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DIVISIONAL COURT.

PRITTIE v. LAUGHTON.

Specific Performance—Alteration of Written Offer—Onus of Proof—Alternative Remedy in Damages—Effect of not Pleading—Division Court—Solicitor's Duty and Risk in Choosing Forum.

Croockewit v. Fletcher, 1 H. & N. 893, per Martin, B., approved.

Adderley v. Dixon, 1 S. & S. at p. 610, and Scanlan v. McDonough, 10 C. P. 104, referred to.

Appeal by plaintiffs from judgment of MEREDITH, C.J., dismissing action to compel specific performance of an agreement to sell certain land. The agreement or option gave plaintiffs a certain number of days within which to purchase. The trial Judge held that the plaintiffs had failed to make out a contract; that the document originally contained the word "thirty" where the word "ninty" in the document, as produced, was written, as the number of days within which the purchase was to be completed; that, in view of that, and looking at the extraordinary character of the instrument—all scratched—it could not be found, in the conflict of evidence, that the option was originally for ninety days; that defendant Peter Laughton did not know that the acceptance was written as declared by plaintiffs, and that, if it was so written, Laughton did not know it was there; and that, there having been a material alteration of the option, the plaintiffs could not succeed.

G. F. Shepley, K.C., for plaintiffs.

C. C. Going, Toronto Junction, for defendant.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.—If the right determination of this case depended entirely upon the single question, was the

writing in question altered as the defendants allege? the judgment should, I think, be reversed, because there is no finding that it was so altered, and the onus of proof of such is ordinarily upon the party asserting it. In a writing of this character an apparent alteration is ordinarily presumed to have been made before it was signed.

But the case is not one of that single and plain character. The action is for specific performance only, and no attempt to obtain in the alternative damages for breach of contract has been made, nor any evidence given sufficient to support such a claim.

And the case is so full of uncertainties that I cannot doubt specific performance was rightly refused, and if so there was no other course open than to dismiss the action.

The writing is of a slovenly character, in pencil only, illegible and misspelt, and no copy of it was made. A very fit subject for alteration without detection, and, making it still more unsatisfactory, it has been crossed and scored over and many words added, in pencil, so as to make it quite unintelligible, in some respects, without parol evidence. These are not matters entirely irrelevant to the issues in this action for specific performance of the agreement—relief not given *ex debito justitiae*, but resting in the judicial discretion of the Court—nor necessarily in an action for damages. See Moine v. Hendron, 30 Miss. 110; Addison on Contracts, 9th ed., p. 175; and Am. and Eng. Encyc. of Law, 2nd ed., pp. 272-9.

See observations of Martin, B., in Croockewit v. Fletcher, 1 H. & N. at p. 912, which cannot be repeated too often, as to any tampering with or alteration in written documents, referring to Davidson v. Cooper, 13 M. & W. 778. . . . The plaintiffs assume quite too much in taking it for granted that the alteration has left the writing plain and legible—that the changed word is not plainly "ninty," intended for ninety. That is not so, and consequently, the onus was upon them of proving the writing to be that which they allege it to be; quite a different case from one in which the alteration is plain on the face of the document, and there is nothing to prevent the presumption against its having been wrongfully made arising. The plaintiffs have not satisfied this onus of proof. The trial Judge has not found even that the word is "ninty," and if the onus rested upon the plaintiffs of proving that when the writing was signed the word was "ninety," the action was rightly dismissed.

There are also all the other circumstances of the case to be taken into consideration . . . and the fact that upon the evidence it must be found that one lot at least had been sold by the vendor before the date of the writing, and there

was therefore uncertainty as to price, preventing specific performance.

But, in addition to these circumstances, the case is one in which the plaintiff might well be left to his common law remedy for breach of contract. The lots, apparently about 20 in number, were to be sold for $100 altogether, an average of $5 each. They were bought to sell again for the purpose of speculation only. They were tax title lots in Toronto Junction. No one can doubt the feasibility of going into the market, and being able to buy abundantly of such lots. . . . It is not a case in which damages will not "afford a complete remedy:" Adderley v. Dixon, 1 S. & S. 608. Here damages will completely compensate.

The plaintiffs' claim should, in my judgment, have been made in the Division Court for damages, and the question of the alteration have been there tried by a jury. No question of title to land is raised, and the Division Court has jurisdiction to award such damages up to $60, three-fifths of the whole price of the lots together. As to a solicitor's duty and risk in bringing an action in a superior Court which might have been brought in an inferior Court, see Scanlan v. McDonough, 10 C. P. 104.

Appeal dismissed with costs.

W. Cook, Toronto, solicitor for plaintiffs.

C. C. Going, Toronto Junction, solicitor for defendant.

MARCH 12TH, 1902.

DIVISIONAL COURT.

HUME v. HUME.

Pleading—Counterclaim—Annuity—Executor.

Appeal by defendant from order of STREET, J., *ante* p. 156.

The same counsel appeared.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Mr. Bicknell has argued this very fully, and, I am sure, has said everything that possibly could be said in support of the appeal, but we think it is not necessary to take time to consider his argument.

What, practically, the defendant is seeking to do is to obtain a judgment for the administration of an estate, of which the plaintiff and two others are executors, and in which she and several others are interested, as next of kin, on a counterclaim in an action in which one of the executors, suing in her own right, is plaintiff.

In my opinion, the legislature did not contemplate that such a claim should be the subject of a counterclaim.

It is true that the language of the Rule giving the right to counterclaim is very wide, but I think it is not wide enough to cover a case of this kind.

Here this defendant has no debt or claim for which she could sue the plaintiff. She has a right as one of the next of kin to bring an action calling upon the plaintiff to account as a trustee or executrix for the moneys of the estate which have come to her hands. That action, notwithstanding Mr. Bicknell's argument, I still think is a class action, an action brought on behalf and for the benefit of all the next of kin of the estate for the purpose of having the accounts taken and the amount in the hands of the defendant distributed.

The only judgment which could result from the counterclaim, if it went to trial, would be a judgment for administration of the estate. It would be necessary to have the other executors before the Court; it would be necessary to have the other next of kin before the Court; and the result would be not a judgment that this defendant should recover from the plaintiff anything,—assuming a sum of money to be in the hands of the defendant,—but an order that the plaintiff pay into Court the amount in her hands, and the Master, or the person to whom the reference was directed, would determine the proportions in which that money would be distributed among the next of kin.

It put in Daniell that a next of kin cannot sue unless for an aliquot portion of an ascertained sum in the hands of an executor. There is no pretence here that there is any aliquot part of an ascertained sum in the hands of the defendants by counterclaim. What is claimed is that she has received the rents of the farm, and that she has not accounted for them, and that the plaintiff by counterclaim is entitled to a distributive share of the moneys in her hands.

I think it would be most inconvenient that an action of this kind, in which the other executors are concerned, and in which the other next of kin are concerned, should be tacked on to an action to recover a legacy to which the plaintiff is entitled under the will; and to treat the provisions of the Rule as to counterclaim as extending so far as to include such a counterclaim would be to create a condition that would be most unsatisfactory, bringing into the suit and tying up along with it an action for the administration of the estate.

I think the order appealed from was right, and that the appeal should be dismissed with costs to the respondent in any event.

BRITTON, J. MARCH 13TH, 1902.

TRIAL.

BIBBY v. DAVIS.

Public Health—Board of—Contagious Disease—Engaging Physician to Attend—Liability to Pay—Medical Health Officer not Personally Liable—Mandamus—R. S. O. 1897 ch. 248, secs. 33, 48, 66.

Action against defendant Dainard as medical health officer and the other defendants as the local board of health of the township of Euphrasia, tried at Owen Sound with a jury.

S. G. McKay, Owen Sound, for plaintiff.

I. B. Lucas, Owen Sound, and W. H. Wright, Owen Sound, for defendants.

BRITTON, J.—The plaintiff, a physician, seeks to recover $560 for attendance on a smallpox patient for 56 days at $10 a day, value of clothing, articles, etc., destroyed by order of the board. Upon the answers of the jury and the whole case, I find that there is no personal liability on the part of the defendant Dainard. He is not a member of the board: see secs. 33, 48, and 66, R. S. O. 1897 ch. 248. Plaintiff is entitled to recover for 25 days at $7 a day and $6.90 for clothing destroyed. The jury found 25 days a reasonable time, and, as the bargain made with defendant Fawcett was for $7 a day as long as the board required his services, it should pay not only for the 12 days plaintiff was actually in charge of Smith, but for the 15 days he was in quarantine afterwards; but I see no authority for allowing against the board the value of property which ought to have been destroyed but was not destroyed: see sec. 100. The jury found that all ought to have been destroyed, and fixed the value at $30. In the absence of any specific evidence as to a larger value, I fix it at $6.90. The articles not destroyed belong to plaintiff, and he may take them. Judgment accordingly for plaintiff, less $83.90 paid into Court, and for High Court costs. The order for mandamus to the board to sign an order to the township council for the amount must also be granted. It is a case where within the authorities the relief by mandamus may properly be termed ancillary relief: see Ward v. Lowndes, 28 L. J. Q. B. 265; Worthington v. Hutton, L. R. 1 Q. B. 63; Webb v. Commissioners, L. R. 5 Q. B. 642. The board have no funds,

but they can make contracts, sue and be sued, and the township must provide money and pay it upon the order of the board or any two members. The mandamus order should be as in Re Derby and Local Board of Health of Plantaganet, 19 O. R. 51, directing all the members to sign the order asked for. It is a case for High Court costs. The letter of defendant Dainard, who met with the board and acted as one of them, though not a member, might well lead plaintiff to suppose he could recover the larger amount.

McKay & Sampson, Owen Sound, solicitors for plaintiff.

Lucas, Wright, & McArdle, Owen Sound, solicitors for defendants.

BRITTON, J. MARCH 12TH, 1902.

TRIAL.

FERGUSON v. ARKELL.

Sale of Goods—Stallion—Warranty—Breach.

Action for a rescission on the ground of fraud of a contract for purchase by plaintiffs of a stallion called Whitby for the price of $1,400, and for an injunction.

S. G. McKay, Owen Sound, for plaintiffs.

H. L. Drayton and J. J. Stevens, Teeswater, for defendant.

BRITTON, J.—The defendant employed one Ferguson and one Armstrong to assist him in selling the horse to a syndicate, the plaintiffs, and the sale was effected on 14th May, 1901, for $200 in cash and three notes of $400 each. The sale was upon the representation by the defendant that the "horse was good and sound, not more than ten years old, and a sure foal-getter." Each of the plaintiffs relied upon practically the same representation made by defendant or one or both of his agents, and he and they intended the representations to be relied on, and knew they were false. I find that at the time they were made and on the sale that the horse was unsound, over ten years old, and not a sure foal-getter. The defendant left his former home so as to avoid a tender of the horse, but the plaintiffs, I find, elected on discovering the fraud to rescind the contract and are entitled to do so. The defendant is entitled to the horse and may take him away at any time; if he refuses, plaintiffs may sell him and apply proceeds on account of their claim. The plaintiffs are entitled to indemnity against payment of any of the notes, and need not pay the $200, which, for some reason, was not paid in cash. Judgment for plaintiffs for

$1,200 and interest. The amount of any notes returned are to be credited on the judgment. Any plaintiff is entitled to contribution from his co-plaintiffs if he pay any note. Each plaintiff was an owner of a one-sixth share in the syndicate except William Richardson, who has two-sixths. High Court costs to plaintiffs. Injunction against defendant restraining him from parting with the two remaining notes continued.

R. Vanstone, Wingham, solicitor for plaintiffs.

J. J. Stevens, Teeswater, solicitor for defendant.

FALCONBRIDGE, C.J. MARCH 12TH, 1902.

WEEKLY COURT.

McCLENAGHAN v. PERKINS.

Executors and Trustees—Negligence—Mismanagement—Breaches of Trust—Compensation.

Appeal by defendant Perkins and his assignee for creditors, defendant Mutchmor, from report of Master at Ottawa, and cross-appeals by plaintiff and defendants H. D. and H. V. Lyon from report of Master at Ottawa, heard at Ottawa.

T. A. Beament, Ottawa, for defendants Perkins and Mutchmor.

W. J. Code, Ottawa, for plaintiff.

T. F. Barrett, Ottawa, for defendant Lyons.

FALCONBRIDGE, C.J.— . . . The findings of the Master are correct and should be sustained on the questions raised by the appeal and cross-appeals, except as to the compensation allowed to the executor, defendant Perkins, who (1) kept no books, (2) failed to invest the estate moneys, though directed to do so, (3) overpaid one of the heirs, (4) allowed taxes to run greatly into arrears, (5) paid large portions of the corpus to beneficiaries before the period of vesting, contrary to the terms of the wills; and, assuming that the estates will lose nothing, though the executor has assigned to defendant Mutchmor, the executor is not on the above facts entitled to any compensation. The plaintiff and the defendants will have their costs against the executor and his assignee of this appeal and of the cross-appeals; the report will be amended by disallowing the $1,900 for compensation; and judgment will go in terms of the report as amended.

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OSLER, J.A. MARCH 10TH, 1902.

C. A.-CHAMBERS.

RE EMPLOYERS' LIABILITY CORPORATION AND EXCELSIOR LIFE INSURANCE CO.

Leave to Appeal—Appointment of Sole Arbitrator.

Leave to appeal from order of a Divisional Court, *ante* p. 87 and 3 O. L. R. 93, was granted.

STREET, J. MARCH 10TH, 1902.

WEEKLY COURT.

CITY OF TORONTO v. BELL TELEPHONE CO. OF CANADA.

Constitutional Law—Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone Company—Right to Carry Poles and Wires along and across Streets—Consent of Municipality—Dominion and Provincial Statutes—Construction—Inconsistent Provisions.

Special case stated by the parties and heard on the 26th February, 1902.

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood, for defendants.

STREET, J., held as follows:—

1. Under the British North America Act, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies, with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the heads mentioned in sec. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference; and in order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial legislation.

2. While the defendants were duly and properly incorporated under their special Act, 43 Vict. ch. 67 (D.), they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or corporations, and could not do so until authorized by an Act of the Provincial Legislature.

3. The defendants, being desirous of exercising their powers within the Province of Ontario, petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province, and thereupon the Act 45 Vict. ch. 71 (O.) was passed, authorizing them to exercise within the Province the powers in the Act mentioned. Two months later, upon the defendants' petition, the Act 45 Vict. ch. 95 (D.) was passed, amending their Act of incorporation in certain particulars, and declaring that the Act of incorporation as amended and the works thereunder authorized were for the general advantage of Canada.

Held, that from this time forward the defendants were subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not thereby repealed, as the Dominion Act had not expressly declared that the provisions of the Ontario Act were no longer binding; and the defendants were still entitled to all the rights and subject to all the restrictions contained in the Ontario Act not abrogated by absolutely inconsistent provisions in the Act of incorporation.

4. By the defendants' Dominion Act they were given a general power to erect and maintain their lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets was to be done under the direction of an officer appointed by the municipal council, and in such manner as the council might direct, and that in certain specified cases the consent of the council must first be obtained. By the Provincial Act similar powers were given, but one important qualification was, "that in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wires less than 22 feet above the surface of the street, nor carry any such poles or wires along any street without the consent of the municipal council."

Held, that the effect of this latter provision was to forbid the defendants carrying *any* poles or wires at all along any street without the consent of the council—not merely poles or wires of the height described in the previous part of the same sentence.

5. The Ontario Act, in so far as it was not consistent with the Dominion Act, must not be taken to be repealed by the latter; the Ontario Act should be treated as conferring special rights upon the defendants in regard to their works

in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.

6. Therefore, the defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council; but, inasmuch as the Ontario Act does not make their power to carry wires *across* streets dependent upon the consent of the council, they may carry them across the streets, either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation.

Thomas Caswell, solicitor for plaintiffs.

S. G. Wood, solicitor for defendants.

LOUNT, J. MARCH 14TH, 1902.

WEEKLY COURT.

RE CITY OF KINGSTON AND KINGSTON LIGHT, HEAT, AND POWER CO.

Arbitration and Award — Voluntary Submission — Construction of Agreement—"Works and Property"—"Franchises and Goodwill"—Ejusdem Generis Rule—54 Vict. ch. 107—R. S. O. ch. 191—R. S. O. ch. 164, sec. 99.

Anderson v. Anderson, 1 Q. B. D. at p. 753, Church v. Mundy, 15 Ves. at p. 406, and Toronto Railway Co. v. Toronto, 20 A. R.125, [1893] A. C. at p. 515, referred to.

Appeal by the company from an award of arbitrators or for an order setting aside the award.

The company is incorporated by 11 Vict. ch. 6 (O.), and by sec. 35 its corporate existence was limited to 50 years. By 54 Vict. ch. 107, sec. 10, sec. 35 was repealed and the time limited to 20 years, but the corporation at any time was given power to expropriate the company's works and property pursuant to R. S. O. 1887 ch. 164, at any time upon giving 12 months' previous notice of intention so to do. In July, 1896, an agreement for 5 years was made between the parties by which at the expiration of it, having given the notice, the corporation was to be at liberty to purchase—sec. 11—"all the works, plant, appliances, and property of the

company used for light, heat, and power purposes, both gas and electric," at a price to be fixed by three arbitrators upon a reference under the Municipal Act, a majority of whom made the award in question, which fixes (1) the value of the works, etc., at $170,173, (2) the value of the franchises conferred by 54 Vict. ch. 107 (O.), at $80,000, and (3) finds that the ten per cent. in addition provided for in R. S. O. 1887 ch. 164, sec. 99, and incorporated with 54 Vict. ch. 107 (O.), has not been included in arriving at the value of the works or of the franchises.

R. T. Walkem, K.C., and J. L. Whiting, K.C., for the company.

D. M. McIntyre, Kingston, for the corporation.

LOUNT, J.—In my opinion the determination of the question is not to be decided by the meaning of the word "property," but by the fair interpretation and construction of the agreement. . . . The parties have by their agreement, sec. 11, agreed that the corporation shall have the option of purchasing and acquiring all the works, etc. The submission is a voluntary one and not under sec. 10 of 54 Vict. ch. 107. Clause 12 provides that the corporation, forthwith after giving notice of intention to purchase, shall have access to the works, plant, property, and appliances of the company. Clause 15 provides that, in the event of the works, plant, and property of the company being acquired by the corporation, then the company shall cease to exist as a corporate body for the purposes for which they were constituted, except as far as may be necessary to wind up the affairs of the company, and shall surrender, assign, transfer, and set over to the corporation all their rights, franchises, privileges, and immunities. In my opinion, the word "property" as used in these clauses can only be held to mean tangible, and not intangible, property, such as the franchise or goodwill of the company. The corporation were not under any necessity to purchase and acquire the franchise of the company. For all purposes necessary the corporation could and can operate under and by virtue of the Municipal Light and Heat Act, R. S. O. ch. 191. What was agreed to be paid for under clause 11 are the works, plant, appliances, and property used for light, heat, and power purposes. I think the doctrine of *ejusdem generis* applies. In Anderson v. Anderson, 1 Q. B. D., Lord Esher says, at p. 753, "nothing can well be plainer," etc. The word "property" as used in the agreement is, on the fair construction of the instrument, limited to the preceding words, and these

words are not to be construed so as to include such an intangible right as the franchise or goodwill of the company. In Church v. Mundy, 15 Ves., Lord Eldon says, at p. 406, "The best rule of construction," etc. The limited sense is, I think, shewn in clause 12, where it is provided that the corporation shall have access to the works, plant, property, and appliances of the company. What is here meant is access to the tangible property. Again, as I read clause 15, the corporation having acquired the tangible property at a price to be fixed by arbitration, the company ceases to exist, and, as part of the bargain, surrender or yield up, without other consideration, their franchises and rights. Moreover, by clause 15, the words "rights, franchises, privileges, and immunities" are expressly used, and these words are not used in the preceding clauses. If it had been intended that the value of the rights, franchises, etc., was to be paid for at a price to be fixed by arbitrators, one would expect to find express provision made, or appropriate words used in clauses 11 and 12. By the Act, *supra*, the rights and privileges were terminable at the option of the company in 20 years, i.e., 1911. See Toronto Street Railway Co. v. Toronto, 20 A. R. 125, [1893] A. C. 506, per Sir Richard Couch, at p. 515, quoting with approval the judgment of Burton, J.A. The time being shortened, the same result would apply at the end of 5 years as at 20 years—the privileges and franchises would cease. I do not think the ten per cent. provided for by R. S. O. ch. 164, sec. 99, can be allowed, because it is to be allowed upon expropriation, apparently as consideration for it and as compensation for disturbance and for interference with and determination of the company's rights and privileges against the assent of the company. That is not this case. The submission is voluntary. Nothing is said about the 10 per cent. in the agreement, and that must control and not the Act. Motion dismissed with costs.

D. M. McIntyre, Kingston, solicitor for corporation.

Walkem & Walkem, Kingston, solicitors for company.

MARCH 11TH, 1902.

DIVISIONAL COURT.

REILLY v. McDONALD.

Specific Performance—Statement of Vendor as to Quantity of Land Sold—Shortage of 20 Acres out of 125 Acres—Effect of—Laches.

Appeal by plaintiffs from judgment of MACMAHON, J., in action for specific performance of an agreement to sell lot

13 in the 4th concession east of Yonge street, in the township of York, containing 125 acres of land. The trial Judge found on the evidence that defendant was not aware that 20 acres had been sold off the lot, but had been told and believed that it contained about 125 acres, and that plaintiffs not owning the whole lot could not succeed: Moorehouse v. Hewish, 22 O. R. 172; and, also, that on account of their delay the plaintiffs could not succeed: McClung v. McCracken, 2 O. R. 609; Nason v. Armstrong, 22 O. R. 542.

J. O'Donohoe, K.C., and William Norris, for plaintiffs.

E. E. A. DuVernet and W. H. Grant, for defendants.

The judgment of the Divisional Court (FERGUSON, J., ROBERTSON, J.) was delivered by

FERGUSON, J., who held that the judgment below was correct and should be affirmed, and that the plaintiffs did not appear to have proved an agreement upon which this or any action could be maintained. Appeal dismissed with costs.

J. O'Donohoe, Toronto, solicitor for plaintiffs.

Duncan, Grant, Skeans, & Miller, Toronto, solicitors for defendants.

FALCONBRIDGE, C.J. MARCH 13TH, 1902.

TRIAL.

RAT PORTAGE LUMBER CO. v. KENDALL.

Sale of Goods—Counterclaim—Onus of Proof.

Action tried at Rat Portage and Toronto, to recover price of lumber and building material and interest on price and for money lent, and upon counterclaim for towing, sawing, splitting, and delivering to plaintiffs 2,520 cords of wood, and for other towing, and half profits on sale of cordwood, pursuant to an alleged agreement.

N. W. Rowell and J. W. Moran, Rat Portage, for plaintiffs.

R. C. Clute, K.C., and A. C. Boyce, Rat Portage, for defendant.

FALCONBRIDGE, C.J.—Held that the evidence was conflicting as to matters set up in the counterclaim, and that defendant had not satisfied the onus of proof. In the result the plaintiffs are entitled to judgment for $1,358.07, less $327.50, to which latter sum defendant is entitled to credit as representing the value of work and labour received by plaintiffs from him. No costs. Thirty days' stay.

Langford & Moran, Rat Portage, solicitors for plaintiffs.

Boyce & Draper, Rat Portage, solicitors for defendant.

MARCH 13TH, 1902.

DIVISIONAL COURT.

TORONTO GENERAL TRUSTS CORPORATION v. WHITE.

Landlord and Tenant—Lease—Purchase of Buildings by Lessor at End of Term—Valuation by Arbitration—Interest on Amount of Award—Possession Given to Lessor.

Appeal by plaintiffs from judgment of MACMAHON, J., upon a special case stated for the opinion of the Court. The lease in question contained a proviso for the valuation, at the end of term, of the buildings on the land, by three indifferent persons, and also provided that the reference should be entered upon, and award made, within 6 months next preceding the 1st day of November, 1900, and that within six months from said 1st day of November, the value of the buildings should be paid, with interest at 7 per cent. per annum from said 1st day of November. Arbitrators were duly appointed, and the parties agreed to extend the time for award for one month, and also until such further time as the arbitrators might extend the same. On 31st October, 1900, the lessee gave up possession, and on the 30th November, 1901, the award was made. The Judge below held that the plaintiffs, who are the executors of the deceased lessee, were not entitled to interest on the amount of the award from the 1st day of November, 1900, until the making of the award, or for any portion of the said period from the 1st day of November, and the making of the award.

F. E. Hodgins, for plaintiffs.

W. Laidlaw, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.) was delivered by

BRITTON, J.—The defendants were, as to the buildings, in the position of purchasers in possession, and the general rule in such cases is that the purchaser pays interest: Birch v. Toy, 3 H. L. Cas. 565. The test as to payment of interest seems to be possession. McCullough v. Clemow, 26 O. R. 467, is not at all like the present case. Where title is not accepted at the time of taking possession, interest is payable on the purchase money from the time of taking possession. Pigott v. G. W. R. W. Co., 18 Ch. D. 146, shews that interest will run from the time when the purchaser may prudently take possession. See also Ballard v. Shutt, 15 Ch. D. 122.

Appeal allowed and judgment directed to be entered for plaintiffs for $1,000 with interest at 7 per cent. from 1st November, 1900.

McMurrich, Hodgins, & McMurrich, Toronto, solicitors for plaintiffs.

Laidlaw, Kappele, & Bicknell, Toronto, solicitors for defendants.

MARCH 13TH, 1902.

DIVISIONAL COURT.

STEVENS v. CITY OF CHATHAM.

Municipal Corporations—Granolithic Sidewalk—Repair — Accumulation of Ice and Snow—Damages—Negligence.

Appeal by plaintiffs, husband and wife, from judgment of STREET, J., at the trial at Chatham, dismissing the action, which was brought to recover damages for injuries received by the wife from a fall on the sidewalk in the city owing to the alleged gross negligence of the defendants in permitting the sidewalk to be and continue in a dangerous state and out of repair owing to an accumulation of snow and ice. The wife on the 11th March, 1900, slipped and fell and broke her thigh bone and sustained other injuries. The sidewalk was a granolithic one, a little lower than the boulevards on each side of it. There was a sort of furrow in the middle of the accumulated snow with icy ridges on each side.

A. B. Aylesworth, K.C., for plaintiffs. The condition of the sidewalk was distinctly dangerous, and that condition had existed long enough to make it gross negligence on the part of the defendants to suffer it to continue.

M. Wilson, K.C., for defendants.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

FERGUSON, J., holding that there was no evidence of gross negligence, and that the evidence fully warranted the finding below. Appeal dismissed with costs.

J. B. Rankin, Chatham, solicitor for plaintiffs.

Wilson, Kerr, & Pike, Chatham, solicitors for defendants.

MARCH 13TH, 1902.

DIVISIONAL COURT.

REX v. McKINNON.

Statutes—Ontario Summary Convictions Act, sec. 2—Time within which Information must be Laid—Criminal Code, sec. 841.

Motion to make absolute an order nisi to quash a conviction of defendant for that in April, 1900, at the town of

Durham, he did erect on lot 11 on the west side of Garafraxa street, within the area of the fire limits established by by-law 336, a frame building.

N. W. Rowell, for defendant.

W. R. Riddell, K.C., for prosecutor.

Per Curiam (MEREDITH, C.J., MACMAHON, J., LOUNT, J.)—The Ontario Summary Convictions Act, R. S. O. ch. 90, sec. 2, has the effect of incorporating in it sec. 841 of the Criminal Code, and the information not having been laid within six months of the alleged offence, the conviction must be quashed. Order accordingly. No costs. Usual order for protection of magistrate.

Lucas, Wright, & McArdle, Owen Sound, solicitors for defendant.

J. P. Telford, Durham, solicitor for plaintiff.

MARCH 11TH, 1902.

DIVISIONAL COURT.

PHILLIPS v. MALONE.

Writ of Summons—Service out of Jurisdiction—Rule 162 (e)—Contract—Place of Performance—Quebec Law—Discretion.

The defendants, having been served with a writ of summons and order allowing the issue of such writ for service out of the jurisdiction, moved to set the same aside as having been improperly allowed. The Master in Chambers made the order as asked, and on appeal Meredith, C.J. (3 O. L. R. 47), affirmed the Master's order. The plaintiff appealed.

J. A. Worrell, K.C., for plaintiff.

George Kerr, for defendants.

A Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) affirmed the orders below.

ROBERTSON, J. MARCH 12TH, 1902.

TRIAL.

MILNER v. KAY.

Patent for Invention—Automatic Stools — Infringement — Foreign Patent—Application "within one year" for Canadian Patent —Evidence Admissible to Shew Invention in use, &c., before Patent—Onus of Proof—Modern Policy of Courts more Liberal to Protect Patents.

The plaintiff is the owner of two Canadian patents for certain new, useful, and valuable improvements on auto-

matic stools, one dated 25th November, 1897, and numbered 57,537, and the other dated 5th May, 1898, and numbered 59,888. He obtained a foreign patent in respect of his invention on 8th September, 1896, and applied for his first Canadian patent on 8th September, 1897. The action is to restrain defendants from infringing the patents and from manufacturing and selling the articles.

A. Mills and W. E. Raney, for plaintiff.

Frank Denton, K.C., and H. L. Dunn, for defendants.

ROBERTSON, J.—The 8th section of the Patent Act provides that "any inventor who elects to obtain a patent for his invention in a foreign country before obtaining a patent for the same invention in Canada, may obtain a patent in Canada, if the same is applied for within one year. . . ." After a full consideration of the cases I find that the plaintiff applied within the year as required by the section: McWilliams v. Nash, 28 Beav. 93; Russell v. Ledsam, 14 M. &. W. 574, per Parke, B., at p. 581; Webb v. Fairmaine, 3 M. & W. 473; Gurney v. Higgon, 6 M. & W. 49; Thomson v. Quirk, 18 S. C. R. 695. . . . On the whole evidence I also find that the defendants have failed to establish that the invention covered by plaintiff's patent, numbered 59,888, was known or used by any other person before the plaintiff's invention, and which has been in practical use or on sale, with the consent or allowance of the inventor, for more than one year previously to his application for patent therefor in Canada, and plaintiff is within the provisions of sec. 7. And, having regard thereto, and to sub-sec. 16 (6) (d), evidence may be given shewing that, before the patent, the invention was known, or was in possession of the public with the allowance of the inventor, and if this is established it vitiates the patent: Reg. v. La Force, 4 Ex C. R. 14; Smith v. Greey, 11 P. R. 169: but the evidence fails to establish such knowledge or possession. . . . The onus was on defendants, and they have not satisfied it: see on this point Ehrlich v. Shlee, 5 R. P. C. 206, 207; Neilson v. Betts, L. R. 1 H. L. 15, 24; Lyon v. Goddard, 10 R. P. C. 33, 11 R. P. C. 354. . . . To defeat a new patent it must be clear that the antecedent specification disclosed a practical mode of producing the discovery which was the object and effect of the subsequent discovery: Betts v. Menzies, 10 H. L. C. 117; Morrison v. American B. W. Co., 6 R. P. C. 518; Thierry v. Rickman, 12 P. R. C. 412, 428; Von Heyden v. Newstadt, 14 Ch. D. 230; Hill v. Evans, 4 DeG. F. & J. 288. . . The Courts are now more liberal in protecting patents: Carter v.

Rose, 30th April, 1890, per Boyd, C.; and Ridout on Patents, p. 36. . . . The best evidence of the improvements in plaintiff's invention is that it has gone into general use, and this turns the scale in his favour: Dion v. Dupuis, Q. R. 12 S. C. R. 473; Smith v. Dental, &c., Co., 93 U. S. R. 495. Judgment for plaintiff with reference to Master in Ordinary. Costs to plaintiff on High Court scale.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for plaintiff.

Denton, Dunn, & Boultbee, Toronto, solicitors for defendants.

MARCH 12TH, 1902.

DIVISIONAL COURT.

RE DOOLITTLE v. ELECTRICAL MAINTENANCE AND CONSTRUCTION CO.

Division Courts — Prohibition — Jurisdiction — Cause of Action— Whole Cause must Arise within Limits of Court.

Appeal by defendants from order of MEREDITH, C.J., in Chambers, refusing a motion for prohibition to the 2nd Division Court in the District of Muskoka, which was made upon the ground that the whole cause of action did not arise, nor did the defendants reside within the jurisdiction of the Division Court. The action was for damages to the plaintiff's land by flooding. The land is in the jurisdiction of the Division Court, and the plaintiff resides therein. The evidence shewed that the flooding was caused by the raising of the waters of the river Severn, and that this was caused by the defendants' dam, which was not within the jurisdiction, and which they were authorized by 62 Vict. ch. 64 to erect.

F. A. Anglin and R. D. Gunn, Orillia, for defendants.

F. G. Evans, Orillia, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—To sustain the jurisdiction of the Division Court, it must be shewn that the whole cause of action arose within its limits. To succeed in the action plaintiff must shew damage, and that it was sustained from the wrongful act of defendant. The erection of the dam was the act of the defendant, and the damage to the plaintiff was consequential upon that act. The plaintiff must plead not only damage, but the manner in which defendant is charged with having caused it, and then defendant has a right to traverse

the allegation that the damage was caused by his dam: see Bullen & Leake, 2nd ed., p. 367, and also Foot v. Edwards, 3 Blatchford (Conn.) Circuit Reports 310; Gould on Waters, 3rd ed., pp. 720-1. Appeal allowed with costs and prohibition granted with costs.

F. G. Evans, Orillia, solicitor for plaintiff.

R. D. Gunn, Orillia, solicitor for defendants.

BRITTON, J. MARCH 10TH, 1902.

CHAMBERS.

WEBLING v. FICK.

Parties — Adding Plaintiffs — Consent — Verification by Affidavit— Identity of Names.

Appeal from order of local Judge at Brantford adding F. Pritchard & Co. as parties plaintiffs.

Action for damages for breach of an agreement to sell and deliver certain apples. Upon the consent of Pritchard & Co. to their addition as plaintiffs being filed, it was found that the witness to that consent, which was executed in Liverpool, England, and not verified by affidavit of execution, bore the identically same name as the witness who signed as to the execution of the agreement in Brantford, Ontario, in respect of which the action was brought. The local Judge, however, made the order.

J. E. Jones, for defendant.

W. S. Brewster, K.C., for plaintiffs.

BRITTON, J.—The consent of Fred. Pritchard & Co. to having their names added as plaintiffs should be proved not necessarily by the subscribing witness, but by an affidavit satisfying me that the consent was really signed at Liverpool, as it purports to be. If the consent was forwarded for signature and returned in due course signed, and if the subscribing witness was in Liverpool on the 3rd January, 1902, that can be shewn. If shewn within one week, the appeal is to be dismissed and plaintiff allowed to add P. & Co. as plaintiffs. The plaintiff Webling to consent that the money deposited as security for costs shall stand as security for P. & Co., and without prejudice to defendant's applying for security for costs from P. & Co. Costs of appeal to be to

defendant in any event. If consent was not filed, appeal to be allowed with costs.

Brewster, Muirhead, & Heyd, Brantford, solicitors for plaintiffs.

Kelly & Porter, Simcoe, solicitors for defendant.

MARCH 15TH, 1902.

DIVISIONAL COURT.

HALL v. ALEXANDER.

Easement—Dominant and Servient Tenement—Covenant by Original Grantor—Discharge of Snow and Water from Roof of Dominant Tenement—Duty of Owner of.

Wheeldon v. Burrows, 12 Ch. D. 31, followed.

Appeal by defendant from judgment of junior Judge of County Court of York granting an injunction and damages. The plaintiff is the owner of house No. 18 Classic avenue in the city of Toronto, and the defendant is the owner of the adjoining house, No. 20, and ice and snow and water are discharged from his house on to the side entrance to plaintiff's house. One Turner formerly owned the land and built and sold the two houses (18 and 20) thereon, selling first to the defendant's predecessor in title. The trial Judge held that at the time of the severance of the properties the eave on the projection of the house of defendant was in existence, and shewed that it was contemplated that the water should be carried off in that way, and that as to the snow and ice, the law will not permit a land owner to create easements of a novel character, and annex them to the soil so as to bind it in the hands of future owners, and that such an easement as here claimed was not unknown: Goddard on Easements: and that there was no evidence to shew that an easement had been established either expressly or impliedly.

G. H. Watson, K.C., for defendant. The conveyance from Turner contained a clause giving the "right and privilege and use of the projection of the roof of the house (No. 20) as at present constructed over and above that part of lot 47 immediately to the east of the house," and a covenant for quiet and undisturbed enjoyment of the projection as at that time constructed, and that the grantor upon a sale of the other portion of land should reserve the right to the projection.

E. E. A. DuVernet and W. W. Vickers, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C. J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The judgment of the learned Judge below cannot be sustained. It is abundantly clear that the want of repair of the eavetrough is not the cause of the trouble. The real question is whether the defendant, whose roof and eavetrough are in precisely the same shape and condition as when the original conveyance was made by Turner to predecessor in title of defendant, is bound to prevent snow and water discharged from the clouds upon his roof from falling upon the piece of plaintiff's land in question. He is not so bound: Wheeldon v. Burrows, 12 Ch. D. 31, per Thesiger, L. J. At the time of the grant from Turner to the plaintiff's predecessor in title on 27th February, 1888, the two houses in question had been built, and the easement of shedding snow and water, as has been done ever since, was necessary to the reasonable enjoyment of the property granted. Any doubt upon this point is set at rest by the express terms of the grant, which expressly gives the right "to use the roof as at present constructed" over the portion of land which was retained by the grantor. It is quite plain that the grantor could not, after such a grant, insist upon the grantee altering the construction of the roof so as to prevent the snow and water from coming down; and the plaintiff stands in no higher position than the original grantor, Turner. The special grant of the right to maintain the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must, to a large extent, descend upon the land below. Appeal allowed with costs and action dismissed with costs.

W. W. Vickers & Co., Toronto, solicitors for plaintiff.

Watson, Smoke, & Masten, Toronto, solicitors for defendant.

MARCH 11TH, 1902.

DIVISIONAL COURT.

THOMPSON v. COULTER.

Sale of Land—Purchase Money—Payment—Evidence—Corroboration—Onus of Proof.

Appeal by plaintiffs from the judgment of the Chancellor, delivered at the trial which took place at Sandwich on the 7th October, 1901, dismissing the action with costs.

F. E. Hodgins, for plaintiffs.

R. U. McPherson, for defendant.

The judgment of the Court (MacMahon, J., Street, J., Lount, J.) was delivered by

MacMahon, J.—The plaintiffs are the executors of the estate of John David Thewes, who died on the 6th September, 1900, at the age of seventy-four or seventy-five years; and the action is brought to recover from the defendant the sum of $1,000 received by the defendant under the following circumstances:—Thewes was a farmer living in the township of Romney, in the county of Essex; he and the defendant, who is a farmer and cattle dealer in the same township, being on terms of intimacy. Thewes lived alone on his farm, and becoming ill, he was, in February or March, 1899, removed to St. Joseph's hospital, in Chatham, where until his death he occupied a room, never leaving the hospital. He advertised his farm for sale, and the defendant, desiring to purchase, saw Thewes, on the 10th or 11th May, who agreed to sell for $2,500, the defendant to pay in cash the difference between that sum and the amount of a mortgage thereon held by a loan company in London, for $1,000, and the interest then due thereon and the accrued taxes. The defendant on the 12th May paid $300 odd, and before Thewes would sign the deed he insisted on Coulter depositing the balance of the purchase money, amounting to $1,000, to his (Thewes's) credit in the Merchants Bank, Chatham, which the defendant did and brought to Thewes, at the hospital, a savings bank deposit book therefor.

On the 29th May, Coulter went to the hospital, and he stated that Thewes desiring him to withdraw the $1,000 from the bank, Thewes signed his name on a piece of paper, which he (Coulter) took to the bank, but the bank would not pay the amount on deposit unless upon a receipt signed by Thewes therefor, and Coulter was given a blank receipt, which Thewes signed,—the body of the receipt being filled in by Coulter. Coulter, having received the money from the bank, stated when in the witness box that he on the same day handed it over to Thewes, who, after counting it, folded it in a piece of paper which he put in his breast, inside his clothing.

When Thewes died, the money was not found in his possession.

In July, Thewes gave to the Rev. Pierre Langlois an order addressed to Coulter, saying: "I ask Father Langlois

to see you about my money. I wish him to have it to be put in the Merchants Bank at Tilbury in trust for me." Father Langlois said he wrote Coulter telling him what was contained in the order, and Coulter while in the box stated that he subsequently saw Thewes and told him of the receipt of the letter from Father Langlois, when Thewes replied, not to mind what the priest said. It is therefore apparent that at the time of this conversation the minds of both Coulter and Thewes were directed to the order given by Thewes as to the money which the latter alleged was in Coulter's possession, and to the demand he had directed Father Langlois to make.

There was no corroboration whatever of the defendant's statement as to his payment of the $1,000 to Thewes, the learned Chancellor holding that the onus of proving that it had not been received by the deceased rested on the plaintiffs. With great respect, I think he erred in so holding. Without adverting to other facts appearing in evidence, I think those to which I have referred are sufficient to cast the onus upon the defendant of shewing that the money was paid over by him to Thewes.

The appeal must be allowed and the judgment directed to be entered for the defendant set aside, and judgment entered for the plaintiff for $1,000, with interest from the 29th May, 1900, with costs, including the costs of this motion.

Davis & Healy, Windsor, solicitors for plaintiffs.

J. W. Hanna, Windsor, solicitor for defendant.

STREET, J. MARCH 14TH, 1902.

TRIAL.

GURNEY v. TILDEN.

Costs—Adding Defendants—Formal Order.

At the trial on 29th June last, the question was reserved as to the disposition of the costs of certain parties (other than the infant defendants), who were added as defendants after the adjournment of the trial on the 14th January previous.

STREET, J., held, after a perusal of the reporter's notes made at the trial, that it appeared that leave was given to the plaintiff to make all necessary amendments and bring

all necessary parties before the Court, but that no order was made; that the parties who have been added as parties defendants by the plaintiff are not necessary parties, and therefore he must pay their costs.

MARCH 15TH, 1902.

DIVISIONAL COURT.

TAYLOR v. DELANEY.

Appeal—Surrogate Court—Bond—Notice of Appeal.

The plaintiff gave notice that he intended to appeal from the judgment of a Surrogate Court to the Court of Appeal.

Held, a valid notice.

The bond on appeal recited that the plaintiff desired to appeal to the Court of Appeal.

Held, a valid security. Court of Appeal may be read "proper appellate tribunal."

Re Nichol, 1 O. L. R. 213, not applied.

Motion by plaintiff to quash appeal of defendant Delaney on the ground that the notice of appeal from judgment of Surrogate Court of Essex did not state the Court appealed to; and that the recital in the bond was of an appeal to the Court of Appeal.

J. H. Moss, for plaintiff.

F. A. Anglin, for defendant.

The motion was argued before a Divisional Court.

BRITTON, J.—I agree to dismissing the motion without costs.

STREET, J.—I am clearly of opinion that the sureties would be liable on the bond put in if the respondent succeeded. The bond must be interpreted in view of the law as it stood at the time it was executed. There was at the time the bond was made only one Court to which an appeal could be made, viz., a Divisional Court of the High Court, and that may fairly be taken to have been the "Court of Appeal" mentioned in the bond. We decided on the argument that the notice was sufficient.

FALCONBRIDGE, C.J.—By 58 Vict. ch. 13 (The Law Courts Act, 1895), sec. 45, appeals from the Surrogate Court were transferred from the Court of Appeal to a Divisional

Court of the High Court, but no corresponding change was made in the Surrogate Court Rules or forms; and in Mr. Howells's work, 2nd ed. (partly re-written, according to the preface, since the Act), the old forms of bond appear at p. 602. It is a case for relief from the harsh rule in Re Nichol, 1 O. L. R. 213. The bond recites that the appellant "desires to appeal to the Court of Appeal," not the Court of Appeal for Ontario, and the words may well be read as equivalent to the "proper appellate tribunal," just as in the original Criminal Code, 1892, the expression "Court of Appeal" in secs. 742 et seq. included any division of the High Court of Justice.

Motion dismissed without costs.

Clarke, Cowan, Bartlett, & Bartlett, Windsor, solicitors for plaintiff.

Murphy, Sale, & O'Connor, Windsor, solicitors for defendant.

LOUNT, J. MARCH 15TH, 1902.

CHAMBERS.

RE PERRIN.

Will—Legacy—To be Paid to Infant upon his Attaining 25 Years—Interest on.

Originating notice by an executor under Rule 938.

Paragraph 1 of the will of David Perrin, deceased, is as follows:—"I give devise and bequeath unto my beloved wife all my real and personal estate . . . to use enjoy sell dispose of assign and convey as she may see fit;" and 2 is:—"After the decease of my said wife I will and direct that whatever may remain of my said estate whether real or personal shall be equally divided among" six persons, naming them.

Paragraph 2 of the codicil is:—"I revoke the provision made in paragraph 2 of my will in favour of Augustus Sharpe," one of the six persons, "he having departed this life." And:—"Out of the estate mentioned in the said second paragraph of my will I give to Wray Sharpe son of Augustus Sharpe the sum of $500 to be paid to him without interest after the death of myself and my wife but the same shall not be paid to him until he shall have attained the age of 25 years." His wife predeceased the testator.

A. E. Watts, Brantford, for executor.

W. S. Brewster, K.C., for A. Sharpe, guardian of W. Sharpe.

LOUNT, J.—The testator and wife both being dead, the meaning to be attached is, I give and bequeath $500 to be paid without interest when Wray Sharpe shall attain 25 years. This would be a payment of the money to him at that time without interest. The testator intended and meant that if he, the testator, died before the legatee reached that age, then the legatee should get the fixed sum of $500 and no more. I do not think that the testator intended that if he and his wife should die before the time fixed for payment interest should begin to run from the date of his death, or the death of both himself and his wife.

Costs of all parties out of the estate.

MARCH 15TH, 1902.

DIVISIONAL COURT.

LAROSE v. OTTAWA TRUST AND DEPOSIT CO.

Contract—Board and Lodging—Bequest in Lieu of—Lapse.

The testatrix boarded with the plaintiff, and while so boarding made her will containing a bequest to plaintiff's wife. From the time of the making of the will, the plaintiff told testatrix he would not take any board money from her, and did not take any. The plaintiff's wife died before the testatrix, and the legacy lapsed.

Held, that, upon the proper construction of what occurred between the parties at the time deceased ceased to pay her board, the agreement was that no board was to be paid for, provided plaintiff's wife should, at the testatrix's death, become entitled to receive her legacy.

Appeal by defendants from judgment of MACMAHON, J. The defendants are administrators with will annexed to estate of Mary Kelly, deceased. In June, 1893, Mary Kelly went to reside with the plaintiff and his wife, agreeing to pay $10 a month for her board and lodging. In June, 1895, Mary Kelly by her will bequeathed a legacy of $2,000 to plaintiff's wife, Catharine Larose, to whom she also bequeathed her residuary estate, amounting to about $1,800. About the time of the making of the will Mary

Kelly became sick, and thereafter required constant attendance and nursing until her death on 4th June, 1901. After the making of the will Mary Kelly ceased to pay the $10 a montn for her board and lodging. Catharine Larose predeceased Mary Kelly, dying on the 1st June, 1901, and her legacy lapsed. The plaintiff claims $2,190, being one dollar a day for board, care, and attendance on Mary Kelly for 6 years previous to her death. The trial Judge held that the plaintiff had not been relying on bounty, and that under the circumstances the proper remuneration was at least the amount claimed.

The appeal was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J.)

A. B. Aylesworth, K.C., for defendants.

M. J. Gorman, Ottawa, for plaintiff.

STREET, J.—It appears from the evidence that when the plaintiff became aware of the fact that the deceased had by her will left a legacy of $2,000 to his wife, besides making her her residuary legatee, and a legacy of $1,000 to his daughter, he told her, in effect, that he would no longer accept pay from her for her board at his house, and that she must consider it her home for the rest of her life. I do not think it necessary to carefully scrutinize the plaintiff's statement of the precise language he used in conveying to Mrs. Kelly his meaning, for the meaning that he intended to convey is plain, and his recollection of the precise words in which he conveyed it could hardly be relied upon after the lapse of some six or seven years. A contract of some sort was entered into by reason of the fact that both parties must be taken to have acted from that time forward upon the understanding then arrived at. . . . The question is whether the contract was that no money should be charged for board, provided Mrs. Kelly did not alter her will, or whether it must be taken to have been that no money should be charged, provided Mrs. Larose should at Mrs. Kelly's death become entitled to receive the legacy and other benefits bqueathed to her. The latter is the proper construction of the understanding. . . . If Mrs. Kelly had by her own act revoked her will, he would not have been bound to continue to keep her without being paid. The allowance found by the learned Judge below, though liberal, is based on the uncontradicted evidence of Dr. Chabot, who attended Mrs. Kelly during the whole period covered by it.

FALCONBRIDGE, C.J.—From the uncontradicted evidence it is manifest that it was understood by the parties that compensation for deceased's board and attendance should be made by will, and the compensation so to be made by will and not the making of the will formed the consideration for the boarding and care of deceased for the remainder of her life. Having regard to Dr. Chabot's evidence, the amount allowed is not too much.

Appeal dismissed with costs.

M. J. Gorman, Ottawa, solicitor for plaintiff.

Scott, Scott, Curle, & Gleeson, Ottawa, solicitors for defendants.

MARCH 12TH, 1902.

C.-A.

WEST v. BENJAMIN.

Partnership—Settlement—Accounting.

Appeal by plaintiff from order of MEREDITH, C.J., upon appeals by plaintiff and also defendant from a report of the Master at Napanee upon a reference directed by the Supreme Court of Canada to take partnership accounts between the parties from and inclusive of the 1st day of January, 1882, to the dissolution of the partnership, and including in such account all the rights and liabilities, assets and effects, belonging to the partnership, as they existed on the 1st day of January, 1882, and the dealings with such property since the dissolution. The judgment of the Supreme Court recited and confirmed a settlement arrived at on February 4th, 1882.

A. B. Aylesworth, K.C., and J. H. Madden, Napanee, for plaintiff. Pursuant to the judgment the report should have allowed as an asset of the partnership on January 1st, 1882, a sum of $4,751, the amount of sundry private accounts of defendant, for which he had given partnership goods in payment and not been charged with their price, and also a sum of $2,063.03 credited as paid by defendant for partnership debts, but paid for by delivery of partnership goods, not charged to him, and both these sums could be properly taken into account without disturbing the figures of matters agreed upon by the settlement of February 1st, 1882. The Master's finding that defendant had at the time of the settlement $4,000 worth of unpaid promissory notes in his hands and

unaccounted for, and which the Chief Justice reduced by $3,000, should not be disturbed.

W. R. Riddell, K.C., and C. A. Masten, for defendant, also appealed from the order. The $3,000 allowed by the Master against defendant, and the $1,000 known as the German note should not be allowed.

The Court, composed of OSLER and MACLENNAN, JJ.A., (LISTER, J.A., having died after the argument and before judgment) allowed the appeal as to promissory notes and dismissed it as to items of $4,751 and $2,063.03. Plaintiff to have three-quarters of the costs of his appeal. The cross-appeal was dismissed with costs and judgment in other respects affirmed. It was stated that LISTER, J.A., had come to a similar conclusion.

Deroche & Madden, Napanee, solicitors for plaintiff.

Herrington & Warner, Napanee, solicitors for defendant.

BRITTON, J. MARCH 10TH, 1902.

CHAMBERS

GEARING v. McGEE.

Pleading—Amendment—Attaching Order—Defence of.

The plaintiff in a former action sued the defendants and one Robinson to enforce a mechanic's lien (see 27 A. R. 364). The plaintiff's action was dismissed as against the owners, the McGees, but his lien was declared against the interests of the Robinsons in the property. In the former action the McGees gave an indemnity to the Robinsons to protect them against liens. This indemnity was subsequently assigned to the plaintiff Gearing, who now brings this action upon it. After judgment in the former action and taxation of costs against Gearing, the McGees obtained a garnishment order attaching all moneys in the hands of Robinson and others, of Gearing, to answer the costs due the McGees by Gearing. In this action by Gearing upon the indemnity thus assigned to him, the Master in Chambers gave the defendants the McGees liberty to set up, as a defence, the above garnishment order.

The plaintiff appealed.

J. E. Jones, for plaintiff.

W. N. Ferguson, for defendant.

BRITTON, J.—Appeal by plaintiff from so much of the order of the Master in Chambers as allows defendants to amend their defence by pleading an attaching order against Robinson and others, obtained by the defendants as judgment creditors in an action against the plaintiff in which defendants recovered judgment. That judgment is in favour of defendants against the plaintiff for $471.59. This amount, with interest, or any part of it, the plaintiff is willing to allow against corresponding amount he may be entitled to in this action. The defendants say that, in addition to the $471.59 and interest, which plaintiff in his claim admits and is willing to set off, they are entitled to subsequent costs; if so, the defendants, in the event of plaintiff's recovery herein, should be entitled to set these off; and no doubt an order would be made upon application for that purpose, if plaintiff objected. The only possible object of pleading the attaching order would be to let in evidence of the state of account between plaintiff and Robinson and others, for the purpose of attempting, in that way, to get the alleged sub sequent costs of defendants upon their judgment against plaintiff, a part of which costs is for an appeal from the taxation. I am of opinion that the amendment should not be allowed. To plead this attaching order would further complicate a matter already a good deal involved. It is not a plea that can help defendants, but will embarrass the plaintiff. It does not in any way go to the merits or assist in determining the real matters in controversy between the parties.

Appeal allowed. Costs to plaintiff in any event.

DuVernet & Jones, Toronto, solicitors for plaintiff.

Millar, Ferguson, & Hughes, Toronto, solicitors for defendants.