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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 7TH, 1921.

BROWN v. UNITED GAS COMPANIES LIMITED.

Contract—Supply of Natural Gas—Provisions of Lease Incorporated in Agreement—Stipulation for Annual Payment in Respect of Easement—Breach of Agreement—Damages—Costs—Appeal—Correction of Error in Formal Judgment.

Appeal by the defendants from the judgment of LATCHFORD, J., 18 O.W.N. 378.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

H. H. Collier, K.C., for the appellants.

G. H. Pettit, for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that he had read the documents and the meagre evidence at the trial, and he agreed with the findings of the trial Judge. The formal judgment should, however, specifically provide that the first-named $25 per annum is payable only until the pipe-line is removed. With that correction of what seemed to be an inadvertent omission, the appeal should be dismissed with costs.

Appeal dismissed.

HIGH COURT DIVISION.

MIDDLETON, J. JANUARY 3RD, 1921.

*RE McBURNEY.

Will—Construction—Devise of Share of Residue to Church—Effect of Amalgamation with another Church—Devise to Trustees in Trust for Grandson upon his Attaining a Specified Age—Residuary Devise—Absence of Gift over—Right to Rents Accumulating in Hands of Trustees during Period from Death of Testatrix to Attainment of Age by Beneficiary—Unconditional Vested Gift—Immediate Devise of Freehold to Trustees—Gift to Beneficiary with Immediate Beneficial Enjoyment Postponed.

Motion by the executors of the will of Ann Jane McBurney, deceased, for an order determining two questions arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.
W. G. Thurston, K.C., for the executors.
R. B. Henderson, for Charles McBurney.
A. Courtney Kingstone, for a residuary legatee.
George Wilkie, for other residuary legatees.
R. B. Beaumont, for the next of kin.

MIDDLETON, J., in a written judgment, said that the testatrix died on the 7th February, 1915.

The first question related to the devise of a share of the residue to the Erskine Presbyterian Church. The effect of the amalgamation of this congregation with that of St. Paul's Church having been considered by Latchford, J. (Re Murray (1920), ante 238), an order should by made in accordance with his views.

The second question was more difficult. The testatrix devised certain lands to her trustees "in trust for my grandson Charles McBurney upon his attaining 25 years." There was a residuary devise, but no gift over if the grandson should not attain 25, and there was no express disposition of the income in the meantime. There were 5 other devises of lands to grandsons and granddaughters, each expressed to be in fee. Charles had now attained the age of 25, and there was no doubt that he was entitled to the lands, but his right to $1,200 rents accumulated in the hands of the trustees was denied.

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

The claim of the rest of kin and heirs might be put aside without discussion, as it was clear that there was no intestacy.

The learned Judge had, after much consideration, come to the conclusion that Charles was entitled to the $1,200. If the gift to him was vested and not conditional, there could be no doubt as to his right.

The case was not one in which there was a mere executory devise to one on his attaining the given age, with no disposition of the freehold in the meantime. Here there was an immediate devise of the freehold to the trustees, who were to hold it for the grandson on his attaining 25.

Where there is an executory devise, and no provision has been made with respect to the property in the meantime, the heir will take unless he is cut out by a residuary devise; but this rule has never extended to personal estate: see Bective v. Hodgson (1864), 10 H.L.C. 656, 664, 665.

Where, as here, there is an immediate devise of the freehold to trustees, the rule does not operate, for the reason for it does not exist. The freehold is not in abeyance, but is vested in the trustees, and the heir is excluded by the very terms of the devise. The rule as to the income from personal estate is well-settled and is founded upon the view which the Court has always entertained as to the intention of the testator. This intention has to give way to the rule of law referred to, when the case is one of an executory devise of land, but this exception is not to be extended so as to defeat the wish of the testator in any case not falling within the letter of this rule of law.

When once the beneficiary complies with the condition of the gift, the whole subject of the trust—the accumulated income as well as the corpus—is his.

Against this view was cited a passage from Theobald on Wills, 6th ed., p. 178: "A future devise of lands, whether residuary or not, and whether the fee is vested in trustees or is in abeyance, does not carry the intermediate rents and profits." The learned Judge said that he could not accept the words indicating that this rule applies where the fee is vested in trustees, if the writer intends to cover a case such as this. The words "a future devise of lands" probably were intended to dominate the whole clause, and it was not intended to apply to a present gifts of lands to trustees, where there is a future beneficial interest.

The following cases were referred to and distinguished: Duffield v. Duffield (1829), 3 Bligh N.S. 260; Perceval v. Perceval (1870), L.R. 9 Eq. 386; In re Eddels' Trusts (1871), L.R. 11 Eq. 559.

The alternative aspect should not be ignored. The absence of a gift over pointed to the intention of a gift to the grandson

with beneficial enjoyment postponed; and there is a marked distinction between a gift to a person named, with an added provision as to age of taking, and the class of cases in which the legatee cannot be found or ascertained, until the contingency happens: see Holmes v. Prescott (1864), 12 W.R. 636, 33 L.J. Ch. 264. Finally, it has been laid down that where an estate, prior to the attainment of the named age, is given to a third person either for the benefit of the devisee or some other person, the estate is to be regarded as vested: see the cases collected in Theobald, 6th ed., p. 551.

Reference also to Dobbie v. McPherson (1872), 19 Gr. 262.

There should be a declaration that Charles takes the accumulated rents; costs out of the estate.

MIDDLETON, J., IN CHAMBERS. JANUARY 4TH, 1921.

*RE MAPLE LEAF CONDENSED MILK CO.

Criminal Law—Delivering Milk on Sunday—"Work of Necessity or Mercy"—Lord's Day Act, R.S.C. 1906 ch. 153, sec. 12 (m)—"Caring for Milk."

Case stated by Police Magistrate for the Village of Winchester, under sec. 761 of the Criminal Code, upon the dismissal of a charge laid against the company under the Lord's Day Act, R.S.C. 1906 ch. 153.

G. F. Henderson, K.C., for the prosecutors.
Strachan Johnston, K.C., for the company.

MIDDLETON, J., in a written judgment, said that the company had a condensed milk factory at the village of Chesterville and took delivery on Sunday from the farmers. The magistrate found as a fact that during the summer season the farmers are not able to keep the milk over Sunday and deliver it on Monday in a condition suitable for manufacture, and the work occasioned by delivery at the factory is less than the work necessary to call for the milk at the farms.

The statute provides (sec. (12)) that, notwithstanding its provisions, "any person may on the Lord's day do any work of necessity or mercy, and for greater certainty, but not so as to restrict the ordinary meaning of the expression 'work of necessity

or mercy,' it is hereby declared that it shall be deemed to include the following classes of work:" and then follows a long list of enumerated things, among others, "(*m*) the caring for milk."

The effect of this is to preclude any further inquiry into the question of necessity, when once it appears that what is being done is "the caring for milk."

What was done here undoubtedly was "caring for milk" within the meaning of the statute. The milk is produced every day and must not be wasted, and all that is honestly done for its conservation is protected by the statute. If the milk had not been delivered it would have been wasted.

It is too narrow a view of the statute to regard the delivery as being part of a sale because there had been some antecedent agreement for its delivery, and so find an offence. The sole test is that prescribed by the statute. Is this a "caring for milk?" If it is there is no offence.

The Police Magistrate was right in his conclusions, and the questions asked in the stated case should be answered accordingly.

MIDDLETON, J. JANUARY 4TH, 1921.

RE O'GRADY.

Will—Construction—Gift of Whole Estate to Son at End of Period of Years upon Condition—Gift over if Condition not Fulfilled—Death of Son during Period—Claim by Personal Representative of Son—Condition not Fulfilled.

Motion by the executor of the will of John Andrew O'Grady for an order determining a question arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.

J. M. Ferguson, for the executor.

T. L. Monahan, for the Roman Catholic Episcopal Corporation of Toronto.

H. L. Steele, for the executor of the will of Joseph O'Grady.

MIDDLETON, J., in a written judgment, said that by the will of the late John Andrew O'Grady, who died on the 22nd November, 1917, his executor was directed to pay his son Joseph the income of his (the testator's) estate for 10 years. The will proceeded:

"If in the opinion of my executor at the end of the said period my son has led a sober life then the whole of my estate is to go to my said son absolutely;" if not, the estate then goes to the Roman Catholic Episcopal Corporation. The executor "is to be the sole judge as to whether my said son is entitled to the said money." The son died in the summer of 1920. Up to the time of his death he was not living in such a way as, in the opinion of the executor, would have entitled him to receive the estate. Those claiming under the son sought to recover, upon the theory that the provision in the will was repugnant to the law, in that it was an attempt to oust the jurisdiction of the Court: In re Raven, [1915] 1 Ch. 673. This was not applicable here, as there was no gift (save of the income for 10 years) unless the son could satisfy the executor that he was living a sober life; and, to quote from the case cited, "a legatee or devisee cannot take under a will and against it; if he takes under it, he must conform to its conditions and submit to the provisoes." Here, too, certain rights were claimed under a will the existence of which depended upon the fulfilment of a condition precedent and their ascertainment by a prescribed method. It was because the rights set up in In re Raven did not depend upon a condition precedent or ascertainment by a prescribed method that the decision was in favour of the claimant: see p. 679.

Here no right could arise in the son unless "in the opinion of my executor at the end of the said period my son has led a sober life." Clearly the son could take nothing unless *at the end of the period* he had led a sober life. The learned Judge was not prepared to say that the son must then have lived a sober life for the whole period; but the learned Judge had no doubt that what the testator charged his executor to ascertain was that then the son was living a sober life. All this was predicated upon the son living the whole 10 years, and upon a favourable judgment upon his conduct at that time by the executor.

As the son could not comply with the condition upon which alone he took, those claiming under him took nothing. The right of the son's executor to the income for the 10 years was not disputed.

The costs of all parties must come out of the fund, but the son's executor was to have no costs of the examination of the executor of the father.

LATCHFORD, J. JANUARY 4TH, 1921.

BEGG v. EDWARDS.

Contract—Agency for Sale of Spirits—Personal Services—Mistake as to Person with whom Contract Made—Action upon Bills of Exchange—Counterclaim for Overpayments Made or Damages for Breach of Contract—Amendment.

Action to recover the aggregate amount of three bills of exchange drawn by the plaintiffs on the defendants; and counterclaim by the defendants for $44,649.38 for overpayments made by them to the plaintiffs, or, in the alternative, for $40,000 damages for breach of contract.

The action was tried without a jury at a Toronto sittings.
J. A. Worrell, K.C., and P. W. Beatty, for the plaintiffs.
Gideon Grant and G. W. Adams, for the defendants.

LATCHFORD, J., in a written judgment, said that there was no defence to the plaintiffs' claim, and they were entitled to judgment for $7,806.65.

In answer to the counterclaim the plaintiffs denied that there had been any overpayment or breach.

The plaintiffs were distillers, carrying on business in Scotland, with agencies in various parts of the world.

"F. Edwards & Company" was, on the 15th May, 1908, registered, pursuant to the Partnership Registration Act, R.S.O. 1897 ch. 152, sec. 9, as having carried on trade in wines and spirits in the city of Toronto since the 1st May, 1908; Laura Ellen Edwards, described as a married woman, declared that she was the sole member of the partnership firm.

For 3 or 4 years before 1912, F. Edwards & Co. acted as agents for the plaintiffs in Toronto. They sold brands of whisky other than those supplied by the plaintiffs. In April, 1912, when Frederick Edwards, the husband of Laura Ellen Edwards, was in England, he was asked by the plaintiffs to discontinue selling other whiskies and to act as sales-agent and distributor of none but the plaintiffs' product. The plaintiffs assumed that Edwards, and not his wife, constituted the firm of F. Edwards & Co. The plaintiffs were not aware until after the present action began that the sole partner was not Frederick Edwards.

Frederick Edwards acceded to the plaintiffs' request, and on the 18th April, 1912, entered into a formal contract with the plaintiffs, in writing and under seal, whereby the plaintiffs

appointed F. Edwards & Co. their agents for a large territory for 5 years from the 30th April, 1914. The plaintiffs bound themselves to sell to the defendants, at stated prices, during the 5 years, the brands which the defendants might order. The western Provinces of Canada were to be worked under a joint management between the parties, each paying half the expenses, including those of a special representative. One paragraph of the agreement read as follows: "The said F. Edwards also undertakes himself to visit the Provinces of Manitoba, Saskatchewan, Alberta, and British Columbia at least once a year," etc. The name "F. Edwards" did not appear in the earlier parts of the contract except as part of the words "F. Edwards & Co." The signature was "F. Edwards & Co." Though made by Frederick Edwards, and, as he asserted, in his capacity as attorney for his wife, it was not expressed to be by procuration, nor did it indicate in any other way a want of identity between Frederick Edwards and F. Edwards & Co. If the plaintiffs had known that Laura Ellen Edwards was "F. Edwards & Co.," they would not have made the agreement on which her claim to reimbursement or damages was based.

The plaintiffs, after the war began, refused to supply whisky at the prices stated in the contract, alleging that they were relieved from their contract by the Immature Spirits (Restriction) Act of 1915, 5 & 6 Geo. V. ch. 46 (Imp.) That statute did not, however, apply to spirits exported for use in the colonies.

Another ground set up by the plaintiffs was, that the Ontario Temperance Act, 1916, altered the position of their agents in Ontario. The defendants opened an establishment in Montreal, but refused to make a new agreement. A lengthy correspondence ensued.

None of the transactions between the plaintiffs and defendants after December, 1916, fell under the agreement of April, 1912; but all resulted from orders given by the defendant firm through Frederick Edwards. Each order when accepted constituted a distinct contract.

As a matter of law the counterclaim could not be maintained. As between Laura Ellen Edwards and the plaintiffs there was no consensus of mind which could lead to any contract: Cundy v. Lindsay (1878), 3 App. Cas. 457, 465. There was plainly a mistake by the plaintiffs as to the identity of the person with whom they were contracting. They were induced by Frederick Edwards to believe that they were contracting with him. The contract involved personal service by Edwards of an important character, which they would not have thought of employing his wife to perform. To entitle F. Edwards & Co. or Laura Ellen Edwards to recover damages for breach of a contract which the

plaintiffs until recently understood to have been made with another person, she must shew that there was a contract with herself: Boulton v. Jones (1857), 2 H. & N. 564.

The counterclaim should be dismissed with costs.

Any amendment considered necessary to set up the mistake discovered during the litigation might be made.

There should be judgment for the plaintiffs for $7,806.65 with interest and costs.

MIDDLETON, J. JANUARY 4TH, 1920.

BOULTON v. LAND.

Limitation of Actions—Mistake as to Identity of Lots Conveyed—Possession — Statutory Title — Evidence — Covenant — Third Parties.

Action to recover possession of the north half of lot 204 on the west side of Goyeau street in the city of Windsor.

T. G. McHugh, for the plaintiff.

F. D. Davis, for the defendant.

E. D. Armour, K.C., for third parties brought in by the defendant, and against whom he claimed relief over.

MIDDLETON, J., in a written judgment, said that many of the owners of land abutting on Goyeau street took possession of land lying to the south of the parcels actually conveyed. Possession had in many cases ripened into statutory titles, and in other cases there was not yet a statutory title; and this prevented a simple clearing of the situation by each remaining in possession of what he had, disregarding the paper-title.

On the 1st October, 1890, Cameron and Curry conveyed the south half of lot 201 to one Hawkins, and Hawkins took possession of the north half of 204, and never was in possession of the land conveyed to him.

On the 19th April, 1902, the sheriff sold to the plaintiff the estate of Hawkins in the south half of 201. This conveyance would pass to her only the interest in the land to which Hawkins was in truth entitled under the deed to him, and would not pass to him any possessory title which Hawkins had acquired in respect of 204.

The plaintiff took possession of that which she thought she had bought—the north half of 204—and until recently had

remained in possession. The defendant took possession in 1918, and this action resulted.

In the meantime, Bell, under a deed of the north half of 201, took possession of the south half and had been in possession for many years and had an undoubted possessory title.

On the 14th April, 1914, the representatives of Curry and Cameron conveyed to the defendant the north half of 204. This deed was in pursuance of an earlier written agreement made in 1907. Under this, the defendant took possession of the south half of 204, and acquired a possessory title in 1917.

In 1916 the defendant found out that there was something wrong, but did not assert what he did later. He may have desired that his title to the land of which he had possession should become secure. He now claimed two lots, one by possession and the other by virtue of his paper-title.

The defendant had no kind of moral claim to the land of which the plaintiff had had possession, as when he bought he had the parcel of which he took possession pointed out to him as being the land which he was buying, and he knew that what he now claimed was in the possession of the plaintiff's tenants.

There was sufficient possession on the part of the plaintiff to give a possessory title before the defendant took possession as against the plaintiff's tenant in 1918.

There should be judgment in the plaintiff's favour upon this ground.

The defendant claimed relief over against the representatives of Cameron and Curry. That claim failed, for the defendant had not shewn any breach by them of their covenant.

ROSE, J. JANUARY 4TH, 1921.

*KORMAN v. ABRAMSON.

Vendor and Purchaser—Agreement for Sale of Land—Purchase-price Payable by Instalments—Time of Essence—Default—Right to Declare Contract at an End—Tender—Forfeiture—Election—Waiver—Return of Money Paid by Vendor—Occupation-rent—Breach of Contract—Possession—Costs.

An action by a vendor of land for a declaration that the purchaser had lost his rights by failing to pay certain instalments of the purchase-price at the appointed times, and for possession and for occupation-rent.

The action was tried without a jury at Haileybury.

F. L. Smiley, for the plaintiff.

H. L. Slaght, for the defendant.

Rose, J., in a written judgment, said that the plaintiff sold to the defendant, at a price payable in instalments, for which promissory notes secured by a chattel mortgage were given, the stock in trade contained in a shop; and by an agreement in writing, dated the 17th February, 1920, agreed to sell him the shop for $2,000. Of the purchase-price of the shop, $475 was paid in cash. The balance was to be paid in equal monthly instalments of $35 each, and interest was to be paid half-yearly. Time was to be considered the essence of the agreement, and unless the payments were punctually made the agreement was to be null and void and the vendor at liberty to resell.

As the payments in respect of the stock in trade fell due, the plaintiff sent the defendant drafts for the amounts, which were duly accepted and paid; but the defendant did not draw for or demand the instalments of the purchase-price of the shop, and the defendant did not pay such instalments; at the end of May there were three of them overdue.

On the 28th May, 1920, the plaintiff wrote a letter to the defendant demanding $400; at that time what was really due amounted to only $207.25. On the 31st May, the plaintiff drew on the defendant for $183. On the 1st July and afterwards, tenders were made to the plaintiff, but the defendant insisted that the plaintiff's rights were at an end.

There was not here any forfeiture against which relief could be granted; but it was said that the plaintiff "waived" or otherwise lost his right to declare the contract at an end.

The plaintiff did not waive the benefit of the time-clause, in the sense contended for. In May, default having been made, he had the right (subject to what was to be said about estoppel) to elect whether he would, because of that default, put an end to the agreement, or would keep the agreement in force and insist upon payment of the sums to which, according to its terms, he was then entitled. He was not at that time put to any further election; and he did not at that time in fact make any election other than the one which he was then called upon to make. There was no evidence that he intended to effect any alteration in the respective rights and obligations of himself and the defendant as to rights in futuro, or that he did anything which reasonably led the defendant to think that he was not to be required to make his future payments on the appointed days, or which otherwise estopped

him from asserting, when further default occurred, that such default was a breach of the agreement, and that—time still being of the essence—the result specified in the agreement followed.

The plaintiff had the right to terminate the agreement when the defendant failed to make the agreement which fell due in June. He did not give the defendant formal notice of his election until after the tender of all the money due; but that was not of importance. The defendant's rights under the agreement come to an end on the 2nd July, 1920; and the plaintiff was entitled to judgment

The agreement did not provide that, upon its termination for default, payments already made should be forfeited. The plaintiff therefore had no right to retain the $475, and that sum must be returned to the defendant: see Brown v. Walsh (1919), 45 O.L.R. 646. The defendant must pay an occupation-rent for the time he had been in possession, and there should be a reference to fix the amount, unless the parties could agree upon it.

A tender by the plaintiff of the $475 was not a necessary part of the exercise of the option to terminate the contract: see Ewart's "Waiver Distributed," p. 241 et seq. No tender would have been necessary even if the defendant had been entitled to the whole of the $475; and, as he was not entitled to the whole of that sum, but only to that sum less the occupation-rent, the amount of which had not been ascertained, it was impossible for the plaintiff to know exactly how much he had to repay.

There did not seem to have been any breach of the defendant's contract as to keeping up fire insurance on the building.

The defendant must pay the costs of the action down to trial. The costs of the reference should be reserved until after the report. If the plaintiff desired immediate possession, he must pay the $475. If he preferred to wait until the sums payable by the defendant were ascertained, he might do so, and then might have possession upon paying the amount, if any, by which the $475 exceeded the amount ascertained to be due to him.

KELLY, J. JANUARY 5TH, 1921.

ROBSON v. FLEWELL.

Vendor and Purchaser—Agreement for Sale of Land—Breach of Contract by Vendor—Failure to Give Possession at Time Stipulated for—Evidence—Return of Moneys Paid on Account of Purchase-price—Damages—Expenses and Loss Sustained by Purchaser—Counterclaim for Specific Performance—Dismissal.

Action to recover moneys paid by the plaintiff to the defendant as part of the purchase-money of a farm under an agreement for sale and purchase, and for damages for breach of the agreement.

Counterclaim by the defendant for specific performance.

The action and counterclaim were tried without a jury at a Toronto sittings.

W. F. Greig, for the plaintiff.

James McCullough, for the defendant.

KELLY, J., in a written judgment, said that the agreement was in writing, dated the 1st December, 1919. The purchase was made through one Miller, the defendant's agent. The contract provided for the payment of $100 down; $400 on the 1st March, 1920; the plaintiff to assume an existing mortgage of $1,100 and to give the defendant a second mortgage for the balance of the purchase-price, $500, for 5 years, with interest at 6 per cent. Possession was to be given on the 1st March, 1920. Time was made the essence of the agreement. The plaintiff paid the $100 cash and also the $400 on the 1st March, 1920. The purchased premises were at the time of the contract occupied by one Hosie as tenant of the defendant on a tenancy which expired on the 1st March. Miller was not at any time the agent of the plaintiff.

Before the 6th February the plaintiff had made it known to Miller that he might not require the defendant to deliver possession promptly on the 1st March. What he said to Miller was not authority to Miller or to the defendant to extend on his behalf the time when the tenant should vacate. But Miller wrote to Hosie telling him that the plaintiff was willing that Hosie should stay on the place until later in the spring or perhaps for the summer. Hosie stayed on, and refused to leave when the plaintiff wanted to get possession in April. The plaintiff did not assume the responsibility of getting possession. The plaintiff had moved his stock and goods from his former place of abode to Uxbridge, which was the nearest town to the farm he had bought; but was not able to get possession.

There was no evidence of any attempt by the defendant after the 9th April to carry out his part of the contract, and no evidence that he had obtained possession of the farm from the tenant or had tendered possession to the plaintiff. On the 10th April the plaintiff wrote to Miller repudiating the whole transaction.

His right to damages was established; the question was as to the amount. Upon the quantum of damages, McCune v. Good

(1915), 34 O.L.R. 51, and Rotman v. Pennett (1920), 47 O.L.R. 433, were referred to. The learned Judge distinguished those cases.

The plaintiff was entitled to such damages as flowed naturally from a breach of the agreement in contemplation of both parties to it. He did not ask for damages for loss of his bargain, but for what he said were his expenses and loss sustained down to the time he learned that the defendant could not fulfil his contract, which, he said, resulted immediately from the defendant's breach. The natural thing for the plaintiff to have done, and what the defendant should reasonably have expected that he would do, in the circumstances, was to make preparations to move his family and his stock and chattels to the farm on or at any time after the 1st March, the date on which the defendant contracted to give possession. On the 9th April, the plaintiff learned that the defendant had not put himself in a position to deliver possession, and that he was not taking steps to do so; the plaintiff wrote on the following day the letter referred to. The defendant made no objection to the notice contained in that letter until he delivered his counterclaim on the 17th September.

There should be judgment in favour of the plaintiff for the return of the two sums of $100 and $400 paid by the plaintiff, with interest from the respective dates of such payments, and for $450 damages; and the counterclaim should be dismissed. The defendant should pay the plaintiff's cost of both action and counterclaim.

ORDE, J. JANUARY 5TH, 1921.

*ORFORD v. ORFORD.

Husband and Wife—Alimony—Adultery of Wife—Proof of—"Artificial Insemination"—Meaning of "Adultery"—Conduct of Husband Conducing to Commission of Offence not a Defence to Action for Alimony—Dismissal of Action—Costs—Disbursements—Rule 388.

Action for alimony, tried without a jury, in Toronto.

Peter White, K.C., and S. J. Birnbaum, for the plaintiff.
W. R. Smyth, K.C., and E. G. McMillan, for the defendant.

ORDE, J., in a written judgment, said that the parties were married in Toronto on the 26th August, 1913. A few days later,

they left for England on their wedding-trip. On the 5th November, 1913, the defendant sailed from England for Canada, leaving the plaintiff with her parents in England. It was admitted that the marriage had not up to that time been consummated. The defendant did not return to England, and the plaintiff remained there until December, 1919, when she returned to Canada; and, upon the defendant, as she alleged, refusing to receive her as his wife, she commenced this action against him on the 19th January, 1920.

By her statement of claim the plaintiff charged the defendant with cruelty and unnatural practices while she was with him on the wedding-trip and in England in the autumn of 1913; and that during his absence from her he had been guilty of adultery, and had falsely charged her with adultery.

Counsel for the defendant admitted that his refusal to take the plaintiff back would render him liable for alimony unless he could establish her adultery; and that admission rendered it unnecessary for the plaintiff to adduce evidence in support of her allegations.

The plaintiff gave birth to a child, in London, on the 13th February, 1919. The birth was registered; the child's name being given as "Peter Lee Hodgkinson," the father's name as "George Edmund Hodgkinson," and the mother's as "Lillian Grace Partridge," which was the plaintiff's maiden name. The plaintiff admitted the birth of the child and that the defendant was not the father. Her story was that the birth of the child was the result of "artificial insemination;" that she was physically incapable of normal sexual intercourse; and that it had been suggested to her by a physician that if she could bear a child the difficulty or defect would be removed. She said that she consented to an operation after discussion with Hodgkinson, who made the arrangements for it; that she was put under an anæsthetic, and semen from Hodgkinson was, as she was told by him, introduced into her uterus by a physician by means of a syringe. The first operation was, she said, unsuccessful, and it was repeated in May, 1918, and pregnancy resulted therefrom. The plaintiff spoke of what had taken place as a "medical cure" for her affliction. She said: "I was trying to cure myself for my husband; that was my only excuse."

The learned Judge concluded that her story was untrue; and he found as a fact that she had sexual intercourse in the ordinary way with Hodgkinson in May, 1918; by that time she had become capable, owing to treatment she had received, of normal sexual intercourse.

. . . But, assuming the plaintiff's story to be true, the learned Judge was of opinion that, as a matter of law, the so-called artificial

insemination was in fact adultery. The essence of the offence consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person.

It was argued that the defendant's conduct conduced to the plaintiff's commission of adultery, if there was adultery; but that is not in Ontario a defence to an action for alimony.

The plaintiff's action must be dismissed. The judgment will provide that the defendant shall pay the plaintiff's cash disbursements (Rule 388), but only upon the condition that she shall account, to the satisfaction of the Taxing Officer, for all moneys already paid to her or to her solicitor for disbursements, including $1,200 paid under an order for the issue of a commission. If the plaintiff is not willing so to account, there will be no judgment for her cash disbursements.

ORDE, J., IN CHAMBERS. JANUARY 5TH, 1921.

*RE ORFORD AND DANFORTH HEIGHTS LIMITED.

Husband and Wife—Wife Living Apart from Husband—Alleged Adultery of Wife Disentitling her to Dower—Application for Order Authorising Husband to Convey Land Free from Dower—Dower Act, sec. 14—Scope of—Evidence—Finding of Adultery—Technical Objections—Land already Conveyed by Husband—Execution of Deed by Husband on Behalf of Wife under Power of Attorney—Fraudulent Exercise of Power Alleged by Wife.

Motion by Frederick Orford, under the provisions of sec. 14 of the Dower Act, R.S.O. 1914 ch. 70, for an order dispensing with the concurrence of his wife for the purpose of barring her dower in land which the applicant had conveyed to Danforth Heights Limited.

E. D. Armour, K.C., and E. G. McMillan, for the applicant.

J. P. White, for Danforth Heights Limited.

Grayson Smith and S. J. Birnbaum, for Lillian Grace Orford, the applicant's wife.

ORDE, J., in a written judgment, said that the application was unusual in that the deed, dated the 10th January, 1920, had already been executed by Orford in favour of Danforth Heights Limited, and contained a bar of dower executed by him under a power of attorney from his wife. This deed had been attacked in an action brought by her against her husband and the company,

on the ground that its execution on her behalf under the power of attorney was fraudulent. See Orford v. Orford and Danforth Heights Limited, infra. The matter was still more out of the ordinary in that an action for alimony was then pending between the wife and husband. See Orford v. Orford, supra.

The evidence upon which this application was based was taken in England, by commission in the pending alimony action, and tended to prove that the wife had been living apart from her husband in circumstances which disentitled her to alimony.

In the judgment in Orford v. Orford, supra, the learned Judge had found as a fact that the wife was guilty of adultery in England in January and May, 1918, and that she gave birth to a child of which her husband was not the father on the 13th February, 1919. During the whole of the period in question she was living apart from her husband.

For the purposes of this motion, the learned Judge took into consideration the evidence in the alimony action and the judgment therein, and he now declared that the applicant's wife was, for a period of more than two years before the making of the application, living apart from her husband in circumstances which disentitled her to alimony, and that the applicant was, therefore, entitled to sell or mortgage his lands, and particularly the lands mentioned in the deed to Danforth Heights Limited, free from dower, and ordered that her concurrence therein for the purpose of barring her dower be dispensed with.

The objection that Orford was not the owner did not come with much force from one who in another action was seeking to set aside the conveyance to the company as fraudulent.

The power of the husband to make a good title under sec. 14 should not be hampered by technical objections. The applicant was the owner at the time he executed the deed. The conveyance to the company was in fact a sale. The ownership and sale brought him sufficiently within the terms of the section to justify the making of the order. In view of the wording of sub-sec. 3, it might be prudent for the applicant to execute a further deed, expressed to be free from his wife's dower, by way of confirmation of the earlier one. Sub-section 4 extends the operation of the section to cases where a conveyance has already been made by the husband and part of the purchase-money has been retained by the purchaser as an indemnity against dower. That serves as a guide to the intended scope of the section. It is not the mere sale or mortgage that is the subject-matter of the section, but the sale or mortgage "free from dower."

The objections to the making of the order are not valid, and an order should be made as already stated.

ORDE, J. JANUARY 5TH, 1921.

ORFORD v. ORFORD AND DANFORTH HEIGHTS LIMITED.

Husband and Wife—Action by Wife to Set aside Conveyance of Land by Husband—Conveyance Executed by Husband on Behalf of Wife under Power of Attorney—Bar of Dower—Allegation of Fraud—Evidence—Dismissal of Action—Costs—Registry of Certificate of Lis Pendens—Vacating.

Action for a declaration that a certain conveyance of land executed by the defendant Orford, the husband of the plaintiff, to the defendant company, in which the defendant Orford purported to bar the plaintiff's dower under a certain power of attorney, was illegal and fraudulent as against the plaintiff, and should be set aside and cancelled, and for an injunction, and for other relief.

The action was tried without a jury at a Toronto sittings.
I. F. Hellmuth, K.C., and S. J. Birnbaum, for the plaintiff.
H. H. Dewart, K.C., for the defendant Orford.
E. D. Armour, K.C., for the defendant company.

ORDE, J., in a written judgment, said that some very interesting questions were raised at the trial, and judgment would have been given long ago but for the fact that a motion was made before the learned Judge under the Dower Act for an order declaring that the defendant Orford might convey the lands free from dower because the plaintiff was living apart from him in circumstances which disentitled her to alimony (see Re Orford and Danforth Heights Limited, supra); and that an action for alimony was also pending (see Orford v. Orford, supra).

The evidence adduced on the motion under the Dower Act and in the action for alimony would make any judgment dealing with the merits of this action, as presented at the trial, futile and illusory.

This action ought now to be dismissed, but in the circumstances without costs; and the judgment should provide that the registry against the land of a certificate of lis pendens be vacated.

HODGINS, J.A., IN CHAMBERS. JANUARY 6TH, 1920.

*RE REX v. SEGUIN.

Ontario Temperance Act—Information for Second Offence—Trial before Justices—Conviction for Offence Charged—Refusal of Justices to Find that Offence was a Second one—Appeal to County Court Judge under sec. 92 (6) of Act by Direction of Attorney-General—Conviction by Judge for Second Offence—Nature of Appeal—Rehearing—Sec. 92 (8), (9)—Ontario Summary Convictions Act, sec. 4—Criminal Code, sec. 752—Procedure—Evidence before Justices Acted upon by Judge—Proof of Prior Conviction—Sec. 96—Imperative or Directory—Jurisdiction of Judge—Prohibition—Sentence—Direction of Attorney-General for Appeal against Dismissal of Charge.

Motion by the defendant for an order prohibiting GUNN, Co.C.J., acting for and at the request of a Judge of the County Court of the United Counties of Prescott and Russell, and the Judges of that Court, from recording or enforcing a conviction of the defendant, made by GUNN, Co.C.J., for a second offence against the Ontario Temperance Act, with a sentence to imprisonment for 6 months.

No formal conviction was produced, and no warrant had been issued. The conviction was made on an appeal, pursuant to a direction of the Attorney-General for Ontario, under sec. 92(6) of that Act, after proceedings before five Justices of the Peace of the united counties.

A. Lemieux, K.C., for the defendant.
F. P. Brennan, for the Crown.

HODGINS, J.A., in a written judgment, said that counsel for the defendant had stated that prohibition was his only remedy, and that he had no right to appeal, referring perhaps to sec. 1121 of the Criminal Code.

The grounds for prohibition were: (1) that the appeal should have been a rehearing and that all the witnesses should have been called de novo; (2) that there was no power in the learned Judge to order imprisonment for 6 months; (3) that he should have inquired, in the manner prescribed by sec. 96 of the Ontario Temperance Act, as to the charge of a prior offence; (4) that he should have asked the defendant, pursuant to sec. 96, whether he had been previously convicted; (5) that the learned Judge was in error in saying that the defendant admitted the prior conviction, he having

pleaded "not guilty" on that charge; (6) that the fiat of the Attorney-General did not authorise the issuing of the summons as drawn, nor the hearing as it was conducted, nor the retrial of the defendant.

The charge laid was for a second offence, and a majority of the Justices found the accused guilty of the particular breach alleged and fined him $300 and costs. They then proceeded to inquire whether he had been previously convicted, and a majority held in his favour—that is, a majority refused to find that the offence was a second one, although a prior conviction was produced before them and the defendant identified therewith.

The learned Judge who heard the appeal decided that the imposition of a fine midway in the proceedings in regard to the second offence was improper, and that there was no jurisdiction in the Justices to impose it, and he reversed their finding. He then held that the defendant should have been found guilty of a second offence, and thereupon found him guilty accordingly and imposed the punishment of 6 months' imprisonment.

As to the appeal being a rehearing, the learned Judge referred to sec. 92, sub-secs. 8 and 9, of the Ontario Temperance Act; sec. 4 of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90; and sec. 752 of the Criminal Code (Part XV.); and said that he did not think that the learned County Court Judge misconceived the proper procedure on the appeal. He followed the course prescribed by sec. 92 (8), and it was not alleged that he refused to hear evidence or that any was tendered or that there was the slightest unfairness in what was done. As the Ontario Temperance Act lays down its own procedure, there is no necessity for reference to decisions as to what is a rehearing under the Criminal Code. The two enactments may well be read together in many respects; but, where their provisions are inconsistent, the Ontario Act must govern.

Objection 2, in regard to the sentence, had no force if the County Court Judge had jurisdiction to make the conviction.

Objections 3, 4, and 5 dealt with matters of procedure under sec. 96, which were within the jurisdiction of the County Court Judge if he became seised of the matter, as he undoubtedly did, and so were not grounds for prohibition: Regina v. Justices of Kent (1889), 24 Q.B.D. 181; In re Long Point Co. v. Anderson (1891), 18 A.R. 401; Rex v. Phillips (1906), 11 O.L.R. 478; Re Sigurdson (1916), 25 Can. Crim. Cas. 291.

The provisions of sec. 96 are not to be regarded as imperative: Rex v. Graves (1910), 21 O.L.R. 329; Rex v. Coote (1910), 22 O.L.R. 269; Rex v. McDevitt (1917), 39 O.L.R. 138; Regina v. Wallace (1883), 4 O.R. 127.

It was impossible for the County Court Judge to comply literally with the requirements of sec. 96 after the evidence had all been taken and the prior conviction proved before the Justices. If, when looked at, those proceedings disclosed a proper conduct of the case before the Justices and proper proof of guilt on the charge and then competent evidence of a prior conviction—all regularly given according to sec. 96, as appeared from the papers filed on this motion—the learned County Court Judge was warranted in holding that a second offence had been established and in inflicting the appropriate penalty.

Objection 5 appeared to be founded on a misconception. The defendant pleaded "not guilty" before the Justices; but on the appeal he did not contest the proof already in of his prior conviction.

As to objection 6, the fiat of the Attorney-General authorised an appeal against the dismissal of the charge preferred against the defendant. There were several stages in the trial and adjudication before the five Justices, and just what exact legal phraseology would most correctly describe the proceedings the learned Judge could not say. But it was clear that the trial resulted in a failure to obtain a finding of guilt or a conviction for the offence charged; and the description of its outcome as a dismissal appeared to be quite correct. It would be absurd to grant prohibition because the language used in the fiat was not meticulous enough to satisfy every critic.

Motion dismissed with costs.

MIDDLETON, J. JANUARY 7TH, 1921.

RE WALMSLEY.

Will—Construction—Division of Residue into Shares—Certain Shares to be Held in Trust for Nephew—Income Payable to him during Life—Power of Appointment among Wife and Children—In Default of Appointment Shares to Go to Wife and Children upon Death of Nephew—Event Actually Occurring, Death of Nephew Unmarried—Absolute Gift to Nephew not Affected by Words Controlling Destiny of Shares in Non-existent Circumstances—Right of Executor of Nephew.

Motion by the executors of the will of Thomas Walmsley for an order determining a question arising under the will.

The motion was heard in the Weekly Court, Toronto.
H. S. White, for the executors.
J. B. Clarke, K.C., for certain beneficiaries.
H. M. Mowat, K.C., for the widow.
R. J. Gibson, for other beneficiaries.
A. B. Armstrong, for other beneficiaries.
A. R. Armstrong, for other beneficiaries.
A. J. Thomson, for the executor of Thomas A. Kirvan.

MIDDLETON, J., in a written judgment, said that the only question argued arose upon clause 44. The testator directed his residuary estate to be divided into 30 equal shares. This clause read: "Three of said shares are to be held in trust for my nephew Thomas Arthur Kirvan, who is to receive the income derived therefrom during his lifetime. He is to have power of appointment over said shares by deed or will among his wife and each of his children and child or children of any deceased child as he may direct or appoint, and in default of such direction or appointment then the said three shares are to go upon his decease to the said wife and children in equal shares or portions, one equal share or portion to each. The child or children of any deceased child to receive the portion which the deceased parent would have received if living."

Thomas survived the testator, and received the income until his death on the 27th September, 1920. He was never married.

It was contended on behalf of Thomas's executor that the effect of this clause was to vest the three shares in Thomas, with superadded words which, in the event of his death leaving a wife and children surviving, would have controlled the destiny of the fund, but which do not operate to cut down the absolute gift, as the circumstances in which they alone could operate do not and cannot exist.

The opposed view was that all that was given Thomas was a life-estate with a power of appointment in favour of his wife and children. As he had neither wife nor child, this went for nothing; and, as there was a life-estate only, which had ended, there was now an intestacy.

There was some suggestion that the shares might fall into the residue and be re-divided; but where shares of a residue lapse they do not fall into the residue, unless the will so provides—they descend.

"Where property is settled under a will by way of a series of positive original trusts, and those trusts are not exhaustive, there is nothing to take away from the testator's estate any interest in the property left undisposed of by those trusts. But where

property is given absolutely in the first instance so as to segregate it from the estate of the testator and then this absolute gift is modified by the settlement of the property upon trusts, then to the extent to which those limiting trusts are not exhaustive the original absolute gift prevails. . . . To the extent that positive trusts are not exhaustive there is an intestacy: to the extent that negative or limiting trusts are not exhaustive a prior positive gift is left unaffected:" Moryoseph v. Moryoseph, [1920] 2 Ch. 33, 36, 37; Lassence v. Tierney (1849), 1 Mac. & G. 551.

This will was most carefully prepared. The testator had before him the cases of all those having claims upon him, and he evidently sought to give to each according to his needs and his deserts. The scheme of the will was to segregate funds and deal fully with each separate fund. When the residue was dealt with, the testator clearly did not intend any intestacy. He set apart one or more shares for each beneficiary, and then proceeded to cut down the enjoyment and control the fate of the share or shares as he deemed expedient; but, as between the legatee and the estate, there was a complete segregation and an absolute gift. All that followed in clause 44 was an attempt to control the enjoyment and to limit the control in certain events. Subject to this, the property was that of the nephew.

Order declaring accordingly. The costs of all parties should be paid out of the estate.

ORDE, J. JANUARY 7TH, 1921.

RE THOMSON.

Will — Construction — Legacies — Annuities — Distributive Gift of Residue—One Annuity Payable out of Residue—Priorities—Possible Deficiency—Devise of "House and Property"—Inclusion of Contents of House as well as Land—Bequest of Life Insurance Policies—Effect as to Policy Matured but not Paid at Death of Testatrix—Beneficiary under Will and one or more Codicils Attesting another Codicil as Witness—Effect of—Annuity Payable to two Persons "Jointly"—Survivorship.

Motion by the National Trust Company, executors of the will of Alice Elizabeth Thomson, deceased, for the advice and direction of the Court as to the meaning and effect of certain provisions of the will and codicils thereto.

The motion was heard in the Weekly Court, Toronto.

C. A. Thomson, for the executors.

Norman A. Keys, for Annie Jane Thomson and Kate Sinclair Spencer.

I. M. Macdonnell, for persons appointed to represent pecuniary and residuary legatees.

ORDE, J., in a written judgment, said that the testatrix died on the 12th July, 1920. By the will she directed that her estate should be converted into cash, and, after the payment of debts and funeral and testamentary expenses, that a large number of pecuniary legacies should be paid and sums set apart for two annuities. Then followed a devise of land at Lac des Isles, Quebec, and then a direction that the residue should be divided equally, payment being postponed till the age of 21, among the nephews and nieces of the testatrix living at her death. The codicils, 5 in number, added to and varied the pecuniary legacies, increased one of the annuities and added another, and also dealt with certain policies of life insurance, but did not otherwise affect the tenor of the will itself.

I. Among the pecuniary legacies was the following: "To my sister Miss Annie Jane Thomson . . . $500 per year to be paid out of the residue of my estate during the term of her natural life." In the respective gifts of the other pecuniary legacies, including the annuity of $225 (increased by codicil to $500) to another sister, Kate Sinclair Spencer, the words "to be paid out of the residue of my estate" did not appear. The question of priority became important, because a deficiency was possible. That the testatrix intended to distinguish the annuity to her sister Annie from the others must be presumed from the fact that the words were there, and could not be ignored; and the conclusion was that the annuity of Annie must be paid out of the residue left after providing for the devise and the other specific and pecuniary legacies; but it must be paid out of the residue in priority to the distributive gift of the rest of the residue; for the residuary distributive gift concluded with the words, "having regard to the condition of my estate and the amount required to provide for the life annuities given in this my will," making it clear that the gift of residue was subject to the annuities.

II. The 4th clause of the will was: "I give and devise my house and property at Lac des Isles, St. Margaret, Quebec, to my sister Annie Jane Thomson." The house was a summer cottage containing some furniture, a portion of which already belonged to Annie. The question was whether the words "and property" were to be confined to the realty or included the contents of the

house as well. Without holding that there is any general rule applicable to the construction of those words, beyond that which requires that the natural meaning of the language used by the testatrix shall be applied to the circumstances as disclosed, the learned Judge was of opinion that the words were intended to include not only the house and land but the contents of the house as well.

III. By one of the codicils, the testatrix gave "my life insurance policies to my sister Kate Sinclair Spencer." By an odd coincidence, the testatrix died on the 12th July, 1920, in Switzerland, and one of the policies matured and became payable on the 12th July, 1920, in Toronto. But, in point of actual time, when the testatrix died at 4.15 a.m. on the 12th July, in Switzerland it was still the 11th July in Ontario, so that the policy had not yet matured. It was suggested that, had the policy matured and become payable upon her death, it would not have come within the terms of the gift. Were it necessary to determine this question, the holding should be that, whether the policy had matured or not, the gift of it would cover all moneys payable under it unless prior to the death of the testatrix the moneys had actually been paid over to her.

IV. The fact that Annie Jane Thomson witnessed one of the codicils did not invalidate the gifts to her either in the will or in any other codicil: Gurney v. Gurney (1855), 3 Drew. 208; Re Marcus (1887), 57 L.T.R. 399; In re Trotter, [1899] 1 Ch. 764, 767.

V. One of the codicils contained this gift: "An annuity of $100 to the Rev. T. Thomson-Reikie . . . jointly with his wife Eleanor." A simple gift of "an annuity" is a gift of the sum mentioned annually during the life of the legatee: Jarman on Wills, 6th ed., pp. 1138, 1139. A gift of an annuity to two persons "jointly" is a joint gift to them, and on the death of one the annuity survives to the other during his or her lifetime.

Order declaring accordingly; costs of all parties out of the estate, fixed at $20 to the executors and $20 to each of the other two groups represented on the motion.

MIDDLETON, J. JANUARY 7TH, 1921.

NASH v. SCHRECK.

Title to Land—Peninsula in River—Crown Patents—Description—Water-lots—Plans—Boundaries—Possession—Limitations Act—Evidence—Action of Flowing Water—Deposit of Sand.

Action to establish the plaintiff's title to a sandy spit of land extending into the Detroit river and for an injunction restraining the defendant from taking sand and gravel therefrom and for damages.

The action was tried without a jury at Sandwich.

A. R. Bartlet, for the plaintiff.

T. A. Hough, for the defendant.

MIDDLETON, J., in a written judgment, said that the defendant claimed title under a patent of lot 21, dated the 15th March, 1881, and divers mesne conveyances. The patent described the land as 100 acres more or less, and gave no metes and bounds. The plaintiff claimed title under patents of the 28th March, 1895, of the water-lots in front of lots 21 and 22. The Crown patent record spoke of lot 21 as on the Detroit river and lot 22 as on the Canard river. The Canard joins the Detroit just above the location. These lands formed part of an Indian Reserve, and this accounted for the late dates of the patents. The land was shewn on a plan of 1846 in the registry office, but this was on small scale, and afforded no real guide beyond shewing that lot 21 came to the river.

The learned Judge accepted the evidence of the plaintiff as to the growth of this bar, and relied much on the testimony of one Harman, who knew the situation, having lived there 47 years.

The shore-line and the boundary of lot 21 are shewn on Paterson's plan, and the peninsula (formerly an island) was formed upon the water-lot, i.e., the land covered by water, in front of lot 21. This was formed partly by the natural action of the flowing water and partly by the groins and stone-heaps placed so as to assist in the deposit of sand.

No such possession had been shewn as to defeat the paper-title in the plaintiff. On the other hand, the plaintiff's possession had been consistent with his paper-title.

There should be judgment for the plaintiff for a declaration and injunction accordingly; the plaintiff's costs to be paid by the defendant.

MIDDLETON, J. JANUARY 7TH, 1921.

CALDWELL v. JANISSE.

Title to Land—Will—Devise to Widow of one Parcel of Land—Devise to Daughters of Second Parcel at Death of Widow—Executors Directed to Rent Second Parcel and Pay Annuity to Widow for Life out of Rents—Widow Continuing in Possession of both Parcels—Second Parcel Sold for Taxes—Conveyance by Purchaser to Widow—Right to Hold Land under Tax-title against Heirs of Daughters—Action by one Heir—Status—Parties—Claim against Executor of Widow—Corroboration—Possession.

An action for the recovery of land, tried without a jury at Sandwich.

F. D. Davis, for the plaintiff.

J. H. Coburn, for the defendants the Essex Land Company.

O. E. Fleming, K.C., for the defendant Janisse.

A. H. Foster, for the defendant the executor of Harriet McCurdy.

MIDDLETON, J., in a written judgment, said that the plaintiff claimed to be a son of Sarah Caldwell, a daughter of Moses Grey, who died on the 28th February, 1874, and alleged that under the will of Grey the children of his two daughters, Sarah and Josephine, became on the death of Harriet Grey, the widow of Moses, who afterwards married a man named McCurdy, and died on the 19th October, 1919, entitled to the land in question.

The action was not a class action, and the others who would be entitled to share if the plaintiff was right were not parties to the action.

By the will of Moses Grey, dated the 6th December, 1873, he attempted to divide his homestead, a block of 5 acres, so as to give his wife one acre and the buildings on it. The intention to give her this one acre was to be gathered not only from clause 2 of the will but from the fact that the executors were to take possession of the 4-acre parcel remaining and lease it. The one-acre parcel was said to be on the north part of the lot and to be half an acre in breadth and two acres deep. The plan put in shewed the location, but the lot was shewn to be only one acre deep. The executors were, out of the proceeds of the sale of the personal estate and the "proceeds of the rent," to pay annually $50 to the widow. On the death of the widow, all the real and

personal estate was given to the testator's two daughters "to be divided equally amongst themselves their heirs executors administrators and assigns to have and to hold the same to them forever."

Harriet Grey married McCurdy shortly after Grey's death. McCurdy lived 8 or 9 years with her upon the property, and upon his death she continued to live thereon until the land was sold recently to the defendant Janisse. The executors never took possession of the land nor rented it. The land was poor and of very little value for farming purposes, and only recently acquired value as building sites.

All the executors died about 25 years ago, and from that time on Harriet McCurdy remained in unquestioned possession of the whole 5 acres. There was no evidence to indicate that she ever in any way acknowledged the title of the executors to the 4 acres.

Taxes fell into arrear, and the land was sold to one Watson for $39.37. The tax-deed was dated the 7th April, 1910. The land was described as the rear part of block A., being composed of 4 acres more or less. Watson conveyed the lands to Harriet McCurdy on the 26th April, 1910, for $60.62. There was no evidence that Watson purchased for Harriet McCurdy.

When the property was sold by Harriet McCurdy in 1916 to the defendant Janisse, its value had largely increased, owing to the steel works at Ojibway; and a motion was made before the learned Judge under the Vendors and Purchasers Act: see Re McCurdy and Janisse (1916), 11 O.W.N. 67. Notice was not then given to the plaintiff or any one who might possibly make a claim under the will of Moses. It was then held that the one-acre parcel passed to the widow under the devise; that the 4 acres passed under the tax-sale; that the widow occupied no fiduciary position which prevented her from acquiring and setting up the tax-title as against those claiming under the will; and that she could set up Watson's title under the tax-sale, confirmed as it was by an Act of the Legislature.

The learned Judge had now reconsidered all these questions in the light of the full argument made at the trial of this action, and saw nothing to cause any change in his views. In the opinion given upon the vendor and purchaser application it was said that the widow was entitled to the income for life—she was in fact entitled to only $50 per annum out of the income.

The right of the plaintiff to attack the tax-title held by Harriet McCurdy was at most an equity, unregistered, and should not prevail against the registered title.

The learned Judge was not satisfied that the action could be maintained in the absence of all the claimants under the daughters

of Moses Grey, nor that the evidence of the plaintiff was sufficiently corroborated to entitle him to succeed against the executor of Harriet.

The land having been conveyed by the defendant Janisse to the defendants the Essex Land Company, he need not have been made a party.

Action dismissed with costs.

ROSE, J. JANUARY 7TH, 1921.

MILLER v. NEELY.

Contract—Formation—Sale of Land—Document Signed by Defendant—Authority to Agent to Make Sale upon Certain Terms only some of which Stated in Document—Agent Exceeding Authority—Offer on Terms Set forth in Document only—Attempted Acceptance by Plaintiff—No Contract Made—Dismissal of Action for Specific Performance.

A purchaser's action for specific performance, tried without a jury at Sarnia.

A. Weir, for the plaintiff.
R. I. Towers and Donoghue, for the defendant.

ROSE, J., in a written judgment, said that the defendant instructed one Nelson, a land-agent, to find a purchaser for a house owned by her in Sarnia, telling him that her price was $3,200. The plaintiff told Nelson that she would pay $2,900, of which $750 was to be paid in cash, and she gave him $25 as a deposit. The defendant would not sell on those terms; she told Nelson that she would take $2,900 if half was paid down and the balance was made payable in a certain way. The plaintiff was not at that time in Sarnia, and so Nelson consulted the plaintiff's nephew, who said he would take the responsibility of dealing with the defendant on those terms, and gave Nelson $25 as a deposit—Nelson saying that, without express instructions from the plaintiff, he could not use the money which she had left with him when different terms were under discussion. Nelson then went to the defendant, told her that he thought he had a purchaser on her terms, and obtained her signature to a document reading thus: "Sarnia, April 8, 1920. Received from W. C. Nelson the sum of $25 deposit on house and property"—describing it informally

"Selling price $2,900. Terms $1,450 cash. Balance $150 at 7% and interest every six months. Adjustments to date of settlement. Vendor to have privilege of placing mortgage on property for whole balance at any time. Commission 2½%." Two days after this was signed by the defendant, the plaintiff returned to Sarnia and expressed herself as content with the arrangements and gave instructions to her solicitors to do what was requisite to complete the purchase. The purchase, however, was not completed, apparently because the defendant wanted 7½ per cent. interest, instead of 7; and this action was the result.

In the learned Judge's opinion, the case turned upon the purpose for which the document was given to Nelson; and that purpose was reasonably certain. It was intended that Nelson should make, on the defendant's behalf, a binding offer to sell the property upon the terms stated in the memorandum, subject to a certain delay in delivering possession. What Nelson was authorised to do was to sell upon the terms stated to him, some only of which were set out in the writing. This authority he exceeded. He made an offer upon the terms set forth in the writing only, and that was the offer which the plaintiff attempted to accept. Hence there was no contract. The question was not whether there was a sufficient memorandum to satisfy the Statute of Frauds, but whether there was a contract at all. The statute "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties:" Jervis v. Berridge (1873), L.R. 8 Ch. 351, 360; Hussey v. Horne Payne (1879), 4 App. Cas. 311, 323.

Action dismissed with costs.

ROSE, J. JANUARY 7TH, 1921.

DOMINION BANK v. REINHARDT.

Fraudulent Conveyance—Voluntary Conveyance of Land by Father to Son for Benefit of Son and other Children—Financial Circumstances of Father at Time of Conveyance—Evidence—Suspicious Circumstances—Explanations.

The plaintiffs, suing on behalf of themselves and all other creditors of Lothar Reinhardt, deceased, brought this action to set aside as a fraud upon the creditors of the deceased, a deed dated the 16th September, 1915, by which the deceased conveyed

to the defendant Lothar Reinhardt the younger a certain hotel property in Toronto, and also a deed dated the 25th September, 1915, by which Lothar Reinhardt the younger declared himself to be a trustee of the said property for himself and his co-defendants, his two brothers and his sister.

The action was tried without a jury at Toronto.

W. B. Milliken and L. B. Campbell, for the plaintiffs.

W. G. Thurston, K.C., and F. H. Snyder, for the defendants Lothar Reinhardt the younger, as executor and trustee, and G. T. Clarkson, as trustee, under the will of the deceased.

No one appeared for the other defendants.

ROSE, J., in a written judgment, said that the deceased was a brewer. In or about 1908 he incorporated the Reinhardt Salvador Brewery Limited, with an authorised capital stock of $600,000, and, in consideration of the issue to himself of $400,000 of fully paid shares, transferred to the company all his brewery property. The other $200,000 of stock was not issued. Of the $400,000 issued to him, he transferred to his wife and children and one other person shares of the par value of $45,000, so that at the time of the transactions in question in this action he held shares of the par value of $355,000, or more than seven-eighths of the issued capital stock. The company was apparently prosperous. The shares of the deceased were apparently worth more than par, and he had other property; he was apparently worth in 1915 something more than $350,000, and his personal indebtedness, apart from a certain guaranty, was not more than $10,000. The company owed the plaintiffs about $113,000; and the deceased was responsible, as a guarantor, for this. The property conveyed to his son had belonged to the company, but was conveyed by the company to the deceased in 1914, in exchange for some land adjoining the brewery. There was nothing to indicate any intention on the part of the deceased to take out of the reach of the company's creditors and give to his children a property of greater value than that which he was to give to the company in exchange.

The conveyance to the son was a voluntary one. If there were suspicious circumstances, the transaction being one between relatives, the plaintiffs had made out a prima facie case: Koop v. Smith (1915), 51 Can. S.C.R. 554, 559.

Were there suspicious circumstances; and, if so, had the prima facie case been displaced in any way?

The case was not like Freeman v. Pope (1870), L.R. 5 Ch. 538, and similar cases, relied on for the plaintiffs, in which the necessary

result of the impeached transactions was to prejudice creditors. Here, if the situation was as it appeared to have been, the creditors —including the bank claiming under the guaranty—were not likely to be prejudiced in the least by the gift. Even now, there did not seem to be any reason to suppose that it ever would have been necessary for the plaintiffs to look to the guaranty, if there had not been the prohibitory legislation of 1916. In 1917 the company made an assignment for the benefit of its creditors; and its buildings, adapted for brewery purposes, were sold for small sums, and there was a corresponding loss in respect of other assets. It was to this that the plaintiffs' loss seemed to be attributable, rather than to any effect that could have been expected to follow upon the gift to the deceased's children.

It was said that the gift was made on the solicitation of the children or some of them; but there was nothing suspicious in this; the deceased was thoroughly competent to decide and did decide such matters for himself.

The conveyance to the son and his declaration of trust were not registered until long after the death of the donor. If there was in this anything to cast suspicion on the reality of the gift or upon the intention with which it was made, that was displaced by the evidence of the son, who swore (on examination for discovery put in by the plaintiffs at the trial) that the deed of conveyance was left with the solicitor to be registered, and that the witness did not know why it was not registered.

The only other thing said to be suspicious was the fact that the son, in his capacity of executor, treated the property conveyed to him as belonging to the estate. He seemed to have thought that, as the deed had not been registered, the gift was incomplete. In this he seemed to have been in error, for there was delivery by the donor. The son also thought that, as succession duty was payable upon the property conveyed to him, it ought to be included among the assets. The learned Judge thought that there was nothing in this to cast suspicion upon the conveyance; and, if there was, the explanation was satisfactory.

The action should be dismissed, and the plaintiffs should pay the costs of the defendants the trustees.

ROSE, J. JANUARY 7TH, 1921.

*DOWNING v. GRAND TRUNK R.W. CO.

Negligence—Injury to Boy of 8 Years Trespassing in Railway-yard —Findings of Jury—Contributory Negligence—Direction to Jury—Reasonable Care to be Expected from Boy, Having Regard to Age and General Intelligence—Whether Contributory Negligence Attributable to Child a Question for Jury.

Action for damages for personal injuries to the plaintiff Stewart Downing, a boy of 8 years, suing by his father as next friend, and for expenses incurred by his father and co-plaintiff in the action, in consequence of the injury to the boy, the plaintiffs charging negligence on the part of the defendants.

The action was tried with a jury at a Toronto sittings.

J. W. Curry, K.C., for the plaintiffs.

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

ROSE, J., in a written judgment, said that the boy was upon the defendants' property and attempted to cross a track by crawling between two cars standing thereon, beneath the couplings connecting the cars, when the cars were moved by an engine, and a wheel or some wheels went over his leg.

At the close of the plaintiffs' case, counsel for the defendants moved for a nonsuit. Judgment upon the motion was reserved, the defendants gave evidence, and questions were submitted to and answered by the jury.

The jury found: (1) that the boy was on the defendants' line with the knowledge of the defendants; (2) that children were in the habit of being upon the line at the place in question, to the knowledge of the defendants; (3) that the defendants objected to their being there, and tried to prevent it; (4) that the boy did not know that he ought not to be on the tracks; (5) that the defendants were guilty of a breach of their statutory duty to erect and maintain fences; (6) that the injury suffered by Stewart Downing was a result of such breach; (7) that the injury was caused by the negligence of the defendants; (8) that the negligence consisted in (a) not maintaining a fence and (b) not ordering the boy off the property; (9) that the boy was guilty of negligence causing or contributing to the casualty; (10) that his negligence was (a) in crawling under the cars" and (b) "the boy should have observed the engine."

The finding that the boy was negligent seemed to the learned Judge to render it unnecessary to decide whether effect ought to be

given to the motion for a nonsuit, or whether the breach of the statutory duty to maintain fences, or the failure of an employee to order the boy to leave would, if there had been no contributory negligence, have supported a judgment in favour of the boy, who was, as the jury had found, a trespasser, and who was injured not by anything negligently done by the defendants, but by getting in the way of cars which were being moved, in the usual course of the company's business, upon the company's property.

The case was quite unlike Tabb v. Grand Trunk R.W. Co. (1904), 8 O.L.R. 203, and Potvin v. Canadian Pacific R.W. Co. (1904), 4 Can. Ry. Cas. 8.

It cannot be said that it is the law in Ontario that no child of 8 can be held to be guilty of contributory negligence. When the learned Judge submitted the question to the jury, he told them more than once that the standard by which the boy's acts were to be judged was not the standard which would be applied in the case of a man, and that what they were to consider was, whether the boy had displayed such reasonable care as was to be expected from him, having regard to his youth and general intelligence.

Further consideration had convinced the learned Judge that it was right to submit the question in the way in which it was submitted. If the question was rightly submitted, the answer was conclusive, and the plaintiffs' case failed.

Reference to Merritt v. Hepenstal (1895), 25 Can. S.C.R. 150; Gardner v. Grace (1858), 1 F. & F. 359; Moran v. Burroughs (1912), 27 O.L.R. 539; Schwartz v. Winnipeg Electric R.W. Co. (1913), 12 D.L.R. 16; Hargrave v. Hart (1912), 9 D.L.R. 521, and cases collected in the note.

Action dismissed, with costs if demanded.

HODGINS, J.A., IN CHAMBERS. JANUARY 8TH, 1921.

*REX v. ROBINS.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Amended Conviction Returned by Magistrate—Penalty—Suspension of Magistrate—Judge's Order Amending Conviction or Confirming Amended Conviction—Sec. 58 (2) of Act (10 & 11 Geo. V. ch. 78, sec. 11)—Affidavit of Magistrate in Support of Motion to Quash Conviction—Improper Practice.

After the judgment delivered by HODGINS, J.A., on the 28th December, 1920 (ante 348), the convicting magistrate returned an amended conviction, and the learned Judge, in a supplemental judgment, said that by the amended conviction a fine of $200 and $10 costs and in default of payment a penalty of 3 months in goal were imposed.

It appeared from a memorandum sent with the papers that the magistrate was under suspension. As, however, he had in fact exercised his discretion under sec. 58 (2) of the Ontario Temperance Act, as added by 10 & 11 Geo. V. ch. 78, sec. 11, against adding a sentence of imprisonment, there was no reason why, in order to avoid any difficulty caused by the suspension, the Judge might not now make an order amending the conviction in the way indicated by the magistrate, if the defendant so desired, or confirm the conviction as now returned. No costs.

The learned Judge calls attention to what he hopes is an unusual practice, namely, the procuring, by the solicitor for the defendant, from the magistrate, of an affidavit in support of the application to quash the conviction. In that affidavit doubt was thrown upon the conviction and upon the magistrate's right to decide as he did. It is improper to ask any magistrate to take such a position. If the offence was not proved, the defendant should have been discharged; but, if a conviction is recorded, the administration of justice will not be advanced by the course taken here.

LEWIS v. LEWIS—KELLY, J.—JAN. 4.

Receiver—Interest of Defendant in Estate—Investment in Debenture—Confirmation of Master's Report.]—Motion by the plaintiff for an order confirming a report of the Local Master at London of the 24th November, 1920, and for the appointment of a receiver. The motion was heard in the Weekly Court, London. KELLY, J., in a written judgment, said that the report should be confirmed. It was found by the report that the defendant was entitled, under the will of his father (now deceased), at the decease of his mother, to $5,000, which was now said to be invested in a debenture of the Huron and Erie Loan and Savings Corporation. The Canada Trust Company should be appointed receiver of the defendant's interest in this debenture and the money which it represents; but subject of course to the prior interest of the defendant's mother and of any other person or persons who may have an interest therein prior to his. P. H. Bartlett, for the plaintiff. The defendant was not represented.

RE NORTON—KELLY, J.—JAN. 4.

Husband and Wife—Wife Living apart from Husband—Alleged Adultery of Wife Disentitling her to Dower—Application for Order Authorising Husband to Convey Land Free from Dower—Dower Act, sec. 14—Contractictory Affidavits—Trial of Issue Directed.] —Motion by Nathan Norton for an order authorising him to convey land free from dower: Dower Act, R.S.O. 1914 ch. 70, sec. 14. The motion was heard in the Weekly Court, London. KELLY, J., in a written judgment, said that it was admitted that the applicant and his wife were and had been for many years living apart, he in the Province of Ontario and she in California. The applicant alleged adultery on his wife's part, disentitling her to dower, and backed up this allegation by an affidavit. This she denied in her affidavit. The circumstances were the subject of grave contradictions which made it impossible to arrive at any satisfactory conclusion in a summary way on a question of such importance. The questions raised should be tried upon an issue. Order directing the trial of an issue; costs of this motion reserved to be disposed of on the trial of the issue. J. Macpherson, for the applicant. R. G. Fisher, for the wife.

RE HYMAN—MIDDLETON, J.—JAN. 5.

Will—Distribution of Residuary Estate among Charities—Designation of Charities by Court—Conditions.]—Motion by the executors of the will of Sophia Hyman, deceased, for the opinion, advice, and direction of the Court upon matters arising in the administration of her estate. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that the will directed that the residue of the estate was to be used for such charitable purposes as might be designated by the Court. There was now about $10,000 ready for distribution. About half of this should go to the only local charity pointed out, and the remainder should be divided among institutions having a wider scope. The learned Judge nominated as beneficiaries: the Children's Aid Society of Brampton and Peel County (for use in the work at present carried on in conjunction with the Children's Aid Society of Halton), $5,000; the Sick Children's Hospital, $1,000; the Hospital for Incurable Children, $1,000; the Boys' Home, $1,000; the Muskoka Free Hospital for Consumptives, $1,000; Pearson Hall for Blind Soldiers, $1,000. The learned Judge reserved the nomination of further charities or the designation of further sums to the above

or any of them till further sums are ready for distribution. The $5,000 should be used for the building scheme mentioned in the affidavit of Mr. Duggan, and the trustees should name the wing after the testatrix. The $1,000 to the Sick Children's Hospital is on condition that a cot be named after her. Costs out of the estate. E. G. Graham, for the executors. D. C. Ross, for the Public Trustee.

FREEDMAN v. FRENCH—KELLY, J.—JAN. 7.

Contract—Sale of Lumber—Action for Price—Counterclaim for Breach of Contract—Dispute as to Subject of Contract—Evidence—Findings of Trial Judge.]—An action for the price of lumber sold by the plaintiff to the defendant, and counterclaim by the defendant for breach of the contract, tried without a jury at Ottawa. KELLY, J., in a written judgment, said that there was a dispute between the parties, the substance of which was that the plaintiff contended that the contract was for 200,000 feet of lumber 2 inches by 6 inches and upwards and 6 feet and upwards in length, at $20 per 1,000 feet; while the defendant insisted that what he purchased was lumber 2 inches by 4 inches and upwards, and that this was afterwards varied so as to include a quantity of ship-lap, after the plaintiff had inquired of the defendant whether he could handle it, and after the defendant had conferred with his customers and ascertained that they would purchase it. The defendant also contended that the purchase was not confined to lumber from the Energite plant at Renfrew. The parties were at variance as to many details of the transaction and as to what followed upon the contract. The learned Judge found that not only had the plaintiff failed to establish his position, but that the defendant's contention and his evidence had been substantially borne out by the evidence of other witnesses. Specific findings of fact were made by the learned Judge. In conclusion, he said that the item of $179.20 in the plaintiff's claim was not in dispute; that the plaintiff was entitled to recover that sum and also $730.78 for two car-lots of lumber at $20 per thousand which he delivered, making together $909.98; and that the defendant was entitled to $1,890 damages. There should be judgment in the defendant's favour for the difference, viz., $980.02, with costs of the action and the counterclaim. The $4,000 draft mentioned in the plaintiff's claim should be delivered up to the defendant. J. J. O'Meara, for the plaintiff. G. F. Henderson, K.C., for the defendant.

CORRECTION.

In BRITISH WHIG PUBLISHING CO. v. E. B. EDDY CO. LIMITED, ante 279, M. G. Powell appeared as junior counsel for the defendants.