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HIGH COURT OF JUSTICE.

CLUTE, J.

OCTOBER 22ND, 1909.

MALCOLM v. FERGUSON.

Will — Testamentary Capacity — Senile Dementia—Absence of Undue Influence—Onus—Principal Beneficiary Concerned in Preparation of Will—Costs.

The plaintiffs, who were beneficiaries under a will made by Mary Jane Daniels in 1901, sought to set aside a subsequent will made on the 9th January, 1909, alleging that the testatrix was suffering from senile dementia, and was incapable of making the will, and also alleging fraud and undue influence.

At the time the will was executed the testatrix was in her 90th year, and she died in the following February. The witnesses on both sides concurred in the statement that she was a woman of strong and determined will, and insistent upon having her own way.

The attack upon the will was chiefly made against the defendant Frances Ferguson, the residuary legatee, a widow and a relative of the deceased, who had resided for a number of years in a house adjoining that of the deceased. She was on very intimate terms with the deceased, was for many years in the habit of visiting her nearly every day, and sometimes twice a day; she nursed her during long periods of illness, and, when the testatrix had no servant living in the house, slept at her house many weeks at a time. In the will of 1901 Frances Ferguson was a beneficiary, receiving thereunder the house and lot occupied by the deceased. In a will made in 1906 she was given, in addition to the house and lot, the furniture and one-half of the residue, and in a codicil of 1908 a gift to Home Missions was cut down from $2,000 to $1,000, and a number of small legacies were cut out, she still sharing as resi-

duary legatee. She had nothing to do with the preparation of either of these wills or of the codicil.

In October, 1908, the testatrix received an injury from a fall; she recovered, but was never able to get about as she had done before. She was under the care of a nurse, who was the sister of Frances Ferguson. In November she decided to change her will, and attempted to do so by obliterating certain portions of the will of 1906 and the codicil thereto. She then directed Frances Ferguson to take the will to a solicitor, a brother of Frances Ferguson, and ascertain from him whether or not the changes made in the will and codicil were legal, and if not to have it put in legal form. This she did, and, upon being informed that, as it stood, the changes were not legally made, he prepared a document from the will and codicil, retaining, notwithstanding their obliteration, the bequest of $1,000 to Home Missions and $1,000 to Mitchell, a relative. This document so prepared was taken back again to the testatrix, who upon reading it objected to the retention of these bequests, but signed it for fear of accident or sudden death, stating that it was her intention to have these changes made.

The effect of this will was further to increase the interest which Frances Ferguson would take; she became sole residuary legatee. Matters continued thus until January, when the testatrix gave instructions to Frances Ferguson to have further changes made, and instructed her to go to Hamilton to her brother for that purpose. This she did, and the will in question was executed on the 9th January, 1909. By it the gift to Mitchell was reduced from $1,000 to $100, and that to the Home Missions was eliminated altogether, and other legacies were reduced, thereby further increasing the interest of Mrs. Ferguson by $2,500.

G. T. Blackstock, K.C., and T. M. Higgins, for plaintiffs.

G. H. Watson, K.C., for defendant Ferguson.

M. R. Gooderham, for the executors.

CLUTE, J. (after setting out the facts):—I find as a fact that at the time of the execution of the will the testatrix was not suffering from senile dementia, and was capable of making a will. There is no direct evidence of undue influence or of any influence exercised by the defendant Ferguson upon the testatrix. This concludes the question, unless, as was urged on behalf of the plaintiffs, having regard to the age of the deceased and her enfeebled condition, and the manner in which the will was prepared, the will ought not to stand. . . .

The will was prepared from instructions taken by Frances Ferguson, the chief beneficiary, by her brother, and was not read

over or explained to the testatrix, and it is alleged that her eyesight was so poor that she could not read it herself.

The defendant Ferguson stated that the reason which the testatrix gave for making the new will was that she was afraid that she would be left penniless. Of course this was absurd, and it was urged on behalf of the plaintiffs that it was a delusion, or at all events shewed that she did not know what she was doing or why she was doing it. It was not clear what she did mean, if she meant anything. I rather inferred . . that what she meant was that, owing to the increased expenses incident to her illness, her estate would be cut down so that there would not be anything left to fall into the residue after making provision for the legacies. Whether this be the correct view or not, I do not think the evidence of a nature in itself to void the will, or upon which I can declare her incompetent to make a will.

The plaintiffs relied upon . . Collins v. Kilroy, 1 O. L. R. 503; Fulton v. Andrew, L. R. 7 H. L. 448; Tyrrell v. Painton, [1894] P. 151; Boyse v. Rossborough, 6 H. L. C. 2; Adams v. McBeath, 27 S. C. R. 13; British and Foreign Bible Society v. Tupper, 37 S. C. R. 100; Re Elwanger's Will, N. Y. R. Supp. Feb. 22, 1909.

None of the cases cited closely resembles the facts in this case. . . . This is a case where the onus is upon the defendant to satisfy the Court that the testatrix had full opportunity to understand and did understand the contents of the will, and that she was a free agent at the time the will was executed. . . . Although the will was not read over . . to the testatrix, there is the evidence of the nurse, which I see no reason to doubt and which I accept, that the will was read over several times by the testatrix herself. From the peculiar characteristics of the deceased and from the evidence, I entertain no doubt that she did in fact read the will and understand it. . . . If she understood the previous wills, it would require very little mental exertion to understand this one.

The testatrix having no near relatives, it was perfectly natural that she should benefit the person from whom she had received the greatest kindness and attention. That person undoubtedly was Mrs. Ferguson. So that, whether one regards the object of her bounty or the circumstances of the preparation of the will, I am of opinion that the defendant Ferguson has satisfied the onus cast upon her of shewing, in the language of Lord Hatherley in Fulton v. Andrews, "the righteousness of the transaction." . . .

[Reference to Boyse v. Rossborough, supra; Baudains v. Richardson, [1906] A. C. 169; Perera v. Perera, [1901] A. C. 354; Barker v. Fellgate, 8 P. D. 171.]

I find that the will proved of the 9th January, 1909, is the last will and testament of Mary Jane Daniels, deceased.

The facts and circumstances detailed in this case as to the preparation of this will are of such a nature as to lead me to the conclusion that no costs should be given to the defendant Ferguson. I wish to express my disapproval of the manner in which the will was prepared. At some stage entirely independent persons might, and I think should, have been called in, either in the preparation of the will or in the reading and explanation of it to the testatrix, and for this reason I withhold costs. The action is dismissed without costs. The costs of the executors to be paid out of the estate.

DIVISIONAL COURT. OCTOBER 23RD, 1909.

BEAL v. MICHIGAN CENTRAL R. R. CO.

Railway—Fire from Engine—Destruction of Property—Evidence —Conjecture as to Cause of Fire—Findings of Trial Judge — Reversed on Appeal—Misappropriation of Evidence—Inference.

Appeal by the defendants from the judgment of MACMAHON, J., who tried the action without a jury, in favour of the plaintiffs for the recovery of $500 and costs.

The plaintiff Paul Beal was the owner of a barn, etc., in the township of Wyndham near the line of the defendants' railway. On the 22nd September, 1908, these were destroyed by fire, and damage to the amount of $500 was done, as found by the trial Judge. The plaintiff Beal was insured in the Perth Mutual Fire Insurance Co. to the amount of $300; that company paid $300 to the plaintiff Beal and took an assignment from him of all claims against the defendants for damages in respect to the fire. Beal and the company united in bringing this action to recover the value of the property destroyed, alleging that the defendants negligently allowed fire to escape from an engine and so caused the destruction.

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

D. W. Saunders, K.C., and W. B. Kingsmill, for the defendants

G. G. McPherson, K.C., for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J., who said that whether the assignment was valid was not of moment in the inquiry as to the liability of the defendants for damages, as both assignor and assignee sued as plaintiffs; referring to McCormack v. Toronto R. W. Co., 13 O. L. R. 656; King v. Victoria Insurance Co., [1896] A. C. 250.

It appeared at the trial that the Wolverine train No. 8 of the defendants passed east about 8 p.m., and that shortly thereafter the place was seen on fire. . . . The Wolverine passed . . at 8.18, a Pere Marquette train at 7.56, and another at 8.01. . . The trial Judge, coupling the evidence of the engineer that the engine was always the same, with the evidence of a witness named Donahue, who said that he had often seen the engine of the Wolverine throw sparks, considers that it has been proved that the engine was in the habit of throwing sparks (at a particular spot). Then, saying that it had not been proved that either of the Pere Marquette engines had thrown sparks, he finds that it was a spark from the Wolverine which caused the damage. . .

Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence. Of course, "when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons:" Lodge v. Wednesbury Corporation, [1908] A. C. 323, 326; . . . And "where the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses:" Coghlan v. Cumberland, [1908] 1 Ch. 704, 705; . . . Bishop v. Bishop, 10 O. W. R. 177. But where the question is not what witness is to be believed, but, giving full credit to the witness who is believed, what is the inference, the rule is not quite the same. And, if it appears from the reasons given by the trial Judge that he has misapprehended the effect of the evidence, or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse these findings. . . .

In the present case the findings are based upon misapprehensions. There is no more evidence that the Wolverine engine was throwing sparks than those of the Pere Marquette at any point from which the sparks could have got to the plaintiff's pro-

perty. It must be a mere guess that the defendants' engine sent the spark which caused the fire—if the fire was caused by a spark, and even that is not proved. . . . "It is a rule of practical wisdom that a Judge is not allowed to guess:" per Kekewich, J., in Re Howell, [1894] 3 Ch. at p. 652. This rule applies to cases of all kinds and not less so as to the present than any other. Cases not dissimilar have been decided in our own Courts. . . .

[Reference to Connacher v. City of Toronto, 4th March, 1893, Queen's Bench Divisional Court, unreported; Campbell v. Acton Tannery Co., 29th June, 1900, Court of Appeal, unreported; Shields v. City of Toronto, 1897, Court of Appeal, unreported.]

The law is quite clear that there must be evidence from which it can be fairly inferred, not simply guessed, that the damage was caused by the defendants. . . .

The plaintiff has failed to meet the onus cast upon him by the law, and to prove that the fire which caused the damage came from the defendants' engine.

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

MEREDITH, C.J., IN CHAMBERS. OCTOBER 26TH, 1909.

ARMSTRONG v. PROCTOR.

KENNER v. PROCTOR.

McCALLUM v. PROCTOR.

Writ of Summons—Service out of the Jurisdiction—Order Authorising—Place where Service to be Effected not Stated—Practice—Time for Delivery of Defence—Rules 162, 164, 246.

Appeals by the plaintiffs from orders dated 11th October, 1909, made in each of these cases by the local Judge at Stratford, setting aside the service of the writ of summons, statement of claim, and order for service (sic) made by him on the 4th September, 1909.

W. E. Middleton, K.C., for the plaintiffs.

Featherston Aylesworth, for the defendant.

MEREDITH, C.J.:—In each case an order was made by the local Judge at Stratford, on the 4th September, 1909, giving leave to the plaintiff to issue a writ of summons for service out of the

jurisdiction on the defendant, who is described as "at present residing at the city of Vancouver, in the province of British Columbia."

The second paragraph of this order gives liberty to the plaintiff "to file and deliver his statement of claim herein for service with the said writ of summons."

Paragraph 3 provides that service of copies of the writ and statement of claim and of the order—not saying where effected—are to be good service of them on the defendant, and paragraph 4 provides that the time for appearance and for delivery of the statement of defence, if any, by the defendant, is to be within 30 days after the service thereof, inclusive of the day of service.

If the order allows service to be made out of the jurisdiction, the service was, I think, properly made at Vancouver, and the ground on which the learned local Judge set aside the service was untenable.

Con. Rule 162 provides that in certain excepted cases service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge, and it was under that Rule that the order was made.

By Con. Rule 164 it is provided that an order allowing service of a writ or notice of a writ out of Ontario shall limit the time for entering appearance, and by paragraph 4 of that Rule it is provided that in regulating the time for entering an appearance regard shall be had to the place where service is to be effected.

There is nothing in either of these Rules which in terms requires that the order shall state the place where the service is to be effected.

In the present case, as I have said, the defendant is described as residing at Vancouver, and there can be no doubt, I think, that the time for appearance was fixed having regard to that being the place where service was to be effected, and that it was intended by the order to allow service to be effected there.

Different considerations would, of course, apply if the service had been effected elsewhere than at Vancouver.

Then does the order allow service to be effected out of Ontario? It does not in terms provide for that being done, but, with some hesitation, I have come to the conclusion that in effect it does so provide. Liberty is given to issue a writ of summons for service out of Ontario on the defendant, "who is at present residing at" Vancouver, and it is ordered that service of copies of the writ and statement of claim on the defendant be good and sufficient service of them on him, and, taking these two provisions

of the order together, they may, I think, be read as giving liberty to serve the summons and statement of claim out of Ontario.

Mr. Aylesworth called attention upon the argument to the provision of the order fixing 30 days from the service of the statement of claim as the time within which the statement of defence was to be delivered, and contended that this was unauthorised, as the defendant was entitled under Con. Rule 246 to 8 days from the expiration of the time for appearance in which to deliver his statement of defence.

I am of opinion that Mr. Aylesworth's contention is well founded, and that the order should be varied by striking out so much of it as requires the defendant to deliver his statement of defence within the time limited for appearance.

The appeals will be allowed and the order of the 4th September, 1909, varied as I have mentioned, and, subject to that variation, the defendant's motions will be dismissed.

The costs of the motions and of the appeals will be costs in the cause.

RIDDELL, J. OCTOBER 26TH, 1909.

ALLEN v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Goods—Liability for Loss—Contract with Express Company—Absence of Privity between Shipper and Railway Company—Form of Action—Tort or Contract—Special Terms of Contract—Right of Railway Company to Benefit of—Agency—Construction of Contract.

Action by a manufacturers' agent and commission merchant to recover the value of a trunk of merchandise alleged to have been destroyed by the negligence of the defendants while in transit on their line near Smith's Falls. The plaintiff gave a written order to the Dominion Express Co. to carry the trunk from Toronto to Quebec. The defendants supplied the car, but the contents were wholly under the control and in the possession of a servant of the express company. The express company asserted that their liability was at most $50 under the terms of the shipping bill; the plaintiff sued the defendants for the full value of the goods.

Shepley, K.C., and G. W. Mason, for the plaintiff.

W. Nesbitt, K.C., and A. D. Armour, for the defendants.

RIDDELL, J.:—The first objection on the part of the defendants is that there is no privity of contract between them and the plaintiff: and, of course, that is so, and, if this action depended upon a breach by the defendants of some contract with him, the plaintiff must fail. Under the old system of pleading in which the plaintiff must set out his claim in contract or in tort, there were many instances in which the action failed by reason of the form of pleading. . . .

[Reference to Alton v. Midland R. W. Co., 19 C. B. N. S. 213; Marshall v. York, etc., R. W. Co., 11 C. B. 655; Govett v. Radnidge, 3 East 62; Pozzi v. Shipton, 8 A. & E. 963.]

Under our present practice, when the battle-ground is removed from the paper, and it is the facts and not a lawyer's ideas of how the case should be reduced to writing which governs, there is no trouble as to the frame of action. Much of the learning as to torts and contracts has become obsolete.

"It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with them or not:" per A. L. Smith, L.J., in Taylor v. Manchester, etc., R. W. Co., [1895] 1 Q. B. 134, at p. 140, citing Marshall's Case, supra; Austin v. Great Western R. W. Co., L. R. 2 Q. B. 442; Foulkes v. Metropolitan District R. W. Co., 5 C. P. D. 157. And Berringer v. Great Eastern R. W. Co., 4 C. P. D. 163, is to the same effect. . . . [Reference also to Meux v. Great Eastern R. W. Co., [1895] 2 Q. B. 387.]

Then the defendants cannot derive any assistance from such cases as Bristol and Exeter R. W. Co. v. Collins, 7 H. L. C. 134. . . In Coxen v. Great Western R. W. Co., 5 H. & N. 274, as in Mytton v. Midland R. W. Co., 4 H. & N. 615, the frame of the action was in contract.

Failing in their contention that an action in tort does not lie against them, the defendants say that the goods in question were carried under an agreement with the express company, and that the express company had made an agreement with the plaintiff to the benefit of which they are entitled.*

* The shipping bill was as follows:—

NOT NEGOTIABLE. Read this receipt. Form 6, Aug., '93.

THE DOMINION EXPRESS COMPANY, LIMITED.

Received from Benjamin Allen of Toronto:

The undermentioned articles which we undertake to forward to the nearest point to destination, reached by this Company, subject expressly to the following conditions, namely: This Company is not to be held liable for

The particular provision in the contract to be first considered is this: "And it is also understood that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom, through this company, the below de-

any loss or damage, except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God, or of the enemies of the Government, the restraints of Government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war. Nor shall this Company be liable for any default or negligence of any person, corporation or association, to whom the below described property shall or may be delivered by this Company, for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this Company, and any such person, corporation or association is not to be regarded, deemed or taken to be the agent of this Company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this Company received the property below described. It being understood that this Company relies upon the various Railroad and Steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars, or of any steamboat upon which said property shall be placed for transportation; nor by the neglect or refusal of any Railroad Company or Steamboat to receive and forward the said property.

It is further agreed that this Company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said Company or their servants; nor in any event shall this Company be held liable or responsible, nor shall any demand be made upon them beyond the sum of Fifty Dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein; nor upon any property or thing, unless properly packed and secured for transportation; nor upon any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the below described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this Company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of warehousemen only. And if the articles herein mentioned are not removed from the office of the said Company, and charges paid thereon in one year from the date of this receipt, it is agreed that the said Company may sell the same at Public Auction for their charges, including the cost of sale thereon, but all articles in the opinion of the said Company of a perishable nature may be disposed of at their discretion if the charges are not paid at once or the consignee cannot be found. In no event shall this Company be liable for any loss or damage, unless the claim thereof shall be presented to them in writing at this office within ninety days from this date, in a statement to which this receipt shall be annexed. And it is also understood that the stipulation contained herein shall extend to, and inure to the benefit of each and every company or person to whom, through this Company, the below described property may be entrusted or delivered for transportation. THE DOMINION EXPRESS COMPANY, Limited, assumes no liability for delays, losses or non-delivery beyond their lines. Deliveries at all points reached by this Company are only to be made within the delivery limits established by this Company at such points at the time of shipment, and prepayment in such cases shall only cover places within delivery limits. The party accepting this receipt hereby agrees to the conditions herein contained.

Date, 1907.	Articles	Value	Consignee	Destination.
Feby. 28	One trunk	Prepaid	The Victor M. F. Co.	Quebec.

scribed property may be intrusted or delivered for transportation." The defendants allege that they come within the words "company or person to whom" etc. . . .If it be that the goods were being carried by the defendants under a special contract with the plaintiff, his position is not improved by suing in tort rather than in contract. . .

[Reference to Powell v. Layton, 2 B. & P. N. R. 365, 370; Legge v. Tucker, 1 H. & N. 500; Morgan v. Raney, 6 H. & N. 265; Baylis v. Lintot, L. R. 8 C. P. 345; Lake Erie and Detroit River R. W. Co. v. Sales, 26 S. C. R. 663.]

The condition of the special contract insisted upon is the latter part of this sentence: "It is further agreed that this company is not to be held liable or responsible for any loss or damage to said property or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants; nor in any event shall this company be held liable or responsible, nor shall any demand be made upon them beyond the sum of $50, at which sum said property is hereby valued, unless the just and true value thereof is stated herein."

The argument that the defendants are entitled to the benefit of this condition of the special contract is based upon . . . Lake Erie and Detroit River R. W. Co. v. Sales, 26 S. C. R. 663. [Examination of that case.]

Full effect must be given to this decision, and if the present case were on all fours with the Sales case, these defendants should be held entitled to take advantage of the shipping bill . . . It will, however, be necessary to examine the bill with care, remembering that this is a commercial contract and should be interpreted in a business-like sense.

[The learned Judge then analysed the various provisions of the shipping bill, and pointed out wherein they differed from the provisions in question in the Sales case.]

If it were considered that these defendants were within the meaning of "company . . to whom, through the company, the . . property may be intrusted or delivered for transportation," the question would arise whether they could take advantage of this contract made by another company, for their benefit indeed, but without their privity. Since Tweedle v. Atkinson, 1 B. & S. 393, it has been clear law that, except under special circumstances, if A. make a contract with B. in favour of C., C. cannot take advantage of it in an action with B.—for want of privity. There may, of course, be special circumstances such as appear in Gregory v. Williams, 3 Mer. 582; Mulholland v. Merriam, 19 Gr. 288; and

Coleman v. Hill, 10 O. R. 178. I have in Kendrick v. Barkey, 9 O. W. R. 356, given some account of the cases.

The defendants in the Sales case based their contention . . . upon the express provisions in the Grand Trunk Railway shipping bill, cl. 11, that the Grand Trunk Railway Company "is to act only as agent of the owner of the goods as to that portion of the said rate required to meet the charges of other carriers beyond the company's line," and that in handing over the goods to the connecting carrier the Grand Trunk Railway Company "shall be held to be the agent of the owner"—the argument being that the Grand Trunk Railway Company handed over the goods to the Lake Erie and Detroit River R. R. Co. under the terms of their shipping bill as agent of the owner, and consequently the owner, through his agent pro hac vice, entered into the contract with the Lake Erie, etc., Co. relied upon by them. Effect was given to this contention: see 26 S. C. R. at p. 676. . . . No such provision is found in the contract in the present case; the Dominion Express Co. is not made the agent of the owner to enter into a contract for him with any other company. . . . The Dominion Express Co. is neither agent nor principal of the connecting carrier, but the connecting carrier is the agent of the plaintiff. And where the stipulation is made which covers the defendants here, there is no provision for agency at all—it would be absurd to consider that when the express company placed the goods in question upon the car of the defendants they were acting as agents of the plaintiff and not as contractors with him. . . .

No defence can be based upon the clause in the agreement between the two companies (sec. 13) that the express company "will assume all responsibility and satisfy all valid claims for the loss of or damage to express matter in its charge . . and will hold harmless and keep indemnified the railway company against any claim . . for damage . . which may be occasioned by accidents to trains on the railway . . .:" Jennings v. Grand Trunk R. W. Co., 15 A. R. 477. . . .

In case anything should ultimately turn upon any fact, I find that the evidence of the plaintiff is wholly to be relied upon.

I am satisfied with the evidence as to value.

The plaintiff will have judgment for the equivalent in our money of 16,000 francs and costs.

DIVISIONAL COURT. OCTOBER 26TH, 1909.

HUTCHINSON v. ROGERS.

Mechanics' Liens—Building Contract—Claim of Contractor—Additional Work—Value of—Consent—Non-completion of Work—Damages for Delay—Inclemency of Weather — Extension of Time—Architect—Negligence.

Appeal by the defendant (the owner) and cross-appeal by the plaintiff (the contractor) from the judgment of an official referee in an action to establish and enforce a lien under the Mechanics' and Wage-Earners' Lien Act.

The plaintiff's claim was upon an agreement dated 30th October, 1906, between him and the defendant, by which the plaintiff agreed to execute and perform the entire excavating, masonry, and brickwork required for the erection of a warehouse for the defendant, agreeably to the plans, drawings, and specifications prepared for the works by Denison & Stephenson, architects, and to find and provide material of all kinds for completing the said works, for $17,300, and upon a subsequent agreement of the 10th January, 1907, by which the plaintiff agreed to build an extra ground floor story in the warehouse for $4,640. The plaintiff also claimed payment for additional work, consisting of alterations to, deviations from, and additions to the original plans and specifications, and for the material used therein, for all of which he alleged the defendant agreed to pay him.

The amount which the plaintiff claimed to recover in respect of the two contracts was $40, and in respect of the additional work was $5,232.10.

The referee found that the plaintiff was entitled to recover $3,250.21, and that he was entitled to a lien for that sum. The referee did not give effect to any of the objections urged against the plaintiff's right to recover, and disallowed the defendant's claim for damages.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

A. B. Morine, K.C., for the defendant, conceded that the plaintiff had performed additional work to the value of $3,066.51, for which he had not been paid, and that, if he had completed his contract so as to be entitled to sue for what remained unpaid of the

contract price, there remained due to him on the contract, apart from the additional work, $40; but contended that the work which the plaintiff contracted to do had not been completed, and that his action must, therefore, fail; that in any case the work had not been completed within the time limited by the contract, and that the defendant was therefore entitled, under its provisions, to $500 as liquidated damages for each week that elapsed after the time so limited during which the work remained uncompleted, and that the defendant was entitled to damages for the negligent manner in which the plaintiff had constructed the basement story of the warehouse; also that the plaintiff was not entitled to be paid for the additional work because an order in writing for the doing of it was not given in accordance with the terms of the contract, and urged that until the architect had determined what was proper to be paid for it, the plaintiff was not in any case entitled to recover for the additional work.

E. E. A. DuVernet, K.C., and W. B. Milliken, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.:— In addition to the reasons given by the referee for holding that the contracts had been performed so as to entitle the plaintiff to recover, his judgment may be supported on the further ground that the sidewalk which was said by the defendant not to have been properly laid was no part of the warehouse . . but a separate and independent piece of work, and his failure to lay it would not disentitle him to recover for what was payable to him on the completion of the contract.

The other objection . . was that it was the duty of the plaintiff under his contract to tar the whole of the outside basement walls below the ground level, and that he had not done this; but we agree with the view of the referee that the tarring of these walls was not work which the plaintiff was under the contract bound to do.

With regard to the claim for additional work, it is, in view of what occurred before the referee, not open to the defendant to raise the objection urged before us. . . . This sum of $3,066.51 had been agreed on by Mr. Stephenson, one of the architects, and Mr. Aldridge, a builder called as a witness on behalf of the plaintiff, as the value of the extras, and this was done with the consent of counsel.

We also agree in the view of the referee that the defendant was not entitled to the $500 a week for the delay beyond the time fixed by the contract for completion. There was ample evidence to warrant a finding that the failure to complete the work by the

stipulated date was, in part at all events, due to the performance of the work being prevented by the acts of the defendant.

The evidence establishes that there was no unreasonable delay on the part of the plaintiff, and that it was impossible in any case to have completed the work by the stipulated date owing to the considerable addition to it caused by the addition to the warehouse of another story and the inclemency of the weather. It may be that as to the additional story the plaintiff was not entitled to any extension of time owing to his not having, at the time the agreement as to the work was made, taken care that an extension was provided for. Different considerations, however, apply to an extension on account of delay occasioned by the inclemency of the weather. The 12th paragraph of the contract provides as follows: "Should any work be delayed beyond the time mentioned in the agreement by the inclemency of the weather . . . the architect shall make a just and reasonable extension of time." In McNamara v. Skain, 23 O. R. 103, it was decided that a contractor was not entitled to any extension of time, none having been given by the architect. . . . In that case the provision was that the architect should have full power to extend the time for completion, which plainly gave to the architect a discretion as to whether any extension should be granted. As I read the 12th paragraph . . the architect has no such discretion, but is bound, if there has been delay owing to the causes mentioned in the paragraph, to make a just and reasonable extension of the time, and his failure to perform that duty ought not to subject the plaintiff to the serious consequences which would result from the conclusion that, not having applied for and obtained an extension, he was bound to complete by the time named in the contract, with the consequent liability to the large damages for which the defendant stipulated as the penalty for the delay.

With regard to the claim for damages for negligence in the construction of the basement story, it is sufficient to say that we see no reason to doubt the correctness of the view taken by the referee that no damages were proved to have resulted from this negligence, if negligence on the part of the plaintiff was established.

. . .

Appeal of the defendant dismissed with costs, and appeal of the plaintiff also dismissed with costs.

MEREDITH, C.J.C.P. OCTOBER 28TH, 1909.

RE ST. PATRICK'S MARKET.

Deed—Construction—Condition Subsequent — Invalidity—Contingent Reversionary Interest.

The Corporation of the City of Toronto having applied under the Quieting Titles Act for a certificate of title to the land known as St. Patrick's market, the appellants, among others, were notified of the proceedings, and filed claims to be entitled to a contingent reversionary interest in the land under the deeds given to the city corporation by the late D'Arcy Boulton, deceased, and the late Sarah Boulton, deceased, his wife, and their claims were disallowed by the Referee of Titles.

The land was conveyed by D'Arcy Boulton to the city corporation by deed dated the 8th June, 1837. The grant was to the corporation for the purpose of a public market, and the habendum was to the corporation and their successors "in trust for the use and purpose of establishing, keeping, and maintaining a public market for the benefit and advantage of the citizens of Toronto and others resorting thereto and for the public sale of all such articles and things as may be brought to the same, subject nevertheless to such rules and regulations," etc.

Following the habendum was a proviso in these words: "Provided always that if the said City of Toronto shall at any time hereafter alienate the said piece or parcel of land or any part thereof, or use or apply the same to any other use or purpose than for a public market as hereinbefore mentioned, then these presents and every matter and thing herein contained shall be utterly null and void to all intents and purposes whatsoever, and the said piece or parcel of land hereby conveyed shall from thenceforth revert to the said D'Arcy Boulton, his heirs and assigns, in as full and ample a manner as if these presents had not been made."

The appellants claimed under this proviso, as the heirs of D'Arcy Boulton.

H. T. Beck, for the appellants.

E. D. Armour, K.C., and H. Howitt, for the city corporation.

MEREDITH, C.J., held, following In re Trustees of Hollis Hospital and Hague's Contract, [1899] 2 Ch. 540, that the Referee of Titles rightly disallowed the claim of the appellants. In the case referred to it was held that the proviso was an express common law

condition subsequent, and that it was obnoxious to the rule against perpetuities, which was applicable to such a condition, and was therefore void.

[Reference also to In re Ashworth, Sibley v. Ashworth, [1905] 1 Ch. 535; Law Quarterly Review, vol. 16, p. 10.]

If it were possible to treat the conveyance as granting the land to the corporation so long as the land should be used as a public market, the result would be different, for in that case when the land ceased to be used for that purpose it would fall into the inheritance for the benefit of the heir of the grantor: Attorney-General v. Pyle, 1 Atk. 435. This is not, however, the form or effect of the conveyance. It is a grant of the whole estate of the grantor, subject to a condition that the grant shall be void and the land revert to the grantor, his heirs and assigns, upon the happening of the event with which it deals.

Appeal dismissed with costs.

RIDDELL, J. OCTOBER 28TH, 1909.

FORSTER v. FORSTER.

Husband and Wife—Alimony—Wife Leaving Husband—Refusal to Return unless Money Allowance Guaranteed—Costs—Cash Disbursements of Plaintiff's Solicitor.

An action for alimony.

R. S. Robertson and R. F. Segsworth, for the plaintiff.

W. Mulock, for the defendant.

RIDDELL, J. (after setting out the facts and referring to the evidence, which shewed that the plaintiff had voluntarily left the place where the defendant was living with his mother, he being ill with typhoid fever):—She called to see her convalescing husband several times and spoke to him about the future. She insisted that he should give her some guarantee, as she says, as to the amount of money he would allow her if and when she came back to live with him. He as often said that he would not give any guarantee; that he did not know what money he could make or would have, but that he would do the best he could. She refused absolutely to agree to go back to live with him unless he would give her such guarantee, and that position she has maintained all along ever since, and firmly maintained it in the witness box. . . .

The defendant has repeatedly offered in good faith to make a home for her; she has repeatedly declined, as her pre-requisite of a guarantee was not complied with. . . .

It is contended that the husband is living separate from the wife without any sufficient cause and under such circumstances as would have entitled her, by the law of England as it stood on the 10th June, 1857, to a decree for restitution of conjugal rights, and therefore, under our statute, she is entitled to alimony. Nelligan v. Nelligan, 26 O. R. 8, is cited for the proposition that the only bar to an action for alimony against a husband who is living separately from his wife is cruelty or adultery on the part of the applicant. Of course that is so, but it must first be shewn that the husband is so living separately without the consent of the wife.

Rae v. Rae, 31 O. R. 321, does not advance the case of the plaintiff, nor does Ferris v. Ferris, 7 O. R. 496. . .

[Reference to 3 Bl. Com. 94; McKay v. McKay, 6 Gr. 380; Gracey v. Gracey, 17 Gr. 113; Edwards v. Edwards, 20 Gr. 392; Keech v. Keech, L. R. 1 P. & D. 641; Fitzgerald v. Fitzgerald, ib. 694, 698; Burn's Eccl. Law, 9th ed. (1842), vol. 3, p. 267; Field v. Field, 14 P. D. 26; Brown & Bales Div. & Mat. Causes, 7th ed., p. 81.]

The question whether a wife insisting upon such a guarantee from her husband, before coming again to live with him, is really calling upon him to resume marital relations, can have only one answer. . . . I can find no cause for this action for alimony; it is wholly unwarranted by the facts, and must be dismissed.

I suppose that I am bound by the authorities to direct the defendant to pay the actual cash disbursements of the plaintiff's solicitor, but I do it most reluctantly, and only because I must. It is putting an additional burden upon this unfortunate man, who has been doing his best to satisfy a dour, unreasonable woman.

APPENDIX.

SYMS v. MCGREGOR—MASTER IN CHAMBERS—OCTOBER 23RD.

Mortgage—Right to Assignment.]—A motion for the plaintiff for summary judgment in an action for possession against the mortgagor, who had conveyed away the equity of redemption, was dismissed, the defendant being ready to pay on having an assignment of the mortgage to his nominee pursuant to R. S. O. 1897 ch. 121, sec. 2. *Semble*, distinguishing Leitch v. Leitch, 2 O. L. R. 233, 236, and following Queen's College v. Claxton, 25 O. R. 282, and Wheeler v. Brooke, 26 O. R. 96, that the section relied an applied. H. E. Rose, K.C., for the plaintiff. L. F. Heyd, K.C., for the defendant.

RE AIKEN AND RAY—MEREDITH, C.J.C.P.—OCTOBER 23RD.

Vendor and Purchaser.]—Upon a motion for further directions and costs reserved by an order made upon an application under the Vendors and Purchasers Act, it was ordered that each party should bear his own costs throughout. The Chief Justice pointed out that the order made on the original application, as drawn up and issued, did not conform to the order as pronounced, which was that the reference should be merely to take evidence as to the possession of the vendor of the land, to which she was unable to shew any title but one depending on length of possession. The order as issued directed a reference to inquire if the vendor could make a good title to the land in question, and if so when a good title was first shewn, etc. C. H. Porter, for the vendor. R. B. Henderson, for the purchaser.

MCCULLY V. MCCULLY—MASTER IN CHAMBERS—OCTOBER 27TH.

Interim Alimony.]—In an action for alimony the Master considered and overruled several objections raised by the defendant to a motion for interim alimony and disbursements, and fixed a monthly allowance of $16 from the service of the writ of summons and $50 for interim disbursements. W. Laidlaw, K.C., for the plaintiff. J. A. Macintosh, for the defendant.

MCCALL V. CANE & CO.—MASTER IN CHAMBERS—OCTOBER 27TH.

Particulars.]—A motion by the defendants for particulars of the statement of claim before the delivery of the statement of defence was dismissed by the Master. The action was on a contract made on the 5th April, 1907, by which the plaintiff sold to the defendants certain white pine lumber then in logs. W. Laidlaw, K.C., for the defendants. W. E. Middleton, K.C., for the plaintiff.

GOODALL V. CLARKE—RIDDELL, J.—OCTOBER 27TH.

Contract—Shares.]—This was an action to enforce an agreement by the defendant for the assignment to the plaintiff of shares in a mining company, in consideration of moneys advanced by the plaintiff to the defendant. The defendant, having sold and transferred his shares, paid $5,000 into Court. An issue of fact was raised as to whether the agreement had become effective, not having been executed by one Crawford. This issue the learned Judge decided in favour of the plaintiff, and directed a reference to determine the amount of damages to which the plaintiff was entitled; the defendant to pay the plaintiff's costs up to judgment; further directions and subsequent costs reserved. H. Cassels, K.C., for the plaintiff. G. H. Watson, K.C., and W. R. Wadsworth, for the defendant.

MITCHELL V. KOWALSKY—MASTER IN CHAMBERS—OCTOBER 28TH.

Chattel Mortgage—Foreclosure—Extension of Time.]—The plaintiff held a chattel mortgage for $4,500 on 300 Russian pictures valued by the mortgagor at over $200,000. The mortgage becoming in default, an action was begun and an order made directing foreclosure on the 1st November, 1909, unless the defendant paid $1,000 on the 1st October and $4,372.45 on the 1st November. The $1,000 was paid, and the defendant now moved for a further extension of 3 months. The Master referred to Imperial Trusts Co. v. New York Securities Co., 9 O. W. R. 45, 98, 730, and made the order as asked, upon terms as to payment of costs and payments on account at certain dates. A. Cohen, for the defendant. A. C. McMaster, for the plaintiff.

MCMILLAN V. THORP—DIVISIONAL COURT—OCTOBER 28TH.

Partnership—Interpleader.]—This was an appeal by the plaintiff (claimant), from the judgment of the County Court of Wellington in favour of the defendants (execution creditors) upon an interpleader issue as to a car-load of potatoes seized by the defendants under execution against the goods of one McMillan, the father and partner of the plaintiff. The Court (BOYD, C., MAGEE and LATCHFORD, JJ.), held, upon the facts, reversing the finding of the County Court Judge, that the execution debtor, the father, had no interest in the property seized, the partnership agreement between the father and son being a peculiar one, by which the son was to be the owner of all the assets and to have all the profits, and the father was to get his board, clothing, and reasonable pocket money. There was, as the Court found, no element of fraud which should induce the making of a colourable association between father and son to be regarded as a subterfuge or cloak or as having no real existence. Appeal allowed with costs. C. R. McKeown, K.C., for plaintiff. J. J. Drew, K.C., for defendants.