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CLUTE, J. DECEMBER 3RD, 1912.

WOOD v. CITY OF HAMILTON.

Negligence—Occupant of Market Stall—Injury to Health from Unsanitary Condition — Notice to Corporation — Landlord and Tenant—Licensee—"Mere" Licensee—Invitation—Duty of Owner to Repair—Contributory Negligence—Incurring Voluntary Risk.

Action by plaintiff, a huckster, to recover damages for loss sustained from disease of her limbs and undermining of her health, alleged to have been caused by the negligence of the defendants.

W. M. McClemont, for the plaintiff.
F. R. Waddell, K.C., for the defendants.

CLUTE, J.:—The plaintiff for some 12 or 14 years carried on the business of a huckster in the market at Hamilton. During about half that period she occupied a covered place or stand outside the market buildings. About seven years ago a number of stalls were made for those carrying on the like business, but there was not a sufficient number of stalls to supply each huckster with one. However, at the request of the plaintiff she was allotted a stall next adjoining the one she now occupies and which she occupied at the time of the grievances complained of.

The first stall which she occupied was dry and as far as she knew sanitary. In 1910 she moved into the stall now occupied by her, and for about a year there was nothing noticeable in the way of wanted repair. In the fall of 1911 the stall became unsanitary, the roof leaked, the water ran in and upon the floor, and kept the place in such a condition that it was continually unhealthy and objectionable on account of its being wet and damp. I find that she gave notice verbally to the chairman

of the market committee, and to Mr. Hill, who was overseer of the market under the chairman. Some repairs were made during the fall, but they did not remove the defects, as when it rained the water still continued to come in. She again notified the chairman of the market committee in the spring, and also Mr. Hill, but nothing was done for some time. The plaintiff says that finally about the end of March, and some time after she had notified the parties, she was taken ill, and she attributes her illness to the unsanitary condition of the stall.

At the close of the evidence I reserved my decision in order to consider the authorities. I found the facts as follows: That the premises in the fall of 1911 did become unfit and unsanitary for the use for which they were given to the plaintiff; I find that she notified the parties of the condition of the stall, and that the repairs were not effective in remedying the condition of the premises; I find that notice was given after that, and that the repairs were not immediately done, or until after the plaintiff became ill, and from her own evidence and that of the medical witnesses called, I think the strong probability is that her illness was caused by reason of the unsanitary condition of the stall which she occupied. I further find that, irrespective of the notice given by the plaintiff, the defendants reserved to themselves the duty of keeping the premises in repair, and that they appointed a person for that purpose (Mr. Hill), and that it was part of his duty to inspect and see that the premises were kept in repair, and that in this regard he neglected his duty, and that the premises were not kept in repair, from which neglect the plaintiff suffered the injuries complained of.

Under these facts and circumstances the defendants contend under the authority of Brown v. Trustees of Toronto General Hospital, 23 O.R. 599, that they are not liable. If the plaintiff was a lessee of the stall, and the liability, if any, arose from that contractual relationship, the authority relied upon seems to be conclusive against the plaintiff's right to recover. But it was strongly urged by plaintiff's counsel that the plaintiff was a mere licensee. She occupied the stall at certain hours of three days in the week under a by-law. The by-law in substance provides: that the market clerk shall, under the control and supervision of the property committee, have superintendence of the market grounds and market buildings and all other buildings, stands, etc. Section 24: hucksters, dealers, etc., and all persons frequenting the market, and not being lessees of the market's stalls or sheds, shall have places assigned to them by the market clerk, subject to the control and direction of the property com-

mittee, and to the general regulations contained in this by-law. Sub-section 2: the stands for hucksters shall be located and numbered by the market clerk and be under his control and supervision, and shall be assigned by him to the several applicants according to his discretion, but no such stand shall be assigned to any person for a longer period than one week. These are the provisions applicable to the plaintiff.

Flynn v. The Toronto Industrial Exhibition, 9 O.L.R. 582, is, I think, applicable to the present case. Osler, J.A., in that case points out that except for the use permitted, the possession and control of the premises remained in the owner, and there was nothing to prevent the defendants, by their officers or servants, from entering or going over the ground, so assigned, when not in actual use by the lessee, and his judgment proceeds on the ground that by the express terms of the agreement the owners retained the right of supervision. The judgment of Garrow, J.A., is to the same effect.

On each Saturday the market clerk collected the dues, $1.50 for the week, punching out the price on a ticket which he then handed to the plaintiff. It was not pretended that the plaintiff had other right than that indicated by this transaction.

[Reference to Marshall v. Industrial Exhibition, 1 O.L.R. 319, affirmed 2 O.L.R. 62, following Rendell v. Roman, 9 Times L.R. 192.]

. . . In the Marshall case, it was held that the plaintiff not being a lessee, but a mere licensee, was there upon the invitation of the association, who owed a duty to the person whom they induced to go there to keep the place in proper repair, and that the association, who had by their negligence caused the accident, were liable. I am of opinion that the plaintiff was a licensee and not a lessee of the stall in question, but not a mere licensee.

The distinction is pointed out by Channell, B., in Holmes v. North Eastern R.W. Co., L.R. 4 Ex. 258, and Beven on Negligence, Canadian ed., p. 452, N 6. Here the license was paid for with the intention that the plaintiff on certain days of the week should occupy the stall in question where persons coming to the market might buy produce from her. There was, therefore, in my opinion, a duty owing from the defendants to the plaintiff, that the stall should be fit for the purpose for which it was intended to be used.

In Lax v. Darlington, 5 Ex. D. 28 . . . it was argued that the plaintiffs incurred their loss by their own fault, and that the danger was obvious, or that they knew it. Bramwell,

L.J., said: "If that question had been before us I should have had very great misgivings whether the plaintiffs were entitled to recover, because if they knew the danger and chose to risk it, it is their own fault; they are volunteers, and in my opinion the defendants ought not to have been made liable to them in that case."

Although this was obiter, yet it touches the point upon which I have the chief difficulty in the present case. The plaintiff had paid for the right of selling her produce in the market. She was entitled, I think, to have the stall in a reasonably fit and sanitary condition for that purpose. This I find it was not, and upon the evidence the strong probability is, and I find as a fact, that her sickness was caused by this unsanitary condition. The question then remains, ought the plaintiff to recover, inasmuch as she knew of this condition and remained there? Her answer to this question in her evidence was that she gave notice of the unsanitary conditions to the defendants, who promised from time to time to repair them, and this she fully expected they would do and so remained on, not realizing her danger.

In the present case the principal trouble arose from the fact that a gutter and down-pipe was clogged, causing an over-flow of the water, and also tending to destroy the roof. Under the facts in this case, it was, I think, clearly the duty of the defendants to make repairs, including this gutter. This, indeed, was admitted by the officer in charge of the market place. There was no inspection, and apparently no repairs made until they did receive notice.

[Reference to Hargroves v. Hartopp, [1905] 1 K.B. 472.]

In the present case whether the plaintiff was lessee or licensee it is quite clear from the evidence that the control of the gutter and down-pipe did not pass to the plaintiff and that the duty to see that it was kept in repair devolves exclusively upon the defendants. The defendants neglected to discharge this duty which they owed to the plaintiff, and the injuries complained of resulted from such neglect. The action does not arise out of the relation of landlord and tenant, or any covenant, express or implied, to repair, but it arises by reason of the duty raised from the defendants to the plaintiff by the license and payment for the right to occupy the stall. In this regard, I think, the case is distinguished from the Brown case, and I find that the plaintiff, under the circumstances, was not guilty of any contributory negligence in respect of the neglect which caused the injury. She had no right as licensee to make the repairs. Even

in the case where it is the duty of a tenant to repair, it has been held that in case the repairing would be so large as to be out of proportion to the tenant's interest in the premises (as it would be in this case), he would not be justified in repairing and treating the costs of such repairs as damages: Cole v. Buckle, 18 U.C.R. 286. Nor is he, it would seem, in such case bound to make repairs under the penalty of a denial of a recovery for injuries which would have been obviated thereby: 18 Am. & Eng. Encyc., 2nd ed., 235.

The fact that the plaintiff continued to occupy the premises after she had given notice and while they were unsanitary, was not unreasonable under the circumstances, from the fact that she was in constant expectancy of the repairs being made, and repairs were in fact made some weeks prior to her illness, but so negligently done that the premises still continued in an unsanitary condition. I do not think such continuance, under the circumstances, constituted contributory negligence upon her part. She was seriously ill for some weeks, was put to a considerable expense and suffered great pain and was otherwise put to loss and damages in connection with her business. I assess the damages at $550 with full costs of the action.

MIDDLETON, J., IN CHAMBERS. DECEMBER 5TH, 1912.

RE CHISHOLM AND CITY OF BERLIN.

Assessment—Salary of County Judge—Appeal from Court of Revision to County Judge—Prohibition—Disqualification by Interest—Jurisdiction of Judge in Chambers—10 Edw. VII. ch. 26, sec. 16—Appointment under the Act.

Motion by the City of Berlin for an order prohibiting the Judge of the County of Waterloo, or any Deputy or Acting Judge thereof, from hearing or disposing of an appeal of His Honour Judge Chisholm from the Court of Revision of the City of Berlin with respect to an assessment of his judicial salary.

W. Davidson, K.C., for the City of Berlin.
R. McKay, K.C., for Chisholm.

MIDDLETON, J.:—His Honour Judge Chisholm, being of opinion that his salary is not subject to municipal assessment,

appealed from his assessment to the Court of Revision. This Court confirmed the assessment. Under the Assessment Act an appeal lies from the Court of Revision to the County Judge; and on the 16th November His Honour appealed from the Court of Revision, "to the County Judge of the County of Waterloo, or any Deputy or Acting Judge thereof, or any Judge who may be sitting for and in the stead of the said County Judge"; and pursuant to this notice His Honour has served an appointment for the hearing of the appeal. "Take notice that I hereby appoint Tuesday, the third day of December proximo, at the Judge's Chambers in the Court House Square, Berlin, at the hour of 11.30 a.m., to hear the above appeal. Dated at the City of Berlin this 23rd day of November, A.D. 1912. D. Chisholm, County Judge."

The motion for prohibition is then launched, and an alternative application is made under the provision of 10 Edw. VII. ch. 26, sec. 16, which provides that where any person or the occupant of any office is empowered to do or perform an act, and such person is disqualified by interest from acting, and no other person is empowered to do or perform such act, then he or any interested person may apply upon summary motion to a Judge of the High Court in Chambers, who shall have power to appoint some disinterested person to do or perform the act in question.

On the return of the motion it is not contended on behalf of the County Judge that he had the right to hear the appeal himself; and it was not his intention, when he issued the appointment, to attempt himself to deal with his own case; but the position is taken that the Judge, although disqualified, should have the privilege of requesting some other County Judge to sit for him and hear the case. The learned Judge desires to act under 9 Edw. VII. ch. 29, sec. 15; and he proposes to request the Judge of some other county to sit for him upon the hearing of this appeal.

This course is objected to by the city, upon the ground that the Judge proposed to be asked to sit is himself interested in the very question; one of the Judges named having already successfully appealed from the assessment of his salary, and another name suggested being that of a Judge who now has an appeal pending. It is also objected that in selecting any other Judge to act for him, the Judge is really performing a judicial act in connection with his own case.

The appeal authorised by the Assessment Act is to the County Judge at Waterloo; and it is manifest that the County Judge is

disqualified by reason of interest. I think that the jurisdiction of a Judge in Chambers immediately arises, and that I have the power to appoint some person under 10 Edw. VII. ch. 26. Moreover, I think the contention of the city is well founded, that the disqualification by reason of interest is absolute, and that the learned Judge has no power to do anything in connection with his own appeal.

I do not go so far as to say that if there was no other provision, he might not upon the ground of necessity request another Judge to act; but when the statute has pointed out a way in which some disinterested person may be named, then I think that course should be followed.

The power given by the statute to a Judge of the High Court is much wider than the power conferred upon the County Court Judge by the Act of 1909. A County Court Judge can only request the Judge of another County Court to act: the High Court Judge can name a disinterested person. While it is quite true that the Judge of an adjoining county would not be interested in the assessment of the Judge of Waterloo upon his income, yet he is interested in a wider sense; as it is entirely likely that the assessment of judicial incomes in one county will be found to govern the action of the municipal authorities in the adjoining county.

Bearing this in mind, and seeking to apply the principle laid down in many cases, that it is important not only that the fountain of justice should be preserved from all impurity, but also that it should be protected against any semblance of impurity—or, as put in Eckersley v. Mersey, [1894] 2 Q.B. 671: "Not only must Judges be not biassed, but even though it be demonstrated that they would not be biassed, they ought not to act in a matter where the circumstances are such that people, not necessarily reasonable people, would expect them to be biassed"—it appears to be my duty to appoint some entirely disinterested person. I do not in any way reflect upon the learned Judge or upon those whom he contemplated asking to act for him; but it seems to me clear that the interests of justice will best be served by taking this course.

I, therefore, appoint the Chairman of the Ontario Railway and Municipal Board, under the statute, to hear the appeal. I select him, as that Board has jurisdiction over many matters of assessment.

There will be no costs of the application.

DIVISIONAL COURT. DECEMBER 6TH, 1912.

RE HOLMAN AND REA.

Criminal Law—Theft—Police Magistrate—Jurisdiction—Regularity of Proceedings—General Principles Governing—Police Magistrates Act, 10 Edw. VII. ch. 36, secs. 18, 10, 31, 34—When Prohibition may be Granted—Action of Crown Attorney.

Appeal by N. J. Holman from the judgment of SUTHERLAND, J., reported ante 207, dismissing a motion for prohibition.

The appeal was heard by MIDDLETON, LENNOX, and LEITCH, JJ.

C. A. Moss, for N. J. Holman.

R. C. H. Cassels, for the respondent.

MIDDLETON, J.:—. . . An information was laid by Holman before the Police Magistrate at Stratford, charging Rea with the theft of a horse. A warrant was issued, and Rea was brought before the Police Magistrate at Stratford, when he was admitted to bail and directed to appear for trial before the Police Magistrate at St. Mary's.

The accused thereupon went before the Police Magistrate at St. Mary's, surrendered himself into custody on the charge, pleaded not guilty, and elected to be summarily tried by that magistrate. The complainant objected to the trial proceeding before the Police Magistrate at St. Mary's, and his counsel attended and protested against the assumption of jurisdiction; whereupon the magistrate proceeded with the trial, and the informant not appearing, the magistrate—although served with the notice of motion for prohibition—acquitted the accused. The informant had been served with a subpœna to attend, but failed to do so.

Upon the motion for prohibition the learned Judge took the view that the course adopted was justified by section 708 of the Code; his attention not having been drawn to the fact that this section is one of the group of sections, 705 to 770, relating entirely to summary convictions, and that the case in hand was a summary trial of the accused by his consent for an indictable offence.

The learned Judge also relied upon section 668 of the Code, which provides that "when any person accused of an indictable

offence, is before a justice, whether voluntarily or upon a summons . . . the justice shall proceed to enquire into the matters charged against such person in the manner hereinafter directed." This section, then, does not purport to confer jurisdiction, and must, I think, be confined to cases in which the accused is rightly before the justices; in which case the procedure to be followed is pointed out.

Upon the argument counsel failed to point out any section authorising the adoption of the course pursued in this case. The case, therefore, falls to be determined upon general principles.

Regina v. McRae (1897), 28 O.R. 569, determines that where an information is laid before a magistrate he becomes seized of the case and that no other magistrate has any right to take part in the trial unless at the request of the magistrate before whom proceedings are taken. All the magistrates in the county have jurisdiction; but so soon as proceedings are taken before any one of these officers having concurrent jurisdiction he becomes solely seized of the case. The magistrate has under the statute, and possibly apart from the statute, the right to ask other magistrates to sit with him; and, if he does so, the whole Bench becomes seized of the complaint: Regina v. Milne, 15 C.P. 94.

The statute relating to Police Magistrates, 10 Edw. VII. ch. 36, sec. 18, recognizes this principle. So also do sections 10 and 34, which provide that the Deputy Police Magistrate, or, if there is no Deputy, any other Police Magistrate appointed for the county, may proceed for the Police Magistrate in the case of his illness or absence. Neither of these sections gives to the magistrate any power, once he has undertaken the case, to discharge himself, save in the case of illness or absence. He has no power to request another magistrate to sit for him. Contrast the provisions of the two sections with section 18, which provides that in the case falling within it, the magistrate may so request. By section 31, where the case arises out of the limits of the city, the Police Magistrate is not bound to act; but if once he does act it appears that he must continue to the end.

This view of the statute is quite consistent with the view taken in Regina v. Gordon, 16 O.R. 64.

It is argued on behalf of the respondent that prohibition ought not now to be awarded, because nothing remains to be done before the magistrate. The magistrate has acquitted. He has no jurisdiction. All that he has done is a nullity, and it may be that a more proper motion would have been for a certiorari, so that the proceedings taken before the magistrate might be quashed. But I think there is yet one thing that the magis-

trate may assume to do, and that is to grant a certificate of acquittal; therefore, prohibition may yet be awarded.

As said in Brazill v. Johns, 24 O.R., at p. 209, a prohibition may be granted at the very latest stage, so long as there is anything to prohibit. From the very earliest times this has been recognized as the guiding principle. In the historic answers of the Judges to the articuli cleri, resulting in the statute 9 Edw. II. ch. 1—found in 2 Inst. 602—it is said: "Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintained the contrary . . . for their proceedings in such case are coram non judice; and the King's Courts that may award prohibitions, being informed either by the parties themselves or by any stranger that any, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgment and execution as before." A statement which is referred to with approval by Willes, J., in Mayor of London v. Cox, L.R. 2 H.L. 239.

I have the less hesitation in awarding prohibition, where the magistrate proceeds with the hearing of the case having knowledge that his jurisdiction is disputed. It would be more seemly for all tribunals charged with the administration of justice to act in such a way as to avoid any suspicion that the course adopted is in any way the result of temper.

Here, the magistrate, knowing that his jurisdiction was disputed, and after having been served with a notice of motion for prohibition, dismissed the charge without having heard the informant's evidence, and apparently sought to put the informant in the position of either attorning to his jurisdiction by appearing in obedience to his summons, or risking everything upon the result of the motion. It would have been more consistent with judicial dignity to have enlarged the hearing until the question of jurisdiction had been determined.

There is no power in the Court to stay proceedings in an inferior Court pending the hearing of the motion: Myron v. McCabe, 4 P.R. 171; and this should make all inferior tribunals reluctant to act in a way that will afford any foundation for the argument here presented, that the motion is rendered nugatory by what has been done after the motion was on foot.

The citation from Coke also answers another objection made to this motion, that the informant had no locus standi to apply.

I think it my duty to draw attention to another matter appearing upon the material. In Livingston v. Livingston the Court

has spoken with no uncertain sound concerning the position occupied by local masters who are by law allowed to practise. What is there said does not apply to the full extent to the conduct of Crown Attorneys; who are, unfortunately, I think, allowed to practise generally. But what has taken place in this case serves to indicate the difficulties that all too frequently arise from this mischievous state of affairs.

Holman purchased a horse from Edgerton Rea, and paid him. William J. Rea, the father of Edgerton, brought an action of replevin to recover the horse. In that action he swore that his son had no authority to sell the horse. If his evidence is true, the son is guilty of larceny. The Crown Attorney appears in the replevin action as counsel for the father. When the information is laid, the son is taken before the magistrate, the Crown Attorney is notified, appears, and consents to the case being transferred to the other magistrate, without in any way communicating with the informant. When the informant goes before the other magistrate to protest against his jurisdiction, the Crown Attorney appears to conduct the prosecution, and apparently assents to the course adopted by the magistrate in acquitting the prisoner pending the motion. When this motion is made, the Crown Attorney appears for the magistrate and argues that the Court has no jurisdiction because the prosecution is ended, and is then awarded costs against the informant. One who thinks that this indicates something wrong in the administration of justice is not necessarily an unreasonable man.

The appeal should be allowed, and the prohibition granted, with costs against the respondent and the magistrate.

LENNOX and LEITCH, JJ., agreed in the result.

FALCONBRIDGE, C.J.K.B. DECEMBER 9TH, 1912.

ROYAL TRUST CO. v. MOLSONS BANK.

Banks and Banking—Money on Deposit—Depositor, an Endorser on Notes Held by Bank — Banker's Lien — Customer and Banker—Creditor and Debtor—Application of Money on Deposit—When to be Made—Interest.

Action by the plaintiffs, the executors of T. W. A. Lindsay, for a judgment directing the defendants to hand over to the

plaintiffs the two notes for $50,700, on which Mr. Lindsay was endorser, and to assign to the plaintiffs the collateral securities held by the defendants, who counterclaimed for $885.10, the balance claimed to be due by the plaintiffs.

J. Bicknell, K.C., and A. G. F. Lawrence, for the plaintiffs.
W. L. Scott, for the defendants.

FALCONBRIDGE, C.J.K.B.:—The facts are admitted. They appear from the correspondence produced, and for the present purpose may be very briefly stated.

The plaintiffs are the executors of T. W. A. Lindsay, who died on the 15th September, 1909. A few days after Lindsay's death two promissory notes upon which he was endorser became due and remained unpaid in the hands of the defendant bank, namely, one for $3,700 on 25th September, and one for $47,000 on 27th September.

The admitted liability of the estate on these notes amounted (with interest at 5% per annum) on 5th January, 1910, to the sum of $51,405.60.

At his death Lindsay also had money on deposit with the bank bearing interest at 3%, repayable on demand, and on 5th January, 1910, the manager of the plaintiff company wrote to the bank as follows:—

"The executors desire to invest the funds now held by the Molsons Bank at credit of the above estate, and we shall feel obliged if you will be good enough to advise us as to the exact amount against which the executors may issue their cheque."

In reply the manager of the bank wrote on 6th January, 1910:—

"The amount at the credit of the late Mr. T. Lindsay to the 31st of December, 1909, is $33,882.67.

"I note that you wish to draw this amount, but I regret having to advise you that our Head Office cannot allow this money to be withdrawn until some settlement has been made relative to the overdue notes of the Metropolitan Electrical Co. on which the late Mr. T. Lindsay is an endorser."

The plaintiffs now claim that on this date interest at 3% per annum to 6th January should be added to the amount at the credit of the estate in the deposit account, making a total of $33,899.37 principal and interest as at that date, and that this sum should be deducted from the amount then due on the notes, leaving a balance of $17,506.23 as the net indebtedness of the estate to the bank.

The bank on the other hand claims that after 6th January, 1910, the notes continued to bear interest at 5% and the deposit account at 3% only, until 29th April, 1911, when a cheque upon the deposit account was given by the executors to the bank, and received by the bank without prejudice to the rights of the parties.

The bank's position is explained in its manager's letter of 14th February, 1912, as follows:—

"I am in receipt of your letter of the 12th instant, asking me to advise you as to the grounds upon which the bank's claim for interest is based. I would have thought that these grounds sufficiently appeared from the correspondence that has passed between us. It is shortly that, until receipt of the cheque for $35,240 enclosed in your letter of the 28th of April, 1911, the bank has never received any authority or even request, to apply the amount standing to the credit of the estate of the late Thomas Lindsay on account of the indebtedness to the bank on the notes of the Metropolitan Electrical Company. You will observe that although on January 6th, 1910, I wrote to you stating that the bank could not allow the amount standing to the credit of the late Thomas Lindsay to be withdrawn until some settlement had been made relative to the overdue notes of the Metropolitan Electrical Company, the bank had no right at that time to apply the amount on account of the indebtedness in question and was not in a position to do so, and was not even requested to do so until receipt of the cheque enclosed in your letter of the 28th of April, 1911."

The amount of this cheque with other payments made by the executors was sufficient to discharge the whole indebtedness of the estate, according to the plaintiffs' method of calculation, i.e., $17,508.23, with interest at 5% from 6th January, 1910, but according to the defendants' method of calculation, there is still a balance of $885.10 with interest since the issue of the writ (18th June, 1912).

The plaintiffs ask that the bank be directed to deliver up to the plaintiffs the notes in question, and to assign to plaintiffs the collateral securities held by the bank in connection with the debt.

The bank denies plaintiffs' right and counterclaims for the $885.10 and interest.

In my opinion the plaintiffs' view is the correct one. At any time after the notes became due the bank would have been entitled to apply the deposit on account of the indebtedness, or in other words, to set off its indebtedness to the depositor against the depositor's indebtedness to the bank pro tanto, as was done in

Jones v. Bank of Montreal (1869), 29 U.C.R. 448. In that case it was held that this application of the deposit was an answer to an action by the customer for refusing to honour the customer's cheque, because there were no funds left upon which a cheque might be drawn.

On 6th January, 1910, the bank was placed in the same position as if it had refused to honour the plaintiffs' cheque—it either applied the deposit on account of the note indebtedness, or it did not do so, and in either case the result seems to be the same. If it so applied the deposit, then the unpaid balance of the indebtedness continued to bear interest at 5%, and on this basis was ultimately paid. If no application of the deposit was made, then the bank wrongfully refused to allow the amount on deposit to be withdrawn, and the plaintiffs are entitled to interest at 5% on the deposit, instead of 3% as theretofore.

No doubt it has been said that the ordinary banker's lien extends to money on deposit with a bank (vide, e.g., Misa v. Currie (1876), 1 App. Cas. 554, at p. 569.

But the word "lien" is used in this connection only as a façon de parler, "A lien is the right of a person having possession of the property of another to retain it until some charge upon it or some demand due him is satisfied" (Century Dict.).

Wharton's definition, sub verb., does not differ materially from this.

But it is well known that in the case of a deposit of money with a bank the relation between the customer and the bank is that of creditor and debtor.

There is no specific property of the customer in the possession of the bank upon which the bank can assert a lien.

The distinction is drawn very accurately in a passage from Morse on Banking, quoted with approval in Hart on Banking, 2nd ed. (1906), p. 742: "It is often stated that the lien attaches to money; but inasmuch as, quite apart from any question of lien, a banker is only bound to pay to, or to the order of, his customer the amount of the balance due to the latter after deducting what is due to the banker himself from the customer, the lien will not normally have any effective application to moneys."

"Indeed, as is well said in the treatise of Mr. Morse on the American Law of Banking, Boston, 4th ed., 596: 'The word "lien" cannot properly be used in reference to the claim of the bank upon a general deposit, for the funds on general deposit are the property of the bank itself. The term "set off" should be applied in such cases, and "lien" when a claim against paper or valuables on special or specific deposit is referred to. In the

cases the words are used very loosely, and sometimes the true force of a case has been mistaken by text-writers through failure to keep in mind this distinction. The practical effect of lien and set off is much the same. They result in balancing opposing claims, and since transfers of a general deposit are subject to the equities between the bank and the depositor, until notice to the bank, its right of set off is as good in respect to a general deposit as its lien in respect to a specific deposit for collection or as collateral.' ''

It follows, in my opinion, that the argument which was advanced on behalf of the bank is not well founded, viz., that there was a lien on plaintiffs' account in favour of the bank, and that the only effect of the letter of 6th January, 1910, was to assert the lien, but that otherwise the deposit was not affected until the plaintiffs themselves chose to apply it on account of the indebtedness.

There will be judgment for plaintiffs as prayed with costs. The counterclaim will be dismissed with costs—all on the High Court scale.

BOYD, C. DECEMBER 10TH, 1912.

RE HAMILTON.

Will—Construction—Trust Fund for Benefit of Daughter—Discretion of Trustee to Defer Payment of Corpus—Restriction During Coverture—Validity of—"Settled upon Herself"—Testamentary Significance of—"I Wish"—Obligatory Import.

Motion by trustee for an order construing the will of the Hon. Robert Hamilton under Con. Rule 938.

G. H. Watson, K.C., for the trustee.
R. A. Hall, and S. T. Medd, for legatees.

BOYD, C.:—By the will the testator intends and directs that distribution shall be made of part of his estate when his youngest child attains 21 and his widow remains unmarried, but this was apparently frustrated by the income of the whole estate being required for the use of the widow during her life, and only upon her death in May, 1912, has the opportunity for making a division of the estate among the beneficiaries arisen.

By the will the daughter on attaining 21, and after making provision for the widow, is to be paid one fourth part of the remainder of his estate, with this proviso, that if the trustees should think it undesirable for any reason that the share should be paid, the testator authorises them to defer the payment of the whole or any part to such time or times as they may think best, and in the meantime to pay only the annual income arising therefrom to the child.

The testator then provides for a further division upon the death of the widow of that part of the estate set aside for her (which in the result proved to be the whole of the estate), and to dispose of it as mentioned in the paragraph preceding, and closes with a repetition of the provision that the trustees shall have the right to defer the payment of the shares of the children as in the preceding clauses mentioned.

If these clauses stood alone, the situation would be that the trustees are directed to pay to the daughter her fourth share, subject to their discretion in deferring the payment, and meanwhile paying only the income to the beneficiary.

Upon this part of the will the question was raised whether the daughter has a present right to payment in full of the corpus, ignoring the discretionary power committed to the trustees.

The other question raised arises upon the consideration of a later clause in which the testator thus expresses himself: "I wish all my money that my daughter Annie Seaton may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same."

And the further question is still whether notwithstanding this "wish," the money shall still be paid without restriction or condition to the daughter, who is now a married woman.

The will of the testator was made in October, 1866; he died in January, 1893: the widow died in May, 1912. The daughter Annie Seaton was born in May, 1873; attained majority in 1894 and married H.C. Hill in December, 1905. (Whether there is any offspring does not appear).

Upon the early clauses of the will as framed and standing per se, I think, contrary to my first impression, that the better view is that they are inoperative so far as regard any discretionary control of the trustees to defer or withhold the corpus of the daughter's share. The law appears to be settled that a sum cannot be given absolutely, coupled with a direction that the trustee of the money is to exercise a discretion as to the time and manner of payment. Such a scheme can be carried out

effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary. The matter was discussed as if it were a new point by Stirling, J., in Re Johnston, [1894] 3 Ch. 304; a decision followed in Re Rispin, 25 O.L.R. at p. 636, which was affirmed in the Supreme Court.

But the foundation of the rule is of older standing. The Court of Chancery has always leant against the postponement of vesting in possession, or the imposition of restrictions on an absolute vested interest (per Lord Davey in Wharton v. Masterman, [1895] A.C. at p. 198, and in the same case at p. 192, Lord Herschell deals thus with the doctrine: "That it was regarded by the Courts as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and could not be postponed till a later day unless the testator had made some other destination of the income during the intermediate period."

The next point discussed was whether the married daughter was entitled to receive her full share, irrespective of the provision that "the money inherited" from her father should be "settled upon herself," etc. This later discretion, if it conflicts with the earlier one, must prevail according to the usual rule. It perhaps does not so much conflict as deal with this testament of his bounty in another point of view; i.e., the element of marriage is introduced, and the desire is expressed to protect the wife from the control or influence of the husband. And what is arrived at is a partial restriction on the enjoyment of the legacy so that it shall not "be encroached upon," i.e., alienated or anticipated during coverture. In this view this clause may well stand with and modify the other. That is to say, both yield this meaning: this money representing the share of the estate is to be given to her as her own absolutely, provided only that during coverture she shall enjoy it to her separate use (i.e. settled upon herself), and so that it shall not be encroached upon by her or her husband during coverture. After coverture, the restriction ends and she has it as if unmarried.

The restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture: Lord Langdale in Tullett v. Armstrong, 1 Beav. 1, and 4 M. & Cr. 377. The words of the will are satisfied if the restraint is limited to the contemplated coverture which is now actually existing, and it may well end therewith: so that when discovered, she may dispose of the corpus as she pleases.

Of the cases cited for the daughter, Re Hutchinson, 59 L.T.

[Reference to that case, and to Re Fraser, 45 W.R. 232, 1897; 490, is really in support of the view that the clause is valid. Re Brown, 27 Ch. D. 411.]

The rule there laid down (i.e. in Re Brown) was that when the bequest is to a married woman for her separate use absolutely, with a clause restraining her from anticipation, the question whether that restraint is effectual does not depend upon whether it is a lump sum in cash or an income-bearing fund, but upon whether the testator has shewn an intention that the trustees should keep the property and pay the income to the beneficiary. And the whole decision turned upon the words of the trust which were *to pay* to the married woman. If these words were found in the later clause of this will, as they do appear in the earlier one, I should be bound by this case also. But the words are different in the later clause, and they are the prevalent words: viz. the money is (not to be paid to her) but "settled upon her," which in my opinion completely differences the present will from the others in the citations. Comment has been made on the word used, "I wish," as not being sufficient to create a trust: it may carry an obligatory import, and it has been used by the testator in the context of the will in that sense: Re Bunting, 1909, W.N. 283, per Joyce, J., and Liddard v. Liddard, 28 Beav. 266; Potter v. Potter, 5 L.J.N.S. Eq. 98, is by no means as strong a case as this. The other words "settled upon herself" have a well known testamentary significance. For instance the form of settlement involved is shewn by Lock v. Lock, L.R. 4 Eq. 122, where the discretion was to "settle" the daughters' shares upon themselves "strictly." That was extended by the Court to mean that the property should be so dealt with that the income of the share should for the joint lives of wife and husband be paid to her for life without power of anticipation: that if she should die in the lifetime of her husband, then her share should go as she should by will appoint, and in default of appointment to her next of kin exclusively of her husband, and that if she should survive her husband, then the share should belong to her absolutely.

Some such form is applicable to the present case: there should be a trustee of the settlement provided, and proper conveyances settled by the Court or a conveyancing counsel if the parties cannot agree: to whom the trustee of the will may discharge himself by a transfer of the fund.

This is a proper case for the estate to bear the costs to be taxed.

LENNOX, J. DECEMBER 11TH, 1912.

TRETHEWEY v. MOYES.

Sale of Goods—Action for Rescission of Contract—Electric Motor Car—Not in Accordance with Specifications—Scienter of Defendant—Variation of Contract—Estoppel by Silence—Sale by Sample—Implied Warranty.

Action for rescission of a contract of sale by the defendant to the plaintiff of an electric motor car at the price of $4,300, on the ground that it was not in accordance with specifications, and for the return of $3,300 paid on account thereof, and of the Babcock motor car, given in part payment, or in the alternative for $3,000 damages.

R. McKay, K.C., for the plaintiff.
W. C. Chisholm, K.C., for the defendant.

LENNOX, J.:—There will be judgment:—

(a) Rescinding and setting aside the contract in the pleadings mentioned;

(b) Directing the defendant to deliver up to plaintiff, upon demand, the Babcock car in the pleadings mentioned; and

(c) For payment by the defendant to the plaintiff of the sum of $3,300 and the costs of this action.

The defendant, amongst other things, is a dealer in motor cars. In consideration of the payment of $3,300 in cash, and the delivery to him of the plaintiff's Babcock motor car, the defendant agreed to furnish and deliver to the plaintiff on or about the 15th of January, 1912, a Detroit Electric Brougham motor car, the same in all respects (except upholstering) as a car which the defendant had previously sold to Dr. C. J. O. Hastings.

The Hastings car is equipped with a 60 a 4 Edison battery and motor to correspond. It is admitted that the car furnished by the defendant, in alleged pursuance of the contract, is equipped, not with a 60 a 4, but with a 40 a 6 Edison battery and a motor to suit this battery. It is also admitted—or is not denied—that in several minor points the car in question does not correspond with the Hastings car.

It is hardly denied by the defendant, and at all events it is abundantly clear upon the evidence, that for some cause or other the car in question has never worked properly—has never been shewn to be an efficient, workable car of the class to which it

belongs. And it is shewn by the defendant's own evidence, and by the evidence of his brother, that the defendant deliberately determined, without the knowledge of the plaintiff, to substitute the 40 a 6 for the 60 a 4 battery provided for by the contract. The defendant's alleged reason is that he considered a 40 a 6 battery better than the other.

The defendant's evidence was, I thought, in the main straightforward and candid. Yet at the trial the defendant was, I think, entirely mistaken as to the motive which actuated him in making this substitution. A battery is worth about a thousand dollars. This one was in stock when Burke came to work for the defendant, some two years ago.

The evidence of William Wilkie Moyes as to what took place when he was in Detroit, the correspondence put in, particularly the letter from this witness to the Anderson Company on his return to Toronto, and the whole trend of circumstances, clearly convinced me that, consciously or unconsciously, the defendant's real motive was to get rid of a battery in stock and thus avoid the purchase of a new one. Motive, however, or even merit or result, is not the question. The defendant has not done what he bargained to do: Forman & Co. v. The Ship "Liddesdale," [1900] A.C. 190.

I judge, too, from the circumstances—although I may easily be mistaken as to this—that the defendant intended to keep the plaintiff in ignorance of the difference in the equipment of the two cars. It is a fact, however, that before the car was tried the plaintiff knew that the batteries were not exactly the same; but it is not suggested that, except by an actual trial and demonstration, he would be able to judge at all as to the relative merits of the two batteries.

It happened in this way. In looking at the car in presence of the plaintiff, Dr. Hastings said to the man representing the defendant that there were not so many cells as there were in his car—or that they were larger—or some words to this effect. This circumstance has given me a great deal of anxious consideration; although, of course, at most it only touches one of the causes upon which the plaintiff bases his action. The difficulty I have felt is as to whether the silence of the plaintiff at that time, pending the trial, prevents him from now setting up this difference in the two cars as a specific answer, in itself, to the defendant's contention that he has complied with the contract.

Upon the whole, I do not think it should. Even if in some cases it would have that effect, the answer of the man in charge in this case should, I think, prevent such a conclusion. This

man's statement was not correct. As I said, there had been no trial. This man in charge said, in substance: "The builders of this car have discontinued the use of the 60 a 4 battery; they think they get better results from this battery; this is a better battery"; whereas the only reason for the change was that it served the defendant's purpose to make a sale of a battery which he had carried in stock for a very long time. As to the time for rejection see Adam v. Richards, 2 H. Bl. 573; Heilbutt v. Hickson, L.R. 7 C.P. 438.

Aside, then, from the relative merits of the two batteries and the motors in conjunction with them, and without reference to whether the car is a good workable and serviceable car or not, I am of the opinion that upon the ground of non-performance alone the plaintiff is entitled to the judgment above set out: Bowes v. Shand (1877), 2 App. Cas. 455, per Lord O'Hagan, at pp. 479, 480, and Lord Blackburn, at pp. 480, 481; Allan v. Lake, 18 Q.B.D. 560.

But the battery is only one point. Under the specific terms of the contract, the plaintiff had not only the right to receive a car duplicating the Hastings car in appearance, equipment, and method of construction, but he had the right to have delivered to him a car equally as good in all respects—as efficient and as satisfactory in operation—as the Hastings car. He was to have a car "like the car . . . sold to Dr. Hastings."

He did not get such a car. A car that will not climb a hill, that must be re-charged every 25 or 30 miles, and that gives constant trouble, is not like Dr. Hastings's car. I have not overlooked the circumstance that towards the end of the trial, the defendant made a half-hearted suggestion that the Hastings car gave trouble too; but there was nothing specific, and I give no weight to this casual interjection, seeing that this was not at all the line of defence throughout the trial, that Dr. Hastings was not even asked as to the working of his car, and that upon the argument it was not even suggested that the Hastings car was not efficient and satisfactory in every respect.

Again, the vendor, as I said, is a dealer in motor cars. This transaction was in a sense a sale by sample—the Hastings car. It is not enough, even if the defendant had been able to do this, to shew that the car furnished was a copy or duplicate of the car sold to Hastings. The defendant was bound to supply a car reasonably fit for the purposes for which it was intended: Drummond v. VanIngen (1887), 12 App. Cas. 284; Mody v. Gregson, L.R. 4 Ex. 49; Randall v. Newson, 2 Q.B.D. 102.

What was the cause of this car not running properly does not clearly appear. The defendant, who was, I think, more com-

petent to speak as an expert than any other witness, said he could not even hazard a guess as to the cause. William Burke, called by the defence to give expert testimony as well as evidence of fact, said that a car of this class should run in cold weather sixty or eighty miles without being recharged, that such a car if half-charged should climb any hill in or about Toronto, and that if the car shewed the lack of power and other deficiencies complained of, there must be something radically wrong.

A good deal of evidence was directed to shewing that the battery was the cause of the trouble, and to controverting this. It does not greatly matter what was the cause. The case is not the weaker for the plaintiff if the battery were not the cause. But a point developed by the defendant himself, late in the trial, is important, viz., that the car probably never had a proper primary charge—that to properly saturate the cell plates of the battery would take at least from eighteen to twenty-four hours, and that without this it could not be expected that the car would work properly. Who should have seen to this? The plaintiff was not even advised of the need of it. The excuse for not properly charging it is that the plaintiff was in a hurry to have possession of the car. How could this be an answer in any case? The time when the plaintiff is said to have been in a hurry was many weeks after the time stipulated for delivery.

KELLY, J. DECEMBER 11TH, 1912.

CLEMENT v. McFARLAND.

Vendor and Purchaser—Contract for Sale of Land—Statute of Frauds—Amendment—Manner and Time of Payment—Authority of Solicitor—Incomplete Agreement.

Action to enforce specific performance of an alleged contract for the sale of the property known as No. 33 Chestnut Avenue, Hamilton, for $1,600.

J. L. Counsell, for the plaintiff.
W. A. Logie, for the defendant.

KELLY, J.:—At the opening of the trial a motion was made by defendant's counsel for leave to amend the statement of de-

fence by pleading the Statute of Frauds, and I allowed its amendment.

Plaintiff was for some years prior to the alleged sale the tenant of the defendant of the lands in question.

On April 5th, 1912, defendant wrote plaintiff as follows:

"I do not like to trouble you, but I think I will have to put up a house beside you. I have been trying to get one in the west for a friend of mine but property up here is almost out of reach."

Plaintiff then approached defendant about buying the property, following which defendant wrote the following to the plaintiff:—

"Hamilton, April 8th, 1912.

"Dear Sir:

If the house and lot is worth $1,600 to you, you can have it: if not, it is all right.

"Yours truly,
"James McFarland
"158 Canada Street."

On the face of this letter it was not addressed to any one, but it was sent to plaintiff by post in an envelope addressed to him at 33 Chestnut Street. This latter document is the memorandum of agreement now relied upon by the plaintiff.

According to the plaintiff's own evidence he then wrote defendant that he thought it would do, but he would let defendant know on the following Saturday night. This letter is not produced. On the Saturday night, defendant went to plaintiff's house, when a discussion took place about the terms of payment. Plaintiff says that he informed defendant he would pay all cash, that is, that he would pay $150 at that time and that he expected some more money soon, and that defendant expressed himself as satisfied with the proposal, that he was satisfied if he got 6 per cent.

Plaintiff's wife, who was present, says $150 was mentioned.

Defendant, on the other hand, says that plaintiff proposed to pay $150 down and $50 every six months, and that if he made default in the payments he would surrender the property, but that he (defendant) expressed dissatisfaction at this proposal, and said he would see his solicitor. He did see his solicitor, Mr. Chisholm, but denies having given him any instructions. Following this, defendant by letter requested plaintiff to go to Chisholm's office, which he did, and there further discussion took place between Chisholm and plaintiff regarding the terms of

payment; particularly as to what amount plaintiff would be able to pay annually on account of principal; plaintiff saying, in answer to the solicitor's inquiry if he could pay $100, that he would not like to state, but would undertake to pay at least $50 per year. The solicitor was not satisfied with this, and plaintiff says he proposed giving an undertaking to stand any loss that might be occasioned by default in keeping up the payment. Plaintiff appears to have got the impression that this was satisfactory to the solicitor, and that the solicitor had authority to complete the agreement on defendant's behalf. I cannot find that there was any such authority.

I do find, however, that on the Saturday night mentioned, the plaintiff and defendant agreed upon $1,600 as the purchase price, but that the terms of payment were not then agreed upon, and that down to the time that plaintiff and the solicitor met in the latter's office, these terms were still open.

On the evidence, and especially in view of defendant's denial of instructions to the solicitor, I do not find that there was any agreement on the part of the defendant as to the terms of payment.

The manner and time of payment were a material part of the agreement, which, in order to satisfy the requirements of the Statute of Frauds, should have been set out with such particularity and certainty as would enable the Court to ascertain and define first, whether or not payment was to be in cash, and secondly, if not in cash, on what dates and in what amounts the payments would be made.

What happened in this case falls short of supplying these terms.

As was said by Mr. Justice Teetzel, in Reynolds v. Foster, 3 O.W.N. 983, at pp. 985-986: "while the Court will carry into effect a contract framed in general terms where the law will supply the details, it is also well settled that if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced."

Here it was necessary for the parties to have gone a step further than they did, and definitely to have agreed upon the terms of payment; that not having been done, the plaintiff cannot succeed.

The negotiations were carried on somewhat loosely, and to hold that an enforceable contract was made would mean going further than the facts warrant.

The action will therefore be dismissed with costs.

I have come to this conclusion somewhat reluctantly, for, though in my opinion the defendant did not render himself

legally liable to plaintiff, the evidence indicates that at the very time he led plaintiff to believe he would be given the opportunity of purchasing, he was negotiating with other parties, with whom he did eventually enter into an agreement for the sale of this same property.

MIDDLETON, J. DECEMBER 11TH, 1912.

RE HUNTER.

Interpleader—Jurisdiction of Master—Administration—Sheriff's Bailiff in Possession—Levy—Lien of Execution Creditor—1 Geo. V. ch. 26, sec. 52.

Appeal by the Dominion Brewery from the decision of the Master at Port Arthur.

W. R. Smyth, K.C., for the Dominion Brewery.
H. E. Rose, K.C., for the administratrix.

MIDDLETON, J.:—The proceedings in this matter appear to be in a state of great confusion. An interpleader issue was directed, and apparently in some way referred to the Master for adjudication. The Master seems to have dealt with the question between the parties in the administration action, and it is very doubtful whether he had any jurisdiction. Counsel, however, shewed their good sense by agreeing that the real question at issue between the parties should now be determined, quite irrespective of questions of form and practice.

On the 5th September, 1908, the Dominion Brewery recovered a judgment against the late George Hunter, who was carrying on business under the name of Hunter & Co. Execution was duly issued and placed in the hands of the sheriff. At that time another execution was in the hands of the sheriff at the instance of the Soo Falls Brewery. That company had also a chattel mortgage upon the property of the debtor. Apparently there was a great deal of difficulty in ascertaining what the position of the Soo Falls Brewery Company was; but this has now disappeared, as the claim of the Soo Falls Brewery Company has been satisfied, its execution withdrawn, and it now makes no claim to the money in question.

Instead of proceeding to sell under the execution, the sheriff placed his bailiff in possession, and the receipts were turned over

by the cashier every day to the sheriff. The situation is indicated by this extract from Youill's evidence:

"The sheriff's man took memo. of sales made during the day, and at night he and I took the money from the cash register, and he took the money and gave me receipt. That continued daily until June 25th, date of sale to the Western Liquor Company. I do not know the amount of sale to this company. I went out of possession when the sale to the Western Liquor Company was completed and license transferred."

Youill, whom I have called the cashier, occupied an anomalous position. He was a clerk of Hunter's. An arrangement had been made by which a trustee was placed in possession for the benefit of creditors. This arrangement probably never was operated, owing to the fact that the creditors had not assented. The trustee ceased to act, and Youill purported to succeed him. In reality he was probably the bailiff of the Soo Company under its mortgage.

The one thing which is certain is that the sheriff received this money; and as he then had two executions in his hands, he received it by virtue of his execution; and I do not know whether it is material, but I think that each time that he received the money must be regarded as a levy made upon it.

After the death of Hunter his administratrix claimed this money. The Master by his report has found in favour of her claim. This ignores the provision of the Trustee Act, 1 Geo. V. ch. 26, s. 52, which provides that the distribution among the creditors in the case of an intestate, being insolvent, shall be pari passu, "but nothing herein shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal property."

I think it is clear that the execution creditor had a lien upon the moneys received by the sheriff, and that this lien is entitled to prevail over the claim of the administratrix.

Where the Legislature has intended that upon the happening of any event, the right of the execution creditor shall be defeated, it has said so in language free from ambiguity. An assignment and a winding-up order are both given priority over executions not completely satisfied by payment. Here, on the other hand, the statute protects the existing liens.

The appeal should, therefore, be allowed, and the execution creditor should have his costs against the administratrix.

Some question was raised upon the argument as to the exact balance due upon the execution. If this cannot be arranged between counsel, I may be spoken to again about it.

DIVISIONAL COURT. DECEMBER 11TH, 1912.

NIGRO v. DONATI.

Master and Servant—Injury to Servant—Negligence of Foreman—Person Intrusted with Superintendence—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 2, 3.

Appeal by the defendant from the judgment of LENNOX, J., at the trial, ante p. 2, where the facts are set out.

The appeal was heard by CLUTE, SUTHERLAND, and KELLY, JJ.

C. A. Moss, for the defendant.

N. W. Rowell, K.C., for the plaintiff.

CLUTE, J.:—The action was tried at Port Arthur by Lennox, J., without a jury, on the 5th June last, and judgment in favour of the plaintiff for $1,446 was given on the 10th September, from which judgment the defendant appeals.

The defendant was a contractor engaged at the time of the accident in blasting rock for a sewer in one of the streets at Port Arthur. The plaintiff was in his employ assisting at the work. It would appear that the defendant with some care had selected one Galzarino who had had a long experience in the handling of dynamite, and placed him in charge of the work.

Five holes were drilled to receive the dynamite. Numbers 1 and 2 were charged with dynamite by the foreman Galzarino. These two charges were exploded without injury. Number 3 was also charged (it is alleged, also by Galzarino) with a small amount of dynamite. This was left unexploded, and without notice to the men. The plaintiff, without knowledge that the hole contained dynamite, proceeded with the defendant personally to drill the hole deeper. A short drill was used; a longer drill was required. This was sent for. The defendant, fortunately for him, turned away from the hole when the plaintiff struck another blow. The charge exploded, and the plaintiff received the injuries complained of.

It was strongly urged by Mr. Moss that Galzarino, although foreman in a sense, and having the right to dismiss the men then engaged upon this job, yet did not have superintendence intrusted to him within the meaning of sec. 3, subsec. 2, of the Workmen's Compensation for Injuries Act.

The trial Judge found as a fact that the evidence did bring the case within the Act.

We think the evidence is clear upon this point. The defendant says: "I engaged a competent foreman of twelve years' experience, Galzarino. On the morning of the accident I had men working there. I said to them, "This is your foreman. If this man sends a man home I stand by him.' "

"Q. Did you tell Joe that? A. Yes, I said to Joe, 'You have nothing to do with the loading or the unloading of the dynamite. I pay a man more wages than you to do that.'

Q. Who looks after the cleaning out of the holes? A. The foreman.

Q. He is the person who superintends that? A. Yes, that is his duty.

Q. He was on hand with you and superintended Joe in the cleaning out of these holes? He was there? A. Yes, he was there with the dynamite. He was standing behind."

The foreman stated that he had acted as foreman for seven years in the handling of dynamite. That he was foreman for Donati and was hired because of such experience. That he was in charge of the work that day, and Donati was there also. That he loaded the two holes and exploded them. That he put a cover on the other holes. That five holes were drilled altogether, and two others were covered. He further states that the holes were 2½ feet deep, and 1¼ sticks of dynamite was put in, or 1½.

The trial Judge has found, and we think the finding is amply supported by the evidence, that the five holes were drilled on the morning of the accident, and the drilling was only completed a few minutes before the explosion of this hole No. 3, that the hole in question was deliberately, or at all events, intentionally, charged by someone. There was only one person who had the right to do this. This was Galzarino, the foreman, who came upon the works that morning, and who was expressly and distinctly put in superintendence of the works being carried on, and particularly of the blasting operations, and which included as incident thereto, drilling, plugging, cleaning out, loading, covering, and firing. The defendant put the plaintiff under the charge of the foreman as his assistant. He assisted in exploding the first and second holes, and the foreman then set him at work cleaning out the third hole and watched him for at least part of the time he worked at this. The defendant came along and assisted the plaintiff in this work, and had only temporarily stepped aside to look for, or speak to the foreman in possession of the dynamite, and swears that no one else at the works that morning had dynamite.

He further says upon the undisputed facts and circumstances given in the evidence in this case, "I am not prepared to accept

Galzarino's statement that he did not put dynamite in the hole in question, although it is possible that he is saying what he believes to be true, but on the contrary, I think that the only reasonable conclusion to be reached is, and I find it as a fact, that Frank Galzarino did place dynamite in hole No. 3."

This we think the only proper inference to draw upon the evidence, and that doing so, we have the simple case of the foreman himself partially filling the hole No. 3, and giving no warning that the same was only partially filled or contained dynamite; and having forgotten the fact, set the plaintiff to work to clean out the hole, from which work, and while so doing, the accident occurred.

It seems to us the clearest kind of case against the defendant. It was negligence of the grossest kind by a person having superintendence within the meaning of the Act. The case also clearly falls within subsec. 3 of sec. 3 of the Act, as the plaintiff had been expressly told to obey the orders of the foreman, at whose instance he did the work: Osborne v. Jackson, 11 Q.B.D. 619; Cox v. Hamilton Sewer Pipe Co., 14 O.R. 300. In Kearney v. Nichols, 76 L.T.J. 63, it was held that it is not necessary that such superintendence should be exercised directly over the workman insured, or that the workman should be acting under the immediate orders of such superintendence. It is enough if the superintendent and the workman are both employed in furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object. This case was applied by this Court in Drake v. Canadian General Electric Company, 3 O.W.N. 817.

The present case is a very much stronger case. Here the plaintiff was under the orders of the foreman doing the work in question. Of course there must be reasonable evidence from which the inference may be drawn. Here, in our opinion, the evidence was such as to raise a necessary inference that the hole in question was charged by the foreman. See Lefebvre v. Trethewey Silver Cobalt Mine Limited, 3 O.W.N. 1535; Evans v. Astley, [1911] A.C. 674, at p. 678.

The appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

KELLY, J.:—I also agree.

RE PRIESTER—MIDDLETON, J.—DEC. 5.

Will—Construction—Children "As Heirs"—Estate Tail.]—Motion for construction of will of Barbara Priester. Judgment: Orville Priester being of age the other children of Frederick Priester have no claim. "The money there may be left" forms no part of the residuary estate and is an absolute trust for the repair of the house. The discretion given the executors is only as to the mode of user. The only question of moment is the devise of the lands to Orville Priester; these are given to him "so long as he may live, and after his death I will that the said real estate be divided equally between his children as heirs." At the date of the will and death the devisee was an unmarried infant and this makes it easier to regard the word "children" as equivalent to "heirs of the body." The will using the words "as heirs" affords the key to the interpretation, and Orville takes an estate tail. The words "divided equally between" the children do not negative this: Atkinson v. Featherstone, 1 B. & Ad. 944, and Van Grutten v. Foxwell, [1897] A.C. at p. 664. "as heirs" affords the key to the interpretation, and Orville spend the small sum on hand in improvements on the farm more urgently needed than repair on the house. Costs out of the estate. V. A. Sinclair, for the executors. T. J. Agar, for Orville Priester. J. R. Meredith, for the official guardian, and also appointed to represent the unborn issue of Orville Priester.

JACKSON V. PEARSON—FALCONBRIDGE, C.J.K.B.—DEC. 6.

Money Lent—Promotion of Company—Evidence.]—Action for money lent. The defence was that the plaintiff and the defendant were, together with others, interested in the promotion of a company incorporated under the name of the Universal Gas Company, Limited, and that the plaintiff advanced the moneys sued for, for the purposes of the said company, and not as a loan to defendant personally. The learned Chief Justice said that he preferred to accept the evidence of the plaintiff as against that of the defendant, and that he adopted it as true. This was his view entirely apart from any question of the burden of proof, and of the probabilities of the case, which were to his mind, however, largely in favour of the plaintiff's contention. Judgment for the plaintiff for $1279.45, with interest from 3rd September, 1912, and costs. G. Wilkie, for the plaintiff. S. C. Smoke, K.C., for the defendant.

RE SMITH—MIDDLETON, J., IN CHAMBERS—DEC. 7.

Interpleader—Adverse Claims to Valuable Chattel—Form of Issue.]—Motion by Thomas Fraser Homer Dixon for leave to appeal from the order of RIDDELL, J., in Chambers, of 30th October, 1912, allowing the appeal of the Art Museum of Toronto from the order of the Master in Chambers.—See ante, 188. MIDDLETON, J.:—The order of my learned brother determines a very substantial question touching the merits of the dispute, and I think that the parties should be at liberty to obtain the view of an appellate Court upon this question. The policy to which effect has been given for many years is that the merits of a controversy should not be dealt with piecemeal on interlocutory applications, but should be disposed of in their entirety at the trial. The form in which the issue is settled may necessarily dispose of matters that ordinarily, and I think more properly, ought to be left to the hearing. Therefore, I suggest to the parties the desirability of considering whether an order might not well be made now, upon consent, by which the issue should be raised by the delivery of pleadings in which each side should be entirely at liberty to present its contentions in such manner as it sees fit, and in that way the whole matter could be more satisfactorily disposed of when the facts are ascertained at the hearing. If this is assented to, the costs throughout should be in the cause. If it is not assented to, the costs of this motion will be in the appeal. The appeal should be brought on during the present sittings. McGregor Young, K.C., for Thomas Fraser Homer Dixon. R. C. H. Cassels, for the Art Museum.

RUTTLE v. RUTTLE—MIDDLETON, J.—DEC. 7.

Alimony—Cohabitation after Action—Costs.]—Action for alimony.—The learned Judge said that the wife had never been in any peril of life or health—nor had she had any real apprehension of danger. The husband had acted badly, particularly when under the influence of liquor, and had made charges in his defence which he has in no way attempted to prove. The wife continued to live with her husband for some two months after action, and cohabited with him. The action is dismissed, but the husband must pay all costs over which the Judge has control under Con. Rule 1145. J. A. Jackson, for the plaintiff. J. E. Jones, for the defendant.

BERTHOLD & JENNINGS LUMBER CO. v. HOLTON LUMBER CO. (LTD.)—MASTER IN CHAMBERS—DEC. 7.

County Court Action — Judgment in — Delivery of Counterclaim Ordered — Transfer to Another County — Discretion of Court — Con. Rule 255.] — Motion by the defendants for an order transferring the action from the County Court of York to the County Court of Hastings. This was an action in the County Court of the County of York in which the plaintiffs on 4th December obtained judgment for $119.30 with a proviso that execution should not issue thereon without leave or until a counterclaim of defendants shall have been disposed of. The defendants were further ordered to "forthwith deliver a counterclaim and set same down for trial for the sittings of this Court commencing the third day of December, 1912." In default of so setting down the plaintiffs were to be at liberty to issue execution "unless otherwise ordered by this Court." The defendants have not yet delivered any counterclaim, but move to have the action transferred to the County Court of Hastings on the ground of that being the proper place for the trial of the counterclaim. The MASTER IN CHAMBERS: "It was not denied that if the whole case was going to trial the present motion would probably succeed. It was contended, however, that under the facts and the terms of the judgment in plaintiffs' favour, no order could now be made. I agree with this view for two reasons—(1) There is no power in the Master in Chambers to transfer a judgment obtained in one County Court to another, which would be the effect of acceding to defendants' motion—(2) The terms of that judgment preclude the defendant from doing otherwise than complying with its conditions unless the same were varied on an appeal, which cannot be heard here. It may further be urged that defendants having obtained an indulgence under that judgment cannot now seek to vary its terms. By indulgence I mean the stay of issue of execution until the counterclaim has been disposed of.—No doubt this is usually directed.—See Holmested & Langton, 3rd ed., p. 801. But Con. Rule 255 leaves this and other terms to the discretion of the Court or Judge. Here that discretion has been exercised, and I at least have no power, even if I had the inclination, to interfere with it." Motion dismissed with costs to the Berthold Co. in the counterclaim in any event. F. Aylesworth, for the defendants. R. W. Hart, for the plaintiffs.

SOVEREIGN BANK v. SEVIGNY—MASTER IN CHAMBERS—DEC. 7.

Consent Minutes—Motion to Enforce Terms of—Jurisdiction of Master.]—Motion by the defendant for an order dismissing the plaintiffs' motion for an order striking out the statement of defence herein, and for entry of judgment against the defendant for default in complying with terms of consent minutes filed at the trial of this action on the 25th June last, on the grounds, (1) that the action had been settled, and (2) that it could not be made before the Master. Judgment: "I agree with this latter contention. It was decided in Pirung v. Dawson, 4 O.W.R. 499, 9 O.L.R. 248, that a motion to enforce a compromise or other agreement must be made to a Judge in Court. The plaintiff's motion was in substance a motion of that kind. Under the circumstances set out in the affidavit of defendant's solicitor filed on this second argument, and not in any way impeached, I think the motion must be dismissed with costs to be set off against the costs taxable against the defendant, such costs being fixed at $20. F. Aylesworth, for the defendant. H. S. White, for the plaintiffs.

STORIE v. HANCOCK—BOYD, C.—DEC. 7.

Sale of Land—Specific Performance—Contract by Correspondence.]—Action by the plaintiff for specific performance by the defendant of a contract to sell him the north 50 acres of lot 9, in the 2nd concession of the township of East Whitby, for $3,000. The contract was made by correspondence, the details of which are discussed by the learned trial Judge, defence being a denial of any contract, and of any valid contract by a competent agreement, and the Statute of Frauds. BOYD, C., found the defence not proved and gave judgment for specific performance, with costs to be deducted from the price. J. F. Grierson, for the plaintiff. W. C. Chisholm, K.C., for the defendant.

NIAGARA NAVIGATION CO. v. TOWN OF NIAGARA-ON-THE-LAKE—MASTER IN CHAMBERS—DEC. 10.

Change of Venue—Recovery of Land—Con. Rule 529(c)—*Title to Land Involved.*]—Motion by defendants to change venue from Toronto to St. Catharines. The Master said that the motion was apparently made on the assumption that the action was

one for the recovery of land, and so coming within Con. Rule 529(c). But on the pleadings this seems to be erroneous. The statement of claim alleges a trespass by the defendants on the land of the plaintiffs and asks for an injunction against any repetition of the acts complained of, and a declaration that the defendants had no right to enter on said lands or any part thereof. The statement of defence alleges that the lands in question are part of a public street or highway known as Nelson Street, which was opened by a by-law of the defendant corporation, number 619; and that the trespass complained of consisted in the removal of a fence across the said highway erected by plaintiffs, on their refusal to remove the same and give up possession of the said highway. There is no relief asked by the defendants by way of counterclaim. The plaintiffs in reply set up title by possession. The Master thought that though the title to land is involved, the action cannot be said to be for, or to include, a claim for the recovery of land. Had the defendants been plaintiffs, then it could have been so framed as to come within Rule 529(c). The motion fails on this ground, and there is no sufficient, if any, evidence to shew a preponderance of convenience. Motion dismissed with costs in the cause to the plaintiffs, without prejudice to a motion on further and better material, if the defendants think it worth while to move. R. H. Parmenter, for the defendants. T. L. Monahan, for the plaintiffs.

DOMINION BANK v. SALMON—KELLY, J.—DEC. 11.

Interpleader—Seizure under Execution—Claim under Prior Sale—Bills of Sale and Chattel Mortgage Act—Change of Possession.]—This was an interpleader issue to determine whether certain lumber which was seized under an execution in an action of the Dominion Bank against A. M. Salmon, was at the time of the seizure the property of the claimant Edson Salmon, carrying on business under the name of the Salmon Lumber Company. The seizure was made on April 11th, 1911, while the claimant, the Salmon Lumber Company, rested its right to ownership on the ground that, on February 24th, 1911, it purchased from A. M. Salmon the lumber and saw-mill business theretofore carried on by him, including all lumber on the mill premises at New Liskeard. The claimant also contended that in the interval between February 24th, 1911, and the seizure on April 11th, 1911, it bought from one Neely and took into the

business two carloads of lumber, for one of which Edson Salmon said he paid $246.02, and for the other $288. The learned trial Judge finds that the alleged sale made by A. M. Salmon to the claimant, on February 24th, 1911, did not comply with the requirements of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, and that A. M. Salmon continued to conduct the business, from the 24th February, until the seizure, just as he had conducted it before the alleged sale. There was not the actual and continued change of possession which is required by the Act, and the alleged sale is declared to be null and void as against the creditors of A. M. Salmon. As to the lumber which was said to have been purchased by the claimant from Neely, after February 24th, 1911, Kelly, J., finds that the evidence does not sufficiently bear out the proposition that it was the property of A. M. Salmon, and allows the claimant, Edson Salmon, what he paid for it, $246.02, with interest from April 11th, 1911. As to the rest of the claim the claimant fails. Success being divided, there will be no costs. G. A. McGaughey, and T. E. McKee, for the claimant. C. L. Dunbar, for the Dominion Bank.

RE SOLICITOR—MASTER IN CHAMBERS—DEC. 11.

Costs—Bill for Services Rendered in County where Solicitor Resides—Reference of Bill to Toronto—Irregular Order—Objection not taken at Proper Time—Con. Rules 1187, 311.]—Motion on behalf of clients for an order to set aside a præcipe order referring a bill for services to one of the Taxing Officers at Toronto. The case arose out of an arbitration as to certain electric lighting plant in the town of Ridgetown. The solicitor and counsel employed by the corporation of that town rendered his bill for services, and when same was not paid, on the 18th November took out a præcipe order from the central office referring the bill to one of the Taxing Officers at Toronto. This order was taken before Mr. McNamara, who on the 21st November, gave an appointment for the 22nd, and directed any objections to the bill to be delivered on or before the 21st. This time was by consent of the solicitor enlarged until the 25th, on which day objections to 30 items of the bill were filed. The taxation had been adjourned to the 27th on the consent above mentioned. After one if not more further enlargements, and no taxation having been had, on the 6th December a motion was made on behalf of the clients to set aside the order of the 18th November and all

proceedings thereunder. The MASTER:—"The ground taken in support of the motion was that under Con. Rule 1187 the taxation should be before the proper taxing officer for the county of Kent, being the county in which the solicitor resides. It may be admitted that the præcipe order in this case was irregular, and if this motion had been made before anything had been done under it by the clients, it would have been set aside with costs. But the case as it now stands is very different. The order though irregular was not a nullity, and when that order was obeyed without any objection, and an enlargement asked for and granted, and objections to the bill were brought in and an enlargement obtained for the taxation to proceed, it is altogether too late to raise any question of irregularity. Such an objection can only be successfully taken if 'made within a reasonable time, and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity.' Con. Rule 311. Justice will be done in this case by dismissing the motion without costs." F. Aylesworth, for the clients. S. S. Mills, for the solicitor.

DIXON v. GEORGAS BROTHERS—LENNOX, J.—DEC. 11.

Fraudulent Misrepresentation—Sale of Business—Evidence—Declaration of Co-partnership—Failure to Register—Remission of Penalties—Costs.]—Action for $1,500 damages for alleged false and fraudulent misrepresentations, and also for $100 penalty against each partner, for failing to register the declaration of co-partnership required by statute. LENNOX, J., gave judgment remitting the penalties in question, in pursuance of the powers vested in him under 7 Edw. VII. ch. 26(O.). The judgment then proceeds: "the statute expressly provides that the costs of the action shall not be remitted. So far as this part of the plaintiff's claim is concerned, he could have sued in the County Court, if not in the Division. In the disposal I shall make of the costs it is not worth while to enquire, and I express no opinion, as to whether the Division Court has jurisdiction or not. The plaintiff would be entitled to the costs of this branch of his case then on the County Court scale, and the defendants to a set off of the extra costs of being brought into the High Court. The plaintiff could have moved for judgment upon the pleadings but I do not think any saving would have been affected in that way. . . . I shall treat the costs as above indicated, and although on taxation, the plaintiffs costs might

not exceed the extra costs to be recovered by the defendants, I shall as a matter of convenience adjust them and allow the plaintiff a net sum of $25 to be set off against the general costs of the defence hereinafter provided for:

The claim for penalties was a mere side issue, a peg perhaps upon which the plaintiff hoped to hang costs in the event of failing in his main claim. The whole contest was as to the plaintiff's right to recover damages for fraudulent misrepresentations alleged to have been made by the defendants to the plaintiff inducing him to purchase a business in Port Hope in October, 1911. . . . I dismiss this portion of the plaintiff's claim with costs to the defendant—these costs to be all the costs of defending the action except such foliage charges as relate specifically to the penalty claim. Against these costs when taxed, the plaintiff may set off pro tanto the $25 allowed him." The learned Judge finds, as to the main branch of the case, that the sale was honestly and fairly entered into and carried out by the defendants. W. F. Kerr, for the plaintiff. W. S. Middlebro, K.C., for the defendants.

QUEBEC BANK v. SOVEREIGN BANK—BRITTON, J.—DEC. 12.

Right to Lumber—Action for Declaration—Facts Found in Prior Action.]—Action for a declaration that out of the spruce and balsam blocks in the yard of the Imperial Paper Mills of Canada, Limited, the plaintiffs are entitled to 400 cords, and that out of the jack-pine blocks in the same yard, the plaintiffs are entitled to 5,208 cords in priority to any claim of the defendants, and for an injunction, etc. BRITTON, J., said that all the rights of the parties to the blocks in the yard of the mill, which blocks were claimed by the plaintiffs, have been considered, and for the present determined, in a prior action between the parties. If that case has gone, or is to go further, the rights as claimed in this action may be further considered and determined there. This action in his opinion should be dismissed, but under all the circumstances, without costs. F. E. Hodgins, K.C., and D. T. Symons, K.C., for the plaintiffs. J. Bicknell, K.C., and W. J. Boland, for the defendants.

CORRECTION.

In Rex v. Cook, ante 383, the counsel for the magistrates and the private prosecutor was *C. S. Cameron*, not *M. C. Cameron*.