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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 12TH, 1916.

*GALBREATH v. CRICH.

Contract—Building Contract—Work not Finished owing to Subsidence—Contractor's Work Improper from Beginning—Intervention of Municipal Building Inspector—Direction of Owner for Substituted Work—Liability to Pay for—Money Paid to Remedy Improper Work—Damage to Owner—Assessment of Damages—Reference—Costs.

Appeal by the defendant from the report of R. S. Neville, K.C., Official Referee, in an action to enforce a mechanic's lien, finding $399.50 due to the plaintiff for work done under a building contract.

The plaintiff, an excavator, by the contract undertook to do necessary excavating and to build a concrete retaining wall where necessary, put in two windows and a door, for $175; this was to include all material necessary, also supporting through centre of cellar; and a concrete floor was to be put in for $33.50. Payment was to be made "on completion of job."

When the excavation was substantially finished, the stone foundation wall, which was to be supported by the cement retaining wall, slipped, and let the building down; and the cement wall could not be completed as contemplated. The plaintiff called in one Fess, who jacked up the building, charging $75 therefor. Afterwards, the municipal building inspector insisted on a change of plan, and the plaintiff built a solid cement cellar wall to support the building.

The Referee allowed the plaintiff the cost of the whole work, done partly under the contract and partly as necessitated by the subsidence, at $324.50, plus the $75 paid to Fess.

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

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. Cohen and W. C. MacKay, for the appellant.

R. G. Agnew, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said, after stating the facts, that the retaining wall could have been built before the cellar was excavated; and the plaintiff must accept responsibility for the method actually adopted, it not being shewn that the defendant actively intervened to direct or superintend: Duncan v. Blundell (1820), 3 Stark. 6.

The plaintiff's work not having been finished, owing to the subsidence, he could not recover, even if this was caused by accident without negligence. He might have abandoned it, subject to the defendant's claim for damages; but, if he went on and did what was necessary to accomplish the designed end, in a different way, he must either prove a new contract for an additional sum, or be limited to his original contract price, if the new work was to be treated as a substituted performance of the old contract.

Reference to Thorn v. Mayor and Commonalty of London (1876), 1 App. Cas. 120.

Sufficient was not proved to warrant a finding that there was an express contract to pay, even on the basis of a quantum meruit. But the work as contemplated was probably improper from the beginning; and, when the inspector intervened, its further performance was both legally and practically impossible. The completion of the work under the old contract was prevented and the doing of new and additional work necessitated. This added to the value of the defendant's house. The direction by the defendant to the plaintiff to go on and do the work, which was fairly proved—coupled, shortly after, with a mention of damages—was sufficient to sustain the claim of the plaintiff to the extent of $324.50 found by the Referee.

But it did not follow that the defendant should pay for the work necessary to prevent further damage—the necessity for jacking up arose in consequence of the plaintiff's operations.

The defendant's damages should be assessed at $50, subject to the right of either party to take a reference back.

The appeal should be allowed and the judgment set aside. If no election to take a reference is made within one week, $50 will be allowed to the defendant and deducted from the $324.50, and judgment will be entered for the plaintiff for $274.50, with costs as allowed by the Referee in the report appealed from, but with no costs of appeal. If a reference is desired, it will be to the

same Referee, as to damages only; and, after his report, judgment will be entered for the plaintiff for $324.50 and costs as aforesaid, less the amount found by him. The costs of the reference will be determined by success in increasing or decreasing the $50 suggested.

FIRST DIVISIONAL COURT. JUNE 12TH, 1916

*WOOD v. WOOD.

Foreign Judgment—Decree of Divorce—Money Payable by Husband for Support of Wife and Child—Alimony—Claim for Arrears Based upon Judgment—Action in Ontario—Jurisdiction—Finality of Judgment—Judicature Act, sec. 34—Penal Action—Effect of Remarriage of Husband—Jurisdiction of New York Court to Grant Permanent Alimony Following Absolute Divorce.

Appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff in an action upon a foreign judgment.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

F. J. Hughes, for the appellant.

A. Bicknell, for the plaintiff, respondent.

HODGINS, J.A., read the judgment of the Court. He said that the judgment sued upon was pronounced by the Supreme Court, State of New York, Erie County, on the 16th January, 1912, and dissolved the marriage between the appellant and respondent; it gave the respondent the custody of the child born of the marriage, and ordered the appellant to pay to the respondent $50 per month for the support of herself and child, beginning on the 15th September, 1911. In this action, in the County Court, judgment for $605 had been given for the plaintiff, being about 12 months' arrears up to the 15th January, 1916. The appellant married again in Ontario on the 11th December, 1915.

A claim for arrears of alimony past due upon a foreign judgment is enforceable in Ontario: Robertson v. Robertson (1908), 16 O.L.R. 170; Swaizie v. Swaizie (1899), 31 O.R. 324. See also Phillips v. Batho (1913), 29 Times L.R. 600.

The want of finality attributed to the English decree for alimony (see Robins v. Robins, [1907] 2 K.B. 13) is not apparent in

the foreign judgment here sued upon; but it appeared from the evidence at the trial that the New York Court could revise its adjudication upon the quantum allowed. In an action for alimony in Ontario, the power reserved by sec. 34 of the Judicature Act to deal with the permanence of the grant of alimony might affect the finality of the judgment; but an Ontario Court could not interfere with the New York judgment except by refusing to enforce it. See Moore v. Bull, [1891] P. 279.

There was nothing in the evidence to shew that the New York Court could revise the amount *past due*, and the judgment of that Court was a final one. The requirements set out in Nouvion v. Freeman (1889), 15 App. Cas. 1, 9, were satisfied.

Reference to Leslie v. Leslie, [1911] P. 203.

The objection that the judgment was recovered in a penal action could not be sustained: Huntington v. Attrill, [1893] A.C. 150; Raulin v. Fischer, [1911] 2 K.B. 93.

The judgment sued upon effectually terminated the bond of matrimony. The appellant is not, by satisfying this judgment, while married to his present wife, contributing to support two wives, but rather paying the legal penalty for those acts which, while enabling him to remarry, entail a yearly reminder of his past delinquencies.

The jurisdiction of the New York Court to grant permanent alimony following an absolute divorce was questioned at the trial, but nothing was elicited to cause difficulty on that point in this case. This decision is not to be taken as indicating that this Court has finally considered and adjudicated upon that point.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 15TH, 1916.

*RE O'NEIL AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Compensation—Claims by Owner, Tenant, and Sub-tenant—Value of Land Taken—Damages for Severance—Incidental Damages—Changes in Proposed Building—Arbitration and Award—Appeal from Award.

An appeal by the Corporation of the City of Toronto from an award of the Official Arbitrator for the city.

Grace N. Gibson, the owner of the lot at the north-east

corner of Gerrard and Parliament streets, let it to O'Neil for 21 years from the 1st May, 1911, at a rental of $1,000 per annum for the first 15 years and $1,200 thereafter, payable by monthly instalments in advance; the lessee to expend at least $2,500 in improvements, keep in repair, etc.

O'Neil proposed to build a moving picture theatre, and to let the property for the remainder of the term (except one day) to Wagner & Hallat, who intended to run the theatre. On the 4th February, 1913, an agreement was made by which Wagner & Hallat were to pay $400 a month from and after the 1st May, 1913, or such time as the theatre should be ready.

The former building was pulled down and preparations made to build, when (21st April, 1913) the city council passed a by-law to expropriate a quadrant of 20 foot radius from the corner. This made it impossible to build a theatre of the same dimensions as had been planned. A lease, however, was made by O'Neil to Wagner & Hallat, and O'Neil transferred to them all his claim for damages and compensation against the city corporation, excepting his claim for increased cost of the proposed building caused by the rounding of the corner.

The arbitrator awarded to Grace N. Gibson $665.16; to O'Neil $1,900; and to Wagner & Hallat $4,130; with interest on the first and third sums from the date of the by-law.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Irving S. Fairty, for the appellants.

A. C. McMaster, for the respondent O'Neil.

S. W. McKeown, for the respondents Wagner & Hallat.

Strachan Johnston, K.C., for Grace N. Gibson.

RIDDELL, J., in a written opinion, said, after stating the facts, that the elements of damages and compensation were: (1) the value of the land taken; (2) damages for severance, if any (sec. 325(4) of the Municipal Act, R.S.O. 1914 ch. 192); and (3) other damages.

The arbitrator allowed the value of the land taken at $1,700, and this was not seriously complained of.

Grace N. Gibson, until the termination of the lease will receive the same rental; but at the end of the term she will receive back her land, less $1,700 worth, and a building less by some square feet than she would have had but for the expropriation. In the absence of any evidence to the contrary, the prospective loss to the claimant Gibson should be taken at $1,700 plus $450, that is,

$2,150; the loss at the 1st May, 1913, was the present value of $2,150, or $850.83, of which $672.74 was attributable to the land alone. She was not entitled to anything for severance or for incidental damages. She should be allowed, therefore, $850.83, with interest from the 1st May, 1913.

The sum allowed to O Neil, $1,900, was too high; it should be reduced to $1,500. His claim was only for the expense occasioned by rounding the corner; he had assigned his claim in respect of the land taken, and could not claim for severance.

The sum allowed to Wagner & Hallat should, on the evidence, be reduced to $1,127.26, with interest from the 1st May, 1913.

The claimant Gibson not having appealed, she should have leave to appeal nunc pro tunc, and in that case she should have no costs. If, however, she was content with the existing award, her costs should be paid by the city corporation.

The other claimants should pay the costs of the city corporation.

MEREDITH, C.J.C.P., and LENNOX, J., concurred.

MASTEN, J., for reasons stated in writing, agreed in the result, except as to the amount allowed to Wagner & Hallat, to which, he thought, $900 should be added.

Award varied.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JUNE 12TH, 1916.

RE HOPF.

Executors and Administrators—Executor Passing Accounts in Surrogate Court—Disallowance of Payment Made to Wife of Executor—Effect upon Claim of Wife against Estate—Not a Bar to Action to Recover from Estate—Payment Made without Notice to Beneficiaries—Refusal of Surrogate Court Judge to Re-open Case for Fresh Evidence—Appeal.

Appeal by Philip Stroh, executor, and Mary Stroh, his wife, from an order of the Judge of the Surrogate Court of the County of Bruce upon the passing of the accounts of the executor in respect of the estate of a deceased testatrix.

The appeal was heard in the Weekly Court at Toronto.

G. H. Watson, K.C., for the appellants.

W. S. Middlebro', K.C., for the adult beneficiaries other than Mary Stroh.

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

FALCONBRIDGE, C.J.K.B., said that the appeal was from the formal order of the learned Judge, and not from his reasons for judgment. The formal order disallowed the payment of $1,500 made by the executor to his wife, Mary Stroh, for a promissory note alleged to have been made by the testatrix. It neither allowed nor barred the claim of Mary Stroh, and she was free to take any action which she might be advised to take, to recover from the estate.

If the executor had in good faith paid this claim before bringing in his accounts, the learned Judge had jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts: In re MacIntyre (1906), 11 O.L.R. 136.

The payment of this money by the executor to his wife without any notice to the beneficiaries was most ill-advised and improper; and even harsher adjectives might appropriately be used. The first notice which other parties interested had of the payment was by seeing the item in the executor's accounts.

The learned Chief Justice said that, if he were concerned with the merits of Mary Stroh's claim, he would entirely agree with the findings of the learned Judge—who had the additional advantage of seeing the witnesses.

The alleged rejection of evidence consisted in the very proper refusal of the Judge to re-open the case or allow fresh evidence to be adduced, in circumstances which would not at all have justified him in so doing, according to the well-settled practice of the Court.

The appeal should be dismissed, with costs to be paid out of the share of Mary Stroh.

To prevent misapprehension, the order dismissing the appeal is declared to be without prejudice to the right of Mary Stroh to take such proceedings as she may be advised to enforce her alleged claim on the estate.

MIDDLETON, J. JUNE 12TH, 1916.

RE HOLMES.

Will—Construction—Charitable Gifts—Division among Beneficiaries—Remuneration of Executors—Originating Notice—Dispensing with Service on Sunday Schools and Missionary Societies.

The executors of a will, having launched a motion, upon originating notice, for an order determining certain questions arising as to the construction of the will, moved for directions as to service of persons interested.

The motion was heard in the Weekly Court at Toronto.

W. Lawr, for the executors.

MIDDLETON, J., said that the remedy was worse than the disease. Three questions were suggested:—

First, a legacy of $500 was given to "The Protestant Sabbath Schools of Ontario." If divided, this would not cover the postage incident to its transmission. There was an incorporated body, "The Ontario Sunday School Association;" the money might well be paid to it, and so some real good might follow.

Second, the sum of $500 was given to Ontario Protestant Home Missionary Societies. This might well be divided among the Anglican, Baptist, Presbyterian, Methodist, and Congregational bodies —$100 each. The deceased, it was said, had no denominational preference; and this would probably well satisfy such a reasonable man.

Lastly, the deceased appointed three executors, and added: "They shall each have $150." These gentlemen wished to know if this was in addition to the compensation they would otherwise have. Clearly this was intended to be their sole remuneration.

The learned Judge said that he found no need of any notice being given to all the Sunday Schools or to any one to represent them, nor to the various Home Mission Societies; and so he construed the will, dispensing with notice. To do otherwise would be to make the legal profession the chief participants in the estate, and nothing in the will indicated that that was the testator's intention. As the executors were empowered to give the residue "unto such persons as they wish to have it," there was no reason why they should not make a present to their legal adviser if they saw fit—but no order to that effect should be made.

MIDDLETON, J. JUNE 12TH, 1916.

RE STRATTON.

Will—Construction—Provision for Sale of Company-shares to two Named Persons, at Low Price—Joint Option—Refusal by one —Successive Options—Priority.

Application by the executors of James R. Stratton, deceased, for an order determining a question arising as to the construction of the will of the deceased.

The application was heard in the Weekly Court at Toronto.
D. O'Connell, for executors.
W. N. Tilley, K.C., for A. H. Stratton.
R. R. Hall, for R. M. Glover.

MIDDLETON, J., said that by clause 15 of the will it was provided that the executors should give to the testator's brother, A. H. Stratton, and Roland Maxwell Glover, jointly, an option for 10 days to purchase 10 shares of the capital stock of the Peterborough Examiner Company, for $50,000, and "in case both of them, the said A. H. Stratton and Roland Maxwell Glover, do not accept said option," then a similar option was to be given to the brother; and, if he did not accept, a similar option was to be given to Mr. Glover.

The stock was said to be worth more than the stipulated price. The brother declined to become a joint purchaser with Glover, and thereupon claimed the right to become sole purchaser.

Glover contended that this was a gift of the stock (subject to payment of $50,000) to Stratton and himself; and, if Stratton declined to accept this joint gift, then he, Glover, might accept, and so become the sole owner, subject only to the charge—the option to Stratton to become sole purchaser being, in Glover's view, an option given when both refuse to accept the proffered joint legacy, and not when one refuses.

The learned Judge said that he could not accept this as being either the testator's meaning or as being what he had said.

The testator had made an offer to these two gentlemen and to them jointly. The acceptance must follow the offer and be by both. "In case both of them . . . do not accept," then successive options are given—to the brother first and to Mr. Glover next.

It would defeat the testator's scheme as well as modify the language if for the words used were substituted the words, "in

case either does not accept," for this would render the following clauses inoperative and meaningless.

What was meant by the testator was: if you two desire to enter upon this venture jointly, well and good; if you cannot agree, my brother has the first chance; if he is unwilling, then Mr. Glover is given the opportunity.

No order as to costs save that the executors may have theirs out of the estate.

MIDDLETON, J. JUNE 13TH, 1916.

*CLERGUE v. PLUMMER.

Evidence—Vendor and Purchaser—Agreement for Sale of Land—Death of Vendor—Entries in Books and Written Statements by Vendor of Agreement Differing from Written Memorandum Delivered to Purchaser—Sale of Half Interest, instead of Whole Block of Land—Admissibility and Weight of Evidence—Self-serving Entry—Onus—Specific Performance.

The plaintiff's claim was, as purchaser, for the specific performance of an agreement, dated the 22nd May, 1903, for the sale to him of certain water lots in Sault Ste. Marie. The defendants were the executors of the late W. H. Plummer, the vendor; and the main contest between the parties was, whether the agreement was for the sale of the lots or of a half interest therein.

The action was tried without a jury at Toronto.

R. McKay, K.C., for the plaintiff.

W. N. Tilley, K.C., for the defendants.

MIDDLETON, J., said, in a written opinion, that he received all the evidence tendered, subject to objection, and had now to consider the question of the admissibility of portions of it, adduced by the defendants.

According to the plaintiff, the agreement was evidenced by a document, exhibit 2, entirely in the handwriting of the deceased Plummer, dated the 22nd May, 1903; by it, he agreed to convey the lots to the plaintiff in fee simple. The price was $3,000; $1,000 was paid at the time; the balance was not paid until long after the time stipulated, one year. This document was signed by Plummer alone, was handed to the plaintiff, and had ever since been in his possession.

Plummer died on the 13th October, 1911; after his death, his executors found among his papers another document bearing the same date, signed by Plummer alone, and which, save the last clause, was substantially a copy of exhibit 2. The last clause was: "I further agree to assign the aforesaid one undivided half-interest to you or your assigns whenever you demand same, or, if you prefer to leave title in me, I will give you a declaration of trust that I hold said half-interest for you."

Entries in Mr. Plummer's land-sales book also referred to the transaction as a sale of a half-interest; there was a credit entry of $1,000 on the 22nd May; and a letter written by Mr. Plummer to the plaintiff in 1908 referred to the purchase of a half-interest.

There was further correspondence, which the learned Judge set out; he also summarised the oral evidence taken at the trial; and referred to the following cases: Higham v. Ridgway (1808), 10 East 109, Sm. L.C., 11th ed., p. 327; Regina v. Overseers of Birmingham (1861), 1 B. & S. 763; Regina v. Exeter Guardians (1869), L.R. 4 Q.B. 341; Davies v. Humphreys (1840), 6 M. & W. 153; Taylor v. Witham (1876), 3 Ch. D. 605; Doe dem. Rowlandson v. Wainwright (1838), 8 A. & E. 691; Regina v. Inhabitants of Worth (1843), 4 Q.B. 132; Massey v. Allen (1879), 13 Ch. D. 558; Crease v. Barrett (1835), 1 C.M. & R. 919; Smith v. Blakey (1867), L.R. 2 Q.B. 326; Newbould v. Smith (1885), 29 Ch. D. 882.

The learned Judge said that he was inclined to the view that the entries in Plummer's book were entirely self-serving; but the effect of the cases was to make the evidence admissible; and the question then was, what weight should be given to it?

The statements and entries could have no greater effect in favour of the deceased than an oral statement made by him under oath if he were alive and in the witness-box. The case would then stand thus: a written contract in the deceased's own handwriting, clear and unambiguous in its terms; the statement of the plaintiff, substantially unshaken, that this was the true bargain; the statement of the deceased that the bargain was quite different from that evidenced by the document he drew and delivered. There was also other strong evidence which shewed the improbability of the plaintiff's purchasing a mere undivided half-interest. The onus upon the defendants had not been met.

Judgment for the plaintiff for specific performance, with costs.

SUTHERLAND, J., IN CHAMBERS. JUNE 14TH, 1916.

DAVISON v. FORBES.

Reference—Stay of, pending Appeal to Supreme Court of Canada from Judgment Directing Reference—"Final Judgment"—3 & 4 Geo. V. ch. 51, sec. 1 (D.), Amending Supreme Court Act sec. 2 (e)—Security—Supreme Court Act, R.S.C. 1906 ch. 139, sec. 76 (d)—Discretion.

Motion by the defendant Forbes by way of appeal from a certificate of the Master in Ordinary, and for an order requiring him to adjourn the reference to him under the judgment of KELLY, J., 9 O.W.N. 22, affirmed by a Divisional Court of the Appellate Division, 9 O.W.N. 319, until after an appeal by the applicant to the Supreme Court of Canada had been disposed of, or for an order staying the reference upon the applicant giving security.

M. L. Gordon, for the applicant.
W. N. Tilley, K.C., for the plaintiff.

SUTHERLAND, J., after setting out the facts in a written opinion, said that it was contended by the defendant Forbes that the amendment to the Supreme Court Act found in 3 & 4 Geo. V. ch. 51, sec. 1, as to the meaning of "final judgment" had application; but the learned Judge was unable to see in what way it applied to or affected this motion.

It was argued that there was no final judgment for the payment of money in the judgment of the Court herein, and Crowe v. Graham (1910), 22 O.L.R. 145, was referred to. There was, however, in this judgment, the specific direction that the defendants should pay to the plaintiff the sum the Master should find him entitled to.

It was contended by the plaintiff and appeared plain from the reasons for judgment of the trial Judge, and indeed it was not substantially denied by counsel for the applicant, that the judgment was for a comparatively large sum in favour of the plaintiff, and that the matters referred to the Master, which might go in reduction, had reference to comparatively small amounts, and that the reference would be a short one.

To give effect to the motion to adjourn the reference would in reality enable the applicant to obtain a stay of execution without giving the security required by sec. 76 of the Supreme Court Act, sub-sec. (*d*). This was not a case in which further directions

were reserved. The proper course was to permit the reference to proceed, and, when the Master had made his report, and the amount payable by the defendants to the plaintiff was thus ascertained, a further application might be made to have the question of the amount of the security to be given in order to stay execution fixed. The granting of a stay or of an order to proceed appeared to be discretionary: Saskatchewan Land and Homestead Co. v. Moore (1913-4), 5 O.W.N. 183, at p. 187, and 6 O.W.N. 262.

Application dismissed with costs.

MIDDLETON, J., IN CHAMBERS. JUNE 14TH, 1916.

GRAHAM CO. LIMITED v. PRITCHARD.

Writ of Summons—Service out of the Jurisdiction—Contract—Sale of Goods—Place of Payment—Place of Performance—Rule 25 (e)—Irregu arities in Form and Issue of Writ—Waiver—Amendment—Defendants out of the Jurisdiction Sued as Partners—Amendment without Personal Re-service—Service on Agent in Canada.

Appeal by the defendants from an order of the Local Master at Belleville refusing to set aside the writ of summons and the service thereof upon the defendants out of the jurisdiction.

W. N. Ponton, K.C., for the defendants.
W. S. Morden, K.C., for the plaintiffs.

MIDDLETON, J., in a written opinion, said that objections as to certain irregularities in the form of the writ and its issue had no substance, and were in fact waived by failure to make them at the proper time, or the irregularities were curable by amendment.

The plaintiffs sued the defendants, doing business in England, in their firm name. As the defendants did not carry on business in Ontario within the meaning of the Rules, it was their right to be sued in their individual names. The Master, recognising this, directed the writ to be amended, but dispensed with further service upon the defendants; and this was objected to. The order might be varied by directing personal service upon one Johns, the agent of the defendants, at Montreal, the plaintiffs being willing.

The plaintiffs were a company carrying on business in Belleville, Ontario; Johns came from England to Montreal, and at

Montreal telephoned to the plaintiffs and offered them a certain price for apples, which they accepted. The acceptance being at Belleville, the contract was made there, and the law of Ontario would govern—the price would be payable at the home of the plaintiffs in Ontario. The price not having been paid, there was a breach within Ontario of the contract to pay, which ought to have been performed within Ontario; and the case fell within Rule 25 (e).

Some letters passed between Johns and the plaintiffs, from which it was argued that payment was to be made by means of a bill of exchange drawn by the plaintiffs on the defendants. This, however, was not the meaning of the correspondence; it was Johns who was to draw upon his principals; and Johns did in fact, later on, remit to the plaintiffs $750 on account of the price.

Some delay in shipment took place, and when the apples arrived in England, the defendants said, they were in bad condition and of poor quality. There was room for litigation as to the liability for this loss; but that did not affect the question of jurisdiction; the case was one in which service out of Ontario might properly be allowed; and the Master's order was in substance right.

If the plaintiffs desired, the order might be modified as indicated, so as to permit the writ to be re-served after amendment.

The costs of the appeal should be paid by the defendants to the plaintiffs in any event of the cause.

MIDDLETON, J., IN CHAMBERS. JUNE 14TH, 1916.

OSHAWA LANDS AND INVESTMENTS LIMITED v. NEWSOM.

Solicitor—Fund in Court—Assertion of Lien or Right to Equitable Intervention of Court to Enable Solicitor to Obtain Payment of Costs—Fund not Created or Preserved by Solicitor—Right of Solicitor—Security Furnished by Client—Nature of Claim for Costs—Counterclaim.

Motion by the third parties for payment out of Court to them of moneys paid in by the plaintiffs pursuant to the judgment in the action. See 8 O.W.N. 260, 9 O.W.N. 355.

E. T. Coatsworth, for the third parties Medcalf and Poutney.
Hamilton Cassels, K.C., for the third party Mackenzie.
N. W. Rowell, K.C., for the defendant and his solicitors.

MIDDLETON, J., in a written opinion, said that the defendant's solicitors claimed a lien upon the money in Court for the excess of their costs over and above the amount recovered against the plaintiffs in the action; the right to assert a lien being reserved by the judgment as entered.

The plaintiffs, owning land, contracted to sell it to the defendant, who assigned his contract to the third parties; the third parties entered into an agreement with the plaintiffs, but it was stipulated that this should not exonerate the defendant from his liability. The plaintiffs sued the defendant upon his covenant for $5,000, part of the purchase-money. He alleged that the sale was brought about by fraud, and counterclaimed for rescission of the contract. Fraud was found, but there could not be rescission unless there was restitution; and the defendant could not make restitution unless he could obtain reconveyances from those to whom he had sold. It was provided by the judgment that there should be rescission, the third parties reconveying, and that the money paid to the plaintiffs by the defendant, received by him from the third parties, should be paid into Court, to be paid out to the third parties; but, the lien being asserted, this direction was subject to the lien, if any, of the defendant's solicitors.

The learned Judge said that the so-called lien is not in strictness a lien at all; it is the right of the solicitor who is unable to obtain possession of the fund, and so unable to assert his lien, to call for the equitable interference of the Court where the fund has been created or preserved by his exertions, and to prevent its dissipation without his costs in that particular matter being paid: Mercer v. Graves (1872), L.R. 7 Q.B. 499, 503.

The costs incurred by the defendant were incurred in the resisting of a claim against him; the counterclaim was a subsidiary matter; no costs of appreciable magnitude were incurred which related solely to the counterclaim; and the payment into Court was not the direct result of the main litigation, but a sort of by-product.

Again, the fund was not created or preserved, within the meaning of the rule; it was in truth the price paid for the assistance of the third parties in enabling the defendant to make restitution, and so free himself from his contractual liability to the plaintiffs.

In general, the solicitor's right can be no greater than his client's; but a case in which a solicitor is entitled to assert a salvage lien is an exception; and, where the fund has been brought into existence by the exertions of the solicitor, he has, notwithstanding the position of his client—as, e.g., not being entitled to party and party costs under the judgment—a right to call for the equitable

interference of the Court: Yemen v. Johnston (1884), 11 P.R. 231.

The solicitors did not, by taking security from the client, abandon their claim to the equitable interference of the Court; but it was not shewn that the defendant would not ultimately be able to pay the full amount of the costs in question.

Again, the fund was much more the result of the endeavours of the solicitor for the third parties Medcalf and Poutney than of what was done by the defendant's solicitors. In no case has a lien been given upon the property of another for the costs of the litigation where that other has been independently represented by his own solicitor.

Order directing that the moneys in Court be paid out as ordered by the judgment, without regard to the solicitors' claim; no costs.

LATCHFORD, J. JUNE 14TH, 1916.

WATSON v. TORONTO AND YORK RADIAL R. W. CO.

Highway—Assumption by County Corporation—Changes of Grade—Injury to Abutting Land—Remedy against County Corporation—Compensation under Municipal Act, sec. 325—County and Township Corporations Permitting Street Railway Company to Obstruct Access to Highway—60 Vict. ch. 92, secs. 2, 7 (9)—Laying Rails in Conformity with Grade of Highway—Claim against Railway Company—Slight Changes in Elevation of Rails—Absence of Appreciable Damage.

Action against the railway company and the Municipal Corporations of the County of York and the Townships of Markham and Vaughan for an injunction, a mandamus, a declaration of right, and damages, in respect of changes made in a highway, Yonge street, in the township of Markham, injuriously affecting the plaintiff's land bordering on the highway.

The action was tried without a jury at Toronto.

R. McKay, K.C., and Grayson Smith, for the plaintiff.

J. H. Moss, K.C., for the defendant railway company.

T. H. Lennox, K.C., and C. W. Plaxton, for the defendants the Municipal Corporations of the County of York and Township of Markham.

W. Proudfoot, K.C., for the defendants the Municipal Corporation of the Township of Vaughan.

LATCHFORD, J., read a judgment in which he set out the facts. He then said that the plaintiff's claim against the municipalities was based partly on a change of the grade of the highway, made in 1915, and partly on the contention that the municipalities permitted the railway company to place their railway-embankment, sleepers, and rails—in a position which constituted a nuisance to the plaintiff, by impairing, if not destroying, the access to and from Yonge street afforded by a viaduct or ramp extending easterly from the via trita of Yonge street across the railway.

It was for such damages only as were wrongfully caused to the property after his purchase of it in 1911 that the plaintiff had any right to compensation, in this action.

So far as the plaintiff's claim was for damages resulting from the raising in 1915 of the travelled part of the highway, the action must fail. The county corporation were acting in the exercise of their statutory powers; and if, acting without negligence, they caused damage to the plaintiff, his only remedy was by the proceedings prescribed by the provision of the Municipal Act which is now R.S.O. 1914 ch. 192, sec. 325: Pratt v. City of Stratford (1888), 16 A.R. 5.

It was urged that liability attached to the township municipalities, and to the county after the date on which they assumed the highway (24th February, 1911), for permitting the railway company to obstruct the access to the plaintiff's lands. Reliance was placed on the principles stated in Castor v. Township of Uxbridge (1876), 39 U.C.R. 113; McKelvin v. City of London (1892), 22 O.R. 70; Huffman v. Township of Bayham (1899), 26 A.R. 514; Homewood v. City of Hamilton (1901), 1 O.L.R. 266. The learned Judge referred also to Corporation of Parkdale v. West (1887), 12 App. Cas. 602, and North Shore R. W. Co. v. Pion (1889), 14 App. Cas. 612; and to the statute 60 Vict. ch. 92, secs. 2, 7 (9), authorising the defendant company's predecessors to maintain and operate their line, and providing that all tracks laid on any portion of the street should "so far as is practicable and where directed by the County Engineer conform to the grade of the street or road."

There was no evidence that the line of railway did not, as far as was practicable, conform to the grade of the highway; there was evidence that it did.

There was no breach of any duty on the part of the municipalities in permitting the railway company to construct their line opposite the plaintiff's land on the grade which it followed when he purchased.

On all grounds, the action failed as against the municipalities;

and it also failed as against the company. The company were authorised to construct their line upon and along Yonge street in the manner in which they did construct it. In the maintenance of the line, it was necessary from time to time to remove depressions caused by erosive agencies and the constant passing of heavy cars. The slight elevation of the tracks in 1911, and again after they were lowered in 1913 at the plaintiff's instance, was no more than was requisite to keep up the metals, and caused no appreciable damage to the plaintiff. The depression of about four inches between the rails was too slight seriously to interfere with a driveway not used for vehicular traffic.

Action dismissed with costs.

CLUTE, J., IN CHAMBERS. JUNE 15TH, 1916.

REX v. GAGE.

Criminal Law—Magistrate's Conviction—Imposition of Unauthorised Costs—Motion to Quash Conviction—Amendment—Criminal Code, secs. 754, 1124—Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, sec. 4.

Motion by the defendant to quash a conviction made against him on the 10th August, 1914, by a magistrate, for an offence against the Liquor License Act.

The defendant was imprisoned in pursuance of the conviction, and a motion, upon habeas corpus, for his discharge, had previously been dismissed: see ante 13, 19. On the 23rd February, 1916, the conviction was brought before the Court by the Crown in the habeas corpus proceedings; and the defendant's motion then made.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown, objected that the motion was not made within 20 days from the date of the conviction, as required by sec. 95 of the Liquor License Act, R.S.O. 1914 ch. 215.

CLUTE, J., said that the only point argued by counsel for the defendant was that unauthorised costs had been charged by the magistrate in the conviction, contrary to sec. 770 of the Code. This section of the Code was made applicable to offences over

which the Legislature of Ontario had authority, by the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4.

The fact of the illegality of the charges was clear, and was not contested by counsel for the Crown; but he relied upon sec. 1124 of the Code, made applicable by the said sec. 4, which expressly provides that Part XV. and sec. 1124, amongst others, shall apply *mutatis mutandis* to every such case, as if the provisions were enacted in and formed part of the Ontario Summary Convictions Act. Section 1124 gives all the powers of amendment given by sec. 754; and sec. 754 is applicable to this case.

The imposition of charges was in excess of the magistrate's jurisdiction; but the learned Judge thought it quite clear that he had the right to deal with the question of costs upon this motion. In other respects the conviction was right; and he adopted the suggestion of counsel for the Crown, to amend the conviction by striking out the part which related to costs. In other respects, motion dismissed without costs.

SUTHERLAND, J. JUNE 16TH, 1916.

RE ROBERTSON.

Will—Construction—Devise—Life Estate—Remainder.

Application by the executors, on originating notice, for the determination of questions arising under the will of Isaac Robertson, deceased.

T. J. Agar, for the executors.
T. H. Peine, for Elbert Messecar.
F. W. Harcourt, K.C., for the infant.

SUTHERLAND, J., in a written opinion, said that the particular clause in question was as follows: "I give devise and bequeath unto my nephew Elbert Messecar during his natural life my farm" (describing it) "and after his death to his children share and share alike."

Chandler v. Gibson (1901), 2 O.L.R. 442, was authoritative on the question what estate was taken by Elbert and what by his children.

See also Young v. Denike (1901), 2 O.L.R. 723; Grant v. Fuller (1902), 33 S.C.R. 34, at p. 38; Purcell v. Tully (1906), 12 O.L.R. 5, 8; Stuart v. Taylor (1914), 33 O.L.R. 20, 46.

Elbert Messecar took an estate for life, and his children an estate in fee in remainder thereafter.

A further question was raised under another clause of the will, but was not argued, counsel agreeing as to the proper interpretation.

Order accordingly; costs of all parties out of the estate.

SUTHERLAND, J., IN CHAMBERS. JUNE 17TH, 1916.

*RE REX v. SCOTT.

Constitutional Law—Liquor License Act, R.S.O. 1914 ch. 215, sec. 141—Amendments by 4 Geo. V. ch. 37, sec. 5, and 5 Geo. V. ch. 39, sec. 33—Intra Vires—Creation of New Crime—Being Found Drunk in Public Place—Application of Enactment to Territory in which Canada Temperance Act in Force—Confinement to Preceding Sections of Act—Municipal Regulation.

Motion by the defendant for an order prohibiting the Police Magistrate for the Town of Seaforth from proceeding to hear or try a charge preferred against the defendant for that he was "on or about the 4th day of March, 1916 . . . in an intoxicated condition in a public place in the town of Seaforth, where no licenses are issued, contrary to the provisions of section 141 of the Liquor License Act, and of the amendments thereto," upon the ground that the magistrate had no jurisdiction to entertain the charge.

Section 141 provides that "where in a municipality in which a local option by-law is in force, a person is found upon a street or in any public place in an intoxicated condition . . . he shall be guilty of an offence against this Act . . ."

By an amendment made in 1914 (4 Geo. V. ch. 37, sec. 5), the words "or in which no tavern or shop license is issued" were inserted after the words "in force."

By an amendment made in 1915 (5 Geo. V. ch. 39, sec. 33), the words "or where in unorganised territory" were inserted after the words added in 1914; and "public place" was defined.

Part II. of the Canada Temperance Act was brought into force in the county of Huron (including the town of Seaforth) on the 1st May, 1915.

F. H. Thompson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Attorney-General for Canada was notified, but did not appear.

SUTHERLAND, J., in a written opinion, said that it was contended that the whole of the Liquor Act is superseded wherever the Canada Temperance Act is brought into force; that sec. 141 purported to create a new crime—thus invading the Dominion jurisdiction: B.N.A. Act, sec. 91(27); and The Queen v. Hodge (1882), 7 A.R. 246, 247, Hodge v. The Queen (1883), 9 App. Cas. 117, and Russell v. The Queen (1882), 7 App. Cas. 829, 839, were cited. He was not able to see, however, that sec. 141 conflicted with anything in the Canada Temperance Act. Reference to Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348; Hodge v. The Queen, 9 App. Cas. at p. 131; Regina v. Stone (1892), 23 O.R. 46, 49; Regina v. Wason (1890), 17 A.R. 221, 241.

It was argued that sec. 141, as amended, must be read in the light of secs. 139 and 140, and applied only to cases coming under those sections; but the argument ignored the provisions of the Act respecting the Revision and Consolidation of the Statutes of Ontario, 3 & 4 Geo. V. ch. 2, sec. 9(4), as to the effect of marginal notes and headings.

It was also argued that the matter dealt with by sec. 141 was a matter of municipal regulation: but it is the Province which gives a municipality its powers.

The learned Judge's opinion was, that sec. 141, as amended, was intra vires of the Ontario Legislature and had not been superseded by the Canada Temperance Act; and that the motion on all grounds must be dismissed, and with costs.

STOTHERS v. BORROWMAN—LATCHFORD, J.—JUNE 14.

Appeal—Master's Report—Judgment—Costs.]—An appeal by the plaintiff from the report of the Local Master at London. The appeal was heard at the London Weekly Court. The learned Judge, in a brief memorandum, said that, upon consideration, he entirely agreed with the findings of fact and conclusions of law of the Master, stated in his written reasons. The appeal should be dismissed, and there should be judgment in accordance with the report, with costs of the trial, reference, and appeal to the defendant. P. H. Bartlett, for the plaintiff. R. G. Fisher, for the defendant.

BIGGAR v. BIGGAR—SUTHERLAND, J.—JUNE 16.

Husband and Wife—Money Paid by Wife to Husband—Action to Recover as Money Lent—Onus—Finding of Fact of Trial Judge—Pleadings—Declaration of Right to Payment out of Proceeds of Sale of Land not Included.]—Action by a married woman against her husband to recover $5,069.50, alleged to have been lent by her to him, in three sums, in September, October, and December, 1910. The defendant alleged that the moneys were voluntarily paid by the plaintiff to him and were used for their joint benefit, and that there never was any agreement between them, express or implied, for the repayment of the moneys paid to him. The action was tried without a jury at Hamilton. SUTHERLAND, J., in a written opinion, set out the facts, and said that it was contended on behalf of the plaintiff that, having regard to the relationship of husband and wife, the onus was upon the defendant to prove the sums to have been gifts: Eversley on Domestic Relations, 3rd ed., p. 302. The learned Judge said that he was unable to come to the conclusion that the sums in question were lent by the plaintiff. It was argued on behalf of the defendant that, as the plaintiff's understanding was that the moneys were not to be repaid by him personally, but out of the proceeds of the sale of a fruit farm, when sold, the action was premature, the farm not having been sold. As to this, the learned Judge said, he felt disposed to make a declaration that the plaintiff should be entitled to repayment of the moneys or part of them when the farm should be sold; but he felt unable, on the pleadings, to do so. Action dismissed without costs. C. W. Bell, for the plaintiff. W. M. McClemont, for the defendant.

RE FITZGERALD—SUTHERLAND, J., IN CHAMBERS—JUNE 17.

Money in Court—Payment out—Persons Entitled—Absentee—Proof of Death—Intestacy.]—An application for payment out of Court of the moneys, or a portion of the moneys, of the estate of Ellen Fitzgerald, deceased, paid in under the Trustee Relief Act. The learned Judge said, in a written opinion, that the proofs submitted seemed fully to warrant the payment to Garrett Fitzgerald of one-half of the moneys in Court, and to Mary Fitzgerald, David Joseph Fitzgerald, William Henry Fitzgerald, James William Fitzgerald, and Edward Fitzgerald, each of one-sixth of the balance, being five-sixths of the share belonging to the children

of James William Fitzgerald. There was some evidence that John Oliver Fitzgerald, entitled to the other one-sixth, was dead, but it was scarcely adequate. Order directing that, upon proof being furnished to the satisfaction of the Junior Registrar of the Court, that John Oliver died intestate, and that no personal representative had been appointed to his estate, payment out should be made of the other one-sixth, in equal shares, to the above named other children of James William Fitzgerald. Costs of all parties out of the fund. J. E. Day, for the applicants. F. W. Harcourt, K.C., for the infants.