The
Ontario Weekly Notes

VOL. IX. TORONTO, DECEMBER 31, 1915. No. 17

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1915.

*McBRIDE v. IRESON.

Landlord and Tenant—Action for Rent—Dispute as to Duration of Lease — Evidence — Finding of Fact of Trial Judge — Reversal on Appeal—Failure of Trial Judge to Consider Portions of Evidence—Surrender—Evidence—Intention—Acceptance.

Appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing without costs an action, brought in the County Court of the County of York, by a mesne tenant against his subtenant, to recover a sum of money as rent.

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

H. M. Mowat, K.C., for the appellant.

S. W. Burns, for the defendant, respondent.

RIDDELL, J., delivering the judgment of the Court, said that the plaintiff, being about to rent a large building from one Greey, entered into negotiations with the defendant to let to him three storeys of it. The plaintiff asserted that it was agreed that the defendant should become his tenant for 6 months certain; the defendant contended that his tenancy was from month to month.

The County Court Judge did not discredit either party; but, on the whole case, he was "unable to find as a fact that the defendant at any time actually obligated himself to take the premises for 6 months."

Both parties expected the defendant to become the plaintiff's

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

tenant, and the plaintiff was endeavouring to get terms from Greey and the defendant which would justify him in taking a lease from Greey; the defendant was willing to pay a certain amount, but not more, as rent; and this was not sufficient to answer the plaintiff's purpose. These were the admitted facts. The plaintiff said, in addition, that the defendant, while declining to pay any further amount explicitly as rent, agreed to pay $100 as a "bonus," which would be the same in effect as paying an increased rent. The defendant admitted that the $100 was to be paid, but said that it was to be paid toward the expense of a stairway. Greey swore that the whole expense of the stairway would not be $50; and he was expressly accredited by the trial Judge. Archer, a witness for the plaintiff, expressly accredited by the trial Judge, said that the defendant stated that he would give the $100 "as a bonus." The trial Judge was of opinion that the evidence of these two witnesses was not helpful; but, RIDDELL, J., said, it was obvious that these two pieces of evidence were entirely overlooked, and that the result would have been different had they received due consideration; and, under the rule in Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, 506, it was the clear duty of the Court to allow the appeal and give judgment for the plaintiff's claim—the balance of the 6 months' rent.

The defendant gave a notice to quit on the assumption that he was a tenant from month to month; and he asserted that his landlord took possession.

Such acts as receiving the key, putting up a placard stating that the premises were for rent, etc., were not necessarily an acceptance of the premises by way of surrender; it depended on the intention: Mickleborough v. Strathy (1911), 23 O.L.R. 33, and cases cited. It was clear that all that was done by or for the plaintiff in connection with the premises was in effect to endeavour to obtain another tenant—if such a tenant could be obtained, the attempted surrender of the defendant would be accepted and effective at that moment, but not till then.

The appeal should be allowed, and judgment entered for the plaintiff for $730, with interest from the teste of the writ of summons, and costs of the action and appeal.

FIRST DIVISIONAL COURT. DECEMBER 21ST, 1915.

*TILBURY TOWN GAS CO. LIMITED v. MAPLE CITY OIL AND GAS CO. LIMITED.

Contract—Agreement between Companies for Supply of Natural Gas—Construction—Reserve Fund—Surrender of Gas-leases—Chattel Interest—Validity of Contract—Rule against Perpetuities.

Appeals by both defendants, the Maple City Oil and Gas Company Limited and the Glenwood Natural Gas Company Limited, from the judgment of LENNOX, J., 7 O.W.N. 786.

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

G. Lynch-Staunton, K.C., O. L. Lewis, K.C., and E. Sweet, for the appellant the Maple City Oil and Gas Company Limited.

J. W. Bain, K.C., and Christopher C. Robinson, for the appellant the Glenwood Natural Gas Company Limited.

I. F. Hellmuth, K.C., W. M. Douglass, K.C., and J. G. Kerr, for the plaintiff company, respondent.

HODGINS, J.A., delivering the judgment of the Court, said that he agreed generally with the learned trial Judge in his view of the actions of all parties; but, apart from that, the case raised an important question as to the interpretation of the contract of the 22nd July, 1912, between the plaintiff company and the Maple City company. The key-note to the judgment appealed from is to be found in these words: "I am of opinion that the agreement requires the Maple City company to act so as to secure, as far as possible, a permanent or quasi-permanent source of supply of gas for the plaintiff company." With this conclusion, HODGINS, J.A., said, he was unable to agree. The recitals in the agreement, where wider than the contractual stipulations, could not extend them. The amount of gas to be delivered to the plaintiff company under clause 1 of the contract is to be "to the full extent of their requirements at all times . . and which gas may be required for supply or marketing or sale by the Tilbury company;" and under clause 3, "sufficient natural gas with at all times sufficient pressure and regularity of delivery required for the purposes from time to time of the Tilbury company."

Clause 3 in effect concedes to the Maple City company the right to supply others with gas after the plaintiff company "shall be supplied as aforesaid with the gas (1) required by it, or (2) to which it may be entitled for supply, for marketing and sale or use by the plaintiff company as aforesaid." It is not seriously disputed that the Maple City company has provided all the gas required by the plaintiff company as in (1); and the plaintiff company is entitled under (2) only to what it actually requires and demands from time to time, and not to the creation and preservation of a reserve fund of untapped or unexhausted gas, which, in the meantime, costs them nothing, although it might cost the Maple City company a very considerable expenditure; and the enforced retention would deprive them of the right given by the contract of selling "subject to the right of the Tilbury company." That expression would be meaningless if its import was, that what it could sell would be nothing at all because of possible future demand. There was nothing in the contract which made against this construction.

Reference to Dolan v. Baker (1905), 10 O.L.R 259, at p. 270.

The plaintiff company had suffered no wrong at the hands of the defendants; and that finding would dispose of the action, were it not for the other defences raised. The defendants pleaded that the whole contract was void as transgressing the rule against perpetuities, and set up the vesting of the properties in the Glenwood company and the subsequent cancellation of the gas-leases.

The Glenwood company had the right to buy the fee; and, having done so, it could forfeit or accept a surrender of the leases, unless its doing so interfered with the rights of the plaintiff company under the contract. In this case, the natural gas was dealt with only as a chattel; and the contract to deliver it into the pipes of the plaintiff company was in no way different from a contract to deliver logs or timber when cut by the vendor, which is not an agreement for the sale of or concerning an interest in land: Smith v. Surman (1829), 9 B. & C. 561; Marshall v. Green (1875), 1 C.P.D. 35, 40. So that the plaintiff company had no right, except that arising out of the contract, to receive the gas when collected and ready for delivery in the pipes of the Maple City company. The plaintiff company was not entitled, in point of law, to the relief given by the judgment in appeal, viz., setting aside the surrenders and forfeitures, so far as they might affect the rights of the plaintiff company in the premises.

Reference to McCall v. Canada Pine Timber Co. (1914), 7 O.W.N. 296, and Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105, 116.

The defence based upon the rule against perpetuities can have reference only to clause 5, giving a right of entry, at the plaintiff company's option, to bore for gas. Whether clause 5 is void or not, the rest of the contract is effective and binding. The Maple City company, when the right arises, may be willing to perform the covenant or allow the exercise of the plaintiff company's rights under it; and it is, therefore, unnecessary now to decide the point raised.

Appeal allowed with costs, judgment below set aside, and a judgment pronounced declaring that the contract in question, as now construed, is in full force and effect between the defendant the Maple City Oil and Gas Company Limited and the plaintiff company, and directing that the plaintiff company pay the costs of the action and counterclaim to the defendants.

SECOND DIVISIONAL COURT. DECEMBER 22ND, 1915.

HOCKEN v. SHAIDLE.

Fraud and Misrepresentation—Sale of Land—Damages—Failure to Prove—Contract for Return of Purchase-money—Notice not Given within Reasonable Time—Dismissal of Action—Leave to Bring New Action for Damages for Deceit—Terms—Costs.

Appeal by the defendant Shaidle from the judgment of CLUTE, J., 8 O.W.N. 619; and cross-appeal by the plaintiff from the same judgment in so far as it dismissed the action as against the defendant Slater.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. Lynch-Staunton, K.C., and S. H. Slater, for the appellant Shaidle and the respondent Slater.

John W. McCullough and James McCullough, for the plaintiffs.

RIDDELL, J., delivering judgment, said that the defendant Shaidle was agent for Messrs. Ivey & Ivey to sell lots in a Win-

nipeg subdivision; by misrepresentations, made with knowledge of their falsity, he induced the plaintiffs to buy lots, they knowing that they were buying from Ivey & Ivey. Ivey & Ivey were not parties to the actions; and, consequently, the contracts for purchase could not be set aside in these actions—whether there could be recovery for damages as in a common law action for deceit depended on the facts as proved. There was no evidence of damage; and, therefore, there could not be a reference. But it was clear that the trial was not conducted on the basis of such an action: and consequently the Court might give judgment herein without prejudice to such an action if the parties were so advised.

Recovery in these actions must be, if at all, on the alleged contracts for the return of the purchase-money. The evidence of the plaintiff Hocken was most unsatisfactory—his constant attempt was to make the transaction a loan, and the learned trial Judge had quite discredited that claim. The best to be made of the evidence for the plaintiffs was that, when buying from Ivey & Ivey, they exacted or received a promise from Shaidle that they could have their money back with interest at 15 per cent. or better, upon certain notice to him. This meant that they should own the land, but that, upon their giving Shaidle the notice required, he undertook to resell for them at an advance.

Such an undertaking must be subject to the implied term that the notice shall be given within a reasonable time—it could not be supposed that the agent was guaranteeing that the land would never fall in price. Reference to Manning v. Carrique (1915), 34 O.L.R. 453. The required notice was not given in the case of any of the plaintiffs till a reasonable time had long passed by.

The judgment below should be reversed and a dismissal of the actions directed. On the pleadings as they stood, relief might be given (had the proof sufficed) in damages for fraud; and, accordingly, a dismissal of the actions might be an estoppel against such an action. If, then, the plaintiffs were permitted to bring such an action, they should pay the costs of the present proceedings—if, however, they undertook not to bring an action in deceit, there should be no costs of the actions or appeal.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

KELLY, J., agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 23RD, 1915.

*CAMERON v. McINTYRE.

Sale of Animal—Warranty—Breach — Damages — Findings of Jury—Contract—Waiver—"Unsoundness."

Action for damages for breach of a warranty upon sale of a stallion.

The action was tried by BOYD, C., and a jury, at Guelph.

Questions were put to the jury, which they answered as follows:—

1. On or before the date of the sale, the 6th February, 1915, did the defendant represent that the horse was sound and right in every way? A. He did.

2. Did he then state that he would give a written warranty that it was sound and right in every way? A. Yes.

3. Did the defendant say that the horse was a sure foal-getter, and that he had made a good season the preceding year? A. Yes.

4. Did the defendant offer to give anything more than his own guaranty that the house was a 50 per cent. foal-producer, the certificate of the veterinary surgeon that it was sound, and its pedigree? A. Yes.

5. If he said he agreed to give more, say what it was? A. His personal guaranty that the horse was sound and right in every way.

6. If you think the plaintiff should get damages, say how much? A. $1,200.

7. Was the horse reasonably fit to travel the country road as a stallion? A. No.

8. If there was any warranty, was there any breach of it, and what was the breach? A. He didn't get a sound horse.

The defendant referred to in the answers was the defendant McIntyre.

Judgment was entered for the plaintiff for $1,200 and costs against both defendants; and they appealed.

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

D. L. McCarthy, K.C., and George Bray, for the appellants.

J. B. Clarke, K.C., for the plaintiff, respondent.

RIDDELL, J., delivering the judgment of the Court, after setting out the facts and portions of the evidence, said that it seemed to him clear, beyond any question, that the original contract of sale was still in existence, though the contrary was argued with great earnestness by counsel for the appellants.

The learned Judge referred to and quoted from Head v. Tattersall (1871), L.R. 7 Ex. 7, which was relied on by the appellants, but was really an authority against them. If the plaintiff had been distinctly told that the horse was unsound, his taking it away thereafter might be considered a waiver of the warranty, but nothing of the kind was pretended or proved.

It was made manifest that the defendant McIntyre refused to give a written warranty of soundness; and, if the real cause of action were the omission or refusal to give a written warranty, an argument might well be based on the facts. But no case of damages arising from the refusal to give a written warranty was made out; and the real cause of action was on the warranty of soundness necessarily implied in the agreement to give a written warranty. When a person agrees to give a written warranty of soundness, he necessarily (1) asserts that the animal is sound, and (2) promises to give his assurance in writing. It is of no importance that the warranty is not actually reduced to writing—Equity looks upon that as done which should have been done.

Then it was said that the horse's particular malady—a malformation of the foot—did not constitute unsoundness; and Dickinson v. Follett (1833), 1 Moo. & Rob. 299, was cited. Whether an abnormal condition constitutes an unsoundness must depend largely upon the ordinary use of the word, and the opinion of experts. There is nowhere any decision indicating that what was found here is not an unsoundness. See Oliphant on Horses, 5th ed., p. 63. The unsoundness here was existent at the time of sale.

Appeal dismissed with costs.

HIGH COURT DIVISION.

BOYD, C. DECEMBER 21ST, 1915.

*REX v. GEDDES.

Municipal Corporations—Transient Traders By-law—Inapplicability to Farmer Selling his own Produce—Municipal Act, R.S.O. 1914 ch. 192, sec. 420, sub-secs. 6, 7—"Trader"—"Other Persons"—"Trading Persons"—"Goods, Wares, and Merchandise."

Case stated by the Police Magistrate for the Town of Cobalt, on the application of the prosecutor, after the dismissal by the magistrate of a charge laid against the defendant of offering for sale goods or merchandise in the said town, without having a transient trader's license, contrary to a transient traders' by-law of the town, passed pursuant to and following the wording of sec. 420, sub-secs. 6 and 7, of the Municipal Act, R.S.O. 1914 ch. 192.

The defendant was a farmer and fruit-grower at Grimsby, in the Province of Ontario, and the goods which he offered for sale, by an agent, in Cobalt, were apples grown by him at Grimsby. The apples were not hawked about, but were sold from a car on the railway track to all comers.

The question asked by the magistrate was, whether he was right, as a matter of law, in dismissing the case.

The case was heard in the Weekly Court at Toronto.

W. J. Tremeear, for the prosecutor.

H. E. Rose, K.C., for the defendant.

THE CHANCELLOR said that the legislation in this Province as to the regulation of petty traders had been of uniform character from the earliest statute in 1816 (56 Geo. III. ch. 36) to its latest development in the Municipal Act, R.S.O. 1914 ch. 192, sec. 420, sub-secs. 6 and 7. Reference was made to the various statutes and to Attorney-General v. Tongue (1823), 12 Price 51, 60, 61; Attorney-General v. Woolhouse (1827), 1 Y. & J. 463; Manson v. Hope (1862), 2 B. & S. 498.

The enactments as to hawkers, pedlars, and transient traders, are in pari materia and should be so construed in considering the question involved in the case.

Throughout the whole course of legislation as to petty traders, exemptions are made in express terms as to commodities which are the growth or produce of the Province, down to the last revision, R.S.O. 1914 ch. 192, sec. 416, sub-sec. 1(*a*); and this exemption plainly was meant to extend to the dealings of persons who might otherwise be called temporary traders.

A farmer selling his own products is not a "trader" in any proper sense. The "other persons" of the transient traders section is to be read as "trading persons," and the farmer's occupation is not a trade, though it may be a business: Grainger & Son v. Gough, [1896] A.C. 325; Harris v. Amery (1865), 35 L.J.C.P. 89, 92; Pinkerton qui tam v. Ross (1873), 33 U.C.R. 508, 514.

Again, the allocation of the words "goods, wares, and merchandise" point to relations of trade and commerce, and are not suggestive of agricultural pursuits and farm products. The matter has been considered as to fish in Saskatchewan: Rex v. Prosterman (1909), 11 W.L.R. 141.

The Municipal Act, while regulating sales in markets, enacts that farmers and other producers may sell fruit and other produce at stores and shops at any time: sec. 401, sub-sec. 5(*a*).

The question asked in the stated case should be answered in the affirmative, upholding the decision that the Act does not apply to the case of a farmer selling his own produce; and costs should be given in the defendant's favour.

SUTHERLAND, J DECEMBER 23RD, 1915.

FINDLAY v. BATTRAM.

Limitation of Actions—Promissory Note Payable on Demand—Time of Commencement of Statutory Period—Departure of Maker from Province after Commencement.

Action upon a promissory note for $8.50, dated the 17th September, 1906, made by the defendant, payable on demand after date, in favour of one Hamilton, and endorsed by Hamilton to the plaintiff. Hamilton was added, upon his own consent, as a party plaintiff, at the trial.

The action was tried without a jury at Owen Sound.

H. G. Tucker, for the plaintiffs.

W. S. Middlebro, K.C., for the defendant.

SUTHERLAND, J., said that, shortly after the making of the note, the defendant left Ontario and went to one of the western Provinces. No demand for payment was made on him before his departure, and no demand was ever made until, on the 24th November, 1909, a firm of bankers, with whom the note had been deposited by Hamilton, wrote a letter to the defendant at his supposed address in the west. The defendant gave no evidence at the trial, and it was not shewn that he received the demand so sent. On the 28th July, 1913, Hamilton purported to assign the note to the plaintiff; but it was admitted at the trial that Hamilton was still the beneficial holder and owner of the note.

This action was begun on the 17th September, 1915; and the plaintiff stated the 24th November, 1909, as the date of maturity.

Among other defences, the defendant pleaded the Statute of Limitations.

The note, being a demand note, created a debt at once without demand; and the statute began to run from the date of the instrument or of its delivery (in this case the same): Byles on Bills, 17th ed. (1911), p. 321; Leake on Contracts, 6th ed. (1912), p. 614. The statute having once begun to run while the defendant was within the Province, it continued to run after the defendant's departure from the Province: Darby & Bosanquet on the Statute of Limitations, 2nd ed. (1899), p. 25; Banning's Limitation of Actions, 3rd ed. (1906), p. 7; Boulton v. Langmuir (1897), 24 A.R. 618. More than 6 years having elapsed from the date of the note, the right of action was barred by the statute.

Action dismissed with costs.

BRITTON, J. DECEMBER 23RD, 1915.

RE LE BRUN.

Will—Construction—Undisposed of Personalty—Insufficiency to Pay Debts and Mortgage Charges—Deficiency Borne by Mortgaged Land—Wills Act, R.S.O. 1914 *ch.* 120, *sec.* 38—*Interest Payable out of Revenue from Mortgaged Land—Period of Distribution—Expiration of Life-tenancy—Persons Entitled to Share—Ascertainment—Vested Estate—Survivorship—Remuneration of Executors — Division between Corpus and Income—Costs out of Corpus.*

Motion by the executors of the will of Honore Le Brun, deceased, for an order determining certain questions arising upon the terms of the will.

By clause 1 of the will, the testator appointed executors and trustees; by clause 2, he gave all his estate to his trustees upon trust to sell and convert into money, except as otherwise provided; by clause 3, he directed his trustees to pay debts and funeral and testamentary expenses and any charge by way of mortgage against his property at the time of his death; by clause 4, he directed his trustees to give his wife certain chattels absolutely; by clauses 5 and 6, he directed his trustees to hold lots 18 and 19 in Peterborough and his island and cottage in Stoney Lake for the benefit of his wife during her lifetime; by clause 7, he directed his trustees, after the death of his wife, to sell such parts of lots 18 and 19 as had not been previously disposed of, and to divide the proceeds in equal shares amongst his brother Carisse, his brother's wife Alphonsine, his sisters who should be alive at the date of the death of his wife, and his nephew, the son of Carisse—his brother's share to go to his brother's wife should his brother die before his brother's wife, and her share to him should she predecease him; by clause 8, he directed his trustees, "as soon as may be convenient," to sell the island already mentioned; by clause 9, he directed that $500 should be given to his step-daughter for her own use absolutely; by clause 10, he authorised the trustees "to sell and convey such parts of the trust premises held by them . . for the benefit of my wife as herein provided for, but only with the consent of my wife if sold in her lifetime, the proceeds of such sale or sales to be invested by my trustees for the benefit of my wife during her lifetime;" by clause 11, he authorised and directed his trustees to sell and dispose of his interest in a certain partnership business, and (12) to divide the proceeds of such sale, and all accumulations of interest on the same, within 3 months from the date that the trustees shall have received the whole of the proceeds, as follows: one-half to be invested for the benefit of his wife during her lifetime, and the other half to be divided in equal shares between his brother Carisse, his brother's wife, and his sisters, "who shall be alive at the date such division is to be made;" by clause 13, he directed that the residue of his estate should be divided equally "between" his brother, his brother's wife, his nephew (their son), and such of his sisters as should be alive at the death of his wife—"it being my intention that should either of the said legatees die before the period of distribution of the proceeds from the sale of said business, that same shall be divided amongst the survivors of them, except in the case of my brother Carisse

or his wife Alphonsine dying, then the share of the one so dying is to be given to the survivor of them, and the share of my nephew is to be set apart, and invested by my trustees . . . until he arrives at the age of 21 years. . . .''

The motion was heard in the Weekly Court at Toronto.

J. R. Corkery, for the executors.

G. F. Shepley, K.C., for Alphonsine Le Brun.

J. M. Ferguson, for the widow of the testator.

H. E. Rose, K.C., for the trustees of the estate.

E. C. Cattanach, for the testator's nephew.

BRITTON, J., in a written opinion, disposed of the questions submitted as follows:—

(1) Q. The undisposed of personalty of the estate not being sufficient to pay the debts, mortgage charges, etc., is the deficiency to be met by the personal estate disposed of by the will, with a consequent abatement of the legacies, or should the deficiency be borne by the mortgaged real estate? And should the mortgage interest already paid, that due, and that to become due, be paid by the life-tenant out of revenue derived from the property?

A. Section 38 of the Wills Act, R.S.O. 1914 ch. 120, applies. The deficiency is to be borne by the mortgaged real estate. The interest upon these mortgages—that already paid and that to be paid—must be paid by the life-tenant out of the revenue from the mortgaged property.

(2) Q. Was it the testator's intention to make the island subject to the direction given regarding lots 18 and 19?

A. Yes. Clauses 5 and 6 of the will deal with both properties in the same way.

(3) Q. Are the sisters who are entitled to share in the proceeds of the sale of the testator's interest in the partnership business those sisters who are alive at the time of the distribution of the proceeds, or those alive at a date 3 months after the trustees have received the whole of the proceeds?

A. The sisters entitled to share are those alive at the time fixed for distribution of the proceeds.

(4) Q. Has the share of Carisse Le Brun, now dead, vested in his estate or in his wife?

A. In his wife. Carisse died before the time for distribution. His wife survived her husband, and was alive at the time fixed for distribution.

(5) Q. Should the remuneration of the executors be borne partly by corpus and partly by income?

A. Yes.

Costs of all parties of this application to be paid out of the corpus of the estate; those of the executors as between solicitor and client.

BOYD, C. DECEMBER 24TH, 1915.

RE CULBERT.

Will—Construction—Trust—"Whatever Belongs to me"—Inclusion of Realty—Avoidance of Intestacy—Devise to Wife "for her own Use and for the Bringing-up of my Children" —Discretion of Wife—Interest of Children.

Motion by the executors of the will of one Culbert, deceased, upon originating notice, for an order determining two questions of construction.

The motion was heard in the Weekly Court at Toronto.

W. J. McClemont, for the executors and the widow.

F. W. Harcourt, K.C., for the infants.

THE CHANCELLOR said that the testator gave all his estate, real and personal, to executors and trustees named, in trust (1) to pay debts, etc., and thereafter to pay over and convey the same to the persons hereinafter named, that is, "to convey to my wife all my personal property, including my business, money, personal property, and whatever belongs to me, for her own use and for the bringing-up of my children." Trustees were appointed with full power and authority to sell and dispose of all the testator's estate, when necessary, and to execute all documents requisite to carry out his will.

The testator disposed of all his estate, real and personal, which became vested in the trustees to convey to the beneficiaries after payment of debts and testamentary expenses.

The sole beneficiary appeared to be the wife, and to her, besides all the personal estate, would go the real estate, under the words "whatever belongs to me." The word that controls in this clause is not "personal;" but, having given to his wife "all his personal property," he proceeds to give her something more, viz., "whatever belongs to me," and that evidently refers to the real estate he had already vested in trustees.

The first question should be answered by saying that there was no intestacy as to the lands—they were devised to the wife as the beneficiary. The lands were to be held by her for her own use and for the bringing-up of the children. Were the testator dealing only with the income, there would be some interest in the children, but where the whole corpus is disposed of, the present trend of authority is, that the mother takes absolutely with no trust for the support of the children such as the Court can recognise or supervise. The law was once otherwise, but has now settled down into the method of construction which simplifies the law, as recommended by Lord St. Leonards (Property, 1849, p. 375). He says: "It is not an unwholesome rule that, if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form."

The reasons against the Court undertaking to revise the discretion of the parent are referred to by Malins, V.-C., in Bond v. Dickinson (1875), 33 L.T.R. 221.

The rule applicable to this devise is clearly laid down by the Judges in In re Hanbury, [1904] 1 Ch. 415, though that was reversed by a majority of Law Lords in Comiskey v. Bowring-Hanbury, [1905] A.C. 84, because of the special expressions used by the testator, which prevailed against the other absolute construction. The same rule is recognised and applied in the Supreme Court of Canada: McIsaac v. Beaton (1905), 37 S.C.R. 143.

The second question should be answered by saying that the children have no interest in the land, but are dependent on the bounty and care of the mother as to their proper bringing-up.

Costs out of the estate.

BOYD, C., IN CHAMBERS. DECEMBER 24TH, 1915.

*REX v. JOHNSON.

Criminal Law — Keeping Common Betting-house — Criminal Code, secs. 227, 228—Police Magistrate's Conviction—Evidence to Sustain — Betting-slips and Money Found on Premises—Forfeiture.

Motion to quash a conviction of the defendant, by the Police Magistrate for the City of Hamilton, for keeping a common gaming-house or common betting-house.

C. W. Bell, for the defendant.
J. R. Cartwright, K.C., for the Attorney-General.

THE CHANCELLOR said that the police had an eye on the house No. 126 James street, in the city of Hamilton, used and occupied by the defendant as a cigar-store and barber-shop combined, until the Chief Constable was able to swear that he had good grounds for believing and did believe that the house was kept or used as a common betting-house. Then a search-warrant was obtained and the premises "raided" on the 27th November by the police, and they found on the person of the defendant 92 slips of paper with words, names, and figures written on them, and $232 in bills. In the defendant's waistcoat pocket were next found 3 more slips and $3 in money, and from another pocket was taken a parcel of "dead" slips. There were also found in his trunk 5 savings-bank books in different banks, which shewed moneys in hand to the credit of the depositor, in the aggregate amounting to about $25,000. At the gaol, was found concealed on the person of the defendant a further sum in bills of $690. The "slips" were "betting-slips" as proved by the police. Certain admissions were made by the defendant at the time of his arrest. The conviction rested upon this evidence, which, the defendant urged, was insufficient. The defendant himself gave no evidence under oath.

Two main purposes are specified in the Criminal Code, secs. 227 and 228: first, keeping a house for the purpose of betting with persons resorting thereto; and, next, keeping it for the purpose of receiving deposits on bets as consideration for a promise to pay on the event of the race. There was evidence on both heads sufficient to make a prima facie case. Though there was no actual evidence of people attending to bet or to make deposits, yet the magistrate might properly conclude that they did so: Reynolds v. Agar (1906), 70 J.P. 568 (journal part).

The importance and significance of the slips were shewn by such cases as Regina v. Worton, [1895] 1 Q.B. 227; Wyton's Case (1910), 5 Cr. App. Cas. 287; Mortimer's Case (1910), ib. 199, at p. 200; and Lester v. Quested (1901), 20 Cox C.C. 66.

After quoting the contents of some of the slips and shewing their meaning, the Chancellor said that these various indications had a cumulative effect, and carried the charge beyond one of suspicion into something properly evidential; and, though to some the evidence might appear slight, it was more than a mere scintilla, and could not be withdrawn from judicial considera-

tion—in this differing from Regina v. Bassett (1884), 10 P.R. 386.

Reference to Rex v. Corrie (1904), 68 J.P. 294, and Lee v. Taylor (1912), 107 L.T.R. 682.

Upon the whole circumstances and evidence the Police Magistrate had passed and had found the defendant guilty. The Chancellor was not disposed to interfere with the result, and the conviction stood affirmed, as well as the forfeiture of the money seized (i.e., excluding what was discovered in the gaol).

BANK OF OTTAWA v. SHILLINGTON—MAGEE, J.A.—DEC. 20.

Promissory Note—Action on—Defence—Conditional Signature by Defendants for Accommodation of Unincorporated Association—Burden of Proof—Evidence—Contradictory Testimony—Findings of Fact of Trial Judge—Amount Due upon Note—Credits—Application of Payments—Interest after Demand—Rate of.]—This action, commenced on the 12th February, 1915, was brought upon a promissory note, dated the 22nd December, 1909, for $2,500 and interest at 7 per cent. per annum, payable on demand, in favour of the plaintiffs, and signed by the three defendants, Shillington, Moore, and Leckie. It was discounted by the plaintiffs for the Cobalt Hockey Club, an unincorporated organisation, to whose credit the proceeds were placed in the plaintiffs' branch at Cobalt on the 28th December, 1909. The defendant Leckie, who was secretary-treasurer of the club, did not appear or defend. Each of the other two defendants swore that he signed the note at the request of A. F. Knight, then manager of the plaintiffs' branch at Cobalt, and upon the condition and understanding that it was to be signed also by two other persons—M. Carr and H. H. Lang. This was positively denied by Knight. The defence of the defendants Shillington and Moore was, that they had signed upon the condition named, and that the condition had not been fulfilled. The action was tried without a jury at Haileybury and Toronto. The learned Judge makes a careful examination of the evidence, in a written opinion of some length. The testimony being contradictory, he takes account of the burden of proof, the probabilities, and the undoubted circumstances. The burden of proof, he says, as against these two defendants' own signatures, their silence to Carr and Lang, their subsequent payments, and the absence of

written repudiation, is cast upon these defendants; and, in the face of the contradictory evidence, he cannot find that the burden has been satisfactorily lifted. The plaintiffs are entitled to recover. As to the amount, the note being payable on demand with interest at 7 per cent. per annum, the plaintiffs' letter of the 31st August, 1910, was a distinct demand of payment; the plaintiffs would be entitled to interest at 7 per cent. per annum until the date mentioned, and at 5 per cent. thereafter: St. John v. Rykert (1884), 10 S.C.R. 278; Peoples Loan and Deposit Co. v. Grant (1890), 18 S.C.R. 262. The amounts placed to the credit of the club's account after the 17th May, 1910, were all intended to be applied on the note, and they, as well as the direct credits on the note, should be credited first in payment of the interest up to the date of receipt and then in reduction of principal—interest being in no case compounded. The plaintiffs appeared to have debited the account with interest on the note at 7 per cent. throughout. There was no evidence that the defendants knew of or assented to this; and the amount should be computed without regard to such debits. The plaintiffs' claim would thus be reduced. Judgment for the plaintiffs, with costs, for a sum to be computed in accordance with the findings. H. H. Dewart, K.C., and George Ross, for the plaintiffs. J. W. Mitchell, for the defendants Shillington and Moore.

CORRECTION.

In RE DINGMAN, ante 272, the appeal was from an order of the Judge of the Surrogate Court of the County of *Prince Edward*.