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HON. MR. JUSTICE MIDDLETON. APRIL 4TH, 1914.

MARTIN v. PERE MARQUETTE RW. CO.

6 O. W. N. 164.

Negligence—Fatal Accidents Act — Master and Servant—Death of Foreman of Coal Sheds — Contributory Negligence — Pouring Gasoline Near Lighted Lantern—Findings of Jury — Defective Appliances—Deceased Author of Accident—Damages Inadequate —Improper Attitude of Jury—Dismissal of Action.

MIDDLETON, J., *held*, that a workman who attempted to pour gasoline from a can into a beer bottle through a funnel within two or three feet of a lighted lantern, thereby causing an explosion, was the author of his own misfortune, and that the findings of the jury that defendants were negligent in not supplying proper appliances must be disregarded.

Action under the Fatal Accidents Act to recover damages for the death of Alexander Martin by reason, as was alleged by the plaintiff, of the negligence of the defendant, by whom the deceased was employed.

The action was tried with a jury at Sandwich, 24th March, 1914.

G. H. Rodd, for the plaintiff.

R. L. Brackin, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The deceased Alexander Martin was foreman of the coalsheds of the defendant company at Blenheim. These sheds were established for the purpose of coaling locomotives. The coal was hoisted into bins at a considerable height from the ground by means of a gas engine. When a locomotive came, and coal was needed, the coal was dropped into the tender through a chute.

A coal shed was destroyed by fire on the 7th November, 1913, and Martin was so badly burned that he died the next

day. At the time of the fire no one else was in the shed, and, apart from the statement made by Martin, there was no evidence to shew how the fire originated or how Martin was injured. The defendant company obtained from Martin a statement in writing as to the cause of the accident, and this statement the defendants put in evidence at the hearing. From the statement and from the evidence given on behalf of the plaintiff the whole occurrence is made abundantly plain.

The gas engine was operated by natural gas, but sometimes there was difficulty in starting it up; so that a quantity of gasoline was kept for the purpose of priming the engine. This gasoline had usually been supplied in five-gallon lots, and until recently had been contained in a five-gallon can. For some reason, a short time before the accident, the five gallons had been supplied in a ten-gallon can. This can had a central neck from which the gasoline could be poured into a smaller vessel for use. During several years the gasoline required for immediate use had been poured from the large can through a funnel into a discarded beer bottle. The quantity contained in this bottle was sufficient to meet all the requirements of the engine for 24 hours. The gasoline itself was stored in this can in the corner of a shed underneath the storage bin. This was lighted by a window in the day time. In the night, this storage room was entirely dark. The other parts of the premises were lighted by natural gas, the reason assigned being that the electric light plant of the town was only operated until 1 a.m. and the operation was not resumed again until the morning.

All the coal that had arrived at Blenheim had been hoisted into the bins, and there was nothing for Martin to do save to be in attendance to give fuel to any engine which might arrive during the night. Some further coal was expected but had not in fact arrived. When the man in charge during the day left the place, the beer bottle was three-quarters full of gasoline, and the can had about two gallons left in it.

According to Martin's account he went to fill up the bottle with gasoline. The reason for his doing so is by no means apparent, as he had more than enough gasoline, even assuming that the coal arrived and that he undertook to hoist it in the night time. However, he went into the dark

storage room, taking a lantern with him, which, according to his own statement, he set down upon the floor between two and three feet from the bottle which he was about to fill, and then commenced pouring the gasoline into the bottle through the funnel. Some of the gasoline splashed upon the lantern, and the not unnatural result was that there was an explosion and Martin was burned so badly that he died, whilst the entire coalsheds were destroyed.

Martin was an experienced man, and it is quite clear that he must have known the risk he incurred when placing the lantern so close to the flowing gasoline. Another man accustomed to work there and to fill up this bottle during the night time stated that he would put the lamp some ten feet away before attemp'ing to pour out the gasoline. There was no conflict of evidence, and upon Martin's own story it appears to me that the accident was the direct result of his carelessness.

The jury in answer to questions submitted have found that the company were guilty of negligence in not supplying better cans and in not supplying better light; but it appears to me that all these things were not really the cause of the accident. Martin knew what the situation was; he knew what he was working with; and his own carelessness brought about his untimely death.

All this is quite apart from the fact that Martin was himself foreman in charge of the works, and if he had desired other appliances it was his duty to ask for them. It is also quite apart from the fact that there was no reason why the bottle should not have been filled up with gasoline during the day time.

Under these circumstances I think I must dismiss the action. It is manifest from the verdict of the jury that they did not take at all a proper view of the case, as, if there is liability, the damages awarded, one thousand dollars, are entirely inadequate.

HON. MR. JUSTICE MIDDLETON. APRIL 4TH, 1914.

MASSIE v. CAMPBELLFORD, ETC., RW. CO.

6 O. W. N. 161.

Arbitration and Award—Submission Agreement — Construction of Submission to Three Arbitrators — No Provision for Majority Award—Invalidity of Majority Award—Rectification of Agreement—Prior Agreement not Proven—Arbitration Act, Schedule sec. K.—Action to Enforce Award—Dismissal of.

MIDDLETON, J., *held*, that where by a submission to arbitration, the matter is referred to three arbitrators, an award cannot be made by the majority unless the submission plainly so provides.

United Kingdom Assurance v. *Houston*, [1896] 1 Q. B. 567, referred to.

That before the submission agreement can be reformed by the Court, a concluded agreement binding on the parties with which the submission agreement is not in accord must be established.

Smith v. *Raney*, 25 O. W. R. 888, followed.

That sec. K. of the schedule to Arbitration Act only applies to a majority award, when under the submission the majority have power to award.

Action to enforce payment of fifteen thousand dollars and interest claimed under an award or valuation made by two of three arbitrators or valuators named in a submission bearing date 2nd July, 1913, and, if necessary, for the reformation of the agreement of submission so as to make plain that two of the arbitrators or valuators may make a valid award.

H. Cassels, K.C., for plaintiff.

S. Denison, K.C., and W. N. Tilley, for defendant.

HON. MR. JUSTICE MIDDLETON:—At the close of the plaintiff's case a motion was made for a non-suit; and, contrary to the practice which I deem proper in the great majority of cases, I thought it desirable to take this motion into consideration before calling on the defendants for their evidence. The defence sets up numerous issues, which promised a long and expensive trial, on which I thought it inadvisable to enter if the plaintiffs must in the end fail upon the grounds argued.

There is no doubt that where the submission is to three a binding award cannot be made by the majority—*United Kingdom Assurance* v. *Houston* (1896), 1 Q. B. 567—and I may adopt the language of Mathew, J., "The question is

not what the parties might reasonably be assumed to have intended, but what they have said they intended," adding, as he did, "If the parties desire to have an effective arbitration they should have framed their rule differently."

I have studied this submission with care to see whether it is possible to find in it any intention that the majority should govern. The operative clause is "the amount of compensation . . . is hereby referred to the determination of," then follow three names. This, as I have said, if standing alone, clearly makes it necessary for all to join. Then follow provisions relating to the death of any of the valuers, as they are called. If the valuer appointed by either party dies, he may substitute a new valuer. If the third valuer dies, the other valuers may agree upon a third valuer in his stead, "and in that case the decision of any two of the valuers shall be conclusive and binding, without appeal." There is then a covenant that the decision of the valuers shall be observed, "and shall not be subject to appeal from the decision of the said valuers or any two of them." There is then a covenant to convey on receipt of the amount payable "as such compensation by the said valuers." In this I think there is nothing which is sufficient to modify the main and controlling clause of the agreement.

On the claim for reformation I much regret that I find myself unable to assist the plaintiffs. The only evidence given was that of Mr. R. S. Cassels, who conducted the negotiations with Mr. Spence representing the railway company. His evidence I accept unhesitatingly, but it does not appear to me to carry the matter far enough. There were negotiations looking to valuation rather than an arbitration. This was assented to. A draft submission was prepared and submitted. Mr. Cassels objected to the provisions contained in it. It provided for the appointment of two valuators, and then the appointment of an umpire in the event of their disagreement. If the umpire could not be agreed upon by the two valuators then the County Judge was to appoint him. Mr. Cassels knew from what had taken place that a disagreement was certain, and insisted that the umpire should be selected in the first instance. This was assented to, and the umpire was finally agreed upon.

A new draft submission, in the form ultimately adopted, was then propounded by the railway solicitors. Mr. Cassels

evidently did not criticize it carefully, and thought that its effect was to make the award of two binding; and I strongly suspect that this was also the view entertained by Mr. Spence. Nevertheless, the only agreement between the owner and the railway was the document executed by the parties; and the claim for reformation fails, I think, for precisely the same reason as that assigned in *Smith* v. *Raney*, 25 O. W. R. 888, namely, that apart from the deed which it is sought to reform no concluded agreement binding upon the parties has been established.

As said by Esten, V.C., in *Kemp* v. *Henderson*, 10 Grant 56, "I am inclined to think that the parties meant that any two might make an award, but they have not said so."

There are other difficulties in the way of granting reformation, which need not now be discussed.

I should mention the contention based upon the Arbitration Act. Section K of the schedule only applies to a majority award when under a submission the majority have power to award. It does not purport to do more than to make the award binding.

The action fails and must be dismissed, but, under the circumstances, without costs.

HON. MR. JUSTICE LENNOX. APRIL 2ND, 1914.

WILLIAMSON v. PLAYFAIR.

6 O. W. N. 174.

Contract — Hypothecation of Stock — Sale or Loan—Evidence—Plaintiff Permitted to Redeem.

LENNOX, J., *held*, that a transaction whereby certain mining stock passed to defendant and which was claimed by him to be a purchase, was in reality a loan and that plaintiff could redeem.

Action to recover the amount received by the defendant on $10,000 stock in the Marks-Williamson Mines Co., less amount of plaintiff's promissory note.

Hamilton Cassels, K.C., for plaintiff.

Leighton McCarthy, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff is well within the mark in saying that he is not a good business man.

Grundy was instructed to borrow upon the security of the stock in question, and he had no instructions or authority to sell the stock. The defendant knew that Grundy was an agent, knew for whom he was acting, and knew that what the plaintiff was asking for was a loan. He knew, too, that the plaintiff was in straitened circumstances, a dilatory debtor, and unlikely to be able to comply with rigid conditions. He must have thought, he must have known in fact, that the plaintiff's note was of some value, for already he had in his hands mining stock of the plaintiff considerably in excess of the balance of his claim against it. He did not know the law—the legal effect of the agreement he entered into.

The defendant is an exceptionally alert and capable business man, and there is no doubt at all that he was persuaded—not by the urgency of Mr. Grundy, as this witness assumes, but by his knowledge of the plaintiff's helplessness—that a short-time loan upon the drastic conditions incorporated in the signed memorandum of agreement would be a good business investment, and would almost inevitably, as he naturally assumed, give him an automatic and absolute transfer of the stock immediately upon default. Of course he thought that a tender of repayment would be ineffective if made a day or an hour after the maturity of the note, and so did the plaintiff, and so would anyone not learned in the law, and this accounts for his dealings with the stock after the limited time had expired and for the plaintiff's suppliant letters and long delay. But it does not affect the legal status of the parties; "once a mortgage always a mortgage." It was intended as a loan, upon a condition of forfeiture. I am satisfied from the whole surroundings, as well before as after the transaction, including the retention of the note, the treatment of it as a debt, and the specific counterclaim for the amount of it "with interest" from the date it was made, that this was the sense in which the defendant agreed to furnish the money, in which Grundy at the defendant's dictation drew up the agreement and in which the defendant signed it and issued his cheque.

I find that the transaction was a loan upon the security of the stock and not a purchase of the stock. It is not necessary then to consider whether the defendant with the knowledge he possessed could have made a purchase so as to bind the plaintiff.

There will be judgment for the plaintiff for the balance of the $3,400 after deducting the $1,000 note and interest, with interest on the balance from the date of its receipt, and the costs of the action. The counterclaim will be dismissed without costs.

Stay of execution for twenty days.

HON. MR. JUSTICE MIDDLETON. APRIL 1ST, 1914.

NATTRESS v. GOODCHILD.

6 O. W. N. 156.

Limitation of Actions—Possession of Lands—Island in Lake Erie—Abandonment in Winter for Physical Reasons—Alleged Possession as Caretaker—Evidence—Action of Ejectment—Dismissal of—Costs.

MIDDLETON, J., *held*, that the open, obvious, exclusive and continuous possession of property necessary to bring the case within the statute is not destroyed simply because, for physical reasons, during the winter season the person acquiring title ceases to occupy the land.

Piper v. *Stevenson*, 28 O. L. R. 379, followed.

Action (tried at Sandwich, 24th March, 1914), for possession of an island containing about seven acres, situate in the western end of Lake Erie, known as Middle Sister Island.

E. C. Kenning, for the plaintiff.

M. Sheppard and A. B. Drake, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The original title of Andrew Ross to the island in question is admitted. Mr. Ross resided in Detroit. He died on the 10th January, 1906.

The island was originally regarded as chiefly valuable for a fishing station. There is a deposit of gravel which is also of value, and more recently the trees growing upon the island have given it value not only for the wood, but as an attractive location for a summer residence. The plaintiff

recently purchased it for $1,500 from those claiming title under Andrew Ross.

About eighteen years ago the defendant, John R. Goodchild, a fisherman, made some arrangement with Mr. Ross, pursuant to which he entered upon the land. He alleges that he received a letter from Mr. Ross, which he kept until recently, and that it made over the island to him absolutely. It is suggested by the plaintiff that this letter was merely an authority to the defendant to occupy the land free of rent, he to act as a caretaker, preventing the removal of gravel or injury by trespassers. This suggestion commends itself to me as being extremely probable, notwithstanding the oath of the defendant and his son; but the onus is upon the plaintiff to establish such an arrangement. Mr. Ross is dead, and no one else can speak of the contents of the letter.

If the defendants' case depended upon their own evidence I would be against them. As it is, they have held possession of the island for eighteen years, practically during the entire summer season, going there early in the spring and returning to the mainland late in the fall. They have used the island as a fishing station, occupying a small house that was upon it when they first went there, until its destruction by fire, when it was replaced by another house, erected by them. Trespassers have been excluded, and in every way the defendants have acted for these many years in precisely the same way that an owner would have acted.

It is said that possessory title has not been acquired because the property was left unoccupied during the winter season. To this the answer is made that the recent decision in *Piper* v. *Stevenson*, 28 O. L. R. 379, has modified the law laid down in the earlier cases and must be taken as establishing the proposition that the open, obvious, exclusive and continuous possession of property necessary to bring the case within the statute is not destroyed simply because during the winter season the person acquiring title ceases to occupy the land. The possession during the winter of this island was precisely the possession that there would have been by the actual owner. Such personal belongings as it was not desired to remove were left upon the island. The house was closed, and left ready for occupation in the following spring. Reluctantly I am compelled to accept this view. The pedal possession required under some of the

earlier cases to be absolutely continuous is, I think, sufficiently shewn by possession such as I have described.

The action, therefore, fails, and I cannot regard my suspicion of the defendant's conduct as justifying a refusal of costs. Mr. Ross, if reasonably cautious, ought to have preserved some evidence of the nature of the occupation by the Goodchilds.

HON. MR. JUSTICE LATCHFORD. MARCH 30TH, 1914.

CHADWICK v. TUDHOPE.

6 O. W. N. 151.

Negligence—Master and Servant—Dangerous Appliance—Knowledge of Master — Appreciation of Servant of Risk — Contributory Negligence—Findings of Jury—Inconsistency — Reconsideration —Common Law Liability—Statutory Liability—Damages.

LATCHFORD, J., *held*, that it is negligence for which a master is liable at common law if he knows or ought to know that the machinery used by the persons employed by him is improper or unsafe and notwithstanding that knowledge sanctions its use.

Action by a workman to recover damages for injuries sustained in the course of his employment in the defendants' factory by reason of the alleged negligence of defendants.

S. S. Sharpe, for plaintiff.

J. M. Godfrey, for defendants.

HON. MR. JUSTICE LATCHFORD:—In answer to the questions submitted to them on the point of contributory negligence, the jury, in the first instance, found against the plaintiff and stated that he had contributed to the accident by not complaining to his foreman that the guard was an improper guard.

I thereupon instructed the jury that what they considered contributory negligence did not in my opinion fall properly within that category, as they had also found he did not appreciate his risk, an requested them to reconsider their findings on the point. They retired from the Court room and on returning presented the questions with their former replies as to contributory negligence struck out. They assessed the damages at $1,000 under the statutes and $2,000 at common law.

Their first findings of the question of the plaintiff's negligence seemed to me absolutely inconsistent and irreconcilable. The plaintiff was not a skilled factory hand. He had been brought into the factory but a short time prior to the accident from outside employment as a labourer, and had, as the jury found, no proper appreciation of the risk he was incurring in operating the jointer provided as it was, according to their finding, with a defective guard. He could not be considered as contributing to an accident attributable to a defect of which he had neither knowledge nor appreciation. As the answers originally given could not be reconciled the only course—short of a new trial—was to remit the questions to the jury, as I did.

Their final answers must now be considered as their verdict, and the only question to be decided is the amount for which the defendants are liable.

I think they are liable at common law . It was their duty—apart from the Factories Act and the Workmen's Compensation for Injuries Act—to provide proper and suitable plant. It is negligence for which a master is liable if he knows or ought to know that the machinery used by the persons employed by him is improper or unsafe, and notwithstanding that knowledge sanctions its use: 20 Hals. 129. The guard to the planer knives was improper and unsafe, as the defendants knew or ought to have known. They are therefore liable for the $2,000 damages found by the jury. Even under the statutes referred to their liability would be $1,500 as damages greater than that amount were upon the jury's findings actually sustained. I direct that judgment be entered for plaintiff for $2,000 damages and costs.

Stay of thirty days.

HON. MR. JUSTICE MIDDLETON. APRIL 4TH, 1914.

BENNETT v. STODGELL.

6 O. W. N. 163.

Vendor and Purchaser—Specific Performance — Subsequent Sale—Subsequent Purchaser not before Court—Damage not Proven—Acceptance of Option in Lease—Consideration Adequate—Statute of Frauds—Identification of Parties—Time Limit—Implied Limit, Life of Lease—Costs.

MIDDLETON, J., *held*, that specific performance of an accepted option to sell certain lands, contained in an informal lease could not be granted a purchaser, where the property had been subsequently sold and the buyer was not before the Court.

That the option in question was not without consideration. *Matthewson* v. *Burns*, 24 O. W. R. 834, approved. *Davis* v. *Shaw*, 21 O. L. R. 481, disapproved.

That where a document uses the word "we" and signatures follow, the parties are sufficiently identified to satisfy the requirements of the Statute of Frauds. *White* v. *Tomalin*, 19 O. R. 513, distinguished.

Action by a purchaser of lands for specific performance, tried at Sandwich on the 28th March, 1914.

M. K. Cowan, K.C., and E. S. Wigle, K.C., for plaintiff.

E. D. Armour, K.C., and J. Sale, for defendants.

HON. MR. JUSTICE MIDDLETON:—By an informal lease, not under seal, the defendants leased a house to the plaintiff for three years from the 1st of November, 1910, at a monthly rental of $40. There followed this clause: "We hereby agree to give to W. M. Bennett an option to purchase the property for $7,300 cash." It is said this option has been accepted, and the action is brought for specific performance.

Specific performance cannot now be granted, because before action the property was conveyed, and the purchaser is not before the Court. No case is made for damages. The vendor sold the property for the same price, although a false consideration is stated in the conveyance. It is not shewn that the property was worth more than the contract price.

Other questions were argued. It is said that the option was without consideration and revoked. As to this, I would prefer the view of the Chancellor in *Matthewson* v. *Burns*, 24 O. W. R. 834, to that expressed in *Davis* v. *Shaw*, 21 O. L. R. 481.

It is also said that the Statute of Frauds affords a complete answer, as the landlords are not named save by the signature, the document simply speaking of them as "we."

I do not think that *White* v. *Tomalin*, 19 O. R. 513, really determines this question. There, the uncertainty was in the purchaser. No one could tell to whom the offer was addressed, and the signature was held not to be sufficient; but the case seems to me to be quite different where the document says: "We hereby offer," and the signatures of the persons making the offer follow.

It is also contended that the offer contained no time limit and therefore was void. I would be inclined to hold as a matter of construction that the offer was one which was to be accepted during the currency of the lease and that it was not void for that reason.

These matters, however, need not be investigated, in view of the opinion I have formed as to the impossibility of granting relief in this action.

I was not at all impressed with the conduct of the defendant, and, while the action fails, I do not give costs.

HON. MR. JUSTICE MIDDLETON. APRIL 1ST, 1914.

SHAW v. TORRANCE.

6 O. W. N. 172.

Contract—Sale of Horse—Warranty—Breach of—Damages.

MIDDLETON, J., *held*, that in an agreement for the sale of a horse, the seller had warranted it and the purchaser was entitled to damages equal to the amount paid where the horse had to be returned not being as warranted.

Action for damages for breach of warranty upon the purchase of a horse, tried at Toronto 10th March, 1914.

F. Arnoldi, K.C., for plaintiff.

Wm. Laidlaw, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff was the owner of a stallion, Black Benedict, which he desired to exchange, as it was well up in years and had travelled in the neighborhood for many years, both of which facts rendered it desirable to make a change as many of the mares to be served were his own progeny.

Torrance was a dealer in horses, importing stallions from Scotland. The parties met on the 15th April, 1913, and the plaintiff exchanged Black Benedict for Feudal Chief, a young stallion then two years old, giving as boot upon the exchange two notes of $350 each; Feudal Chief being valued at $1,300 and Black Benedict at $600.

That there was some agreement for the return of Feudal Chief if he was not found satisfactory is not denied. Upon delivery he was found to be unwilling to perform the duties required of him, possibly owing to youth and inexperience. and he was returned. The plaintiff then demanded the return of his notes and the value of Black Benedict, or the substitution of another stallion of value equal to Feudal Chief; alleging that under the agreement he was to have another stallion of equal value at once, so that he might cover his accustomed route. The defendant denies this, and says that the bargain was that in the event of the horse being returned another horse was to be imported in the fall, of equal value, which the plaintiff was to accept.

I have held the matter over till the present to enable the parties to negotiate for a settlement, but I am now told that no settlement can be arrived at.

I think that the evidence of Ira Fountain, the groom, may be accepted as reliable; and, accepting this, I find in favour of the plaintiff, and give him judgment for $1,300, $700 to be satisfied by the surrender to him of the notes, which are with the exhibits.

Costs will follow the event.

HON. MR. JUSTICE MIDDLETON. MARCH 30TH, 1914.

RE SOLICITOR.

6 O. W. N. 170.

Solicitor — Application for Delivery up of Papers and Funds to Client—Retainer—Evidence—Costs.

MIDDLETON, J., upon the application of a client made an order for delivery up by a solicitor of all papers and funds in his possession.

Motion by Mary McGrath and Michael McGrath for an order directing the solicitor to pay to Messrs. Lee and O'Donoghue, solicitors for the applicant, the amount

due to them, and directing him to hand over to the said solicitors all title papers and other documents in the hands of the said solicitor, and in the alternative for an order striking the solicitor off the rolls.

A. J. Brady, for clients.

Solicitor, in person.

Hon. Mr. Justice Middleton:—The answer made by the solicitor is that the applicant, Michael McGrath, who is at present ill in St. Michael's hospital, does not desire this motion to be made, and that in an interview with the applicant Michael he expressed his desire for the solicitor to retain control of his papers and funds.

I do not think this objection can be taken as an answer to the motion, as in the absence of some direct attack the applicants must conclusively be taken to have authorised the proceeding launched in their name by their present solicitors. But as the matter was represented to me as being urgent, I thought it better to have enquiry made by the Official Guardian to ascertain the real wishes of this man, who is said to be in an extremely precarious condition of health.

The Official Guardian now tells me that he has seen Michael McGrath, that he is apparently upon his death bed, but is conscious, and has no hesitation in saying that he does not desire his funds or papers to remain with the solicitor, and that he has authorised the present proceedings.

I therefore make the order sought, directing the solicitor to at once hand over the papers and funds. I do not think that it is necessary to embody in the order the other direction sought; but of course, if the solicitor does not comply with the order made, this will follow in due course.

The solicitor must pay the costs of the application.

HON. MR. JUSTICE KELLY. MARCH 31ST, 1914.

MACDONALD v. BOUGHNER.

6 O. W. N. 172.

Master—Motion to Confirm Report—Reference to Ascertain Next of Kin—Missing Beneficiary—Insufficient Enquiry—Reference Back—Direction as to Advertising.

MIDDLETON, J., on an application to confirm the Report of a Local Master as to the next of kin of an intestate directed that the matter be remitted to the Local Master in order that diligent enquiries be made for a party interested in the estate whose whereabouts had not been known for some years.

Motion by plaintiff for an order confirming the report of the local Master at Cayuga.

F. Aylesworth, for plaintiff.

J. R. Meredith, for infants.

HON. MR. JUSTICE KELLY:—By an order made in this matter on October 24th, 1913, it was referred to the Local Master at Cayuga to determine and report who are the lawful heirs and heiresses-at-law and next of kin of Fanny Williams, deceased, entitled to share in the distribution of her estate. The Master has found that Gertrude Boughner and John Paul Trotter, Jr., are not lawful heirs-at-law and are not entitled to share in the estate that Charles William Williams, a son of the intestate Fanny Williams, is not now alive; and that deceased's daughters Jane Kirk Macdonald (the plaintiff) and her sister Amelia Kirk Sanders (one of the defendants) are the only heirs-at-law entitled to share in the distribution of the estate.

The finding in favour of these two daughters as being heiresses-at-law of deceased and against Gertrude Boughner and John Paul Trotter, Jr., are supported by the evidence, and to that extent the report should be confirmed.

There is evidence that Charles William Williams has not been heard of for twenty-five years or more and that the last known of him was that he was at or in the locality of Green Bush, Michigan. No attempt has been made to find him by advertising and I think he should not have been declared not to be now alive until that means of ascertaining his

whereabouts, if he is still alive, had failed to produce results, It will be referred back to the Master to make further enquiries about him.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 30TH, 1914.

ATTENBOROUGH v. WALLER.

6 O. W. N. 171.

Landlord and Tenant—Alleged Conversion of Chattels—Short Forms of Leases Act 10 Edw. VII. c. 54, sch. B., cl. 10—Removal of Fixtures—Costs—Set-off.

FALCONBRIDGE, C.J.K.B., in an action for damages for alleged wrongful detention of chattels gave judgment for plaintiff for $50 with Division Court costs, defendant to have set-off on the Supreme Court scale.

Action to recover $870 for contents of garage, goods, chattels, effects and building material, and $100 damages for deprivation, detention and use of goods, upon premises owned by the defendant.

Tried in Toronto.

R. Holmes, for plaintiff.

W. G. Thurston, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The facts are set out in the statement of defence, which I find to have been proved.

Even if defendant had accepted or recognised plaintiff as his tenant, which he never did, the provision "that the lessee may remove his fixtures" means (10 Edw. VII. ch. 54, cl. 10 of the schedule, now R. S. O. 1914, ch. 116) that "the lessee may at or prior to the expiration of the term hereby granted, take, remove and carry away . . . ."

Defendant has always been willing to give up the electric sign on plaintiff proving it to be his property. This the defendant by his own memo. (Ex. 1) valued at $50.

Judgment for plaintiff for $50 with Division Court costs; defendant to have set-off of costs as provided by Rule 649.

Execution whichever way the excess may lie.

Thirty days' stay.

HON. MR. JUSTICE LENNOX. APRIL 3RD, 1914.

BRODEY v. LEFEUVRE.

6 O. W. N. 175.

Principal and Agent—Secret Dealings—Account—Commission—Costs.

LENNOX, J., gave judgment in favour of the principal for the moneys received by an agent from such principal where the agent had recently dealt with the principal's property as his own.

Action for $3,832.48 moneys alleged to have been paid to the defendant for duties and services to be performed, but not performed, and moneys received by defendant to the use of the plaintiff.

A. Cohen, for plaintiff.

R. B. Beaumont, for defendant.

HON. MR. JUSTICE LENNOX:—In the circumstances of this case the defendant is not entitled to commission, and is bound to account to the plaintiff for his receipts beyond actual disbursements. He deceived the plaintiff and secretly dealt with the plaintiff's property as his own. *Prima facie* he is bond to account on the basis of the consideration, $23,500, stated in his agreement with Mrs. Hurwitz, but his actual net profits could only be ascertained by a reference. He admits that counting the $275 paid him by the plaintiff he had net receipt of the amount of $466.33 at all events; and the plaintiff's counsel not insisting upon a reference here will be judgment for his amount with costs according to the tariff of this Court.

Execution stayed for thirty days.

I may add that even if the plaintiff were only entitled to recover the commission he paid the defendant, $275, I would still direct the payment of costs on the Supreme Court scale.

HON. MR. JUSTICE MIDDLETON. APRIL 1ST, 1914.

RE KELLY & GIBSON.

6 O. W. N. 173.

Will—Construction—Gift to Wife—"For Best Advantage of Herself and Son"—Absolute Gift — Precatory Trust—Tendency against—Vendor and Purchaser Application—Notice to Official Guardian—Costs.

MIDDLETON, J., *held*, that a gift by a testator to his wife of all his real and personal property "to be used by her for the best advantage as she considers best for herself and our infant son" was an absolute gift.

Lambe v. *Eames*, L. R. 6 Ch. 597, referred to.

Motion by vendor to determine a question as between vendor and purchaser arising upon the construction of the will of the late J. J. Kelly.

G. R. Roach, for vendor.

E. C. Cattanach, for infant.

HON. MR. JUSTICE MIDDLETON:—Pursuant to Rule 602, I directed the guardian of the infant to be notified.

By the will of the testator he gives all his real and personal property "to my wife Margaret Helena Kelly, to be used by her for the best advantage as she considers best for herself and our infant son Joseph Charles Kelly."

I think this is an absolute gift to the wife. The case is very like *Lambe* v. *Eames*, L. R. 6 Ch. 597. The whole modern tendency is against the creation of a precatory trust, unless the language is plain.

The order will therefore declare that a good title can be made, and there will be no costs as between vendor and purchaser. The vendor must pay the costs of the official guardian.

HON. MR. JUSTICE MIDDLETON. APRIL 2ND, 1914.

DOWNEY v. BURNEY.

6 O. W. N. 174.

Injunction—Motion to Commit — Technical Breach—Discretion of Court—Offending Party to Pay Costs.

MIDDLETON, J., refused to commit a party for a technical breach of an injunction order but ordered him to pay the costs of the application.

Motion by plaintiff to commit defendant for disobedience of an injunction order of the Court.

J. M. Langstaff, for motion.

N. Somerville, contra.

HON. MR. JUSTICE MIDDLETON:—I am not at all satisfied that the defendant did not intend to be guilty of some breach of the injunction. Technically he has undoubtedly been guilty of a breach. On the other hand it appears to me that there is a disposition on the part of the plaintiff to make too much of a comparatively small matter, and I am disposed to give the defendant in one way the benefit of the doubt; intimating at the same time that nothing can justify even a technical violation of an order of the Court, more particularly when that order is based upon a consent.

I do not think I should go so far as to award imprisonment on the present occasion, and the ends of justice will, I think, be amply satisfied if I direct the defendant to pay the costs of the motion. He will, however, understand that he must live up to the letter as well as the spirit of the injunction order, or take the consequences.

Another Judge may not be as lenient.

HON. SIR G. FALCONBRIDGE, C.J.K.B., IN CHRS.

APRIL 4TH, 1914.

RE TAYLOR.

6 O. W. N. 175.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Creditor Suing in Name of Assignee—Order of County Court Judge Allowing—Leave to Appeal.

FALCONBRIDGE, C.J.K.B., granted leave to appeal from the order of a County Court Judge giving leave to a creditor to sue in the name of the assignee to set aside a transfer of property by an insolvent.

Motion by the assignee for the benefit of creditors of J. G. Taylor, an insolvent, for leave to appeal from an order made by a County Court Judge under the Assignments and Preferences Act, giving one John A. Lawson, a creditor of the insolvent, leave to bring an action in the name of the assignee in respect of a transfer of property by the insolvent.

W. R. P. Parker, for assignee.

W. H. McFadden, K.C., for John A. Lawson, a creditor.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I am of the opinion that special leave ought to be granted to the assignee to appeal from the order of the learned County Judge.

It is better that the question involved, which is manifestly one of great importance and one which ought to be definitely settled, should be disposed of *in limine* rather than that the creditor should be left, in the event of his succeeding in the contestation and of there being an appeal, to face the additional difficulty suggested in *Campbell* v. *Halley* (1895), 22 A. R. at p. 226.

Costs of this motion to be costs in the proceeding.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 6TH, 1914.

BELL v. COLERIDGE.

6 O. W. N. 200.

Principal and Agent—Secret Profit—Purchase of Lands—Evidence—Fraud—Account—Counterclaim — Variation of Judgment—Declaration of Partnership — Contingent Order for Dissolution—Costs.

LATCHFORD, J., *held* (25 O. W. R. 575) that an agent who purchased certain lands from a syndicate at $400 per acre and resold them to his principals at $450 per acre representing to the latter that $450 per acre was the true purchase price was liable for the secret profit so made by him.

SUP. CT. ONT. (1st App. Div.) *held*, that the judgment in appeal should be varied by declaring that plaintiff, defendant and a third party, not a party to the action were partners in respect of the transaction in question and that such partnership was entitled to the profits wrongfully made by the appellant.

Appeal by defendant Coleridge from judgment of HON. MR. JUSTICE LATCHFORD, 25 O. W. R. 575.

M. Wilson, K.C., for defendant, Coleridge, appellant.

D. L. McCarthy, K.C., for plaintiff, respondent.

HON. MR. JUSTICE HODGINS:—The respondent says that the appellant "said we might buy it (the Pratt farm) for $450 an acre and that it was a good buy at that price and that he and Dr. Smith would go into partnership with me. I do not say that he literally put it in these words, but that was the understanding, we were all to be in it together. Up to that time, he says, he had never heard of the Pratt farm. He further says the appellant told him "that the price would be $450 an acre." He understood a syndicate owned it. Further on this occurs:

"Q. As being partners, can you tell his Lordship or give his Lordship any idea when that discussion took place in reference to the Pratt farm? A. There was a series of talks but that started about the 6th May."

In cross-examination he adds: "Naturally I judge that Dr. Coleridge started it, to talk to me about the Pratt farm as soon as he heard of it, so I simply took it approximately at that date," i.e., the 6th May. . . . "It is purely a

case of deduction that I fix on May 6th." As to where it was mentioned, the respondent thinks it was in Windsor but cannot say for certain, and if Dr. Smith says it was in the Cadillac Hotel in Detroit he would not contradict it. He also says in reference to the 18th May, that he had agreed previously, provisionally, if he was able to get the money, with the parties, with Dr. Coleridge and Dr. Smith, if he was able to get the money.

On re-examination he refers to attempts to get the money during the week previous to the 18th May and to the date the deed of the Ojibway farm, the 12th May, and its registry on the 15th May, as helping to fix the date of the agreement with the appellant, because the mortgage on that farm was "put on for the purpose of assisting "to buy the Pratt farm."

Dr. Smith denies meeting the respondent until the 18th May in the Cadillac Hotel in Detroit, while the respondent says a partnership arrangement or a syndicate arrangement was started about then, "but it was understood previously" and that Dr. Smith "must have talked about it before and known it."

He, however, limits his acquaintance with Dr. Smith prior to that date to one introduction on the street in Windsor. The respondent said: "I believe we are going to be partners," but the answer of Dr. Smith, if any, is not given, nor was the Pratt farm apparently mentioned.

The agreement of sale to the respondent which the appellant got Mr. Kenning to prepare, while dated 7th May, was signed by the latter on the 13th May. On the day previous he had paid $1,500 out of the respondent's money.

Evidently therefore something had transpired before the 18th May which led the respondent to treat Dr. Smith as interested on that date. It is unlikely that he would have made the proposition to give a stranger an interest of one-fifth on the spot, although he indicates that he had regarded Dr. Smith's association as an advantage and one of the reasons why he should get the money for the purchase. In his mind he regarded Dr. Smith as in the purchase when he proposed, as he says he did, the partnership or syndicate arrangement. He had, previous to this, paid to Dr. Coleridge $350, and allowed $1,500 to be paid out the farm out of his moneys and would naturally be in a

position, unless it had already been arranged to refuse to allow anyone to join in.

The result of the evidence as to the dealings prior to 18th May is this: "The appellant says he sold to the respondent at $450 per acre. The respondent says he had understood he was going into a syndicate or partnership with the appellant and Dr. Smith to purchase at that figure, while Dr. Smith denies any participation in the matter until the 18th. As a matter of fact the respondent's money had been put up upon some understanding or agreement. But notwithstanding the latter fact it is obviously impossible to find that the three parties ever completely understood one another prior to that date, or that there was a sale made to the respondent. All that was done by the appellant and respondent is consistent either with a sale or a syndicate arrangement, except one thing, the agreement drawn by Mr. Kenning This was the act of one of the parties only and was not communicated to the other or others.

But on the 18th or 20th May an arrangement was undoubtedly made in which all parties agree, namely, that the respondent would furnish the balance of the $13,750 required as the first payment, that the appellant and Dr. Smith would pay the second, third and fourth payments, and that the respondent would pay one-half of the last payment.

The shares of the parties were settled, namely, to the respondent, a three-fifths interest in the property, and to the appellant and Dr. Smith a one-fifth interest each. While the original proposition was half and quarter shares respectively, all say that the other propositions were finally settled upon.

On the faith of that agreement the balance of $11,750 was raised and paid by the respondent and it is common ground that the whole arrangement was based upon $450 per acre.

This being the case the respondent afterwards discovered that the appellant had bought from the Morton syndicate at $400 per acre and brings this action claiming the profit.

The position of the appellant at the time of his negotiations with Bell, throw some light upon the transaction. He had given $100 down as a payment upon an expiring option, upon the promise of an agreement which he signed next day, and which involved a payment of $9,900 in a few days. He was apparently solely interested in the purchase and on the faith of its being a sale to him Marcon was paid his commis-

sion of $1,000 by the Morton estate. The agreement that he should not sell for less than $450 per acre is admitted by both Smith and Marcon to have been made after the $100 was paid and the other arrangements made. But whether in law it bound the respondent or not, he appears to have treated it as valid. He had to find some one to supply the $9,900 due by him on the 12th May as well as the extra $50 per acre. To do the one he could form a syndicate, but to do the other he had to sell. But if he could get anyone to put up the first heavy payment then a partnership with that person in which he and Smith were interested would enable him, on paying Marcon his third, to carry it through. If he could also realise his one-third and Smith's one-third of the $50 per acre he could meet the third payment without difficulty when it became due. The property would in all liklihood have been turned over. This may be crediting him with too much foresight, but it was what he actually did. His agreement with the respondent was, therefore, naturally based upon $450 per acre and all agree that it was so arranged.

The partnership or syndicate agreement prepared by Mr. Ellis is produced in the form (Ex. 2) which it assumed after the respondent had made changes in it relating to the control of the appellant as syndicate manager. The vital parts of it, so far as this action is concerned, were not changed and it clearly sets out the matter in a form which I think it is impossible for the respondent to disavow. The instructions came from him in the first place to Mr. Ellis. The object of the syndicate as set forth is to acquire the Pratt farm "from R. M. Morton *et al.*, under agreement dated 6th May, 1913." Although the cost is said to be "estimated" at $33,750, another estimate includes the payments "due under said agreement" which are given as "$13,750 forthwith" whereas the agreement only calls for $9,900. The agreement further recites that "in entering into agreement dated the 6th May, 1913, for the acquisition of the property by John G. Coleridge, one of the subscribers hereto, he shall be deemed to have been acting on behalf of the syndicate."

The respondent has, therefore, a clear right to complain that when the syndicate or partnership was formed upon the faith of which he paid his money and by which the Pratt farm became partnership or syndicate property, his partner, the appellant, received, as did Smith, a profit of

$50 per acre. They had failed to disclose to him that they were benefitting to that extent.

The respondent has, therefore, no cause to complain if he is held to the price he agreed to pay, save to the extent to which his partners have wrongly profited. The appellant has received $2,500 to which the partnership is entitled and fortunately for the respondent, Dr. Smith agreed to let the appellant use it, and the appellant is, therefore, still chargeable with it.

The appellant contends that he is not bound by the partnership agreement because what he dictated to Ellis was changed by the respondent. But the change related only to a question of management and the extent to which the appellant should control it, a matter which no one says was part of the arrangement of the 18th or 20th May. The appellant cannot now recede from that to which he did agree and on the faith of which he used the respondent's money. The latter's position has been changed and he has embarked on a speculation and is entitled to insist on his rights.

The judgment, however, seems to go too far in declaring what those rights are. It is not in accordance with the evidence that the appellant bought for the respondent. He bought for himself, and it is his turning the thing bought into the partnership, at an amount which he was not, as between him and his partner, entitled to insist on without full disclosure, that gives the latter cause for complaint. While it is not possible to do complete justice owing to Dr. Smith not being a party, enough may be adjudged to protect the respondent.

Dr. Smith at the trial admitted that he had been invited into a syndicate and agreed to go into it, but paid no money because he had no agreement and does not think he is interested in the property.

There is nothing to prevent a declaration that the appellant, respondent and Dr. Smith became partners or were jointly interested in the venture in which the Pratt farm was acquired from the other defendants, in the proportion of one-fifth, three-fifths, and one-fifth respectively, and restraining the appellant from dealing with it in any way inconsistent with the other partnership interests. An order should also be made directing the appellant to pay into Court to the credit of this action for the benefit of

the partnership the sum of $2,500, wrongly received by him. This will enable the respondent to proceed under Con. Rule 534. If the respondent so desires, he may also have a declaration that he has paid the sums agreed to be paid by him up to this time, and has a lien for the excess already paid, or that he may hereafter pay to comply with the contract, upon the partnership assets, namely, the Pratt farm, and that the appellant has failed to pay what he had agreed to pay.

I do not think the partnership can be dissolved or any further relief given in Dr. Smith's absence, but if he agrees to be added as a party, a proper judgment may be pronounced for the dissolution of the partnership, the taking of the partnership accounts and a sale of the lands. If Dr. Smith will not agree to be added, the respondent may take such steps as he may be advised by new action or otherwise. Pending this the other defendants should not be restrained from taking steps to realize their claim, and if they desire to proceed there is nothing to prevent the respondent from making further payments to save the property until it can be properly brought to sale as partnership property.

The judgment in appeal should be varied in accordance with the above. The appellant partly succeeds, but fails as to his main contention and should get no costs. The respondent may have his costs of action and appeal out of the partnership assets without prejudice to Dr. Smith's right to object to the same in the ultimate taking of the partnership accounts. If Dr. Smith agrees to be added and to be bound by the judgment the usual partnership judgment for dissolution and winding up may issue with the declarations as stated herein.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE:—We agree.

HON. MR. JUSTICE BRITTON. APRIL 6TH, 1914.

GNAM v. McNEIL.

6 O. W. N. 223.

Contract—Settlement of Former Action — Dispute as to Terms—Action by Parish Priest—Evidence—Onus—Statute of Frauds.

BRITTON, J., dismissed an action for damages for breach of an alleged agreement made by defendant, Roman Catholic Archbishop of Toronto, with plaintiff, a former parish priest to pay the costs of a certain former action brought by plaintiff against the Bishop of London, the damages sustained by him by reason of the alleged wrongful acts of the latter, and to restore him to his parish, holding that plaintiff had failed to establish the agreement alleged.

Action for damages for breach of an alleged agreement, tried at Sarnia without a jury.

R. I. Towers, for plaintiff.

D. L. McCarthy, K.C., and Monahan, for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff was and is a parish priest residing in Wyoming in the county of Lambton. Wyoming is in the diocese of London. The plaintiff and the Bishop of London had some differences which resulted in an action instituted by the plaintiff against the Bishop. That action was ripe for trial in March, 1913, when the defendant, who is the Archbishop of Toronto, intervened. He, by letter of 24th March, asked the plaintiff if he, the plaintiff, could conveniently go to Toronto and talk the matter over. The plaintiff went as requested and negotiations for a settlement were entered upon, but no concluded agreement was made. The plaintiff desired to consult his solicitor and lay the matter before him and it anything should be done the plaintiff wished that it should be done by the solicitor.

On the 4th April, 1913, Mr. McMillan, as plaintiff's solicitor, went to Toronto and had an interview with the defendant.

The agreement sued upon is one alleged to have been made between the plaintiff, by his attorney, D. S. McMillan, and the defendant. The contract was not in writing, but oral. The proof relied upon is that of Mr. McMillan who refreshed his memory by looking at a letter written by him

to the plaintiff on the 5th April, 1913; written by him at Sarnia to the plaintiff at Wyoming. Mr. McMillan states that the agreement with the defendant was, that in consideration of the plaintiff withdrawing the suit then pending by the plaintiff against the Bishop of London, he the defendant, would pay the costs fixed at the sum of $650; that the plaintiff would have restoration to his parish church and dependent missions and that the defendant would personally look after the "damage end of it," which the solicitor and the plaintiff interpreted to mean that the defendant would pay the plaintiff all damages that he had sustained by reason of the action of the Bishop of London.

The defendant denies that he undertook to have the plaintiff restored to what plaintiff calls his rights, to the parish church and dependent missions, and he asserts that such restoration was quite beyond his power. The defendant alleges that it is not within his power to so deal with such a matter in a different diocese from his own. The defendant denies that he promised to pay to the plaintiff any damages. He denies that he said that the plaintiff, in the event of the suit going to trial, would recover heavy or any damages.

Bishop Fallon, as Bishop of London, had taken proceedings against the plaintiff, under the decree of "*maxima cura,*" a decree well known to the plaintiff and defendant.

In the statement of claim in the present action it is alleged that the defendant "set aside all the proceedings under the decree of *maxima cura,* instituted by Bishop Fallon." That allegation must mean that the defendant had then already set aside, or would set aside all such proceedings. Neither was established.

It is further alleged that the defendant would be responsible for the plaintiff's maintenance pending an adjustment of the difference between the plaintiff and the said Bishop Fallon, and also that the defendant would pay the costs of said action fixed at $650; and that he, the defendant, would intercede and give or procure for the plaintiff a fair trial before the tribunal known to both plaintiff and defendant as the "Rota" at Rome. That the defendant would use his best endeavours to have the plaintiff restored to his full position and emoluments as parish priest at Wyoming and the dependent missions of Petrolia and Oil

Springs. The plaintiff by his solicitor, on the 7th April, 1913, agreed with the solicitor for Bishop Fallon:

"It is agreed that this action is ended, without costs to either party, and that no further proceedings will be taken herein."

The plaintiff claims that in consequence of the failure of the defendant to maintain the plaintiff, the plaintiff has suffered pain in mind and body—suffered by reason of lack of maintenance and by reason of his not being restored to his position as parish priest—and he claims a very large sum. It is alleged by plaintiff's counsel that the damage should be at least such a sum as would be the present value of an annuity of $800 or $1,000. The plaintiff is now fifty-four years of age.

I am of opinion that the defendant did not promise to the plaintiff restoration of his alleged rights, nor did he promise to pay damages in the way the plaintiff interprets the words that he would look after "the damage end" of plaintiff's troubles.

I accept the defendant's statement as to what was promised and that nothing was promised than that the defendant should pay costs and that defendant would do what was in his power to procure for plaintiff a hearing or trial by the Rota at Rome in reference to the whole case, the defendant has done, in my view of the evidence, all that he promised to do. He has fully complied with and performed the agreement that he made with Mr. McMillan, acting for the plaintiff. In short, I find that the defence as set out in the statement of defence, has been made out. This, as it seems to me, is fully borne out by the correspondence that shortly followed, what took place on the 3rd April. The defendant, so far as he could, provided the way whereby the plaintiff could have had a full trial before or by the tribunal known as the Rota at Rome, and he offered to the plaintiff a temporary place of residence where the plaintiff could have been maintained in comparative comfort. Mr. McMillan is, in my opinion, mistaken in his recollection of exactly what was promised by the defendant. Mr. McMillan was glad, for the sake of his client, to get the costs of troublesome and expensive litigation paid. He was pleased with the reception granted by the defendant. It is quite clear that the defendant was sincerely sympathetic. The plaintiff admits this. Both plaintiff and Mr. McMillan over-estimated

the defendant's power and thinking of what, in their opinion, defendant, as Archbishop, could do, they have perhaps quite naturally come to think that the defendant did promise what is alleged.

Mr. McCarthy applied for leave to amend statement of defence by pleading the Statute of Frauds in case it should, upon the evidence, appear that there was any promise, express or implied, on the part of defendant, to pay to the plaintiff the debt of his parish or of the diocese of London, or of the Bishop of London. I allowed the amendment to be made. If during the negotiations for settlement there was discussed the question of paying plaintiff's damages, it amounted only to negotiation and fell short of a completed agreement on that point. The parties were not, *ad idem*, as to payment of damages. Mr. McMillan says the defendant offered to put the agreement arrived at in writing; to give him, Mr. McMillan, a letter stating what the agreement was.

Having full regard to the frank and candid way the matter was discussed, Mr. McMillan should have accepted the letter offered by the defendant or should have reduced to writing the real agreement, verbally arrived at.

I venture to express my pleasure that the evidence given at the trial, both by plaintiff and defendant, was given in an admirable spirit of goodwill; not a harsh word was spoken by either of the other.

The action will be dismissed, and under the circumstances, without costs.

Thirty days' stay.

MASTER-IN-CHAMBERS. APRIL 9TH, 1914.

ROSSWORM v. ROSSWORM.

6 O. W. N. 226.

Husband and Wife—Alimony—Interim Alimony—Principles on which Granted—Wife in Possession of Funds to Maintain Herself until Trial — Unexplained Delay in Prosecution of Action—Foreign Divorce Obtained by Plaintiff—Estoppel—Dismissal of Motion.

CAMERON, M-in-C., *held*, that where the applicant's own material filed on a motion for interim alimony and disbursements shewed that she had sufficient means to maintain herself until the trial of the action and there had been great and unexplained delay in bringing the action to trial, that the motion must be refused.

Knapp v. *Knapp*, 12 P. R. 105, followed.

That the plaintiff having obtained a foreign divorce, thereby evoking and submitting to the foreign jurisdiction is precluded from setting up want of jurisdiction.

Swaizie v. *Swaizie*, 31 O. R. 324, followed.

Motion by plaintiff for an order requiring defendant to pay interim alimony from date of service of the writ of summons until trial of action, and interim disbursements.

E. F. Raney, for the plaintiff.

H. H. Davis, for the defendant.

CAMERON, MASTER:—In support of the application plaintiff filed her affidavit alleging that she has no means whatever of support and has no separate estate and is at the present time in a very delicate condition of health and not able to earn a living for herself, and has to a certain extent to depend upon the support and maintenance of her friends. She swears further that she has no means whereby to bring the action down to trial and that she requires money to pay the witness' fees and to set the action down for trial.

The action was commenced 11th February, 1913, but the statement of claim was not delivered until 2nd March, 1914. The statement of claim alleges that plaintiff and defendant were married on 4th November, 1879, in township of Normandy in Grey County, and that although defendant from the first shewed signs of a very bad temper and disposition they continued to live together for some 27 years. There were 6 children of the issue and the 3 that survive appear to be of age. Plaintiff alleges that in consequence of constant abuse and violent conduct on the part of defendant as set out in the statement of claim and from the apprehension that her life was unsafe with defendant, she was forced to leave his house in May, 1906. Defendant in his statement of defence alleges that his wife left him at that time of her own accord and went to live in the State of Oklahoma, U.S.A., and has supported herself ever since, and has never offered to return to his home since she left it some 9 years ago.

The pleadings in the action and the material filed on the motion disclose conflicting stories of a long married life, but this conflict of evidence is a matter for the trial Judge and I am not concerned with the merits of the action. The peculiar practice as to interim alimony and costs in matrimonial causes arose under the old English law which gave to the husband at the time of marriage the whole of the personal property of the wife and the income of her real estate. When a wife was forced to leave her husband's home she

found herself penniless and the Ecclesiastical Courts not only provided for her costs but for her support and maintenance *pendente lite*. This was before the Married Woman's Separate Property Act, and although the old practice continues the origin is clearly founded upon the need and refusal of support. Interim alimony should be granted if necessary to enable a wife to procure justice by being provided with her costs and her maintenance until the trial or determination of the action. The law is clearly set forth by the learned Chancellor in *Knapp* v. *Knapp*, 12 P. R. 105. In the case before me it is perfectly plain from her own affidavit filed in reply, that plaintiff has at the present time in the bank a sum of about $450. It is contended that she should not be forced to encroach on this corpus but is entitled to interim alimony. The test, as I understand it, is the need of support and plaintiff in this case has sufficient separate estate for her support until the trial of the action and for the interim costs and disbursements. The delay in prosecuting the action is another serious bar to the plaintiff's application and the explanation in the first affidavit filed by her that she could not proceed to trial because of her lack of funds absolutely falls to the ground upon the facts as sworn to in her second affidavit, in which she says that she has about $450 in the bank. At the time that this motion was launched plaintiff could have set down her action and had the same tried before the motion was argued before me, and the long delay in prosecuting the action is in no way satisfactorily accounted for.

In this view of the case, it is not necessary for me to consider at length a divorce which the plaintiff applied for and obtained in the District Court of the County of Garfield, Oklahoma, in April, 1907, whereby the marriage between plaintiff and defendant was dissolved and set aside and plaintiff and defendant divorced from each other. Defendant has put in a duly certified record of this judgment which not only decrees divorce but gives judgment in favour of plaintiff against defendant in the sum of $1,000, payable $100 annually on 1st of February in each year for a period of 10 consecutive years. Plaintiff now chooses to treat this divorce very lightly and apparently considers it of no legal force or effect in this province. Mr. Davis referred me to *Swaizie* v. *Swaizie*, 31 O. R. 324, on this point. Upon the law therein stated, it seems clear that plaintiff having evoked and sub-

mitted to the jurisdiction of the foreign Court has precluded herself from setting up want of jurisdiction. The record before me is *prima facie* evidence and although the presumption in favour of the judgment may be rebutted at the trial proof of the facts to shew want of jurisdiction must be adduced and this is not a matter with which I have to deal. I refer also to *Rex.* v. *Hamilton,* 22 O. L. R. 484, 17 O. W. R. 809.

A lengthy examination of the plaintiff taken before the local Registrar at Walkerton pursuant to an appointment, is before me. It was argued by Mr. Raney that I am not entitled to refer to this examination upon the law in *Karch* v. *Karch,* 21 O. W. R. 883. It does not appear, however, from the depositions whether they were taken upon an examination for discovery or upon the affidavit filed on this application. I pass no opinion upon these depositions for there are sufficient grounds established by the other material in my opinion to disentitle the plaintiff to succeed and I accordingly dismiss the motion with costs.

HON. MR. JUSTICE MIDDLETON. APRIL 6TH, 1914.

STUART v. TAYLOR.

6 O. W. N. 217.

Will—Construction—Devise to Bachelor Son for Life, to His Wife for Life and to Children—Devise to Children Void—Rule against Perpetuities—Contingent Remainder on Contingent Remainder—Intestacy—Improvements under Mistake of Title—Lien for—Alternative Retention of Lands upon Payment of Value—Possession—Limitations Act—Time not Running against Remainderman until Life Estates Determined—Partition.

MIDDLETON, J., *held,* that under a gift by will to a son, a bachelor, and after his death to his wife for life if he should have one, him surviving, and thereafter to his children, the children took no interest, because the gift to them offended against both the rule against perpetuities and the rule that there cannot be a contingent remainder on a contingent remainder, it being possible that the son's wife might not be born until after the testator's death and that she might survive the son 21 years.

Re Park's Settlement, [1914] W. N. 103 and *Re Nash,* [1910] 1 Ch. 1, referred to.

In *Re Sharon and Stuart,* 12 O. L. R. 605, the same clause in the will in question was adjudicated upon.

That the persons in possession of the lands in question who had made improvements under mistake of title were entitled to the option of remaining in possession paying the value of the lands at the termination of the life tenancies, or of being paid the value of the improvements made under mistake of title.

That possession did not begin to run against the heirs of the intestate until the life tenancies expired.

Action for a declaration of the rights of the parties in regard to a parcel of land, for partition thereof, and for possession against the persons now in possession, tried at Sandwich 28th March, 1914.

J. H. Rodd, for plaintiff.

A. R. Bartlett, for defendant Taylor.

F. D. Davis, for defendants Strong, Chevalier and Duby.

HON. MR. JUSTICE MIDDLETON:—The late Pierre Charron, as he appears to have written his name, was admittedly the owner of the entire parcel designated on the plan as lot A, bounded by Tecumseh road, the concession road, the extension of Broadway, and 11th street. This contained about 100 acres.

By his will, dated 21st October, 1860, Charron attempted to dispose of the land in question. This will has been already the subject of litigation, and is set forth in the report of *Re Sharon and Stuart*, 12 O. L. R. 605, where an application was made under the Vendors and Purchasers Act, and Sir Glenholme Falconbridge interpreted the will in such a way as to indicate that a good title could not be made to the portion now owned by Stuart.

On the hearing of this case all parties agreed to accept the facts as stated in that report, and supplemented the facts there stated by fresh evidence and admissions.

By the will, clause secondly, the testator gave "to my three sons—Gilbert, Oliver and Joseph—the south part of lot lettered A. . . . containing fifty arpents (not acres as stated in the report) to have and to hold to them as is aforesaid mentioned." By another clause, also numbered secondly, the testator directs the "land covered with water running through lot lettered A. as aforesaid, that is, the marsh land, be used in common by all my sons for the purpose of hunting, fishing and keeping swine or cattle."

Shortly after the death of Charron, the sons by common consent set apart three portions of the easterly end of lot lettered A. These contain, together, almost the fifty arpents. Gilbert took the easterly portion, and it is admitted that Stuart has acquired the interest of all children of Gilbert in the fifty arpents. If this partition stands, then Stuart will be entitled to retain the portion of land of which he is in possession. In the same way it is admitted that Strong has acquired the interest of all the children of Oliver, who

took the more westerly of the three portions. Joseph took the central portion, and his interest has been conveyed to Mrs. Taylor, but she has not acquired the interest of Joseph's only child.

The sons, it appears, assumed that the whole of the westerly portion of the land passed to them as tenants in common, and this, containing about sixty acres, was subdivided into fifths, Chevalier, who lives on the portion between the fifty arpents and the creek, having acquired two one-fifth interests, thus giving him the 24 or 25 acres remaining on that side of the stream after setting off the fifty arpents. Those claiming under the other three sons have taken similar shares in the land west of the stream.

In was agreed by all that the fifty arpents should be taken from the east end of the lot in question, so as not to interfere with the partition which has heretofore been made, particularly that dealing with the land to the west.

In is contended that the testator used the words "arpents" and "acres" interchangeably and that fifty acres should be measured from the east end of the lot instead of fifty arpents; the difference between seven and eight acres. I do not think this is so, and I think the line shewn as the fifty arpents line upon the plan put in is the governing line.

The first real difficulty arises upon a clause of the will which I have not referred to, which the Chief Justice held interprets the words "to hold to them as aforesaid" found in the gifts to the sons. The testator had previously given to each son other parcels of land, following the gift by this provision, "to have and to hold to each of them for and during their natural life respectively, and if they should marry after and after their and such of their decease to have and to hold to their surviving wife respectively, on the demise of their or each of their wives to hold to their children respectively and their heirs forever."

The question raised before the learned Chief Justice was the applicability of this clause to the devise of the shares in the fifty arpents, and as to the effect of the clause. The learned Chief Justice held that each son took an estate for life, his widow, if he left one, an estate for life after his death, and his children the remainder in fee after her death, or if no widow was left then in fee after the death of the life tenant. He negatived the contention that the case was governed either by *Wild's Case* or *Shelley's Case*. The result

was simply a declaration that the vendor could not make good title.

Upon the argument before me the effect of the devise was attacked upon a totally different ground. It is said that the gift to the children is void for remoteness. Manifestly the wife of the son then unmarried might be a person not born at the time of the testator's death; so that the gift to the children is a contingent remainder dependent upon the life estate of a person not yet born. It is true that these children are also the children of the son who was, of course, *in esse* at the time of the death; and at first I was inclined to think that this might make a difference. I do not think that the true principle applicable is really so much remoteness as the fact that the estate given to the children is a contingent remainder preceded by an estate which is also a contingent remainder. There cannot be a contingent remainder upon a contingent remainder.

The latest case upon this is a judgment of Mr. Justice Eve in *Re Park's Settlement,* [1914] W. N. 103, where he held that under a settlement by which property was settled upon a bachelor for life, after his death to his widow, on the death of his widow to his issue, the rule applied and rendered void the gift to the issue; stating the point thus: "As the limitations were to John Foran's widow for life, with remainder to issue who might be born to her as his wife, and John Foran being a bachelor at the time of the deed, that wife might be a person not born at the date of the deed, and there was a 'double contingency' and a limitation, which offended against what was called the rule against 'double possibilities.'"

In *Re Nash,* [1910] 1 Ch. 1, Mr. Justice Farwell puts the matter, in a way, more simply. According to the rule against perpetuities, all estates and interests must vest indefeasibly within a life in being and 21 years thereafter. At the time of Pierre Charron's death the wife of the son, as already pointed out, might not have been born. She might well outlive the son twenty-one years. So that it is plain that the interest of the children, whether regarded as the children of the father or mother, might not vest within the time limited.

This being so, upon the death of the sons and their wives —which has now happened—the estate in this fifty arpents is not dealt with by the will; and as there was an intestacy

as to this remainder, it passed to the heirs at law of Pierre Charron, that is, to those who were his heirs at his death.

According to the statement in the report, there were ten children, and they took share and share alike. Some of these have died, and probably left no issue, so that the number of shares will be somewhat reduced. The three defendants claiming under the sons have acquired not merely the estate of the son under the devise of the will, but also the estate of the son in the residue of the estate which at the date of the conveyance any of these sons had acquired owing to the intestacy of any of the brothers and sisters then dead or otherwise.

The three defendants in possession of the lands have no doubt made improvements under a mistake of title, and I think the case is one in which they should be at liberty either to take the portions of the land of which they are in possession, paying its value at the date of the termination of the life tenancies, or to claim a lien for improvements. R. S. O. ch. 109, sec. 14. I would trust that, the rights having been ascertained, the parties may come to some fair arrangement preventing further litigation. If no arrangement can be made, there must be a partition, leaving the Master to deal with the details.

So far I have not dealt with the question raised concerning the rights of the defendant Duby. Duby purchased the lands immediately south of the property in question. Lot 1 undoubtedly ran, according to the earlier plans, as far south as the centre line of Broadway street. There was some intention to extend Broadway, taking one half of the extension from the land in question and one half from the land to the south. Possession was taken, and has been held for a long time; but as this was after Charron's death, the right of his heirs and those claiming under them, which only arose upon the death of the last surviving life tenant, would not be defeated, the statutory time not having run since that death.

The judgment will, therefore, be for partition of the fifty arpents in question, with reference to the Master, who will deal with all questions arising out of the right of the present occupant to a lien for improvements or otherwise. The costs will come out of the estate, save that as to Duby there will be no costs. The judgment will declare that he has not acquired possessory title to the strip of land in question.

PRIVY COUNCIL.

APRIL 2ND, 1914.

HYATT v. ALLEN.

Company—Sale of Plant and Assets — Secret Profit by Directors—Action for Accounting—Fraud—Directors Held Trustees—Reference to Take Accounts—Costs.

An action for a declaration that defendants were trustees of the moneys and other considerations received by them from the Dominion Canners Ltd., for the use and benefit of the shareholders of the Lakeside Canning Co., and that the interests of all parties interested might be ascertained, for a full discovery and account of the profits received by defendants, etc. Defendants received from Dominion Canners $33,750 in cash and $15,250 in preferred stock in one certificate issued in the name of defendant company, and $15,000 of stock issued in another certificate also in the name of defendant company. They subsequently apparently received further consideration in cash, which Dominion Canners, Ltd., paid for portions of the property of defendant company purchased by it, but not included in option.

SUTHERLAND, J., *held*, 18 O. W. R. 850; 2 O. W. N. 927, that there should be judgment for plaintiffs, declaring that the individual defendants were trustees for plaintiffs of the shares in defendant company respectively transferred by plaintiffs to individual defendants, and that plaintiffs were entitled to be paid all profits realised by individual defendants, in respect of such shares, and directing a reference to Master at Picton to enquire and state what profits said individual defendants had respectively realised as to such shares.

DIVISIONAL COURT, 20 O. W. R. 594; 3 O. W. N. 370, varied above judgment by declaring that the *cestuis que trustent* should not include one Bately nor anyone not a party to the record. The scope of the reference before the Master was extended so he could enquire and report the amount which each of the plaintiffs should receive, and that in such enquiry the defendants should be entitled to shew any ground by way of estoppel or otherwise, why any particular plaintiff should not receive money. Otherwise the appeal was dismissed with costs.

COURT OF APPEAL, 22 O. W. R. 469; 3 O. W. N. 1401, dismissed defendants' appeal from above judgment with costs.

PRIVY COUNCIL *held*, that the duty of directors is primarily one to the company itself, yet under circumstances such as here presented they also owed a duty to the individual shareholders, for they held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the company itself, viz., as agents, and as such they were liable.

Judgments of the lower Courts affirmed.

Appeal from a judgment of the Court of Appeal for Ontario, 22 O. W. R. 469; 3 O. W. N. 1401, affirming a judgment of Divisional Court, 20 O. W. R. 594, 3 O. W. N. 370, which affirmed a judgment of HON. MR. JUSTICE SUTHERLAND at trial, 18 O. W. R. 850, 2 O. W. N. 927.

The appeal to the Judicial Committee of the Privy Council was heard by VISCOUNT HALDANE, L.C., LORD DUNEDIN, LORD SHAW of Dunfermline, LORD MOULTON and LORD PARKER of Waddington.

Their Lordships' judgment was delivered by

VISCOUNT HALDANE: L.C.:—The appellants were the directors of a company called the Lakeside Canning Co., Ltd. The capital of the company was $750,000 in shares, each of $250. Such shares were issued to the extent of $30,500, and in the year 1909 and for a short time in 1910 these shares were held to the extent of $10,000 by the seven appellants, and to the extent of $20,500 by the twenty-two respondents and certain other persons not parties to these proceedings. In January, 1907, a dividend of 15 per cent. had been paid, but no further dividend had since been declared.

In November, 1909, negotiations took place between the appellants as directors and one Grant, who was endeavouring to amalgamate the canning companies of Ontario. His purpose was to acquire the shares and undertaking of the Lakeside Co. After negotiation, during which the consideration asked by the appelants was increased, a transfer was finally agreed on at the following price:

Cash for factory and plant	$33,750 00
Cash for raw materials	8,406 44
Allotment of preferred stock in Dominion Canners, Limited .	11,250 00
Allotment of common stock in ditto	15,000 00
Total in cash	42,156 44
Total in shares	26,250 00

The Dominion Canners, Limited, was the amalgamating company which Grant was forming. The transaction was carried through early in March, 1910.

In the interval the appellant directors took various steps which have given rise to this litigation. On the representation that it was necessary for the directors to secure the consent of the majority of the shareholders in order to effect the amalgamation, and before the price had been settled they approached individual shareholders, including the respondents, and induced them to give to the appellants options

to purchase their shares at the par value of $250 with interest at 7 per cent. for the periods during which no dividend had been paid. About 18th February, 1910, they exercised these options and paid the shareholders concerned $22,883.75. The shareholders endorsed their share certificates in blank and handed them to the appellants. The result of the transaction was that the appellants made what was apparently a handsome profit, measured by the difference between what they paid the other shareholders, and what they received from the Dominion Company, subject only to deduction of the debts of the Lakeside Co., which they had undertaken to the former company to pay, but which do not appear to have been large.

The action was brought by the respondents for a declaration that the appellants were trustees for the shareholders of the Lakeside Canning Co. of the profits derived from the Dominion Company, and for an account and consequential relief. Mr. Justice Sutherland tried the case and, after hearing evidence, found the facts substantially as follows: that general and similar representations were made by the appellants to each of the respondents, to the effect that the former as directors wanted the options from the shareholders in order to deal on behalf of all the shareholders with the representatives of the Dominion Company; that the appellants expected to realise the par value of the shares, and the 7 per cent. interest and that all the shareholders including themselves were to share *pro rata* in the amount realised; that the appellants did not inform the other shareholders that they were buying their shares on their own account, and that they had entered into a secret arrangement by which they kept concealed from the other shareholders, the information which it was their duty, as directors, to disclose, and that the appellants were thereby guilty of fraud. Objections were taken on behalf of the appellants at the trial to the form of the proceedings. It was said that the directors were trustees, if at all, for the Lakeside Company, and that the latter ought to have been a party either as plaintiff or defendant, and that in its absence the respondents were not entitled to sue on behalf of themselves, and the other shareholders. There appears to have been some doubt as to whether the company had or had not been added as a party and the learned Judge inclined to think that, possibly because the Dominion Company had by the time of the litigation acquired all the shares, it was not re-

presented so as to enable him to deal effectively with the matters in question. He, however, seems to have considered that as it had been made out to his satisfaction, that the appellants were, on the footing that the transacion could not then be set aside but must be treated as adopted by the respondents and the other shareholders, trustees of what they had received, the objection was not serious. He offered, if the respondents preferred it, to retain the record, and after any further trial that was necessary to put it into proper form, but expressed his willingness to give judgment as it then stood to the effect already indicated. The respondents elected to accept the second alternative. The appellants appealed to the Divisional Court, which affirmed the judgment. But as the learned Judges who heard the appeal considered that the action was really one in which a group of individual shareholders had joined together, but were suing individually on separate causes of action, they amended his judgment by confining it to the plaintiffs on the record, and directing that the account taken should deal with the amount which each individual plaintiff was entitled to receive. From the judgment in this form the appellants appealed to the Court of Appeal for Ontario. This Court took the same view as the Divisional Court, and dismissed the appeal. They concurred in the findings of fact by the trial Judge just as the Divisional Court had done. They held that although under other circumstances it might be that the fiduciary duty of the directors was a duty to the company and not to individual shareholders, yet under circumstances such as those of the case before them, the directors became the agents in the transaction of the shareholders, when they took the options from them. They thought that the addition of the Lakeside Company as a party, if made, had been irregularly made, having regard to the real character of the action as one brought by a group of individual plaintiffs with what were substantially similar causes of action, and they struck out the name of the company from the record in affirming the judgment.

Arguments have been addressed to their Lordships both on the question of procedure and on the substantial issue whether the appellants were properly found to have put themselves in the circumstances of this case in a fiduciary relation to the respondents. On the latter point their Lordships do not think it necessary to say more, so far as the questions of fact are concerned, than that, having heard the

arguments and considered the evidence, they see no ground for not accepting the concurrent findings of the three Courts which have already decided this issue. They agree with the learned Judges of the Court of Appeal of Ontario in thinking that under the circumstances of the case the respondents were entitled to treat the appellants as trustees for them, and, subject to the question of procedure, to ask for the relief they obtained.

The appellants appear to have been under the impression that the directors of a company are entitled under all circumstances to act as though they owed no duty to individual shareholders. No doubt the duty of the directors is primarily one to the company itself. It may be that in circumstances such as those of *Percival* v. *Wright,* [1902] 2 Ch. 421, which was relied on in the argument, they can deal at arm's length with a shareholder. But the facts as found in the present case are widely different from those in *Percival* v. *Wright,* and their Lordships think that the directors must here be taken to have held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the company itself, that is as agents.

The question of procedure has, however, been strenuously argued, and their Lordships will deal with the points raised under this head. There is no doubt that on the statement of claim the action was originally brought as a class action by the plaintiffs on behalf of themselves and all the other shareholders. In the absence of the company itself, which does not appear to have been properly made a party, the claim was demurrable. Moreover it appears on the face of the Statement of Claim that the shares of the plaintiffs had been transferred to the Dominion Company, so that, in the absence of a claim to set this transfer aside, a claim which could not have been successfully made in the absence of that company, the relief sought was demurrable on this ground also. The appellants, therefore, argued that as the proper plaintiff was the company and as the respondents had parted with their shares, the action must fail. It appears, however, that throughout the proceedings in the three Courts below the action was treated by these Courts, which had power to amend the pleadings if they thought it necessary, as one for a declaration that the appellants became, under the circumstances proved by the evidence, the agents of the respondents in dealing as they did with their shares, and that on this footing judgment was given in a form which afforded

the relief to which the respondents were held entitled. In other words the action was treated as one in which the respondents had sued individually as co-plaintiffs, joining in asserting their causes of action. Their Lordships see no reason for holding that any substantial injustice has been done by the Courts below in proceeding on this footing. The rule of procedure in Ontario does not, in their Lordships' opinion, preclude the Court from amending or treating as amended the pleadings so as to enable relief to be given as though claimed in this fashion. It has been argued for the appellants that because of the original form of the pleadings and the joinder in one proceeding of separate causes of action injustice may have happened by the improper admission of evidence. Their Lordships are, however, unable to find that such a result was brought about, and they think that under the circumstances the procedure adopted in the Courts below was admissible.

They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

PRIVY COUNCIL.

APRIL 7TH, 1914

RE FARRELL ESTATE.

Will—Construction—Codicil—Bequest of Residue—Later Bequest of "Balance" of Estate—Repugnancy—Desire to Avoid Intestacy—Clear Gift Followed in Preference to Vague—Costs.

Motion for construction of a will and codicil. The testator, by his will, clearly disposed of his residuary estate, making due contingencies against intestacy, which he expressed himself as anxious to avoid. By a later codicil he provided "whatever balance may remain to the credit of my estate, whenever the final settlement of the same is made by my trustees, I direct that the same shall be invested by them and paid over to my grandson E. F., after the death of his mother, and in the case of his death, divided equally between his issue, and if no issue, to go to my residuary estate." On behalf of E. F., it was contended that the codicil was repugnant to the earlier grant of the residuary estate and, therefore, as a latter gift, should prevail.

TEETZEL, J., *held*, that the word "balance" could not be taken to refer to the residuary estate, and that the clauses in the will were not revoked by the codicil, which might, possibly, be ineffective for the lack of a "balance" to which it might apply.

Costs of all parties out of estate, those of trustees as between solicitor and client.

COURT OF APPEAL dismissed appeal from above judgment.

PRIVY COUNCIL *held*, that dispositions of property carefully made by a will, cannot be treated as revoked by a subsequent codicil when the language used therein is ambiguous and indefinite in its directions.

Judgments of Ontario Court of Appeal and Teetzel, J., 23 O. W. R. 518; 4 O. W. N. 335; 3 O. W. N. 1099, affirmed.

Appeal from a judgment of Ontario Court of Appeal, 23 O. W. R. 518; 4 O. W. N. 335; affirming a judgment of HON. MR. JUSTICE TEETZEL, 3 O. W. N. 1099.

The appeal to the Judicial Committee of the Privy Council was heard by VISCOUNT HALDANE, L.C., LORD DUNEDIN, LORD SHAW, of Dunfermline. LORD MOULTON, and LORD PARKER of Waddington.

Their Lordships' judgment was delivered by

VISCOUNT HALDANE:—Their Lordships have considered the will and the various codicils made by the testator. The conclusion at which they have arrived is that it is impossible to attach to the codicil of the 20th March, 1909, either of the meanings which are contended for by the appellant. If it is suggested that this codicil was intended to dispose of the whole of the residue which had already been exhaustively dealt with in the will itself, the answer is that the codicil provides that on failure of the issue of Dr. Edward Farrell, what is given by it is to go into the testator's residuary estate. This shews that he contemplated that the disposition of his residue by the will was intended by him to remain unrevoked. If it is, on the other hand, suggested that the testator intended to give Dr. Edward Farrell something by the codicil, and that effect must be given to the intention, the answer is that this something has not been sufficiently indicated by the testator to enable it to be ascertained by a Court of Justice. He purports to dispose of:—"Whatever balance may remain to the credit of my estate whenever the final settlement of the same is made by my trustees, the National Trust Company of Ontario, at Toronto." There is no time defined at which this final settlement is to be made, and it can hardly be conceived that the testator meant to leave the amount given to depend on the discretion of the trustees. Nor, if this difficulty were got over, is it easy to think that he meant that the whole of the income of his residue, reaching a much larger amount than he was giving to other legatees in a similar position to Dr. Farrell, was to go, as has been suggested, to the original residuary legatees until the death of Dr. Farrell's mother, and was then to pass to Dr. Farrell in such a way as to give him the corpus, which in its turn was to come back to the original residuary legatees in the event of his death without

issue. In whatever way the codicil is read the inference from the language used is that the testator had not clearly thought out what it was that he meant to dispose of by it.

Under these circumstances their Lordships take the same view of the question of construction as was taken by the Court of Appeal for Ontario, that dispositions carefully made by the will cannot be treated as revoked by language used subsequently which is ambiguous and indefinite in its directions.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, those of the trustee respondents being paid out of the estate.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 18TH, 1914.

DAVID DICK & SONS v. STANDARD UNDERGROUND CABLE CO.

5 O. W. N. 889.

Contract—Default in Delivery of Goods Purchased—Cause of—Evidence—Dismissal of Action—Contingent Assessment of Damages.

MIDDLETON, J., 25 O. W. R. 53; 5 O. W. N. 82, *held*, in an action for damages for non-delivery of goods as ordered that the default was due solely to the actions of the plaintiffs and dismissed the action with costs, but fixed the damages in the event of a successful appeal at $1,000.

SUP. CT. ONT. (2nd App. Div.) varied above judgment by reducing amount allowed on counterclaim by $1,693, otherwise appeal dismissed with costs.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 53.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. L. Counsell, for the appellant.

D. L. McCarthy, K.C., for the defendants, the respondents.

H. A. Burbidge, for the third parties.

THEIR LORDSHIPS (v.v.) varied the judgment of Hon. Mr. Justice Middleton, by reducing the amount allowed on the counterclaim by $1,693; and, with this variation, dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 20TH, 1914.

MILLER v. WENTWORTH COUNTY.

5 O. W. N. 891.

Negligence—Municipal Corporation — Automobile Accident—Alleged Defective Guardrail—Contributory Negligence — Recklessness on Part of Driver of Car—Right of Passenger to Recover—Knowledge of Passenger—Assumption of Risk.

MIDDLETON, J., 25 O. W. R. 270; 5 O. W. N. 317, *held*, that where the driver of an automobile was killed in attempting to descend a steep road with sharp turns at night and with an automobile whose head lights were injured so as to give little light, the accident was attributable to his own negligence and not to an insufficient guardrail upon the road.

That a passenger in the automobile, a brother of the driver, could not recover for injuries sustained in the accident, as the facts were all known to him and he, as much as his brother, voluntarily incurred the risk.

Plant v. *Normanby*, 10 O. L. R. 16, distinguished.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeals by the plaintiffs in two actions from the judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 270.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

W. S. McBrayne, for the plaintiffs.

J. L. Counsell, for the defendants.

THEIR LORDSHIPS (v.v.) dismissed the appeals with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 16TH, 1914.

GUEST v. CITY OF HAMILTON.

5 O. W. N. 889.

Municipal Corporations — By-law Expropriating Lands—Power of Corporation to Repeal—No Entry Authorised—Trifling Entry in Fact Made — Lesser Quantity of Land Taken — Consolidated Municipal Act 1903, s. 463.

MIDDLETON, J., 25 O. W. R. 274; 5 O. W. N. 310, *held*, that where an expropriatory by-law of a municipality did not authorise or profess to authorise an entry to be made upon the lands expropriated that a trifling entry upon one corner of the said lands for the purpose of constructing a drain did not preclude the municipality from repealing the by-law.

Grimshaw v. *Toronto*, 28 O. L. R. 512, discussed.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal with costs, reserving to appellant all rights outside the claims in the action.

Appeal by the plaintiffs from the judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 274.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. L. Counsell, for the appellant.

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

THEIR LORDSHIPS dismissed the appeal with costs, reserving to the appellant all rights outside of the claims in the action.