THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM AUGUST, 1918, TO THE 28th FEBRUARY, 1919.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

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CASES NOTED.

(Cases marked * are reported or to be reported in the Ontario Law Reports.)

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The
Ontario Weekly Notes

VOL. XV. TORONTO, SEPTEMBER 6, 1918. No. 1

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. JULY 11TH, 1918.

RE RONSON.

Will—Construction—Devise to Son—Limitation—"Death without Issue"—Issue Surviving Son—Originating Notice—Rule 604—Wills Act, sec. 33—Costs.

Motion by William Peter Ronson, a son of George Ronson, deceased, upon an originating notice under Rule 604, for a declaration and determination of the applicant's rights under the will of his father, dependent upon the construction of the will.

The application was heard in the London Weekly Court.
W. H. Barnum, for the applicant.
F. P. Betts, K.C., for the Official Guardian.

MEREDITH, C.J.C.P., in a written judgment, said that the case had not been very fully argued; but the applicant's contention seemed to be that he took the land devised to him absolutely, in the events which had arisen.

The land was devised to him by these words: "I give and bequeath to my third son William Peter Ronson the north half of lot number 19 north of Talbot street in the said township of Middleton, containing 100 acres more or less." But that gift was limited, by a subsequent clause of the will, in these words: "I further will that in the event of the death of any of the within mentioned heirs without issue then the property both real and personal willed to them shall be divided by my executors equally between the remaining heirs share and share alike."

There were similar devises to all of the testator's sons, and to some of his daughters, all of which were subject to that limitation. There were bequests to his other daughters.

The applicant's contention presumably was, that, he having had issue, the limitation could not take effect, that the words "death without issue" meant without ever having had any children; or else that they meant an indefinite failure of issue, and so the limitation contravened the rule against perpetuities, and therefore the limitation was void.

Whatever what might have been the rule of construction applicable to such contentions before the Wills Act legislation, in these days such contentions cannot prevail; the rule which stood in the way of giving effect, in many cases, to a testator's intention cannot aid the applicant in this case: the Wills Act, sec. 33.

The purpose of the testator was to keep his property in the family through two generations, and probably into the third; his own, his children's, and his grandchildren's. As any child died without leaving surviving children, the gift to that child went over to the other children; the dominating thought was, grandchildren capable of taking at the parent's death. The possibility of all children dying without leaving a surviving child was probably too remote to be taken into consideration and provided for.

The learned Chief Justice ruled that, if the applicant should die without leaving any issue surviving him, but leaving brothers and sisters, or brothers or sisters, or a brother or a sister, all his rights in the land in question would cease; the property would go from him to them or him or her.

The case was not one for costs; it was one which needed clearing up; and the respondents had got enough without adding costs; in short, the costs should come out of the estate, of which each of children had a share, and so "out of the estate" meant "out of them," or, in other words—substantially—each should pay his and her own costs.

MEREDITH, C.J.C.P. JULY 11TH, 1918.

RE CHAPMAN.

Infant—Fund in Hands of Trustees—Payments out of Corpus for Advancement in Life of Infant—Safeguards.

Motion by the father of Madge Chapman, an infant, for an order authorising the payment by trustees of moneys in their hands to which the infant was entitled, for her advancement in life.

The motion was heard in the London Weekly Court.

Edmund Meredith, K.C., for the applicant.

MEREDITH, C.J.C.P., in a written judgment, said that the infant was in the eighteenth year of her age, and she and her father desired that she might have the benefit of being trained as an hospital nurse. The money was bequeathed to her by her father's mother, and was invested now by a trust company, the trustees of it under her grandmother's will. The corpus of the money amounted to a little more than $900, and income unexpended to a little more than $600. Under the will the whole of the current income was now payable to the beneficiary; but, under an order of this Court, $75 a year was now, and had been for some time past, paid for her maintenance. The corpus was, under the will, payable to her at her father's death.

What was asked was, that the annual amount now payable for her maintenance be increased to $200 for three years.

It was very plainly in the interests of the young woman that she should have a training leading to the acquirement of an honourable calling which might be a means of self-support throughout her life.

The money seemed to be hers absolutely, and she was old enough to know what the expenditure of it now meant, and to be able to consider for herself, as well as obtain advice, as to her fitness for the occupation of a trained nurse.

There was nothing in her grandmother's will that was opposed to such an advancement as that sought: the provision for payment of the income only during her father's life did not indicate sufficiently any such opposition: see *Morgan* v. *Morgan*, [1917] 1 I.R. 181; and *In re Borwick's Settlement*, [1916] 2 Ch. 304.

The father seemed to be unable to pay for his daughter's advancement without the help of the payment sought out of this fund.

There was no doubt of the power of the Court to authorise the payments—see *Re Adkins Infants* (1915), 33 O.L.R. 110; *Re Rundle* (1914), 32 O.L.R. 312; and the cases collected and referred to in Lewin on Trusts, 8th ed., p. 588; Williams on Executors, 9th ed., p. 1275—and the payments should be so authorised, subject to these safeguards: that the trustees should first satisfy themselves that their *cestui que trust* was likely to become a capable trained nurse; and that her proper training would be secured; and also that the father was not reasonably able to supply the needed means. The trustees appeared to be willing (they were not represented at the hearing, but had since been conferred with); and such services as they might perform in this respect should be taken into account when their remuneration should be fixed.

Order accordingly; costs out of the fund.

MEREDITH, C.J.C.P. JULY 11TH, 1918.

RE SMITH.

Infant—Custody—Application of Mother—Child in Custody of Guardian Appointed by Will of Deceased Father—Welfare of Infant—Ability of Mother to Undertake Care and Custody—Infants Act, R.S.O. 1914 ch. 153, secs. 2, 3, 28.

Application by the mother of Roddick Lorne Smith, an infant, for an order awarding her the custody of the child.

The motion was heard in the London Weekly Court.

T. Scullard, for the applicant.

O. L. Lewis, K.C., for the testamentary guardian.

MEREDITH, C.J.C.P., in a written judgment, said that the child was of tender years—the son of one who died fighting for his country in the present war.

The child was in the custody of his guardian, appointed by his father in his last will, and was admittedly being well cared for, and was much attached to those with whom he was living.

The child had not been in the custody or care of his mother because of her ill-health and consequent incapacity. She now asserted that she had so far recovered as to be able to undertake the custody and care of the child. The testamentary guardian, with exemplary fairness and an evident desire only to safeguard

the child's welfare, and carry out the trust imposed upon her, raised the question whether, as testamentary guardian, it was not her duty to retain the custody and care of the child.

The learned Chief Justice referred to secs. 2, 3, and 28 of the Infants Act, R.S.O. 1914 ch. 153, and to Davis v. McCaffrey (1874), 21 Gr. 554; and said that the Court had power, in all cases, to consider the question of the custody and care of a child "for cause," whosesoever the custody might be.

In ordinary cases, on the death of the father, the care of the children naturally falls upon the mother; but this was an exceptional case; owing to ill-health, the mother, until the past year, had not deemed herself able to assume that responsibility, and until now had made no effort to obtain the custody of the child, and seemed to have been quite satisfied with the care that others were taking of him.

The main question therefore was, whether the mother had so surely recovered her health, and her ability generally, that the Court might, wisely, give to her the custody, care, and bringing-up of the child; so surely recovered that the child might safely be taken from his present satisfactory home and surroundings and be committed to her care and custody.

The learned Chief Justice was of opinion that the evidence did not fully establish the mother's ability to care for the child at present; and that it would be better, in the interest of the child, that he should remain in his present home for a time, during which such a test as having the child with the mother for a visit might be made, and her own physician might become satisfied of her ability.

No order is made, except that the costs of the guardian be paid out of any of the funds of the father's estate available for the purpose; but, if any question should arise as to access by the mother to the child, or visits by the child to the mother, liberty to apply is reserved, and to that extent the motion is undisposed of and stands adjourned sine die.

MEREDITH, C.J.C.P. AUGUST 7TH, 1918.

*RAYMOND v. TOWNSHIP OF BOSANQUET.

Highway—Nonrepair—Injury to Person Travelling in Motor-car—Overturn of Car—Dangerous Approach to Bridge—Narrow Bridge—Negligence of Municipality—Proximate Cause of Injury—Contributory Negligence of Driver of Car—Person Injured not Responsible for—Damages.

Action to recover damages for bodily injuries sustained by the plaintiff in a highway accident on the 26th July, 1917.

The action was tried without a jury at Sarnia.

J. M. McEvoy, for the plaintiff.

A. Weir, for the defendants.

MEREDITH, C.J.C.P., in a written judgment, said that the claim of the plaintiff was grounded mainly upon the duty imposed by statute upon the defendants to keep in repair the highway upon which the accident happened: Municipal Act, sec. 460. The defendants admitted the duty, but denied any breach of it; and it was unquestionable that there was no disrepair, in the sense in which that word is ordinarily used—dilapidation; though there may have been a failure to perform the statute-imposed duty, which is wide enough to require that the highway be kept in a condition reasonably sufficient for the needs of the traffic over it—the defendants having a margin of taxation power more than enough for the purpose: see Ackersviller v. County of Perth (1914), 32 O.L.R. 423, 428. The case had also a misfeasance aspect: see Webb v. Barton Stoney Creek Consolidated Road Co. (1895), 26 O.R. 343.

For their own purposes the defendants diverted the travelled road from the right-hand side, going north, of the original allowance for road, sufficient for a road on that side of the ditch until a change in the course of the ditch permitted a return to the original allowance for road. A bridge over the ditch was necessary to permit of this "cross-over;" and it was the character of that "cross-over," which the defendants compelled the traffic to make, that the plaintiff found fault with. His contention was, that the turn which must be made, going north, at the bridge, was too sharp, having regard especially to the narrowness of the bridge, and that the

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

bridge was altogether too narrow; that, instead of keeping the road in repair, the defendants had needlessly made it dangerous, really creating a public nuisance. Instead of building a new bridge, the defendants, for the purposes of economy, made the "cross-over" by means of a bridge which, years before, they had made for the use of a single farm-owner, in order to give him access to the road, which was then on the other side of the ditch.

It was made plain by the defendants' recent conduct, respecting the bridge, that they considered it insufficient. When the accident happened, they were about to widen it.

The learned Judge had no difficulty in reading the conclusion that the defendants had been guilty of neglect of the duty imposed upon them by statute, to keep in repair the highway at the place where the accident happened. It was not necessary to determine whether the case was one of malfeasance also.

Municipalities with low assessments and low taxation should not be encouraged in any such notion as that such a bridge as that in question was enough for the needs of traffic such as passed over the highway at that place—such a highway is not kept in repair by such a structure.

The want of repair of the road was the proximate cause of the accident.

The injury to the plaintiff was caused by the overturning of a motor-car in which the plaintiff was being carried; he was not the owner or driver.

Upon the evidence, it was impossible to find that reckless or careless driving, and not the character of the bridge, was the proximate cause of the accident.

If contributory negligence on the part of the driver of the car were found, the defendants would not escape liability. The driver was not the servant or agent of the plaintiff, nor was the driver in any manner subject to the plaintiff's orders or control; and there was no evidence that the plaintiff had anything to do or say regarding the manner in which the approach to the bridge was made.

The defendants were liable in damages to the plaintiff for the injuries sustained by him in the accident.

The damages should be assessed at $1,750. This included $250 for out of pocket payments; that sum was assessed provisionally, the right being reserved to the plaintiff to prove more accurately the actual amount; the actual amount, when ascertained, to be substituted for the $250.

Judgment for the plaintiff (subject as above) for $1,750 with costs.

FALCONBRIDGE, C.J.K.B. AUGUST 7TH, 1918.

MENZIES v. BARTLET.

Contract—Promise of Deceased Mortgagee (Aunt of Mortgagor) to Cancel Mortgage in Consideration of Services and Goods Supplied—Statute of Frauds—Action against Administrator with Will Annexed—Evidence—Legacy Given to Mortgagor—Costs.

Action by William Menzies against A. R. Bartlet, administrator with the will annexed of the estate of Margaret Menzies, deceased, for a declaration that a certain mortgage for $3,000 made by the plaintiff to the deceased had been satisfied and to compel the defendant to release or discharge the mortgage, or, in the alternative, to recover the sum of $3,000 for services rendered and supplies furnished by the plaintiff to the deceased.

The plaintiff alleged that he performed services for the deceased, who was his aunt, and supplied her with fish, ice, liquors, and wood, upon the understanding and agreement with her that she would pay for these services and supplies by a legacy, which she failed to do; and that she also promised, in consideration of his services, that she would cancel the indebtedness evidenced by the mortgage, which she failed to do.

The action was tried without a jury at Sandwich.

F. A. Hough, for the plaintiff.

A. R. Bartlet, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the promise of Margaret Menzies, if ever made, was within the 4th section of the Statute of Frauds, and should have been in writing: Maddison v. Alderson (1883), 8 App. Cas. 467.

It was difficult to believe that there was not some accounting as to the plaintiff's services and furnishing of ice, liquors, &c., when the mortgage in question was given.

And the testatrix probably considered the bequest of $1,000 to the plaintiff as sufficient remuneration on this head.

The plaintiff was a party defendant in the suit of Menzies v. McLeod, in which the validity of the will was attacked. He did not appear to defend the action or to assert any right.

A Divisional Court, on appeal from the judgment of the trial Judge, and on consent of counsel, varied the judgment and gave this defendant leave to apply for letters of administration, which was done accordingly.

The action should be dismissed—in all the circumstances, without costs.

FALCONBRIDGE, C.J.K.B. AUGUST 9TH, 1918.

O'NEILL v. O'NEILL.

Promissory Notes—Action on, by Executor of Payee—Defence and Counterclaim—Notes Made by Son of Deceased Payee—Bargain Alleged to have been Made with Father—Statute of Frauds.

Action by the executor of the defendant's deceased father to recover $1,694.10, the amount alleged to be due upon two promissory notes made by the defendant payable to his father's order. The defendant, by statement of defence and counterclaim, set up an agreement with his father by which the notes were satisfied, as the defendant alleged.

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

T. G. Meredith, K.C., for the plaintiff.

J. B. McKillop, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that he reserved judgment to enable the parties to arrive at a settlement, which they had apparently not done.

The Statute of Frauds was pleaded and seemed to be an answer to the defence and counterclaim. The defendant paid a year's interest on the notes; and, when the will was read to him by the plaintiff's solicitor, the defendant said nothing about the bargain which he now set up: Smith v. Smith (1898), 29 O.R. 309; Cross v. Cleary (1898), 29 O.R. 542; Herries v. Fletcher (1914), 6 O.W.N. 587, 589, 26 O.W.R. 553, 555.

Judgment for the plaintiff for the amount of the notes and interest with costs. Counterclaim dismissed with costs.

FALCONBRIDGE, C.J.K.B. AUGUST 13TH, 1918.

STRAUS LAND CORPORATION LIMITED v. INTERNATIONAL HOTEL WINDSOR LIMITED.

Landlord and Tenant—Action by Landlord for Forfeiture of Lease—Breach of Covenant to Repair—Alteration in Premises—Necessary Repairs—Absence of Complaint—Breach of Covenant not to Assign or Sublet—Hotel Company—Power to Carry on Business as Dealers in Rubber Goods—Letting into Possession—Necessity for Shewing Valid Assignment—Consent to Subletting.

Action for forfeiture of a lease and for possession of an hotel property.

The action was tried without a jury at Sandwich.

O. E. Fleming, K.C., and A. H. Foster, for the plaintiffs.

E. S. Wigle, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that in their statement of claim the plaintiffs asked for forfeiture of the lease and possession of the hotel property: (1) for non-payment of rent; (2) for breach of covenant to repair; (3) for breach of covenant not to assign or sublet without leave; and (4) they asked for damages.

At the trial claim No. 1 was abandoned.

2. Plans and specifications had been agreed upon for certain repairs to the front of the building. The defendants undertook to make an immaterial variation in the design, altering the front so as to make two entrances, and breaking up the interior into two shops. Upon the evidence, the value of the property as a revenue-producer was increased instead of being decreased by the alteration. It might be that under the covenant the plaintiffs would have the right to have the building restored at the end of the term to the same style and condition in which it was at the time of the demise or to the design contemplated in the plans and specifications agreed upon: Sullivan v. Doré (1913), 5 O.W.N. 70, at p. 72. Repairs of some kind were necessary, as shewn by the evidence of the sanitary inspector.

No complaint or objection was offered by the plaintiffs while the work was in progress, and no claim for forfeiture was made until the work was completed. The real trouble was that difficulty had arisen between G. H. Wilkinson (president and principal

shareholder in the defendant company) and the plaintiffs about another matter, and that the plaintiffs were determined to get him and the defendants out of possession upon any pretext whatever.

3. Most of the repaired portion of the building was occupied by the defendant company. The plaintiffs contended that the hotel company had not the power to carry on business as dealers in rubber goods. That claim was answered by the decision of the Privy Council in Bonanza Creek Gold Mining Co. Limited v. The King, [1916] 1 A.C. 566, followed in our Courts in Edwards v. Blackmore (1918), 13 O.W.N. 423, 42 O.L.R. 105. There must be a valid assignment to work a forfeiture: Cornish v. Boles (1914), 31 O.L.R. 505, at p. 519.

The mere letting into possession is not a breach of covenant not to assign or sublet: McCallum Hill & Co. v. Imperial Bank (1914), 30 W.L.R. 343.

The plaintiffs had given their consent to a subletting, although, they contended, not to this one.

The Court always leans against a forfeiture: McLaren v. Kerr (1876), 39 U.C.R. 507; Hyman v. Rose, [1912] A.C. 623.

There was nothing in the authorities cited by the plaintiffs to affect this view of the case: Curry v. Pennock (1913), 4 O.W.N. 712 and 1065; Fitzgerald v. Barbour (1908) 17 O.L.R. 254; affirmed in S.C., sub nom. Loveless v. Fitzgerald (1909), 42 S.C.R. 254; Holman v. Knox (1912), 25 O.L.R. 588. Some of the views expressed by the Court in this latter case must be modified by the judgment in Hyman v. Rose, supra.

Action dismissed with costs.

FALCONBRIDGE, C.J.K.B. AUGUST 23RD, 1918.

TOWN OF OSHAWA v. ONTARIO ASPHALT BLOCK PAVING CO.

Contract—Construction of Pavements—Guarantee-bond—Defective Work and Materials—Action on Bond—Recovery of Amount of Bond less Sum Expended in Repairs—Findings of Fact of Trial Judge.

Action upon a bond guaranteeing the proper construction of pavements upon the streets of the Town of Oshawa.

The action was tried without a jury at Whitby.
R. T. Harding, for the plaintiffs.
J. H. Rodd, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, found in favour of the plaintiffs' contention as to all the allegations of defects in materials and in the mode of laying the pavement, and agreed with the plaintiffs' view of the interpretation of the contract.

He also found that the bad condition of the pavements was due to such defects and improper work, and not to the operation of the railway. It was to be noted also that the defendants contracted for and guaranteed and built the pavement when the railway was already *in situ* and in operation, and presumably with reference to the then present conditions. The defendants might have expected or hoped that a heavier rail would be laid subsequently, but had no contract or assurance that such would be done.

Both counsel stated in argument that the defendants had voluntarily expended some $2,600 on repairs. The learned Chief Justice accepted that statement, although it did not quite agree with his notes, and gave the defendants credit for that sum.

Judgment for the plaintiffs for $7,400—the balance due under the bond—with costs.

LENNOX, J. AUGUST 23RD, 1918.

SISTERS OF ST. JOSEPH OF THE DIOCESE OF HAMILTON v. WALSH.

Will—Construction—Bequest of Residue to Charitable Institution—Inaccurate but Sufficient Description—Residue Payable after Payment of other Legacies in Full—Absentee Legatees—Presumption of Death—Lapsed Legacies—Benefit of Residuary Legatee—Declaration—Distribution of Estate—Costs.

Action for construction of the will of Timothy Tracey, and for a declaration that the plaintiffs, as residuary legatees, were entitled to the sum of $2,208.75 and interest.

The action was tried without a jury at Toronto.
M. G. Cameron, K.C., for the plaintiffs.
William Proudfoot, K.C., for the defendants.

LENNOX, J., in a written judgment, said that, under the terms of the will of Timothy Tracey, all his estate, for the purposes of administration, was to be treated as personalty. The money in dispute in this action was the share of that estate to which John, Jeremiah, and Mary Tracey became entitled as legatees, at the death of Timothy Tracey, by the terms of his will, if they were then alive. Timothy Tracey made his will on the 5th May, 1893, died on the 20th February, 1904, and his will was admitted to probate on the 17th March, 1904.

Two of the provisions of the will were as follows:—

"Should my estate be insufficient to pay the said legacies in full then the legacy to the Roman Catholic Episcopal Corporation shall be paid in full out of the pure personalty as aforesaid and the other legacies shall as far as necessary be abated proportionately to their respective amounts."

"Should there be any residue of my personal estate after payment of the above mentioned legacies *in full* I give all such residue to the Sisters of St. Joseph Home in Hamilton."

There were other legatees in addition to the three above mentioned. The legacy to the Roman Catholic Episcopal Corporation was paid in full. Including the three mentioned, there was not quite sufficient to pay all the individual legatees in full; and the estate, after payment of debts etc. and the legacy to the Episcopal Corporation, was divided proportionately; the shares of the three named legatees were paid into Court; and the share of each other legatee, on this basis, had been actually paid.

The defendant Ellen Walsh, alleging upon oath that the three named legatees died on a certain stated day, subsequent to the death of the testator Timothy Tracey, obtained letters of administration of the estates of these three persons from the Surrogate Court of the County of Huron, and thereupon obtained an order for payment out to her of the moneys in Court aforesaid and the interest thereon, but upon the undertaking that the money would be deposited and remain in a chartered bank until the determination of this action; and the money was in a bank on deposit as agreed.

The three named legatees left this country many years ago, and had not been heard of by their relatives or connections or by any person who would be likely to hear from them, if alive, since they left Canada. The last trace of them that could be found was 10 years or more before the death of Timothy Tracey. The legal inference that these three persons were dead should be drawn.

The description of the plaintiffs in the will was not verbally accurate, but the plaintiff corporation was the institution the testa-

tor intended to benefit, and the language he used was a legally sufficient description.

The expression in the second clause above quoted was "any residue . . . after payment of the *above mentioned* legacies in full" etc. If this were read literally, the plaintiffs would not be entitled, as there was not sufficient to pay all who were *mentioned* in full. The presumption of law was, however, that the testator intended to dispose of all his estate and to include in the residue moneys representing lapsed legacies. The contest was as to the time when the three legatees died, respectively, and this was to be determined as a matter of presumption. When the 7 years have elapsed which, with other circumstances, gives rise to a legal presumption of death, the Court should not infer that the absentee died at any specified date during the 7 years. The Judge of the Surrogate Court was imposed upon by a false affidavit. The money in question was part of the estate of Timothy, and that estate had not been fully administered. The presumption of death arose at the end of the 7-year period, and was that the absentee died at some date, which the Court should not determine, within or at the beginning or end of that period. That legal inference should be drawn in this case, and, in the absence of proof of survivorship as a matter of fact, it should be declared that these legacies had lapsed. They belonged to the residuary estate bequeathed to the plaintiffs except the portion thereof necessary to make good the abatement suffered by the other legatees. The residue should be determined after payment in full.

There should be judgment declaring that the plaintiffs were entitled to these moneys and to a lien on these moneys in the bank (less the part payable to the other legatees, about $30, and the Court and bank interest earned), and directing that the money deposited in the bank and the interest thereon be paid into Court to the credit of this action—the taxed costs of the plaintiffs' solicitor to be paid out of this fund. No costs to or against the defendants.

A sufficient sum to pay the legatees other than the three above named in full in the terms of the will should be paid out to the defendants' solicitor if he should be willing to distribute it—if not, it should remain in Court subject to further order.

It was possible that one or all of these legatees might yet be living. Subject to these payments or deductions, the money in question should be paid out to the plaintiffs, upon their filing in Court their undertaking, under their corporate seal, to abide by and perform such order as the Court might hereafter make for repayment or accounting, in case it should hereafter be shewn that these legatees or any of them survived the testator.

FALCONBRIDGE, C.J.K.B. AUGUST 30TH, 1918.

SANDWICH WINDSOR AND AMHERSTBURG RAILWAY v. CITY OF WINDSOR.

Company—Limited Powers—Electric Street Railway Company—Sale or Lease of Surplus Electricity—56 Vict. ch. 97, sec. 9—Right to Place Poles and Wires on Highway—Evidence—Judgment of Appellate Court—Effect of.

Action for an injunction to restrain the defendants from interfering with the plaintiffs in the erection of extensions, and for damages.

See the note of the judgment of a Divisional Court of the Appellate Division, Sandwich Windsor and Amherstburg Railway v. City of Windsor (1917), 13 O.W.N. 336.

The further trial of the action took place at Sandwich.

A. W. Anglin, K.C., and A. R. Bartlet, for the plaintiffs.

E. D. Armour, K.C., and F. D. Davis, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the uncontradicted evidence of the assistant general manager of the Detroit United Railways supplied the information called for by the Divisional Court on the following points, viz., to what extent and in what circumstances surplus electricity beyond that required for the purposes mentioned in 56 Vict. ch. 97, sec. 9, was produced, also as to the nature and extent of the operations of the plaintiffs in selling or leasing their surplus power.

If the matter had been *res integra*, the learned Chief Justice would have been of opinion that the plaintiffs had the right to erect the poles and have their wires on the highway or lane, and that the question of the limits of the use to which the poles might be put was not in issue here.

But, in view of the strong expressions of opinion in the early part of the judgment of the Divisional Court (which he was not at liberty to regard as mere *obiter dicta*), he must hold that the action failed.

Both parties should have leave to amend the pleadings as they might be advised.

Action dismissed with costs.

HASSARD v. ALLEN ET AL.—FALCONBRIDGE, C.J.K.B.—AUG. 21.

Fraudulent Conveyance—Action to Set aside—Assignments and Preferences Act—Action not Brought within 60 Days—Evidence—Findings of Fact of Trial Judge—Suspicious Circumstances—Dismissal of Action without Costs.]—Action by a creditor of the defendant Allen, suing on behalf of all creditors, to set aside a conveyance of land by the defendant Allen to the defendant Wilkins, a conveyance by the defendant Wilkins to the defendant Crombie, and a mortgage by the defendant Crombie to the defendant Wilkins, as being fraudulent and void against the creditors of Allen. The action was tried without a jury at Orangeville. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the transactions had a most suspicious appearance; but Wilkins and Crombie were fairly good witnesses, and the benefit of the doubt must be given to them, especially as the action was not brought within 60 days. Action dismissed; but, as the transactions seemed to invite attack, without costs. J. Callahan, for the plaintiff. C. R. McKeown, K.C., for the defendant Allen. W. H. Wright, for the defendants Wilkins and Crombie.

HASSARD v. ALLEN ET UX.—FALCONBRIDGE, C.J.K.B.—AUG. 21.

Husband and Wife—Conveyance of Land by Husband to Wife—Fraud upon Creditors—Evidence—Findings of Fact of Trial Judge.]—Action to set aside a conveyance of land by husband to wife as being fraudulent and void against the plaintiff and other creditors of the husband. The defence was that the wife had bought the land and paid for it. The action was tried without a jury at Orangeville. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff must succeed. The wife's story of saving up $400 in bureau drawers without a bank-account is an old story and is always most suspicious. The release of dower also set up by the wife was not mentioned in the statement of defence, nor in the wife's examination for discovery, and appeared to be an afterthought. Judgment for the plaintiff as prayed with costs. J. Callahan, for the plaintiff. C. R. McKeown, K.C., for the defendants.