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MEREDITH, C.J. FEBRUARY 3RD, 1909.

WEEKLY COURT.

RE BOWERMAN AND HUNTER.

Devolution of Estates Act — Registration of Caution after Expiry of Three Years—Approval of Official Guardian—Vested Interest of Infant in Land Devolving—Construction of secs. 14, 15, 16—Revesting in Personal Representative—Sale with Approval of Guardian.

The following case was stated for the opinion of the Court, under the Vendors and Purchasers Act:—

"Certain objections to the title were made under the contract of sale, dated 9th December, 1908, between L. H. Bowerman, as vendor, and Mary Ann Hunter, as purchaser, all of which have been satisfactorily disposed of, except the following, and, in order to narrow the point to be decided, a stated case has been agreed on as to the facts which give rise to the point in dispute.

"Mary Elizabeth Lee acquired an estate in fee simple by purchase of lot 38, plan 516, Wallace avenue, Toronto, on 5th May, 1890, and died intestate 24th October, 1904, leaving her surviving her husband, Frederick William Lee, and one infant child, Mary Helen N. Lee, without having sold or disposed of said lands. On 5th December, 1904, letters of administration were granted by the Surrogate Court of the county of York to Frederick William Lee, husband.

"The said administrator, Frederick William Lee, filed a caution under the Devolution of Estates Act more than 3 years after the decease of the said intestate, Mary Elizabeth

Lee. It is admitted that the administrator, pursuant to the provisions of the said statute, obtained the consent in writing of the adult beneficiary of the estate of the said Mary Elizabeth Lee, before filing the said caution..

"Subsequently the said administrator sold and conveyed the said lot 38, plan 516, Wallace avenue, Toronto, to the vendor, with the concurrence and consent of the official guardian on behalf of the infant Mary Helen N. Lee, which consent is evidenced by the official guardian indorsing his consent to the said conveyance in the usual way.

"The vendor asserts and the purchaser denies that the said conveyance by the administrator, with the concurrence and consent of the official guardian on behalf of said infant, is sufficient to convey the said infant's interest in the lands of her mother, the intestate.

"The opinion of the Court is requested on the above."

A. C. Heighington, for the purchaser, contended that, the estate having vested in the infant, there was no provision in the Devolution of Estates Act for registering a caution after the lapse of 3 years, in the case of an infant's lands; consequently, that the administrator could not, after such lapse, convey for the infant, even with the consent of the official guardian. He cited the following passages from Armour on the Devolution of Land: "The provision for obtaining a consent implies a capacity in the heir or devisee to give the consent; and therefore infants and persons of unsound mind are not within the effect of this clause, and no subsequent caution could be obtained as against their interests:" p. 155. "If this reasoning is sound, it follows that no order can be made when the heir or devisee is an infant or of unsound mind. The official guardian does not act under this clause for or on behalf of infants, but as a substitute for a Judge, and only where adult heirs or devisees do not consent. It is true that by sec. 16 the official guardian is given power to approve, on behalf of infants and lunatics, of sales by executors and administrators—but only of the sales of land vested in the executors or administrators under the Act. And where the land has passed from the executors or administrators to an infant or lunatic, there seems to be no way of revesting it in the personal representative:" p. 156. He also referred to Armour on Titles, 3rd ed., p. 344 et seq.

W. J. Clark, for the vendor.

M. C. Cameron, for the official guardian.

MEREDITH, C.J.:—With all respect for Mr. Armour's opinion, I think it is plain that the objections of the purchaser are not entitled to prevail, and that a good title can be made.

The scheme of the Devolution of Estates Act, R. S. O. 1897 ch. 127, is that land shall devolve upon the personal representative in the same way as personal property does, but that, at the expiration of 12 months from the death of the testator or intestate, unless a caution is in the meantime registered, the land shall vest in the person beneficially entitled to it. The caution remains in force for 12 months, but may be renewed from time to time. This period of one year was, by subsequent legislation, extended to 3 years. (See 2 Edw. VII. ch. 17.)

It was found that the object of the Act, which was, in part at least, to render unnecessary the expense of administering an estate in Court, was frequently frustrated owing to the neglect of the personal representative to register or to re-register the caution in time, and an amendment was, therefore, introduced by which it is provided that where the personal representative, by oversight or otherwise, has omitted to register or to re-register a caution in due time, he may, subject to the provisions which are contained in what is now sec. 14 of the revised statute, register it.

Section 14 provides that "where executors or administrators have, through oversight or otherwise, omitted to register a caution within 12 months after the death of the testator or intestate, as provided by the preceding section, or have omitted to re-register a caution as required by the said section, they may register the caution in either case notwithstanding the lapse of the 12 months respectively provided for the said purposes, provided they register therewith:—

"1. The affidavit of verification therein mentioned;

"2. A further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate (or the part thereof mentioned in the caution, as the case may be), under their powers and in fulfilment of their duties in that behalf;

"3. The consent in writing of any adult devisees or heirs whose property or interest would be affected; and

"4. An affidavit verifying such assent; or

"5. In the absence and in lieu of such consent, an order signed by a High Court Judge or County Court Judge, or the certificate of the official guardian approving of and authorising the caution to be registered, which order or certificate the Judge or official guardian may make. . . ."

Section 15 deals with the effect of the caution:—

"15. In case of such caution being registered or re-registered under the authority of the preceding section, such caution shall have the same effect as a caution registered within 12 months from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees or some of them; and save also and subject to any equities on the part of the non-consenting heirs or devisees, or persons claiming under them, for improvements made after the expiration of 12 months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators."

Section 16 gives to the executors or administrators in whom the estate is vested as full power to sell and convey "for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto whether there are debts or not, as they have in regard to personal estate," subject to a proviso that where infants or lunatics are beneficially entitled to the estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, and there are no debts, the sale shall not be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian.

Two objections to the title are made:—

First, it is said that these provisions are applicable only where the devisees or heirs whose interests are to be affected are all adults.

Second, that the land having become vested in the heirs owing to the failure to register the caution, there is nothing to divest the estate or take it out of them and to transfer it to the executors.

I think neither objection is entitled to prevail.

The object of the legislation is manifest, and the language used is, in my opinion, sufficient to give effect to that object.

The third pre-requisite to the right to register the caution is "the consent in writing of *any* adult devisees or heirs whose property or interest would be affected," plainly meaning, I think, the consent in writing of such of the devisees or heirs whose property or interest would be affected as are adults. As Mr. Cameron pointed out, they are the only persons who would be really interested in preventing the registration of the caution, because an infant cannot deal with his property, and there are ample means of protecting the interests of the infant provided by the subsequent sections of the Act requiring the intervention of the guardian before a sale effectual to bind his interest can be made.

Then the legislature has thought that it might not be reasonable to require that there should be the consent of the adult devisees or heirs, and therefore provision is made that, where they do not consent, an order signed by a High Court Judge or a County Court Judge, or the certificate of the official guardian approving of and authorising the caution to be registered, may be registered in lieu of the consent provided for by clause 3.

This case, in my opinion, comes within the very words of the section, and the caution was therefore properly registered.

I have no more doubt as to the meaning of sec. 15: "In case of such caution being registered or re-registered under the authority of the preceding section, such caution shall have the same effect as a caution registered within 12 months from the death of the testator or intestate. . . ." That language, I think, plainly means that the effect is to be to re-vest the land in the personal representative, just as it would have been vested, or remained vested, which perhaps would be more accurate, if the caution had been registered within the 12 months. If the caution had been registered in due time, the land would have remained vested in the personal representative, and the registration of the caution under sec. 14 could not have the same effect as the registration of a caution in due time, unless it is given the effect I have mentioned, or unless, by the ex post facto operation of sec. 16, the statutory vesting in the beneficiaries is to be treated as if it had not taken place, and quacunque via the same result is reached.

If anything be necessary to shew that that is what was intended, the words which follow shew it—"save as regards

persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them"—words which would be senseless unless the effect of the registration of the caution was to re-vest the land in the personal representatives, and they have the effect of preventing the registration of the caution from having the effect of revesting the shares of beneficiaries which had been transferred for valuable consideration to other persons.

Then, by sec. 16, the executors and administrators, in whom the real estate is vested under the Act, are deemed to have full power to sell and convey the real estate.

I am unable to agree with the view to the contrary contended for by Mr. Heighington, and supported by the opinion of Mr. Armour which he cited. It may be that the statute is not well drawn, but the language used presents no difficulty in the way of giving effect to what is the very plain intention of the provisions I have had to construe.

The result is, that there will be a declaration that, in the circumstances of this case, the personal representative, with the consent of the official guardian acting on behalf of infants, may exercise the powers conferred by sec. 16 of the Act.

I suppose, as this may be treated as a test case, it would not be reasonable to make Mr. Heighington's client pay the costs.

MULOCK, C.J. MARCH 25TH, 1909.

TRIAL.

LA BANQUE NATIONALE v. USHER.

Husband and Wife—Promissory Note Signed by Wife at Request of Husband—Absence of Fraud—Husband Acting as Agent for Bank—Note Given to Secure Indebtedness of Husband to Bank—Wife Acting without Independent Advice—Liability.

Action upon a promissory note made by the defendant William J. Usher and the defendant Nellie Usher, his wife.

F. A. Magee, Ottawa, for plaintiffs, cited, among other cases, Howes v. Bishop, 25 Times L. R. 171.

W. L. Scott, Ottawa, for defendant Nellie Usher.

Judgment in favour of the plaintiffs against the defendant William J. Usher had been given on 26th January, 1909.

MULOCK, C.J.:—At the close of the argument of this case yesterday, it was urged by counsel for plaintiffs that judgment be reserved until the Supreme Court delivered judgment in Stuart v. Bank of Montreal.* Having carefully considered this suggestion, I have reached the conclusion that the law involved in this case is fully covered by authorities, and that no useful purpose would be served by me withholding judgment. I will, therefore, now dispose of the case.

The action is brought upon a promissory note dated 16th December, 1907, made by the defendants, husband and wife, for $2,439, payable on demand, to the plaintiffs or order.

It appears that the husband was liable to the plaintiffs on a note made by one Pepper, and was also indebted to them in other amounts. Pepper absconded, and the husband desired to get possession of the Pepper note, and made application therefor to the bank. The manager agreed to deliver the note to the husband, if he would procure and bring to the bank the note of himself and his wife covering the total indebtedness and liability of the husband to the bank, and also a trifling sum of about $20 owing by the wife herself. The husband agreed with the manager to endeavour to procure his wife's signature, and thereupon the manager prepared a note dated 17th November, 1907, payable at the expiration of one month, for $2,439, being the amount of the husband's indebtedness and liability, and including the trifling sum owing by the wife. This note he handed to the husband for the purpose of his taking it to the wife for her signature. Thereafter the husband returned this note to the bank, signed by himself, and purporting to be also signed by the wife, but she has no recollection of having signed it. She had, however, been in the habit of signing notes at her husband's request, and it may be assumed that she signed this note. It was not paid at maturity, and the banker says it was renewed, and that he repeated the former pro-

*The decision of the Court of Appeal in that case is reported in 12 O. W. R. 958, 17 O. L. R. 436. Judgment was given by the Supreme Court of Canada on the 5th April, 1909, allowing the appeal of the plaintiff.

cedure, preparing a note payable on demand, bearing date 16th December, 1907, for the said sum of $2,349, payable to the order of La Banque Nationale, and delivering it to the husband that he might obtain his wife's signature thereto. That note the husband took to his wife, and in the witness box Mrs. Usher stated that he came to her, asked her to sign it, and she signed it. He did not explain to her the nature of the transaction, the amount for which the note was drawn, nor when it was payable; he evidently treated his wife as a creature in his hands to do as he willed, and she, apparently an affectionate and confiding wife, deemed it her duty to meet her husband's wishes, and thus, without a single thought as to the nature of the transaction, or as to the liability which she was asked to assume, she signed the note in question as surety for her husband's indebtedness.

I make no findings in respect of the first note. The probabilities may be that she went through the same process in connection with that note as the note sued upon; but I am not dealing with probabilities; the evidence, and the only evidence we have here, is that of the wife. The bank manager did not say that the signature on the former note (which he says bore her signature) was her signature; he took it to be her signature; he may or may not have been familiar with her signature—his conduct would be evidence that he believed it to be her signature; but there is no evidence that she signed the first note. The issue here, however, is limited to the note sued upon. The whole transaction comes down to this, that the bank chose to appoint the husband their agent to endeavour to secure the signature of his wife to the note in question, and the bank's case is that he was successful. The wife was without the benefit of independent advice. Married women as a class are not in position to resist the importunities of husbands to become liable for their husbands' debts. It seems to me against public policy that a married woman should be left in a position where she must either resist demands of this nature from her husband, with the probable result of domestic differences, or yield, and run, with the not unlikely result of losing her property. In either case she would be a loser.

I take it to be the law that a married woman is presumed to be under the influence of her husband, and is, therefore, incapable of becoming surety for his debts so as to bind her estate, unless the presumption of undue influ-

ence is rebutted by her having the protection of independent advice before becoming such surety. It is essential to the validity of such transaction that she be a free agent—to that end she should have an opportunity of deliberately considering, under independent advice, whether or not, in all the circumstances, it is expedient for her to become liable for her husband. Was she here a free agent, voluntarily assuming a liability? The bank prepared the note for her signature, and employed her husband as their agent to procure it; the husband went to her and did procure it, without her appreciating the nature of the transaction and the possible consequences. It is not a question whether he unduly desired to influence her; his influence was active and effective at the time; and, however quietly or gently or affectionately exercised, it was that influence which induced the wife without a thought to sign a note for an amount she knew not what, and payable she knew not when. In form only was it her note. Her hand signed it, but it was not her free act and deed, but in substance the act of her husband.

As I interpret the views of the majority of the Court in Cox v. Adams, 35 S. C. R. 393, a married woman cannot bind herself as surety for her husband at his request unless she have independent advice in regard to her assuming such liability. For this reason alone, I think the plaintiffs cannot recover against her.

It is also to be observed that here the bank employed the husband as their agent to procure the wife's signature, and as such agent he procured her signature without her being advised as to the amount of liability she was assuming when the note would mature, or the reason for her signing. Beyond the fact that it was a note in favour of the plaintiffs, she understood nothing of the transaction. The case comes within the class of cases illustrated in Chaplin v. Brammall, [1908] 1 K. B. 233. The plaintiffs are affected by the conduct of their agent; and the wife, by reason of the plaintiffs' conduct, not knowing the nature of the agreement into which she entered, is entitled to be relieved therefrom and to have her signature to the note cancelled.

The action, therefore, should be dismissed with costs.

APRIL 5TH, 1909.

C.A.

RE WRIGHT AND COLEMAN DEVELOPMENT CO.

Mines and Minerals—Abandonment of Application for Claim —Effect of Subsequent Application for Same Claim— Validity—Discovery—Work on Ground — Staking —Recording—Mining Act—Powers of Commissioner—Parties —Trusteeship—No Findings on Evidence—Mandamus— Appeal from Decision of Mining Commissioner — Reference back.

Appeal by Tiberius J. Wright from the order of a Divisional Court, 12 O. W. R. 248.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

J. Shilton, for the appellants.

W. M. Douglas, K.C., and A. G. Slaght, Haileybury, for the company, the respondents.

MOSS, C.J.O.:—This is an appeal, pursuant to leave granted, from a judgment or order of a Divisional Court pronounced on an appeal by the Coleman Development Co. from an order of the Mining Commissioner.

The matter concerns a mining claim described as the west half of the north-east quarter of the south half of lot No. 2 in the 3rd concession of the township of Coleman.

The order of the Mining Commissioner declared that the stakings and applications of the Coleman Development Co. upon the property, and being applications numbered 1771½, 48½, 90½, and 194½, respectively, were invalid, and that the record of them in the books of the Mining Recorder should be cancelled, and that the application of Tiberius J. Wright was the only valid and subsisting application upon the property.

The Divisional Court reversed this order, and in substance declared that the Coleman Development Co. were the owners of and entitled to the only valid and subsisting claim in respect of the property, but one member of the Court was of opinion that the case ought not to have been finally dis-

posed of by the Court, but that it should be remitted to the Mining Commissioner for adjudication by him upon the real merits and substantial justice of the case.

The Mining Commissioner had dealt with the matter in one aspect only, viz., whether in law the Coleman Development Co.'s claims were invalidated by reason of certain proceedings taken on the property by them or on their behalf. The Mining Commissioner decided that their claim was extinguished or abandoned by operation of law, relying for this position upon Australian and United States decisions.

The Divisional Court was unanimous in holding that the case could not be made to turn upon that question. It was held, and we agree, that there was no abandonment, and that the rights of the Coleman Development Co. were not to be finally disposed of on that ground.

The Court then entered upon the merits, which had not been dealt with by the Mining Commissioner. There seem to be some weighty objections to the adoption of this course, which might well have led to the acceptance of the suggestion made by Riddell, J., that the case be remitted to the Mining Commissioner.

Apart from the consideration that there were no findings on the evidence, and that the case was hardly ripe for an appeal, there was the objection that Sharpe, who was shewn to be interested with Wright, was not a party. No doubt, in making the application to the Mining Recorder, Wright was representing Sharpe as well as himself, but when the matter assumed the shape in the Divisional Court of substantially an action to declare Wright a trustee for the Coleman Development Co. of the whole claim, that issue should not be determined in Sharpe's absence.

As we have come to the conclusion that the proper course is to remit the case to the Mining Commissioner for trial, it is not in accordance with our practice to discuss the evidence so far as it was developed. But it is proper to draw attention to the effect attributed by the Chancellor to the recording of the Coleman claim of 10th August, 1906, as of that date, under an order made upon an application for a mandamus. The learned Chancellor says that this recording gives the claim standing and priority over the Wright claim recorded as of 16th September. It must be remembered, however, that the order for mandamus was applied for and

granted without any notice to Wright or Sharpe or any person having an interest to oppose it.

The question of its effect, if any, upon the rights of the parties, is, therefore, open, if, in the course of the contest, it should appear to be important.

The order now made is that the orders of the Mining Commissioner and of the Divisional Court be vacated and the matter remitted for trial by the Mining Commissioner, who is to add Sharpe as a party and proceed to determine all claims, questions, and disputes in respect of the mining claim in question, and the rights, title, and interest therein of the parties or any of them.

The costs of the proceedings up to the present, including the costs of the appeals to the Divisional Court and this Court, will be disposed of by the Mining Commissioner.

MEREDITH, J.A., was of the same opinion, for reasons stated in writing.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

LATCHFORD, J. APRIL 13TH, 1909.

CHAMBERS.

EMPIRE CREAM SEPARATOR CO. v. PETTYPIECE.

Venue—Motion to Change—County Court Action—Contract —Representations of Agent — Convenience — Appeal — Costs.

Appeal by defendant from order of Master in Chambers, ante 740, dismissing application of defendant for an order changing the venue from Toronto to Sandwich and transferring the action from the County Court of York to the County Court of Essex.

H. M. Mowat, K.C., for defendant.

D. G. Galbraith, for plaintiffs.

LATCHFORD, J.:—Except as to items amounting to a few dollars, this action is based upon two orders addressed to the plaintiffs and signed by the defendant at Amherstburgh.

By these he agreed to pay to the plaintiffs $136.25 for 3 cream separators directed to be shipped to him at Amherstburgh. The defendant, in signing the orders, acknowledged that the plaintiffs' travelling representative, through whom the contracts were made, was not authorised to make any verbal arrangement whatever except as indorsed on the orders. The orders bear no indorsement. The defendant also entered into a contract to purchase from the plaintiffs the separators mentioned in the orders. A term of the contract so made is that the plaintiffs will not be responsible for any understanding, verbal or otherwise, not contained in the agreement, unless made in writing over the signature of one of the plaintiffs' officers or branch managers. The defendant sets up in his defence representations alleged to be false which were made to him by the plaintiffs' travelling representative. To establish these representations and their falsity, he will, he says, require to call 6 witnesses who reside near Amherstburgh. If the defence set up were open to the defendant, the overwhelming preponderance of convenience would warrant a change in the venue laid in the statement of claim. But, in view of the agreements signed by the defendants, such a defence cannot, I think, succeed, and the appeal must be dismissed: Wellington v. Fraser, 12 O. W. R. 1141; reversed on appeal, ib. 1175.

To mark, however, my disapproval of the form of the plaintiffs' contracts, which are obviously devised to enable the plaintiffs to take advantage of any false and fraudulent representations their agents may make, the dismissal will be without costs.

LATCHFORD, J. APRIL 13TH, 1909.

CHAMBERS.

ST. MARY'S AND WESTERN R. W. CO. v. WEBB.

Venue—Naming Place of Trial in Writ of Summons not Specially Indorsed—Effect of—Subsequent Naming of another Place in Statement of Claim—Practice.

Appeal by plaintiffs from order of Master in Chambers directing that plaintiff amend his statement of claim by striking out the words "the city of Brantford" as the place

of trial of this action, and substituting therefor the words "the city of Stratford."

C. A. Moss, for plaintiffs.

W. R. Wadsworth, for defendant.

LATCHFORD, J.:—In the writ of summons, which was not specially indorsed under Rule 138, cl. 2, the plaintiff named Stratford as the place of trial. The mention of any place of trial in a writ not specially indorsed has, in my opinion, no binding effect. It is not done in compliance with any Rule. On the other hand, Rule 529 (a) prescribes that the plaintiff shall in his statement of claim name the county town in which he proposes that the action shall be tried. The plaintiff in this case so named the city of Brantford. It is not suggested that any inconvenience will result to the defendant by the selection of Brantford as the place of trial. That selection in the statement of claim, deliberately and compulsorily made, cannot, I think, be affected by the naming of Brantford in the writ.

It would be otherwise if the writ were specially indorsed: Segsworth v. McKinnon, 19 P. R. 178.

The appeal is allowed with costs to plaintiff in any event of the action.

LATCHFORD, J. APRIL 13TH, 1909.

TRIAL.

McDIRMOTT v. COOK.

Guaranty—Conditional Promise to Pay Debt of Another—Formation of Partnership — Condition not Fulfilled — Assignment of Money Claim—Order for Payment—Same Condition Applicable.

Action by P. McDirmott against Reinhart Cook and I. S. K. Weber to recover from defendant Cook a large sum for money lent by plaintiff and money paid by plaintiff for defendant Cook, and to recover from defendant Weber the same amount upon an alleged guaranty.

On default of appearance judgment was entered against the defendant Reinhart Cook on 10th February, 1909, for

$12,672.95. The action then proceeded against defendant Weber.

G. A. McCaughey, North Bay, and J. McCurry, North Bay, for plaintiff.

W. L. Haight, Parry Sound, for defendant Weber.

LATCHFORD, J.:—As against defendant Weber, the action was based wholly upon a telegram sent by him to the plaintiff. The telegram is as follows: "Berlin, Sept. 14th, 1907. P. McDirmott: Will guarantee claim against Cook. Meet me Toronto Monday. Answer. I. S. K. Weber."

At the trial I gave leave to the plaintiff to amend his statement of claim by setting up the following order: "Berlin, Ont., Sept. 14th, 1907. Mr. I. S. K. Weber, Berlin. Dear Sir: I hereby authorise you to pay Mr. Patrick McDirmott claim against me out of the moneys coming to me under the agreement dated August 27th, 1907. Yours truly, Reinhart Cook."

The agreement of 27th August was an option given by Cook to Weber, whereby the latter was given the right to purchase Cook's one-half share or interest in timber berth No. 90 on the north shore of Lake Huron, for the sum of $30,000. The date on or before which the option was to be exercised was 10th September, 1907.

Cook and McDirmott were jointly interested in the timber berth. McDirmott told Weber and Weber's father that he was a half owner. His real position was that of an accommodation indorser for Cook. McDirmott's indorsation had enabled Cook to borrow large sums from the Traders Bank, and the bank held an assignment of the license. Cook was also indebted to McDirmott upon two promissory notes, one for $1,030 and the other for $930, and on other accounts, to an amount in all of about $2,500.

Weber and his father, while the option from Cook was in force, met McDirmott at South River, his home, and discussed with him the purchase they contemplated making, and proposed a partnership with Weber senior. McDirmott stated to the Webers that before anything was done $2,500 or $3,000, which he claimed from Cook, would have to be paid. All considered that, before a partnership between Weber and McDirmott was entered into, the Traders Bank would have to be satisfied to accept the incoming partner in the place of Cook. A meeting at the head office of the

bank was arranged, but Weber senior failed to keep his appointment, and McDirmott refused to have anything to do with the son, the defendant I. S. K. Weber. In the meantime, and prior to the meeting of the plaintiff and the defendant Weber at Toronto, the guaranty relied on by the plaintiff had been sent in reply to the following telegram: "South River, Ontario, Sept. 14th, 1907. I. S. K. Weber: I have to get $3,000 from Cook's half for accommodation notes and expenses. Will do nothing till this is paid. P. McDirmott."

The defendant Weber then obtained from Cook the order authorising Weber to pay McDirmott, and Weber sent McDirmott the telegram purporting to guarantee McDirmott's claim against Cook.

The partnership, however, which all parties had at the time in mind, was not entered into. The defendant, and not his father, met the plaintiff at Toronto, and the plaintiff refused to enter into a partnership with the defendant. McDirmott says he declined to have anything to do with the defendant. "The deal was off." The promissory notes for $1,030 and $930, which were among the liabilities the defendant was to assume, were afterwards renewed by the plaintiff and Cook, and still form a liability of Cook to the plaintiff.

In December, 1908, McDirmott and Cook sold and conveyed the timber berth to the defendant Weber, in consideration, as to Cook, of $1, and as to McDirmott, of $15,000, paid on his account by Weber to the Traders Bank. McDirmott contends that, notwithstanding the fact that the partnership contemplated in September, 1907, was not entered into, he is entitled to avail himself of the guaranty and order of 14th September.

I cannot so hold. Both documents were made upon the understanding that a partnership would be formed. "Will do nothing till this is paid," in the plaintiff's telegram of 14th September, is admitted to mean that plaintiff would not form partnership until the $3,000 was paid. The guaranty was sent in order that McDirmott should become a partner with Weber senior in working the berth, in which Weber then intended to purchase Cook's interest. They did not so purchase, and the guaranty failed. Something remained to be done to give effect to it, and that thing was not done: Kastner v. Wistanley, 20 C. P. 101.

The order given by Cook to Weber was also based upon the partnership. It was never communicated to plaintiff. In fact, plaintiff had no knowledge of it until it was produced at the trial. It cannot be regarded as an equitable assignment, and the plaintiff is not entitled to recover upon it any more than upon the guaranty.

The acts of the Webers and Cook subsequently appear to have been conducted with a view to preventing the plaintiff and other creditors of Cook from realising anything out of Cook's interest in the timber berth, and might properly be questioned in an action differently constituted.

But in the present case no course is, I think, open to me but to dismiss the action with costs.

RIDDELL, J. APRIL 13TH, 1909.

TRIAL.

HESSEY v. QUINN.

Landlord and Tenant—Lease of Hotel—Lease by Executors —Effect of one not Joining—Beneficial Owner for Life Executing as Executor—Proviso for Reasonable Rebate of Rent in Certain Event—Happening of Event—Enforcement of Proviso—Reference to Ascertain Amount of Rebate.

Action for a declaration as to the amount of rent payable by the plaintiff for an hotel and premises, in the circumstances mentioned in the judgment.

F. E. Hodgins, K.C., and J. T. Mulcahy, Orillia, for plaintiff.

A. E. H. Creswicke, K.C., for defendants.

RIDDELL, J.:—James Quinn, by his will, left all his real and personal estate to his executrix, Mary Wilson Quinn, and his executors, G. T. B. and W. G., in trust, first, to pay debts, etc., and "in the second place to hold the same unto and to the use of my said wife Mary Wilson Quinn for and during the term of her natural life." Upon her death the remainder was to be divided amongst his children in such

proportions as the wife should by will appoint, and, in default of appointment, equally (with one exception not necessary to mention here). "My said executors and the survivors and last survivor of them shall have full power and authority to mortgage, sell, lease, and otherwise generally deal with . . . all or any part of my property," etc. James Quinn died in 1898. Probate was granted to all three.

On 15th May, 1899, an indenture in pursuance of the Act respecting short forms of leases was engrossed in duplicate, the parties being the said executrix and executors, of the first part, and the plaintiff herein, of the second part. This was executed by Mrs. Quinn, Mr. G., and the plaintiff, but the other executor, Mr. B., did not execute the indenture. The property leased was part of the real estate passing under the will; it was an hotel in Orillia; the term was 10 years from 1st May, 1899; the rental $1,200 per annum: "provided that, in the event of any law being enacted in the future which shall prohibit the sale of intoxicating liquors upon the demised premises, the said lessors shall make a reasonable rebate in said rent during the period of such prohibition, provided that the lessee, his heirs and assigns, shall, during the existence of this lease and any renewal thereof, carry on the business of hotel-keeping therein and conduct same under the name of the 'Orillia House' for the entertainment of the travelling public."

The plaintiff went into possession, and so continues: he has kept the premises as an hotel. A by-law was passed by the town of Orillia, in 1908, prohibiting the sale of liquor in taverns and shops. This, after being sustained by the Chief Justice of the Common Pleas, was quashed by a Divisional Court: Re Hickey and Town of Orillia, 17 O. L. R. 317, 12 O. W. R. 68, 433. A motion for leave to appeal to the Court of Appeal was dismissed by Mr. Justice Osler: 12 O. W. R. 650; as such an appeal would be a needless appeal, the Provincial Secretary having refused his consent to the issue of licenses under the provisions of sec. 11 of 8 Edw. VII. ch. 54. This dismissal of the motion for leave to appeal took place in September, 1908, and in November, 1908 (the certified copy of the pleadings makes this date 6th November, 1909), this action was begun.

The tenant is the plaintiff: the defendants "Mary Quinn and John A. Quinn, executors of last will of James Quinn, deceased."

By order of the Court, made in 1907, it was ordered and adjudged that "John Alexander Quinn be and he is hereby appointed an executor and trustee of the said estate in the place of and in substitution for the said William Grant, and that the estate be vested in Mary Wilson Quinn and John Alexander Quinn, subject to the trusts of the said will . . ."

As to what has become of G. T. B., and what his relations to the estate, we are not informed.

The plaintiff claims a declaration as to the amount of rent payable by him; the defendants set up that the lease has not been duly executed and is void, and therefore the plaintiff is only a tenant from year to year; that no law has been enacted prohibiting the sale of intoxicating liquors upon the premises; and ask a dismissal of the action.

The defendants are willing to take the premises off the plaintiff's hands, but not to reduce the rent; the plaintiff is willing to pay a reduced rent, but not to give up the hotel; both agree that the facts as to the by-law, etc., are as set out in the reports already referred to in 17 O. L. R. and 12 O. W. R.

I do not think it necessary to pass upon the question as to the effect of the indenture, the third lessor not having executed. The cases cited for the plaintiff, however, have no application: Simpson v. Guthridge, 1 Madd. 616; Doe dem. Hayes v. Sturges, 7 Taunt. 217. These are cases in which one executor has dealt with personal property, i.e., a term of years, and not with real property, by granting a term of years. Of course, executors under the law of England have nothing to do with real estate as executors. By our law the estate vested in the 3 executors named, but the will itself makes them trustees.

At the time of the making of the lease and now, the beneficial owner of the property was and is Mary Wilson Quinn. The executors would not have been permitted to make a lease of this property without her consent: Lewin on Trusts, 10th ed., p. 708. She executes the lease and covenants for quiet enjoyment. She is the owner in equity for her life; and, at least during her life, the lease is valid and effective.

The action is sufficiently framed for a declaration under the present circumstances.

As to the facts, a "local option" by-law was passed 8th February, 1908, which had the effect (assuming its validity)

of preventing the sale of liquor from and after 1st May, 1908. This by-law was valid until it was set aside, 29th June, 1908; in the meantime an Act was passed, 14th April, 1908, which gave even to this invalid by-law the status of a condition preventing the issue of a tavern license to the plaintiff without the written consent of the Minister: 8 Edw. VII. ch. 54, sec. 11. Without such license a sale of liquor by the plaintiff, in the ordinary method of selling liquor in a hotel, is illegal. This "law," 8 Edw. VII. ch. 54, sec. 11, has been enacted since the lease, and it does most effectively prohibit the sale of intoxicating liquors upon the demised premises, by preventing the delivery to the plaintiff of that without which he cannot legally so sell.

It is true that this prohibition may be removed by the written consent of the Provincial Secretary being obtained; but, unless and until such written consent be obtained, there is a law prohibiting sale.

It is unnecessary to consider whether any sale of any kind might be made by the plaintiff; the lease must be construed in view of the property leased and the intent of the parties; and it is quite clear what the parties meant by prohibiting "the sale of intoxicating liquor upon the demised premises."

The plaintiff is entitled to a "reasonable rebate on the rent" during the time he is prohibited by law from selling. It is a matter of indifference whether this rebate be considered as a part of the rent secured by the lease being returned to the lessee, upon his paying the full sum, or, what is more probable ("rebate" being defined as "an allowance by way of discount or drawback," "a deduction from a gross amount"), as an amount to be retained by the lessee out of the gross amount secured by the lease.

I do not find any difference in the principle that the rent must be a profit certain or capable of being reduced to a certainty by either party: Woodfall, p. 438. Here the amount of rent, as fixed by the instrument, is certain, so that the lease is effective; and there is nothing to prevent the lessors agreeing to reduce the rent by any sum, so long as such an agreement would be valid between parties under different relations from those of landlord and tenant. Nor does the difficulty arise which might, had the agreement to reduce the rent been merely oral: Crowley v. Vitty, 7 Ex. 319. It could scarcely be argued that an agreement to pay or deduct a reasonable sum is too indefinite to be enforced.

Here the equitable owner of the property, the same person who is entitled to the rent, has agreed to make a reasonable rebate, under circumstances which have happened.

I think she must do so. It will be referred to Mr. Cotter to inquire what such reasonable rebate will amount to.

The defendants will pay the costs up to and including judgment. Further directions and costs reserved until after report.

MEREDITH, C.J. APRIL 14TH, 1909.

CHAMBERS.

NIXON v. JAMIESON.

Writ of Summons—Service out of Jurisdiction—Rules 162, 163—Affidavit—Sufficiency — Cause of Action — Agent's Commission on Sale of Goods—Place of Payment—Breach of Contract — Place of Acceptance — Correspondence — Parol Evidence—Intention as to Place of Payment—Conditional Appearance.

Appeal by defendants from an order of the Master in Chambers, ante 634, refusing to set aside the service of the writ of summons and statement of claim and his own order of 12th December, 1908, allowing service of the writ to be made out of Ontario, but giving the defendants leave to enter a conditional appearance.

C. A. Moss, for defendants.

W. E. Middleton, K.C., for plaintiff.

MEREDITH, C.J.:—The defendants are manufacturers, residing and carrying on business in Scotland, and the plaintiff is a manufacturer's agent, residing and carrying on business in Ontario, and the action is brought to recover commissions on sales of goods manufactured and sold by the defendants, in respect of which the plaintiff claims to be entitled to commission.

The plaintiff has been employed as the agent of the defendants in Canada for several years. His employment was arranged for by correspondence, and the contract between the parties was completed by a letter from the plaintiff to the

defendants, written and posted at Toronto, accepting an offer made by the defendants to him in a previous letter from them. The contract was, therefore, made in Ontario, and the part of it which was to be performed by the plaintiff was to be performed within Ontario.

Nothing, however, is said in the correspondence as to how or in what manner the payments of commissions were to be made, but the course of business has invariably been for the plaintiff to draw on the defendants at sight for his commissions, and for the defendants to accept and pay the drafts in Scotland.

Unless the adoption of this practice takes the case out of the principle upon which Hoerler v. Hanover, 10 Times L. R. 22, 103, and Blackley v. Elite Costume Co., 9 O. L. R. 382, 5 O. W. R. 57, were decided, these cases are conclusive against the defendants, and the order of the Master in Chambers was rightly made.

According to the legal construction of the contract, the place of payment was, I think, where the plaintiff carried on his business, and parol evidence is not admissible to shew that the contrary was the intention of the parties: Greaves v. Ashlin, 3 Camp. 426; Ford v. Yates, 2 M. & G. 549. It follows, I think, that the contract is to be treated as if it contained this provision as an expressed term of it, and, therefore, evidence of the course of business after the contract was made is not admissible to shew that the parties meant that payment should be made in Scotland: Beal on Legal Interpretation, 2nd ed., p. 126.

The rule which admits proof of existing facts dehors a written document in order to construe it, is limited to facts relating to it which were existing at the time the written contract was made and which were known to both parties: Beal on Legal Interpretation, 2nd ed., pp. 123 4.

For these reasons, I am of opinion that the order was rightly made and must be affirmed, and the costs of the appeal will be costs in the cause to the plaintiff in any event of the action.

APRIL 14TH, 1909.

DIVISIONAL COURT.

RICHARDSON v. SHENK.

Contract—Sale and Delivery of Mining Shares — Breach—Specific Performance—Damages—Measure of—Delay in Completion—Reasonable Time.

Appeal by plaintiff and cross-appeal by defendants from judgment of MEREDITH, C.J., in an action for specific performance of an alleged contract by defendants to deliver 15,000 shares of Temiskaming Mining Co. shares to plaintiff, or for damages for breach of the contract. The trial Judge found that there was a contract, but held that plaintiff was entitled only to the difference between the contract price and what the stock could be bought at on 20th August, 1908, which amounted to $3,600. The plaintiff appealed for the purpose of getting the shares or larger damages. The defendants cross-appealed for a dismissal of the action.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

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

H. E. Rose, K.C., for defendants.

FALCONBRIDGE, C.J.:— . . . I am of the opinion that the telegram of 14th July from defendant Charles E. Shenk to plaintiff, "Do not send draft until you hear from me further," did not convey the intimation to plaintiff that defendants then refused to carry out the contract, so as to make the breach occur on the receipt thereof. So that plaintiff had a right for a reasonable time to await further action by or advice from defendants. But he certainly could have no right to wait until 2nd November, when the stock had advanced in price from about 40 to over 175.

I think the learned Chief Justice fixed a reasonable date —20th August—and the price of that day affords the rule for the measure of damages.

It is not a case for specific performance; for one reason, the plaintiff has shewn himself "ready, desirous, prompt, and eager:" Milward v. Earl March, 5 Ves. 720n., cited in Fry on Specific Performance, 3rd ed., sec. 1102; Mills v. Hayward, 6 Ch. D. 196.

As to the cross-appeal, there undoubtedly was a contract; such contract was not rescinded by mutual consent, and the breach did not occur on 14th July.

The appeal and cross-appeal both fail, and both are dismissed without costs.

BRITTON, J.:—I am of opinion that both appeal and cross-appeal should be dismissed and without costs. I agree with the learned trial Judge, and for the reasons given by him, that the plaintiff was not bound to accept the telegram of 14th July as an unqualified refusal to sell, or as breach of defendants' contract. The plaintiff was entitled to wait a reasonable time. The learned trial Judge has found that reasonable time to be until 20th August, and that finding of fact we should not disturb. There was a contract, the plaintiff was ready to pay and to receive the shares, the defendants were not ready to receive the money, and, as the plaintiff had a right to assume, because the defendants were not ready to deliver the shares. The defendants, by the telegram, requested plaintiff not to pay until further notice. Plaintiff accepted this, and acted upon it by writing. I do not think plaintiff was obliged then and there to notify defendants that he would wait. How long was plaintiff to wait, in the absence of further word from defendants? A reasonable time, in my opinion. What did the defendant Charles E. Shenk mean by his telegram? What did he intend that plaintiff should understand by it? What did the plaintiff understand by it? What would any reasonable man understand on receipt of such a message, in the circumstances? The whole matter was before the learned trial Judge, and he has, I think, put the correct construction upon the defendant's message.

The defendants were apparently willing to accept the judgment, and there would have been no appeal by them, had the plaintiff not appealed.

Complete justice will, in my opinion, be done by leaving the matter as it was left by the trial Judge.

RIDDELL, J., for reasons stated in writing, was of opinion that the appeal of the plaintiff should be dismissed, and that of the defendants allowed and the action dismissed, without costs of action or of appeal to either party.

RIDDELL, J. APRIL 15TH, 1909.

CHAMBERS.

RE REID.

Practice—Forum—Court or Chambers—Motion by Assignee for Benefit of Creditors for Directions—Rule 938—Court Motion Made in Chambers—Refusal to Enlarge into Court, Respondent not Appearing.

Donald Reid made an assignment for the benefit of his creditors to R. J. McNabb. Shortly after this his house and the contents thereof, partly covered by insurance, were destroyed by fire. The insurance policy included the chattels exempt from seizure.

The assignee served upon the insolvent a notice of motion, returnable in Chambers, for an order directing the assignee as to the proper division to be made of the insurance money.

The motion purported to be made under Con. Rule 938.

It came before RIDDELL, J., in Chambers, on 13th April, 1909.

W. A. F. Campbell, Georgetown, for the assignee and creditors.

No one appeared for the insolvent.

RIDDELL, J.:—Assuming that the present is a case within Rule 938, the motion can be made only to a Judge in Court. I have no jurisdiction in Chambers to dispose of the application, nor should I remove it into Court, the insolvent not appearing.

The motion will be refused.

TEETZEL, J., APRIL 15TH, 1909.

WEEKLY COURT.

RE CANADIAN McVICKER ENGINE CO.

GEIS'S CASE.

Company—Winding-up — Contributory — Conditional Subscription for Shares—Special Agreement to be Entered into—Non-performance of Condition — Evidence — Allotment—Absence of By-law or Resolution of Directors—Cmpanies Act, R. S. O. 1897 ch. 191, sec. 26—Entries in Books—Notices of Calls—Attendance at Meetings of Directors—Explanation.

Appeal by one Geis from order of James S. Cartwright, K.C., official referee, placing the appellant on the list of contributories of the company in winding-up proceedings, for $1,714.95.

M. A. Secord, Galt, for the appellant.

J. F. Boland, for the liquidator.

TEETZEL, J.:—The grounds of appeal chiefly relied upon are:—

1. That the subscription was conditional upon the company entering into an agreement with Geis, in the terms of exhibit 19, given him at the time of the subscription, by the director who obtained the subscription, which was an unsigned memorandum in the following words: "Agreed by Mr. Geis that he is willing to take stock as for $234.60, and also to take stock for the month's account, about $250, and to take additional stock to amount to $2,000 in all, and to pay for the same by rebate of 10 per cent. from each month's account, conditional on a new contract to be entered into on a satisfactory basis for supply of castings."

2. That there was no allotment of stock by the company to Geis.

The company was incorporated under the Ontario Companies Act by charter dated 13th June, 1906, its chief object being the manufacture of gas and gasoline engines.

On the 20th May, 1907, the appellant signed, under seal, a subscription list for $2,000 of stock. His evidence as to

what took place when the subscription was signed is as follows: "I was invited to attend a meeting, by whom I cannot say, but I went to Galt and found a good many present. I only knew a few of them; this was on 20th May; re-organisation was discussed, and getting the company into good shape. I could not say if any one subscribed at the meeting. I was not asked to do so until after the meeting, which was held in Brown's office. All had left except Fryer. He asked me to take stock for the amount of the account they owed. I said I could not do so. He urged me to take stock, and finally I said that the only thing possible would be that I would allow 10 per cent. on each month's account. An agreement was to be made with the company, before I subscribed, so as to shew the terms and that my subscription was conditional only. Fryer shewed me an agreement now produced, marked exhibit 19. No such agreement was ever made by the company. I signed the subscription list after getting exhibit 19. No calls were ever made on me. I attended a few meetings, but only as a creditor. I asked for a similar agreement from the company. Mr. Newlands said that he would get it into shape, but I never got any."

No explanation is given why the agreement was not entered into by the company, and Geis's evidence in regard to it is not contradicted.

If the matter of making the special agreement by the company must be construed as only collateral to the subscription, as in In re Richmond Hill Hotel Co., Elkington's Case, L. R. 2 Ch. 511, then, on the authority of that case, it affords no answer to the application to place him on the list of contributories; but, if the matter of making the special agreement should be construed as a condition of the subscription, then, not being performed by the company, an answer is thereby afforded to the application, upon the authority of Pellat's Case, on p. 527 of the same report. Also In re National Equity Provident Society, Wood's Case, L. R. 15 Eq. 236; In re Standard Fire Insurance Co., Turner's Case, 7 O. R. 459. See also Buckley on Companies, 8th ed., p. 72.

The point for determination upon the evidence is whether Geis, when he signed the subscription, intended thereupon to become a shareholder with a promised collateral agreement by the company, in the terms of exhibit 19, or

whether he signed on the condition that he would not become a shareholder until the company should make such an agreement. In my opinion, the proper conclusion to draw from the evidence is that he did not intend to become a shareholder in præsenti, but that when, and only when, the company should execute an agreement in the terms of exhibit 19 he should become liable under its terms for the $2,000 stock.

Then as to the second ground of appeal, I am of opinion that there was no binding allotment of the stock by the company.

The charter contains no provision as to the allotment of stock.

Until 1st July, 1907, when the new Ontario Companies Act, 7 Edw. VII. ch. 34, came into force, sec. 26 of ch. 191, R. S. O. 1897 governed. That section provides that, if the letters patent make no other definite provision, the share stock of the company shall be allotted when and as the directors by by-law or otherwise ordain. Section 87 of 7 Edw. VII. ch. 34 provides that the directors may from time to time make by-laws not contrary to law to regulate the allotment of shares.

There is no evidence of any by-law regulating or making any provision for allotment of shares, nor is there on record any resolution or other corporate act from which it can be said that the diectors have "otherwise ordained" the manner of allotting the stock, nor is there any record of any specific allotment, by the directors or any one authorised by them, of the stock in question.

The only record regarding this stock in the company's books is an account in the ledger, headed "P. Geis, stock account," in which he is debited with the $2,000 of stock and credited with $285.05, being a transfer from his account for goods supplied.

Mr. Twaites, the company's bookkeeper, explains that these entries were made on instructions from one of the directors, and he also says that he made calls on some persons, but not on Mr. Geis, because of the above agreement.

On 18th July Mr. Twaites wrote Geis stating, among other things, that the first 3 calls on his stock amounted to $600, and proposing to credit against that sum a portion of the amount then owing to him by the company for goods. On receiving this letter, Mr. Geis called up the company

by telephone and told them it was wrong to make calls on him, and the matter appears to have rested there.

The only other letters sent to Mr. Geis were notices of shareholders' meetings inviting him to attend. Geis swears he attended some of these meetings, but only as a creditor, and this seems probable, in view of the fact that the company was largely indebted to him and was endeavouring to raise money by stock subscriptions to pay its liabilities.

There is no evidence that he voted at any of the meetings.

The learned Master found that "he appears to have been considered a director and to have attended a meeting as such on 12th June, 1907." The minutes of that meeting do not nor does any evidence submitted support this finding. The only reference I have been able to find in regard to allotment of stock is an entry in the minutes of a shareholders' meeting on 20th May, 1907, which says: "Subscriptions for stock were called for, and it was agreed that allotment should be made pursuant to the said subscriptions."

The uncontradicted evidence of Geis is that, while he attended that meeting, he did not subscribe for stock during the meeting, but after the meeting, and when no one was present except Mr. Fryer, a director, and himself. I am of opinion, upon all the evidence, that there was no allotment or appropriation of specific shares to Geis.

In was held in Re Canadian Tin Plate Decorating Co., Morton's Case, 12 O. L. R. 594, 8 O. W. R. 531, that the fact that notice of calls were sent to subscribers amounted to nothing if the stock had not already been allotted to them, and that the entry of their names in the stock ledger was not conclusive. At p. 599 of 12 O. L. R. (p. 533 of 8 O. W. R.) Osler, J.A., says: "The absence of any record in the minute book of any resolution of the directors dealing with the respondents' application, and the silence of the persons who ought to know whether it was ever brought before or passed upon by the board, strongly supports the inference that the stock was never allotted." This language is appropriate to the facts of this case. See also In re Pakenham Pork Packing Co., Galloway's Case, 7 O. W. R. 658, 12 O. L. R. 100.

On both grounds, therefore, the appellant is entitled to succeed, and his appeal must be allowed with costs.

Moss, C.J.O. APRIL 15TH, 1909.

C.A.—CHAMBERS.

WM. DIXON INCORPORATED v. C. H. HUBBARD DENTAL CO.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Affirming Order for Summary Judgment — Refusal of Master in Chambers to Adjourn Motion for Cross-examination on Affidavit — No Special Grounds for Treating Case as Exceptional.

Motion by defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court (5th April, 1909), dismissing an appeal from an order of MEREDITH, C.J., in Chambers, affirming an order of the Master in Chambers allowing the plaintiffs to enter final judgment under Rule 603 for the amount of a money demand specially indorsed upon the writ of summons, and refusing to adjourn the motion for judgment to allow the defendants to cross-examine the plaintiffs' manager in New York upon his affidavit in support of the motion.

J. F. Boland, for defendants.

R. McKay, for plaintiffs.

Moss, C.J.O.:—Nothing appears in the material which was before the Master in Chambers, the learned Chief Justice of the Common Pleas, or the Divisional Court, upon the motion for judgment and the several appeals from the order made thereon, from which the defendants can obtain any support in fact for the proposed questions of law which they say they desire to discuss on an appeal to this Court. The amount originally involved was $338.04, and this, it is said, has been reduced to $268 or thereabouts.

It would, of course, be out of the question to permit an appeal to this Court, after two appeals have already been had, from the refusal of the Master in Chambers to adjourn the motion to enable the defendants to issue a commission to New York for the purpose of cross-examining the plaintiffs' manager upon his affidavit in support of the plaintiffs' motion, except upon terms of the defendants filing an affi-

davit shewing a defence on the merits, which they declined to do.

On the other branches of the proposed appeal, the facts, so far as disclosed, appear to be adverse to the defendants' contention.

There appears to be no good reason why the defendants should be permitted to appeal further in respect to this small claim, with regard to which no defence on the merits has been put forward.

Motion refused with costs.

RIDDELL, J. APRIL 16TH, 1909.

CHAMBERS.

STAVERT v. McNAUGHT.

Jury Notice—Striking out—Separate Sittings for Jury and Non-jury Cases — Practice—Discretion—Trial—Issues of Fact and Law—Jurisdiction of Judge in Chambers.

Motion by plaintiff and third parties to set aside a jury notice filed and served by defendants, in an action to be tried at Toronto.

J. H. Moss, K.C., for plaintiff.

Glyn Osler, for third parties.

F. Arnoldi, K.C., for defendants.

RIDDELL, J.:—An action upon a promissory note for a large sum, alleged to have been made by the defendant Boland and indorsed by the defendant McNaught. It is alleged that McNaught guaranteed payment of it.

The defendant McNaught denies all allegations; alleges that, if the note was made or indorsed, it was without consideration; that, if he did so guarantee, this was without consideration; denies that the plaintiff is the holder; alleges that any possession the plaintiff may have is on behalf of and for the Sovereign Bank and as trustee for the Sovereign Bank; and says that, if the alleged note was made or indorsed to the Sovereign Bank, the bank at the time agreed that he should be under no liability in respect thereof, but would indemnify him; and, in the alternative, the making and indorsing were void as being pursuant to an illegal device for concealing and covering up the fact that the Sovereign Bank

was purchasing its own shares; and, moreover, that the bank took the shares in satisfaction of the alleged debt upon the note.

The plaintiff replies, holder in due course without notice, and that McNaught was a party to the illegal device, if there was one.

Boland denies everything, and sets up that the note was an accommodation note for the accommodation of the bank.

A third party notice was served for McNaught upon the Sovereign Bank, Æmilius Jarvis, and F. G. Jemmett, claiming indemnification against liability, upon the grounds of an express agreement to indemnify him, and that the note was procured by them as a mere device to enable the bank to purchase its own shares; that Jarvis and Jemmett agreed to procure a cancellation.

The third parties appear and deny the allegations in the third party notice, and say that the note was indorsed by McNaught and delivered by him to the bank for valuable consideration.

A jury notice was served for the defendants, and the case was put upon the jury list for trial at Toronto.

An application is now made by the plaintiff, supported by the third parties, to set aside the jury notice.

It is plain that the making and indorsing of the note will not be contested, and that the plaintiff really has possession of the note; and the real onus will be cast upon the defendants.

The defendant McNaught undertakes to prove facts which will relieve him from liability, while, as against the third parties, he must prove facts establishing liability on their part.

In respect of the plaintiff, the nature of the possession will depend upon the interpretation of a document; that will be for the Judge; while some of the other issues will be of mixed law and fact, depending, to a certain extent, upon the interpretation to be placed upon certain alleged transactions. But no issue is of an equitable nature, so that the principle of Baldwin v. McGuire, 15 P. R. 305, does not apply. And I can find nothing which would prevent the trial by a jury if it were thought advisable so to try the action. But that does not appear to be the test.

Whatever may be the proper course in cases not to be tried in Toronto—and I agree with the Chief Justice of

the Common Pleas that "the rule of practice laid down in Montgomery v. Ryan, 9 O. W. R. 855, 13 O. L. R. 297, might well be extended to any case, whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury:" Bryans v. Moffatt, 15 O. L. R. at p. 223, 10 O. W. R. 1029-30—the practice in cases to be tried in Toronto, where there are separate lists and separate sittings for the trial of jury and of non-jury cases, is that "if the action is one that plainly ought to be tried without a jury, in order to prevent the jury list from being incumbered with such cases . . . the jury notice" is struck out: Montgomery v. Ryan, supra.

This rule laid down by the Chief Justice of the Common Pleas in Montgomery v. Ryan, supra, has been approved by the Divisional Court in Clisdell v. Lovell, 15 O. L. R. 379, 10 O. W. R. 609, 925, and Bryans v. Moffatt, supra.

When it can be said that "the action is one that plainly ought to be tried without a jury," may not be wholly clear. Mr. Justice Anglin says in Clisdell v. Lovell, 15 O. L. R. at p. 382, 10 O. W. R. 925: "The jurisdiction to strike out jury notices in Chambers as a matter of discretion should, however, be strictly confined to cases in which it is obvious that no Judge would try the issues upon the record with a jury." Neither of the other Judges in the Divisional Court states the proposition in these terms: nor does the Chief Justice giving the judgment of the Court in Bryans v. Moffatt.

If the rule be restricted as is indicated in the judgment of Mr. Justice Anglin, just cited, I am not sure that this case would fall within the rule. It may be that some of my brethren would try this case with a jury, not to speak of the Judge yet in gremio. I think the rule indicated in the judgment of the Divisional Court in Bryans v. Moffatt should be adopted, namely, that the jury notice should go "where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury." My opinion is that such is this case.

The jury notice will be struck out. Costs in the cause.

Having tried Clisdell v. Lovell, I do not think it can be contended that that case was any less a case for a jury than the present.

APRIL 16TH, 1909.

DIVISIONAL COURT.

AMYOT v. SUGARMAN.

Costs—Scale of—Increased Jurisdiction of County Court—Amount Involved—Ascertainment "as Being Due"—County Courts Act, R. S. O. 1897 ch 55, sec. 23 (2)—4 Edw. VII. ch. 10, sec. 10.

Appeal by defendant from order of BOYD, C., ante 429, as to the scale of costs, made on appeal from taxation.

H. M. Mowat, K.C., for defendant.

H. L. Dunn, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) reversed the decision of the Chancellor, upon the ground that the trial Judge had expressly found that the amount was ascertained by the act of the parties as being due. The Chancellor based his judgment upon the pleadings, the reasons of the trial Judge not being before him.

Appeal allowed, and ruling of the local taxing officer at Ottawa that the costs should be taxed on the County Court scale restored; but, as the point upon which the appeal turned was not raised before the Chancellor, no costs were allowed.

APRIL 16TH, 1909.

DIVISIONAL COURT.

DOMINION EXPRESS CO. v. KRIGBAUM.

Principal and Agent—Agency for Sale of Money Orders—Contract—Construction—Undertaking of Agent to Account for Orders and Proceeds—Theft and Forgery by Servant of Agent—Payment of Orders Forged—Liability of Agent to Account—Bailment.

Appeal by defendant from judgment of LATCHFORD, J., ante 364.

R. J. McLaughlin, K.C., for defendant.

Shirley Denison, for plaintiffs.

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

MEREDITH, C.J.:—The principal facts are stated in the judgment of my learned brother, ante 364, and it is not therefore necessary to repeat them.

It is to be borne in mind, in construing the agreement sued on, that the plaintiffs are not bankers, but carriers, and that a part of their business is to receive money from customers for transmission.

Upon receipt of money from a customer, a document is given to him, signed on behalf of the company, and, where the transaction takes place at an agency, countersigned by the agent. This document is headed "Express Money Order," and by it the company "agrees to transmit and pay to the order" of the person to whom the money is to be sent, the money, and at the foot of the document are the words "name of remitter," beneath which the name of the person transmitting the money is signed. The document has at the upper left-hand corner the words "when countersigned by agent at point of issue," which are intended to qualify the words of agreement.

The plaintiffs are, or were at the time the transaction in question took place, in the habit of appointing as agents persons whose business required the transmission of money by them, and of supplying them with blank forms of these express money orders, signed on behalf of the plaintiffs. The defendant, who carried on business as the Canadian Newspaper Association, was one of the persons so appointed, and he was furnished with a number of these forms, so signed. A man named Heyburn, who had been, but was not then, a clerk in his employment, stole a number of the forms, forged a name of the defendant to the countersigning of them, and put them off. They were made payable in some cases to his own order, and in others to the order of a fictitious person, and all of them were presented at an agency of the plaintiffs, and paid there, and it is to recover the amount so paid that the action is brought.

The obligation of the defendant, according to the terms of the agreement, was: (1) to accept the responsibility of "due issue and sale" of the money orders; (2) "to account for each money order and the proceeds thereof;" (3) "to hold in trust such proceeds, and every part thereof, entirely

separate from other funds in" his "hands, and to pay over the whole of said proceeds from time to time to the (plaintiffs) express company, as required," after deducting, as should be authorised by plaintiffs, his lawful commission and the amount of other express orders or cheques authorised by the plaintiffs to be paid by him; (4) "not to deal with or use such money orders, or the proceeds thereof, either in whole or in part, in any other manner."

Having regard to the nature of the business to be transacted by the defendant for the plaintiffs, the effect of the agreement was that the defendant became answerable that none of the money orders should be issued and sold unless he had received for transmission the money which it represented, and to constitute him a trustee for the plaintiffs of the moneys so received, with the obligation to keep them separate from his own moneys, and to pay them to the company when required, after making the deductions mentioned in the agreement, and not to deal with or use the money orders or their proceeds, i.e., the money received for transmission in respect of them, in any other manner.

No moneys were received by the defendant in respect of the money orders in question. The defendant is answerable, therefore, in the circumstances under which the money orders in question were dealt with, only, if at all, by reason of his having by the agreement assumed the responsibility of "due issue and sale" of the orders, or by reason of his having undertaken to account for those which were intrusted to him.

That these money orders were not issued or sold by the defendant does not, I think, admit of any doubt. They were stolen from him, as I have said, and filled up, countersigned, and presented for payment by the thief. There is no evidence that they were sold by the thief or by any one else, or that any of them passed into the hands of any third person. I do not think that, by accepting the responsibility of "due issue and sale," the defendant undertook to be answerable to pay to the plaintiffs the amount of money orders dealt with in the way in which those in question were dealt with. The fair meaning of the words is, I think, that he was to be responsible that no order should be issued unless the money which it represented was first received by him for transmission; in other words, that he would not issue or sell any money order which would have the

effect of rendering the plaintiffs answerable to the holder of it, unless in the due course of the business he was appointed to transact, that is to say, unless he had received for transmission the money which it represented. If that be the meaning of this provision of the agreement, there was, I think, no breach of it, because the money orders in question were not issued or sold by the defendant.

Nor do I think that there was any breach of the defendant's agreement to account for the money orders in question, or the proceeds of them. I do not understand the provision of the agreement as to accounting, to mean that the defendant was to return to the plaintiffs the money orders intrusted to him, or such of them in respect of which what is called the proceeds of them he did not pay over to the plaintiffs. He has, in my opinion, accounted for those in question by shewing that, without negligence on his part, they have been stolen from him, and he is therefore unable to return them. Much clearer and much stronger language than is used would be needed, in my opinion, to impose upon the defendant such a liability as the plaintiffs are seeking to impose upon him.

But, assuming that the defendant is liable to the extent contended for by the plaintiffs, I am unable to see how they can recover. The money orders, even if they had been countersigned by the defendant himself, would not have been binding on the plaintiffs, though issued by him, unless the money which they represented had been received by him for transmission by the plaintiffs.

I am unable to distinguish this case from Erb v. Great Western R. W. Co., 42 U. C. R. 90, 3 A. R. 446, 5 S. C. R. 179. In that case an agent of a railway company had, in fraud of the company, issued a bill of lading for flour stated in it to have been delivered to the company to be carried from Chatham to St. John, when in fact none had been delivered; the bill of lading was delivered to the plaintiffs, the consignees named in the bill of lading, and, on the faith of the bill of lading, the plaintiffs accepted a bill of exchange, drawn on them by the persons named in the bill of lading as the shippers, for the price of flour, and sought to make the company liable for the loss sustained by them by having to pay the bill of exchange without receiving the flour, basing their claim to recover on an alleged false and fraudulent representation contained in the bill of lading,

that the flour had been shipped to them, on the faith of which they had accepted the bill of exchange. The plaintiffs failed in the action, the ground of the decision being that the act of the agent in issuing the false and fraudulent receipt for goods never delivered to him was not an act done within the scope of his authority as the company's agent, and that the company were not therefore liable.

As I have said, I am unable to distinguish the case at bar from that case. The defendant had no authority to issue the money orders in question, and they were issued in fraud of the company, and the fact that in the one case it was money that was to be transmitted, and in the other it was flour to be delivered, can make no difference in the application of the principle upon which the decision in the Erb case was based.

There is, I think, a further ground upon which the plaintiffs must fail.

The money order is not a bill of exchange, but an agreement with the "remitter" to transmit and pay to the order of the payee of it the sum mentioned in it, and neither the payee nor the indorsee of it would be entitled to sue upon it, there being no privity of contract between him and the plaintiffs.

For the last two reasons, assuming that there was a breach of the defendant's contract, the plaintiffs suffered no damage by reason of it, as they incurred no liability to the payee or transferee of the money orders.

I would, therefore, allow the appeal with costs, and reverse the judgment of my brother Latchford, and substitute for it a judgment dismissing the action with costs.

RIDDELL, J. APRIL 17TH, 1909.

CHAMBERS.

McCLOY v. HOLLIDAY.

Jury Notice—Action for Deceit—Claim for Rescission of Term of Contract—Abandonment by Plaintiff—Amendment—Plaintiff's Jury Notice Allowed to Stand—Costs.

Motion by defendant to strike out a jury notice filed and served by plaintiff.

R. T. Harding, Stratford, for defendant.

Featherston Aylesworth, for plaintiff.

RIDDELL, J.:—The plaintiff says that he sold the defendant a house for $2,250; that the defendant falsely and fraudulently misrepresented the value of certain stock he owned in a joint stock company, and thereby induced the plaintiff to accept this stock as in satisfaction of $500 of the said price, the stock being in fact wholly valueless. He, therefore, claims: (1) $500 and interest; (2) "a declaration that the term of the said agreement whereby the plaintiff was to accept the said shares in satisfaction of the sum of $500 was obtained by the fraud and false representations of the defendant, and that the same is not binding upon the plaintiff;" (3) in the alternative $600 damages for the fraud and misrepresentation of the defendant; (4) general relief; (5) costs.

A defence is put in; and by the plaintiff a jury notice filed. A motion being made to strike out this jury notice, plaintiff asks to be allowed to abandon all claim to equitable relief; the defendant opposes, and insists on the matter being disposed of upon the pleadings as they stand.

It is apparent that the two matters of fact to be tried are: whether false and fraudulent misrepresentations by the defendant did induce the contract; and, if so, what are the damages. No difficult question of law will remain, and, if the plaintiff's request be acceded to, no reason exists why a jury might not try the action.

I do not see any objection to allowing the plaintiff to withdraw all allegations and claim other than those solely applicable to a common law action of deceit. This will be done forthwith; the jury notice will be allowed to stand, and this motion dismissed; but the plaintiff must pay in any event the costs of this motion and of all amendments rendered necessary.

RIDDELL, J. APRIL 17TH, 1909.

CHAMBERS.

HALL v. McPHERSON.

Jury Notice—Irregularity—Judicature Act, sec. 103—Exclusive Jurisdiction of Court of Chancery before 1873—Action to Set aside Contracts for Fraud—Frame of Statement of Claim.

Appeal by defendant from order of Master in Chambers validating a jury notice filed and served by plaintiff.

R. C. H. Cassels, for defendant.

W. Proudfoot, K.C., for plaintiff.

RIDDELL, J.:—The plaintiff says that he is a man of no business experience, while the defendant is "a man of vast experience, well known to the plaintiff, and in whom he reposed the utmost confidence." On 26th October, 1906, the defendant is alleged to have induced the plaintiff to enter into a written agreement for sale by the defendant to him of an undivided one-sixth interest in 7,808 acres of land in Saskatchewan, for $6,181.33, payable $1,563.28 in cash, and 3 instalments of $1,539.35 on the 15th days of January, April, and July following. The land being subject to an incumbrance amounting to $49,944, the plaintiff covenants to pay one-sixth of this. It is alleged that the defendant induced the plaintiff to execute this contract by false and fraudulent representations as to the quality of the land of the settlers in the vicinity.

Another document is then set out, executed by the plaintiff, by which, after reciting (inter alia) the sale by the defendants of the whole of his interest in sixths to various persons, and that the plaintiff had paid upon his purchase money $4,029, and had also paid one-sixth of $4.40 per acre and interest, the defendant was directed (inter alia) to convey to the plaintiff certain lands specifically mentioned. The purchasers of the other five-sixths join in this instrument, which is substantially a partition of the estate in common.

The plaintiff says he did not understand this document when he executed it, and relied solely upon what the defendant stated in reference thereto, and charges fraud in the defendant.

He says he has paid, in all, to the plaintiff $4,303 on account of the purchase money, and has also given him 2 promissory notes, one for $1,400, the other for $1,539.35, on account thereof.

The plaintiff claims: (1) that the two agreements may be set aside and cancelled; (2) the recovery of the said sum of $4,303 and interest and the delivery up of the two notes; (3) costs; and (4) general relief.

The defendant's defence is a denial of the alleged facts.

The statement of defence was delivered on 2nd February, 1909; on 9th March a reply and jury notice were served;

the failure to serve a jury notice in time having been, as the plaintiff's solicitor swears, through an oversight.

On 7th April a motion was made before the Master in Chambers by the defendant to strike out the jury notice, upon which the Master made an order validating the jury notice. The defendant now appeals.

It is obvious that this action has nothing in common with a common law action in deceit, such as is set out in McCloy v. Holliday, in which I have just given a decision (ante 928). The plaintiff does not affirm the contracts and sue for damages for deceit, on the principle of such cases as Pearson v. Dublin, [1907] A. C. 351. Had he done so, it is not at all certain that he would not be entitled to a jury. He sues to set aside these contracts, upon the ground of fraud, and to recover back the money he has paid under the agreements, or one of them. Precisely how he can succeed, in the absence of the other parties to the later agreement, is not a matter of moment upon this application—his claim is clear.

I am not to consider whether the claim might not have been moulded into such a form as to set up a common law action; the pleadings must be taken as they stand: Pawson v. Merchants Bank, 11 P. R. 72; and the circumstance that the questions of fact are such as juries are accustomed to try in actions differently constituted does not entitle the plaintiff to a jury: Farran v. Hunter, 12 P. R. 324.

The common law Courts had no jurisdiction to declare that documents were void; this was a matter before 1873 within the exclusive jurisdiction of the Court of Chancery, and, consequently, must, under sec. 103 of the Judicature Act, be tried without a jury, unless otherwise ordered. Nor is it a case precisely like Sawyer v. Robertson, 19 P. R. 172. There two claims were made, the one for the enforcement of a lien upon land for the price of a machine, and the other for the price of the machine; either of these claims could be enforced without the other. In the present case there can be no claim at all for money except as a consequence of the cancellation of the documents. In the former case an action might have been brought at the common law for the purchase price, and a bill in Chancery filed to enforce the lien, and with success. In the present, if an action were brought at the common law for the recovery back of the

money paid, a complete answer would be furnished by the production of the documents; in other words, this action is one which could not "have been formerly maintained in any Court but the Court of Chancery:" see per Patterson, J.A., in 11 P. R. at p. 75. "The defendant could not successfully have demurred to a bill in the Court of Chancery claiming the relief that the plaintiff seeks in this action:" Farran v. Hunter, 12 P. R. 324, at p. 326.

I am of opinion that sec. 103 applies; and that the case should not be tried by a jury.

In any event the jury notice would, I think, be struck out upon application to a Judge in Chambers.

The jury notice will be struck out, and the plaintiff will pay the costs of motion and appeal in any event.

FALCONBRIDGE, C.J. APRIL 17TH, 1909.

WEEKLY COURT.

RE COMMERCIAL TRAVELLERS MUTUAL BENEFIT SOCIETY AND TUNE.

Life Insurance—Indorsement of Policy in Favour of Beneficiary for Value—Advances to Insured—Debt Barred by Statute of Limitations—No Answer to Claim on Security—Payment of Debt—Evidence—Onus—Right of Creditor to Insurance Moneys as against Executrix of Insured.

Motion by the Toronto General Trusts Corporation, the executors of Henry James, upon an originating notice, for an order determining the right of the applicants to a fund arising from an insurance upon the life of Thomas Tune, deceased.

E. R. Read, Brantford, for the applicants.

U. A. Buchner, London, for Lillian Tune, executrix of Thomas Tune.

FALCONBRIDGE, C.J.:—Thomas Tune was insured in the above society, under certificate bearing date 8th September, 1882, whereby the society promised and agreed "to pay out of its death funds, and out of any moneys realised from

assessments to be made for that purpose, the sum of $1,000 to his wife Theresa Tune, or such other beneficiary or beneficiaries as the said member may in his lifetime have designated, in writing, as provided by the laws of the province of Ontario; and, in default of any such designation, to his legal personal representatives."

Tune became indebted to James, and he and his wife on 5th March, 1895, signed the following indorsement on the certificate: "This is to certify that Mr. Henry James, of Brantford, is to be a beneficiary, to the amount of $686, of the benefit payable in within certificate, and Mrs. Theresa Tune to the amount of $314."

This was duly entered and noted in the books of the society, as appears by the memorandum of the secretary, of the same date.

After the death of his wife, Tune signed the following indorsement: "Toronto, May 5th, 1899. This is to certify that I wish the full amount payable by this certificate to be paid to Mr. Henry James, of Brantford, as my wife has since died:" which was also duly entered and noted in the books of the society Tune seems to have retained possession of the certificate, and by memorandum dated 2nd July, 1904, he certified that he wished the amount payable thereunder to be paid to his 3 daughters, of whom Lillian is one. There is no memorandum of noting by the society.

Tune died on or about 5th November, 1908, and Lillian Tune is his executrix and sole devisee and legatee.

The indorsements in favour of James were perfected before the 1 Edw. VII. ch. 21, sec. 2, sub-secs. 5 and 6, and James was a beneficiary for value.

James had predeceased Tune, and probate of his will was granted to the Toronto General Trusts Corporation.

The onus is upon Tune's executrix to prove payment of the debt, and she has failed to discharge it. The Statute of Limitations is no answer to the claim on the security, even though the original debt is barred: Spears v. Hartley, 8 Esp. 81; Hewitt on Limitations, pp. 7 and 126; Waterous Engine Works Co. v. Livingstone, 3 O. W. R. at p. 671.

Judgment will, therefore, go for payment of the fund in hand to the Toronto General Trusts Corporation, as executors of Henry James, less Lillian Tune's costs, to be taxed as between solicitor and client.

APRIL 17TH, 1909.

DIVISIONAL COURT.

DUBORGEL v. WHITHAM.

Building Contract — Sub-contract for Plastering Building — "Rendering"—Contract Price—Retention of Percentage—Premature Action—Extras—Set-off—Damages—Costs.

Appeal by plaintiffs from judgment of ANGLIN, J., dismissing the action as to the greater part of the plaintiffs' claim. The action was brought to recover the balance of the contract price and extras for the plastering of a school building in the city of Hamilton, under a sub-contract with the defendant, the principal contractor. The trial Judge held that the plaintiffs' action was premature as to the main part of the claim, and gave judgment in their favour as to a small part, with costs on the County Court scale, and a set-off to the defendant of the excess of his costs over County Court costs.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

P. D. Crerar, K.C., for plaintiffs.

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

BRITTON, J.:— . . . The claim for balance on contract was $340.50, and for extras $216.43, making in all $556.93. At the trial the plaintiffs were allowed to amend by adding a claim for damages for delay caused by defendant, and for being deprived of the use of a hoist to which the plaintiffs claimed to be entitled. A counterclaim was put in by the defendant. Particulars were furnished of the plaintiffs' claim for extras, and the learned trial Judge dealt with these, item by item. He found amount of contract $1,700, and for extras $85.68.

The items of plaintiffs' claim for extras which have been allowed are as follows (setting them out, amounting to $85.-68) . . . . There was allowed to the defendant set-off in respect of removal of platforms, $3, leaving $82.68. Then the plaintiffs were allowed for damages for not having use

of hoist, etc., $35. Against this the defendant was allowed for use of extra plant and washing windows, $14, leaving to the plaintiffs $21, making the total claim of the plaintiffs, before deducting payments, $1,782.68, as above, including the $82.68 excess extras.

The learned Judge held that the defendant was entitled to retain 20 per cent. of the $1,782.68, or $356.53.

Plaintiffs, upon this calculation, would be entitled to 80 per cent., or $1,426.15. Deducting the $1,359.50, there would remain $66.65. Add to this the balance of damages in favour of plaintiffs, $21, making the total of $87.65, for which judgment was given, leaving the 20 per cent. to be recovered later, upon the architect's certificate being obtained.

From this judgment the plaintiffs appeal, limiting the appeal to 3 points: (1) that there was error in holding that the defendant is entitled to retain the 20 per cent. owing to the plaintiffs, on the ground that the same was not yet payable under the terms of the plaintiffs' contract; (2) error in disallowing a claim of $15 for putting caps on columns . . .; and (3) error in disallowing or reducing claim for lathing.

The first point is by far the most important, as it involves the very serious question of the scale on which plaintiffs get the costs of the action. The terms of the contract are very plain and very rigid. The plaintiffs agree to do this work, as mentioned, for $1,700; 40 per cent. of the cost of work and material to be paid when browning coat is done; 40 per cent. of the cost of work and material to be paid when finishing coat is completed; the balance of 20 per cent. to be paid one month after work is accepted by the architect.

The interpretation put upon the contract as to contract work, and so far as it provides for payment for work under it, for which the sum of $1,700 was to be paid, is, in my opinion, correct, and the appeal cannot prevail.

If the plaintiffs had waited until 30 days after 6th August—the date of defendant's letter—they possibly could have relied upon the promise in that letter of payment in 30 days from that date, but that was not argued; and at the trial the plaintiffs were willing to stand or fall by the contract itself, and so plaintiffs must be left to recover the 20

per cent. when they can do so by the terms of the contract itself. The defendant is not entitled to retain 20 per cent. on any larger sum than the contract price, viz., on the $1,700. I entirely agree with my brother Riddell as to the items which were the subject of the appeal. The sum of $15 for putting caps on columns should be allowed. These caps are made of plaster, but are not "plastering" within any fair meaning of that word. The extra for lathing as charged, $35.25, should be allowed. The places where it was done were really inside walls; but, whether so shewn on the plans and specifications as such or not, this lathing was not intended to be included in the contract price; it was done by the plaintiffs, necessarily done, and should be paid. The result will be judgment for plaintiffs for $154.43, made up as follows:—

Amount of contract		$1,700.00
Less 20 per cent. defendant allowed to retain for the present	$340.00	
And paid by defendant on account	1,359.50	
		1,699.50
Balance		$ 0.50
Extras allowed by trial Judge		85.68
" " on this appeal	$ 15.00	
	35.25	
		50.25
		$ 136.43
Less set-off allowed by trial Judge to defendant		3.00
		$ 133.43
Damages allowed to plaintiffs	$ 35.00	
Less allowed to defendant	14.00	
Amount in favour of plaintiffs		21.00
		$ 154.43

Leaving the 20 per cent. to be collected in future.

No costs of appeal.

RIDDELL, J.: (after referring to the facts):—It will be seen that the contract is for "lathing and plastering and

rendering." "Rendering" is defined as "the laying on of a first coat of plaster on brickwork or stonework:" Century Dict. ad voc. It is contended that no lathing goes on inside walls, but that the "rendering" process is used without lathing. The particular wall for which a claim is made for extras is held by the trial Judge (p. 113) not to be an outside wall, but in giving judgment (p. 154) he says: "There is no claim made by the plaintiff as extra for the plastering that was done here; I cannot see why the lathing is in any different position . . .; this is not an inside wall . . ." And, after discussion with plaintiffs' counsel, the Judge declines to allow the lathing at that place.

I think the learned trial Judge was right when, during the course of the trial, he said the wall was not an outside wall. The specifications (p. 25) provide that "the whole of the outside walls and partitions . . . excepting gymnasium and boiler room, is to be lathed . . . the walls and partitions throughout the basement . . . to be rendered . . ." The particular wall was not, under these specifications, to be lathed; it was lathed under instructions of the defendant, and this work is properly an extra, and should have been allowed for.

In reference to the claim for the gymnasium, the result will depend upon whether the gymnasium is in the basement. It is alleged that the floor of the gymnasium is below that of the basement generally, but I find that, upon the plans, a separate plan being given for each storey, the gymnasium appears upon the plan of the basement. I think, then, that it should be held that the gymnasium is part of the basement, and the appeal upon this point should be disallowed.

As to the topping of the pillars, these pillars were fitted with plaster tops. I am unable to understand how such work can come within a contract for "lathing and plastering and rendering." It is true that plaster was used, but the work is utterly different from "lathing and plastering and rendering." The appeal should be allowed upon this point.

. . .

It is contended by Mr. Crerar that because the plaintiffs are in morals entitled to have their work accepted, the provision of the contract that 20 per cent. should not be paid until the acceptance of the work should not stand in his

way, and a decision of the Chancellors—Petrie v. Hunter, 2 O. R. 233—is cited in support of this contention. That, however, is a wholly different case. There Hunter had employed Coatsworth to build certain houses. Coatsworth had employed Petrie and others to do certain work. Hunter discharged Coatsworth, and employed Petrie and the others, and agreed with them that if they would complete the work under their contracts with Coatsworth, he would see them paid, or, as the Chancellor puts it at p. 236, he would pay them. It was held that if they as a fact did complete the work under their contracts, they had a right to be paid—that, indeed, was their bargain with Hunter. Hunter could not be allowed to import into his bargain with them the terms of his bargain with Coatsworth. And Lewis v. Hoare, 44 L. T. N. S. 66, is just such a case. There the defendant had promised to pay to the plaintiff "the sum of £110 on the completion of 6 houses . . . in accordance with a contract . . . between myself and Mr. Thick." The House of Lords, affirming the decision of the Court of Appeal, held that, the houses being as a fact finished in accordance with the contract, the money was payable, and the terms of payment, etc., in the Thick contract could not be imported into this contract.

It will be seen that both these cases are really cases of the interpretation of contracts.

This is quite a different case; here the contract itself is express, and every term must be given full effect to.

But this applies only to the contract price. The defendant is entitled to retain 20 per cent. of $1,700 = $340 only, under the contract. The extras are payable as soon as completed: Robsone v. Godfrey, 1 Stark. N. P. 275; cf. Rees v. Lines, 8 C. & P. 126. . . . I have seen the figures of my brother Britton, and they correctly express the result.

Success being divided, there should be no costs.

FALCONBRIDGE, C.J., concurred.

RIDDELL, J. APRIL 3RD, 1909.

CHAMBERS.

RE DAVIS.

Infant — Custody — Adoption — Rights of Parent—R. S. O. 1897 ch. 259, sec. 12—Payment for Maintenance of Child.

Application by one E. J. Davis for an order upon A. J. Boon and his wife for the delivery of the applicant's infant child to his custody.

T. H. Luscombe, London, for the applicant.

J. M. McEvoy, London, for the respondent.

RIDDELL, J.:—To E. J. Davis of London and his wife was born, at that city, in October, 1908, the female child the subject of the present controversy.

Davis was a brakesman, and both he and his wife were in bad health; he was "laid off" from his employment, and, having been promised a place in Detroit, he made up his mind to go there, rather than wait in London in idleness till the spring. His wife had an older child, and did not feel well enough to look after both children: accordingly a temporary home was advertised for (Mrs. Davis's mother was also sick, and the baby could not be left with her). Mrs. Boon, wife of the chef at a leading London hotel, answered the advertisement, and an arrangement was made whereby Mrs. Boon was to be paid $8 per month in advance for care of the child so long as it remained with her. She apparently was also to be paid for clothing, etc., supplied for the child.

Davis and his wife went to Detroit, leaving the infant with Mrs. Boon, who lived with her husband in London.

The money was not paid as agreed, and on 15th December, 1908, Mrs. Davis wrote Mrs. Boon, saying: "If you want to adopt the baby, we are willing any time;" and, after desiring Mrs. Boon not to mention the matter to a person named in the letter, she concludes by "hoping we shall come to terms." On 5th January, 1909, she again writes: "There is no need to worry about our delay in

settling the matter between us, as we intend giving you the child . . .; he (Mr. Davis) is away in Toledo now, so I can't sign the papers until he comes back, and it may be a couple of weeks or less, but, as soon as he comes back, we will settle things up, so you can rest assured that the baby is yours." She again asks that the person named should not be told about adopting, as that person wanted the baby herself.

On 28th January, 1909, a document was signed by Davis and his wife: "We hereby state that we will give Mr. and Mrs. A. J. Boon our child Margery Davis, born October 15th, 1908, whereas we lose all claim of said child." This was sent to Mrs. Boon, with another request not to tell the person referred to—"just tell her, as I did, that we have paid up the baby's board . . . but nothing about adopting; she wants the baby herself if any one can get her."

The Boons have become much attached to the baby, and have treated her well. There is the usual contradiction as to the manner in which she is clothed and looked after generally; it is common knowledge that nurses and women generally cannot be got to agree as to how a child is to be cared for, but, upon all the evidence, I think it fairly clear that the child is doing well.

A short time ago, the child was demanded of the Boons by the person whose knowledge of the fact of adoption Mrs. Davis feared, acting for Mr. and Mrs. Davis. The demand was refused, and an application was made before me at the London Weekly Court.

In view of the letters already referred to, it is hard to accept Mrs. Davis's statement that she did not intend to part with the child altogether; and, if it were necessary to determine the fact as to Davis's intention, I should require better evidence than his own affidavit, in which he says that that being sick ot the time he did not read the document, although he signed it, but supposed and "intended and understood that it contained nothing more than an agreement that we would not remove the child until we were ready to pay up all that might be owing." He may have persuaded himself that such was his state of mind, but I should require better evidence than this affidavit to prove the fact.

But is that material?

Admitting that it was the intention of all parties that the father and mother should give up the child to the Boons, what follows?

Under the civil law, as is well known, adoption with its fictions more or less curious and interesting, played a conspicuous part, but "the law of England, strictly speaking, knows nothing of adoption:" Eversley, 3rd ed., p. 514; Blayborough v. Brantford Gas Co., ante 573. "By the common law of England the father has the right to the custody of his infant children as against third parties:" Eversley, p. 511. And "parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children, and, if they elect to do so, can at any moment resume their control over them:" p. 513.

No doubt has been attempted to be cast upon these propositions; but it is argued that the statutory provisions do or may prevent an order for the delivery of the child to the parents now asking for it. R. S. O. 1897 ch. 259, sec. 12, provides that "where the parent of a child applies to any Court . . . for . . . an order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to . . . make the order."

This Act is based upon the Imperial Act of 1871, 34 Vict. ch. 3, "Custody of Children Act, 1871;" but does not very much assist in this case.

I think "abandon" and "desert" must, in this legislation, involve a wilful omission to take charge of the child, or some mode of dealing with it calculated to leave it without proper care. Leaving the child with those who had contracted to take proper care of it cannot be fairly called abandonment or desertion, and the further and subsequent act of giving up all claim to the child, I think, is not an abandonment or desertion within the Act. The Act to be relied upon must be such as shews such disregard of the welfare of the infant as would shew the parent to be unfit to again receive it into his charge. And I cannot say that there is anything in the conduct of the father shewing him to be unfit to take charge of the infant.

But "the child is being brought up by another person," and an order should be made for the payment by the parent, under R. S. O. 1897 ch. 259, sec. 12 (2), of the sum of $90, properly incurred by Mrs. Boon in bringing up the child.

Counsel for the application having undertaken at the hearing to pay this sum, an order may go for possession of the child to be given to Davis, or to some person to be named by him.