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COURT OF APPEAL.

MAY 8TH, 1911.

RE HENDERSON AND TOWNSHIP OF WEST NISSOURI.

Appeal—Strangers to Record—Application to be Allowed to Intervene—Schools—Continuation School Board—Substantial Interest of, in Application—Probable Withdrawal of Original Respondents—Costs.

Motion by the West Nissouri Continuation School Board to be allowed to intervene and be heard by counsel in support of the by-law in question in appeal from the judgment of the Divisional Court, 23 O.L.R. 21.

W. R. Meredith, for the continuation school board of West Nissouri.

Sir George Gibbons, K.C., for the township corporation.

J. M. McEvoy, for the appellant Henderson.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

MOSS, C.J.O.:—This is an application on behalf of the West Nissouri Continuation School Board to be allowed to intervene and be heard by counsel in support of the by-law in question in this appeal. The by-law was passed by the council of the township of West Nissouri to authorise the issue of $7,000 debentures for the purpose of purchasing a site and erecting a school house for the West Nissouri Continuation School, which was established, it is said, by a by-law of the county council of the county of Middlesex. The validity of this by-law is not admitted, but it is not the subject of direct attack in this proceeding which is an application by a ratepayer of the township to quash the debenture by-law.

The application was dismissed by Middleton, J., and his decision was upheld by a Divisional Court, Riddell, J., dissenting, and this is an appeal from that decision. Since it was lodged, there has been a change in the personnel of the township council, and there is now reason to believe that they will not support the by-law before this Court. Under these circumstances the continuation school board desires an opportunity of being heard in its support. The board was not made a party to, or notified of the application to quash the by-law. It is quite apparent that the interest of the board in the money to be raised by the debentures under the by-law is of a sufficiently substantial kind to have justified its being made a party to the application to quash. If not an absolutely necessary party, it was at all events a proper party.

In these circumstances, if the township were appellants instead of respondents, and were proposing not to further prosecute the appeal, the school board would have little difficulty in procuring themselves to be substituted as appellants, or to be permitted to carry on the appeal. The practice in such a case was considered by this Court in Langtry v. Dumoulin, 11 A.R. 544, at p. 549. The application was refused on the ground that the applicants had no interest, and that the defendant Dumoulin was solely interested, and so was *dominus litis*. But, on application to the Supreme Court, the applicants were allowed to appeal *per saltum* to that Court, apparently on the ground that the defendant was not solely interested, but was in some sense a trustee for the applicants: see head-note to report of the case in the Supreme Court *sub nom.* Dumoulin v. Langtry, 13 S.C.R. 258.

A somewhat similar application was allowed by a Divisional Court in Re Ritz and Village of New Hamburg, 4 O.L.R. 639.

There appears to be no good reason why the same course should not be pursued in the case of a respondent, where it appears that there is an interest proper to be supported, and that the withdrawal of the party by whom it has hitherto been protected leaves it practically unrepresented before the Court.

In the case of Re Billings and Municipal Council of the Township of Gloucester, 10 U.C.R. 273, upon the argument of a rule nisi to quash a by-law authorising the subscription of shares in the capital stock of a railway company, the Court declined to hear counsel on behalf of the company, upon the ground that the rule did not call upon the company. But in the case of Re McKinnon and Corporation of the Village of Caledonia, 33 U.C.R. 502, at p. 507, the Court in discharging a

rule nisi to quash a by-law to provide for the carrying of the Hamilton & Lake Erie Railway along certain streets in the village of Caledonia, expressed the opinion that properly the railway company should have been a party to the rule.

The same might, not improperly, be said of the School Board in this case, and that being so it may well be permitted to intervene under the present circumstances. As to the rule or practice of the Judicial Committee, see Safford & Wheeler, Privy Council Practice, p. 818.

Probably it will be sufficient for all purposes to order that the school board be at liberty at its own expense to appear and be represented by counsel upon the argument of the appeal, and support the present judgment. If any further question of costs arises it can be dealt with upon the final disposition of the appeal. The order will contain an undertaking on the part of the school board to submit to, and abide by any order as to costs to be made on the appeal.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MAY 10TH, 1911.

PAQUETTE v. GRAND TRUNK R.W. CO.

Railway — Negligence—Contributory Negligence—Findings of Jury not Justified by Evidence—Improper Light—Excessive Speed—Actionable Negligence not Proved.

Appeal by the defendants from the judgment of MULOCK, C.J. Ex.D., at the trial, with a jury, on the 28th October, 1910.

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

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

A. E. Fripp, K.C., for the plaintiff.

MOSS, C.J.O.:—The plaintiff, a car cleaner in the employment of the defendants, claims in this action damages from the defendants for injuries he received through being struck by a locomotive engine of the defendants while walking upon the track upon which the engine was moving. The jury found that he was not guilty of any negligence which caused or contributed to the accident, upon evidence which, but for the finding, would appear to shew very convincingly that the injuries were

due to his own fault—in other words that he was the author of the injuries of which he complains.

The jury having by their finding exonerated him of the charge of contributory negligence, the next step is to ascertain whether there was evidence upon which the jury might reasonably find negligence on the part of the defendants that caused the injury. Was there evidence of actionable negligence, or do the findings of the jury make a case of actionable negligence against the defendants?

The jury found that the negligence which caused the accident was improper light of yards during time of alterations, the train being a little ahead of time, running at an excessive speed. The findings are somewhat vague. On their face they leave it very uncertain as to the meaning to be attached to the expressions "improper light of yard," train "a little ahead of time," and "excessive speed." Interpreted by the light of the evidence and the charge, they appear to mean that some sand or gravel for use in ballasting was being placed between two of the tracks, and that a shallow trench was being dug which crossed one of the tracks, and that the yard was not sufficiently lighted while these operations were going on, that the train, the locomotive of which struck the plaintiff, was timed to reach Ottawa Station a little later than it actually arrived on the occasion in question, and that the train was running at a speed which was "excessive" in the opinion of the jury. In dealing with the question of speed the jury do not appear to have attended to the learned Chief Justice's remarks in his charge, wherein commenting upon this branch of the case he said: "It is said that the train came in at an excessive rate of speed. And here you have a conflict of testimony also. What is an excessive rate of speed? You cannot fix a particular rate and say that is excessive."

Nothing is given shewing what in the opinion of the jury they would consider an excessive rate of speed for an express train coming to a station.

There was a charge of failure to ring the bell, of which much was made in the evidence, and which was expressly put to the jury by the learned Chief Justice as one of the grounds of negligence, but the jury did not so find, and it must be taken that they negatived the charge.

Then do the acts found, or any of them, constitute actionable negligence as regards the plaintiff? Improper light was not charged in the pleadings, and the plaintiff's counsel at the trial disclaimed any intention of insisting on the fact of the train being ahead of time as causing the accident, and stated that what

caused it was the complaint they made in the pleadings—want of warning.

It seems as though the jury, not being able to find negligence with regard to that upon which the plaintiff relied, viz., the non-ringing of the bell, concluded to attach to the excessive speed the elements of non-lighting and too early arrival, forgetting that neither of them had been made a factor of negligence in the case. The condition of the spaces between the tracks, and of the lights in the yard, was rightly enough put forward as justifying the plaintiff in walking between the rails of the track on which the incoming train was, but was only relied upon for that purpose. But conceding to these conditions such weight as could properly be attached to them, they afforded to the plaintiff, with the knowledge he possessed with regard to the movements of the train, no justification whatever for placing himself in the dangerous position which he deliberately took. He was expecting the arrival of the train, he knew of the rate of speed at which it usually came, and he cannot but have known he was doing a most dangerous thing, and exposing himself to serious risk and almost certain injury.

It was not shewn that there was negligence or breach of any duty to the plaintiff in bringing in the train to the station at the rate at which it was moving. And there is nothing to shew that the speed of the train contributed in any way to the accident. In no view does it appear that it was due to actionable negligence on the defendants' part.

The appeal should be allowed and the action dismissed with costs if demanded.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A., also concurred, for reasons stated in writing.

HIGH COURT OF JUSTICE.

BRITTON, J., IN CHAMBERS. MAY 6TH, 1911.

YOULDON v. LONDON GUARANTEE CO.

Practice—Application to Postpone Trial—Jurisdiction of County Judge—Con. Rule 45.

Appeal by the plaintiff from the Judge of the County Court of Frontenac, refusing an application to postpone the

trial of this action until the autumn non-jury sittings at Kingston.

J. J. Maclennan, for the plaintiff.

C. Swabey, for the defendants.

BRITTON, J.:—The learned County Judge held that he had no jurisdiction, as in his opinion the case of Wendover v. Nicholson, 5 O.W.R. 645, applied. In that case the application to the District Judge was under Con. Rules 1215-1220, and the Master in Chambers had no jurisdiction. Upon an application to postpone a trial, the Master in Chambers in Toronto has jurisdiction, so by Con. Rule 45 the County Judge has jurisdiction as to an action brought in his county.

The appeal must be allowed. The parties consented that I should deal with the application to postpone the trial, and I think it should be postponed. The order to postpone may go as asked, without prejudice to the defendants making an application to further postpone in the event of that being necessary by reason of the absence from the country of a necessary and material witness.

Costs of the application and of this appeal to be costs in the cause.

DIVISIONAL COURT. MAY 8TH, 1911.

McCUTCHEON v. TRADERS' FIRE INSURANCE CO.

Fire Insurance—Application Covering Two Properties—Unauthorised Alterations in—Policy Issued Covering only One Property—Second Statutory Condition — Contract Controlled by—Difference between Application and Policy not Pointed out in Writing to Insured—Whether Renewal a New Contract—Laches—Acquiescence.

Appeal by the defendants from the judgment of the Judge of the County Court of Haldimand of the 31st January, 1911. The facts are set out in the judgment of SUTHERLAND, J., infra.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

R. S. Cassels, K.C., for the defendants.

S. H. Bradford, K.C., for the plaintiff.

SUTHERLAND, J.:—On the 26th March, 1906, the plaintiff made an application to the defendants for an insurance against loss or damage by fire, to the amount of $800 for the period of 12 months from that date, as follows: "On natural gas drilling plant owned by Thomas J. McCutcheon, known as No. 1, operating within 25 miles of Dunnville, and not outside of Counties of Welland, Haldimand and Lincoln, without permission.

$ 25.00 on boiler, engine and attachments.
325.00 on drill, shafting, belting, gearing, cables, tools, and other attachments belonging to or used in natural gas drilling plant.
50.00 on building containing drill, boiler, engine, shafting, belting, gearing, cables, and attachments, belonging thereto.

$400.00

Concurrent insurance permitted with Merchants Fire Insurance Co., to the amount of $400.00. Lightning clause to be attached.

"On natural gas drilling plant owned by Thomas J. McCutcheon, known as No. 2, operating within 25 miles of Dunnville, and not outside of counties of Welland, Haldimand and Lincoln, without permission.

$ 25.00 on boiler, engine, and attachments.
325.00 on drill, shafting, belting, gearing, cables, tools, and attachments belonging to or used in natural gas drilling plant.
50.00 on building containing drill, boiler, engine, shafting, belting, gearing, cables, and attachments, belonging thereto.

$400.00

Concurrent insurance permitted with Merchants Fire Insurance Co. to the extent of $400.00. Lightning clause to be attached," and in which application the premium to be paid is stated to be $16.00.

The defendant company subsequently on the 6th April, 1906, issued its policy No. 31530 in the plaintiff's favour, in which it is stated that in consideration of the stipulations herein named and of $16.00 premium, the defendant company insured the plaintiff for the term of one year from the said date "to an amount not exceeding $800.00 to the following described property while located and contained as described herein and not

elsewhere, to wit: On natural gas drilling plant, owned by the assured and known as No. 2, operating within 25 miles of Dunnville, and not outside of the counties of Welland, Haldimand and Lincoln, Ontario, without permission.

$100.00 on the frame, metal clad building.
50.00 on boiler, engine and attachments.
650.00 on drill, shafting, gearing, belting, cables, tools and attachments belonging to or used in natural gas drilling plant, while contained in the above described building.

$800.00

Further concurrent insurance Merchants.

$400 subject to Lightning clause stamped hereon:—"

From time to time subsequently the plaintiff paid the annual or renewal premiums until the 26th March, 1909, and the premium paid on that date kept the insurance alive down to the time of the fire in question.

On the 13th December, 1909, the plaintiff alleges that he suffered a loss by fire which destroyed the natural gas rig No. 1, referred to in his original application, but on applying to the defendants for payment pursuant to what he had up till then believed to be the terms of his policy, was met by a refusal, and the statement that the policy in question only covered natural gas rig No. 2, set out in the original application.

It appears that after the original application had been sent in to the company by the agent it was altered in the following manner:—The typewritten particulars were apparently torn off and the typewritten particulars referring to No. 2 moved up on the face of, and attached to the application over and at the place where the particulars as to No. 1 had been when signed by the plaintiff and forwarded by the agent to the defendants. On the left-hand margin of the particulars referring to No. 2, the figures in typewriting had been changed in lead pencil in the following way: $25.00 changed to $50.00, $325.00 to $650.00, $50.00 to $100.00, and the total of $400.00 to $800.00, thus apparently making an application which was for $400.00 each, on each of the two natural gas drilling plants, Nos. 1 and 2, read an application for $800.00 on one of them, viz., No. 2. At the trial, it was not shewn who made these alterations. They were not done by the plaintiff, or with his consent.

It appears that the plaintiff was insuring at the same time the two drilling plants by concurrent insurance with the Merchants

Fire Insurance Company to the extent of $400.00 on each, as indicated in the application.

No explanation is given as to why the defendants should prefer to put $800.00 on one of the plants rather than $400.00 on each.

The plaintiff's evidence is, that assuming that the policy was in the terms of the application which he intended to make, and did in explicit terms make, for $400.00 on each plant, he did not read the policy on receiving it from the company, but laid it away among his papers, and only learned when the difficulty arose after the fire that it read in the terms already indicated.

The defendant company pleads that it issued and delivered to the plaintiff the said policy for $800.00 on the plaintiff's natural gas drilling plant known as No. 2, that the plaintiff accepted the said policy, and obtained a renewal thereof by the defendants on the 26th March, 1907, and further renewals to the 26th March, 1910. They say further, that if the application to the defendants for a policy of insurance in response to which the said policy No. 31530 was issued by the defendants was for insurance of $400.00 on natural gas rig No. 1, and $400.00 on natural gas rig No. 2, which the defendants do not admit but deny, the application was never accepted by the defendants, and the defendants never intended to issue a policy in terms of said application, and the defendants submit that the plaintiff, by reason of his acceptance from the defendants of the policy No. 31530 and the repeated renewals thereof, and by his laches and acquiescence and delay, is precluded from making the claim in question.

They further say that if they received an application from the plaintiff for a policy of insurance upon his natural rig No. 1, which they do not admit, but deny, they did not accept such application, and issued no policy in the plaintiff's favour upon said natural gas rig No. 1, and never insured at any time that rig.

The policy issued contains the usual printed statutory conditions, and among others that known as statutory condition No. 2, which is as follows: "After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application unless the company points out in writing the particulars wherein the policy differs from the application."

No proof whatever was furnished at the trial on behalf of the defendants that after receiving the application from the plaintiff they ever notified him in any way that the terms of the

application were not such as they were willing to accede to, or upon which they would issue a policy, or that they before the issuance of the said policy, or afterwards notified him in writing or otherwise of the particulars wherein the policy differed from the application. The only application the plaintiff made was the one already indicated. The defendants received the premium which he paid for the issuance of a policy in pursuance of that application, and continued subsequently to receive the renewal premiums.

The action was tried by the Judge of the County Court of the county of Haldimand, and judgment was delivered by him on the 31st January, 1911.

The following are extracts from his judgment: "The defendant company I find did not notify plaintiff of any change between the application and the policy issued. The application produced in Court was not in the form it was when signed and forwarded to the defendant company. The typewritten sheet above referred to had been cut in two, the upper part referring to rig No. 1 had been detached from the printed form of application, and the lower part of the typewritten sheet referring to rig No. 2 had been attached to the printed form of application. There can be no doubt of this after a reference to the impression copy appearing in the letter-book of the defendants' agents which was produced at the trial. It does not appear from the evidence when this material alteration of the application was made, but I am satisfied the plaintiff did not consent to this change. Mr. Renwick, defendants' secretary since January, 1908, could only say that the application was in its present form when he became secretary, and that he knows nothing of the original transaction.

"In the policy issued to the plaintiff by the defendants, special reference is made to the application of assured on file at the office of the company, which it is said is his warranty and made part of his policy.

"I am of the opinion that the contract is controlled by the 2nd statutory condition, and the defendants did not point out in writing to the assured the particulars wherein the policy differed from the application.

"I believe it was intended that the policy should be issued in accordance with the terms of the written application as before referred to, and before its mutilation.

"I think there should be judgment for the plaintiff for $400 with interest from the time the same should have been paid and costs of action."

In my opinion the trial Judge was right in coming to the conclusion that the second statutory condition applied, and that the contract was controlled by it. The scope and effect of the said clause is clearly dealt with by Meredith, C.J., in the case of Davidson v. Waterloo Mutual Fire Insurance Company, 9 O.L.R. 394, at p. 400: "Then what is the effect of the condition? Its purpose is manifestly, I think, to secure to the applicant the very contract for which he has applied, unless the insurer informs him in writing that the policy sent to him is a different one, and points out the particulars in which it differs from his application."

But the appellant contends that if statutory condition No. 2, applies, there are other objections which are fatal to the plaintiff's case. The defendant company contends that the application was for insurance for a year, and that the second statutory condition only applies for that period. It contends that each renewal is a new contract. But in the case of Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co., 33 S.C.R. 94, it was held, "that the renewal is not a new contract of insurance."

The appellant also contends that the plaintiff is estopped by his laches and acquiescence from disputing that the contract is other than as set out in the policy in question. The company contends that the plaintiff having received the policy and retained it in his possession for several years after it was issued and before the fire occurred, and having paid the annual premiums necessary to keep it in force, and being an intelligent man, it must be presumed that he knew the contents of the policy and cannot now be heard to contend otherwise. In this connection, the plaintiff recites, and perhaps on the appeal mainly relies upon the decision in the case of the Provident Savings Life Assurance Society of New York v. Mowat, 32 S.C.R. 147, the headnote of which is as follows: "A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon."

But that case refers to a life insurance policy. There was there no statutory condition similar to No. 2 in the present policy, by which the defendants agreed that, after an application for insurance, it shall be deemed that the policy sent to

the assured was intended to be in accordance with the terms of the application, unless the company pointed out in writing the particulars wherein it differed from such application. I do not think the case last cited can be considered as applicable to a policy with such a condition. The plaintiff had a right to assume that the policy was in accordance with his application, and in default of notice to the contrary by the defendant it cannot dispute that the policy was intended so to be.

Upon the facts in the case of Hawthorne and Boulter v. Canadian Casualty and Boiler Insurance Co., 14 O.L.R. 166, (affirmed 39 S.C.R. 558), Falconbridge, C.J., said: "I think this is a very honest claim and one that ought not to be defeated on merely technical grounds." I think that expression of opinion applies with equal force to the present case. The claim of the plaintiff is apparently an honest one in so far as one can gather from the evidence, and should not be defeated on technical grounds. No explanation or even suggestion is offered by the defendant company as to when, why, how, or by whom the alteration or mutilation was made in the plaintiff's application. In the absence of explanation by the defendant company as to why, on the plaintiff sending in an application for insurance on each of the natural gas drilling plants for $400, that is $800 in all, it should have considered it better to insure one for $800, it would appear reasonable to believe that through error the defendants had inserted only one instead of both of said plants in the policy. It would also be open to surmise if not suspicion, in default of any explanation by the defendants, that the application of the plaintiff was after the fire altered by some one in the employ of the defendant company in the manner hereinbefore indicated, and so as to make it appear to conform, if possible, to a policy which had in some way and by mistake been prepared and issued in the form in which it now appears.

In Wyld v. Liverpool and London and Globe Insurance Co. 23 Gr. 442, Spragge, C., at p. 445 says: "Not returning the premium and sending a policy, was it not a representation that they had accepted the application and that the policy sent was in pursuance of it?" The Wyld case was affirmed, 1 S.C.R. 604: "Held, that the true construction of the application, written notice, and interim receipt, read together, established a contract of insurance between the plaintiffs and the defendants, embracing the goods situated in the flats added by plaintiffs, and that notwithstanding the acceptance of a policy which did not cover goods in the added flats, plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats."

[Reference also to Kettlewell v. Refuge Assurance Co., [1908] 1 K.B. 545, (affirmed, [1909] A.C. 243).]

I would dismiss the appeal with costs.

BRITTON, J.:—For reasons given by the learned trial Judge, I am of opinion that the Judge is right.

I have read the judgment of my brother Sutherland, and agree in the result. The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., dissented, giving reasons in writing, in which he stated that he had very grave doubt (notwithstanding its wide language), whether the second statutory condition applied to a case like the present, and that in any case the plaintiff was estopped by his laches and acquiescence from disputing the terms of the policy. In his opinion, the judgment should be set aside, and the appeal allowed with costs, but under all the circumstances the action should be dismissed without costs.

BRITTON, J. MAY 8TH, 1911.

RE PLAETZER ESTATE.

Will—Construction—Annuity—Creation of Fund for—Right to Resort to Corpus.

Motion by the executors of John Plaetzer for an order construing his will.

W. Brydone, for the executors.

W. Proudfoot, K.C., for the widow.

C. Garrow, for the residuary legatees.

BRITTON, J.:—John Plaetzer made his will on the 14th June, 1899, and he died on the 10th May, 1908. When the will was made he had a wife, three sons and two daughters. All were living at the time of the testator's death and are now living. Shortly before making his will the testator had sold his farm, but reserved a small parcel of land and a house upon it, for the life of his wife and himself, and they continued to reside there together until the testator's death, and the widow resides there now. The sum of $3,000, part of the purchase money of the farm, was secured by a mortgage, carrying interest at 5 per cent. per annum, and this mortgage for the full amount was

outstanding at the time the will was made. One hundred dollars of principal was paid to the testator in his lifetime, so at the time of his death only $2,900 of principal remained.

The clauses of the will requiring consideration are these:—

"I give and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say:

"To my wife Catharine, one hundred and fifty dollars per year during her lifetime, and the use of the house, said sum to be paid her from the interest accruing from a three thousand dollar mortgage held by the testator upon lot 34, concession 13, in the township of Hullett."

"After my wife's decease I direct my executors hereinafter named to convert my whole estate into cash and divide the same, share and share alike, among my two daughters, Mary and Elizabeth and my three sons John, Henry, and George."

"All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto my two daughters, Mary and Elizabeth, share and share alike."

The executors ask the Court the following questions:—

(1) In the event of the interest on the $3,000 proving insufficient to pay the annuity of $150 given to Catharine, wife of testator:—

(*a*) Is the annuity chargeable upon, and payable out of the corpus, to the extent of the deficiency from year to year accruing?

(*b*) Does the annuity cease upon the death of the annuitant, or does it continue to be payable out of aforesaid interest until the whole amount of the annuity has been satisfied?

(*c*) Is the annuitant entitled to all the interest which may accrue upon the fund of $3,000 during her life, so long as such interest does not exceed $150 per year for that time?

2. What is meant by the words, "the whole of my estate," in the sixth paragraph of said will, and to what share of the said estate are the five beneficiaries in said paragraph entitled?

3. To what are the two daughters Mary and Elizabeth entitled, if anything, under the seventh paragraph of said will?

By an order of Court made on the 26th April, 1911, the daughter Elizabeth Yungblut was appointed to represent the five sons and daughters of the testator.

I am of opinion that the testator intended that the whole fund should, if necessary, be available for the payment of the annuity to the widow. It is true that there is a direction that

this annuity be paid out of the income derived from the fund, and in that respect this case differs from Re McKenzie, 4 O.L.R. 707, but even so, it is after all only an indication of where the money can be found to provide for the annuity previously given, and so is within the case of In re Mason. Mason v. Robinson, 8 Ch. D. 411.

Mr. Garrow, who so ably argued this case for the residuary legatees, frankly admitted that the whole question was "whether this was a matter to be adjusted between an annuitant and a residuary legatee, or between a life-tenant and a remainder-man."

If this case is between an annuitant and a residuary legatee, then Mason v. Mason, cited above, and Re Taylor, Illsly v. Randall, 50 L.T.N.S. 717, govern. If between life-tenant and remainder-man, then the case is completely covered by Baker v. Baker, 6 H.L.C. 616.

Here the proper construction of this will is that the widow should get not only the use of the house for her life, but an annuity of $150 a year, out of his estate. It may have been in the mind of the testator that his death would occur before the mortgage would be paid, and if so the amount of principal would, at the rate carried by the mortgage then, be sufficient to provide for the annuity, but there is nothing to indicate that in the event of payment in full of principal, and investment at a lower rate, the widow should submit to a reduction. This annuity was for her maintenance—during her life—something that was necessary—and no doubt the testator realised this. The testator's bounty fixed the amount, and that amount should be paid in full before anything reserved for residuary legatees.

Kimball v. Cooney, 27 A.R. 453, was cited. That case is quite in point, and I may adopt the language of the present Chief Justice of Ontario, then Judge of Appeal, in saying that "I think this case falls within the category of gifts of an annuity, and that the directions about putting to interest are not sufficient to cut down the bequest to a gift of the interest merely." See Carmichael v. Gee, 5 App. Cas. 588.

This is a gift of an annuity not payable exclusively out of the interest reserved and payable out of a particular fund.

The answer to the 1st question, (a), will be—the annuity is chargeable upon, and payable out of the corpus, to the extent necessary, if necessary at all, to make the payment of $150 a year.

(*b*) The annuity ceases upon the death of the annuitant except as to arrears, if any.

(*c*) If the interest on the fund exceeds $150, such excess is not payable to the annuitant, unless for payment of arrears, if any.

(2) "The whole" means "all" of testator's estate. When the five beneficiaries named become entitled they are entitled "share and share alike," that is to say, each to one-fifth of the residue.

(3) The daughters Mary and Elizabeth do not take under the last clause of the will. There is nothing to take, as all had been previously by the will disposed of. They took with their brothers—each of the daughters one-fifth.

The questions (*b*) and (*c*) can perhaps be made more clearly to express the meaning intended.

The money should be properly invested so as to yield a larger return.

Costs of all parties out of the estate.

BRITTON, J., IN CHAMBERS. MAY 8TH, 1911.

TELFER v. DUN.

Discovery—Examination of Parties—Denial by Party that he is a Partner—Appeal—Con. Rules 223, 224.

Appeal from the decision of the Master in Chambers, ante 1126, dismissing an application by the plaintiff to compel the defendant W. C. Matthews to re-attend at his own expense and submit to examination in reference to matters in question.

H. M. Mowat, K.C., for the plaintiff.

T. P. Galt, K.C., for the defendants, Dun and Matthews.

BRITTON, J.:—W. C. Matthews was served with a copy of the writ herein pursuant to Con. Rule 223. He was served as a partner in the firm of R. G. Dun & Co., in the name of the firm. If the plaintiff had desired to limit the service, or explain it by saying whether Matthews was served as a partner, or as a person having the control or management of the partnership, or in both characters, the plaintiff should have given the notice required by Con. Rule 224. No such notice was given, so by that rule 224, Matthews must be deemed to have been served as a partner. He is before the Court, and upon the pleadings as a defendant

charged by the plaintiff as a partner, and so, as a person adverse in interest.

Matthews very properly appeared under protest, and he denies that he is in fact a partner. That is an issue upon which he will succeed unless the plaintiff establishes the contrary. If it shall turn out upon the trial that Matthews is not a partner, the examination cannot be used except against himself, but he may be examined generally for discovery. The appeal will be allowed. Matthews must attend at his own expense and submit to examination as a party defendant in the action, saving all just exceptions to any questions that may be put.

Costs of the application to the Master, and of this appeal, will be costs in the cause to the plaintiff.

[On May 10th the defendant Matthews applied to MEREDITH, C.J., in Chambers, for leave to appeal from the order of BRITTON, J., but the motion was refused with costs.]

DIVISIONAL COURT. MAY 9TH, 1911.

UNION BANK v. CRATE.

Husband and Wife—Notes and Mortgage Given by Wife to Secure Debt of Husband—Absence of Independent Advice—Alleged Misrepresentation as to Mortgage—Conflict of Testimony—Knowledge by Wife of Husband's Business.

Appeal by the defendants from the report of the Junior Judge of the United Counties of Leeds and Grenville, whose decision was in favour of the plaintiffs. There were seven actions in all brought by the plaintiffs, in all of which the defendants Hiram A. Crate and Lucy M. Crate were parties defendants. In two of the actions they were the sole defendants. All of these seven actions were consolidated and referred, and the understanding between the parties was that any outstanding differences should be included in the reference, so that the result of the reference would be a final adjustment between the defendants and the plaintiffs, in regard to the defendants' dealings with the bank.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON, and SUTHERLAND, JJ.

G. F. Henderson, K.C., for the defendants.

J. A. Hutcheson, K.C., for the plaintiffs.

BRITTON, J. [after stating the facts as above, dealt with the objection taken by the defendants that some of the actions had been prematurely commenced because the notes sued upon were current at the time of the issuing of the writs. On this point, and also as to questions of account, the learned Judge agreed with the findings of the referee in favour of the plaintiffs. The judgment proceeds]:

The other objections are on behalf of Lucy M. Crate, wife of Hiram A. Crate, and are—

1. That in signing the notes she did so as surety for her husband, to the knowledge of the plaintiffs, without having any proper understanding of the surrounding circumstances, at the request of her husband, and without any independent advice.

2. That she signed the mortgage at the request of her husband, and at the instigation of the then manager of the plaintiffs at Smith's Falls, and without having a proper understanding of the surrounding circumstances, and without having had any independent advice; and

3. That the mortgage sued upon was obtained by fraud and misrepresentation.

It may be conceded that Mrs. Crate in signing notes did so as surety for her husband, although in the business, and in at least one application to the plaintiffs for credit she joined in the statement that she and her husband were doing business together, and as if on joint account. Upon the evidence it appears that Mrs. Crate had, for all practical purposes, as accurate a knowledge as her husband had of the business and of all surrounding circumstances. In her evidence, speaking of matters prior to giving the mortgage, she stated that she had been signing notes, generally signing, sometimes endorsing notes for her husband. Down to the time of the giving of the mortgage the story is a long one, and no useful purpose would be served by referring to the evidence in detail. Without doubt or hesitation I reach the conclusion that whatever Mrs. Crate signed by way of security to the plaintiffs prior to the giving of the mortgage, cannot be impeached. The manager of the plaintiffs' branch at Smith's Falls immediately prior to Mr. Waddell, was D. A. Bethune. He absconded from Smith's Falls. It was hardly suggested—it was not proved, and there was no attempt to prove that the disappearance of Bethune was caused by anything connected with Crate or his dealings with the bank, and it was not shewn that Bethune, if present at the trial, could aid in the defence to these actions.

When Mr. Waddell arrived at Smith's Falls to take charge of the plaintiffs' business there after the departure of Bethune, in investigating this account, he found a very large indebtedness, to all or the greater part of which Lucy M. Crate was a party. He found in addition to the notes signed or endorsed by her, that on the 17th February, 1903, she had assigned a policy in the Standard Life Assurance Co. upon her life for $5,000; that on the 26th August, 1904, Mrs. Crate and her husband, by a formal document in which was the recital that both husband and wife were indebted to the plaintiffs in a large sum of money, and that they then desired to get further advances, assigned two policies to the plaintiffs of $10,000 each in the Standard Life Assurance Co., one upon the life of the husband, and one upon the life of herself; that on the 5th September, 1905, a joint application was made by husband and wife to the plaintiffs for a credit of $32,000. She could not reasonably ask to be relieved from her liability as surety, but she objects to liability on the mortgage. Her evidence is that, when asked to give the mortgage, she asked the manager if the mortgage would cover all there was in the bank if given, and he replied it would. She wanted everything cleared up, and Mr. Waddell said the mortgage did cover everything.

The objection is expressly put by counsel for the defendants that this mortgage was obtained by misrepresentation of the facts, or at least by a mistake as to the state of facts. There is conflict of testimony as to misrepresentation, even if such misrepresentation would set aside the mortgage.

The learned referee has accepted the evidence on behalf of the plaintiffs, and has not found that there was any misrepresentation. It is difficult to see how the statement by the bank manager, even if made, that the mortgage covered the whole indebtedness to the bank, would have in any way influenced Mrs. Crate either to give, or refrain from giving the mortgage in question. She said that she kept track of the indebtedness in a way, that she was pretty well informed in the office. She kept herself well informed by conversations with her husband generally, and she had access to the books had she cared to examine them. She kept track of what was coming in. In short, the evidence satisfies me that Mrs. Crate knew nearly, if not quite as well as her husband, how the business was conducted, and she knew and fully realised that from first to last the bank was relying upon her so far as any security she could give. She was not in need of independent advice as

to the impeached mortgage. Out of money from the business, in part at least, lands were purchased and buildings erected, and money for the business was supplied by the bank—the property mortgaged in that way equitably belonged to the bank. Mrs. Crate is not shewn to have lived in "passive obedience to her husband's direction." She had the means of forming an independent judgment. There was no "overpowering influence" upon Mrs. Crate. The transaction was not "unnatural or irrational." It is what might reasonably be expected to be done by a shrewd, careful, honest woman, considering the kind of business done, and her knowledge of and relation to that business. The evidence does not disclose that any unfair advantage was taken of Mrs. Crate. The transaction was not hurried—there was nothing to prevent deliberation, and nothing to prevent her obtaining independent advice. She was not relying upon either Sparham or McCrae farther than relying, as she says, upon the statement that the mortgage mentioned the total indebtedness.

In my opinion the defence fails, and the appeal should be dismissed with costs, and judgment should be entered for the plaintiffs in accordance with the findings and report of the referee.

See Euclid Avenue Trusts Co. v. Hohs, 2 O.W.N. 825; Bank of Montreal v. Stuart, [1911] A.C. 120, disapproving of Cox v. Adams, 35 S.C.R. 393.

FALCONBRIDGE, C.J.K.B.:—I agree.

SUTHERLAND, J.:—I agree.

DIVISIONAL COURT. MAY 10TH, 1911.

ROBINS v. HEES.

Sale of Land—Agents—Commission—Introduction of Purchaser—Contract.

Appeal from the judgment of BRITTON, J., at the trial, ante 938.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. G. O'Donoghue, for the plaintiffs.

A. J. Thomson, for the defendants.

MIDDLETON, J.:—In this case the plaintiff for a limited time was "retained" as exclusive agent for the sale of this property,

and later on had for limited periods exclusive rights or options, but all these rights expired without a purchaser having been found. There is no real difference between the parties as to what then took place. The plaintiff says: "I was told by Mr. Hees that our option had expired, that he was going to try to sell it through other agents. I said all right." "We have had the same right as other agents to sell the property." "I knew that I had to take my chances the same as any other agent, and I was willing to do it."

Hees says: "At the end of the period I called up Mr. Robins and told him that they had not sold it then, and that the option was off, and that I was not going to have any exclusive agent, and that we would entertain offers from anybody that brought them to us for the sale of the property."

The plaintiff cannot recover any commission unless he can shew that he brought to the defendants an offer to purchase that was accepted by them.

Ross, a real estate agent to whom Hees had made a similar proposition, brought an offer to him which was accepted, and the sale was carried out and the commission has been paid Ross.

The plaintiff bases his claim upon the fact that he introduced this property to the purchaser at an earlier date than Ross, and that it can therefore be said that he and not Ross found the purchaser.

Had the plaintiff been an exclusive agent employed to find a purchaser, he would have earned his commission when he found the purchaser, and the defendants could not have defeated his claim by revoking his authority before making the actual bargain with the purchaser. This is the meaning of such cases as Wilkinson v. Alston, 48 L.J.Q.B. 733.

Under this contract, if indeed there was any contract at all, the commission was not earned until an actual offer was brought to the defendants which they were willing to accept. The agent bringing about the contract is the one entitled to the commission: Prickett v. Badger, 1 C.B.N.S. 296; Barnett v. Brown, 6 Times L.R. 463.

The fisherman who actually lands the fish is entitled to it, even though it was first allured by the bait of another.

I am inclined to think that there was no contract, but merely an offer which would be accepted by the first agent complying with its terms and bringing an acceptable purchaser: Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256. The appeal should be dismissed with costs.

BOYD, C., and LATCHFORD, J., concurred.

MULOCK, C.J.Ex.D. MAY 10TH, 1911.

QUINTO v. BISHOP.

Negligence—Workmen's Compensation for Injuries Act—Notice of Injury—Fall Caused by Slippery Condition of Timber—Lack of Proper Protection—Negligence of Foreman—R.S.O. 1897 *ch.* 160, *sec.* 3(2).

Action under the Workmen's Compensation for Injuries Act for damages because of injury sustained by the plaintiff when in the defendants' employment.

R. G. Agnew, for the plaintiff.
T. N. Phelan, for the defendants.

MULOCK, C.J.:—Amongst other defences the defendant company pleaded that no notice of the injury was given as required by the Act. On my announcing an intention to postpone the trial in order to enable such notice to be given, defendants' counsel abandoned that defence. During the course of the trial I dispensed with the jury.

The facts of the case are as follows: The plaintiff, a labourer, was employed by the defendant company in connection with the erection of a concrete dam on the Otonabee River, working at the mixer, a machine for making concrete. On Sunday, the 13th November, 1909, the defendants decided to erect in the bed of the river above the dam a certain protective temporary work, consisting of crib work of square timber, for the purpose of keeping back the water from the dam then in process of erection. The foreman ordered the plaintiff to assist in constructing this crib, and whilst so engaged he met with the injury in question. The crib was being built of square timber, each stick being fifteen feet long by six inches square, and the foreman ordered the plaintiff, as the crib was being constructed, to stand on the top of the timbers and assist in placing them in proper position. When the structure had reached a height of about four feet, the plaintiff at that time being by orders of the foreman standing on the top stick of timber, was directed by him to get down and bring him a sledge hammer. The plaintiff proceeded to do as ordered, and when walking along the timber towards the corner where he intended to descend, slipped and fell to the ground, sustaining the injury complained of.

The cause of his falling was the slippery condition of the timber caused by ice and water. There was no scaffolding, railing or other device to protect the plaintiff from slipping, nor was he supplied with rubber or hob-nailed boots such as are used by lumbermen. There was ample material in the immediate vicinity of the work with which a temporary scaffolding or railing could have been constructed at a very trifling expense.

Apart from the slippery condition of the timber, it was, I think, an act of negligence for the foreman to have required the plaintiff to stand and perform work on timber only six inches wide. Much more was he negligent because of the slippery condition of the timber. It had been exposed to the weather and had become wet and icy, and I consider the foreman guilty of gross negligence in having required the plaintiff to work on top of this timber without any protection whatever against accident.

The case, I think, comes within sub-sec. 2 of sec. 3 of the Act, which gives a cause of action where personal injury is caused to a workman "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, while in the exercise of such superintendence." The foreman was such a superintendent, and his negligence was that of his employer, the defendants.

There is no evidence to shew that the accident was caused by any want of care on the part of the plaintiff. The injury which he sustained is of a serious character. When he fell to the ground he struck his knee against a stone and injured it. The defendants' doctor ordered him into the hospital, where he remained for 24 days. He was obliged to undergo two operations, the first one upon the knee, and another upon the leg below the knee, but at the time of the trial, a period of fourteen months after the accident, he had not recovered the proper use of his knee and the injury may prove permanent.

The plaintiff was earning $1.75 per day, and one week's wages owing to him is still unpaid. He must have suffered considerable pain from the injury and the surgical operations, whilst his earning power has been greatly diminished, in fact he is unable now to perform hard work, and he may never recover the full use of his leg.

I award him $1,500, damages for the injury, and $10.50 arrears of wages owing to him, with costs of the action.

LATCHFORD, J. MAY 10TH, 1911.

HALDIMAND v. BELL TELEPHONE CO.

Telephone Company—Right to Erect Poles on Bridge—Consent not Given by Municipality—Tendency of Work to Weaken Bridge—No Actual Damage—Constitutional Law—43 Vict. ch. 67, sec. 3(D.)—Restrictions Imposed by sec. 248 of Railway Act—Right to Apply to Board of Railway Commissioners.

Action by the County of Haldimand for a declaration that the defendants have not the right to erect telephone poles upon a bridge built by the plaintiffs over the Grand River in the village of Cayuga, and for a mandatory injunction commanding the defendants to remove their poles and wires from the bridge.

T. G. Meredith, K.C., and T. A. Snider, K.C., for the plaintiffs.

G. Lynch-Staunton, K.C., for the defendants.

LATCHFORD, J. (after stating the nature of the case):—The poles were placed upon the bridge piers early in 1907, without the consent of the plaintiffs. Permission to use the bridge in a certain way had been given in 1887, and the defendants had strung a few wires across the river on the brackets they were then permitted to attach to the bridge. But there is not the slighest warrant to be found in the permission granted in 1887, for the acts done by the defendants twenty years later. Nor is any justification afforded by the negotiations had with the plaintiffs in November and December, 1907, and the earlier months of 1908. The by-law sanctioning the use of the bridge by the defendants failed to pass the municipal council, and the negotiations resulted in no act binding upon the plaintiffs.

The only fact seriously in issue is whether the attachment of the poles to the piers injures or tends to injure the bridge. The experts called by the parties to the suit give, as might be expected, conflicting evidence, but all agree that no actual injury has thus far occurred. I find, however, that the poles erected by the defendants with cross arms and wires tend to weaken the piers and cause damage to the bridge. The piers are old. They were built in 1871. The mortar was in-

ferior, and by 1904 the stones had become so loosened that it was found necessary to surround each pier by an 18 inch concrete "jacket" extending from the foundations to within five feet of the top of each pier, and to cement the joints in the stones above that level. The defendants rested their poles on the concrete jacket south of each pier, and secured the poles by passing iron bands around them, and fastening such bands to rock bolts placed in holes drilled in the piers. Some, if not all, of the poles are thus attached to stones supporting the outer bed plates on which the main trusses of the bridge rest. The poles and attachments placed by the defendants upon the bridge add considerably to the weight the piers have to carry, and under the influence of the wind, especially when the wires are coated with ice, exert a powerful leverage upon the top courses of the piers and undoubtedly tend to weaken the bridge, though they have thus far, I find, caused no damage to it.

Apart from the issue of fact thus disposed of, the defence is that under the Dominion Act incorporating the defendants, 43 Vict. ch. 67, sec. 3, the defendants were empowered to erect and maintain their telephone lines along the sides of, and across or under, any public highways, streets, bridges, watercourses or other such places. The location of the lines and the opening up of the streets were required by an amending Dominion Act, 45 Vict. ch. 95, to be under the direction of a certain municipal officer, and in such manner as the municipal council should direct; and the works of the defendants were declared to be for the general advantage of Canada.

In Toronto v. Bell Telephone Co., 6 O.L.R. 535, it was held by the Court of Appeal, reversing the judgment of Street, J., 3 O.L.R. 465, that the defendants under the powers conferred by sec. 3 of 43 Vict. ch. 67 (D.) had the right to erect their telephone lines in the streets of the City of Toronto. On appeal to the Judicial Committee of the Privy Council the judgment of the Court of Appeal was confirmed, [1905] A.C. 52. The principal question considered by the Courts was whether the legislation was within the proper competence of the Dominion Parliament under sec. 91 of the B.N.A. Act. This was determined affirmatively, and an Ontario Act, 45 Vict. ch. 71, was held to be ultra vires. But slight effect appears to have been given to the proviso as amended by 45 Vict. ch. 95 (Dominion) that in cities, towns, and incorporated villages, the location of the line or lines, and the opening up of the street for the erection of poles or for carrying the wires underground

shall be done under the direction and supervision of the engineer or such other officer as the council may appoint, and in such manner as the council may direct. Lord Macnaghten in stating the judgment of the Committee, says, at p. 60: "Their Lordships do not think the words . . . can have the effect of enabling the council to refuse the company access to streets through which it may propose to carry its line or lines. They may give the council a voice in determining the position of the poles in streets selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground."

Bridges, it will be observed, are mentioned in sec. 3 of the statute in the same category as highways and streets, and it is urged on behalf of the defendants that they have all the rights in regard to bridges, that under the judgment in the Toronto case it has been held they have in regard to streets. The wholesome restrictions imposed upon the defendants by sec. 248 of the Railway Act, R.S.O. 1906, ch. 37, were rendered necessary by the decision in Bell Telephone Co. v. Toronto, and the defendants notwithstanding the wide powers conferred by 43 Vict. ch. 67, could not now construct their lines upon, along, across, or under any "highway, square or other public place" without the consent of the municipality, or, failing such consent, without the leave of the Board of Railway Commissioners. An existing line like that in question in this case falls under sub-sec 9 of sec. 248, and gives the plaintiffs the right to apply to the Board of Railway Commissioners to have the poles removed. But the plaintiffs have no other remedy until they suffer actual damage, and this action must be dismissed with costs.

ROSS v. MCLAREN—DIVISIONAL COURT—MAY 9.

Way—Private Way—Right to Fence in Sides of "Lane"—Reservation in Deed—Possession—Evidence.]—Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 861. The Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.) dismissed the appeal with costs. D. B. Maclennan, K.C., for the plaintiff. G. H. Watson, K.C., for the defendant.

RE MILNE AND TOWNSHIP OF THOROLD—DIVISIONAL COURT—MAY 10.

Municipal Corporation — Local Option By-law — Motion to Quash — Ballot not in Prescribed Form — Alleged Misleading Effect.]—Appeal by the applicant, David Milne, from the order of SUTHERLAND, J., ante 1009, refusing the application to quash the by-law. The Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.), dismissed the appeal with costs. J. Haverson, K.C., for the appellant. H. S. White, and J. F. Cross, for the respondents.