The
# Ontario Weekly Notes

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## APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 31ST, 1917.

### RE BUTCHER.

*Infant—Custody—Neglected Child—Children's Aid Society—Rights of Parents—Acquired Rights of Foster-parents—Welfare of Child.*

Appeal by Roland Butcher from the order of MIDDLETON, J., ante 197.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

D. O'Connell, for the appellant.

A. W. Ballantyne, for the respondents.

THE COURT dismissed the appeal with costs.

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## HIGH COURT DIVISION.

CLUTE, J., IN CHAMBERS. MAY 28TH, 1917.

### *DANFORTH GLEBE ESTATE LIMITED v. HARRIS & CO.

*Discovery—Action to Restrain Nuisance—Offensive Odours from Glue Factory—Charge of Negligence in Operation of Factory—Order for Inspection of Premises by Plaintiffs and Experts or Witnesses—Rules 266, 370—Costs.*

Appeal by the plaintiffs from an order of the Master in Chambers dismissing the plaintiffs' motion for an order for inspection of the defendants' glue and fertilizer factory.

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

The plaintiffs complained that the factory, by reason of offensive odours therefrom, was a public nuisance, and rendered the lands of the plaintiffs and other lands in the neighbourhood unfit for residential purposes. By the 22nd paragraph of the statement of claim the plaintiffs alleged that the defendants were negligent in the operation of their plant and factory, and that by reason of the defendants' negligence the nuisance was greater than it would be if the defendants' operations were conducted with reasonable care and with the most approved machinery and methods. The plaintiffs sought an injunction and damages. The defendants denied the plaintiffs' allegations, except as admitted; claimed an easement by user; said that the nuisance, if any, had been abated; and denied negligence.

Upon this appeal the plaintiffs contended that an inspection of the factory was necessary and material for the proper determination of the questions arising in the action.

W. E. Raney, K.C., for the plaintiffs.
W. N. Tilley, K.C., for the defendants.

CLUTE, J., in a written judgment, after stating the pleadings and the contentions of counsel, and referring to Barlow v. Bailey (1870), 18 W.R. 783, McAlpine & Co. v. Calder & Co., [1893] 1 Q.B. 545, and the English Rule 659, pointed out the difference between that Rule and the Ontario Rules 266 and 370, and said that he did not regard the case of Barlow v. Bailey as controlling the question here involved, which must be determined by the language of the Rules. Under our Rules, the inspection asked for is permissible because it comes within the wording of the Rules, the inspection being necessary for the proper determination of the question in dispute, and necessary or expedient for the purpose of obtaining full information or evidence. He could see no possible objection to inspection by a witness or expert; on the contrary, he thought it was expedient and necessary for the obtaining of full information in reference to the questions at issue. The Rules should receive a liberal construction.

The plaintiffs were entitled to the inspection asked, and the appeal should be allowed. As the question was now apparently up for the first time for decision, the costs of the motion and appeal should be costs in the cause.

MULOCK, C.J.Ex. MAY 30TH, 1917.

## *VANZANT v. COATES.

*Gift—Parent and Child—Voluntary Conveyance of Land by Mother to Daughter—Fiduciary Relation—Undue Influence—Lack of Independent Advice—Public Policy.*

Action by Frances R. Vanzant against George Coates, her brother, to recover possession of the north half of a lot conveyed to the plaintiffs by Elizabeth Coates, the mother of the plaintiff and defendant, on the 6th October, 1915. Elizabeth Coates died on the 23rd January, 1916. The defendant denied the validity of the conveyance to the plaintiff, and claimed title as devisee of his mother and also by possession. The conveyance to the plaintiff was in consideration of natural love and affection, other valuable considerations, and the sum of $1.

The action was tried without a jury at Toronto.

George Wilkie, for the plaintiff.

F. Arnoldi, K.C., for the defendant.

MULOCK, C.J. Ex., set out the facts and circumstances in an elaborate written judgment. He said that Elizabeth Coates had been paralysed in her right side for two years before her death and was in her 76th year and in feeble health when she executed the deed by making her mark. The deed was procured through the instrumentality of the plaintiff. Having regard to the mother's infirmities, helplessness, and dependent condition, she was unable to refuse the daughter's appeal, and was not in a position to form an absolutely free and unfettered judgment. The deed was the result of the plaintiff's undue influence over her mother.

Reference to Allcard v. Skinner (1887), 36 Ch. D. 145; Huguenin v. Baseley (1807), 14 Ves. 273, 300; Hoghton v. Hoghton (1852), 15 Beav. 278; and other cases.

The gift, having been procured by the plaintiff's undue influence, could not stand; and, further, on the ground of public policy, could not stand; the plaintiff stood in a fiduciary relation to her mother at the time of the gift; and the evidence shewed that the mother had no competent and independent advice.

The deed being set aside, the defendant took as devisee.

Judgment setting aside the impeached deed and dismissing the action, with costs.

CLUTE, J. MAY 30TH, 1917.

## RYCROFT v. TRUSTS AND GUARANTEE CO.

*Contract—Agreement to Devise Farm to Nephew—Services Rendered by Expectant Devisee—Action to Enforce Agreement against Administrators of Estate of Uncle—Evidence—Corroboration—Intention of Testator—Failure to Prove Contract—Statute of Frauds—Wages or Remuneration for Services—Uncle in Loco Parentis—Limitations Act—Wages for only Six Years before Decease.*

Action by Murray E. Rycroft against the administrators of the estate of his uncle, William A. Spoar, who died in March, 1917, intestate and unmarried, for specific performance of an agreement alleged to have been made by the deceased with the plaintiff to devise to the plaintiff a farm, in consideration of the plaintiff devoting himself upon the farm to the support of his uncle, or, in the alternative, to recover $3,850 as remuneration for the plaintiff's services rendered to his uncle for eleven years before his death. There was no writing evidencing the alleged agreement.

The action was tried without a jury at Brantford.
E. R. Read, for the plaintiff.
W. S. Brewster, K.C., for the defendants.

CLUTE, J., in a written judgment, set forth the facts, which were not in dispute, and said that it was clear from the evidence of the plaintiff and other witnesses that the plaintiff was induced to remain and work for the intestate upon the farm, devoting his whole time thereto, upon the understanding that he was to be compensated for his work by the intestate leaving him all his property. Accepting the plaintiff's evidence and that of other witnesses who stated what the intentions of the uncle were, the learned Judge was yet unable to say that such a contract was established as entitled the plaintiff to specific performance, even if the Statute of Frauds did not bar the way; but the evidence clearly established the plaintiff's right to wages and compensation for his services, and took the case out of the ordinary rule that children are not to look for wages to their parents or those in loco parentis: Walker v. Boughner (1889), 18 O.R. 448; Herries v. Fletcher (1914), 6 O.W.N. 587, 589; Cross v. Cleary (1898),

29 O.R. 542; Johnson v. Brown (1909), 13 O.W.R. 1212; Re Rutherford (1915), 34 O.L.R. 395; Mather v. Fidlin (1916), 10 O.W.N. 229; McGugan v. Smith (1892), 21 S.C.R. 263; Murdoch v. West (1895), 24 S.C.R. 305.

The Statute of Limitations (pleaded by the defendants) applied, and the remuneration should be limited to six years.

Judgment for the plaintiff for $2,460 with costs.

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BRITTON, J. MAY 31ST, 1917.

## SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

*Negligence—Local Board of Health—Medical Officer of Health—Death of Diphtheria Patient—Action under Fatal Accidents Act—Evidence—Failure to Shew Negligence Causing or Contributing to Death—Dismissal of Action—Costs.*

Action under the Fatal Accidents Act by the parents of Martha Simpson, a child of seven years, to recover damages for her death by reason (as alleged) of the negligence of the defendants, the Local Board of Health and the Medical Officer of Health.

The action was tried with a jury at Belleville.

W. C. Mikel, K.C., for the plaintiffs.

S. Masson, K.C., for the defendants.

BRITTON, J., in a written judgment, said that the child was taken ill on the 26th January, 1916, with a disease that proved to be diphtheria, from which she died on the 2nd February, 1916, after having been isolated and attended to by a health officer employed by the Local Board and the defendant Yeomans, the Medical Officer of Health. All the medical testimony was to the effect that it could not be said that death resulted from anything alleged to have been done or omitted by the defendants or either of them. At the close of the plaintiffs' case, the defendants' counsel moved for the dismissal of the action, on the ground that the death was not shewn to have been caused by the negligence alleged. Judgment was reserved upon this motion, the defendants called witnesses, and questions were submitted to the jury. The jury found: (1) that the Local Board were guilty of negligence which caused the death; (2) that the negligence was, "lack of proper medical attention and nursing and food and fuel;" (3)

that the defendant Yeomans was guilty of negligence which caused the death; (4) that the negligence was, "not giving proper attention." And the jury assessed the damages at $300.

The learned Judge was of opinion that there was no evidence proper to submit to the jury that anything done or omitted by the defendants or either of them could be said to have caused or contributed to the death.

Reference to Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, and cases cited; and to the Public Health Act, R.S.O. 1914 ch. 218, secs. 51 (2), 54, 58.

Action dismissed, but without costs.

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KELLY, J. JUNE 1ST, 1917.

## RE LALLY.

*Will—Construction—Bequest to Next of Kin of Named Person on his Death—Strict Interpretation—Persons Entitled to Share—Surviving Sisters of Propositus—Exclusion of Children of Deceased Brothers and Sisters.*

Motion by the Toronto General Trusts Corporation, trustees under the will of Annie Lally, deceased, for an order determining questions arising upon the will.

The motion was heard in the Weekly Court at Toronto.

W. D. Gwynne, for the Toronto General Trusts Corporation and for Annie Ethelrida Ince.

D. L. McCarthy, K.C., for Agnes Elizabeth McCarthy and others.

W. Lawr, for Constance Lally and others.

KELLY, J., in a written judgment, said that, by her will, Annie Lally, now deceased, directed her executor and executrix to pay to the Toronto General Trusts Corporation one-ninth of the moneys remaining in the hands of the executor and executrix after payment of certain legacies, upon specific trusts during the lifetime of her son Francis Lally, and after his decease to pay over the principal money of this one-ninth part to "the then next of kin of my said son Francis."

Francis Lally, on his death, left him surviving two sisters and several nephews and nieces, children of other sisters and brothers of his who predeceased him. Some of these claimed to be entitled

to participate in these principal moneys, while the two surviving sisters contended that they alone were entitled.

The leading decisions affecting the question thus raised are to the effect that a bequest to the next of kin, without more, or where there is no manifestation of any different purpose in the will, means to the nearest blood relations in equal degree to the propositus, and that these take as joint tenants. Those, therefore, entitled are the next of kin in the strictest sense, to the exclusion of persons entitled by representation under the Statute of Distributions. Applying that to the present case, the sisters of Francis Lally who survived him were entitled, to the exclusion of children of his brothers and sisters who predeceased him: Elmsley v. Young (1835), 2 My. & K. 780; Cooper v. Denison (1843), 13 Sim. 290; Avison v. Simpson (1859), Johns. Ch. 43; Rook v. Attorney-General (1862), 31 L.J.N.S. Ch. 791; Halton v. Foster (1868), L.R. 3 Ch. 505.

Costs of the Toronto General Trusts Corporation, as between solicitor and client, out of the fund.

No order as to the costs of the other parties.

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BLACK v. CANADIAN COPPER CO.—TAILLIFER v. CANADIAN COPPER CO.—SUDBURY DAIRY CO. v. CANADIAN COPPER CO.—BELANGER v. CANADIAN COPPER CO.—CLARY v. MOND NICKEL CO.—OSTROSKY v. MOND NICKEL CO.—MIDDLETON, J.—MAY 31.

*Nuisance—Injury to Crops and Soil by Vapours from Smelting Works—Evidence—Damages in Lieu of Injunction—Judicature Act, R.S.O. 1897 ch. 51, sec. 58 (10)—Assessment of Damages—Costs.*]—Action for damages alleged to have been sustained by the plaintiffs respectively in respect of their neighbouring farms and gardens, etc., from vapours contained in matallurgical smoke issuing from the roast-beds and smelter-stacks of the defendants, near Sudbury. In all the actions claims were originally made for injunctions, but these claims were abandoned, and the cases resolved themselves mainly, if not altogether, into assessments of damages. The actions were tried without a jury at Sudbury and Toronto; 34 days were occupied in the trial. MIDDLETON, J., in an elaborate written judgment, said that the difficulty was to ascertain what damage, if any, had been done by the emission of the smoke-vapours from

the roast-beds and smelter-stacks. Mines cannot be operated without the production of smoke from the roast-yards and smelters, which smoke contains very large quantities of sulphur dioxide. There are circumstances in which it is impossible for the individual so to assert his individual rights as to inflict a substantial injury upon the whole community. If the mines should be prevented from operating, the community could not exist at all. Once close the mines, and the mining community would be at an end, and farming would not long continue. Any capable farmer would find farms easier to operate and nearer general markets if the local market ceased. The consideration of this situation induced the plaintiffs' counsel to abandon the claims for injunctions. The Court ought not to destroy the mining industry—nickel is of great value to the world—even if a few farms are damaged or destroyed; but in all such cases compensation, liberally estimated, ought to be awarded. The Court has now by statute (Judicature Act, R.S.O. 1897 ch. 51, sec. 58, sub-sec. 10) discretion to refuse an injunction and award damages in lieu thereof. See Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287. The defendants set up that many of the things complained of were not the result of the smoke, but were to be attributed to other causes, and that the claims were grossly exaggerated. In addition to claims for damage to crops, claims were made for permanent injury to the soil. The learned Judge, after a full examination and consideration of the evidence, stated his conclusions as to the damages which should be awarded to each plaintiff, without giving any details of computation, thinking that on the whole fairest and best: to Black, $1,000; to Taillifer, $800; to the Sudbury Dairy Company, $1,000; to Belanger, $750; to Clary, $1,400; to Ostrosky, $500. In view of the fact that these are test cases (many other actions having been brought), costs should be awarded to the plaintiff in each case; but, as there was much exaggeration in the claims presented, the amount of costs in each case will be fixed upon bills being submitted, the amounts to be reduced somewhat from what would be allowed upon a taxation under a general award of costs. H. H. Dewart, K.C., A. W. Fraser, K.C., J. S. McKessock, J. A. Mulligan, and J. H. Clary, for the plaintiffs. D. L. McCarthy, K.C., and Britton Osler, for the defendants the Canadian Copper Company. J. M. Clark, K.C., and R. U. McPherson, for the defendants the Mond Nickel Company.

FRIND v. FRIND.—MIDDLETON, J.—JUNE 1.

*Husband and Wife—Alimony—Evidence—Adultery—Cruelty—Desertion—Dismissal of Action—Costs—Rule 388.*]—An action for alimony, tried without a jury at Toronto. MIDDLETON, J., in a written judgment, said that the action presented many peculiarly unpleasant and unfortunate features. He found against the contention that the defendant had been guilty of adultery. The conduct of the husband and of the young woman mentioned in the evidence was imprudent and objectionable, but the situation was brought about by the detective employed by the wife and was not the result of any plot between the parties charged. There was no evidence shewing such cruelty as would entitle a wife to alimony, even under the liberal rule approved in Lovell v. Lovell (1906), 13 O.L.R. 569. The wife is stronger and larger than the husband, and never was in any jeopardy at his hands. The case was simply one in which agreement and marital happiness seemed impossible, but in which there was no such misconduct on the husband's part as justified the wife in leaving his home. The husband had behaved very badly, and the wife was not free from blame. The action should be dismissed, but the defendant must pay the plaintiff's disbursements: Rule 388. If the wife is ready to return, and the husband does not now provide a proper and suitable home for her and receive her as his wife, he will be guilty of desertion, and a new action may be brought. This judgment is upon the assumption that the husband is ready and willing to perform his duty and to receive and care for his wife as required by law. H. H. Dewart, K.C., and J. M. Ferguson, for the plaintiff. A. C. McMaster and W. A. Skeans, for the defendant.

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RE ONTARIO BANK.—MIDDLETON, J., IN CHAMBERS—JUNE 1.

*Company—Winding-up—Disallowance of Claims by Referee—Affirmance by Judge—Application for Leave to Appeal Refused—Winding-up Act, R.S.C. 1906 ch. 144, sec. 101.*]—Motion by claimants for leave to appeal from an order of MASTEN, J., confirming the report of a Referee disallowing the claims in the course of a reference for the winding-up of the bank. MIDDLETON, J., in a written judgment, said that, before the claimants reach the discussion of the legal difficulties in their way, they have to

get over the adverse finding of fact of the Referee, confirmed by MASTEN, J. The Winding-up Act, R.S.C. 1906 ch. 144, sec. 101, intends the decision of a Judge to be final, unless, in the opinion of the Judge applied to for leave to appeal, there is some ground for allowing the litigation to be prolonged. Leave ought, generally speaking, to be refused unless there appears to be some reason for doubting the validity of the judgment in review. Upon the evidence in this case, the finding appeared to be the only one which could properly be made. There was evidence which, if believed, would warrant an opposite conclusion. It was not accepted by the Referee, who saw the witnesses; and MASTEN, J., who heard very full argument, had no hesitation in affirming the Referee's finding. MIDDLETON, J., having read the important parts of the evidence, could not conceive it possible that any Court would now interfere with the findings of fact. No doubt was awakened in his mind as to their accuracy. Motion dismissed with costs. Daniel O'Connell, for the claimants. J. W. Bain, K.C., for the liquidator. J. A. Paterson, K.C., for contributories.

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RE KELLY—KELLY, J.—JUNE 1.

*Will—Construction—Joint Bequest of Farm Implements and Stock—Devise—Effect of Codicil—Joint Devise to two Infants—Property not Specifically Disposed of—Intestacy.*]—Motion by the executors of the will of Robert Kelly for an order determining certain questions arising upon the will. The motion was heard in the Weekly Court at Toronto. KELLY, J., in a written judgment, said that he determined the questions only in so far as was desirable at the present time, having regard to the interests represented. Order declaring: (1) that William Frederick Graves and Myrtle Graves, his wife, are together entitled to the testator's farm implements and to one pair of horses and two cows; (2) that under the codicil the infant Robert Frederick Graves is entitled to share jointly with the other infant, Harold Graves, in the devise made by the will to Harold of the testator's real estate, but subject to the terms and conditions of the devise; (3) that any part of the testator's estate not specifically disposed of by the will and codicil passes as in the case of an intestacy. Costs out of the estate—those of the executors as between solicitor and client. T. J. Agar, for the executors and for William F. Graves and Myrtle Graves. F. W. Harcourt, K.C., for the infant Harley Graves. E. C. Cattanach, for the infant Robert Frederick Graves.

BOARDMAN v. FURRY—BRITTON, J.—JUNE 1.

*Contract—Use of Rooms in House—Life-interest in Land—Destruction of House by Fire—Refusal to Rebuild or Provide other Accommodation—Damages—Future Payments in Lieu of Rooms.*]—Action for possession of land, for damages, and to compel the enforcement of an agreement. In December, 1904, the plaintiff owned two parcels of land, one of 100 acres and the other of 40 acres, both subject to a blanket mortgage for $2,600. The defendant purchased both parcels, paying $100 and assuming the mortgage; and the plaintiff conveyed both parcels to the defendant on the 14th December, 1904, reserving to the plaintiff a life-estate in the 40-acre parcel. By an agreement dated the 1st November, 1906, it was provided that the defendant was to have the south part of what was called the old house, on the 40-acre parcel, to include the bed-room and lodge-room then occupied by him, and also the use of the large barn on that parcel, except the part described in the agreement. The plaintiff was to have the small barn and the north part of the house for his own use during his life. The defendant undertook to pay taxes on the buildings and on his own lands and "insurance on the buildings." The defendant paid insurance and taxes, and continued to occupy according to the agreement, until the 21st June, 1915, when a fire occurred which destroyed the house, small barn, and shed. The fire insurance company paid $1,200 in respect of the loss, and this was paid to the mortgagee and applied upon the mortgage which the defendant had assumed. The defendant refused to rebuild except for himself or provide the necessary rooms for the plaintiff. The action was tried without a jury at Welland. BRITTON, J., in a written judgment, after stating the facts, said that he was of opinion that, under the agreement, the defendant was bound to furnish rooms for the plaintiff or otherwise provide an equivalent shelter for him. For the refusal to do so, the measure of damages was the reasonable cost to the plaintiff of the equivalent of what he was entitled to under the agreement. The plaintiff's loss was at least $5 a month, which would be 5 per cent. on the $1,200 insurance money received by the defendant. Allowing the defendant from the 21st June to the 15th August, 1915, as a breathing-space in which to rebuild or provide accommodation for the plaintiff, and assessing damages from the 15th August, 1915, to the 15th May, 1917, the plaintiff was entitled to recover $105. If the defendant still refuses to build or provide rooms, the plaintiff will be entitled to $5 a month in the future, payable quarterly from the 15th May, 1917, on the 15th days of August, November, February, and May, while the plaintiff lives. Judg-

ment accordingly with costs on the County Court scale, without set-off. J. F. Gross, for the plaintiff. D. B. White, for the defendant.

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WILLIS v. HARRISON—BRITTON, J.—JUNE 1.

*Landlord and Tenant—Lease—Reformation—Action to Set aside Lease for Misrepresentations by Lessor—Failure to Prove Misrepresentations—Costs.*]—Action to set aside a lease of land made by the defendant to the plaintiff for 5 years at a rental of $250 yearly, on the ground of fraudulent misrepresentation by the defendant as to the land and its quality and fitness for a market-garden. The plaintiff accepted the lease and went into possession, after which he discovered, as he said, that the representations made to him were false. The plaintiff also claimed reformation of the lease. The action was tried without a jury at Toronto. BRITTON, J., in a written judgment, said that upon examination for discovery the defendant admitted that there was an error in not inserting in the lease a clause permitting the plaintiff, at the expiration or other determination of the lease, to remove fixtures and buildings placed upon the land by the plaintiff; and the lease must, therefore, be reformed in this particular. Upon the other branch of the case, the learned Judge finds that the representations made by the defendant were substantially true; and, if any statement was false in fact, it was not known by the defendant to be so. Judgment for the plaintiff against the defendant for the reformation of the lease by inserting a clause as above; the plaintiff's costs of the action up to and inclusive of the examination of the defendant for discovery to be paid by the defendant. As to the plaintiff's other claims, action dismissed with costs subsequent to the examination for discovery, to be paid by the plaintiff to the defendant. J. P. MacGregor, for the plaintiff. S. H. Bradford, K.C., for the defendant.

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## CORRECTION.

In CAMPBELL v. HEDLEY, ante 215, it is stated at the end of p. 216, that written reasons are to be given later by MEREDITH, C.J.C.P. This is a mistake. The only written reasons are those of LENNOX, J. The other members of the Court agree that the appeal shall be dismissed.