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COURT OF APPEAL.

APRIL 18TH, 1910.

CANTY v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to and Death of Brakesman—Accident in Railway Yard—Making up Train—Negligence — Alleged Insufficiency of Men for Operation—Finding of Jury—No Evidence to Support—Negativing of other Grounds of Negligence.

Appeal by the defendants from the judgment of MULOCK, C.J.ExD., in favour of the plaintiff, upon the findings of a jury.

Action for damages for the death of the plaintiff's son, Patrick Canty, who lost his life while in the service of the defendants as a yard brakesman.

The accident occurred in the defendants' yard at the city of Ottawa on the 3rd May, 1909. The deceased was the senior brakesman, and as such was in charge of the signals by which the engine movements were governed. At the time of the injury he with others was engaged in gathering together and making up a train of freight-cars intended to be sent on to their destination. His fellow-servants in the operation were: the engine-driver and fireman; Duntz, the junior brakesman; and Reynolds, the yard foreman, the deceased's immediately superior officer.

Reynolds had gone on ahead to find and mark with chalk, according to the usual custom, the cars which were to be gathered and placed together to form the train. The place of Duntz was on top of the cars, so as to be in a position to receive from the deceased the signals, which he transmitted to the engine-driver. The engine, with some 13 cars attached, had pulled out of track 7, a siding, intending to back into track 10, into which at the time the engine was slowly backing. In that situation the plaintiff, in some way not apparent, had the misfortune to have his foot

caught between two converging rails, and, being unable to extricate it in time, was run over by the slowly backing train. The theory of the plaintiff was that, at the time, the deceased was crossing back to his proper side of the train after having set the switch into track 10, and that the train was negligently backed upon him without a signal. A further ground was, that there should have been more help to carry out the operation safely.

The jury answered questions: (1) Were the defendants guilty of any negligence which caused the accident? A. Yes. (2) If so, in what did such negligence consist? A. Neglect of help. (3) If the defendants were guilty of any negligence, could the deceased, by the exercise of reasonable care, have avoided the consequences of the defendant's negligence, and, if so, how? A. No; his duty compelled him to cross the track to give a signal. (4) Was the deceased guilty of any negligence which caused or contributed to the accident? A. No. (5) If so, in what did such negligence consist? (6) What damages, if any, do you award the plaintiff. A. $2,500.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

D. L. McCarthy, K.C., and W. L. Scott, for the defendants.

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

The judgment of the Court was delivered by GARROW, J.A. (after setting out the facts as above):—The effect of the findings is to exclude the other items of alleged negligence. And the question on this appeal is, was there any evidence upon which the jury could reasonably arrive at the conclusion which they did?

The meaning of the expression "neglect of help" is, I assume, that the defendants failed in their duty to furnish enough men to enable the operation to be carried on with a reasonable degree of safety. And it clearly refers to the absence of the foreman at the moment of the accident, he having gone ahead, as before mentioned.

The question of what is the proper number of men to constitute a train crew working in a yard, as these men were, and what is the safe and proper mode of carrying on the operation then in progress, is not one upon which a jury can be permitted to trust to their own knowledge or lack of knowledge, or, in other words, merely to conjecture. There must be evidence from witnesses duly qualified to express an opinion, from whose testimony the desired inference of negligence can reasonably be drawn—otherwise, of course, the case fails.

Several railway men of experience were in the witness box—men who had experience—and they all, with the utmost unanimity, said that the operation in question was being carried on at the time of the accident in the usual way, and with the usual and sufficient help, and there is no evidence to the contrary. Moreover, what was being done was according to the usual practice in the defendants' yard, with which the deceased, who had been in the yard for a long time, was perfectly familiar; it was, indeed, the daily routine, without an exceptional circumstance.

There was, in my opinion, a total lack of evidence proper for the jury in support of the only finding of negligence which appears; and, for this reason, the appeal should be allowed and the action dismissed, both with costs, if demanded.

APRIL 18TH, 1910.

WALKER v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Passenger Alighting from Train—Absence of Invitation—Evidence.

Appeal by the defendants from the judgment at the trial in favour of the plaintiff, upon the findings of a jury, in an action by a passenger upon the defendants' railway to recover damages for injuries sustained by being thrown under a car while alighting from a train at Dundalk, by reason, as he alleged, of the defendants negligently starting the train without giving him time to alight.

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

I. F. Hellmuth, K.C., and Shirley Denison, for the defendants.

W. E. Raney, K.C., and I. B. Lucas, K.C., for the plaintiff.

The judgment of the Court was delivered by OSLER, J.A.:—In my opinion, the plaintiff has failed to prove that there was any negligence in the management of the train.

The accident happened on the 13th July, 1908. The action was not brought until the 26th June of the following year. The plaintiff's case, as put forward at the trial, differing, as regards the negligence relied upon, from the way in which it had been alleged in the statement of claim, was that he was travelling on a long excursion train consisting of 16 cars going south from Owen

Sound to Dundalk; that the train drew up and stopped at Dundalk for 5 or 6 minutes, but not long enough for all the passengers to alight; that he determined not to get off with the crowd, but to wait until the train should stop, as he seemed to have expected it to do, nearer to a switch or highway crossing, 500 to 800 feet south of the station. The train proceeded in that direction, the plaintiff being then (apparently unnecessarily) on the platform of the car, and, as it stopped for the second time, he was in the act of getting off, standing with one foot on the 2nd step of the platform, when it gave a jerk or shunt backward, which threw him off, and the wheel of the next car went over his leg, severing his foot.

Apart from the plaintiff's difficulty in maintaining the action arising from the fact that he was standing on the platform or steps of the car while the train was in motion after the first stop, the evidence appears to me to point conclusively to the fact that the plaintiff was attempting to get off before the train had come entirely to a stop, and that the jerk or jolt to which he attributes his fall was nothing more than the usual jar or jolt which, especially in a long train of cars, is caused by the release of the brakes in the ordinary course of the management and stoppage of the train. There is no evidence that it was caused after the stop by a proceeding to move the cars reversely for the purpose of shunting or entering the switch or otherwise. The movement is not properly described as a shunt or backing-up. Brady, a witness for the plaintiff, describes it as a jolt—a jolt back a little—no more than a flutter—just a jolt. McAllister, another witness, speaks of it as a jerk, just the faintest bump back, and Thomas Wilson, who had got off at the first stop and saw the second, and the plaintiff's accident, said the people started to get off before the jolt back. He speaks of it as a little jolt; that it was just a matter of moments before the jolt took place. The train was standing just a moment or a second; it was done almost immediately. It did not stand long enough for any one to get off before the jolt came. It came almost at once, following the halt. Asked how he accounted for the jolt, he said he has seen a good many trains coming to a halt do the same thing, not so often on a train of three or four coaches, but with a long train it does it nine times out of ten, or any time jolts back along the length of the train.

From this evidence it appears to me that the proper conclusion is that the train had not come to a complete stop so as to warrant the plaintiff in attempting to alight; in other words, that there was no invitation to alight at the moment when he met with his accident, the stop not being complete.

I do not see how on these facts there was anything from which a jury could properly infer negligence. The accident was really caused by the plaintiff having negligently placed himself in an improper situation in which he was liable to be thrown down in the course of the ordinary management of the train.

There was an extraordinary conflict of evidence as to the length of time occupied by the first stop, the plaintiff and some of his witnesses saying that it was only 5 or 6 minutes at the most, while the train hands and other employees say that it stopped 15 or 20 minutes, long enough for all the passengers to debark, and that the accident happened while the train was moving down after that stop, to take the switch. It is clear that all and probably a very considerable number of the passengers did not get out at the first stop, and there is evidence that this must have been known to the persons in charge, but the accident did not happen there or then. The train, I should infer, did move further on for the convenience of the occupants of cars which did not stop opposite the station platform; and there was another stop; but that, as I have said, taking the whole of the evidence for the plaintiff, was not completed, and the plaintiff suffered because he was attempting to get off prematurely.

I think the appeal should be allowed, with costs if demanded.

APRIL 18TH, 1910.

PERDUE v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Licensee—Evidence—Absence of Negligence —Extent of Duty Owed to Licensee — Person Injured—Attempt to Get on Moving Train — Injury by Contact with Truck Left on Platform.

Appeal by the plaintiff from the judgment at the trial before MACMAHON, J., and a jury, whereby the plaintiff's action was dismissed, upon the ground that the plaintiff had failed to prove that the defendants had been negligent on the occasion in question.

The plaintiff was a labourer in the employment of the Toronto Construction Co., contractors for the grading of a portion of a new line of railway then being constructed by the defendants. By the agreement between the defendants and the construction company, the defendants supplied the engine, the cars, and the train-crew used in the grading operations. Upon one of the flat

cars was a machine called a "Ledgerwood" used to unload earth and other material; and the plaintiff was in charge of this machine.

On the 23rd September, 1907, the construction train, which had been working to the north of Bala station, backed down to that station to obtain a supply of water for the use of the engine, and, while the engine-driver and conductor went into the station-house for orders, to enable the train to pass the station and proceed to the tank, the plaintiff alighted from his post on the flat car with the "Ledgerwood," and stood upon the platform until the train started towards the tank. He then, when the train was in motion, and going at least 5 miles an hour, attempted to get on board by putting his foot upon the truss-rod and grasping with his hand a part of the machinery of the "Ledgerwood" with which to pull himself up, and, while in that position, he came in contact with a baggage truck which was standing on the platform, with the result that his leg was broken.

The acts of negligence complained of in the pleadings were: (1) the truck; (2) inviting the plaintiff to board and starting too soon; (3) appliances for boarding the train imperfect and out of repair.

There was no conflict of evidence. The only witness called at the trial as to the occurrence itself was the plaintiff. A discussion arose at the trial as to the admissibility of the defendants' rules for the operation and management of trains, but, by consent of counsel, the rules were admitted before the Court of Appeal.

MacMahon, J., held that the plaintiff had failed to establish negligence against the defendants, and that he was himself negligent in attempting to board the train when in motion, and dismissed the action.

The appeal was heard by Moss, C.J.O., Osler, Garrow, and Maclaren, JJ.A.

E. F. B. Johnston, K.C., and B. F. Justin, K.C., for the plaintiff.

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants.

The judgment of the Court was delivered by Garrow, J.A.:—No one invited the plaintiff to alight. He knew the stop was to obtain orders, and would probably only be momentary. He had no business to transact with the defendants, nothing except idle curiosity, as he himself admits, to induce him

to alight. It is not even clear that those in charge of the train knew that he had alighted, although he may have been standing, as he says he was, within sight of the conductor, who was doubtless busy with his own affairs and may not have observed him. And no one invited him to get on board. What he says occurred is that when the conductor came out of the station-house he said, "it is all right" to the engine-driver, and then gave the "high all" signal to proceed. The plaintiff waited on the edge of the platform until his car came forward, and then attempted to get on board. He made no attempt to use the steps, which, indeed, he says he never used, and he was, therefore, not injured because of their damaged condition. Nor, in my opinion, have the defendants' rules anything to do with the question. The train was not a passenger train, nor was the plaintiff in the position of a passenger; nor was he injured by any peculiar movement or operation of the train, whether contrary to the rules or otherwise, but solely by coming into contact with the truck; and the only question in the case, in my opinion, is, can he complain of that.

The maxim res ipsa loquitur, the application of which is practically confined to the question of the burden of proof, cannot, I think, be invoked in the plaintiff's favour. The plaintiff was bound to give reasonable evidence of two things: (1) the nature and extent of the duty, if any, owing to him by the defendants in the circumstances; and (2) the facts which constituted the alleged breach of such duty. Negligence, of course, presupposes a duty to take care, for, if there is no duty, there can be no negligence, however carelessly one may use his own property.

Now as to the duty, the facts, in my opinion, establish that the true position of the plaintiff was at the best that of a mere licensee. He came upon the platform, from his post of duty on the car, entirely for his own purposes. The duty of the owner of premises to a person in that position is a very narrow one, speaking somewhat generally, practically confined to two classes of things: one, that he shall not be exposed to a trap or other concealed danger; the other, that the owner shall not be guilty of what may be called acts of active negligence. In other respects, the licensee must at his own risk use the premises as he finds them: see Gautret v. Egerton, L. R. 2 C. P. 371; Bolch v. Smith, 7 H. & N. 742; Nightingale v. Union Colliery Co., 35 S. C. R. 65; Lowery v. Walker, 26 Times L. R. (C.A.) 108; Graham v. Toronto Grey and Bruce R. W. Co., 23 C. P. 541; Blackmore v. Toronto Street R. W. Co., 38 U. C. R. 172.

The accident occurred in broad daylight. The truck was plainly visible. How long it had been where it was, or who had

placed it there, was not proved, and the lack of such proof constitutes a serious defect in the plaintiff's case; for the mere temporary presence of a truck on the platform would not in itself necessarily be any evidence of negligence, even in favour of a passenger, to whom a much higher duty is owing. But, assuming that evidence had been given that the truck had been carelessly left where it was, under circumstances of which a passenger might have complained, I would still be of the opinion that the plaintiff could not complain, unless upon proof that the defendants or their servants had negligently done, or avoided doing, something to bring about the contact which injured him. It certainly was not negligent, nor evidence of negligence, to start up the train in order to proceed to its destination at the tank. The plaintiff was perfectly safe on the platform after he knew that the order to start had been given, and nothing required him to jump upon the moving train.

The defendants were not, I think, bound to anticipate that he would probably do such a foolish thing. And there is no evidence that, after he had voluntarily placed himself in that perilous position, the defendants could, by the exercise of reasonable diligence, have done anything to prevent the accident.

The appeal fails, and should, in my opinion, be dismissed with costs, if demanded.

APRIL 18TH, 1910.

*RE ONTARIO BANK.

BANK OF MONTREAL'S CLAIM.

Banks and Banking—Contract between Banks—Advances Made by one Bank to the other—Pledge or Sale of Assets—Bank Act, secs. 99-111 — Application of — Construction and Validity of Contract—Claim Made in Winding-up of Bank—Powers of Bank—Authority of Directors.

Appeal by the liquidator of the Ontario Bank and by W. J. McFarland and others, shareholders of the bank, from an order of BRITTON, J., affirming the decision or ruling of an Official Referee with respect to the mode of proof of the claim preferred by the Bank of Montreal as a creditor of the Ontario Bank.

In the course of the inquiry by the Official Referee into the claim of the Bank of Montreal, a question was raised as to the form of the claim and as to the nature of the proof in support of

* This case will be reported in the Ontario Law Reports.

it, turning upon the terms of a certain agreement between the banks, the validity of which was questioned on behalf of certain shareholders.

The Referee, with the consent of counsel representing all parties concerned, proceeded to determine in limine the question whether or not the agreement was valid and binding, in whole or in part, upon the Ontario Bank and its shareholders, and be determined and found that it was valid and binding so as to form a sufficient basis for taking the account.

The only substantial objection to the validity and binding effect of the agreement was that it was in reality a transaction of sale by the Ontario Bank and a purchase by the Bank of Montreal of the assets of the first-named bank; that it fell within the provisions of secs. 99 to 111, inclusive, of the Bank Act, and was not legally made or legally consummated in accordance with those provisions; and was ultra vires.

The Referee was of opinion that the transaction did not fall within those sections; that it was an arrangement which was within the powers of the board of directors to enter into; that it was binding; and that the Bank of Montreal was entitled to make proof of its claim against the estate of the Ontario Bank upon the footing of it.

The appeal was heard by Moss, C.J.O., Osler, Garrow, and Maclaren, JJ.A.

J. Bicknell, K.C., and G. B. Strathy, for the liquidator.

I. F. Hellmuth, K.C., J. A. Paterson, K.C., and Glyn Osler, for W. J. McFarland and other shareholders.

W. Nesbitt, K.C., J. J. Gormully, K.C., and J. A. Worrell, K.C., for the Bank of Montreal.

Moss, C.J.O.:— . . . No question arises of priority over other creditors: neither does any question as to the right of the Bank of Montreal to a preferential or privileged claim against the assets. The claim is simply as a creditor of the Ontario Bank now in course of liquidation in due course of law.

It is, of course, common ground that the transaction in question was not carried through in conformity with the requirements of the above-mentioned sections of the Act. The question is, whether it was of such a character as to call for compliance with those requirements. . . .

There was no intention on the part of any of the parties concerned to enter into and carry out a transaction which would involve recourse to the provisions of these sections.

The circumstances in which it was entered into, the utter inability of the Ontario Bank to make immediate provisions for meeting or redeeming the circulation, the failure of efforts towards an arrangement for amalgamation with the Royal Bank of Canada, the obvious impossibility of inducing any bank, with knowledge of the condition of affairs, to enter into any such arrangement, and the urgent necessity for speedy and effective action, the only means by which the effects of the impending calamity could be minimised and made to entail the least possible loss to the shareholders, repel any such notion. It is manifest that nothing was further from the minds of the parties than the intention, at this time, when prompt and immediate measures were imperatively called for, to do something which would have the effect of tieing up all the affairs of the bank until the sanction of the shareholders and the Governor in council could be obtained.

It is also abundantly clear that the transaction was beneficial and advantageous alike to the depositors, the holders of bills and notes in circulation, and the other creditors, and to the shareholders. . . . That in entering into it the directors acted in good faith and in what they believed to be in the best interests of the bank and its shareholders, seems beyond question.

Was it one within the scope of their powers and authority?

The arrangement is evidenced by the instrument dated the 13th October, 1906, under the corporate seals of the respective banks. And from it must be gathered, if it is to be gathered anywhere, the conclusion that the transaction was as contended for by the appellants. A fair reading of the whole instrument, giving to each part its proper effect in relation to the remainder, and bearing in mind the evident object and intention of the parties, leaves no reasonable doubt as to its meaning and effect.

The strongest ground in favour of the appellants' contention is the use, in No. 2 of the operative clauses, of the expression "purchase by way of discount and of rediscount at the rate of 6 per cent." But, if these words are inconsistent with the general aim and scope of the instrument, not much force is to be attributed to them, and they should not be permitted to govern. But in truth they are not inconsistent, for they merely describe a species of dealing with a particular class of securities which is quite as consistent with a pledge as an absolute sale. It was just as necessary for the purposes of a pledge for advances, as for the purposes of a sale out and out, that the property in and control of the securities should be vested in the Bank of Montreal. And to speak of a purchase by way of discount is simply to state the effect in law of discounting. . . .

[Reference to Hart on Banking, 2nd ed., p. 617; Fleckner v. Bank of the United States, 21 U. S. (8 Wheaton) 338, 350.]

Every other clause is consistent with the idea of advances, and some are entirely at variance with the notion of a sale of assets and nothing more. Many of the ordinary elements of a sale and purchase are not to be found, which it is inconceivable would be omitted if that was the intention.

The power of persons carrying on the business of banking to obtain advances and to transfer by way of pledge such assets and securities as are required, has long been recognised. It is a necessary incident of the business of banking. . . .

[Reference to Lindley on Companies, 6th ed., p. 289; Bank of Australasia v. Breillat, 6 Moo. P. C. 152.]

There is nothing in the Bank Act which affects or controls that general power, which is really a part of the general law merchant.

As the Referee has pointed out, a bank, in addition to all the specific matters set forth in sec. 76 of the Bank Act, is authorised to engage in and carry on such business generally as appertains to the business of banking. And, by secs. 19 and 29, the board of directors is invested with wide and extensive powers of management and disposition over the stock, property, affairs, and concerns of the bank and over all such matters as appertain to the business of a bank. These properly and naturally draw to them the essential powers and authority to take such steps as may seem necessary to protect the interests of the bank, and, amongst others, to obtain such advances as may appear to be called for by the necessities of the occasion.

It was, therefore, not beyond the power of the Ontario Bank, or the authority of its board of directors, to enter into an arrangement with the Bank of Montreal whereby that bank should advance the funds necessary to meet the calls made upon the other, and to enter into such suitable and necessary engagements as were proper to secure the reimbursement of such advances. And such was and is the nature of the agreement in question. If that be so, it seems unnecessary to inquire whether some of its provisions were such as could be enforced against the Ontario Bank.

They appear to have been designed with a view of conserving the resources of the Ontario Bank and disposing in the most advantageous manner of the available assets. . . .

Appeal dismissed with costs.

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

[MACLAREN, J.A., is to give reasons in writing.]

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. APRIL 5TH, 1910.

REX v. AKERS.

Liquor License Act—Conviction—Imprisonment—Period of Detention — Blank in Summons — Direction as to Payment of Costs—Sufficiency—Information Taken by Police Magistrate —Conviction by two Justices—Jurisdiction—Request—Implication—Habeas Corpus—Refusal—Appeal to Divisional Court.

Appeal by the defendant from the order of BOYD, C., in Chambers, ante 585, refusing a writ of habeas corpus and a writ of certiorari in aid, looking to the defendant's discharge from the common gaol of the county of Hastings under a warrant of commitment pursuant to a conviction for an offence against the Liquor License Act.

The hearing and conviction were before two justices of the peace, the information having been laid before a police magistrate, whose illness or absence or request to them to act for him did not appear on the face of the subsequent proceedings.

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

J. B. Mackenzie, for the appellant, contended (inter alia) that what appeared to have occurred in connection with the granting and sending on the summons to the defendant, taken with its framing, was not equivalent to a request by the police magistrate to the justices to act for him in the later proceedings.

THE COURT, upon this contention and the other points raised on behalf of the defendant before the Chancellor, held that there was probable ground for the issue of the writs, and directed them to issue accordingly.

The right of the defendant to come before a Divisional Court by way of appeal was not combatted.

DIVISIONAL COURT. APRIL 14TH, 1910.

HADLEY v. WESTMAN.

Municipal Water Commissioners — Status and Qualification — Right of Ratepayer to Attack — Contract of Water Taker— "Flat" Rate of Payment—Duration—Termination—Notice.

Appeal by the plaintiffs from the judgment of CLUTE, J., at the trial, dismissing the action.

Action by ratepayers of the city of Chatham to restrain the defendants, as water commissioners, from stopping the plaintiffs' supply of water. The plaintiffs alleged a contract for a continuous supply of water to their factory at a specific price of $65 per year, and denied the defendants' right to install a meter in their (the plaintiffs') premises and to compel the plaintiffs to pay for their supply according to the meter indications, and, in default of the plaintiffs consenting, to turn off the water.

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

M. Wilson, K.C., for the plaintiffs.

O. L. Lewis, K.C., for the defendants.

The judgment of the Court was delivered by FALCONBRIDGE, C.J..—It is quite clear that the plaintiffs cannot in these proceedings attack the status or qualification as water commissioners of Chatham of the defendants Westman and Lamont: see Dillon on Municipal Corporations, 4th ed., vol. 2, secs. 892, 1078, and note sub fin. 1079.

In Lewis v. Brady, 17 O. R. 377, it was held that the effect of the defendant (collector of taxes) not having made and subscribed the declaration required by sec. 271 of the Municipal Act, R. S. O. 1887 ch. 184, was not to make his acts void, citing Margate Pier Co. v. Haman, 3 B. & Ald. 266, and Rex v. Justices of Herefordshire, 1 Chit. 700. . . .

[Reference also to Town of Peterborough v. Hatton, 30 C. P. 455, 461; Martin v. City of St. Catharines, 13 O. W. R. 559.]

It is further contended by the plaintiffs that the agreement for a "flat" rate of $65 per year has never been terminated and still exists; that it is on its face indefinite and unlimited in point of time, and therefore perpetual, and that it cannot be rescinded (unless the plaintiffs broke the contract in the use and disposition of the water.)

It would seem to be a startling proposition that by this loose verbal understanding it was agreed that for all time, and notwithstanding possible future extensions of the premises and buildings of the plaintiffs or their successors, a "flat" rate only should be imposed.

The learned trial Judge has dealt with this as a question of fact, and he has, in my opinion, determined it rightly, on the basis of the written documents—the application and permit, etc. He has also rightly found that the defendants have given reasonable notice, and in other respects acted reasonably.

It is further contended by the defendants that there is abundant evidence that the plaintiffs had broken the contract before the defendants took action; but I consider it unnecessary to pass upon that question, in view of the above conclusions.

In my opinion, the appeal should be dismissed with costs.

MEREDITH, C.J.C.P. APRIL 15TH, 1910.

RE GRAHAM.

Settled Estates Act — Sale of Land — Jurisdiction of Court to Order—Powers under secs. 14 and 16—Consent of all Persons Presently Entitled — Improbability of Others Becoming Entitled—Special Circumstances.

Petition by the trustees of the will of the late John Graham, deceased, under the Settled Estates Act, for authority to sell the northerly 32 feet of lot No. 29 and the southerly 14 feet of lot No. 30 on the west side of Yonge street, in the city of Toronto, according to plan No. D. 27.

G. C. Campbell, for the petitioners.

F. W. Harcourt, K.C., Official Guardian, for the children of the devisees.

MEREDITH, C.J.:—The testator, by his will, which is dated the 17th June, 1889, devised to the trustees named in it his whole estate, real and personal, in trust out of the income of it to pay to his wife an annuity of $1,200 for the support and maintenance of herself and of his children until his youngest child should attain the age of 25 years, and to allow his wife to occupy his residence so long as she should remain his widow and a member of the Church of England, and gave power to his trustees to sell and dispose of his real and personal estate upon the youngest child

attaining the age of 25 years; and he directed that, after deducting from the proceeds of the sale a sum which when invested would be sufficient to pay to his wife an annuity of $600 to be paid to her so long as she should remain his widow and a member of the Church of England, the residue of the proceeds of the sale should be divided equally among his five children and any other children he might have who should survive him; he also provided for the sale on the death or marriage of his wife of his residence and furniture, and for a fund to secure the annuity of $600, and the division of the proceeds among his children; and he further provided that, if any child should die before the period appointed for distribution, his or her share should be divided in equal shares between his or her surviving children, if any, and, if none, in equal shares between his own surviving children.

The testator died on the 12th July, 1890, and his wife on the 17th January, 1905.

The testator left surviving him the five children named in his will, all now living, the youngest of whom will not attain the age of 25 years until August next, and all of them are desirous that the application should be granted.

As I understood Mr. Campbell, his contention was that there was jurisdiction in the Court, under sec. 14 of the Act, to authorise the sale, but that is, I think, clearly not so, as the jurisdiction conferred by that section is confined to cases in which the sale is required to be made "for the purpose of raising money to repair, rebuild, or alter any existing buildings upon the remainder of such settled estates, or otherwise to build upon or improve the same, or for the purpose of raising money to pay off and discharge wholly or in part any incumbrances existing thereon;" and no such case is made by the petition.

Section 16 is not so limited, and the Court under it has jurisdiction, "if it deems it proper and consistent with a due regard for the interests of all parties entitled under the settlement," to authorise a sale of the whole or any part of the settled estate.

Under the special circumstances of this case, and having regard to the fact that all the persons presently entitled to the estate are desirous that the proposed sale be carried out, and the further fact that as soon as August next arrives they will become absolutely entitled, and there is therefore but little chance of the children of any of them becoming entitled, I may, I think, properly determine that the case is brought within sec. 16, and I so determine and authorise the proposed sale accordingly.

It may be proper to observe that sec. 16 is taken from the English Settled Estates Act of 1877, 40 & 41 Vict. ch. 18, and is

sec. 16 of that Act; that sec. 14 is not to be found in the English Act; and that that section, so far as a sale is concerned, covers in part the same ground as sec. 16.

The order must provide for payment into Court of the cash payment, and the mortgage for the unpaid purchase money must be made to the Accountant. The costs of all parties will be paid out of the purchase money, and the costs of the petitioners will be taxed as between solicitor and client.

DIVISIONAL COURT. APRIL 16TH, 1910.

*STANDARD CONSTRUCTION CO. v. WALLBERG.

Conditional Appearance—Rule 173—Refusal of Leave—Discretion—Appeal—Defendant Residing out of Ontario—Service out of Ontario—Con. Rule 162—Place of Making Contract—Jurisdiction.

An appeal by the defendant Wallberg from an order of FALCONBRIDGE, C.J.K.B., ante 608, affirming an order of the Master in Chambers, ante 527, dismissing the appellant's motion for leave to enter a conditional appearance.

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

M. Lockhart Gordon, for the appellant.

G. F. McFarland, for the plaintiffs.

MIDDLETON, J.:—A contractual liability is personal, and therefore ambulatory with the person, so that an Ontario Court has jurisdiction, no matter where the contract was made, or between whom, if service can be effected. Service can be made upon any defendant within Ontario, even though he be a foreigner only temporarily within the jurisdiction. Whether the service can be made out of Ontario is a question which for Ontario Courts must be determined by the statutes and statutory Rules in force here. Whether such statutes and Rules are within the principles of international comity is a question which the Courts of Ontario can not entertain: Western, etc., Co. v. Perez, [1891] 1 Q. B. 304. A foreign Court will, no doubt, regard a judgment obtained against a non-resident as entitled to no extra-territorial recognition: Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670; Emanuel v. Symons, [1908] 1 K. B. 302; Deacon v. Chadwick, 1 O. L. R. 346. But the validity of the judgment in the

* This case will be reported in the Ontario Law Reports.

country of the forum by which it is pronounced is expressly recognised in the case in [1894] A. C. at p. 684.

It was argued that the English cases could not be applied in Ontario, because, while the Imperial Parliament has plenary jurisdiction, the legislature of Ontario cannot make laws having any extra-territorial effect. The answer is obvious: the provision has no extra-territorial effect. The Courts of Ontario can only authorise the taking in execution of the defendant's assets within the province; and the enforcement of civil rights is undoubtedly within the ambit of provincial jurisdiction.

Upon the material, there can be no doubt that a case is shewn within the provisions of Con. Rule 162. This being so, there is no reason why a conditional appearance should be entered. The power to allow a conditional appearance should only be exercised where it is doubtful if the plaintiff can bring himself within the Rule by reason of the facts being in issue. Conditional appearance is the modern substitute for the undertaking formerly required of the plaintiff, in cases of doubt, to submit to nonsuit if he fail to establish a case within the Rule. . . .

The right to serve out of Ontario in cases within the Rule is not absolute, but depends upon the exercise of a sound discretion. . . . Justice and convenience demand a trial here.

Appeal dismissed; costs to the plaintiffs in any event.

BOYD, C., said that Rule 173, providing that a conditional appearance may be entered by leave, imports a discretionary power to grant leave, and no sufficient ground had been made to appear for reversing the orders below. He agreed with Middleton, J., as to the general law and the facts of the case.

LATCHFORD, J., concurred.

BRITTON, J.

APRIL 21ST, 1910.

RE CRONIN.

Will—Construction—Bequest for Perpetual Care of Grave—Validity — Bequest of Residue to Executors — Precatory Trust — Charitable Object Unspecified—Bequest Void for Uncertainty.

Application by the executors under Rule 938 for an order declaring the construction of the will of John Cronin, deceased.

T. J. Rigney, for the executors.

J. L. Whiting, K.C., for the next of kin.

BRITTON, J.:—John Cronin died on the 24th March, 1909. His will, dated the 19th November, 1908, contains the following clauses in reference to which the opinion and advice of the Court is asked:—

"(3) I direct that my said executors purchase a lot in St. Mary's cemetery, Kingston, that my body be buried therein, and that a sum sufficient be set aside and expended to provide for the perpetual care of my grave."

"(7) The rest and residue of my estate I leave to my said executors absolutely, to use as they deem best, trusting that they may spend the same upon some charitable object, or objects, but I leave their discretion absolutely unfettered as to this."

I am of opinion that the direction in clause 3 is valid, and that a sum reasonably sufficient for the purposes mentioned may be used and appropriatel by the executors out of the estate.

If the governing body of St. Mary's Cemetery, Kingston, undertake the "perpetual care of" graves within its limits, then the executors may pay to them such reasonable sum as may be required for such care of testator's grave.

A careful perusal of the will satisfies me that the testator did not intend to give the residue of his estate to the executors for their own use.

By clause 6 he bequeathed to each of the executors the sum of $100, "exclusive of their commission."

In clause 7 the words are, "I leave to my said executors absolutely, to use as they deem best, trusting," etc. It was not to be for the executors personally but to be used by them,—the testator "trusting," that is to say, hoping, expecting, believing that the executors would "spend the same upon some charitable object or objects," but as to what the object or objects would be, the discretion of the executors was to be absolutely unfettered.

The construction I place upon this clause is that the residue should be absolutely used upon and for some charitable object or objects.

No trust is created in favour of any particular charity, and so the gift of residue is not "a good charitable bequest," but is void for uncertainty.

The conclusion being reached that the executors do not take for their own use, In re Davidson, Minty v. Bourne, [1909] 1 Ch. 567, seems clear authority that the gift of the residue is void for uncertainty.

Costs of all parties out of the estate.

UPPER ONTARIO STEAMBOAT CO. v. CAHILL—MEREDITH, C.J.C.P.—APRIL 15.

Reference for Trial—Report—Motion for Judgment—Practice—Costs.]—By order of the Court the action was referred for trial to a District Court Judge, as special Referee, under sec. 121 (b) of the Judicature Act, and the costs of the application and order were reserved. The Referee made his report finding that there was due by the defendants to the plaintiffs $280.45, and awarding the plaintiffs costs of the action on the High Court scale, and finding also that nothing was due by the plaintiffs to the defendants in respect of their counterclaim. Upon motion by the plaintiffs for judgment in accordance with the report and for the costs reserved by the order of reference, it was held that the course pursued by the plaintiffs of moving for judgment was in accordance with the practice; and judgment was granted for the plaintiffs for the amount found due to them with costs on the High Court scale, including the costs of the order of reference, and dismissing the defendants' counterclaim. H. W. A. Foster, for the plaintiffs. No one for the defendants.

MCKNIGHT v. ROBERTSON—DIVISIONAL COURT—APRIL 15.

Contract — Construction of — Payments Made under.]—The order of the Divisional Court, ante 469, was varied by the Court, and as varied is as follows. Appeal allowed with costs up to and inclusive of the trial and of the appeal, and the judgment below varied so as to provide for a reference to the Master to ascertain what sums of money should have been paid to the plaintiff as reasonable for his care during his illness for the period covered by the claims mentioned in the plaintiff's statement of claim, and that for such sums as may be found by the said Master the plaintiff should have judgment against the defendant, inclusive of the costs of the reference. E. Meek, K.C., for the plaintiff. G. Lynch-Staunton, K.C., for the defendant.

DYMENT v. HOWELL—BRITTON, J.—APRIL 18.

Mortgage — Security for Maintenance — Lease of Farm.]—Action to enforce a mortgage made by Daniel Dyment, now deceased, upon land in the township of Ancaster, to secure the carrying out of an agreement for the maintenance of the deceased's father and mother. Daniel and his father both died in 1904.

The executors of Daniel were unable to rent the farm, reserving a room for the mother; but they rented it for $200 a year, without that reservation, the mother joining in the lease. The entire rental, except what was necessary to pay the interest on the first mortgage, was paid to the mother for her maintenance. She alleged that this was not sufficient, and brought this action against the executors of her son and his widow and child, asking to have the farm sold and the purchase money applied for her maintenance. The lease was renewed till the 1st May, 1911, the plaintiff consenting to the renewal. In these circumstances, the action was dismissed without costs as against the plaintiff. The costs of the defendant to be paid out of the estate upon its being wound up in accordance with the will of Daniel Dyment. A. M. Lewis, for the plaintiff. W. E. S. Knowles, for the defendants.

FARQUHAR v. ROYCE—MASTER IN CHAMBERS—APRIL 21.

Pleading — Counterclaim — Consistency — Convenience — Amendment—Practice.]—Motion by the plaintiff to strike out the counterclaim of the defendant against the plaintiff and one Mullins. The action was for damages for breach of an alleged contract by which the plaintiff was to have the right up to a certain date to remove sand and gravel from land sold to the plaintiff, the plaintiff alleging that the defendant had refused to allow removal. The defendant denied the contract, and counterclaimed for damages for the removal of gravel. Held, that the counterclaim was not inconsistent with the defence and was such as might properly be set up and conveniently tried with the action. Evans v. Buck, 4 Ch. D. 432, cited by the plaintiff, was considered inapplicable. The counterclaim was filed a day late, and the defendant wished to change the name of "Mullins" to "Mullin." Order allowing amendment and validating the counterclaim as of the day of filing. Motion otherwise dismissed. Costs in the cause. W. E. Mackay, for the plaintiff. R. B. Henderson, for the defendant.

CORRECTION.

On p. 589, ante, third line from bottom, for "Crawford" read "Cameron."