THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING FEBRUARY 10TH, 1906.)

VOL. VII. TORONTO, FEBRUARY 15, 1906. NO. 5

MAGEE, J. FEBRUARY 6TH, 1906.

CHAMBERS.

RE SIBBETT.

Will—Construction—Life Interest of Widow—Personalty—Beneficial Enjoyment in Specie—Household Furniture—Executors—Power of Sale—Payment of Debts—Legacy—Assent of Executors—Trustees and Cestui que Trust—Devolution of Estates Act—Real Estate—Specific Devises—Equitable Tenant for Life—Lease—Sale—Discretion.

Application by one of the executors and trustees under a will, upon an originating notice, for an order determining certain questions with regard to the disposition of the estate.

T. E. Godson, Bracebridge, for the applicant.

R. U. McPherson, for the other trustee and the widow of the testator.

F. W. Harcourt, for infant remaindermen.

F. E. Hodgins, K.C., for adult remaindermen.

MAGEE, J.:—In so far as this case involves the application of the rule as to conversion of wasting residuary personalty in which successive interests are bequeathed, the widow in respect of her interest for life or widowhood would, I consider, be entitled to the beneficial enjoyment in specie.

The real estate consisted only of the hotel, the two houses, and the islands. The only personalty left is the furniture in the hotel. What the other consisted of does not appear, but it has been used for payment of debts. The particular property in respect of which the executor has difficulties is the hotel and its furniture. It is, perhaps, not too much to assume that if the testator thought of the matter at all, he would expect them to be kept together so as to be a going concern, and not that the chattels should be sold away from the house to injure the value of each, and probably still less would he expect his private household effects to be sold away from his wife, to whom he was giving his whole estate for life. However, in the will he does not direct conversion, but that after his wife's death his estate be divided. Such a direction has been considered, so far as it goes, to indicate an intention that the estate should during the life interest be enjoyed in specie: Collins v. Collins, 2 My. & K. 703; while the conferring upon the executors of a power of sale, whenever they shall think it advisable, has been considered an evidence that the immediate conversion which the rule adverted to would require from the executors, without any discretion on their part, is not to take place without their approval: Re Pitcairn, [1896] 2 Ch. 199; Burton v. Mount, 2 DeG. & Sm. 383.

It is not necessary to consider whether articles such as furniture should come within the rule, though it has in some cases been applied to them. They may well be supposed by a testator to have a value for the reversioners after the life interest has ceased, and the argument from his supposed predominating intention of a benefit to the reversioner does not apply so readily as it would to other species of property. Apart from the rule as to conversion, there have to be considered the rights of the widow as legatee and devisee as between her and the executors as such, and her rights as cestui que trust as against her trustees. The rights of creditors are a separate matter. As to the question between the legatee for life and the executors, it is stated by the widow, and not denied, that the license for the hotel carried on by her husband and continued by her was transferred to her with the consent of the executors. No special arrangement is shewn to have been made to preserve the executors' right. I think that transfer and the subsequent permitting the widow for

months to continue the trade, must be taken as an assent by them to the retention by her not only of the hotel, but of the goods with which it was furnished and the license law complied with. And, as there is nothing to shew that the executors acted under any mistake as to the financial position of the estate, they stand in the ordinary position of executors who have assented to a legacy and delivered over the articles bequeathed. They cannot recover them back without shewing special circumstances which are not shewn here. They still have real property vested in them, and not in the widow's possession, sufficient for the payment of debts, so that there does not appear to be actual damage to any person.

As legatee for life, she would, so soon as the legacy was assented to, be entitled to the possession of the goods on proper acknowledgment of the articles received and her limited rights therein.

It is true the bequest is not directly to her, but to the executors themselves in trust for her, but, no other arrangement having been made, it could only be as beneficial owner during widowhood, under the gift to them as trustees, that she was placed in possession, and, as each executor can assent to legacies either to the executors jointly or to others, the assent has not the less been given and the position turned into that of cestui que trust and trustees. With regard to the hotel itself and the land which goes with it, there may be some question. Under the Devolution of Estates Act and amendments the realty vests, on the testator's death, in the personal representatives, and, unless they convey to the devisees or heirs, remains vested in them for 3 years, when, unless the personal representatives register a caution that it is still required by them, it vests in the devisees or heirs, but still remains liable for the debts.

It does not become personal property, but both the realty and personalty are assets in the hands of the personal representatives for payment of debts, though the personalty is still the primary fund (Re Hopkins, 32 O. R. 315), unless in the case provided for by sec. 7 of the Act, where there is a residuary gift of both, and then the two classes share ratably, unless a contrary intention appears in the will.

The effect of an executor's assent in giving a legatee a right to recover personalty bequeathed to him, can perhaps hardly be extended to the real property so as to entitle the

devisee to a conveyance or possession. But, as all devises, even general ones, of land, are deemed specific, even since the Wills Act, I think it must be taken that until the land vests in the devisee, the executors are trustees for him, even during the 3 year period, subject always to the rights of creditors, and of course to any charges existing under the will.

If so, the result is that, as regards both goods and lands, we are brought to the situation as between trustees and cestui que trust. The will gave the property to the executors in trust for the wife during widowhood, "so that she may receive the income, rents, and profits thereof," and in a subsequent clause, after the power to sell any part and invest the proceeds, the executors are directed to pay her "the rents and profits or other income from the estate every 6 months."

Now, under this devise she becomes the equitable tenant for life of the hotel. As such it would be competent for her to apply to the Court if the trustees refused to let her take possession, and, though she would not be as of right entitled to be placed in possession, yet the Court in the exercise of judicial discretion to be exercised under all the circumstances, might so direct on such terms, but it would only be till further order, and, under proper circumstances, she might be ordered to restore possession to the trustees. Here the trustees have themselves thought it wise to allow her to conduct the hotel. One of them still thinks so, and no reason has been shewn for change of opinion. She is the person most interested in the success of the hotel, and I think would, under the circumstances, be placed by the Court in possession. See Re Wythes, [1893] 2 Ch. 369, and Re Bagot, [1894] 1 Ch. 177. Being in possession, what is urged against her continuing there is the fact of outstanding debts, and that she has possession of the only remaining personalty. But, as I have said, the applicant assented to that, and there are other assets. Then there is the mortgage—but it is admitted that it is not in arrear, and she keeps up the interest upon it, which, as life tenant, is all she should bear. She says she has, besides, laid out some $700 in improving the property. It is said that if the hotel were rented it would bring in $1,000 per year, and this would lead to a good sale. But it is not suggested that she is not as good a tenant as a stranger. . . .

No power of leasing is given by the will, unless it can be inferred from the directions to pay rents and profits. In the view which I take, that the possession of the widow should not be disturbed, it is unnecessary to consider whether the premises should be leased. Indeed, if there be power of leasing for 5 or more years, as desired by the applicant, it would be discretionary with the executors, and in such cases the Court does not express an opinion. The same would be the position as regards exercising the power of sale.

As regards the rights of creditors, they are not before me. Their rights in respect of any of the property cannot be prejudiced. The life tenant says none are pressing. I have no doubt she will see it to her interest to make some arrangements which will prevent them being compelled to interfere with the estate.

I answer the questions submitted as follows:

1. The widow is entitled to the beneficial enjoyment of the property of the deceased in specie during widowhood, subject to the power of sale given by the will and to the rights of creditors.

2. She is entitled to be allowed to remain in possession of the property of which she is now in possession until sufficient grounds for dispossessing her thereof be shewn.

3 and 4. She being now in possession of the hotel premises, with the consent of the executors, they are not entitled to possession until sufficient grounds be shewn, and cannot lease them without her consent, and the question of the advisability of a sale is, under the terms of the will, in their discretion.

Costs of all parties should be paid out of the estate.

MAGEE, J. FEBRUARY 6TH, 1906.

CHAMBERS.

BRUCE v. ANCIENT ORDER OF UNITED WORKMEN.

Parties—Interpleader Issue—Who should be Plaintiff—Insurance Moneys—Rival Claimants—Residence abroad—Security for Costs.

Appeal by plaintiff and cross-appeal by claimants, legatees under will of Robert Bruce, from order of Master in Chambers (4 O. W. R. 241), directing that claimants be plaintiffs

in issue directed as to moneys arising from life policy, but refusing to order that they give security for costs, though resident in Scotland.

W. J. Elliott, for plaintiff.

F. S. Mearns, for claimants.

MAGEE, J.:—The benefit certificate was payable to Jane Bruce, wife of the assured; that was in 1884. He was then and had been for several years living in Toronto with one Jane, known as Jane Bruce, his wife, and he continued to live with her till his death at Toronto in May, 1903. By his will he calls her his housekeeper, and bequeaths the certificate to another Jane Bruce, living in Scotland, whom he calls his wife, and Elizabeth Jane Bruce, his daughter, living in the same place. The latter Jane Bruce was originally Jane Munroe. She alleges that she was married to him on 12th April, 1861, in Scotland, and that he deserted her about 1869, after 4 children were born to them. The Jane in Ontario, who was formerly Jane Robertson, alleges that she was married to Robert Bruce in Scotland about 1869, and they came at once to America and lived together ever since, and that two children were born to them.

Each claims to have been his lawful wife, and disputes the title of the other.

After his death the claimant in Ontario produces the benefit certificate and says it was given by him to her as being the beneficiary named in it.

The claimant in Scotland produces the usual certified copies of the registry of her marriage. The claimant in Ontario has not as yet done so, but can point to the long residence together and acknowledged marital relationship.

The money is claimed from the benefit society on both sides, and Jane Bruce of Toronto follows up her claim by an action against the society to recover it. In that action the interpleader is ordered.

The Scottish claimants have the declaration of benefit in the will in their favour. But if the Ontario claimant was really the wife of the member, while he might have changed the benefit in favour of his children, he could not change it over to strangers, and the Ontario wife should not be prejudiced by a declaration by him to which she is not party. The

certificate was issued here, where he and she lived. She was the only one then known to the society or to members as Jane Bruce the wife, and but for the will would in all probability have been paid the money.

The evidence so far is somewhat more precise in favour of the fact of the marriage alleged by the Scottish claimants, but there may be other questions, and the parties cannot be expected to produce all their evidence at this stage. The issue does not start with the assumption that either was validly married.

The Master, I think, properly considered that the claimants in Scotland should be plaintiffs, as attacking the recognized status of the Ontario claimant, even assuming that the certificate was not in her possession as distinct from that of the deceased.

But then, they being the attacking parties and plaintiffs, why should not the ordinary rule as to security for costs from non-residents be applied? The Master thought that the difficulty had been caused by the assured himself, and it was probable that costs would not be ordered to be paid. But, if the Ontario claimant be proved to be the lawful wife, her husband could not make any change of the beneficiaries against her in favour of the Scottish claimants, and she would be entitled to the whole fund, and it should not be reduced by having to pay her own costs, much less the costs of the other side. The trial Court may well consider that the principle cannot be invoked on which the Courts act when a testator confers a benefit and at the same time creates doubts as to it which give rise to litigation—there the hand which gives has the right to take away. If the Ontario claimant had to continue her action against the society, she would have had some one within the jurisdiction responsible for costs. If the Scottish claimants had to bring action against the society or against the Ontario claimant, they would have had to give security. They are in no worse position now, and should give security. See Knickerbocker Trust Co. v. Webster, 17 P. R. 189, and Book v. Book, 1 O. L. R. 86.

Costs of the appeal by the Scottish claimants to be costs in the cause to the Ontario claimant.

Costs of the appeal by the Ontario claimant to be costs in the cause.

SCOTT, LOCAL MASTER. JANUARY 30TH, 1906.

MEREDITH, C.J. FEBRUARY 6TH, 1906.

CHAMBERS.

ONTARIO BANK v. CAPITAL POWER CO.

Summary Judgment—Action on Promissory Notes—Defences—Agreement for Advances—Construction—Powers of Company—Accommodation Indorsers—Sureties—Discharge—Counterclaim—Damages—Accounting.

Motion by plaintiffs for summary judgment under Rule 603. The claim was for $82,301.69, alleged to be due on two promissory notes made by defendants the Capital Power Company, one for $37,959.30, payable to the order of the defendant W. J. Conroy, and the other for $39,633.92, payable to the order of the defendant Louis Simpson, both dated 2nd February, 1904, payable 15 days after date and indorsed to plaintiffs. The notes were in renewal of similar earlier ones, the originals of the series having been given some time about March, 1902. A concurrent action was brought against the defendant company and defendant Conroy, on a similar note for $6,000, and a motion for judgment in that case was brought on with this motion but was abandoned.

F. R. Latchford, K.C., and Glyn Osler, Ottawa, for plaintiffs.

A. W. Fraser, K.C., and J. G. Gibson, Ottawa, for defendant company and defendant Simpson.

G. F. Henderson, Ottawa, for defendant Conroy.

THE MASTER:—In order to understand the defences sought to be set up it will be necessary to review at some length the transactions out of which the loans in question in this and the other action arose. Prior to June, 1900, the defendant Conroy and his brother, since deceased, were the owners of certain property, including water power only partly developed, against which were several mortgages. Through the efforts of the Conroys and the defendant Simpson the defendant company was formed to take over a portion of the property, including the water power, and by two

agreements dated respectively in June and September, 1900, a sale was put through on the following terms:—The Conroys were to hand over to the company a fully completed plant, free of all incumbrances, and were to receive in payment all of the bonds and a portion of the preference and common stock of the company. After incurring a liability to plaintiffs of some $50,000, a portion of which was secured by the indorsement of defendant Louis Simpson, the Conroys made default in carrying out their undertaking to complete the plant; and difficulties having also arisen in making title to the property, an agreement was on 13th September, 1901, entered into between defendant Louis Simpson, acting both for himself and as managing director of defendant company, Alexander Simpson, as trustee and representing also the plaintiffs, of whose bank he was local manager, the Conroys, and one Foran, a Quebec advocate, acting as attorney for certain of the mortgagees who were willing to accept preference stock in payment of their claims. The agreement is long and complicated, but the substance of it, in so far as it affects the issues sought to be raised, may be briefly stated. The property was to be bought in by Alexander Simpson at a sheriff's sale under proceedings then pending, and was to be held by him upon trust to pay off all incumbrances and the debt of the Conroys to the bank, and to convey to the company the portion covered by the sale to it. As security for the money so expended he was to hold the bonds of the company and the portions of the property not sold to the company. The bonds and part of the property were subsequently sold for enough to wipe out all of this liability, and as to that nothing arises. But it was further agreed that the company should itself complete the work which the Conroys were under contract to do, together with certain further work stipulated for by prospective purchasers of the bonds, charging the cost to the Conroys; and in order to provide funds for this and to pay off liens on portions of the machinery installed or ordered, the plaintiffs, through their manager, agreed to discount the notes of the company indorsed by the defendant Simpson to the extent of $36,500, and indorsed by defendant Conroy to the extent of $30,000, holding as security therefor the preference and common stock coming to the Conroys under their agreements with the company. The notes of which those now sued on are the ultimate re-

newals, were discounted pursuant to the agreement, and the proceeds were applied as contemplated. The only other portion of the agreement which need be referred to is clause 14, which reads as follows:—"(14). The said Alexander Simpson, acting for himself and for the Ontario Bank, does hereby agree that he will not sell at less than par value the securities deposited with him under this agreement during the term of 12 months after the completion of the works arranged for in clause (6), unless he be authorized so to do by the Messrs. R. and W. Conroy, and that at the expiration of the said term he agrees not to dispose of the said securities unless at a rate equal to that of the current day's market quotation, except with the sanction of the said Messrs. R. and W. Conroy. He further agrees that he will at all times agree to transfer such stock or any portion thereof upon being tendered and paid the par value of the same, and he reserves to himself the right to sell at par value whenever the same is obtainable, and after the expiration of said term of 12 months, at the current market price, the Capital Power Company undertaking to have the stocks listed."

In November, 1901, the company contracted with one Askwith to do the work suggested by the prospective purchasers of the bonds, and other additional work, but the operations, after continuing for nearly a year, were discontinued, owing to litigation between the contractor and the company, and have not since been resumed. These difficulties are alleged to have been due to a dispute which, about that time, arose between the company and plaintiffs, owing to the refusal of the latter to make advances beyond the $66,500 mentioned in the agreement. The dispute was, however, settled by plaintiffs consenting to make further advances to the extent of $17,500, secured by a collateral note of E. B. Eddy, the president of the company, 400 shares of the common stock held by the bank to be set apart as security for Mr. Eddy. This agreement was entered into, so it is said, by Mr. Eddy personally, and the company was not a party to it, but the latter took the benefit of it by borrowing $10,000 under it on notes of the company, the final renewal of which is the note sued on in the other action. The remaining $7,500 which the bank were willing to advance was never asked for by the company.

There is one other transaction that must be referred to. Small sales of preference and common stock were made from time to time by Alexander Simpson, but it proved difficult to dispose of, and the great bulk of it remained unsold. In June, 1905, however, plaintiffs' manager was negotiating with W. L. Marler, local manager of the Merchants Bank, for the sale of all the remaining stock, at a price sufficient to pay off the notes and leave a small balance over. The sale was in fact agreed to, subject to the condition that the purchasers should be given immediate control of the board. The amount of stock was sufficient for this, but the purchasers could not be ready with their money until a few days after the annual meeting, and the stock while held in trust was non-votable. To get over the difficulty Alexander Simpson, as trustee, executed transfers of the stock to himself, Marler, and one Glenney, the accountant in the plaintiffs' bank, intending in this way to get and hold control of the board until the completion of the sale to Marler's clients. The president of the company, however, declined to sign stock certificates or to receive the votes of the transferees at the meeting, and in consequence the scheme fell through, and with it the proposed sale of the stock.

The defences sought to be set up are as follows:—

(1) The company allege (though in this they are at issue with the other defendants) that the execution of the agreement of 13th September, 1901, by Louis Simpson, on behalf of the company, was unauthorized, and that the agreement does not bind the company. This is clearly not a defence. Assuming it to be true, it cannot invalidate the notes sued on. They were admittedly signed by the company, and the proceeds placed to the company's credit and drawn out by them.

(2) All of the defendants allege that under the terms of the agreement (assuming it to bind the company) plaintiffs were under obligations to carry the loans until 12 months after completion of the work, and that, as the work has not yet been completed, the action is premature. If it is material, I must of course assume that the work referred to in the agreement has not been completed. There is, however, nothing whatever in the agreement as to when the loans were to be repaid, and the contracts embodied in the notes themselves must, therefore, govern. The clause of the agreement relied on is the 14th, which I have quoted in extenso, and

it is plain that the only matter there postponed until after the completion of the work is the power to sell the stock at less than par without the authorization of the Conroys. It is said that this assumes that the debt will be still in existence at that time. It assumes that it may be in existence then, but that is quite consistent with plaintiffs' right to recover before then. Recovery of judgment does not necessarily mean liquidation of the debt. Moreover, whatever inference there might seem to be is amply negatived by the distinct promise to pay on a specified day, embodied in the notes made two years and a half later. The whole contract, consisting of the agreement and the notes, is in writing and is before me, and it is not capable of the construction contended for by defendants. No verbal modification of it is alleged, even if evidence of such could be received. Foran and the defendants Conroy and Louis Simpson, it is true, all swear that in executing the agreement they understood it to mean what the defendants now contend it does mean; but the interpretation of it is for the Court, and its meaning is too clear for argument.

(3) The company contend that under the agreement they were only to be liable in the event of the securities proving insufficient. There is no warrant whatever for this in the agreement, and there is against it the company's unqualified promise to pay, embodied in the notes. Doubtless when the agreement was entered into, all parties expected that the sale of the stock would cover the proposed advances, but there is nothing in the contract limiting the rights of plaintiffs in that respect.

(4) The defendants Louis Simpson and the company claim to have been merely sureties for the Conroys, and to have been discharged. The Conroys appear to have been the principal debtors and the others merely sureties. Assuming this, however, nothing whatever is shewn or suggested which could possibly have discharged them. The incidents which it is suggested had this effect are the refusal of plaintiffs to make further advances, the appropriating of the 400 shares to secure Mr. Eddy's indorsement, and the attempted sale of the stock in June, 1905. None of these can possibly have the effect claimed. The refusal to make further advances appears to have been quite justifiable under the contract; but, assuming it to have been wrongful, it did not entail any

dealings with one party behind the back of the other. The dispute was between the plaintiffs on the one side and all of the defendants on the other, and it at most gave the defendants a right of action for damages. Similarly the setting aside of the stock to secure Eddy was admittedly done with the consent of all parties. A written consent of the defendants Simpson and Conroy is put in, and the agreement was made with Eddy, the president of the company, at the company's instance and for their benefit. In these circumstances, what was done could not possibly have acted as a discharge of the sureties. Moreover, both the refusal to make further advances and the setting apart of the stock to secure Eddy took place in 1902, and the defendants, with full knowledge of all the circumstances, signed the notes sued on more than two years afterwards. Neither can the dealing or attempted dealing with the stock in June last have possibly had the effect of discharging the sureties. The attempt to sell proved abortive, and the stock is still held by the plaintiffs as it was prior to the attempted sale. Here again the most that can have arisen is an action for damages. There can be no question of discharging sureties.

(5) The defendant Conroy, on his part, asserts that it is he that is the surety for the company, and that he has been discharged by the same three incidents relied on for that purpose by the company. Assuming Conroy, and not the company, to have been the surety, there can be no question as to his having been discharged, as must be plain from what I have said under the last head.

(6) It is alleged that the defendants have a counterclaim for damages by reason of the plaintiff's refusal to make further advances in 1902. As I have said, this refusal appears to me to have been amply justified under the contract, and the matter was, moreover, settled by the agreement with Mr. Eddy. But, assuming, as I must, for the purposes of this motion, that there is a claim for damages, allowing the defendants to set it up as a counterclaim is discretionary, and they ought not to be permitted to do so in the absence of any other defence. The claim is most shadowy, and the effect of setting it up would be to materially delay plaintiffs in recovering on the notes. See my reasons in Imperial Bank v. Martin, 6 O. W. R. 485, confirmed on appeal, 6 O. W. R. 824.

(7) It is alleged that by what took place in June last plaintiffs have rendered themselves liable to account for the stock they hold on the basis of the price offered by Marler's clients, and that an account so taken will shew nothing due from defendants. It is not pretended that plaintiffs have actually received anything for the stock. Alexander Simpson, whether he acted rightly or wrongly, did his best to put the sale through, but his efforts were thwarted by the refusal of the company's president to sign the stock certificates and receive the votes. Defendant Conroy also did his best to block the sale by the issue and service of an injunction, though it came too late to be of any service. There can, therefore, be no question of accounting. Here again the very most that can be assumed is a possible, though very shadowy, right of action for damages, but one which defendants ought not to be allowed to delay plaintiffs by setting up as a counterclaim.

(8) The defendant Louis Simpson alleges that certain credits to which he is entitled have not been given him. This is a mere matter of account, which can be dealt with under Rule 607. Counsel for defendants have shewn great ingenuity in suggesting alleged defences to this action, but they have, I think, wholly failed in shewing that there is any triable issue relevant to plaintiffs' claim. The constructions they seek to place on the agreements are not even arguable, and there is not a single fact sworn to which, if proved at the trial, would entitle defendants to judgment. Unless, therefore, complicated circumstances and voluminous material are of themselves sufficient to defeat a motion of this kind, defendants should not succeed.

In so far as the company are concerned, their directors, in 1904 at least, plainly did not consider that there was any defence to the claim. On 25th April of that year the secretary, in reply to a demand for payment, forwarded to plaintiffs a copy of the following resolution:—"Resolved that the secretary be instructed to write the manager of the Ontario Bank at Ottawa, stating that, as Messrs. Conroy have already cleared their debt to the Bank of Ottawa, and are in possession of the securities formerly held by the Bank of Ottawa, and as further and other negotiations are pending, which we are assured are near completion, looking towards the payment in full of the Conroys' debt to the Capital Power Company, or at all events payment of a sufficient proportion

thereof to clear the debt at the Ontario Bank, the manager be asked to forward this letter to the general manager with the request to give a little more time for the payment of the indebtedness." Similarly in the auditors' report for the year ending 30th April, 1905, the notes in question are entered among the liabilities and stated to be "past due since February, 1904."

There will therefore be judgment as asked, with a reference to take the account as against defendant Louis Simpson.

An appeal by the defendants came on for hearing before MEREDITH, C.J., in Chambers, on 6th February, 1906.

A. W. Fraser, K.C., for defendant company and defendant Simpson.

G. F. Henderson, Ottawa, for defendant Conroy.

Glyn Osler, Ottawa, and C. A. Moss, for plaintiffs.

Counsel effected a settlement.

MEREDITH, C.J., pronounced a judgment in terms of consent minutes.

FEBRUARY 6TH, 1906.

DIVISIONAL COURT.

TALBOT v. HALL.

DELAIRE v. HALL.

Master and Servant—Injury to Servant—Negligence—Elevator—Defective Appliances—Inspection—Duty of Tenant—Findings of Jury—New Trial.

Appeal by defendants from judgment of ANGLIN, J., 5 O. W. R. 751, in favour of plaintiff in each case, pronounced after answers given by the jury to questions propounded by the Judge at the trial of the action before him; and from his judgment refusing a nonsuit.

G. H. Watson, K.C., for defendants.

D. O'Connell, Peterborough, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., CLUTE, J.), was delivered by

STREET, J.:—In my opinion, there was evidence proper to be submitted to the jury that no proper arrangements were made by defendants for the systematic inspection of the elevator in question, and that a proper inspection would have disclosed the defects in the adjustment of the safety appliances. The inspection which took place was not made under any contract to inspect, and was not remunerated, but was purely voluntary; there was evidence also that it was not thorough. Under these circumstances the motion for nonsuit was, in my opinion, properly refused.

I find, however, a serious difficulty in deciding that the verdict can stand in face of what appear to be ambiguous or contradictory findings by the jury. They find, in answer to the first four questions, that the fall of the elevator was due to the fact that the safety appliances were out of adjustment; and that their being out of adjustment was due to the negligence of defendants in not having them properly inspected. Then, in answer to the 23rd, 24th, and 25th questions, they find that defendants had no knowledge of the defects in the elevator, but that their lack of knowledge was due to an omission on their part of their duty to employ an expert inspector.

Then in answer to question 26, which was, "What defects, if any, do you find the defendants knew or should have known?" they answered, "Already covered."

They were sent back to state specifically, in answer to question 26, what were the defects which defendants should have known, and they brought back as their reply, "They should, from the inspections of an expert, have known the stop balls on the operating cable were too far apart." This answer appears to exclude from the defects which a proper inspection would have revealed, the defects in the adjustment of the safety appliances; but that question had already been effectually found against defendants by the answers to the 3rd and 4th questions, so that we have in effect two inconsistent answers to the same important question. If defendants could not by a proper inspection have discovered the defect in the safety appliances, then the absence of such an inspection was not negligence which caused the accident.

There was evidence upon which the jury might have found for either party upon this question, and they have found both ways upon it.

Upon the other question which the jury have found against defendants, viz., the position of the stop balls, I agree in the opinion expressed very clearly by my brother Anglin in his considered judgment delivered after the trial. There was nothing but mere conjecture to establish the fact that the position of the stop balls was not proper down to the hour of the accident.

In my opinion, therefore, there should be a new trial, the judgment for plaintiffs being set aside, and the costs of the former trial and of the appeal are to be taxed to the party who ultimately succeeds.

FEBRUARY 6TH, 1906.

C.A.

REX v. LECONTE.

Criminal Law—Keeping Bawdy House—Conviction—Jurisdiction of Justices—Absence or Request of Police Magistrate—Commitment—Habeas Corpus — Return of Fresh Warrant on Appeal — Form of Conviction — Offence — Criminal Code, secs. 207, 846.

Appeal by prisoner from order of a Divisional Court (6 O. W. R. 970), upon the return of a habeas corpus, remanding the prisoner to custody under a commitment pursuant to a conviction under sec. 207 (j) of the Criminal Code, for keeping a disorderly house, bawdy house, house of ill fame, or house for the resort of prostitutes, in the city of Brantford.

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

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MOSS, C.J.O.:—Appeal by the prisoner from an order of a Divisional Court made upon the return of a writ of

habeas corpus, refusing her discharge and remanding her into custody (6 O. W. R. 970). The objections made before the Divisional Court were that the warrant of commitment was bad because it disclosed no offence, and because it should have been signed by all committing justices, whereas only two signed it.

Upon the appeal additional grounds were urged, those chiefly relied upon being: that the committing justices were not shewn to have authority to commit, the conviction and commitment having been made in the city of Brantford by three justices of the peace, whereas there is a police magistrate in and for the city of Brantford; that if there was a deputation of his authority by the police magistrate, it must be presumed to have been to Nelson Howell, J.P., alone, the summons having been signed by him alone, and the other justices had no authority to participate in the proceedings, and a conviction by them was bad; that the warrant of commitment was not properly sealed; and that in any case it was not shewn on the face of the commitment that the authority of the justices continued beyond the making of the conviction, and therefore it did not appear that there was jurisdiction to make the commitment.

After the argument, a further warrant of commitment was returned, signed by all three committing justices, and under their respective seals, setting forth a conviction of the prisoner by them, all acting in the absence of, and Nelson Howell also acting at the request of, the police magistrate.

Assuming the justices to have jurisdiction in the premises, the production of this document puts an end to all questions as to the form and sufficiency of the commitment.

As to the other objections, it is shewn on the face of the conviction that Nelson Howell was acting in the absence of the police magistrate, and this fact was sufficient to give him jurisdiction in the premises. The conviction also states that Nelson Howell was acting at the request of the police magistrate, but a request was not necessary to the former's jurisdiction, the latter being absent. Section 7 of R. S. O. ch. 87 enacts that "No justice of the peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act in any case for a town or city where there is a police magistrate, except at the Court of General Sessions of the Peace, or in the case of the illness, absence, or at the request of the

police magistrate." Hence under this provision a justice of the peace has authority to act in the case of the absence of the police magistrate, without any other authority. He may also act at the request of the police magistrate, but in that case illness or absence does not appear to be a necessary precedent.

Here it appears that the police magistrate was absent, and therefore Mr. Howell had authority to issue the warrant, and under sec. 208 of the Criminal Code, as amended in the year 1894 by 57 & 58 Vict. ch. 57, to adjudicate upon the charge sitting alone, for the effect of that enactment is to give one justice of the peace jurisdiction to deal with a charge of the kind preferred in this case. If authority be given to one justice of the peace, it may be executed by any greater number, and the fact that others sit with him and join in making the conviction does not invalidate the proceeding: Paley on Convictions, 8th ed., p. 38.

The charge was, therefore, properly adjudicated upon, and the conviction is not open to objection on that ground.

Then as regards the objections that the offence is not properly set out, or that a double offence is stated, or that no offence is disclosed, the conviction is under sec. 207 (j) of the Criminal Code, and both the conviction and the commitment follow the language of that section, and that is all that is required: sec. 846 (2). All the objections fail, and the appeal must be dismissed.

OSLER, J.A.:—I agree in the result.

GARROW and MACLAREN, JJ.A., and CLUTE, J., also concurred.

MAGEE, J. FEBRUARY 7TH, 1906.

WEEKLY COURT.

RE MARTIN AND DAGNEAU.

Will—Devise—Restraint upon Alienation — Partial Restriction—"Mortgaging or Selling"—Validity—Vendor and Purchaser.

Application by the vendor, under the Vendors and Purchasers Act, for an order declaring that Wilfred Martin, the

applicant, could, under the will of his father, Moses Martin, dated 3rd September, 1899, convey a good title in fee simple to the north-east quarter of lot 8 in the 8th concession of Dover East.

MAGEE, J.:—The will directs the testator's debts and funeral and testamentary expenses to be paid by his executors. The devise of the land in question is as follows: "To my son Wilfred Martin the north-east quarter of lot 8 in the 8th concession of Dover East aforesaid, 50 acres, more or less, subject to the following conditions, reservations, limitations therein, that is to say, to pay to his brother Zephyr the sum of $300 when of age, and also to pay the sum of $400 on the mortgage held on the said lot: to have and to hold unto the said Wilfred Martin, his heirs, executors, administrators, and assigns forever." There are devises to 3 other sons of 50 acres each, subject to conditions of paying a sum to Zephyr and a sum on the mortgage. . . . And there is a devise to another son, Henry, of 50 acres, he to take care of his mother with food, etc., and pay certain sums to Zephyr and 2 sisters, and also to pay the balance of the mortgage, that is to say, $1,000, held against the property. Then comes the clause on which the question turns: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement, the executors will see that same will remain in the Martin estate." . . .

The restriction here is only against the sons mortgaging or selling. It is, therefore, confined to the lifetime of the sons and confined to the two classes of alienation mentioned, viz., mortgages and sales.

The Supreme Court has declared that the limitation as to time will not of itself make valid an otherwise invalid restraint upon alienation: Blackburn v. McCallum, 33 S. C. R. 65; Re Rosher, 26 Ch. D. 801; and see Renaud v. Tourangeau, L. R. 2 P. C. 4, as commented on in Armstrong v. McAlpine, 4 A. R. 250; in Earls v. McAlpine, 6 A. R. 145; and in Blackburn v. McCallum, 33 S. C. R. at p. 77. But, as a restraint upon alienation otherwise invalid must not infringe upon the rule against perpetuities, the limitation here to the son's lifetime preserves the restraint from any objection under that rule: Re Macleay, L. R. 20 Eq. 186; Blackburn v. McCallum, supra.

As to the limitation of the restrain upon alienation to mortgages and sales, two questions also arise: (1) Is it substantially less than a total prohibition of all alienation? (2) If it is, does that fact prevent it from being void as being in any case a restraint upon the right of alienation which the law attaches to the ownership of property? . . .

[Reference to and quotations from the cases already referred to, and also the following: Smith v. Faught, 45 U. C. R. 484; Re Winstanley, 6 O. R. 315; Re Weller, 16 O. R. 318; Re Northcote, 18 O. R. 107; O'Sullivan v. Phelan, 17 O. R. 730; Meyers v. Hamilton Provident and Loan Socy., 19 O. R. 358; Chisholm v. London and Western Trusts Co., 28 O. R. 347; Re Shanacy and Quinlan, ib. 372; Re Thomas and Shannon, 30 O. R. 49; McRae v. McRae, ib. 54; Re Bell, ib. 318; Doe d. Gill v. Pearson, 6 East 173.]

The position then is, that in support of the validity of a restraint sufficiently limited as to the class of prohibited alienation, we have Re Macleay . . . Smith v. Faught, Re Winstanley, Re Northcote, Re Thomas and Shannon, and Re Bell; and in support of the sufficiency of a limitation to prohibition of mortgaging and selling, we have Re Winstanley, Re Northcote, Re Thomas and Shannon, and Re Bell, while in O'Sullivan v. Phelan, Smith v. Faught, and Meyers v. Hamilton Provident and Loan Socy., the limited character of the word "sale" as representing only one of several modes of alienation is recognized.

The only Ontario case opposed to these . . . is Re Shanacy and Quinlan . . . in which the restraint was classed with that in Re Watson and Woods, 14 O. R. 48, and that in Heddlestone v. Heddlestone, 15 O. R. 280, as being absolute and unqualified, but in the Watson case the condition was, that the devisee should never make away with the property by any means, but keep it for his heirs, while in the Heddlestone case the land was not to be disposed of by the devisees, either by sale, mortgage, or otherwise, except by will to their lawful heirs.

Since Blackburn v. McCallum restraints have been adjudged invalid in two cases in 1905, Re Corbit, 5 O. W. R. 239, and Re Tuck, 6 O. W. R. 150. In the former the restraint was against sale, but it was to continue forever. In the latter the restraint was not only against all power to

sell, but all right to dispose of the property, and in effect all right to devise it, for the devisee was to transmit it unimpaired to his lawful heirs, if he should have any.

In this state of the decisions, I am bound to hold that the restriction here against mortgaging or selling was a valid one, and would prevent the vendor, Wilfred Martin, as devisee, from making a good title to the purchaser.

There remains the provision as to what the executors are to do in the contingency of the land having to be sold on account of mismanagement. This cannot possibly affect the present question, and it is unnecessary for me to speculate as to what is meant or how the executors were to act.

Also I need not deal with the question of the possibility of the two executors being able to make sale under the Devolution of Estates Act, nor the possibility of the devisee with the other heirs-at-law joining in making a conveyance, as to which see Re Bell and Re Shanacy and Quinlan.

The costs, unless the parties have agreed, should be paid by the vendor.

TEETZEL, J. FEBRUARY 7TH, 1906.

TRIAL.

WAY v. CITY OF ST. THOMAS.

Statutes—Special Act—Repeal by Implication—Repugnancy to Subsequent General Act—Rule of Construction—Assessment and Taxes—Exemptions—Railway—By-law of Municipality—Commutation—School Rates.

Action by a ratepayer of the city of St. Thomas against the city corporation and the Michigan Central and Canada Southern Railway Companies to obtain a declaration that a certain by-law and agreement were invalid, etc.

J. M. Glenn, K.C., and A. Grant, St. Thomas, for plaintiff.

W. B. Doherty, St. Thomas, for defendant city corporation.

D. W. Saunders, for defendant railway companies.

TEETZEL, J.:—On 6th April, 1897, the corporation of St. Thomas passed a by-law enacting that the annual sum of $3,750 should be accepted by the city for each of the succeeding 15 years "by way of commutation and in lieu of all and every municipal rate or rates and assessments that can be by any law now in force or which may hereafter be enacted or imposed by the corporation of the city of St. Thomas for any purpose whatever," etc., in respect of the lands in the by-law particularly described, being a portion of the property of the Canada Southern Railway Company in that city.

Plaintiff's claim is for a declaration that the by-law, and agreement pursuant to which it was passed, are invalid, and that the property mentioned in the by-law may be declared liable for all school rates, and that the railway companies may be ordered to pay the amount thereof which they ought to have paid since the passing of the by-law, and that in any event the railway companies should be declared liable to pay all school rates upon the property for the current and next succeeding 3 years, and that all errors and omissions in the assessment rolls should be amended accordingly.

Plaintiff's position is that the by-law is in violation of 55 Vict. ch. 60, sec. 4 (O.): "No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever."

As respects defendants the Michigan Central Railway Company, I find that they have in fact no property in St. Thomas affected by the by-law.

Section 3 of 48 Vict. ch. 65 (O.) reads: "It shall be lawful for the corporation of any municipality through any part of which any line or branch of the Canada Southern Railway has been constructed, to exempt the said company and its property within such municipality, either in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum or otherwise in gross or by way of commutation or composition for payment or in lieu of all or any municipal rates or assessments to be imposed by such municipal corporation, and for such term of years as such municipal corporation may deem expedient."

The by-law in question was passed under the authority of this section, and, if it is not repealed by sec. 4 of the

general Act above cited, the by-law cannot be impeached, notwithstanding that the effect of the by-law may be partly to exempt the property of the railway company from taxation. . . .

The general Act does not by express words repeal this or any other special Act. Then, is there in this case a repeal of the special Act by necessary implication?

The general rule that a prior statute is held to be repealed by implication by a subsequent statute, if the two are repugnant, is said not to apply if the prior enactment is special and the subsequent enactment is general. . . .

[Reference to Seward v. Vera Cruz, 10 App. Cas. 59, 68; Hardcastle's Statute Law, 3rd ed., p. 341 et seq.; Lancashire v. Manchester, [1900] 1 Q. B. 458, 470; Barker v. Edgar, [1898] A. C. 748, 754; Garnett v. Bradley, 3 App. Cas. 944; Maxwell's Interpretation of Statutes, 3rd ed., p. 263 et seq.; Sedgewick on Construction of Statutes, 2nd ed., p. 98; Williams v. Pritchard, 4 D. & L. 2; Potter's Dwarris on Statutes, pp. 156-7; Beale's Cardinal Rules of Legal Interpretation, p. 214 et seq.]

I am of opinion that sec. 4 of ch. 60 of 1892 does not by implication repeal sec. 3 of ch. 65 of 1885.

The Consolidated Municipal Act, 1892, sec. 366, amended sec. 366 of R. S. O. 1887 ch. 184 by excepting "school taxes" from the power of exemption which, by a two-thirds vote, the members of a municipal council might grant to any manufacturing establishment or waterworks or water company.

The title of ch. 60 of 1892 is "An Act to amend and explain certain portions of the School Laws." The Act contains 6 sections, all of which except sec. 4 are appropriate to the heading, but it seems to me that sec. 4 is more in the nature of an explanation or interpretation of sec. 366 of the Consolidated Municipal Act.

To hold that the general language of sec. 4 involves a repeal of all prior special Acts of the same legislature conferring upon municipalities the power to pass exemption or commutation by-laws in favour of railway companies, without giving the railway companies an opportunity of defending their charter rights thus acquired, would be to impute to the legislature a disregard for vested interests.

It is another well settled rule of construction that when the language of the legislature admits of two constructions, and if construed one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention has been manifested in express words: see Hardcastle, 4th ed., p. 300, and cases there cited.

Action dismissed with costs.

CARTWRIGHT, MASTER. FEBRUARY 8TH, 1906.

CHAMBERS.

McKERGOW v. COMSTOCK.

Discovery — Examination of Plaintiff—Libel — Defence— Relevancy of Questions.

Motion by defendants for an order requiring plaintiff to attend for re-examination for discovery and answer certain questions which he refused to answer on his former examination.

C. A. Moss, for defendants.

John Jennings, for plaintiff.

THE MASTER:—This is an action for libel . . . Prior to 27th June last plaintiff was secretary of a company in which defendant Comstock was induced to buy shares. Before doing so, he employed his co-defendant McCullough to ascertain for him . . . from the president and secretary the financial condition of the company; and this was so satisfactory that Comstock invested $5,000 in what seemed a promising venture. The company, however, soon got into difficulties, and it was stated on the argument that it is now in liquidation.

Comstock then employed McCullough to make an examination of the company's affairs. The result of McCullough's investigations was unsatisfactory. Comstock's solicitor, under instructions from Comstock, wrote to McCullough

saying that Comstock proposed "to take criminal proceedings against the president and secretary for having furnished him with a false financial statement, as well as civil proceedings to cancel the subscription and obtain a refund of the money"—of which it seems that $1,800 has been repaid.

This letter McCullough forwarded to plaintiff's father, with one from himself in which he spoke of criminal proceedings as being in contemplation.

The present action was thereupon commenced. . . .

The 2nd paragraph of the statement of defence of defendant Comstock says that the libel complained of "was a privileged communication, in that it was written as the result of an audit or investigation made by defendant McCullough for his co-defendant Comstock into the affairs of the company."

The questions which plaintiff refused to answer were as to plaintiff's connection with the company and his duties and powers as secretary, and as to the financial condition of the company at the time when Comstock was induced to subscribe. Some questions objected to were answered later on, but he positively declined to answer any which were directed to elicit the real condition of the company at the very time when plaintiff sent to defendants (or one of them) a statement of the company's affairs, dated 13th April, which he nevertheless says "was a strictly honest statement at that time and made to the best of my ability and with all the information I had or knew about."

The statement of defence might have been fuller and more explicit. But in an action such as the present defendants should not be tied down too strictly, especially as in the reply plaintiff charges them with "endeavouring to extort moneys from John McKergow (plaintiff's father) by threatening criminal proceedings against his son," and that "the letters complained of were written in pursuance of an illegal conspiracy between defendants to that effect, and with no other purpose or object whatsoever"—a charge which, if sustained, would render defendants liable to 7 years' imprisonment under sec. 406 of the Criminal Code, and would probably lead a jury to give heavy damages.

The defence of defendant Comstock may fairly be taken to mean that the audit made by McCullough shewed the real condition of the company on 13th April to have been so

entirely different from that contained in plaintiff's statement of that date that Comstock had sufficient grounds for writing the letter. . . .

Evidence of what McCullough found might be relevant to a defence of qualified privilege which defendant sets up. It would certainly be important on mitigation of damages as tending to disprove the deliberate malice which is expressly charged in the reply, and a defendant is entitled to get from the plaintiff everything which may, not which must, assist his defence.

Plaintiff should attend for further examination and answer fully on the matters in question, and the trial must be stayed until the examination is finished. But, as the defence was not put as clearly as it might have been, the costs of the present motion will be in the cause.

MAGEE, J. FEBRUARY 8TH, 1906.

CHAMBERS.

RE BELL.

Will — Construction—Devise — Life Estate—Charge on—Payment of Mortgage and Legacies — Acceptance—Refusal—Acceleration of Estate of Remainderman—Executors—Legal Estate—Power of Sale—Crop-payments—Deductions—Labour—Waste — Repairs—Fire Insurance —Lease.

Motion by executors under Rule 938 for order declaring construction of will.

A. E. Scanlon, Bradford, for executors.

T. W. W. Evans, Bradford, for Richard Bell.

H. H. Strathy, K.C., for remainderman.

F. W. Harcourt, for infant.

MAGEE, J.:—It does not appear, but I assume, that the farm, 100 acres, renting usually for $300 per year, is good security for the balance of $2,556.24 and interest owing upon

the mortgage, so that the executors are not particularly interested as to any possible claim by the mortgagee on the other property of the testatrix.

Thus I read the will as meaning that she intended the mortgage to be paid out of her "estate" other than the mortgaged land—although she prefaces her direction in that respect by disposing of all her real and personal estate "in manner following." She adds that if there is not sufficient to pay the mortgage and legacies, her brother Richard was to pay it from the crops of the farm, and he is to enter on the farm at once, and after he has paid off the mortgage and legacies he is to have the full benefit of the farm for his life and after his decease it is to be sold. She evidently contemplated that the "estate" from which the mortgage was to be paid might be insufficient and that the farm would remain after the payment.

Also I think the reasonable construction of the will is that there were not two different interests in the land to go to Richard—one till the mortgage was paid, and the other for the balance of his life—but that the one life estate was given to him, commencing at once, but, as he was to pay the mortgage out of the crops, he could not get the full benefit until that was paid. Practically it makes no difference, I think, which view is taken—for, assuming there were two interests, if the first one failed by refusal or forfeiture, the other would follow it.

At the decease of the testatrix the brother Richard was in possession, under some arrangement made with her, the nature of which does not appear. The executors' affidavit states that Richard declines to work the farm on the terms and conditions imposed by the will, while, on the other hand, the heirs at law contend that he, as life tenant, should work the farm, and that the terms of the will should be strictly complied with. No affidavit to the contrary is filed, but it was stated by his counsel that Richard had not absolutely refused to accept the devise, but postponed his decision, and in the meantime he had remained in possession under a temporary arrangement with the executors, but that he certainly was not in possession under the terms of the will.

If he refused the devise under the terms of the will, the effect is that the disposition made of the land "after his decease" is accelerated and takes effect at once during his

life, and the duty of the executors to sell arises, whether it be considered that they have the legal estate or only a power to sell with the legal estate vested elsewhere. See Lianson v. Lianson, 18 Beav. 1, affirmed in 5 DeG. M. & G. 754, where the words "from and after the decease" of the life tenant were held to mean from and after the determination of his estate by death or otherwise; and Jull v. Jacobs, 3 Ch. D. 703, where the life tenant was an attesting witness and incapable of taking: Craven v. Brady, L. R. 4 Eq. 209; Re Clark, 31 Ch. D. 72; and Yeaton v. Roberts, 28 N. H. 459, where the life tenant refused the devise.

In Truell v. Tyson, 21 Beav. 437, a power to sell with consent of life tenant in possession was held exercisable with the consent of the second life tenant when the first life tenant had surrendered. The power attended the acceleration of the estate.

In In re Johnson, 68 L. T. 20, a trust for sale was accelerated by revocation of the devise of the previous life estate, and it had the same effect on the period for ascertainment of the persons who were to benefit, and in that respect may apply to the estate of this testatrix.

As to whether the executors here take the legal estate or merely a power under the wording of the will, see Doe d. Hampton v. Shotter, 8 A. & E. 905, which is almost identical with this, and in which it was held they only took a power—as I hold the executors here do.

Now, if Richard Bell has accepted the devise to him, it becomes his duty under the will to pay the mortgage from the crops. It was conceded that he would be entitled to deduct from the gross proceeds of the crops the amount of his reasonable outlay for labour and a reasonable amount for his own labour; and with this I agree. But I do not think that, unless by consent, he is entitled to deduct outlay for repairs on the fences or buildings, which are said to have been in a poor state of repair at the death of the testatrix. Excepting the deduction for labour, cost of seed, taxes, and such necessary outlay, he should apply the whole proceeds of the crops upon the mortgage, and the payment of a reasonable rent would not suffice. The testatrix intended the principal to be gradually reduced, and has directed the mode. There is no hint that Richard was to make any profit except the

ultimate hope of a free farm for life. It may be that she underestimated the burden she was placing on him, but, short of the whole yearly benefit, she has given no other criterion for the amount he is to pay.

That he shall make the payment is a condition imposed on him by the will with a view to the speedy satisfaction of the mortgage, and if he fails he will be liable to forfeiture of his estate—with consequent acceleration of the disposition in remainder.

As regards fire insurance—if the mortgage contains a covenant for insurance, the premiums may properly be deducted from the proceeds of the crops. If not, the life tenant is not bound to insure for the benefit of the remainderman, and the executors have no funds out of which to pay premiums under the Trustee Act, sec. 31, and I do not think they would be justified, as donees of a power to sell, in making the outlay with a view to reimbursement after the life estate falls in. If the life estate has been refused, they, as present holders of the legal estate, as executors and also donees of the power, would be justified in insuring. If the life estate has not been refused, they would in the same capacity be justified in consenting to the payment of premiums out of the annual produce, provided the interests in remainder be properly guarded, so that the insurance money representing their interest in the buildings be not applicable to pay a mortgage which the tenant for life should pay, unless a charge therefor on the life estate be reserved: see Heron v. Moffatt, 22 Gr. 370.

As to repairs, the tenant for life is not bound to put the premises in better condition that he finds them, and is not liable for mere permissive waste: Re Cartwright, 41 Ch. D. 532; Patterson v. Central Savings Co., 29 O. R. 134; Holmes v. Wolfe, 26 Gr. 228.

The particular class of repairs is not shewn, or whether they would be beneficial to the interest in remainder: see Re Tucker, [1895] 2 Ch. 468; and Re Willis, [1902] 1 Ch. 15.

As regards leasing, if Richard Bell accepted the devise, he is entitled to lease, but only subject to the terms of the will as to application of the crops. If he refuse the devise, it becomes the duty of the executors to sell, and they could not be advised, except by consent of all beneficiaries, to make

a lease, unless for a short temporary period, to prevent loss or deterioration pending sale, and while the legal estate remains vested in them as personal representatives. Even trustees for sale are not authorized to lease unless under exceptional circumstances.

The order will declare: 1. That Richard Bell is not bound to pay the whole proceeds of the crops to be applied on the mortgage, but is entitled to make deductions for reasonable wages paid by him for hired help and for his own time and labour. 2. That the executors would not be responsible for any portion of the proceeds of the yearly crop not applied by Richard Bell on the mortgage, but so long as the legal estate remained vested in them it would be their duty in respect of the interests in remainder to take proceedings against him if he failed to apply any of the same, either to enforce payment or forfeiture. 3. If Richard Bell accepted the devise and ceased to work or wasted the farm, it would be the duty of the executors, as long as the legal estate was vested in them, to consider whether to enforce the forfeiture of his interest and then sell under the power in the will. Pending the sale they would be justified, while they had the legal estate, in leasing for a year at a time, if deemed necessary to provide against loss or deterioration. 4. The same as 2. 5. Richard Bell would have no right to any portion of the rent. 6. As the nature of the repairs is not shewn, it cannot be said whether the executors should in any way be parties to incumbering the interest in remainder for their cost. If the life estate is at an end, they would be justified in making necessary repairs. 7. It would be proper for the executors to consent to the payment of the fire insurance premiums out of the proceeds of the crops, provided that if the mortgage does not contain a covenant for fire insurance there should be a proper agreement to guard against the share belonging to the interests in remainder of the insurance money in case of fire being applied in reduction of the mortgage which the life tenant should pay, without a charge being retained therefor on the life estate. Costs of the executors and infant and remainderman to be paid out of the estate in remainder. Life tenant to pay his own costs.

TEETZEL, J. FEBRUARY 8TH, 1906.

TRIAL.

GOODWIN v. CITY OF OTTAWA.

Assessment and Taxes—Income Assessment—Dividends on Shares in Ottawa Electric Company — Agreements between Company and City Corporation—Exemptions—Special Statutes—Assessment Act.

Plaintiff, a resident of Ottawa, was assessed in 1905 in respect of $1,304, part of his income, which sum represented dividends paid to him upon 163 shares of the capital stock of the Ottawa Electric Railway Company.

The action was for a declaration that the assessment made by defendants upon the $1,304 was contrary to the agreements in force between defendants and the railway company, and was illegal and void, and for an injunction restraining defendants from collecting any taxes levied upon the assessment.

F. H. Chrysler, K.C., for plaintiff.

T. McVeity, Ottawa, for defendants.

TEETZEL, J.:—Two agreements were put in evidence, the first dated 5th November, 1890, between defendants and Ahearn & Soper, providing for the construction and operation of an electric railway, paragraph 10 of which provides for exemption from taxation on "the income of the contractors earned from the working of the railway." On 30th April, 1891, this agreement was assigned by Ahearn & Soper to the Ottawa Electric Street Railway Company. A subsequent agreement, dated 28th June, 1893, was entered into between the corporation of Ottawa, the Ottawa City Passenger Railway Company, and the Ottawa Electric Street Railway Company, paragraph 18 of which provides as follows: "The corporation shall grant to the said companies exemption from taxation and all other municipal rates on their franchises, tracks, and rolling stock, and other personal property used in and about the working of the railway, also on the income of the companies earned from the working of the said railway, for a period of 30 years from the said 13th day of

August, A.D. 1893. But this shall not apply to the real estate of the companies."

This agreement was confirmed both by Dominion and Ontario legislation: Dominion statutes of 1894, ch. 86; Ontario statutes of 1894, ch. 76.

By these statutes, also, an amalgamation of the two companies is authorized, and the Ottawa Electric Railway Company is the amalgamated company.

Plaintiff based his claim upon two grounds: (1) that his dividends are a part of the income of the company, and thus exempt under the agreements, as against defendants; (2) that under the Assessment Act, ch. 23 of the Ontario statutes of 1904, the Ottawa Electric Railway Company would, but for the said agreements, be assessable for income, and, therefore, dividends on the stock of the company are exempt under sub-sec. 17 of sec. 5 of the Assessment Act.

There is certainly no privity under either contract between defendants and plaintiff as a shareholder in the Ottawa Electric Railway Company. There is not a word in the contract evidencing any intention to exempt from taxation moneys paid by the company out of its surplus revenue to holders of shares in the company, by way of dividends on their stock.

It is the "income of the companies earned from the working of the said railway," that is exempt; and the manifest intention and purpose of the exemption is a relief to the company, but not a relief to third parties to whom the company may pay the money representing surplus income, either for dividends or otherwise.

I am therefore of opinion that the first ground of objection must fail.

The value of the second ground of objection depends upon whether the company would under the Assessment Act be liable to assessment in respect of its income, if the above recited agreements did not exist. If liable to such assessment, then, under sub-sec. 17 of sec. 5 of that Act, the dividends or income from the stock held by any person in the company would be exempt.

Section 10 of the Act makes provision for assessing persons who occupy land for the purpose of any business liable to assessment, for a sum to be called "business assessment," and clause (i) of sub-sec. 1 of sec. 10 provides that in case

of a person carrying on a business like the Ottawa Electric Railway Company's, such business assessment shall be for a sum equal to 25 per cent. of the assessed value of the land (not being a highway, etc.), occupied or used by such person, exclusive of the value of any machinery, etc., erected or placed upon, in, over, or under, or affixed to, such land.

Sub-section 7 of sec. 10 provides that every person liable to assessment in respect of a business under sub-sec. 1 shall not be subject to assessment in respect of income derived from such business, etc.

Section 11, sub-sec. 1 (a), provides that, subject to the exemptions in secs. 5 and 10 of the Act, every person not liable to business assessment under sec. 10 shall be assessed and taxed in respect of income.

It seems to me, therefore, perfectly clear that the Ottawa Electric Railway Company is not liable to be assessed for income.

I am not able to adopt Mr. Chrysler's argument that the business assessment is a partial income assessment, or that it takes the place of income assessment in the sense that a Court may read into sub-sec. 17 of sec. 5 the words "or which is liable to a business assessment." While it is true that a person or company is not liable to both business assessment and income assessment, except in the instances provided for in sub-secs. (b) and (c) of sec. 11, which do not apply to this case, the legislature has drawn a sharp distinction between the two methods of assessment, and I can find in the Act no evidence of any intention to confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from the stock in the company, except as contained in sub-sec. 7 of sec. 10, which confines such exemptions to shares in a "corporation carrying on a mercantile or manufacturing business and which corporation is subject to assessment under sub-sec. 1."

The fact of this express and limited provision argues almost conclusively against any intention to extend the exemption by implication to a case like plaintiff's, applying the maxim expressio unius est exclusio alterius.

The second ground of objection therefore also fails, and the action must be dismissed with costs.

FEBRUARY 8TH, 1906.

DIVISIONAL COURT.

LIDDIARD v. TORONTO R. W. CO.

Negligence—Street Railways—Contributory Negligence—Collision between Electric Car and Waggon—Findings of Jury —Meaning of.

Appeal by defendants from judgment of BOYD, C., at the third trial of the action with a jury, in favour of plaintiff upon the findings of the jury in an action for personal injuries and injury to property sustained by plaintiff in a collision of an electric car of defendants with an express waggon driven by plaintiff.

The judgment of the Court of Appeal affirming an order of a Divisional Court for a new trial is reported in 3 O. W. R. 852.

The present appeal was heard by MULOCK, C.J., TEETZEL and ANGLIN, JJ.

H. S. Osler, K.C., for defendants.

G. T. Blackstock, K.C., and J. E. Cook, for plaintiff.

The judgment of the Court was delivered by

ANGLIN J.:— . . . Plaintiff charged that the collision was due to the negligence of defendants in several particulars, including excessive speed of the car, lack of control of the car and brakes by the motorman, and inattention on his part to the duty of looking out for crossing vehicles.

The questions put to the jury with their answers were as follows: (1) Did plaintiff take reasonable care in trying to cross Queen street? A. Yes. (2) If so, were plaintiff and his property injured by the negligence of defendants? A. Yes. (3) What was the negligence of defendants, if any? A. In not paying attention to his duties and using all the appliances at hand to stop his car. (4) If plaintiff failed in reasonable care in trying to cross, were defendants (after they saw or should have seen plaintiff's danger) able to avoid the collision? A. No.

The Chancellor, after a colloquy with the jury, appended to the answer to the 4th question this note: "They answer

that they believe plaintiff's evidence, and I think this answer may be rejected." . . .

While the answer to the hypothetical 4th question may be regarded as unnecessary and superfluous, it is at least doubtful whether it should, as a finding of fact, be entirely ignored, as there was certainly evidence quite sufficient to warrant it. The jury in effect say that from the first moment when plaintiff's danger should have been apparent to the motorman, the collision was inevitable. That is, in substance, a finding that from that moment there was no causative negligence on his part. Yet, in answer to question 2, causative negligence has been found against defendants, and in answer to question 3 the jury say that that negligence consisted in the motorman "not paying attention to his duties," etc. It follows that there must be ascribed to the jury the intention to find, and their answer to question 3 must be construed as in fact a finding, that before plaintiff's danger should have been first apparent to the motorman, the latter was inattentive to his duty in that he failed to use the appliances at hand to stop his car for the purpose of bringing its speed down to a proper rate, and of giving him that control of its momentum which the surrounding circumstances of danger required. Thus understood, this answer is quite consistent with the answer to the 4th question. . . .

Appeal dismissed with costs.

MEREDITH, C.J. FEBRUARY 9TH, 1906.

CHAMBERS.

GILLARD v. McKINNON.

Venue — Change — Convenience — Witnesses — Expense — Fair Trial—Jury—Undertaking—Costs.

Appeal by defendants from order of Master in Chambers (ante 161) refusing to change the venue from Stratford to Cornwall.

Grayson Smith, for defendants.

R. C. H. Cassels, for plaintiff.

MEREDITH, C.J., dismissed the appeal, with costs to plaintiff in any event.

CARTWRIGHT, MASTER. FEBRUARY 10TH, 1906.

CHAMBERS.

MONYPENNY v. GOODMAN.

Constitutional Law—Criminal Code, sec. 534—Intra Vires—Civil Action for Same Cause as Criminal Prosecution—Motion to Stay Action.

Motion by defendant to stay proceedings, on the ground that defendant was being proceeded against criminally in respect of the same matters as were alleged against him in this action, and that sec. 534 of the Criminal Code, which assumes to allow a civil action to proceed in such circumstances, is ultra vires of the Dominion Parliament.

W. A. Henderson (Robinette & Co.), for defendant.

W. E. Raney, for plaintiffs.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Minister of Justice for Canada was not represented, though duly notified pursuant to sec. 60 of the Judicature Act.

THE MASTER:—The argument for the motion was, that, as the effect of sec. 534 is to enlarge the rights of plaintiffs in civil actions, its enactment by the federal parliament is an infringement of sub-sec. 13 of sec. 92 of the B. N. A. Act. It was contended with some plausibility that such an enactment was a violation of the opening words of sec. 92, "In each province the legislature may exclusively make laws in relation to matters coming within the classes" afterwards enumerated. This argument was supported by reference to sec. 94 of the Constitutional Act, as defining the only way in which the federal power could effectively deal with civil rights, and that all such legislation must be confirmed by a provincial enactment.

It was contended on the other side that the enactment in question was clearly a matter of criminal law. The previous rule, it was said, was based on the fact that in England (until

quite recently) the criminal law was put in motion solely by private prosecutors and at their expense. The former requirement was, therefore, considered necessary to ensure the punishment of offences before any person injured thereby could seek redress by civil proceedings; that in this province a different system has always existed; and the enactment of the Code was, therefore, only a somewhat tardy application of the maxim "Cessante ratione legis, cessat ipsa lex."

It was further argued that sec. 534 is not an interference with civil rights within the province in the true sense of those words, and is, therefore, not within the mischief which was being guarded against by sub-sec. 13 of sec. 92.

It was contended that it is only the repeal of a prohibition and restraint on civil proceedings no longer deemed to be necessary in the public interest. It was asked, could the provincial legislature have effectually passed such an enactment? And this question being answered in the negative (as it must be), then it was said it must be within the jurisdiction of the federal Parliament, as it certainly is within the power of one or the other.

It was long ago decided by the Privy Council that if a matter comes primarily within the provisions of sec. 91 of the B. N. A. Act, the legislation in respect thereof is not invalidated because it may to some extent affect those subjects which, by sec. 92, are reserved exclusively to the provincial jurisdiction.

The question, however, seems to have been disposed of by a Divisional Court in Gambell v. Heggie, 6 O. W. R. 184. The point was there under consideration, though no question was raised as to the validity of sec. 534. . . . This is, perhaps, not an express and binding decision on the validity of the section, as that question was not argued by the counsel for the defendant. It is, however, such an expression of opinion as it would be extremely improper to disregard, even if I had formed a definite conclusion to the contrary.

If defendant's counsel are still unconvinced, they must be left to carry the matter further, and perhaps to succeed they must be prepared to go at least as high as the Court of Appeal, in view of the decision in Gambell v. Heggie, supra.

They may then satisfy the Court that at least the section of the Code is not binding until it has been confirmed by a

provincial enactment, as in the case of federal legislation under sec. 94. But I do not desire to be understood as expressing any opinion on the point.

Motion dismissed; costs in the cause.

MAGEE, J. FEBRUARY 10TH, 1906.

WEEKLY COURT.

DAVIES v. DAVIS.

Covenant—Restraint of Trade—Breach—Injunction—Damages—Trade Name—Competition—Representations.

Motion by plaintiff for judgment on the statement of claim in default of defence in an action for an injunction and damages in respect of a breach of a trade covenant.

J. R. Code, for plaintiff.

No one for defendant.

MAGEE, J.:—The defendant George R. Davis did not appear or allege that the restriction upon trade was unreasonable or inflicted any hardship upon him. The old limits allowed for restraint have been considerably relaxed in compliance with the necessities of modern business: Underwood v. Barker, [1899] 1 Ch. 300; Nordenfelt v. Maxim Co., [1894] A. C. 535; Cook v. Shaw, 25 O. R. 124; Haynes v. Doman, [1899] 2 Ch. 13.

The contract is not very clearly set out in the statement of claim, but it can be assumed from it that defendant George R. Davis sold to plaintiff the business, stock, plant, patents, and right to the exclusive use of the name of the Novelty Manufacturing Co. as a trade name, and covenanted not to carry on the business or use the trade name in competition with plaintiff.

Plaintiff is therefore entitled to have an injunction continued against the carrying on by George R. Davis, his executors or administrators, in Toronto or elsewhere in Canada, of business of the kind carried on under the name of the

Novelty Manufacturing Co. before 25th March, 1884, at Toronto, by defendant George R. Davis, or any business, under the representation that any such business was the same or a continuation of the same business so carried on before 25th March, 1884, and from use by defendant George R. Davis, his executors or administrators, of the name "Novelty Manufacturing Co." as a trade name in competition with plaintiff.

Plaintiff is also entitled to damages for past acts of defendant George R. Davis in carrying on business or using the trade name in manner which plaintiff is so entitled to have restrained, and also damages for the alleged misrepresentation, and may have a reference to assess damages if desired.

The names "Specialty Co." and "Davis Specialty Co." cannot be said so to resemble the name "Novelty Manufacturing Co." that the use of those names, apart from representations in relation to the business being the same as or a continuation of that sold to plaintiff, and apart from competition under those names, would be a cause for damages or relief.

Judgment accordingly. Costs to plaintiff, including costs of interim injunction.