fit to make to the only tribunal which had jurisdiction.

LOGIE, J. JANUARY 23RD, 1920.

INDUSTRIAL AND TECHNICAL PRESS LIMITED v. JACK CANUCK PUBLISHING CO. LIMITED.

Contract—Weekly Newspaper—Printing, Trimming, Binding, and Making Ready for Delivery at Weekly Rate—Action for Price of Work Done—Credits Omitted—Dispute as to Time when Weekly Delivery Complete and Money Payable—Money Earned before Action Brought—Counterclaim—Damages for Failure to "Trim" Newspaper—Meaning of "Trim"—Evidence—Failure to Prove Loss by Alleged Want of Trimming—Costs of Action and Counterclaim.

Action to recover the price of work done under a contract; counterclaim for damages for breach of the contract.

The action and counterclaim were tried without a jury at a Toronto sittings.

J. M. Ferguson, for the plaintiffs.

George Wilkie, for the defendants.

LOGIE, J., in a written judgment, said that the parties agreed that the sum due from the defendants to the plaintiffs was $2,414.58, certain credits having been omitted by the plaintiffs in their statement of claim, unless one part of the claim, an item of $638.32, was not due at the date of the commencement of the action.

The contract between the parties, dated the 15th April, 1915, bound the plaintiffs to print, trim, bind, and have ready for delivery f.o.b. the plaintiffs' plant, the weekly newspaper published by the defendants, at $475 per week. The plaintiffs completed their work "ready for delivery" on the Saturday previous to the date of each issue of the newspaper, and the defendants took part of the issue away on each Friday night and the remainder on the following Monday. The defendants supplied all paper, cuts, prints, etc., used by the plaintiffs in printing the newspaper.

The learned Judge was of opinion that the plaintiffs' money was earned on the Saturday of each week prior to the date of issue, and was then due and payable.

The sum of $638.32, or, as amended by the plaintiffs, $636.97, was earned, therefore, and was due and payable on Saturday the 27th September, 1919. The action was begun on the 1st October, 1919; and the sum of $636.97 was, therefore, properly included in the plaintiffs' claim.

There should be judgment for the plaintiffs for $2,414.58.

The counterclaim turned on the meaning of the word "trim" in the contract above mentioned.

After stating the facts, the learned Judge said that the plaintiffs must be deemed to have entered into the contract having in mind that the newspaper was to be printed on the Goss press.

Parol evidence may be given to prove or explain the meaning of words having a special or unusual meaning. Parol evidence is also admissible to prove any trade or mercantile custom or the meaning of words or terms, in order that the meaning may be applied to the subject-matter and bind the parties.

Brown v. Byrne (1854), 23 L.J.Q.B. 313, referred to.

No evidence explaining the trade meaning of "trim" had been adduced; and the learned Judge found that no special trade meaning had been attached to that word in the contract.

He was, therefore, driven to the ordinary meaning—"To cut off in the process of bookbinding, said of the ragged edges of paper or the bolts of book sections:" Century Dictionary, sub verb.

Real evidence, or evidence afforded by production of chattels or other physical objects for inspection by the Court, is admissible; and copies of the plaintiffs' newspaper had been produced and filed. Upon inspection these appeared to be trimmed in accordance with the above definition, and it must be found that the copies of the newspaper had been "trimmed" within the meaning of the contract.

Even if this finding was erroneous, and the defendants were entitled to damages on their counterclaim, those damages must be merely nominal.

A witness expressed the opinion that the sales of the newspaper were affected by the lack of trimming, but that witness gave no instance either of loss or of complaint by purchasers of the newspaper. No loss attributable to the alleged failure of the plaintiffs to trim the paper had in fact been proved by the defendants.

There should be no costs of the action, as the plaintiffs had omitted credits, which should have been given, and so had been only partly successful; the counterclaim should be dismissed with costs.

KELLY, J. JANUARY 24TH, 1920.

ANKCORN v. STEWART.

Will—Discretion of Executors as to Daughters of Testator Sharing in Estate—Evidence of Exercise—Powers of Surviving Executor—Married Daughter Deprived of Share—Conveyance by Surviving Executor to Son of Testator—Action by Representative of Daughter against Son for Accounting Based on Alleged Breach of Trust.

Action by the daughter and administratrix of the estate of Matilda Sanderson, deceased, against the grantee of the surviving executor of the will of Hugh Stewart, the father of Matilda Sanderson, for an accounting and payment over of the share of Hugh Stewart's estate to which Matilda Sanderson was entitled. The defendant was the son of Hugh Stewart and the brother of Matilda Sanderson.

The action was tried without a jury at Chatham.

J. G. Kerr and W. G. Kerr, for the plaintiff.

O. L. Lewis, K.C., and H. D. Smith, for the defendant.

KELLY, J., in a written judgment, said that Hugh Stewart made his will in 1890 and died on the 21st August, 1893; Matilda Stewart married George Sanderson in December, 1892, and died in December, 1893, when the plaintiff was less than a month old. Probate of Hugh Stewart's will was granted in January, 1894, to the executors, Margaret Stewart, the widow, and William Stewart, who was not related to the testator. Margaret Stewart died in April, 1896. Janet Stewart, the youngest of the testator's children who were named as beneficiaries in his will, attained the age of 21 in October, 1896. She married in February, 1897. The conveyance from William Stewart, as surviving executor, to the defendant, was made in March, 1897. William Stewart died in 1917. In July, 1919, letters of administration of her mother's estate were granted to the plaintiff.

Hugh Stewart's will directed that after his decease his wife should have the use and management of his estate for her support and maintenance and for the support, maintenance, and education of four of his children, Margaret, Matilda, Janet, and Hugh, until the youngest of them should attain her majority, and upon that event happening the estate should be sold by the executors, who, after making all lawful allowance to the testator's widow, were authorised to dispose of the residue among the four named children, four-tenths to Hugh and three-tenths to each of the daughters. There was a proviso that the payments to the daughters

should depend upon their being still unmarried at the time of the distribution of the residue, "and for this purpose I direct that the said estate of mine be sold within one year after my said youngest child surviving me shall have attained the age of 21 years then the share or shares of such one or more of them as shall have got married shall not be required to be paid in full by my executors if they think that she or they are then in comfortable circumstances which I leave to the good judgment of my said executors and the said share or shares or portions of such share or shares thus saved to the estate shall be divided equally amongst the other persons herein named as legatees namely the three or less than three remaining legatees."

The plaintiff alleged that the defendant had committed a breach of trust by taking a conveyance to himself, from the surviving executor, of the testator's farm, and refusing to account for the share of his sister Matilda.

Matilda, however, had married long before the time set for the distribution, and her right to share had become dependent upon the discretion conferred upon the executors. Though not proved by any written document, there was abundant evidence of the exercise of discretion in regard to Matilda by the two executors, and that the manner of their dealing with the daughters was in accordance with what manifestly was the desire of the testator. Matilda's husband, at the time of and following her marriage, was apparently in comfortable circumstances. She was given by the executors some household furniture and other chattels to assist her in setting up housekeeping, and it was manifest that, in their discretion, they considered her entitled to no further benefit from the estate.

The question whether the surviving executor could exercise this discretion (as to which see now the Trustee Act, R.S.O. 1914 ch. 121, sec. 27) did not arise, for the discretion had been exercised and lived up to by the two executors before the death of the widow, and any action or expression of the surviving executor, after her death, was merely in pursuance of and founded on the discretion which they together had exercised.

The defendant's dealings throughout were in good faith and without improper motive or fraud such as was suggested by the plaintiff. He was not the trustee and did not act or assume to act as such.

Action dismissed with costs.

KELLY, J. JANUARY 24TH, 1920.

WARD v. WARD.

Husband and Wife—Sale of Separate Estate of Wife—Purchase-money Handed over to Husband—Absence of Intention to Make Gift—Husband Declared Trustee for Wife—Statute of Limitations—Income from Money—Interest—Action against Executors of Husband—Costs.

Action to recover from the executors of the plaintiff's husband a half share in the proceeds of the sale of certain property, with interest.

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

G. C. Thomson, for the plaintiff.

W. H. Wardrope, K.C., for the defendants.

KELLY, J., in a written judgment, said that the admissions signed by counsel narrowed the contest to the question of whether the plaintiff was entitled to a half share of the proceeds of the sale of a property purchased by the Canadian Northern Railway Company.

It was admitted that on the 23rd May, 1911, a cheque for $1,041.40, the proceeds of the sale, was given to the plaintiff and her late husband, of whose will the defendants were the executors; that the plaintiff was entitled to half of this sum as her own separate estate; that her husband promised to account to her for this half "whenever she wanted it;" that between the 23rd May, 1911, and the time that the plaintiff left her husband, she repeatedly asked him to give her her money, and he refused and neglected to do so, and never paid any part of her share; that, in consequence of quarrels between the plaintiff and her husband and of his alleged cruelty, she left him in September, 1911, and did not again demand the money during his lifetime.

In these circumstances, it was clear that when the plaintiff permitted her husband to take these moneys she did not make a gift to him or otherwise relinquish her right to her share. Where a wife hands over to her husband property belonging to her for her separate use without any intention of making a gift of it to him, he is a trustee of it for her: Green v. Carlill (1877), 4 Ch. D. 882; In re Flamank (1889), 40 Ch. D. 461; Mercier v. Mercier, [1903] 2 Ch. 98. This does not apply where there is evidence of a contrary intention: Marshal v. Crutwell (1875), L.R. 20 Eq. 328. There was clearly no such contrary intention here. See also Halsbury, vol. 28, p. 61, para. 117; "Where a husband is

in possession of property belonging in equity to his wife for her separate use, he is a trustee of it for her."

The Statute of Limitations did not apply.

The plaintiff was therefore entitled to a half share in these moneys. On the admitted facts, there could be no presumption of a gift to the husband of the income of the plaintiff's share, to be used for their joint benefit, or that he was otherwise entitled to such income. The plaintiff should therefore recover also interest from the time her husband so received these moneys.

The plaintiff's costs of the action should be paid by the defendants.

MASTEN, J. JANUARY 24TH, 1920.

HEPWORTH BRICK CO. v. LABERGE LUMBER CO.

Sale of Goods—Action for Price—Opportunity for Inspection—Place of Inspection—Sale by Sample—Defective Condition of Goods—Defects Ascertainable by Inspection—Attempted Rejection after Acceptance—Cross-claim for Damages for Inferiority in Quality—Reference to Ascertain Damages.

Action to recover the purchase-price of 61,300 sand lime pressed bricks sold and delivered by the plaintiffs to the defendants in July, 1919.

The action was tried without a jury at Owen Sound.

W. H. Wright, for the plaintiff.

D. Inglis Grant, for the defendants.

MASTEN, J., in a written judgment, said that the plaintiffs alleged that the bricks were in fact inspected and accepted at Hepworth, and sued for the whole price according to the terms of the contract; in the alternative, they set up that, the contract being for delivery f.o.b. cars at Hepworth, inspection must take place there or not at all, and that the defendants could not reject on arrival of the bricks at Espanola.

The defendants contended: (1) that the purchase was by sample, and that the bricks did not accord with the sample; (2) that the purchase was of "face brick," that most of the bricks supplied were not reasonably fit for use as "face brick," and consequently none could be used; (3) that their agent did not inspect and accept at Hepworth, and that they were not bound by the rule requiring inspection by the purchaser at the time and place of delivery by

the vendor, because the defect of the unmixed lime in the interior of the bricks was a latent defect which could not be discovered by inspection. In the alternative, the defendants said that, if no right of rejection existed, they were entitled to a cross-claim against the plaintiffs for damages in respect to such of the bricks as did not answer the description of "face brick."

The learned Judge found that the purchase was not by sample.

It was plain that the contract was for delivery f.o.b. cars at Hepworth; and, whether the bricks were effectively inspected or not, there was an opportunity for inspection. The place for inspection is where the goods are to be delivered, unless there is a general custom to the contrary, or special circumstances are shewn which preclude the possibility of inspection at that point: Trent Valley Woollen Manufacturing Co. v. Oelrichs & Co. (1894), 23 Can. S.C.R. 682; Towers v. Dominion Iron and Metal Co. (1885), 11 A.R. 315; Dyment v. Thomson (1886), 12 A.R. 659.

The defendants were bound to inspect and reject at Hepworth if they desired so to do. Not having done so, the property in the bricks passed to them, and their only claim was for damages if certain of the bricks supplied were not of the kind called for by the contract.

The defendants, however, contended that the lumps of lime in the hearts of the bricks could not be detected by inspection, and a right to rejection would arise when the defect became known by the breaking of the bricks in transit or upon exposure: Heilbutt v. Hickson (1872), L.R. 7 C.P. 438, 41 L.J.C.P. 228; Drummond v. Van Ingen (1887), 12 App. Cas. 284, 297. That law, however, was not applicable to the facts of this case. Lumps of unmixed lime were visible on the faces of many of the bricks. If there were lumps of lime on the faces, it was plain that the same condition must exist inside the bricks, and a proper inspection at Hepworth would have disclosed the condition, both within and without. Not having been inspected, they were accepted and the property passed.

The learned Judge found that the plaintiffs were entitled to recover; but that defective bricks were delivered, in respect of which the defendants were entitled to damages.

There should be a reference to the Local Master at Sudbury to ascertain the damages; and further directions and costs should be reserved until after report.

ANNIS v. ANNIS—FALCONBRIDGE, C.J.K.B., IN CHAMBERS.—JAN. 24.

Security for Costs—Order for—Motion to Discharge—Return of Plaintiff to Ontario—Intention to Reside in Ontario—Reduction in Amount of Security.]—Motion by the plaintiff to discharge an order for security for costs, made in Chambers after hearing counsel for both parties, on the ground that the plaintiff is now resident in the city of London, Ontario. The motion was heard in Chambers at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that there was some question as to whether the plaintiff intended to reside in Ontario. He was a candy-maker, employed by his brother at a salary of $15 a week and his board. He did not return to London until the 28th November, 1919. A fair order would be to reduce the security to a bond for $200 or deposit of $100 in Court. Order accordingly; costs in the cause. W. G. R. Bartram, for the plaintiff. W. C. Fitzgerald, for the defendant.