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APPELLATE DIVISION.

DECEMBER 7TH, 1914.

RE JESSOP AND JESSOP.

Mines and Minerals—Interest in Mining Claims—Husband and Wife—Evidence—Decision of Mining Commissioner — Appeal.

Appeal by T. Harvey Jessop from a decision of the Mining Commissioner of the 1st October, 1914.

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

W. R. Smyth, K.C., for the appellant.

A. G. Slaght, for the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The parties are husband and wife, and the claim of the appellant is, that he is entitled to certain interests in six mining claims recorded in the name of his wife, and one recorded in the name of H. Routley, who holds one-quarter interest for the wife.

We are of opinion that the husband failed in making out his case, and that the decision of the Commissioner should be affirmed.

The right of the appellant to a share in these interests or to have it determined that they belong to a partnership between his wife and him was denied by the respondent, who also denied that any such partnership existed.

Counsel for the appellant contended that certain expressions in letters which were written by him to his wife shew that they were jointly interested in the claims. Whatever might have been

the force of this contention if the letters had been written by one stranger to another, written as they were by a wife to her husband the expressions relied upon mean no more than that her husband was interested in the ventures, just as any husband is interested in the ventures of his wife, and are not to be taken to indicate that the respondent was treating her husband as having any proprietary interest in the claims.

It was also contended that in giving her evidence before the Commissioner the respondent admitted the right of her husband to a share in the claims; but that is not the effect of her evidence. She did not admit any right of her husband to a share, but conceded that he had a moral right to a share, and said that she was willing to give him an interest, if the interest were so settled that he could not waste it, and if provision were made that she should have the control of the disposition to be made of the claims—a prudent safeguard, I think, in view of the habits of the appellant. That offer was not accepted, and is, of course, not binding on the respondent.

Appeal dismissed with costs.

DECEMBER 7TH, 1914.

*LIVINGSTON v. LIVINGSTON.

Partnership—Account—Profits of Separate Business Carried on by one Partner—Assent of other Partner—"Competing" Business—Sale of Property of Firm after Death of one Partner—Purchase by Trustee for Surviving Partner—Adequacy of Price—Liability to Account for Profits on Resale—Allowance to Surviving Partner for Services in Liquidation—Trustee Act, sec. 40—Trustee—Express Trustee.

Appeal by the plaintiffs and cross-appeal by the defendant from the order of MIDDLETON, J., 26 O.L.R. 246, 3 O.W.N. 1066.

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

Wallace Nesbitt, K.C., H. S. Osler, K.C., and Christopher C. Robinson, for the plaintiffs.

I. F. Hellmuth, K.C., and J. H. Moss, K.C., for the defendant.

*To be reported in the Ontario Law Reports.

MEREDITH, C.J.O.:—. . . The matters to which the appeal and cross-appeal relate may be referred to as: (1) the Yale business; (2) the Wuerth Haist & Co. business; (3) the oil mill property; (4) the defendant's claim for commission. . . .

The argument of counsel has failed to satisfy me that the conclusion of my brother Middleton as to the Yale business is erroneous.

It is, no doubt, clear law that a partner must account to his firm for the profits made by him in any business of the same nature as and competing with that of his firm, if he carries on any such business without the consent of his partners.

I share the doubt of my brother Middleton as to the Yale business being of the same nature as and competing with the partnership business; but, assuming it to have been, the evidence, in my opinion, establishes that it was carried on with the consent of John Livingston. . . .

In my opinion, the appeal fails and should be dismissed.

My brother Middleton dealt with the Wuerth Haist & Co.'s business in the same way as with the Yale business, under the mistaken belief that it was conceded that the same considerations were applicable to both of them. There was no evidence of any consent by John Livingston to his brother engaging in the Wuerth Haist & Co. business on his own account, and it was not even shewn that John knew or had any reason to think that James was interested in it.

I would, therefore, reverse the order of my brother Middleton as to that business, and allow the referee's report as to it to stand.

I agree with the conclusion of my brother Middleton as to the liability of the defendant with respect to the oil mill property, but I am not able to agree with his reasons for that conclusion. The view of my learned brother is, that the purchase of that property, though in form by Erbach, was in fact a purchase by the defendant, but that, the property having been afterwards, and before the transaction was attacked, transferred by Erbach to an incorporated company . . . at the same price as that for which it was sold to Erbach, there was no profit on the resale to be accounted for; that, nevertheless, the defendant would have been liable to account for the real value of the property, but that there was no liability on that basis because the Referee has found that it was sold for its full value, and that finding has not been appealed from.

My learned brother appears to have thought that the Referee

found that the defendant was in truth himself the purchaser, and that Erbach was a trustee for him. I do not so understand the Referee's finding, which is: "It seems to me that the whole legal effect of what was done must hinge upon the fact that he had financed the whole scheme, and that, excepting for his arrangement with the bank, the scheme could not have been carried out. In this view of the evidence, I must find that the defendant was in fact the purchaser at the sale in question, and that he must account to the estate for what he received for the property when it was sold by the . . . company which he controlled and practically owned."

As I understand this finding, it is not that the defendant was in fact the purchaser, but that, by the application of some supposed legal principle, the fact that "the defendant financed the whole scheme, and that, excepting for his arrangement with the bank, the scheme could not have been carried out," made it necessary for the Referee to find that the defendant was in fact the purchaser.

I know of no such legal principle, and am quite unable to understand why it was not open to the defendant, both as a matter of morals and a matter of law, to provide the money which the purchaser required to enable him to acquire the property and carry on the business. The defendant had as large an interest in the property as the representatives of his deceased brother, and surely there was nothing wrong in his providing the money to enable the purchaser to buy, and by so doing prevent the property being sacrificed. No case was cited in support of the Referee's view of the law, and I should be surprised to find any case which gives countenance to the view that a surviving partner who lends his credit to a bonâ fide purchaser of partnership property is to be held to be for that reason the real purchaser, even though the purchase would not and could not have been made but for the lending of his credit. In saying this, I am not dealing with a case in which the partner is to share in the profits, but only with that of a bonâ fide lending of his credit by the partner to a real purchaser.

I am unable, in view of the facts . . . , to agree with the view of my learned brother that the conclusion is "irresistible that Livingston was in truth the purchaser." . . .

This disposes of all the grounds of the appeal of the plaintiffs, and there remains to be considered the cross-appeal of the defendant.

That, unless entitled to it under the provisions of the Trustee Act, the defendant is clearly not entitled to compensation for his

services in winding up the affairs of the partnership, was not disputed by his counsel; but it was argued that the defendant was, in respect of these duties, a trustee, and therefore entitled to compensation under the provisions of the Trustee Act. I am unable to agree with that argument, and am of opinion that the defendant was not a trustee—not even an implied or constructive trustee. . . .

[Reference to Knox v. Gye (1872), L.R. 5 H.L. 656, 675, 676, 679; Bank of Scotland v. Macleod, [1914] A.C. 311, 324; Farrars v. Farrars Limited (1888), 40 Ch. D. 395, 410, 411; Omnion Electric Palaces Limited v. Baines, [1914] 1 Ch. 332, 347.]

That the duties of a surviving partner with regard to the realisation of the partnership assets are of a fiduciary character is undoubted, but he is not a trustee, and his position is analogous, I think, to that of the promoters in Omnion Electric Palaces Limited v. Baines.

If I had come to the conclusion that the defendant was an implied or constructive trustee, it would have been necessary to consider whether, as respects his services before the Trustee Act came into force (1st June, 1911), he was entitled to the benefit of the provisions of sec. 66 of that Act, for before that Act came into force the right of a trustee to a fair and reasonable allowance for his care, pains, and trouble, and his time expended about the estate, was confined to trustees "under a deed, settlement, or will:" R.S.O. 1897 ch. 129, sec. 40.

For these reasons, I am of opinion that the defendant's cross-appeal fails, and should be dismissed.

The result is, that the appeal of the plaintiffs as to the Yale business and the oil mill property is dismissed with costs, and their appeal as to the Wuerth Haist & Co. business is allowed with costs here and below; and that the defendant's cross-appeal is dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., was of opinion, for reasons stated in writing, that the appeal of the plaintiffs should be allowed with costs as to the Yale and Wuerth Haist & Co.'s businesses; that the order of Middleton, J., should be affirmed as to the oil property without costs; and that the cross-appeal of the defendant as to the question of remuneration should be dismissed with costs.

Order as stated by MEREDITH, C.J.O.; HODGINS, J.A., *dissenting in part.*

DECEMBER 7TH, 1914.

*KOLARI v. MOND NICKEL CO.

Master and Servant—Injury to Servant—Miner Working at Bottom of Shaft — Falling of Bucket and Cross-head — Breaking of Cable—Evidence—Res Ipsa Loquitur—Application of Rule—Onus—Negligence—Defects—Want of Inspection—Damages.

Appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Sudbury dismissing the action, after trial without a jury.

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

J. S. McKessock, for the applicant.

J. M. Clark, K.C., for the defendant company, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover damages for personal injuries sustained by the appellant while employed by the respondent as a labourer in one of its mines.

The appellant, when he met with his injuries, was working as a "mucker" at the bottom of a shaft several hundred feet deep in a mine of the respondent, and his duties were to "muck" and to give the signal for raising the laden buckets, which were moved by electrical power operated upon the surface. The shaft was divided into four compartments, two for the buckets, one for a cage, and the fourth for a ladder-way. The compartment in which the appellant was working was not timbered to the bottom of the shaft. The bucket was lifted by means of a steel cable; and there was a cross-head, weighing according to the testimony of the appellant about a ton, but according to the testimony of the witness Stovel about 400 lbs.; and there was a clip attached to the cable, the purpose of which was to keep the cross-head, as was stated on the argument, ten feet away from the bucket; and there were, at the distance of 100 feet from the bottom of the shaft, stop-blocks intended to prevent the cross-head from descending below that point. While the bucket, which had been filled, was being raised to the surface, the cable broke "right at the bucket," and the bucket and the cross-head

*To be reported in the Ontario Law Reports.

fell to the bottom of the shaft, striking the appellant, who had "got out of the way in a corner;" and it is in respect of the injuries thus sustained that the action is brought. . . .

The learned Judge determined the case on the application of the principle that "where the thing is shewn to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care;" and his conclusion upon the evidence was that the respondent had met this onus, and had shewn that it had exercised proper care; and he, therefore, gave judgment dismissing the action.

I am, with respect, of the opinion, that this conclusion was not well-founded. The evidence of Stovel was most unsatisfactory. Although the accident had resulted in the death of one workman, as well as in causing the appellant's injuries, Stovel, though he was the superintendent in charge, appears not to have taken the trouble to ascertain definitely whether there was more than one break in the cable. . . . There was, besides, no explanation offered as to the cause of the cross-head falling to the bottom of the shaft. . . . It is a proper conclusion from what happened that, if the stop-blocks were there, as probably they were, they were insufficient, and that the respondent was negligent in not having stop-blocks of sufficient strength to withstand the impact of the falling cross-head.

These considerations and the fact that no attempt was made to shew that the cable or the safety devices were ever inspected after April, 1912, lead me to the conclusion that the respondent failed to displace the inference which, if the principle that the learned Judge held to be applicable were applicable, was to be drawn from the happening of the accident. . . .

It was . . . argued by counsel for the respondent that the principle which the learned Judge applied was not applicable; that the . . . rule of evidence res ipsa loquitur does not apply to a case between master and servant; and he cited, in support of his contention, Beven on Negligence, 3rd ed., p. 130.

The cases referred to by Mr. Beven in support of this statement do not, in my opinion, justify as broad a statement as he makes.

If all that is meant be that in cases between master and servant the application of the principle enunciated by the Exchequer Chamber in Scott v. London and St. Katherine Docks Co. (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631, that "there

must be reasonable evidence of negligence, but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care,'' will not, without more, make a case to go to the jury, I agree with his statement of the law. . . .

[Reference to Lovegrove v. London Brighton and South Coast R.W. Co. (1864), 16 C.B.N.S. 669, 692; Hammack v. Williams (1862), 11 C.B.N.S. 588, 596; Cotton v. Wood (1860), 8 C. B.N.S. 568, 571, 572, 573; Toomey v. London Brighton and South Coast R.W. Co. (1857), 3 C.B.N.S. 146, 150; Patton v. Texas and Pacific R.W. Co. (1900), 179 U.S. 658.]

The inference may be drawn from the happening of the accident, in the absence of explanation by the defendant, that it arose from want of care upon the part of the defendant or his servants, but not necessarily want of care for which the master is responsible to his workmen; the master's duty being to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that place and machinery shall be absolutely safe. . . .

[Reference to Haywood v. Hamilton Bridge Co. (1914), ante 231, and to the case there cited of Hanson v. Lancashire and Yorkshire R.W. Co. (1870), 20 W.R. 297, and to Ruegg's Employers' Liability Act, 8th ed., pp. 223, 224.]

The case at bar is, I think, distinguishable from these two cases. Here the defect in the chain, if it was defective, was not a latent one; and, although the general superintendent and the superintendent in charge of the work upon which the appellant was engaged were called as witnesses for the defence, it was not pretended by either of them that there had been any inspection of the hoisting apparatus or its appurtenances. . . .

The proper conclusion, in my opinion, upon the evidence, is, that the falling of the bucket and cross-head was not due to any negligence on the part of the appellant or any of his fellow-servants, but was due to three causes: (1) a defect in the cable; (2) the insufficiency of the clip; and (3) the insufficiency of the stop-blocks; that the defect in the cable might and ought to have been discovered if the cable had been properly inspected; that either there was no inspection provided for or the person charged with the duty of inspecting was negligent in the performance of it; that the insufficiency of the clip and the stop-

blocks was due to the negligence of the respondent or the person who was entrusted with the duty of seeing that these safeguards were properly provided.

I am not of opinion that if it did not appear from which of the three causes I have mentioned the accident happened, but it did appear that it must have happened from one or more of them, even assuming the law to be as stated by Mr. Beven, the appellant fails to make out his case. In other words, I am of opinion that, if the conclusion is warranted that the accident happened from one or more of these three causes or from the combined effect of all three of them, the appellant made a case entitling him to recover.

Upon the whole, I am of opinion that the appeal should be allowed with costs, and that there should be substituted for the judgment which has been directed to be entered a judgment for the appellant for $450 with costs.

The damages were not assessed by the learned Judge, but the evidence amply warrants their being assessed at at least the sum I have named.

Appeal allowed.

DECEMBER 7TH, 1914.

DAWSON v. HAMILTON BRIDGE CO.

Master and Servant—Injury to Servant—Falling of Beam—Defective Hook—Negligence—Evidence—Findings of Jury—Cause of Injury—Negativing Cause not Found.

Appeal by the plaintiff from the judgment of KELLY, J., at the trial of the action at Hamilton with a jury, dismissing it with costs.

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

T. N. Phelan, for the appellant.

S. F. Washington, K.C., for the defendant company, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover damages for personal

injuries sustained by the appellant while in the employment of the respondent, which, as he alleges, were caused by the negligence of the respondent.

The injuries were sustained while the appellant was "in the act of working at a hoist, lifting iron beams with a hook and derrick," and were caused by the beam falling upon him. The fall of the beam, as the appellant alleges, was caused "by the insufficient hook and tackle supplied" by the respondent for doing the work in which the appellant was engaged, "inasmuch as that, while the" appellant "was in the act of lifting large iron beams with the hooks supplied by the" respondent, "the hooks, through age and wear and insufficiency, broke, and allowed the iron beam to fall "over and upon the" appellant (para. 11 of the statement of claim).

The appellant also alleges in his statement of claim (para. 7) that "his injuries were caused by the negligence of the" respondent "in not providing sufficient and safe material with which to carry on his work, and that the tackle and hooks were bad and insufficient, and that the ways, means, and manner in which he was obliged to perform his work and in which" the respondent carried on its work, "were dangerous and unfit for the work therein being performed."

The theory of the appellant which he endeavoured to support at the trial was, that the hook which was attached to the beam for the purpose of its being lifted was defective, and that the fall of the beam was caused by the hook "widening out" so as no longer to operate as a hook.

At the close of the appellant's case, a motion was made on behalf of the respondent to dismiss the action, on the ground that there was nothing to go to the jury. The learned Judge reserved that question, and the case was left to the jury without any evidence being adduced by the respondent.

The jury found, in answer to questions, that the appellant's injuries were caused by the negligence of the respondent, and that the negligence was "by not providing proper protection for the men" (question 3), and they found that the appellant had not been guilty of contributory negligence.

Upon these answers being returned, the learned Judge pointed out to the jury that the answer to the third question was indefinite, and asked them to find "the acts or omissions which resulted in the man not being furnished proper protection;" and, after further consideration, the jury made the following addition to their answer to the third question: "No protection is

provided in case of an accident to chains or other parts, and we would suggest that the workmen should not come in contact with the article being moved, some safety device should be used to enable the workmen to handle heavy weights. We think long heavy weights should have two chains to prevent tipping."

Upon motion being made for judgment, the learned Judge pointed out that, as the fact was, there was no evidence "that two chains would be better than one or even as good as one," and ruled that, both on the ground on which the motion for a nonsuit was based and on the findings of the jury, the action failed, and he directed that judgment should be entered dismissing it with costs.

It was argued by counsel for the appellant that the findings of the jury must be taken to include a finding that the fall of the beam was caused by the widening of the hook, but I am not of that opinion. When asked, "What do you complain of as far as the company is concerned? the appellant's answer was, "I complain of a defective hook on the chain, the hook becoming defective;" and, as appears from the charge of the learned Judge, counsel for the appellant rested his case on the hypothesis that that was the cause of the falling of the beam, and upon that alone; and he contended that the respondent was negligent in not having had the hook inspected; in other words, his case was that the hook was defective, and that the defect could have been discovered if the hook had been inspected. The answers of the jury shew plainly that the jury negatived that hypothesis, and rested their conclusion that the appellant's injuries were caused by the negligence of the respondent, upon the absence of the protection they mention in their answer to the third question.

I cannot imagine that, if the jury had thought that the theory of the appellant as to the cause of the falling of the beam was correct, they would not have found that the defective hook was the cause of it, instead of finding another and different reason for attributing negligence to the respondent.

It does not appear to have been suggested during the course of the trial, and there was no evidence to warrant the conclusion of the jury, that the respondent was negligent for the reason stated in the answer to the third question. As I have pointed out, the appellant's case was, that the falling of the beam was due to the defective hook, and the jury's answer plainly indicates that they were unable to accept that theory, and rejected it, and based their finding of negligence on the view that the consequence of the slipping of the hook might have been avoided

if some protection—but of what nature they do not say—had been provided. As I have said, no such case was made on the pleadings, nor was there any evidence to support it; and the shorthand notes of the proceedings at the trial indicate clearly that such a case was not presented by the appellant's counsel; and the learned Judge, in my opinion, properly directed that judgment should be entered for the respondent.

Having come to this conclusion, it is unnecessary to decide whether there was any evidence to go to the jury; but, however that may be, it is certain that, if there was any, it was of the slimmest character.

Appeal dismissed with costs.

DECEMBER 7TH, 1914.

*ROSE v. ROSE.

Trusts and Trustees—Shares in Commercial Company Held by Trustee for Beneficiaries—Control of Company—Issue of New Shares—Purchase by Trustee for himself—Loss of Control—Depreciation in Value — Removal of Trustee—Conflict between Interest and Duty—Declaration of Trust with Respect to Shares Acquired by Trustee.

Appeal by the plaintiff from the judgment of BOYD, C., at the trial, sitting without a jury, dismissing the action, which was brought to remove the defendant from his position as trustee of certain shares of the capital stock of the Hunter Rose Company Limited, a commercial company, and to declare the defendant a trustee for the beneficiaries under the will of George Maclean Rose of 115 shares of the capital stock of the company which were allotted to the defendant by the directors of the company, subject to a lien on those shares for the amount paid by him to the company for them. Of the shares allotted to the defendant only 74 were in question, that number having been bought by the defendant in July, 1912, at par, from the company.

George Maclean Rose died in 1898, and by his will appointed a trust company executors and trustees. The defendant became trustee in place of the trust company on the 8th September, 1907, upon the terms either of the will or of an unsigned declaration of trust prepared at the time of his accession to the trust.

*To be reported in the Ontario Law Reports.

In May, 1912, an action was begun by the present plaintiff and Malcolm C. Rose against the present defendant to prevent the division among the family of the shares in the Hunter Rose Company owned by the estate, 244 in number, and to compel the sale of the shares en bloc. Pending that action, the 74 shares were bought by the defendant from the company at par. The estate of George Maclean Rose, owning 244 shares, had a majority of those issued; but, after the 74 were put out, the total amount of stock became 500 shares, thus leaving the estate with less than 51 per cent. This action was then brought, leaving the other pending and undisposed of.

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

L. F. Heyd, K.C., for the appellant, contended that the action of the defendant in buying the 74 shares depreciated the value of the holdings of the estate, in so far as the estate thereby lost the controlling interest, and that the defendant had committed a breach of trust.

W. N. Tilley and J. J. Maclennan, for the defendant, the respondent, contra.

The judgment of the Court was delivered by HODGINS, J.A.:— . . . The point for decision is, whether a breach of trust has taken place on the part of the trustee in so purchasing the remaining shares, if that depreciated or might depreciate the value of those held by him for the benefit of the estate, or, if not a breach of trust, whether the respondent should be removed from his office on the ground that his interest and his duty conflict.

No doubt, control of a limited company vested in an estate or in an individual is of importance apart from the intrinsic value of the holding.

The respondent here has not dealt with any trust property, nor has he made any profit out of it. The sole ground put forward is, that his personal action in acquiring other shares, validly issued, confirmed as it was by the shareholders of the company, will result in a possible depreciation of the selling value of the shares held by him as trustee if they are to be sold en bloc. I am far from thinking that this is proved to be certain or even probable. . . . Upon the evidence . . . it would be impossible to say that depreciation in fact has taken or will take place. . . .

[As to conflict between interest and duty, reference to Ham-

ilton v. Wright (1842), 9 Cl. & F. 111, 123; Bennett v. Gaslight and Coke Co. of London (1882), 48 L.T.R. 156; Broughton v. Broughton (1855), 5 DeG. M. & G. 160, 164; Moore v. McGlynn, [1894] 1 I.R. 74; Thompson v. Havelock (1808), 1 Camp. 527, at p. 528; Shipway v. Broadwood, [1899] 1 Q.B. 369, at p. 373; Benson v. Heathorn (1842), 1 Y. & C. Ch. 326, at p. 341; Tennant v. Trenchard (1869), L.R. 4 Ch. 537; Re Iron Clay Brick Manufacturing Co., Turner's Case (1889), 19 O.R. 113, 123.]

The principle of these decisions extends, it seems to me, to any act where it is established that there is a direct conflict, and to cases where it may reasonably be said that such a conflict may arise. I can conceive of a position arising by the acquisition of shares by a trustee to which this rule may be applicable. But this is not at present one of those cases to which the rule, if extended to cases of possible conflict, can be applied. This respondent was not appointed by the testator, but by the beneficiaries; and, if he holds the estate shares as trustee for them, their rights must be determined by the terms of the trust they created. It is doubtful whether the respondent holds the shares under the terms of the will, or whether the act of the beneficiaries created an entirely new status and responsibility, evidenced by the unsigned memorandum. . . . Under either, it would be competent for the *cestui que trust* to put an end to the trust, or for the trustee, if the time has come for winding it up, to do so. From his evidence it appears that he is anxious to do this, and that before the writ in the first action was issued he so declared himself. His intention in acquiring shares beyond what he then held may be in one view as much in the interest of his *cestuis que trust* as against it, for his idea seems to have been to prevent the sale to an outsider and to preserve for the estate a control through him of the situation and of the business. It would at this juncture be unjust to assume that his interest and his duty do or may conflict; a decision as to which cannot be made until the terms of his duty are ascertained and defined. If it turns out to have been his duty to divide the estate shares among the beneficiaries, it is plain that his purchase of the 74 shares could by no possibility have injured the estate. It is a strange position for the appellant to occupy, namely, that, while the respondent as trustee is anxious to put an end to the trust by distributing the shares among those entitled to them, the appellant should have pending an action to prevent him from doing this, and at the same time be endeavouring

to remove him from the trust because he will not sell to an outsider, the result of which would be to give away the control of the business against the wishes of the majority.

The relief sought, namely, to remove the respondent as trustee, is just what the respondent himself is anxious to accomplish in another way. While the first action is pending to determine whether the respondent should be compelled to sell the estate shares in a block, or whether he is not entitled to rid himself of the trust by dividing them among those entitled—in short, the very point at issue between the parties—it would be manifestly unjust to remove him.

It may be that, applying the case of Moore v. McGlynn, and having the view the possibility that the voting power on the shares of the respondent might in some event be used against that of the estate so as to depreciate their value, if it became a question of control, the respondent should relinquish the trust or be removed from it. But it must be first determined what his duty is. When that point falls to be settled, reference may usefully be made to the case of In re Marshall, [1914] 1 Ch. 192.

I think that the rights, if any, of the appellant would be fully provided for by postponing decision as to any action such as that until the determination of the first pending action. It will be there adjudged whether the respondent is bound to sell en bloc, and in that case he may desire to have leave to bid; and that leave, if granted, would end his fiduciary position: Coaks v. Boswell (1886), 11 App. Cas. 232. The other relief sought, namely, to declare him a trustee for the estate of the 74 shares, is of course impossible upon the evidence. He became possessed of these shares, paying for them with his own money; the estate has and can have no claim upon them, unless they were in some way acquired as a gift or addition to the estate which he was disabled from acquiring in his own behalf. No such suggestion is put forward.

The appeal should be dismissed with costs, and the appellant should have the right, notwithstanding this dismissal, to apply, after the final disposition of the first action, under the statute, for the removal of the respondent as trustee, if in that action the rights declared leave it open to him so to do.

Appeal dismissed.

DECEMBER 7TH, 1914.

*JUNOR v. INTERNATIONAL HOTEL CO.

Master and Servant—Death of Servant—Action under Fatal Accidents Act — Explosion of Hot Water Range in Hotel Kitchen—Negligence—Evidence—Employment of Competent Person to Install Range—Duty of Master—Reasonable Care—Findings of Jury.

Appeal by the plaintiffs from the judgment of BRITTON, J., 6 O.W.N. 690.

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

J. E. Irving, for the appellants.

D. L. McCarthy, K.C., for the defendant company, respondent.

MEREDITH, C.J.O. (after setting out the facts and the findings of the jury):—It will be well at the outset to ascertain what duty a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work.

The nature and extent of that duty has been expressed in different language by different Judges; but, when their statements are read in the light of the particular circumstances of the cases they were dealing with, they do not differ from the statement of Lord Herschell in Smith v. Baker, [1891] A.C. 325, 362, which is: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

See also Halsbury's Laws of England, vol. 20, para. 234, pp. 119, 120.

The learned counsel for the appellants contended that the duty of the employer is an absolute one, and that it is not limited by the qualification as to taking reasonable care which forms part of the statement of it by Lord Herschell. In the recent case of Bergklint v. Western Canada Power Co. (1914), 50

*To be reported in the Ontario Law Reports.

S.C.R. 39, 67, Anglin, J., speaks of a similar duty as an "absolute duty," but I do not understand that that learned Judge used the word "absolute" in the sense in which the learned counsel used it, but that all that was meant is, that it is a duty which the employer may not delegate; and I agree that the respondent in this case is responsible for any neglect of this duty on the part of its manager, though as to other matters there would be no liability at common law because the manager was a fellow-servant of the deceased.

I am unable to discover anything in the evidence which warrants the finding of the jury that the respondent's manager did not exercise reasonable care in the employment of Gallagher or that the manager's negligence as well as that of Gallagher "led to the explosion." Gallagher was a plumber and steam-fitter in apparently good standing and of upwards of twenty years' experience. The work as to which he was employed to give his opinion, and which he was afterwards employed to do, was a simple one, and one which involved no danger from the operation of it, if the most ordinary precautions were taken to provide an adequate vent for the air. It is a startling and to me a novel proposition that a householder who employs a competent plumber and steam-fitter to make a connection between his furnace and his kitchen does so at the peril of being answerable for any injury that may be occasioned to his servants owing to the neglect of the plumber and steam-fitter to provide some safety device which he erroneously believes to be quite unnecessary—at all events, unless the householder knows or ought to know of the defect.

All the witnesses, including the experts called by the appellants, agree that what the manager required to be done was feasible, and, as I gather from their evidence, could be done and the system be operated with safety, and, as I have said, was something that any plumber and steam-fitter who understood his business could be trusted to do.

There was no evidence upon which the respondent could be held liable for having employed an incompetent man to do the work which was entrusted to Gallagher.

There was no evidence of Gallagher's incompetency beyond the fact that the work which he did on this occasion was unskillfully done, and there was no evidence that the respondent or Pollock knew that Gallagher was incompetent. . . .

[Reference to Lovegrove v. London Brighton and South Coast R.W. Co. (1864), 16 C.B.N.S. 669, per Willes, J., at pp. 691, 692.]

I also think that there was no evidence to warrant the answer to the second question. There was nothing in the circumstance that the result of the connection which Gallagher had made did not give as good results as had been expected that led Gallagher, according to his testimony, to think that there was anything beyond the inconvenience resulting from the water not being heated to the extent that he had expected, or any danger to be anticipated, and there was nothing whatever to suggest danger to the manager. There was, therefore, I think, no duty cast upon him to have the work inspected. All that he was bound to do was what, in the circumstances, a reasonable man would have done; and, although it may be that, if he had had an inspection made, the explosion would not have occurred, I do not think that it would have crossed the mind of a reasonable man that any danger would or might arise from the operation of the system that had been installed.

Having come to this conclusion, it is unnecessary for me to consider the question, so much debated upon the argument, as to how far and in what circumstances a person who does something which cause injury to another may escape liability because the thing done was done by an independent contractor.

An employer is not an insurer of the safety of his employees. What it is his duty to do I have already pointed out, and the full extent of his duty is to exercise reasonable care. That he may not delegate that duty means no more, as applied to the circumstances of this case, than that the respondent could not escape liability for the negligence of its manager if negligence on his part had been established.

In my opinion, the findings of the jury in answer to the second, third, sixth, and so much of the first of the additional questions as relates to the manager, should be set aside; and that, for the reasons I have given, the judgment should be affirmed and the appeal dismissed with costs.

MACLAREN and HODGINS, JJ.A., agreed.

CLUTE, J., dissented, for reasons stated at length in a written opinion. His view was that there was evidence to support the answers given to all the questions put to the jury; that the proximate cause of the accident was the negligence of the manager of the hotel in directing and permitting the installation of the range without waiting for a plan which would have made it safe; that the system was incomplete, and no proper precautions were taken.

Appeal dismissed; CLUTE, J., *dissenting.*

DECEMBER 7TH, 1914.

MILLER v. INTERNATIONAL HOTEL CO.

Master and Servant—Injury to Servant — Negligence — Explosion in Hotel Kitchen—Defect in Hot Water Plant—Liability at Common Law—Workmen's Compensation for Injuries Act, R.S.O. 1897 *ch.* 160, *sec.* 6 (*a*)—*Findings of Jury—Finding by Appellate Court on Evidence—Judicature Act, sec.* 27(2).

Appeal by the defendant company from the judgment of the Senior Judge of the District Court of the District of Algoma, upon the findings of a jury, in favour of the plaintiff, in an action brought in that Court to recover damages for personal injuries sustained by the plaintiff by reason of an explosion in the defendant company's hotel, in which she was a waitress.

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

D. L. McCarthy, K.C., for the appellant company.

R. C. H. Cassels, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action arises out of the same explosion as is in question in Junor v. International Hotel Co. (ante). . . . Though the witnesses were not the same, the evidence was substantially the same as that given in the Junor case, except that the manager, Pollock, was called as a witness for the defence and testified that he had nothing to do with "the manner of connecting up the system," and offered no suggestions and gave no instructions; that he exercised no supervision over Gallagher, but depended upon Gallagher to see that everything was right; that he did not understand anything about steam-fitting, and never saw anything afterwards to indicate defects, although the system was in use continually from the 28th April until the explosion occurred, and that he saw nothing to indicate danger.

The jury in answer to questions made the following findings:—

Q. 1. Was the defendant guilty of any negligence that occasioned the injuries complained of? A. Yes.

Q. 2. If so, in what did the negligence consist? A. The evidence of Mr. Gallagher shews that he knew that the system was

not working right, and that he, Mr. Gallagher, was there on several occasions trying to locate defects; and the defendant, as manager of a well-conducted hotel, should have known what a man was in the kitchen for.

Q. 3. Did the defendant provide a safe place for the plaintiff to work in? A. No.

Q. 4. If not, in what did the unsafeness consist? A. In an improperly constructed kitchen furnishing.

Q. 5. Did the explosion occur by reason of any defect in the defendant's hot water plant? A. Yes.

Q. 6. If so, what was the defect? A. Lack of air and insufficient radiation.

Q. 7. Was the defendant aware of the defect prior to the explosion? A. The answer to No. 2 should answer No. 7.

The Junor action was based solely on common law liability; but in this action, although no specific claim is made in the pleadings under the Workmen's Compensation for Injuries Act, the respondent is, we think, entitled, if she can, to maintain her claim both under the Act and at common law.

For the reasons given in the Junor case, I am of opinion that there is no common law liability; and I am also of opinion that, in the absence of a finding that the defect in the hot water plant which the jury found to exist, arose from or had not been discovered owing to the negligence of the appellant or of some person entrusted by it with the duty of seeing that the condition or arrangement of the plant was proper (R.S.O. 1897 ch. 160, sec. 6 (a)), judgment could not properly be entered for the respondent.

The proper course is, I think, for the Court to exercise the power conferred upon it by the Judicature Act, R.S.O. 1914 ch. 56, sec. 27(2), and to make the proper finding on the evidence, which is, I think, that what is required by the provision of the Act to which I have referred, was not proved. The view of the jury apparently was, that, because Gallagher, according to his testimony, was in the kitchen examining the work he had done, on some occasions after it was completed, and that, as the jury thought, his object in being there was to try to locate the defect, knowledge of the defect was to be imputed to the manager, Pollock, because Pollock, "as manager of a well-conducted hotel, should know what a man was in the kitchen for." It requires no argument to prove that this conclusion is not warranted by the premises on which it is based.

The third question put to the jury was not the proper ques-

tion. It should have been, "Did the defendant take reasonable care to see that the place which was provided for the plaintiff to work in was a safe place in which to work?" And to that question the evidence warrants no answer but one in the affirmative.

Upon the whole case, and drawing the proper inferences from the evidence, I am of opinion that the case of the respondent failed, and that her action should have been dismissed; and I would, therefore, allow the appeal with costs, and substitute for the judgment which has been entered a judgment dismissing the action with costs.

Appeal allowed.

DECEMBER 10TH, 1914.

RE NELSON.

Will—Construction—Devise and Bequest to Widow—Limitation to "Natural Life"—Application of, to Devise—Life Estate in Land Devised.

Appeal by the executors of the widow of William Nelson, deceased, from the judgment of LATCHFORD, J., ante 250.

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

G. H. Kilmer, K.C., for the appellants.

P. A. Malcolmson, for the executors of William Nelson, respondents.

THE COURT dismissed the appeal with costs.

DECEMBER 10TH, 1914.

STIMSON v. BAUGH AND PROCTOR.

Contract—Promissory Note—Partnership—Liability—Fraud—Findings of Fact of Trial Judge—Appeal.

Appeals by both defendants from the judgment of MIDDLETON, J., 6 O.W.N. 264.

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

J. M. Clark, K.C., for the appellant Baugh.

C. Kappele, for the appellant Proctor.

J. B. Clarke, K.C., for the plaintiff, respondent.

THE COURT dismissed both appeals with costs.

DECEMBER 9TH, 1914.

REX v. WILLIAMS.

Criminal Law—Evidence—Accomplice—Corroboration.

Case reserved and stated by the Senior Judge of the County Court of the County of Carleton, under sec. 206 of the Criminal Code.

The accused was tried on a charge of having committed an act of gross indecency with another male person during the month of February, 1914. There was a similar charge against the accused in respect of a brother of the same person, and a case was reserved by the learned trial Judge in respect of each charge, the following questions being submitted by him for the opinion of the Court:—

(1) Was the person with whom the offence was committed an accomplice?

(2) If he was an accomplice, was it essential to the validity of the conviction that his evidence should be corroborated?

(3) If corroborative evidence was necessary, was such evidence given?

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

J. A. Macintosh, for the accused, argued that in each case the boy with whom the alleged offence was committed was an accomplice and that his evidence required corroboration. The statements of the accused which are relied on by the prosecution were obtained by inducements held out to him, and should be disregarded, and the accused should have been warned. He referred to Russell on Crimes, 7th ed., p. 266; Rex v. Everest (1909), 73 J.P. 269; Rex v. Winkel (1911), 76 J.P. 191, [MEREDITH, C.J.O., referred to Lewis v. Harris (1913), 30 Times L.R. 109].

J. R. Cartwright, K.C., for the Crown, was not called upon to argue, but admitted, in reply to a question from the Court, that the person with whom the alleged offence was committed was an accomplice. He referred in this connection to Rex v. Frank (1910), 21 O.L.R. 196,

The judgment of the Court was delivered by MEREDITH, C.J.O., at the conclusion of the argument, holding that corroboration of the evidence of the accomplice in this case was not essential to the validity of the conviction, and that, even if corroboration were necessary, it had been supplied.

Conviction affirmed.

DECEMBER 11TH, 1914.

SCHMIDT v. SCHMIDT.

Pleading—Statement of Claim—Addition of Cause of Action not Endorsed on Writ of Summons—Rule 109*—Alimony—Separate Action—Costs — Undertakings — Security for Costs.*

Appeal by the plaintiff from the order of LATCHFORD, J., in Chambers, ante 257, affirming the order of the Master in Chambers, ante 228, striking out of the statement of claim all references to the plaintiff's claim for alimony, made in the statement of claim, but not in the endorsement of the writ of summons.

Leave to appeal was granted by LENNOX, J., in Chambers: ante 392.

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

A. McLean Macdonell, K.C., for the appellant.

George Wilkie, for the defendant Schmidt, the respondent.

THE COURT affirmed the orders made by the Master and LATCHFORD, J., but ordered that there should be no costs to either party of the motions in Chambers or of the appeal, upon the plaintiff undertaking to begin, within a week, a separate action for alimony, the defendant undertaking to accept service of the writ of summons and enter an appearance at once, and not to ask for security for costs.

DECEMBER 12TH, 1914.

EPSTEIN v. LYONS.

Title to Land—Ascertainment of Boundary-line between Tiers of Lots—Evidence—Ownership of Legal Estate—Mortgage—Foreclosure—Possession — Non-user — Right of Way—Easement—Prescription—Injunction — Conveyance to Assignee for Benefit of Creditors—Title Outstanding in Assignee.

Judgment upon the defendants' appeal from the judgment of KELLY, J., 5 O.W.N. 875, was pronounced by a Divisional Court composed of MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., on the 27th November, 1914, and the result is noted ante 323.

Reasons for the judgment were given later by MAGEE, J.A.:—The defendants appeal from the judgment of Kelly, J., which declares that the easterly boundary of the plaintiffs' lot 3 on James street in Hughson's survey in the city of Hamilton, is a line drawn parallel with and 153 ft. 6 in. distant easterly from James street, and that the plaintiffs are entitled to the use of an alleyway along the south side of lot 3 on Hughson street, in the same survey, in common with all others entitled thereto, and restraining the defendants from erecting any fence, wall, or other obstruction on the easterly part of the plaintiffs' said lands, and ordering the defendants to remove the wall by them erected thereon and to restore the ground to its previous condition, and restraining the defendants from using any part of the plaintiffs' said lot 3 to afford access to or as a right of way appurtenant to the defendants' lands, being part of lot 2 on James street.

The learned trial Judge has set out so fully the facts that it is unnecessary to refer to them in detail.

The plaintiffs claim as owners of lot 3 on James street. That lot was acquired by Mark Hill in 1871, and was mortgaged by him to Edward Martin on the 14th February, 1887. Hill, on the 10th December, 1888, assigned all his property to F. H. Lamb in trust to sell and convert and pay expenses and pay his creditors, and any surplus to Hill. It does not appear that Lamb did anything under this assignment unless to register it.

On the 26th December, 1890, by a deed, which recites that on the 9th May, 1889, Hill had assigned his property to David Blackley for the benefit of his executors and had afterwards compromised with his creditors, Hill and Blackley conveyed lot 3 on James street to one Farewell, with a right of way over the southerly strip of 11 feet 4 inches of lot 3 on Hughson street, which adjoins lot 3 on James street, but reserving a right of way in common over the easterly twelve feet of lot 3 on James street.

On the 23rd May, 1899, Martin obtained judgment for possession and foreclosure in an action against Farewell, the action being referred to the Master at Hamilton. On the 6th June, 1899, the Master reported that he had added F. H. Lamb and others as defendants, and, they not having appeared, he had declared them foreclosed, and he appointed the 16th December, 1899, for payment of the mortgage-debt by Farewell. On the same 16th June, 1899, he, as Deputy Registrar, certified that all the defendants stood foreclosed by his order, as Master, of that date. The order is not produced.

Objection is taken to the regularity of these proceedings for foreclosure; but, inasmuch as Martin had the legal estate, he was entitled to possession, and the plaintiffs, as claiming under him, are also entitled thereto. He entered into possession at once, and had a fence put across the north end of the eleven-foot strip now in question, at the back of the lot; and any objection to the proceedings for foreclosure or to the absence of foreclosure of any parties interested are now removed by length of possession.

The defendants claim the eleven foot strip referred to as being part of lot 3 on Hughson street in Hughson's survey. If this were so, lot 3 on James street would have been laid out eleven feet shorter than all the other five lots fronting on James street in the same block, and lot 3 on Hughson street correspondingly shorter than all the others fronting on Hughson street. Apart from this being wholly unlikely, it is contrary to the old Mackenzie map of the town of Hamilton, published in 1836, as "reduced and compiled from various surveys by Alexander Mackenzie, surveyor," and the other map "reduced and com-

piled from various surveys in 1837 by Joshua Lind, surveyor.'' Both are produced from the registry office, where they have been for many years, and are recognised by surveyors, solicitors, and conveyancers as authentic maps and the best information available; and in the case of one block, where the numbers in Lind's and Mackenzie's maps differ, owing possibly to a later survey in one, the Registrar has opened an index shewing both numbers.

These maps shew the block divided by a straight line joining the boundary between the lots fronting on James street and those fronting on Hughson street. Mackenzie's map, in its ''references,'' states: ''The lots circumscribed thus'' (giving a colour) ''the property of James Hughson;'' and so with lots of other owners; and this block, with others, has apparently that colour, though faded. Then the deed from Hughson on the 3rd December, 1840, of lot 2 on James street in this block, made while he was still the owner of lot 3 on Hughson street, recognises this map, for the lot is conveyed ''as described on Mackenzie's map of Hamilton aforesaid.'' The deeds of lot 1 on James street on the 5th March, 1836, and of lot 3 on James street on the 1st October, 1838, to which latter Joshua Lind, of Hamilton, surveyor, was subscribing witness, give each of those two lots a length of 2 chains 24 links and a frontage of 1 chain 8 links; the words ''more or less'' being added in the case of lot 3. These frontages are those stated on Mackenzie's map.

Then there is the evidence of Mark Hill, practically unchallenged, that, when he purchased lot 3 on James street in 1871, there was a fence existing at the rear end, which was on the line now claimed by the plaintiffs. This line coincides with the actual division lines at lots 2, 5, and 6, and is not shewn to differ from that at lot 1 or that at lot 4.

On the question of possession, Hill says that he pulled down that fence of 1871 soon after he acquired lot 3 on Hughson street, which was on the 30th September, 1888, and did not erect another either on the same or any other line. After acquiring that land for the purpose of obtaining an outlet to Hughson street, the only object of tearing down the fence would be to give access that way, and it would seem he would have no reason for erecting another close fence eleven feet further west, in a position to shut off from his buildings the very outlet which he had been planning for. Up till the deed to Farewell in 1890, both lots were beneficially owned by Hill or his assignees, and there could be no adverse possession. In 1899, Martin, the mort-

gagee, took possession, and later put the fence across the north end of this 11-foot strip in dispute. It is not without significance that the shed or lean-to near that fence, and between the plaintiffs' and the defendants' stable, was, according to witnesses for the defendants, attached to the plaintiffs' stable, and extended across to within two or three feet of the defendants' stable—which does not indicate an abandonment of claim to the strip.

The learned trial Judge has dealt so fully with the evidence as to the existence of a fence and non-access through it, that it would be bootless to refer to it in detail. Over 60 witnesses were called. He had the opportunity of seeing them; and a perusal of the evidence given does not lead one to differ from his conclusion on the question of fact, that the plaintiffs and their predecessors in title were not out of possession. The plaintiffs are, therefore, entitled to succeed as to the ownership of that 11-foot strip.

That carries with it the absence of any right to the defendants to enter upon it from the door which they opened in the eastern end of the north side of their new building of 1911, on the north part of lot 2 on James street. There was no opening from lot 2 to that strip previously. Mark Hill deeded to them such rights, if any, as he had reserved in the deed to Farewell; but that was not a right for lot 2, which belonged to Promguey; and, even if it were any, the rights of Hill are overridden by the mortgagee title of Martin.

There remains the question of the plaintiffs' right to a way from lot 3 on James street to Hughson street over the southerly 11 ft. 4 in. strip of lot 3 on Hughson street. That right of way was not covered by Martin's mortgage, and Martin's title to it depended on his deed from Farewell. Farewell's title depended on the deed to him from Hill and Blackley, made after Hill had granted both lots to Lamb in December, 1888. No explanation is given as to why Hill made the two assignments. Considering the lapse of time and the absence of any sign of action by Lamb, and the fact that Hill was allowed to lease and receive rents from and convey the part of lot 3 on Hughson street, the fair inference from the statement that he compromised with his creditors would seem to be that his creditors were all settled with by him, and therefore that he became entitled to have his real estate re-conveyed to him by Lamb, who became and was a bare trustee for him before the date of the deed to Farewell. It would not be too much, indeed, to presume that there was a

reconveyance by Lamb to either Hill or Blackley, which has disappeared, just as Hill's assignment to Blackley has disappeared. If there was such a reconveyance, then Farewell's title was complete. Even without it, the plaintiffs, as claiming under Farewell's deed to Martin, would be the beneficial owners of the way and entitled to exercise it and to prevent its interruption by the wall built across it by the defendants.

Apart from such a question and from the effect to be given to the reference to the way in the deed from Hill to the defendants, the plaintiffs and those under whom they claim have been, by themselves and their tenants, using the way as of right for more than twenty years before action; after Lamb's estate in lot 3 on Hughson street accrued in 1888, and after the deed to Farewell in 1890.

The appeal should be dismissed with costs.

HIGH COURT DIVISION.

BOYD, C. DECEMBER 7TH, 1914.

GREENLEES v. GREENLEES.

Will—Construction—Devise of Farm to Eldest Son—Provision for Use of Farm by two other Sons till Devisee "Comes to Reside"—Death of one Son—Survivor Continuing in Possession—Acceptance of Leases from Eldest Son in Ignorance of Right—Estoppel—Inoperative Restriction on Sale of Farm—Right of Devisee to Put an End to Occupation by "Coming to Reside" or by Sale.

Action by Robert Greenlees against Angus Greenlees to recover possession of a farm and payment of a sum for rent.

The action was tried without a jury at Sarnia.

W. N. Tilley, for the plaintiff.

R. I. Towers, for the defendant.

BOYD, C.:—This action is brought by one brother, aged 82, against another brother, aged 72, to recover possession of a farm and for payment of a sum claimed for rent. Notice was duly given to determine the overholding tenancy alleged by the plaintiff. The defendant disputed the tenancy, but was willing

to pay an amount equal to the amount of rent claimed. So it was agreed at the close of the trial that the case was to be settled on payment of $360 by the defendant to the plaintiff, without costs, but that the effect of the father's will, under which both claimed (construed in the light of the evidence in the case) should be determined by the Court.

The father made his will on the 16th January, 1869, and died on the last day of that month. The defendant and other members of the family do not appear to have known the terms of the will beyond a general understanding that the farm in question had been left to the plaintiff (the eldest son). The will was not admitted to probate, but was registered by the plaintiff on the land on the 30th November, 1871. The defendant first became aware of the terms of the will when he obtained a copy from the registry office on the 2nd October, 1907.

I believe the evidence of all the witnesses; there is really no hostile feeling between the parties, but the difficulty has arisen of late because of some younger relatives who are caring for the aged plaintiff.

The defendant was living with the father at his death on the farm, and so remained on the place for two years, taking the produce for his own use. The plaintiff, before the father's death, was living in the neighbourhood of Bowmanville, and has so remained till the present time. The farm is in the township of Plympton, in the county of Lambton.

The defendant contemplated getting married, and applied to the brother to get a lease of the farm, for that reason, in 1871, and the first lease was made to him on the 13th October, 1871, and he was married two months afterwards. After this, leases were made in succession for terms of years down to January, 1886. During the terms of the leases, rent was duly paid to the plaintiff according to the agreements.

When the defendant obtained a knowledge of the language of the will in 1907, he ceased paying rent as such, but rendered money or other payment equivalent thereto, and apparently no question arose between the brothers till later. There is no clear evidence of earlier payments, but particularity begins in November, 1911, when a payment of $75 was made generally, and again on the 11th November, 1912, when $60 was paid as "pocket-money."

The father's will gives the farm to the plaintiff, directing him to pay all debts and funeral expenses, with the proviso that "until he comes to reside" the sons David and Angus shall have

the use of the farm. As already stated, the defendant was on the farm with his brother David, and both so continued after the father's death—then David died, and the defendant kept on alone till he took the first lease.

The testator gave directions about "the mare": "I wish her to remain on the farm with her mate which is the property of my son Robert both to be worked on the farm and not on any excuse to be disposed of and when my son Robert comes to reside he shall have her for his own use."

There is also this clause: "I hope and request that my son Robert will not on any account dispose of the farm as it is my earnest desire that it may remain in the family as long as there is one of the name."

In the Oxford Dictionary "reside" is defined: (1) To settle: to take one's abode or station. (3) To dwell permanently or for a considerable time: to have one's settled or usual abode: to live in or at a particular place.

"Reside" is used by the testator with the ordinary meaning which comes first to the mind. His eldest son was living at a distance: he wished him to come back to the farm and live there as his settled place of abode, and his idea was that this personal occupation should be kept up in the family as long as one of the name should exist. The last is, of course, an illegal restriction, but I see no objection to the direction that, pending the personal coming of Robert to live on and work the farm, the right to go upon it and use it should fall to David and Angus or the survivor.

I rather think that no estoppel exists, in these circumstances, to disable the defendant from shewing that he is in possession now under the sanction of the will, and not as an overholding tenant. He took the leases in ignorance of the tenor of the will in regard to his use of the place while Robert was residentially absent: when he came to know this provision, his attitude as to paying out changed, though he was willing to pay at the same rate for the maintenance of his brother.

The plaintiff was in possession under the father and by virtue of the provision in the father's will before any lease was taken from the brother, and the motive for taking that lease was to give him a less precarious footing, on his marriage, in the occupation of the farm, than he would otherwise have had. When the leases terminated, and his right of user in the absence of his brother from the farm became known to him, he then was in a position to elect whether to lease again or to occupy as under the father's will. This appears to me to be the

proper result of the provision of the will, and I do not think it is displaced by the intermediate leasing, done when the defendant was in ignorance of the true state of the title of his brother.

In this view, the defendant now holds subject to be ousted at any moment by the act of the plaintiff coming to reside on the farm. It may be that the plaintiff is now too old to make such a move. In that case, it appears to me, relief may be had by acting *dehors* the will. The plaintiff has the right to violate the directions as to disposing of the farm: he can sell it, and upon the sale the right to the possession would pass to the purchaser. This is a situation not contemplated and not provided for by the testator—but it is the necessary result of that exercise of ownership which is vested by the will in the plaintiff. The purchaser of the land will be entitled to the premises as against the defendant, who has no locus standi to be in possession when the land passes out of the hands and the control of the plaintiff.

MEREDITH, C.J.C.P. DECEMBER 7TH, 1914.

*ACKERSVILLIER v. COUNTY OF PERTH.

Highway—Nonrepair—Injury to Traveller—Road Assumed by County Corporation—Highways Improvement Act—Negligence—Absence of Guard-rail at Dangerous Place—Liability of County Corporation—Limits of County Road—By-law—Construction—"Concession"—Damages.

Action to recover damages for personal injuries sustained by the plaintiff and for injury to his motor car, by reason, as he alleged, of the negligence of the defendants, the Corporations of the County of Perth, the Townships of Downie and South Easthope, and the City of Stratford, in failing to keep a highway in repair.

The action was tried without a jury at Stratford.

R. T. Harding and M. G. Owens, for the plaintiff.

G. G. McPherson, K.C., for the defendants the county and township corporations.

R. S. Robertson, for the defendant city corporation.

MEREDITH, C.J.C.P.:—If the plaintiff can recover damages in this action at all, it can be only on the ground that the de-

*To be reported in the Ontario Law Reports.

fendants, or some of them, owed a duty to him, in common with all other persons making a lawful use of the highway in question, to have placed some guard, at the place where the accident happened, which would have been sufficient to have prevented it. . .

The main facts of the case are plain; I have no doubt about them: the plaintiff had proceeded in his motor car along the highway which forms the boundary line between the city of Stratford and one of the two defendant townships, until he had reached, and just crossed, the highway in question, which runs between the said two townships to the place in question, whence it runs into the city of Stratford. Having reached that point, the plaintiff stopped, and then backed into the highway in which the accident happened, with a view to turning around and going back on the same highway by which he had come. In this backing around he reached the edge of the bank at the culvert, on the left hand side of the road, with the result that the car turned over into the ditch; he went too far on that tack, thereby making the drop into the ditch inevitable: nothing, as I find, depended on the width of the road or its condition in any respect, except that there was no device of any kind to prevent anything or any one going into the ditch if it or he went far enough in that direction; . . . The night was dark; the man had no means of seeing just where he was, even if he had looked behind; his own guide was his position as indicated by the light of the lamps of his car thrown upon the road in front of him; he had not, I find, completed his intended backward turn, when the sinking of the wheel indicated his danger; then, I am satisfied, he applied the powerful lever brake, called the emergency brake, which was found, after the accident, to be firmly set; but then it was too late; the car was then on too frail ground for any such action to save it; the only chance, if there was indeed any, was immediate forward movement.

I do not find it necessary to say whether the plaintiff really made the mistake of pressing with his foot the "speed-accelerating" foot lever, instead of the foot brake, whilst the car was still going backward; as two apparently quite credible witnesses testified that he had immediately after the accident informed them was the fact and cause of the accident; for, even so, and even if it were held that that was negligence on his part, it would have had no serious consequence had there been a reasonably sufficient guard, in the shape of a coping rail or anything else, at the side of the road where the accident happened: contact with any such guard would have caused the car to be stopped

without any kind of danger of its going over the bank after jumping it or breaking it down. Then was it a breach of duty on the part of any of the defendants in having failed to provide such a guard there

Before answering that question it is better to consider which of the defendants is liable, if there has been any liability, because it may be that, if the Municipality of the County of Perth were charged with the repair of the part of the road in question, more might be required, in the construction and repair of the road, than if the duty rested upon all or any of the other municipalities. Then which, if any of them, was so charged

That the defendant county municipality "assumed" the road in question, under the provisions of the Highways Improvement Act, in the year 1907, and have ever since had control of it, as a county road, under the provisions of that enactment, is admitted on all hands; but this municipality contend that the road in respect of which they are answerable for "maintenance and repair" does not quite extend to the place where the accident happened. The place where the accident happened, they assert, is close to, but just beyond, the northerly limit of the road assumed by them; that they "assumed" the road only as far as the southerly limit of the cross-road which lies between the city of Stratford and the two defendant townships; and in support of that contention they point to the provisions of the by-law under which the road was assumed—by-law No. 414, passed on the 6th June, 1907.

But the language employed in that by-law is by no means as definite, clear, and unambiguous as these defendants assert. In one place the road assumed is described as "across the 3rd, 4th, 5th, and 6th concessions;" and in another as "facing the 3rd, 4th, 5th, and 6th concessions."

It is well known that the "lines" or roads between concessions are quite commonly spoken of as concessions. The much more common expression is, I am sure, "I live *on* the third concession," having reference to the concession line, not the concession between the concession lines, than the expression "I live *in* the third concession." And I am not prepared to say, notwithstanding the legislation vesting in the Crown or the municipalities the soil and freehold of the land under the highways, that accurately and technically speaking the concession may not extend to the middle line of the road upon which it fronts. No legislation, that I am aware of, settles the question. Section 17 of the Surveys Act refers to width, not depth; and "front

posts'' and ''front angles'' are terms hardly applicable to concession lines: see sec. 33.

But, however that may be, I have no doubt I may, as I do, adopt the interpretation which all the municipalities concerned have from first to last, without question or doubt, put upon the by-law, that is, that it covers the whole of the road in question to the middle line of the intersecting road, and so includes the place in question. Upon that view of it, the county took possession and have ever since controlled the road up to that line: they built the culvert and made the bank where the accident happened. . . .

Were the defendants, or any of them, guilty of negligence in regard to the plaintiff in not having placed an efficient guard of some kind at the side of the road at the place where the accident happened?

The statute-imposed duty of a municipality in regard to the care of highways is to keep them in repair. The Highways Improvement Act adds the word ''maintain,'' but unnecessarily, as it seems to me, for to keep in repair necessarily includes maintenance, whilst maintenance does not necessarily include all that must be done to keep in repair. . . . The statute does not say that any municipality shall pave its streets, but it says that which necessarily compels pavement where pavement is needed; the municipality shall keep the road in repair; and where the traffic is great that injunction can be obeyed only, in places of great traffic, by the construction of paved ways. That is, as it seems to me, quite plain; and has been, as I have always understood it, the law in this respect as it has always been administered in this Court. But that duty may be limited by the money means which the municipality has; and that is not Court-made law; another statute limits the money-raising power of every municipality; the two statutes are of equal authority and must not be interpreted to conflict with one another; hence it is commonly said, with substantial accuracy, that the municipality must, having regard to its means, keep the roads under its control, in this respect, in a state reasonably sufficient for the requirements of the traffic over it. That is an obligation necessarily increasing with the settlement and improvement of the country; but one which has hardly kept pace with them, as such legislation as the Highways Improvement Act, ''good roads'' agitations, and many other things, indicate; and it was just because of this state of affairs that the defendant county municipality assumed the road; that municipality deemed that the road was not as good as it should be under the township municipalities'

control, and so the county assumed control over it for the purpose of making it a better road—improving it—at the cost of the county, with very substantial assistance out of the funds of the Province.

It was an important road with a good deal of traffic over it, as the action of the county municipality in assuming it, and the fact that the place in question is a place of junction of the whole four defendant municipalities, shew. And at this place the defendant county municipality made a ditch four feet deep, with a culvert, four feet in height, running into it, and left the ditch without any guard-rail or other protection against person, animal, or vehicle going over the bank into it—an obviously dangerous exploit, especially in the case of a heavy carriage such as the plaintiff drove over it. . . .

There was no evidence that, if it were the duty of those charged with, or undertaking, the repair of this road, to guard all such ditches as this, it would be a too onerous task; but I am aware—it is common knowledge—that to require a guard-rail, or other like protection, in all places where injury might be sustained by driving off the road into the ditch, would be an absurd exaggeration of the duty to keep the roads in repair, and would possibly lead to nothing being done. . . .

It may be, indeed it must be, difficult to draw the line between the place that must be and that which need not be guarded, in order to keep a highway in repair. Different places have their different circumstances, and each must be dealt with as it arises; dealt with, not according to the notion of the particular Judge before whom it is tried, but according to the evidence; and, upon the evidence adduced in this case, I find that the defendant county municipality owed a duty to the plaintiff, and to all other persons lawfully travelling upon the road in question, to provide some efficient guard against the accident which happened, and all like accidents arising from the danger which the unguarded ditch creates; that neglect of that duty was the proximate cause of the accident and of all the injury which was the result of it; and that, if there were any negligence on the part of the plaintiff, it was not a proximate cause of the accident, nor was it contributory negligence disentitling the plaintiff to recover in this action.

It is proved that "wing-walls," built up so as to have afforded ample protection, would have cost but from $30 to $35, and, as I have said, there is no evidence that this wealthy county would have been hampered, in any money sense, if it had expended

that sum at the place in question, and any other sums of money required to give the like protection in all other places, if any, requiring it, upon any of the highways which this municipality is statute-bound to keep in repair.

The plaintiff is accordingly entitled to recover from the defendant county municipality damages—reasonable compensation under all the circumstances of the case—for the injuries he sustained in the accident; and the other defendants are entitled to have this action dismissed as to them. . . .

There will be judgment for the plaintiff against the defendants the Corporation of the County of Perth and $1,000 damages, with costs of action; in other respects the action will be dismissed with costs. . . .

MIDDLETON, J. DECEMBER 7TH, 1914.

*SEIFERT v. SEIFERT.

Domicile—Change — Evidence — Marriage — Quebec Law — Holograph Will—Revocation—Intestacy.

Issues arising in a Surrogate Court matter, transferred to the Supreme Court of Ontario, were directed to be tried.

The trial was before MIDDLETON, J., without a jury, at Ottawa.

H. H. Dewart, K.C., and A. Haydon, for the plaintiff.

Travers Lewis, K.C., for the infant defendants.

J. A. Ritchie, K.C., for the adult defendants.

MIDDLETON, J.:—Issues have been directed to be tried for the purpose of determining: (1) the domicile of the deceased Gustavus Otto Seifert at the time of his death on the 4th December, 1913; (2) the domicile of the deceased at the time of his marriage on the 1st June, 1910; (3) whether a certain holograph will dated the 16th February, 1909, ought to be admitted to probate; (4) whether the deceased died intestate, and letters of administration should issue to the plaintiff, his widow.

Undoubtedly the domicile of origin of the deceased was the city of Quebec. There his parents resided and his youth was spent. The parents of the deceased resided there for many years and until their death. In his early years Otto Seifert took part

*To be reported in the Ontario Law Reports.

in his father's business, and lived with his father. Some 13 or 14 years ago he gave up his interest in his father's business, and about the same time became interested in a steam laundry business which he established and carried on in the city of Quebec. In 1901 he also started a steam laundry business in the city of Ottawa. He continued to carry on both businesses until his death. Prior to his marriage he continued his home in Quebec, although he was necessarily a good deal at Ottawa in connection with the important business he carried on there. . . . Up to a time shortly before his marriage, there is nothing from which a change of domicile could be inferred.

On the 1st June, 1910, Mr. Seifert married Miss O'Sullivan. The marriage took place at the city of Ottawa. . . . The wife now says that it was stipulated, and was a condition of her assent to the marriage, not only that the ceremony should take place in Ottawa, but that the future home should be there. I see no reason to discredit this statement; in fact, everything points to its accuracy; and, if it is necessary that this statement should be corroborated, I think it is sufficiently corroborated by what took place.

Prior to the marriage Mr. Seifert leased a furnished house in the city of Ottawa, and added to its furnishings. . . . Upon the marriage taking place, Mr. and Mrs. Seifert resided in this house. Subsequently another house was rented. More lately the house was purchased which became the Seiferts' home until shortly before his death, when he purchased another residence at Britannia, a suburb of Ottawa. Death came suddenly and unexpectedly on the 4th December, 1913.

Although Mr. Seifert and his wife spent the summer following the marriage in the Province of Quebec, their residence there was temporary and in the nature of a visit; and, apart from this visit, the matrimonial home has always been in Ottawa, in the premises rented and owned by the husband. . . . From the time of the marriage onward there was no difficulty in accepting the view that Ottawa had become his home.

This, however, is not the point of difficulty in the case. The question of domicile at the date of the marriage is the critical and important question.

According to the law of the Province of Quebec a testator may validly make a holograph will. On the 16th February, 1909, Mr. Seifert, then not having matrimony in view, executed a holograph will, by which substantially all his estate is divided equally between his surviving brothers and sisters. According

to the law of Quebec, upon marriage a will is not revoked, but where the marriage takes place, as here, without a marriage settlement, a community of property is established which secures to the surviving spouse a share of the assets of the community. If the matrimonial domicile is the Province of Quebec, then Mrs. Seifert would be entitled to receive, speaking generally, half of her husband's property. If, on the other hand, the domicile was in the Province of Ontario, then marriage would, by virtue of the Ontario law, revoke this will, and the widow and infant children would take, to the exclusion of the brothers and sisters. The contest is thus between those taking under the holograph will on the one side, and the widow and children on the other; the widow preferring to allege an intestacy instead of a community.

This holograph will has been admitted to probate by the Superior Court of the Province of Quebec. It is admitted by all counsel concerned that this judicial act is not conclusive upon me, as apparently a probate in the Province of Quebec differs widely from the proof of a will before a Surrogate Court in the Province of Ontario; probate issuing there as a matter of course upon the filing of a petition and an affidavit shewing the due execution of the will.

A good many facts were established in evidence, some pointing towards a Quebec domicile, some pointing towards a domicile at Ottawa. . . .; but these appear to me to afford little assistance. Of greater value is the affidavit made for the purpose of obtaining a marriage license, in which Mr. Seifert not only describes himself as of the city of Ottawa, in the county of Carleton, but in which he states that he has had since May, 1902, his usual place of abode within the city of Ottawa. I do not regard this as indicating that Seifert was domiciled at Ottawa from 1902, the time when he established the laundry business there, but it appears to me to go far to confirm the statement that in 1910 he had definitely made up his mind, at a date antecedent to the actual marriage, to claim Ottawa as his usual place of abode; and in this respect the statement made by the wife receives very substantial confirmation.

In attaching this value to the evidence, I have present to my mind the decision of the Supreme Court of Canada in Wadsworth v. McCord (1886), 12 S.C.R. 466, where it was held that a description attributing residence in an *acte de mariage* has only relation to the residence necessary to permit a marriage lawfully taking place. . . .

In the evolution of the English law relating to the acquisition of a domicile of choice, the distinction between domicile and national allegiance has not always been borne in mind; and, although the English law must now be regarded as well settled, occasionally expressions are found indicating a tendency to revert to the earlier period in which the factor of national allegiance took too prominent a place. The Scotch case, Udny v. Udny (1869), L.R. 1 Sc. App. 441, contains still the most authoritative exposition of the law. Domicile of choice is the creation of the party. A man may change his domicile as often as he pleases, without changing his allegiance. . . .

"Domicile" has been described as equivalent to "home" (Phillimore, vol. 4, p. 45). It follows from this that the same principles apply in determining whether there has been a change of domicile when the suggested change is from one sovereignty to another sovereignty, and when the change is from one part to another of the same dominion; but it appears to me that some of the facts relied on in some of the cases possess more cogency when applied to a change which would ordinarily be accompanied by an abandonment of the original allegiance than when the allegiance remains the same. This is particularly so where the fact relied upon is the exercise of the political right of voting.

All the cases point out that the domicile of origin is not to be treated as abandoned upon slight evidence. The onus is clearly upon those asking the Court to determine that a new domicile has been chosen, to satisfy the Court that there has been an actual intention on the part of the individual to abandon his domicile of origin. It is not necessary to multiply citations in support of this. The cases are well collected in the Supreme Court decision already referred to and in the later case of Jones v. City of St. John (1899), 30 S.C.R. 122. . . .

[Reference also to Marchioness of Huntly v. Gaskell, [1906] A.C. 56; Winans v. Attorney-General, [1904] A.C. 287; Haldane v. Eckford (1869), L.R. 8 Eq. 631; Douglas v. Douglas (1871), L.R. 12 Eq. 617; In re Grove (1888), 40 Ch. D. 216.]

The last-named case is of value here as establishing the proposition that acts, events, and declarations, subject to the time at which a domicile arises, are admissible in evidence upon that question, when they indicate what the intention was at a given time.

Applying the law as laid down in all these cases and in many others to which I have referred and carefully read, I have come

to the conclusion that here the deceased before his marriage determined to make his home in the Province of Ontario, and that he elected to change his domicile from Quebec to Ottawa, and that in the renting and furnishing of the house in Ottawa he had given effect to this intention, so that the new domicile was gained *animo et facto*. Ottawa became his home. There he lived with his wife and children. Some evidence was given shewing that Mr. Seifert had entered into negotiations looking towards the purchase of a family house in Quebec. This, I think, does not displace the intention to remain in Ottawa as his permanent home. It may indicate that at the time these inquiries were made there was a half-formed intention to abandon the domicile of choice he had then acquired; but, as nothing came of the overtures then made, there was no abandonment of the domicile of choice.

This brings the case precisely within the decision in In re Martin, Loustalan v. Loustalan, [1900] P. 211.

The provision of the statute of Ontario by which the marriage revoked the will formed part of the matrimonial law, and not of the testamentary law, and operated here to revoke the will executed in the Province of Quebec. This will was valid at the time it was executed, and, for aught I know, it may yet remain valid so far as the Province of Quebec is concerned, for I do not know whether that Court follows the law of domicile in dealing with the administration of the effects of deceased persons; but that question will have to be determined by the Courts of Quebec according to the Quebec law. The case just referred to is also of great value upon the question first discussed.

I, therefore, find, upon the issues submitted, that at the time of the death of the deceased he was domiciled in the Province of Ontario, and that he became domiciled in Ontario at a time prior to the marriage of the 1st June, 1910; that before the marriage the holograph will dated the 16th February, 1909, became revoked; and, it not being shewn that any other will was ever executed in accordance with the laws of the Province of Ontario, the deceased died intestate; and the plaintiff as his widow is entitled to letters of administration of the estate of the deceased in Ontario.

The costs of all parties may, I think, be paid out of the estate of the deceased.

MIDDLETON, J. DECEMBER 7TH, 1914.

SNIDER v. SNIDER.

Promissory Notes—Failure of Consideration—Legacy—Will—Attempted Cancellation of Note by Cross-instrument—Renunciation in Writing—Bills of Exchange Act—Testamentary Intention—Evidence — Foreign Domicile — Forum—Costs.

Two actions were brought by J. E. Snider: the first on the 1st February, 1913, to recover the sum of $10,000 upon certain promissory notes; the second, on the 10th January, 1914, for a declaration that a certain promissory note made by the plaintiff in favour of T. A. Snider, deceased, had been satisfied and discharged by the giving of two certain other notes by the deceased to the plaintiff, and for a declaration that there was a family settlement whereby all liabilities of the plaintiff to the deceased were satisfied and discharged, and also to recover $10,000, the amount of a legacy payable to the plaintiff under the will of the deceased.

By order of the Appellate Division on the 24th February, 1914 (Snider v. Snider, 6 O.W.N. 254), these two actions were consolidated.

The consolidated action was tried before Middleton, J., without a jury, at Toronto, on the 19th November, 1914.

G. H. Watson, K.C., and H. E. Irwin, K.C., for the plaintiff.

W. J. Elliott and H. D. Anger, for the defendants the foreign executors of T. A. Snider.

F. C. Snider and J. H. Bone, for the defendant the Canadian executor.

MIDDLETON, J. :—Upon a motion for leave to appeal to the Appellate Division (Snider v. Snider, 6 O.W.N. 80), I took occasion to point out the exceedingly cumbrous and inartificial way taken to present the controversy between the parties. Nothwithstanding this, the case is now presented in the same unsatisfactory form.

The real question may be very simply stated. The testator by his will directs payment to the plaintiff, his brother, of $10,000, less the amount of any note made by the plaintiff outstanding at the date of his death. After the will and shortly

before the death, the brothers met in Toronto, and some discussion took place as to the brother's position under the will. The testator had recently remarried, and so had made an alteration to his will which materially changed a provision under which the plaintiff would have taken other benefits. I quite accept the plaintiff's evidence in its entirety. The effect of this is that an understanding was arrived at between the brothers by which the note for $10,000 made by the plaintiff in the testator's favour, and which would wipe out the legacy, was to be discharged. This not had been left at the testator's residence in Cincinnati, and the device was adopted of having cross-notes made by the testator in the plaintiff's favour for the same amount; it being assumed that this would in effect cancel the other note.

The testator, who was in Toronto upon his wedding trip, then proceeded upon the journey. He and his wife were both killed in an automobile accident a few days after this arrangement was made.

I have no doubt that the intention of the testator was that his brother should receive the $10,000; but those interested under the will resist the claim. Apart from any technical difficulty, I think the plaintiff's claim fails. He cannot take the legacy if his liability upon his note remains. I think it does remain. The Bills of Exchange Act provides that, where the note is not itself destroyed, liability may be ended by a renunciation in writing. The cases establish that the writing itself must clearly embody the renunciation. The notes which were given are not and cannot be regarded as equivalent to a renunciation.

The claim put forward upon the notes given by the testator clearly fails. These notes were without consideration; and, quite apart from this, it is clear that there never was any intention between the parties that they should be paid.

The plaintiff fails because the testator has not complied with the law which requires his testamentary intention to be evidenced by a written document, and because the Bills of Exchange Act requires the renunciation of liability upon a note to be in writing.

Those interested under the will are charities, and I hope, in view of the undoubted intention of the testator, that those who take may see fit voluntarily to carry out the testator's wishes.

There being no room for doubt upon the evidence as to what the testator's intention was, the resisting of the claim upon these legal grounds is not only ungracious, but is a course calculated to dissuade testators from exercising charitable intentions.

The testator was domiciled at Cincinnati, and the legacy is directed to be paid by the American executors. So far as the action is an action to enforce payment of the legacy, the plaintiff has probably chosen the wrong forum; but, in the view I take of the facts, this is not material.

While the actions fail, I do not think that costs should be awarded against the plaintiff.

MIDDLETON, J. DECEMBER 7TH, 1914.

RE McLELLAN.

Will—Construction—Trust—Failure of — Perpetuity — Tendency to Create Perpetuity.

Motion by the executors of the will of Donald McLellan, deceased, for an order determining certain questions as to the proper construction of the will.

J. H. Spence, for the applicants.

J. R. Meredith, for the Official Guardian, representing members of the McLellan family.

C. A. Masten, K.C., for the next of kin.

MIDDLETON, J.:—Donald McLellan, who died on the 3rd March, 1913, by his will and certain codicils provided, first: "In case the 'old McLellan homestead farm,' which has descended from my grandfather, or the east half of it, should be put up for sale, I direct my trustees, or their successors for the time being, to buy it and hold it always as a part of my estate, applying the rent of the land in keeping the house and other buildings and the fences in good repair and insured; the house is not to be rented, but a caretaker thereof to be appointed. I would like the house to be kept as a memorial of our family and the descendants of our family for the time being to meet there once a year, say for their holidays, the purchase-money to be taken from the part of said residue given in my said will for education of members of our family in addition to any sum then due my estate from my brother Duncan's estate."

This bequest is plainly bad, as offending against the law as to perpetuities.

By another clause of the will it is provided: "The interest

accruing from the remainder of said residue I direct my said trustee to apply from time to time in educating McLellans of our family. The selection of the beneficiaries to be wholly in the discretion of my said trustees."

This trust is, I think, also bad, because it tends to create a perpetuity.

The only exception to the rule invalidating perpetual trusts is where the object of the trust is a charity of a public nature. Where those who are to be benefited are either particular individuals or a fluctuating body of particular individuals, then the bequest ceases to be charitable, as that term is understood in law.

I do not need to review the authorities, many of which I have read, as the law is very clearly stated in Halsbury's Laws of England, vol. 4, paras. 169 and 184.

The Irish case referred to by Mr. Meredith, Laverty v. Laverty, [1907] 1 I.R. 9, is in no way in conflict with this principle.

Costs of all parties may come out of the estate.

MIDDLETON, J. DECEMBER 7TH, 1914.

GRAMM MOTOR TRUCK CO. OF CANADA LIMITED v. GRAMM MOTOR TRUCK CO. OF LIMA OHIO.

Contract—Construction—Sale of Goods—"At Factory Cost"—"Overhead Charges"—Royalties—List Price in Excess of Actual Cost—Refund of Excess.

Appeal by the defendants from the report of a Special Referee.

A. R. Bartlet, for the defendants.
J. H. Rodd, for the plaintiffs.

MIDDLETON, J.:—The two companies entered into an agreement bearing date the 19th January, 1911, which provides as follows: "The Ohio company shall ship or cause to be shipped to the Canadian company from time to time, as required by the Canadian company, all materials and parts which it is necessary for the Canadian company to purchase in rough or finished condition in the United States, at the same cost as the Ohio company has to pay for the said several articles, and shall furnish the Canadian company as ordered from time to time, at factory

cost, such complete units as are manufactured by the Ohio company. Schedule of such cost to be furnished to the Canadian company as soon as possible in each case. It is, of course, understood above costs to include overhead."

The whole difficulty is as to the ascertainment of what is to be allowed as "overhead," and how this is to be ascertained.

Shortly after the making of the agreement, a schedule of prices, supposed to be cost prices within the meaning of the agreement, was supplied. No complaint was made as to this list, and, during the almost two years in which the agreement remained current, goods were shipped and paid for upon the footing of this price-list.

For a full understanding of the relation of the parties, it should be also mentioned that the reason for the sale of goods at cost was the payment by the Canadian company of a royalty upon each machine purchased.

It is now alleged that the list price was in excess of the actual cost price, and this action is brought to secure a refund of the excess. The learned Referee has found in the plaintiffs' favour, awarding $18,959.92. From this award, the appeal is taken.

It is common ground that there is no way of ascertaining with mathematical accuracy, or perhaps even with substantial accuracy, what the actual cost, including overhead, is, of the different individual articles supplied.

The American company established at its factory a system of cost-cards, for the purpose of its guidance in its own business affairs. The items entered upon these cost-cards consisted, first, of the actual material entering into the individual article; secondly, of the productive labour expended upon that particular article; and, thirdly, there was added a sum arbitrarily fixed, supposed to cover the overhead charges. It is common ground that these cards do not accurately state the proper amount for overhead charges, and I think it may be taken for granted that, while the amount inserted on this card as representing the cost of material is substantially accurate, the amount entered as representing productive labour is quite erroneous.

The amount inserted in the price-lists furnished, and carried into the invoices, in no case corresponds with the amount inserted in the cost-cards, and this was well known to both parties. An investigation was made for the purpose of fixing the amount upon which duty had to be paid by the Canadian company; and,

even if there had not been the fullest disclosure before—and I think there was—the whole situation as to these cost-cards was then thoroughly known to both parties.

After the controversy had arisen between the parties, an accountant was sent to investigate the books of the American company, and it is upon his report that the Referee has acted. If the price entered in the cost-cards had been taken to control the situation, the overcharge would have been some $16,000 greater than the amount the Referee has fixed.

Upon investigation being had into the affairs of the American company, the result arrived at by the accountant as to what constitutes the total overhead expense, and the principle upon which that overhead expense is arrived at, does not appear to be in any way objectionable; and his figures may, I think, be accepted. He places the total overhead expenses of the company at $452,200. He then ascertains the total amount of productive labour as $352,905. He adopts the principle that is now generally accepted in all accountancy, that the overhead charges should be distributed amongst the articles manufactured in proportion to the amount of productive labour expended thereon, not, as was at one time assumed, in proportion to the cost of material plus the amount of productive labour; and he then ascertains that the overhead charges are 128 per cent. of the productive labour. So far, I think, he has proceeded upon the right lines.

For the purpose of adjusting the accounts, the accountant then took the amount of productive labour entered upon the cost-sheet of each article sold, and added to the cost of material and the amount charged for productive labour 128 per cent. of the productive labour charge, as representing the overhead; and upon this basis he ascertained the amount allowed by the Referee.

There could be no objection to this if in fact the productive labour which entered into the manufacture of these articles was accurately stated upon the cost-cards. An investigation has been had, and it has been ascertained that, applying the cost-cards to the entire output of the factory for the same period, the amount of productive labour they represent falls short of the amount actually spent for productive labour, by the very large sum of $137,366. If, instead of purchasing a small part of the output of the factory, the purchasers had purchased the entire output on this basis, it is clear that the vendors would not receive the actual cost of their entire output by this sum of $137,366, as

representing the proportion of overhead charges to be attributed thereto. This demonstrates very clearly the fallacy of the mode applied.

The defendants contend that, if the price-list which was put forward and exhibited as the basis of dealing is not to be accepted, and an endeavour is to be made to apportion the overhead as between the goods sold to the Canadian company and those dealt with elsewhere, the matter can better be approached in this way. This shortage, representing $137,366 and $176,791, amounting together to $314,157, representing the difference in labour and the corresponding proportion of the overhead, should be distributed over the whole business, and that the amount fairly to be attributed to the goods sold to the defendants should bear the same proportion to this sum as the goods sold bear to the total output. The total amount of business has been ascertained, and the goods sold to the defendants amount to 5.58 per cent. of the total. This would mean that the proper charge to be allowed, as against the $18,959.92 allowed by the Referee, would be $17,530, so reducing the amount to $1,429.92.

I am much impressed with the view that the figures included in the list furnished as being the cost of the articles ought to be accepted as having been agreed upon between the parties, and that they should be taken to represent the cost. Certainly no case of fraud is made out to relieve against that which must stand on substantially the same footing as a stating of accounts; but the intention of the parties was, no doubt, that no more should be charged than the actual cost of the articles sold, plus the royalty; and, for this reason, I think the defendants cannot complain if I direct credit to be given upon the sum of $5,864.54, due them by the plaintiffs, for this sum of $1,429.92.

The appeal will, therefore, be allowed, and the report of the learned Referee will be amended accordingly. The appeal has been substantially successful, and I think it follows that the defendants should have the costs of the appeal.

MIDDLETON, J. DECEMBER 7TH, 1914.

RE JACOBS AND TORONTO BOARD OF EDUCATION.

Appeal—Award under School Sites Act — Appeal to County Court Judge — Motion for Leave to Appeal to Appellate Division — R.S.O. 1914 ch. 277, sec. 20 (3) — Reasonable Ground—Discretion—Costs.

Motion by the land-owner, under sec. 20 (3) of the School Sites Act, R.S.O. 1914 ch. 277, for leave to appeal to a Divisional Court of the Appellate Division from the decision of a County Court Judge upon an appeal from an award of arbitrators under that Act.

G. T. Walsh, for the applicant.
E. P. Brown, for the Board of Education.

MIDDLETON, J.:—The whole controversy is about a comparatively small matter. Mr. Jacobs bought this land for $3,200, and spent about $200 upon it. Almost immediately the School Board expropriated, offering $4,000. Jacobs thinks he ought to have $4,500. The arbitrators have given $3,900. The County Court Judge can find no ground for interference.

When the Legislature has taken away the right of appeal unless by leave, I think it is intended that the Judge applied to for leave should take the responsibility of ascertaining whether, in his opinion, any substantial reason exists for granting the indulgence of a second appeal, and that leave to appeal should not be granted merely because the applicant desires further litigation.

I have looked into this matter with some little care, and can find nothing to justify granting the leave. There is nothing exceptional in the case. It is purely a question of "how much;" and I am satisfied that there is no reasonable ground for supposing that there is any error or injustice in the award.

No one can avoid sympathising with a land-owner whose land is taken from him against his will, at a price which he deems inadequate, particularly where he is saddled with a very heavy burden of costs as the result of claiming more compensation than in the result he is found entitled to. Many expropriation statutes provide that if no more is awarded than offered, each party

shall bear his own costs. In other statutes the principle seems to be that the incidence of costs must follow the determination as to the adequacy of the offer made. This, however, does not concern me, as the discretion under this Act is vested in the arbitrators, and there is no power to review the discretion given to them.

The motion must be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 7TH, 1914.

RE INTERNATIONAL HARVESTER CO. v. KERTON.

Division Court—Territorial Jurisdiction—Place where Cause of Action Arose—Whole Cause of Action—Prohibition—Limitation—Transfer of Action to Proper Court.

Motion by the defendant for prohibition to a Division Court in the county of Wentworth, with territorial jurisdiction in the city of Hamilton.

H. S. White, for the defendant.
H. E. McKittrick, for the plaintiffs.

MIDDLETON, J.:—The plaintiffs' office is in Hamilton; the defendant carries on business in the county of Grey. An agency contract was entered into between the parties. This contract was negotiated and signed by the defendant at his residence, but it was provided that the contract, although signed by the travelling agent of the company, in the county of Grey, should not be binding until approved at the Hamilton office. It was approved at the Hamilton office, and the goods were shipped. Some disputes have arisen as to the amount due in respect of goods received by the defendant at Grey, supposed to have been disposed of by him there.

Suit has been entered at Hamilton, and a motion to transfer the case to Grey has failed. This motion for prohibition is now made.

Under a long series of decisions upon the Division Courts Act, "cause of action" has been held to mean all material facts essential for the proof of the plaintiffs' case. Manifestly, much that took place in the county of Grey falls within this definition.

It is only when the whole cause of action has arisen in some other place that the defendant loses his right to be sued at his place of residence.

I think the Hamilton Court has no jurisdiction, and that prohibition should be awarded, so limited as not to prevent an order being made to transfer the action to the proper Court. This is better than to compel the bringing of a new action.

Costs will follow the event of the motion, and must be paid by the plaintiffs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 7TH, 1914.

RE AYRE.

Infant—Maintenance—Infant Entitled to Share of Estate under Will—Application of Income—Discretion of Trustees—Application of Father of Infant for Payment of Income to him—Benefit of Infant.

Motion by the father of an infant for an order authorising the trustees under a will to pay to the applicant the income of the infant's share of the estate of the testatrix for the maintenance of the infant.

J. H. G. Wallace, for the applicant.
J. G. O'Donoghue, for the trustees.
F. W. Harcourt, K.C., Official Guardian, for the infant.

MIDDLETON, J.:—By her last will the testatrix, who died on the 13th January, 1914, directed that a fourth interest in her estate should be held by her executors and trustees until her grandson, the infant in question, should arrive at the age of 30 years, and that the income "shall be used by my said executors and trustees for the maintenance and education of my said grandson until he shall have arrived at the age of 21 years." After arriving at the age of 21, and until he is 30, the infant is to receive the income.

The father was not, at the date of the grandmother's death, maintaining the infant, but he has now taken him to his home and is maintaining him. The income from the infant's share is $36 per month, and this is what the father desires to receive. The executors, on the other hand, take the position that the father is amply able to maintain the child, and that, in the exe-

cution of the trust imposed on them, it is their desire to husband the revenue from the share so that when the proper time arrives, in some three or four years, the boy may receive a proper collegiate education.

The father bases his claim to this money upon the right which he claims to have to receive it under the terms of the will. If he has no such right, and the executors hold discretion, then I am quite clear that the discretion is being honestly exercised, and that the Court has neither the power nor the inclination to interfere with them in the discharge of the duty imposed upon by the testatrix. This is abundantly plain from cases such as Gisborne v. Gisborne (1877), 2 App. Cas. 300, and In re Bryant, [1894] 1 Ch. 324.

There has been much fluctuation of opinion upon the question that now arises. Earlier cases are reviewed and discussed in a note to Hughes v. Hughes (1784), 1 Bro. C.C. 387, reprinted in 28 E.R. 1193. In that case it is stated that maintenance will not be allowed by the Court where a parent is of ability, although directed by the will.

The case Mundy v. Howe (1793), 4 Bro. C.C. 223, decided not long after this, marks the extreme limit to which the Court has gone in the opposite direction. The fundamental principle underlying that decision is, that there is a difference between cases where there is a marriage settlement and cases where the infant takes under a will. Lord Chancellor Loughborough says: "It is perfectly clear from the cases that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child." Although this is so clearly stated, the decision has been frequently regarded as one justifying the opposite conclusion.

I do not need to review the cases at length. They are mostly discussed in Wilson v. Turner (1883), 22 Ch.D. 521, which was a decision upon a settlement; and it is explained that Mundy v. Howe turned upon there being a contract under which there was an obligatory trust which compelled the trustees to maintain the children. In that case, it was said, the father had the right to demand and receive the income.

I think the claim of the father in this case fails: first, because this was merely a voluntary settlement, which was primarily intended for the benefit of the child, and not to confer any benefit on the father or exonerate him from any legal liability to maintain his child; and, secondly, because the trustees have a discretion, and that which they propose to do is within the limits of the discretion.

The testatrix has not directed that the money shall be spent as and when received, or annually. All she has said is that the income must be used for the education of the child. The trustees propose to do this in the way that they believe to be best for the child's interest.

The application is dismissed, and I can see no reason why the father should not bear the costs.

RIDDELL, J., IN CHAMBERS. DECEMBER 8TH, 1914.

LEUSHNER v. LINDEN.

Practice—Affidavit Filed with Appearance to Specially Endorsed Writ—Rule 56(1), (4)—*"Good Defence upon the Merits"—Defective Affidavit—Motion for Summary Judgment under Rule* 57—*Leave to Move Substantively for Permission to File Proper Affidavit—Duty of Officer of Court Receiving Affidavit when Filed.*

Appeal by the defendant from a summary judgment granted by the Master in Chambers, under Rule 57, for the amount of the plaintiff's claim, as specially endorsed upon the writ of summons.

A. J. Russell Snow, K.C., for the defendant.
J. R. Roaf, for the plaintiff.

RIDDELL, J.:—To a specially endorsed writ, the defendant entered an appearance, which has been set aside by the Master in Chambers on the merits. The defendant now appeals.

The Rule governing such appearances is perfectly clear and precise, and does not admit of misunderstanding: "Where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action. . . . . If the defendant fails to file an affidavit the appearance shall not be received" (Rule 56(1) and (4)).

By this Rule there are two prerequisites which must be found in the affidavit: (1) "that he has a good defence upon the merits;" (2) the nature of the defence with its facts. The Rule has the force of a statute, and must be observed. The affidavit

in this case reads: "I have a good defence to this action." That this is not a compliance with the Rule is conclusively decided by Robinson v. Morris (1908), 15 O.L.R. 649, in the King's Bench Division. The same point was decided in the Appellate Division by a Court of which I was a member—there, indeed, under the circumstances of the particular case, we gave the defendant leave to file a better affidavit nunc pro tunc.

Whatever the merits of the proposed defence may be, I do not go into them—they may be developed fully in an application which I reserve leave to the defendant to make substantively for leave to file a proper affidavit, etc.

The appeal will be dismissed with costs—the plaintiff undertakes not to proceed on his judgment until the 11th December to enable such proposed motion to be made.

The attention of the defendant having been called to the defect of merit as well as of form, she must expect that any defence she may set up will be closely scrutinised and rigidly dealt with.

The Rule being specific that the appearance shall not be received without an affidavit, and that the affidavit should contain a statement that the defendant "has a good defence upon the merits," officers should not receive an appearance unless the affidavit does contain that statement. It is not to be expected that they will pass upon the sufficiency of the facts alleged to constitute a valid defence: but they may and should see that the affidavit is not defective in form.

BRITTON, J. DECEMBER 11TH, 1914.

RICHARDSON v. CANADIAN PACIFIC R.W. CO.

Carriers—Shipment of Grain—Placing in Elevator—Failure to Notify Shippers—Loss by Fire in Elevator—Insurance—Marine Policy — Adjustment — Insufficiency of Amount to Cover Loss—Negligence of Carriers—Damages.

Action for damages for the loss by fire of a large quantity of oats shipped by the plaintiffs at Fort William for Owen Sound.

The action was tried without a jury at Kingston.

J. L. Whiting, K.C., Glyn Osler, and A. B. Cunningham, for the plaintiffs.

I. F. Hellmuth, K.C., and J. D. Spence, for the defendants.

BRITTON, J.:—The plaintiffs are dealers in grain, having their head office at Kingston. On or about the 4th December, 1911, they shipped on the defendants' steamer "Kewatin," at Fort William, 90,000 bushels of oats for carriage to Owen Sound. These oats were classified as 30,000 bushels of extra No. 1 feed oats, 30,000 bushels of No. 3 Canada Western oats, and 30,000 bushels of No. 1 feed oats. These oats were safely carried by the "Kewatin" to Owen Sound, arriving there on the 16th November, and they were transferred by the defendants from their steamer to their elevator "B" on the 9th December, 1911.

On the 11th December, before the defendants had notified the plaintiffs of the arrival of the ship or of the transfer of the oats, an accidental fire occurred, destroying elevators "A" and "B" of the defendants, and a large quantity of these oats.

At the time of placing the oats in elevator "B" the plaintiffs had other grain there; and, should it be deemed of any importance in any view of this case, I find that these oats were placed in compartments of the elevator with other oats of the same grade.

The plaintiffs' claim is that the defendants were guilty of negligence in not notifying the plaintiffs of the arrival of the steamer at Owen Sound and of her unloading and of the oats being placed in elevator "B."

The plaintiffs already, and before any of the cargo of the "Kewatin" was placed in the elevator, had an insurance upon

their grain that might from time to time be stored there, up to a limit of $200,000. The value of the plaintiffs' grain, including the cargo of the "Kewatin," was $228,098.45. Had notice been given to the plaintiffs, they would have increased the amount of their insurance to the full value of their grain, and so would not have sustained loss.

There is very little in dispute between the parties upon questions of fact. . . .

The defendants state their position to be this. The only damages the plaintiffs seek to recover are those arising from alleged short insurance, and the defendants say that the plaintiffs at the time of the fire already were fully protected by insurance, and they should have collected from the insurers up to the full amount of the loss.

The policy in favour of the plaintiffs was one issued by Lloyds, and it was in the main a marine policy, covering grain afloat, shipments to be valued at amount of invoice until otherwise declared, and then at the amount declared. The policy contained the clause, "To pay average irrespective of percentages." The word "average" is, no doubt, used as meaning loss or damage. It is a word used in marine insurance; and, so used, the clause means that, even if the charge upon the property insured was only a small percentage, the insurers would pay the loss. The word is not used in connection with fire losses on land. See Chalmers and Owen on Marine Insurance, 2nd ed., pp. 92, 146, 164.

The policy provided very carefully in reference to loss by "perils of the sea," and then contains the following:—

"We further certify that this policy covers, with London Lloyds underwriters and or companies the fire risk on grain in any Canadian elevator excepting it being understood and agreed that the underwriters hereunder shall not be liable for more than $200,000 at any one time in any one elevator.

"It is understood and agreed that any losses arising on translake or river risks shall be settled according to the rules and usages of the Lake Underwriters Association, but any loss which may arise or occur in any elevator shall be settled in conformity with the rules and usages of companies . . . comprising the Canadian Fire Underwriters Association."

The loss in question arose by fire in an elevator not excepted, and the risk attached.

The plaintiffs settled with the insurance companies, and accepted the adjustment as if it was a loss that happened at sea

and by reason of perils of the sea insured against. The defendants say that the plaintiffs were fully covered, and therefore should not have accepted such a settlement, and that therefore the loss was not in any way due to the defendants' negligence, but to the plaintiffs accepting less than the amount to which they were entitled.

The total value of the plaintiffs' grain in elevator "B," after placing therein the cargo of the "Kewatin" was..$228,098.45

The amount of salvage was 40,603.12

Amount of the plaintiffs' loss $187,495.33

The amount of insurance was $200,000, enough to pay in full and $12,904.67 over.

The assurers asserted the right to adjust and pay, adopting the usage in settlement of losses under marine policies, viz., that of applying the doctrine of co-insurance, which is, that where the total value of the property exceeds the amount of insurance, and where the total loss is less than the amount of insurance, the amount payable by the insurers is found by the following proportion: as the total value of property is to the total insurance, so is the total amount of loss to the amount payable by the insurers.

Upon this adjustment the insurers admitted a liability for $164,196.93, and no more.

This resulted in net loss to the plaintiffs of $23,068.40, made up in this way:—

The plaintiffs' total loss $187,265.33

Less paid by insurers 164,196.93

As above .....$ 23,068.40

Total value, $228,098.45; total insurance, $200,000; total loss, $187,365.33 = $164.196.93, as above.

No evidence was given of rules and usages of companies comprising the Canadian Fire Underwriters Association. It does not appear that any such association exists, much less any rules or usages that may be relied upon as to mode of settlement of fire losses binding upon the parties; but, even if there were such rules, they would not preclude a settlement between the parties to the contract of insurance according to the real understanding and agreement between them. There was a settlement in good faith and in the honest belief of the parties that such settlement was all that the plaintiffs were entitled to get under their policy, and all that the insurance companies were liable to pay. No

doubt, the plaintiffs' solicitor was at one time of opinion that the companies were liable for the full amount of loss, and issued a writ upon the policy. The evidence, undisputed, was that the issue of the writ was not authorised by the plaintiffs. Even if the issue of the writ was authorised, the defendants are not, in my opinion, entitled to use that fact as in itself a defence to this action. The defendants were not hurt by the issue of this unserved writ. It was issued on the 19th September, 1913, whilst the writ in the present action was issued on the 24th day of July, 1912. It does not appear that the defendants in any way offered to pay, taking over the policy, or objected to the plaintiffs' settlement with the insurance companies.

It seems to me a very reasonable thing to treat this policy as marine, whatever liabilities might attach or whatever exemption from or limitation of liability may follow. In greater part it was marine, and placing the grain in elevator was without the consent or even knowledge of the plaintiffs.

A marine policy may cover a risk on land during part of the voyage: Rodocanachi v. Elliott (1873), L.R. 8 C.P. 649.

It was not the fault of the plaintiffs, and ought not to enure to the benefit of the defendants, that the plaintiffs became, if they did become, co-insurers of their property to the amount of the excess in value over $200,000. If the insurers had the right, as a matter of agreement with the plaintiffs, express or implied, upon the facts, to treat the plaintiffs as co-insurers, the defendants ought not to be allowed, in relief of their negligence, to take advantage of a situation created by them, to the prejudice of the plaintiffs.

No doubt, it is a general rule that, in the absence of agreement, the insured should in case of loss recover that loss up to the full amount of it, if the amount of insurance is sufficient; but a different rule prevails under such circumstances as these. Wherever unconnected properties or perils of goods are insured under one sum, the rule of average is applied, by which the insured recovers only such proportion of his loss as the total sum insured bears to the total value of the property carried.

That is this case. Grain of different kinds was at different times placed in elevator "B." Even as to the cargo of the "Kewatin," it was of different grades of oats, shipped under different bills of lading, and this cargo was placed upon the grain of the plaintiffs already in the elevator.

The defendants did not comply with the bills under which they received and carried the grain of the plaintiffs. These bills

contained the clause, "Advise James Richardson & Son Limited" (the plaintiffs) "at Kingston of the arrival at Owen Sound." The defendants were guilty of negligence in not complying with the Dominion statute of 1910, 9 & 10 Edw. VII. ch. 61, sec. 11.

The plaintiffs would have placed the further insurance had they been notified. The plaintiffs' loss is directly the result of want of notice. The damages are not, in my opinion, too remote.

The plaintiffs' loss is the amount they would have received in addition to the amount they did receive. The plaintiffs were not bound, as between them and the defendants, to go into protracted and costly litigation with the insurance companies before making their claims against the defendants.

The plaintiffs are entitled to judgment for $23,068.40, with interest at 5 per cent. per annum from the 24th July, 1912, and costs.

BRITTON, J. DECEMBER 12TH, 1914.

SMITH v. HUMBERVALE CEMETERY CO.

Company—Cemetery Company—Incorporation under Ontario Companies Act—Power to Sell Lands not Required for Cemetery Purposes—Reincorporation of Company under Companies Act, 2 Geo. V. ch. 31—Additional Powers—Act respecting Cemetery Companies, R.S.O. 1897 ch. 213—By-law—Petition—Order in Council—False Representations.

Action is brought by the plaintiffs, as alleged lot-owners and shareholders in the Humbervale Cemetery Company, and on behalf of all other shareholders and lot-owners: (1) to have a certain by-law of the original company declared void; (2) to have it declared that the petition of the Humbervale Cemetery Company, under the Ontario Joint Stock Companies Act, was not authorised by the shareholders of the Humbervale Cemetery Company; (3) to have it declared that there was no right on the part of the cemetery company to sell part of their land to the defendant Winter; (4) for an injunction restraining the defendants from using the cemetery land otherwise than for cemetery purposes; (5) to compel Winter and the other defendants to restore the land to its former condition; and (6) for damages.

The action was tried without a jury at Toronto.

E. F. B. Johnston, K.C., and D. Inglis Grant, for the plaintiffs.

G. H. Watson, K.C., and G. A. Grover, for the defendants.

BRITTON, J.:—What the defendants rely upon in answer to this action is fully set out in the statements of defence.

The facts, so far as they are material in the view I take, are as follows:—

The Humbervale Cemetery Company was on the 14th April, 1893, regularly incorporated under R.S.O. 1887 ch. 175, secs. 1 and 2.

The defendants Smith and others, shortly prior to the incorporation mentioned, acquired land, viz., 50 and $\frac{5}{10}$ acres, as set out in the statement of claim, for the purpose of a cemetery.

Having complied with the requirements of the Act last cited, the applicants for incorporation became "a body corporate under the name of the Humbervale Cemetery Company, with power to hold and convey the land, to be used exclusively for cemetery purposes."

It was argued that the old company, under their corporate powers, and as trustees acting in good faith, could, if any part of the original parcel of land became unsuitable or not required for burial purposes, sell such portion, not in any way interfering with lots sold to or acquired by any persons for burial lots. There is much force in the argument—where land originally acquired is found much too large for use reasonably required for burial purposes—but, because of what has taken place, I express no opinion upon that point.

The company acquired 50 $\frac{5}{10}$ acres as described in the statement of claim. They subdivided a part into small burial lots 10 x 10—some lots were larger and not rectangular.

Later on, they desired to sell a portion of their land, not required, as the directors thought, for cemetery purposes. A price was fixed, and the defendant Winter was found as a person willing to buy at the price—but he questioned the right of the company to sell for purposes other than for cemetery purposes. The directors sought legal advice, and were told that the company might be reincorporated under the Joint Stock Companies Act. The old company then applied for reincorporation, under 2 Geo. V. ch. 31.

The Humbervale company was one of those companies within the Act, as it was "a corporation incorporated for purposes and objects within the scope of the Companies Act." A cemetery company could be only Provincial—but it was brought directly under the Act by ch. 213, R.S.O. 1897, "An Act respecting Cemetery Companies."

This applies to cemetery companies incorporated before the 1st day of July, 1897, and this company was incorporated in 1893, and was, at the time of the application for reincorporation, "a valid and subsisting corporation."

Letters patent were granted reincorporating the company, under the name of the Humber Vale Cemetery Company Limited, on the 18th October, 1912.

The powers conferred are "to carry on business as a cemetery company and for the purpose to hold the lands now owned by the Humbervale Cemetery Company, and, if deemed necessary or expedient, to purchase or otherwise acquire and hold any additional lands for the purposes of the company, and with power to sell, alienate, and convey any of the said lands now held by the company and any other lands not required for the purposes of the company, if deemed necessary or expedient."

The last-mentioned company then, deeming it expedient and advisable to sell a portion of the land as not required for cemetery purposes, renewed negotiations with Ogden A. Winter, and a sale to him resulted. A conveyance has been executed of the part he purchased and a mortgage given by Winter to the company for the balance of the purchase-money.

I am not able to give effect to the contention of the plaintiffs in this action.

As to the objection to the by-law and the objection that the petition was not authorised, these are cured by sec. 27 of the Joint Stock Companies Act.

The defendant Winter has apparently acquired a large amount—perhaps the majority—of the stock of the company. Of that the plaintiffs have no right to complain.

It was objected that the plaintiffs are not shareholders or lot-owners so as to entitle them to bring this action. I make no finding upon that issue.

I appreciate the desire of the plaintiffs and lot-owners to see the cemetery ground large and extensive, as it was before the sale to Winter—but I may add that, according to the evidence, a great deal more care and attention could be given to the smaller enclosure than has been—and, beyond question, the smaller area is and will be sufficient for the burial during very many years of those whose friends will select the cemetery as a place of interment.

The order in council approved by His Honour the Lieutenant-Governor of Ontario, dated the 22nd day of September, 1914,

can have no effect as to what was done prior to its date—and, therefore, cannot operate as a stay of proceedings in this action.

I find that there were no false or fraudulent representations in this matter by any of the defendants—but what has been done has been done in good faith.

The action will be dismissed with costs.

WESTBROOK v. KERNAHAN—LENNOX, J.—DEC. 7.

Principal and Agent—Agent's Commission on Sale of Block of Shares in Commercial Company—Evidence—Employment of Agent—Sale Effected through Instrumentality of Agent—Quantum of Commission.]—Action against the executors and trustees under the will of Widmer Hawke, deceased, to recover $95,000 as commission on a sale to Charles Millar and Cawthra Mulock for $950,000 of 12,000 shares of preferred and common stock of the O'Keefe Brewery Limited, the property of the defendants as executors and trustees. It was not alleged that there was an agreement as to the rate of commission or amount of compensation to be paid to the plaintiff or that the sale was directly effected by any act of his. The bargain or understanding upon which the plaintiff based his right to recover was with the defendant Kernahan, who was the active executor in negotiating and carrying out the sale. The defendants denied the employment of the plaintiff and denied that he was directly or indirectly the means of effecting the sale to Millar and Mulock. The learned Judge, after discussing the evidence in a written opinion, finds both these issues in favour of the plaintiff, and gives judgment for the plaintiff for $15,000 with costs. M. K. Cowan, K.C., for the plaintiff. I. F. Hellmuth, K.C., for the defendants.

CURRY v. MATTAIR—LENNOX, J.—DEC. 7.

Vendor and Purchaser—Sale of Mining Claims—Guaranty of Title—Failure to Make Title—Recovery of Purchase-money.]—Action to recover moneys paid by the plaintiffs to the defendant as the purchase-price of two mining claims, to which the defendant failed to make title, the defendant having guaranteed the title. LENNOX, J., was of opinion that the plaintiffs had not made out a right to recover in respect of mining claim M.R.

1465; but was entitled to recover in respect of mining claim M.R. 1753. Aside from the adjudication of the Mining Commissioner filed, the evidence satisfied the learned Judge that the defendant had not a title to the property in question, within the meaning of his guaranty, and it never was possible for the plaintiffs to obtain a patent or license from the Department. Neither the plaintiffs nor the defendant had a right to obtain conveyance of this claim. There were preliminary expenses which were recoverable, even if the defendant acted in good faith; and these should be fixed at $85. It was not shewn that the plaintiffs demanded re-payment until about the time the action was commenced. Judgment for the plaintiffs for $2,085, with interest from the date of the writ, and the costs of the action, but without costs referable only to the claim in respect of M.R. 1465; the defendant to have the right to deduct from the plaintiffs' costs $15 for attendance in Court on the 3rd instant, when the only question involved related to the claim disallowed. G. H. Watson, K.C., for the plaintiffs. A. G. Slaght, for the defendant.

MILO CANDY CO. v. BROWNS LIMITED—LATCHFORD, J.—DEC. 10.

Contract—Rectification—Breach—Damages.]—Action for rectification of an agreement, for a declaration that there had been a breach of the true agreement, for the value of goods illegally removed from the plaintiffs' premises or for the return of the goods, and for damages. The agreement was for the purchase by the plaintiffs from the defendants of a business. At the trial (without a jury) the learned Judge found the facts in favour of the plaintiffs, and reserved judgment upon the question of damages. Judgment was now given for the plaintiffs for $4,557.40 with costs, including the costs of a motion for an interim injunction. J. W. McCullough and S. J. Arnott, for the plaintiffs. W. N. Tilley, for the defendants.

CORRECTION.

In MCLARTY v. DIXON, ante 347, the page of 6 O.W.N. where the note of the judgment of KELLY, J., is to be found, should be 330.