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STREET, J. NOVEMBER 21ST, 1902.

TRIAL.

BLACK v. IMPERIAL BOOK CO.

Copyright—Infringement — Importation of Foreign Reprints — Title of Plaintiffs—License—Notice to Customs Authorities—Insufficiency of.

Action to restrain defendants from infringing plaintiffs' copyright in the 9th edition of the Encyclopædia Britannica by the importation by defendants into Canada of copies of the work printed in the United States. The defendants set up that the copyright had been assigned by plaintiffs to the Clarke Co., and that, as this assignment had not been registered at Stationers' Hall, neither plaintiffs nor the Clarke Co. had a right to sue.

Walter Barwick, K.C., and J. H. Moss, for plaintiffs.

S. H. Blake, K.C., for defendant company.

A. Mills, for defendant Hales.

STREET, J.—The agreement with the Clarke Co. was in effect a mere license to publish the work in question for a period which would expire before the expiry of the copyright, and, as there was no assignment of the copyright itself, the plaintiffs had proved a sufficient title.

The defendants also set up that no notice had been given to the customs authorities under sec. 152 of the Imperial Customs Act of 1876 (39 & 40 Vict. ch. 36). This section must be read along with the 17th section of the Imperial Copyright Act of 1842, and must be construed as making it necessary that, before there can be an unlawful importation of a copyright work, notice shall have been given to the Customs shewing the name of the work, the owners of the copyright, and the date of its expiration. The notice of which proof was here offered, which correctly set out the name of the book and the owners of the copyright, but incorrectly stated the date of the expiry of the copyright, as the 30th

January, 1924, instead of 29th or 30th January, 1917, was insufficient under the section referred to, and the plaintiffs, therefore, had no right which they could enforce with respect to imported reprints.

Action dismissed with costs.

BRITTON, J. NOVEMBER 24TH, 1902

WEEKLY COURT.

RE GRIMSHAW AND GRIMSHAW.

Arbitration and Award—Arbitrators not Taking down Evidence in Writing—Objection not Raised—Findings of Arbitrators—Errors—Setting aside Award—Costs—Uncertainty.

Application by Delos Grimshaw to set aside an award whereby the arbitrators between the parties found $145 due from the applicant to Coleman Grimshaw in respect of produce and on other accounts.

BRITTON, J., held, (1) that, as no objection had been made upon the arbitration to the incomplete taking down of the evidence in writing, none was open now; (2) that the arbitrators were clearly wrong in not allowing the applicant $192.73 received by Coleman Grimshaw from the sale of some hay and oats replevied by him from the applicant; (3) that, upon the evidence so far before them, they were wrong in allowing $50 for straw in favour of Coleman Grimshaw; and (4) that the award was too vague and uncertain as to costs.

Award set aside and all these matters remitted to the arbitrators for reconsideration; costs of this application (fixed at $25) to be paid by Coleman Grimshaw.

BOYD, C. NOVEMBER 24TH, 1902.

WEEKLY COURT.

RE CORBETT AND HARTIN.

Will—Devise—Description of Land—Statute of Frauds—Identifying Land—Restraint on Alienation—Invalidity—Repugnancy.

Application under the Vendors and Purchasers Act. The testator devised the land in question in these terms: "To my brother Patrick all that lot of land in the township of Goulbourn . . . being the east half of lot number 27 in the said township, and to the heirs of his body lawfully

begotten, subject to a charge of £40 to be paid to my brother Nelson in instalments, the first instalment to be payable one year after my said brother Patrick shall take possession of the said lands, which shall not be till three years after my decease, my father retaining possession of the said land during the said term for his own benefit. . . . And I further direct that the said lot shall at no time ever be mortgaged, sold, or let, and that if my brother Patrick should die without issue lawfully begotten, the said lands shall descend to my next younger brother and his heirs as aforesaid."

BOYD, C., held, first, that the words of description in the will, which did not include any mention of the concession, were not per se sufficient to operate as a devise of the lands; and that, as the ambiguity was patent, to admit parol evidence of the intention of the testator, in order to identify the lands, would be to go in the teeth of the Statute of Frauds. But held, also, that looking at the provision giving the testator's father the benefit of the land for a term of three years, and the undisputed evidence of the fact that testator's father had after testator's death worked lot 27 in the 10th concession of Goulbourn jointly with his son Patrick until the latter died, aged 22, in 1848, there was no difficulty in finding that the will carried the land to the beneficiary named therein.

Held, on the second point, that the clause restricting alienation was not operative, since it expressly referred only to the first devise to Patrick, and since, even if it were to be read as applicable as well to the devise to Nelson, Patrick's younger brother, the present vendor, then the point was covered by Re Thomas and Shannon, 30 O. R. 51, and that the restrictive clause must, therefore, be held void as repugnant to the nature of the estate devised.

Order declaring in favour of the title.

NOVEMBER 24TH, 1902.

C. A.

DAVIS v. WALKER.

Donatio Mortis Causa — Solicitor — Lack of Independent Advice — Action against Administrator—Want of Corroboration—Burden of Proof—Costs.

An appeal by plaintiff from judgment of FALCONBRIDGE, C.J., ante 3, dismissing the action.

The defendant was administrator of the estate of Betsy Ann Walker, who died on the 28th February, 1900, intestate and without children.

The plaintiff sued to recover from the estate of the deceased a sum of $1,500, representing the amount of certain bank deposits and of sums due to the deceased upon a mortgage and under an agreement for sale of a parcel of land. The plaintiff asserted that on the day before her death the deceased gave him the bank book, mortgage, and agreement, and that they were received by him as a donatio mortis causa.

The Chief Justice found that at the time in question the plaintiff was the solicitor of the deceased; and held that, having relation to that fact and the circumstances under which the alleged gift was made, it was not valid. At the time when the gift was made the deceased and plaintiff were alone; there had been no previous intimation to plaintiff or any one else of an intention to make the gift, no other or disinterested person was called in, and no advice or explanation as to the nature and effect of the proposed gift was given by plaintiff or any one else.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A.

T. Langton, K.C., and W. R. Riddell, K.C., for appellant.

E. S. Wigle, Windsor, for defendant.

MOSS, J.A.—In my opinion, the judgment appealed from is right and should be affirmed. The evidence makes it clear that for many years before the transaction in question and down to the day on which it took place, the plaintiff was the trusted solicitor and business adviser of the deceased, and that the relation had never been severed. The transaction took place, therefore, during the subsistence in its fullest influence of the relation of solicitor and client. The handing over to the plaintiff of the sum of $1,500, or the placing him in possession of documents or indicia of title which would enable him to receive that sum, was an act of bounty on the part of the deceased, and none the less so because it was made with the intention, to borrow the expression of Lord Russell of Killowen, C.J., in Cain v. Moon, [1896] 2 Q. B. 283, "that it should revert to the donor in case of her recovery."

The rule of law with regard to gifts by clients to their solicitors, is much stricter than the rule with regard to other dealings between them, and it has been so from an early period. In Tomson v. Judge, 3 Drew. 306, Vice-Chancellor Kindersley, at p. 314, pointed out the difference between a gift and a purchase. . . . In O'Brien v. Lewis, 4 Giff. 221, Sir John Stuart, V.-C., expressed the rule in substantially similar terms, and his decision was affirmed by Lord Westbury, 32 L. J. Ch. 572.

While the relation exists, so long as it remains unsevered either by the solicitor having ceased to hold the position of or to act as solicitor for the donor, or possibly by the intervention of other and wholly independent advisers as to the nature and effect of the particular transaction, a solicitor cannot validly accept a bounty from his client. In Morgan v. Minet, 6 Ch. D. 638, Vice-Chancellor Bacon states the matter at p. 646-7. . . .

I see no reason why the rule should not apply to a donatio mortis causa, as much as to a gift inter vivos. It is not necessary to determine whether Walsh v. Studdart, 4 Dr. & War. 159, 2 C. & L. 423, was a case of donatio mortis causa or of gift inter vivos. The remarks of Sir E. Sugden as to the duty of a solicitor receiving a present from his client have a bearing upon the point. See especially p. 428 of the last mentioned report. The rule has been held to apply so as to exclude the ordinary presumption of a gift to a son being an advancement in a case where the son was also the solicitor of his parent: Garrett v. Wilkinson, 2 DeG. & S. 244. If there is to be any difference, and the case of a donatio mortis causa is to be likened to the case of a provision in favour of a solicitor contained in a will drawn by himself or under his instructions, then it lies upon the solicitor claiming the benefit to remove all suspicion, and to prove affirmatively that the donor was fully aware of the nature and effect of the gift, and with such knowledge approved of what was being done. In this case, if all that the plaintiff states occurred between him and the deceased had been written down by him and signed by her, the production of that paper would not have been sufficient to establish the plaintiff's case.

There is an entire absence of evidence to shew that the nature of the transaction was explained, or that the usual precautions for making sure that she fully understood what she was doing, and its effect with regard to the property she was dealing with, were adopted: Tyrrell v. Painton, [1894] P. 151.

I think the plaintiff has failed to establish a case for the relief he seeks.

The defendant claims by way of cross-appeal to vary the judgment of the learned Chief Justice by directing the plaintiff to pay the defendant's costs of the action, but I think no case has been shewn for interfering with the discretion exercised.

The appeal and cross-appeal should be dismissed.

GARROW, J.A., concurred in the judgment of MOSS, J.A.

OSLER, J.A.—I think the appeal must be dismissed. I rest my judgment on the ground that the plaintiff's testimony has not been corroborated as required by sec. 10 of the Evidence Act, R. S. O. 1897 ch. 73. . . .

MACLENNAN, J.A.—If the gift in question were claimed as absolute, and not one causa mortis, and therefore revocable, the case of Walsh v. Studdart, 4 Dr. & War. 171, on which the Chief Justice rested his judgment, would be conclusive. It was not a case of donatio mortis causa at all, although indexed as such in the report, and treated as such in 1 W. & T. L. C. 406, 413. [Discussion of that case.]

* * * * * * * *

A donatio mortis causa being revocable ab initio, and being conditional upon the death of the donor, resembles a legacy in most respects, and the equities applicable cannot be different. I, therefore, think that the law applicable to wills is that which is to be applied to such gifts, and not that which is applicable to gifts inter vivos. [Collins v. Kilroy, 1 O. L. R. 503, referred to.] It was there pointed out that a person standing in a fiduciary relation may lawfully exert his influence to obtain a legacy, and unless there has been something amounting to coercion or fraud, such legacy is good: Huguenin v. Basely, 1 W. & T. L. C., 7th ed., p. 287, and cases there cited; Kerr on Fraud, 3rd ed., pp. 274-9. Nothing of the kind has been proved here. There is, however, the other rule stated by Lord Hatherley in Fulton v. Andrew, L. R. 7 H. L. 471, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, has thrown upon him the onus of shewing the righteousness of the transaction. If the plaintiff is to be regarded as having been instrumental in procuring this donation, then I think he has discharged that onus. . . . If it is proved, as I think it is, that the donor and the plaintiff and his family had for a long time been intimate friends, that she had for some time an intention of giving him her property at her death, that without any request or solicitation on his part she came to his house, and while there made these gifts to him in the manner he has described, I think the plaintiff has shewn, that the transaction was righteous, and that it is valid.

I therefore think the appeal should be allowed with costs, and that there should be judgment for the plaintiff with costs.

Appeal dismissed with costs; MACLENNAN, J.A., diss.

NOVEMBER 24TH, 1902.

C. A.

KEITH v. OTTAWA AND NEW YORK R. W. CO.

Railway—Injury to Passenger—Alighting from Moving Car—Negligence—Contributory Negligence—Findings of Jury—Damages.

Appeal by defendants from judgment of MACMAHON, J., ante 104, in favour of plaintiff upon the findings of the jury in an action for damages for injuries sustained by plaintiff in endeavouring to get off a train of defendants as it was moving out of the station.

The questions and answers of the jury were as follows: (1) How long did the train stop at Finch station? A.—Cannot say. (2) Was the time the train remained there sufficient to enable plaintiff to alight? A.—No. (3) Was Keith aware when he reached the platform of the car that the train was in motion? A.—Yes. (4) If Keith was guilty of any negligence which contributed to the accident, what was such negligence? A.—None. (5) If Keith is entitled to recover, at what do you assess the damages? A.—$1,000.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A.

W. R. Riddell, K.C., and W. H. Curle, Ottawa, for appellants, contended that the trial Judge should have nonsuited, on the ground that the act of alighting from a moving train was in itself negligence on the part of the plaintiff which relieved defendants from liability for damages, in the absence of circumstances tending to excuse or justify the act, and that if defendants were guilty of negligence in not stopping the train for a sufficient time to allow plaintiff to alight, the damages claimed were too remote. They also contended that upon the evidence the jury should have found that the train was stopped for a sufficient time to enable plaintiff to alight, and have found plaintiff guilty of contributory negligence. They submitted further that the learned Judge should not have entered judgment for plaintiff in face of the jury's answers that they could not say how long the train was stopped, and that the damages were excessive.

W. H. Blake, K.C., for plaintiff, contra.

MOSS, J.A.—I think the learned Judge properly declined to withdraw the case from the jury. I do not understand the defendants' proposition to go the length that under no circumstances and in no case is a person justified in alighting from a moving train, but that presumptively it is an act of

negligence, and if any injury result from it the party suffering the injury cannot recover damages without shewing circumstances tending to excuse or justify the act. I am disposed to think that the rule of conduct as stated by the defendants is not strictly accurate, but, if it be the rule, then it must follow that when circumstances are stated it is for the jury to consider and determine as to their sufficiency. In this case there were circumstances stated which could not have been withdrawn from the jury. And it was for the jury to say upon the evidence whether the plaintiff's injuries were caused by the negligence of the defendants or were the result of his own carelessness and negligence. Upon the motion for nonsuit the question for the learned Judge was whether, assuming, as for the purposes of the motion for nonsuit it was to be assumed, that the defendants were negligent in not stopping their train for a sufficient time to enable the plaintiff to alight, there was evidence upon which the jury might find that the injury was the result of that negligence and was not occasioned by the plaintiff's own negligent and imprudent act in attempting to alight while the train was in motion. And if the jury could reasonably find in favour of the plaintiff on this question, the damages would not be too remote. The nonsuit was, therefore, rightly refused. There was evidence upon which the jury might find, as they did, that the train was not stopped for a sufficient time to enable the plaintiff to alight. The jury having so found, a case for negligence has been established against the defendants. To relieve themselves of liability for such negligence, they were obliged to shew that it did not contribute to the plaintiff's injury. The next inquiry, therefore, is, whether the learned trial Judge properly submitted the question of the plaintiff's conduct to the jury, and whether there was evidence to support their finding. The point to be determined by the jury was whether the plaintiff acted in a reasonable and prudent manner in endeavouring to alight from the car, while it was moving at the rate spoken of in the evidence. The question involved consideration of the circumstances. Finch station was the plaintiff's point of destination on the defendants' line. The train was leaving it without his having been afforded a proper opportunity of alighting. It was for the jury to consider and say whether, taking into consideration the plaintiff's position when the train began to move, the speed it had attained, the point it had reached before he got on the step, the place on which he could alight, the effect upon his movements of the bundle or parcel which he carried, and the other circumstances, the plaintiff was guilty of negligence in attempting to alight.

The question was not given to the jury in this form. But the question actually put must be read in connection with the charge. The learned Judge explained to the jury that if the defendants did not stop the train for a sufficient time to enable the plaintiff to alight, or did not afford him proper facilities for alighting before the train was started, they were guilty of negligence. He then adverted to the starting of the train, the plaintiff's position in the car at that time, his carrying a bundle in one hand, and the speed of the train when he reached the platform, and told them that it was for them to say whether he acted reasonably under the circumstances appearing in evidence. Substantially he left to the jury to say whether the plaintiff was in fault at all. The question he gave was: "If Keith was guilty of any negligence which contributed to the accident, what was such negligence?" The answer of the jury was that the plaintiff was guilty of no negligence which contributed to the accident. Having regard to the terms of the charge, this is a finding that the plaintiff acted reasonably and was not in fault. There is evidence upon which the jury might properly come to this conclusion, and judgment was, therefore, properly entered for the plaintiff. In view of the finding that the train was not stopped a sufficient time to enable the plaintiff to alight, the question as to the exact time was immaterial. If they had found it, they would still have been obliged to say whether it was sufficient.

Complaint was also made that the damages were excessive. The plaintiff's injury was of a very painful kind. The question of the period within which he might have fully recovered was complicated to some extent by another accident he met with between five and six weeks afterwards, resulting in a fracture of the leg previously injured or affected.

But the jury were carefully cautioned not to take that into consideration, and to confine their award of damages to the injury sustained at Finch, and it must be assumed that they have done so. There was evidence that at the time of the trial, rather more than a year after the accident, he was still suffering from its effects.

The amount awarded is not so large as to suggest any mistake, misapprehension, or prejudice on the part of the jury.

The appeal should be dismissed.

OSLER, J.A., gave reasons in writing for coming to the same conclusions, and referred to the following authorities: Beach on Contributory Negligence, 3rd ed., sec. 147; American Negligence Cases, vol. 4; Clayards v. Dethick, 12 Q. B.

439; Pollock on Torts, 4th ed., p. 433; Connell v. Town of Prescott, 20 A. R. 49, 22 S. C. R. 147; Edgar v. Northern R. W. Co., 11 A. R. 452; Filer v. New York Central R. R. Co., 49 N. Y. 47; Central R. R. Co. v. Miles, 88 Ala.

MACLENNAN and GARROW, JJ.A., concurred.

NOVEMBER 24TH, 1902.

C. A.

McCLENAGHAN v. PERKINS.

Executors and Administrators—Claim by Executor against Estate—Corroboration—Payment in Lifetime of Testator—Admission—Executor's Compensation—Devise, whether in Lieu of—Construction of Will—Grounds for Depriving Executor of Compensation—Negligence—Mismanagement—Breaches of Trust.

An appeal by defendant Perkins from an order of FALCONBRIDGE, J., in Court, ante 191, dismissing that defendant's appeal from the report of the Master at Ottawa and allowing in part a cross-appeal by the plaintiff. The report was made upon a consent reference to take the accounts in an action for administration of the estates of V. E. Hinton, deceased, and M. S. McGillivray, deceased. The Chief Justice affirmed the Master's findings except in one particular, viz., as to compensation to the defendant Perkins as executor, which he disallowed.

The appeal was heard by OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

T. A. Beament, Ottawa, for appellant.

W. J. Code, Ottawa, for respondents.

MACLENNAN, J.A.—The first item in question in this appeal is one of $1,275. The precise form in which this and other items were stated in the appellant's account in the administration proceedings of his father's estate in Armstrong v. Perkins is not before us, although it was before the Master. What the Master says about it is this: "In the accounts filed in Armstrong v. Perkins there is an item of $1,200 credited as paid by the estate of Victoria Elizabeth Hinton on the 30th April, 1883." At that time the appellant was passing his accounts as executor of his father, Lyman Perkins, and he was at the same time executor of his sister Mrs. Hinton, who had died on the 25th December, 1882. It seems to have been assumed by all parties that the item of $1,200 was allowed to the appellant as executor of his father. On taking the present accounts, and on being surcharged with the item

of $1,275, he explained it by saying the money was not received on the 30th April, 1883, but was made up of several smaller payments made by him as executor of his father to his sister Mrs. Hinton, in her lifetime, in the year 1882. The Master has not given effect to that evidence, and has charged the appellant with the item, on the ground that his evidence was in respect of a matter occurring before the death of the deceased, and was not corroborated as required by R. S. O. ch. 73, sec. 10. The learned Chief Justice has upheld the decision of the Master.

I am, with great respect, of opinion that the Master's ruling on the question of corroboration is wrong, and cannot be supported. The question before him was whether the appellant had received the sum in question on the 30th April, 1883, or at any time after Mrs. Hinton's death. If he did, he was chargeable, but not otherwise. To my mind, the matter is too plain for argument. The respondents say to the executor: "You received this sum of $1,200 or $1,275 on or about the 30th April, 1883, or at all events some time after Mrs. Hinton's death, and after you became her executor; and that is apparent from your own admission in your account filed in Armstrong v. Perkins." He answers that by a denial. He says: "That admission requires explanation and qualification. I did not receive it on the 30th April, 1883, or after my sister's death at all. It was the aggregate of several sums which I, as my father's executor, paid to my sister in her lifetime, and I claimed and obtained credit for them as my father's executor, which I was entitled to do." It was not correct to say in his account that the item had been paid to the estate of Victoria Elizabeth Hinton, or to himself as her executor, instead of saying it had been paid to her in her lifetime. But the important matter at that time was to get credit for it with his father's estate as a payment by him on account of his sister's share. Whether it was paid in her lifetime or shortly afterwards was immaterial, and the error was not an unnatural one to commit in preparing the accounts after Mrs. Hinton's death. The matter in question before the Master was, therefore, in my opinion, clearly not a "matter occurring before the death" of Mrs. Hinton, and so not one requiring corroboration under the statute. This item must be referred back to the Master for reconsideration and determination.

The second ground of appeal is the finding of the Master, on which the Chief Justice expressed no opinion, that the devise by Mrs. McGillivray of certain land to the appellant, with a direction for the payment out of her personal estate of the incumbrance thereon, was made to him in his character

of executor, and was an answer to his claim to an allowance for his care, pains, and trouble, and time expended as executor, under R. S. O. ch. 129, sec. 40. The learned Chief Justice held that the appellant's faults in the execution of his trust were sufficient to disentitle him to any compensation, and that it was not necessary to determine whether the devise was made to him in his quality of executor.

I have examined the numerous cases on this subject, and I am of opinion that on this point the Master came to a wrong conclusion.

The appellant was the testatrix's brother, and the first disposing paragraph of the will is the one in question:—"I give and devise all and singular these certain parcels or tracts of land (describing them) unto my brother G. W. Perkins, his heirs and assigns absolutely, for his and their sole and only use forever, free from all incumbrances, and I hereby direct that the mortgage at present on said lands, or any other incumbrances that may be on said lands at the time of my death, shall be paid out of my personal estate, and the payment of the said incumbrance shall be a first claim on my said personal estate." She then proceeds to dispose of the residue of her real estate and her personal estate, in a number of subsequent paragraphs, for the benefit of her nephews and nieces and other objects. She next appoints "the said G W. Perkins sole executor" of her will, and then follows the usual clause enabling "the said trustee hereby appointed or any trustee or trustees to be appointed as hereinafter provided," in case of vacancy in the office, to appoint a successor or successors in the trust, and afterwards she gives the appellant three portraits.

Now, taking this will as a whole, I think the presumption that the devise was intended as compensation to the executor is rebutted. [Compton v. Bloxam, 2 Coll. 201, and In re Appleton, 29 Ch. D. 893, referred to.] Here, the gift is to "my brother G. W. Perkins," and I think that is an indication of the testatrix's motive for her gift, sufficient, having regard to the other parts of the will, to rebut the general presumption. See also cases cited in Theobald on Wills, 5th ed., p. 318; Williams on Executors, 9th ed., p. 1147.

I therefore think that the question of compensation to the appellant as executor of Mrs. McGillivray is not excluded by the devise contained in the will.

The next question is that of compensation. The Master allowed the appellant compensation to the amount of $1,900 out of the estate of Mrs. Hinton, but allowed nothing out of Mrs. McGillivray's estate, for the reason already mentioned.

The learned Chief Justice held him not entitled out of either estate by reason of misconduct. He was of opinion that the appellant's acts of negligence, mismanagement, and breach of trust, made a cumulative case quite sufficient to deprive the executor of the compensation provided by the statute. The learned Chief Justice enumerates the neglects and defaults of the executor; and they are certainly not trifling, or at all to be excused. Nevertheless, they are not the neglects or defaults of a dishonest or fraudulent trustee, and are all capable of being compensated, and the losses resulting from them capable of being made good, in money. That being so, I think it is not a case for depriving him of compensation. The appellant has been trustee of the Hinton estate for nineteen years, and of the McGillivray estate for, I think, fourteen years. The aggregate amount of the money which came to his hands during that term was about $72,000. It is evident that he must during that period have bestowed much care, pains, trouble, and time in connection with the business of both estates, and, although the care and pains were not of the highest quality, yet his position under the statute was and is that of a person performing services on terms of fair and reasonable remuneration for care, pains, trouble, and time. I think it is the effect of all the decisions on the statute that an executor or trustee is not to be deprived of compensation for actual and beneficial services, though he may also have been guilty of neglects and defaults more or less grave: Hoover v. Wilson, 24 A. R. 434. I think that to do so would be to punish him by depriving him of a statutory right, which the Court has no jurisdiction to do. He will be made to account for what he actually received, or must be presumed to have received, or ought to have received, but no more: Attorney-General v. Alford, 4 DeG. M. & G. 851; Vyse v. Fortier, L. R. 8 Ch. 333, L. R. 7 H. L. 318; Ex p. Ogle, L. R. 8 Ch. 716. The Master has charged him with all the losses to the estates resulting from his neglects and defaults, and has allowed him a compensation of $100 per annum from the Hinton estate, which seems a moderate sum.

It follows that the executor's appeal in respect of his compensation should be allowed as to both estates, and it will be referred back to the Master to fix a proper amount in the McGillivray estate.

The appeal will be allowed with costs.

OSLER, J.A., gave reasons in writing for coming to the same conclusions.

MOSS and GARROW, JJ.A., concurred, but gave no reasons.

NOVEMBER 24TH, 1902.

C. A.

HOLMAN v. TIMES PRINTING CO.

Master and Servant—Injury to Servant—Workmen's Compensation Acts—Negligence of Master's Foreman—Infant.

An appeal by defendants from the judgment of FALCONBRIDGE, C.J., after a trial without a jury, awarding plaintiff $1,200 damages, in an action against his employers under the Workmen's Compensation Act.

In March, 1900, plaintiff, then being about 16 years of age, went into the employment of defendants, who were the proprietors of a printing establishment in the city of Hamilton. Among other kinds of work done by them was the printing of railway coupon tickets by means of a ticket printing press. After plaintiff had been in defendants' employment for about two months, during which he did some work or "practising" at using a press, he was put to work at printing on cardboard, and he continued at this, working some hours each day, until a week before the 4th July, 1900, on which day he received the injury which was the cause of this action. The defendants had three ticket printing presses, very similar in construction and operation. Two of them were alike in every particular; the third, the one at which plaintiff was working when he was injured, differed from the others in some particulars. The plaintiff did not work at the third machine until a week before the accident. On the 27th June, 1900, he was put to work on the third machine by defendants' foreman, to print coupon tickets upon thin, slight paper, different from the stiff paper upon which he had hitherto been engaged. The quality of this paper made it more difficult to properly adjust, and called for quick action on the part of the operator, even when the machine was not working at its greatest speed. For the first few days that plaintiff was working on the machine, it was worked at first speed. On the third day, he said that the foreman told him to run at faster speed, and it was put up to second speed. On the fourth day he complained to the foreman that the speed was too great and that he was tired out and was spoiling tickets; that on account of the material being so flimsy and the speed so great it was very difficult and hard to handle it, and he could not do it; that it was dangerous to run at that speed. The foreman, however, told him to go back and run at that speed. On the next working day, he put the speed down to first speed, but the foreman came over and put it back to second. On the next day the accident hap-

pened. The plaintiff was placing a slip on the lower plate, and finding it was not entering the guides properly, he endeavoured to throw off the impression with his left hand, at the same time trying to put the slip right. The result was that his right hand was so crushed and injured as to necessitate amputation.

J. Crerar, K.C., and W. R. Riddell, K.C., for appellants.

D'Arcy Tate, Hamilton, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

MOSS, J.A., who, after setting out the facts and evidence at length, concluded:—

If the plaintiff's right to maintain the action depended upon the claim that the foreman was incompetent to discharge the duties of foreman or superintendent, and that defendants were guilty of negligence in employing him in that capacity, I should be of opinion that the plaintiff had failed upon the facts. But upon other grounds of negligence the plaintiff is entitled to retain the judgment in his favour.

The evidence fully establishes that the plaintiff when put to work at the machine in question was, from lack of proper instruction and experience, not capable of working it properly and with safety to himself. The speed at which he was required to work it, and the difficulty of properly manipulating the impression bar, rendered it dangerous to him. He realized this after a short trial at second speed, and complained to the foreman, and informed him that he considered it dangerous, but was ordered to continue working at it and prevented from lowering the speed. The foreman admitted in evidence that he considered working at second speed with the plaintiff was too fast, because he was a little slower in picking up feeding than other boys. But he contended that the machine was not working at second speed, but only at first speed, and he said that if he had seen the plaintiff working at second speed he would have stopped him.

On the question of the speed there is not only the evidence of the plaintiff, but that of several witnesses who prove that the machine was running at second speed, and that fact must be found against the testimony of the foreman, with the consequent conclusion that he directed a boy whom he knew not to be competent or capable of doing it, to work the machine at second speed.

There is also evidence that the impression bar, though a useful contrivance, is not readily managed without a good deal of practice. The operator must learn to grasp it near

the centre, and to use his strength upon it in the right way and at the right moment, and this requires experience. It appears also to require more strength than the use of the knob.

The effect upon the plaintiff was to waste his strength and tire him out, and to make it dangerous to work at second speed, so that when the difficulty occurred about the misplaced dip, and he attempted to work the impression bar, while endeavouring with his other hand to manipulate the slip, the lower plate closed upon him before he was aware of it.

The injury was the result of the negligence of the foreman, for whose acts and orders in the premises the defendants are liable.

An attempt was made to shew that the plaintiff was in the habit of acting carelessly while at his work in looking about him and not paying attention to his task. But the evidence shews that at the moment of this accident he was wholly occupied with his work, devoting his full attention to it, and endeavouring as well as he could to perform the operations which had become necessary in the circumstances.

His youth, inexperience, lack of proper instruction, and want of necessary strength and quickness, rendered him incapable of accomplishing the operations with the requisite skill, and interfered with his withdrawing his hand in time. And there is no ground for holding that the injury was the result of his own negligence or want of proper care.

The appeal should be dismissed with costs.

NOVEMBER 24TH, 1902.

C. A.

MORRISON v. GRAND TRUNK R. W. CO.

Discovery—Examination of Officers of Company—Railway Company—Engine-driver.

Appeal by defendants from order of a Divisional Court, ante 263, 4 O.L.R. 43, reversing order of STREET, J., ante 180, and holding that the driver of an engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of an accident, was an officer of the railway company examinable for discovery under Rule 439, in an action against the company to recover damages for the death of the husband by negligence causing such accident.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A., BRITTON, J.

D. L. McCarthy, for appellants.

J. G. O'Donoghue, for plaintiff.

OSLER, J.A.:—Leitch v. Grand Trunk R. W. Co., 13 P. R. 369, binds us to hold, and so far as I am concerned, for the reasons there given by me, that the conductor of a railway train may be examined as an officer of defendants within the meaning of Rule 439 (1), the language of which is the same as that of the old Con. Rule 487 and R. S. O. 1877 ch. 56, sec. 156. The question now is, whether the engine driver is also an officer who may be examined. I have considered the reasons given by me in the opinion I delivered in the case cited, and, while abiding by what I said there, do not think I said anything which obliges me to hold that the engine-driver is a person on the same plane as the conductor, or possessed of the degree of authority or charge of the train which there led me to the conclusion that the latter might be regarded as an officer. He did not in fact in the present case become conductor under the rules of the company in place of the conductor whose death has given rise to the action, as a person superior in authority to both of them was then on the train and took charge of it.

The whole question of the examination for discovery of officers of a corporation is full of difficulty, which might be solved in one direction, perhaps, by treating the word "officer" as merely a synonym for "servant," and regarding these as convertible terms. This, if not actually decided, appears to be the result of the decision in the Court below, but I am not prepared to go so far as to give the former word the wide meaning contended for. There would indeed be no practical harm in doing so, were the rules as to the use which may be made of the deposition of the person examined the same as they were when Leitch's case was decided, and when such deposition could not be read against the corporation, if at all, unless the latter took part in the examination. Rule 461 (2), (3), has made a material change in the practice in this respect, and the deposition of the officer, no matter what his grade or authority, may now be read against the corporation, just as those of a natural party may be read against him under the first clause of the Rule.

I do not agree that the consequences are so unimportant or free from disadvantage to the corporation as one of my learned brothers in the Court below seems to think, and while, perhaps, it is not legitimate to construe Rule 439 (1) by looking at the consequences I have refered to under

Rule 461, I think these fully justify us in saying that we ought not to extend the meaning of the word "officer" in the former Rule or carry the cases further than they have already gone. It might be quite reasonable to examine, for discovery merely, any officer or servant of a corporation, but to allow this examination to be used as evidence against the corporation in the same way as that of a natural person may be used against himself, is a practice the justice of which, in many cases at all events, is not so clear. The plaintiff or defendant, as the case might be, could obtain everything he ought to obtain in the way of discovery if Rule 439 were enlarged so as to admit of the examination of officers and servants of the corporation, and the 2nd and 3rd clauses of Rule 461 might in that case be repealed without injustice to any one. The persons examined for discovery would then be examined, as they should be, as witnesses at the trial, while any difficulty in obtaining their evidence then would be obviated by examining them in like manner under Rules 485 and 486.

It appears to me, therefore, with all deference, that we should allow the appeal.

MOSS, J.A., gave reasons in writing for coming to the same conclusion.

GARROW, J.A., and BRITTON, J.A., concurred.

MACLENNAN, J.A., concurred, but *dubitante*.

NOVEMBER 24TH, 1902.

C. A.

TORONTO GENERAL TRUSTS CORPORATION v. WHITE.

Landlord and Tenant—Building Lease—Valuation of Buildings—Arbitration and Award—Extension of Time for Making Award—Interest.

Appeal by defendants from an order of a Divisional Court, *ante* 198, 3 O.L.R.519, reversing the judgment of MACMAHON, J., which was in favour of defendants upon a special case stated for the opinion of the Court in an action to recover interest upon the amount payable to the plaintiffs as executors of the will of Charles Potter, in respect of the value of buildings upon King street, east of Yonge street, in the city of Toronto. A lease to Potter of the lands on which the buildings stood expired on the 31st October, 1900, and there was no provision for renewal. A clause in the lease provided

for payment by the defendants of the value of the buildings, to be fixed by valuators. The valuators were appointed in due time, but did not make their valuation until the 30th November, 1901. The interest sued for was the interest on the sum fixed from the date of the expiry of the lease until the date of the valuation or award. The clause in question provided that the reference should be entered upon and award made within six months next preceding the 1st November, 1900, and that within six months from that date the value of the buildings should be paid, with interest at seven per cent. per annum from that date. The Court below held that the defendants were, as to the buildings, in the position of purchasers in possession, and applied the general rule (Birch v. Joy, 3 H. L. Cas. 565) that the purchaser pays interest from the time of taking possession.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A., counsel for both parties consenting to its being heard by four Judges instead of five.

J. Bicknell, for appellants, contended that interest would be allowed only in cases of contract therefor, or in cases where the money has been wrongfully withheld, and here, by the contract, it could not be paid until ascertained.

F. E. Hodgins, K.C., for plaintiffs, contra.

MACLENNAN, J.A. (after stating the facts) :—It does not appear what the reasons were for the award not having been made within the time originally agreed upon, nor why the time was extended, and the award not made until 13 months after the expiration of the term, and we must suppose that the extension of time and delay were agreed to for the convenience of both parties and without the fault of either.

When the extension of time of the 23rd October, 1900, was agreed to, it was still possible to make the award within the time originally limited, and if that had been done the defendants would have had to pay interest at seven per cent. per annum for any delay in payment after the 1st November, 1900, and until six months from that day, after which it would be at the legal rate of five per cent.: St. John v. Rykert, 10 S. C. R. 278; People's Loan Co. v. Grant, 18 S. C. R. 262. So also interest would be payable if the award had been made at any time within the six months next after the expiration of the term, for the covenant for payment within that time would still be capable of fulfilment, and therefore still in force, and if the award was made on the very last day of the six months, I think the defendants would still be obliged to pay six months' interest from the 1st November, 1900, at seven per cent.

The award, however, not having been made within the time limited for payment, it was impossible for the defendants to pay within that time, and, although they do not dispute their liability to pay the value fixed by the award, they dispute the obligation to pay interest. They say that that obligation was done away with by the extension of time. They say that the effect of the extension was, that although if the award had been made one day before the six months had expired, they would have had to pay interest, if made one day after, they would not, which would be a rather startling result.

In Birch v. Joy, 3 H. L. Cas. 565, which was a case of a contract for the sale of an estate, there had been a variation of the original contract by a subsequent agreement, and Lord St. Leonards said, p. 591, that the only true mode of ascertaining the real intention of the contract was to consider it at first without reference to the second agreement.

Doing that in this case, we see that the intention was that inasmuch as when the term expired the title to the buildings would at once vest in the lessors without any conveyance, would merge in the freehold, and the lessors would at once be entitled to possession and to the rents and profits, the lessees should have interest on the purchase money of the buildings from that time, in case the lessors required time, not exceeding six months, to make payment. That agreement accorded with what was fair and just between the parties, and with the doctrine of Courts of Equity in cases of sales such as this. That doctrine was clearly stated by the same Judge in the case already referred to in a passage just preceding that already quoted. He said, speaking with reference to the contract then before the Court: "This contract, if it had been executed by a Court of Equity, would have been executed according to equity and good conscience, and according to the rules of the Court, upon which there cannot be any difference at the bar. From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed the owner of the purchase money, and that purchase money, not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they

exchange characters in a Court of Equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a Court of Equity."

Now the present contract was drawn conformably to this settled rule of equity, inasmuch as the lessors would have a complete title and possession on the 1st November, and if they required time to pay they were also to pay interest, and the lessee was to have a lien on the estate as security until payment was made. By that agreement the award was to be made at or before the end of the term. But finding that the award could not be made before the end of the term, the time was extended by mutual consent. There is not a word in this new agreement changing or varying the original contract in any other respect, and so the provisions of the latter must stand and have effect as far as possible, except so far as necessarily interfered with by reason of the extension. Now it appears to me that the original agreement can and ought to stand in everything except as to the time of payment. That was to be within six months after the expiration of the term. By the consent of parties the award was not made until after that time, and so the payment could not be made until afterwards. The time for payment was in effect postponed by consent. No new day or time was named, and so payment would be due when the award was made and published. But that did not do away with the agreement to pay interest from the 1st November, 1900. That still stands as an essential part of the original agreement and is still binding on the defendants. I suppose no one would argue that payment of interest was dispensed with by a subsequent agreement that the amount of the award might be paid within twelve months instead of six months as provided in the original deed.

It was argued that interest was agreed to be paid as the consideration for time for payment after the amount to be paid was ascertained. That is plausible, but is a mere guess. A better guess would, I think, be that it was agreed to be paid because it would be unjust that the lessors should have the buildings at and from the 1st November, but that the lessees should not have their money until some later day without interest.

In Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, which was a case of land taken by the company, and of which they had entered into possession, the amount of compensation to be paid to the landowner was referred to arbitration. An award was made, but it was afterwards set aside and sent back to the arbitrators. No binding award, however, was made, and the compensation was ultimately assessed by a

jury in an action at £2,000, five years after possession taken. The landowner claimed interest on that sum from the time the company took possession, and his claim was conceded, Bacon, V.-C., quoting the language of the Lord Chancellor in Birch v. Joy, and adding: "If I were to withhold payment of interest, I should not only be going against the cases which have been cited, but I should be going against common sense, justice, and honesty."

In Piggott v. Great Western R. W. Co., 18 Ch. D. 146, Jessel, M.R., held the railway company liable to pay interest not merely from the time when they actually took possession, nor from the date of the award ascertaining the amount of the purchase money, but from the time when the company might prudently have taken possession, resting his judgment upon the ordinary rules as between vendor and purchaser, and referring with approval to Rhys v. Dare Valley R. W. Co. And, if I had not come to the conclusion that the agreement for the payment of interest was left in full force by the extension of the time for making the award, I should still have been of opinion that the vendors were entitled to interest at five per cent. from the expiration of the term.

By the original agreement the vendors were only to have interest at seven per cent. for six months, so I think they cannot have it at that rate for any longer period under the agreement as altered by the extension of time. The judgment has allowed interest at seven per cent. for thirteen months, and I think it ought to be varied to that extent. There should be interest at seven per cent. for six months, and after that at five per cent.

GARROW, J.A., gave reasons in writing for coming to the same conclusion.

MOSS, J.A., concurred without giving reasons.

OSLER, J.A., also concurred, but *dubitante*, giving his reasons in writing.

NOVEMBER 24TH, 1902.

C. A.

UNION BANK OF CANADA v. RIDEAU LUMBER CO.

Damages—Measure of—Trespass—Entering on Land and Cutting and Removing Timber—Value of Timber—Other Elements of Damage—Distinction between Trover and Trespass.

Appeal by defendants and cross-appeal by plaintiffs from an order of LOUNT, J., in Court, allowing an appeal from the report of the Master at Ottawa, to whom the question of

the amount of damages sustained by plaintiffs by the trespasses of defendants in entering upon, and cutting and carrying away a large quantity of timber from, certain timber limits, was referred by STREET, J., at the trial, who held the trespasses as alleged by plaintiffs to have been established.

The statement of claim alleged that the trespasses were wrongfully and wilfully committed.

The formal judgment at the trial adjudged that plaintiffs have the right to recover damages from defendants in respect of the matters complained of in the plaintiffs' statement of claim, and referred it to the Master to ascertain the value of the timber cut and the damage to plaintiffs from and incidental to the cutting down and carrying away thereof, and other trespasses committed by defendants upon and in respect of plaintiffs' timber limits, and adjudged that defendants should pay to plaintiffs the amount thereof when so ascertained.

The Master found that the trespasses were not wilful, but rather innocent or inadvertent, and applied the milder rule of assessment.

LOUNT, J., on appeal, directed that the matter should be referred back to the Master to ascertain and report the amount of the damages on the footing of "wrongful and wilful" trespass.

The appeals were heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A.

G. F. Henderson, Ottawa, for defendants.

W. M. Douglas, K.C., and J. F. Smellie, Ottawa, for plaintiffs.

The judgment of the Court was delivered by

GARROW, J.A.—The learned Judge apparently held that the nature and quality of the trespasses in question were *res judicata* by the judgment pronounced at the trial—a conclusion which, with deference, I am inclined to doubt—but as, after a careful perusal of the evidence, I am of the opinion that the formal judgment defining the trespasses as "wrongful and wilful" is correct, and should be sustained, it would be a waste of time to attempt to solve this doubt, nor is it necessary, in the view which I take, to deal specifically with the several heads of appeal nor with the cross-appeal by plaintiffs. The whole matter should, I think, be referred back to the Master for reconsideration upon the new footing of wrongful and wilful trespass. . . .

The action, it is to be observed, is purely one of trespass, and the formal judgment at the trial so treats it.

In Smith v. Baechler, 16 O. R. 293, Wooden Ware Co. v. United States, 106 U. S. R. 432, and Tuttle v. White, 46 Mich. 485, the articles had reached the hands of purchasers from the original trespassers, who, of course, had no better title than their vendors had. Demands were made in each case upon the defendants for the return of the articles themselves and not acceded to. Such demands and refusals were held to constitute a wrongful conversion of the articles by the defendants.

In trover the value of the article at the time of conversion is the proper measure of damages: Scott v. McAlpine, 6 C. P. 304; Henderson v. Williams, [1895] 1 Q. B. 527. . . .

Such a rule has not, I think, been applied in cases such as this, where the original trespasser is sued, not because he is entitled to any consideration, but because in trespass the value of the article taken is not the only or necessarily the chief element which enters into the question of the amount of damages recoverable. And yet, after all, the real inquiry is not seriously different. In trover it is, subject of course to allegation and proof of special damage, the value of the article converted at the time of conversion (of which conversion the demand and refusal are merely evidence), whereas in trespass the inquiry is, what damages will compensate the plaintiff, or restore him financially to his original position as nearly as possible at the time when the trespass was committed.

Here the trespasses were committed, and as continuing acts completed, when the defendants had cut and removed the timber off the plaintiffs' lands or timber limits. The plaintiffs might have followed the articles and claimed them, as I have pointed out, and, had they done so, would, I think, have established, in case of a refusal to deliver, a different cause of action. But, instead, they have sued in trespass, and the damages recoverable in actions of trespass must now, I think, be the measure of their recovery.

The exact point has not, so far as I can find, received much, if any, consideration in this Province, probably because such questions as the amount of damages are usually determined as questions of fact by juries under judicial charges more or less general in their terms.

[Flint v. Bird, 11 U. C. R. 444, referred to.]

The question, however, has been repeatedly discussed in England, especially in underground trespasses in the getting of coal, and, as there is apparently no difference between a trespass underground and one on the surface (Hunter v. Gibbons, 1 H. & N. at p. 465, and Bulli Coal Co. v. Osborne,

[1899] A. C. at p. 361), there is no reason, I think, why the principles of these coal cases should not apply.

[Martin v. Porter, 5 M. & W. 351, Bulli Coal Co. v. Osborne, supra, Trotter v. McLean, 13 Ch. D. 574, Jegon v. Vivian, L. R. 6 Ch. 762, Taylor v. Mostyn, 33 Ch. D. 226, Llignvi v. Brogden, L. R. 11 Eq. 188, Attorney-General v. Tomline, 5 Ch. D. 750, 15 Ch. D. 150, and Morgan v. Powell, 3 Q. B. 278, referred to.]

Applying the rules laid down in these cases to the present case, it appears to me that the proper measure of damages is:

1st. The value of the timber after it was severed and manufactured, as far as it was manufactured while on the timber limits of plaintiffs, immediately before defendants removed it. Such value may be conveniently ascertained by taking into account the amount for which defendants afterwards sold the articles, less the cost of carriage and excluding the cost of severing and manufacturing.

2nd. Such sum (if any) as represents the extent to which the timber limits themselves may have been injured for the purpose of working or of selling them by reason of their having become partly denuded by the acts of defendants, because it may well be that, over and above the value of the timber taken, a serious injury may have been done to the value of the timber left; and in order that plaintiffs may be fully compensated this should be taken into account.

3rd. Such further and other damage as plaintiffs may shew, or have shewn in case no further evidence is offered, resulted to the timber limits by the acts of defendants, such, for instance and by way only of illustration, as wasteful methods in cutting, manufacturing, and otherwise using or destroying not merely the trees taken, but those left, if those left were cut down or injured; also damages, if any, for using the surface to pass and repass, and for cutting and making roads, etc.; all of which were, of course, wrongful and included in the trespasses complained of, and not necessarily included in the value of the articles themselves, the chief element in determining the plaintiffs' compensation.

With these instructions, I think the matter should be remitted to the Master, the defendants' appeal dismissed with costs, and the cross-appeal of plaintiffs also dismissed, but without costs.

NOVEMBER 24TH, 1902.

C. A.

McDERMOTT v. HICKLING.

Mistake—Recovery of Money Paid under Mistake of Fact—Mortgage Account—Acknowledgment—Laches—Estoppel — Statute of Limitations — Costs — Appeal — Leave to Present Cross-appeal after Hearing of Main Appeal.

Appeal by defendants G. W. L. Hickling and C. M. Hickling, as executors, from the judgment of ROBERTSON, J. (*ante* 19) in favour of plaintiff in an action to recover moneys alleged to have been, by mistake, overpaid upon a mortgage, and cross-appeal by plaintiff against defendant G. W. L. Hickling personally. The mortgage was made in 1885, for $2,750. The mortgagors (represented by plaintiff) made payments from time to time to the mortgagee, and after his death, in 1892, to his executors. Written receipts were given to the mortgagors, and an account was kept by the mortgagee in a book, but, as found by the trial Judge, the mortgagee failed to credit a payment of $153 made on the 1st November, 1890, and a further payment of $25.16 made on the 27th February, 1892. In November, 1894, the three executors assigned the mortgage to the defendant G. W. L. Hickling (himself one of the executors) in part payment of a legacy to him from the mortgagee. The amount mentioned in the assignment as due upon the mortgage was $1,159 and interest, but this was made up from the book, and in arriving at it credit was not given for the two payments of $153 and $25.16. On the 2nd March, 1895, the plaintiff signed a written acknowledgment that the amount due at that date was $1,159.54 for principal and $76.49 for interest. Further payments were made from time to time by the mortgagors, and on the 23rd February, 1901, they made a final payment of $474.88 to the defendant G. W. L. Hickling, the assignee of the mortgage, which was supposed by them and by him to be the balance due, though the true amount was about $168 only. This action as launched was against the defendant G. W. L. Hickling only, as assignee of the mortgage, but the plaintiffs before the trial added the other executor, C. M. Hickling, as a defendant, and claimed an account against the estate.

The trial Judge found that the mortgagors were uneducated and incapable of keeping accounts or understanding them when made out, and depended entirely on the mortgagee, and, after his death, upon the active executor, for the

keeping of the account, and, although they had the written receipts in their possession, they never had the account checked by them or an independent account made up from them; and he held that the money paid in excess of the amount due, having been paid in ignorance of the facts, was recoverable, notwithstanding the acknowledgment and notwithstanding laches, the mortgagors not having waived all inquiry; also, that there was no estoppel; and that the plaintiff's claim was not barred by the Statute of Limitations; and he gave judgment against the executors.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A.

W. M. Douglas, K.C., and W. A. Boys, Barrie, for the executors, contended that they were not liable for the overpayment (if any) to the assignee of the mortgage, and that at all events there was an estoppel, and the Limitations Act applied.

H. H. Strathy, K.C., and C. W. Plaxton, Barrie, for plaintiff, contended that he was entitled to recover against the executors, but, if not, then against the assignee personally.

OSLER, J.A.—The judgment of Robertson, J., against the executors is manifestly wrong, because their testator was not the person who received the erroneous overpayments now sought to be recovered back. He omitted, no doubt, to give credit in his books or on the plaintiff's mortgage for two items now proved by his receipts therefor to have been paid to him, but plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors of the mortgagee subsequently assigned the mortgage to the defendant G. W. L. Hickling, in part satisfaction of the legacy bequeathed to him by their testator, there was still a considerable balance due thereon. The time, therefore, when these payments should have been taken into account was when the mortgage was being paid off to the defendant G. W. L. Hickling. I am unable to perceive anything in the evidence which created any estoppel as between him and plaintiff so as to have prevented the latter from then claiming credit for these payments. G. W. L. Hickling was one of the executors. He himself admits that he did not take over the mortgage in reliance upon any statement or admission then made by plaintiff of the amount due, and there is nothing which can stand in the way of his obtaining indemnity from the estate of the testator, which has not yet been fully wound up or administered, for any sum the mortgage may be found to fall short of what he took it for. He,

and not the testator, was the person who received too much, and it is the payment to him which was erroneous, and by the amount of the sums received but not credited by the testator, made under a mistake of fact, since there was not then, by that amount, so much due on the mortgage held by him. The cause of action is, strictly, to recover back money paid, by a mistake of fact, to him and not to the executors.

I cannot understand why the executors were made parties to the action, or why G. W. L. Hickling being also a party in his individual capacity, judgment was not given against him, instead of against them.

The executors have appealed, insisting that this action ought to be dismissed as against them, and I think they are right. The plaintiff, unfortunately, omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. Hickling, and we have, since the argument of the executors' appeal, on which the rights of all the parties were discussed, permitted him to do so. We thought it possible that G. W. L. Hickling might desire to have the relief over against the executors which he seems clearly entitled to, but are now informed that no order of that kind is sought for. No doubt, he and his co-executor will settle the matter between themselves, and we have only to give the judgment which, in our opinion, our brother Robertson should have given at the trial, namely, judgment for the plaintiff against G. W. L. Hickling for the amount to which he has been held entitled, and the costs of the action down to the trial and settlement of the judgment before Robertson, J., as if G. W. L. Hickling had been the original and only defendant. As against the executors, the action must be dismissed with costs. There should be no costs of the appeal to any of the parties. Not to the plaintiff, because the appeal has been rendered necessary by his erroneous proceedings, and he fails as against the executors. Nor to G. W. L. Hickling, because in the result the plaintiff has succeeded against him. And not to the executors, because the whole of the litigation might have been avoided if they had acted reasonably and justly on discovering the error made by the testator, and had arranged between themselves and the plaintiff to indemnify G. W. L. Hickling at once by making good to the former the amount which G. W. L. Hickling is now ordered to pay him.

GARROW, J.A., gave written reasons for coming to the same conclusion.

MACLENNAN and MOSS, JJ.A., also concurred.

STREET, J. NOVEMBER 25TH, 1902.

CHAMBERS.

RE EXCELSIOR LIFE INSURANCE CO. AND DEGEER.

Life Insurance—Policy in Favour of Mother—Advance by Mother on Faith of—Subsequent Marriage of Insured—Apportionment in Favour of Wife—Claim by Mother as Beneficiary for Value.

Appeal by Sarah Ann DeGeer from order of Master in Chambers (ante 702) declaring that Melina Amelia DeGeer, the widow of James DeGeer, was entitled to $174.25 payable under a policy of life insurance in the company, and directing payment out of Court.

A. E. H. Creswicke, Barrie, for the appellant.

R. McKay, for the company and the widow.

STREET, J.—I think the case is governed by Potts v. Potts, 31 O. R. 452. The amendment effected by 1 Edw. VII. ch. 21, sec. 2, is merely a confirmation of the law as declared in that case.

Appeal dismissed with costs.

STREET, J. NOVEMBER 25TH, 1902.

TRIAL.

LENNOX v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury.

Action tried at Barrie, brought under Lord Campbell's Act, for damages for the death of a man who was run over by a train on defendants' line where it crosses the sixth concession of the township of Flos. The jury found defendants negligent in not whistling, and assessed the damages at $2,500, but answered in the affirmative a question as to whether deceased could have avoided the accident by the exercise of reasonable care.

STREET, J., held that Brown v. London Street R. W. Co., 2 O. L. R. 53, supported defendants' claim to judgment on the answer to the last question, which was answered by the jury in the only way they could upon the evidence have properly answered it.

Action dismissed with costs.

STREET, J. NOVEMBER 26TH, 1902.

CHAMBERS.

RE PINK.

Will—Construction—Conflicting Bequests of Personalty—Reconciling—Ejusdem Generis Rule—Residuary Bequest.

Motion by Henry Brown and Margaret Rosevear, executors of the will of Alexander Pink, deceased, for a summary order declaring the construction of certain clauses of the will, which was dated 28th November, 1899. The testator died on 9th April, 1902. He appointed the applicants executors, and directed them to pay his debts. Then he made the following provisions: "I give and bequeath all my clothing, wearing apparel, and personal effects to my brother Robert Pink. I give and bequeath all my household furniture and other personal property to my sister Margaret Rosevear." He then devised to his sister Margaret Rosevear for her life all his real estate, with remainder in fee to his nephew Roy Pink, subject to certain legacies and annuities which he charged upon it. He then wound up his will with the following provision: "The rest and residue of my real and personal property I give, devise, and bequeath to my nephew Roy Pink." At the time of his death the personal property of the testator consisted of: household goods and furniture, $150; farming implements, horses, cattle, etc., about $500; book debts, $35; cash on hand and in bank, $273; wearing apparel, watch and chain, etc., $25; total, $983. The questions to be determined were as to the effect of the three bequests of personalty set out above.

W. F. Kerr, Cobourg, for the executors and for Margaret Rosevear personally.

B. Morton Jones, for Robert Pink.

F. W. Harcourt, for Roy Pink, an infant.

STREET, J.—The testator intended to give part of his personal estate to his brother Robert, and part to his sister Margaret. Whether he also intended to give any part to his nephew Roy was the principal difficulty. It being necessary to limit the gift to Robert in order to leave something for Margaret, a strict construction must be placed upon the gift to Robert, and this is readily done by applying the principle of ejusdem generis to it. All that Robert took was the clothing and wearing apparel and the watch and chain, because the testator limited the bequest to his strictly personal effects, that is to say, to the effects connected with his person, such as his clothing and wearing apparel. But it would not be

proper to place a similar limited construction upon the gift to Margaret. There is no necessity for holding that the testator intended Roy to take part of his personal estate under all circumstances; the gift, being of a residue only, would be satisfied by the possibility of his taking under the residuary clause any gift that should lapse. This view is confirmed by the testator's devise of all his real estate, followed by a bequest and devise of the residue of his real and personal property. The testator, having disposed of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. Therefore, all the personal estate which does not pass to Robert passes to Margaret, and none to Roy.

Order accordingly. Costs of all parties of the application to be paid out of the personal estate going to Margaret.

STREET, J. NOVEMBER 26TH, 1902.

CHAMBERS.

RE DAUBENY.

Will—Construction—"Personal Representatives"—Executors or Next of Kin—Part Intestacy—Rights of Widow—Advertisement for Creditors.

Petition for payment of money out of Court. The direction in the will to the executors of Barak Daubeny was to divide the estate upon the death of his widow amongst the persons named. William Gough, one of these persons, survived the testator, but died in the widow's lifetime, leaving a widow, now Alice Otter, but no children, and leaving the petitioners, his sister Jane Allingham and his half-brother Flinton John Medforth, his only next of kin. It was plain by the terms of the will that the share did not vest in William Gough during the lifetime of the testator's widow, but passed under the substituted gift to his personal representatives upon the happening of his death in the lifetime of the testator's widow. The question was, whether by the term "personal representatives" the testator intended that William Gough's executors or administrators should take, or his next of kin.

W. H. Blake, K.C., for the petitioners.

D. L. McCarthy, for the executor of William Gough.

STREET, J.—When there is a gift of the income to one for life, followed by a gift of the corpus at the termination of the life estate to another, with a substitutional gift to the

"personal representatives" of that other, then, in the absence of a clearly controlling context, these words are to be construed as meaning "executors or administrators," and not "next of kin." Re Crawford's Trusts, 2 Drew. 230, Hinchcliffe v. Westwood, 2 DeG. & Sm. 216, and Re Thompson, 55 L. T. 86, referred to. And therefore the share of William Gough became vested in his executors as part of his estate to be administered.

William Gough by his will bequeathed to his widow certain specific articles. Such bequest can not be stretched to cover his share of the Daubeny estate, and, there being no residuary bequest, there was an intestacy as to that share, now represented by the moneys in Court.

William Gough having died before 1st July, 1895, and not wholly intestate, his widow is not entitled to the increased rights given by sec. 12 of R. S. O. ch. 127, but merely to her share under the Statute of Distributions.

There should be an advertisement for creditors and persons having claims on the estate of William Gough, in the Gazette and a Sarnia newspaper, unless it can be shewn that an advertisement has already appeared. Subject to any claims that may be filed, the moneys in Court, after payment of the costs of all parties of this application, should be paid out one-half to Alice Otter and the other half to the next of kin of William Gough.

WINCHESTER, MASTER. NOVEMBER 27TH, 1902.

CHAMBERS.

HOLNESS v. RUSSELL.

Lunatic—Plaintiff Becoming Insane after Judgment — Proposed Appeal—Appointment of Next Friend—Inspector of Prisons and Public Charities.

Motion made on behalf of plaintiff, who had become insane since the trial of this action, for an order appointing her husband her next friend to enable an appeal to be taken to a Divisional Court.

E. Coatsworth, for plaintiff.

J. H. Denton, for defendant, objected that the Inspector of Prisons and Public Charities was the proper person to be appointed next friend.

THE MASTER held, following Mastin v. Mastin, 15 P. R. 177, that this objection could not be sustained. Order made as asked. Costs in the cause.

NOVEMBER 27TH, 1902.

DIVISIONAL COURT.

FLETT v. COULTER.

Infant—Party to Action—Right of Opposite Party to Examine for Discovery—Discretion of Examiner.

Appeal by plaintiff, an infant of the age of 12 years, by his next friend, from an order of MEREDITH, C.J., in Chambers, dismissing an appeal by plaintiff from an order of the Master in Chambers directing plaintiff to attend at his own expense before a special examiner and submit to be examined as to his competency to give evidence, and to submit to be examined viva voce for discovery, unless the special examiner should deem him of too tender an age to be examined viva voce upon oath. An affidavit of plaintiff's mother was filed upon the motion, but it shewed no mental incapacity on the part of plaintiff.

J. G. O'Donoghue, for plaintiff.

W. R. P. Parker, for defendant.

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

STREET, J.—We should adhere to the practice settled nearly eleven years ago in Arnold v. Playter, 14 P. R. 399, and dismiss the appeal.

It appears to us that the provision of the order which gave to the examiner a discretion to determine the competency of the infant and to act accordingly, was not in accordance with proper and convenient practice. The proper manner of raising any question as to the competency or capacity of the party to be examined is by a motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be raised and considered by the Court itself. If it be left to the examiner, the Court is not always in a position to review his discretion upon the same evidence as that upon which he exercised it.

Appeal dismissed with costs.

MOSS, C.J.O. NOVEMBER 27TH, 1902.

C.A.—CHAMBERS.

HINDS v. TOWN OF BARRIE.

Appeal—Leave—Question of Substance—Joinder of Plaintiffs and Causes of Action.

Motion by defendants for leave to appeal from order of a Divisional Court dismissing appeal from order of MEREDITH,

C.J., in Chambers, dismissing application by defendants for an order calling upon plaintiff to elect which of the two defendants, the town corporation and Reuben Webb, she will proceed against. The action was brought for negligence, the defendants, as they alleged, being charged with separate acts, done at different times, the result of both of which was to cause the damage.

W. M. Douglas, K.C., for defendants.

A. E. H. Creswicke, Barrie, for plaintiff.

Moss, C.J.O.—The question is one of substance, and not of mere practice, and sufficient has been shewn to make it proper that it should be further discussed before the parties proceed to trial.

Leave granted on the usual terms.

WINCHESTER, MASTER. NOVEMBER 28TH, 1902.

CHAMBERS.

DUTHIE v. McDEARMOTT.

Partnership—Appearance as for—Foreign Corporation Carrying on Business without License.

Motion by defendants to set aside appearance on the ground that it was entered without authority. The defendants, under the name of "McDearmott, Evans, & Lee," were doing a brokerage and stock business in Toronto. The person representing them in Toronto employed solicitors on their behalf to arrange certain matters for them, and instructed such solicitors to accept service of the writ of summons in this action, which they did, and believing defendants to be a firm, entered an appearance for each supposed member of the firm. It turned out, however, that defendants were not a firm, but a foreign corporation, having become incorporated in the State of New York.

W. H. Blake, K.C., for defendants.

G. Grant, for plaintiff, referred to Bank of Montreal v. Bethune, 4 O. S. 341, and Genesee Mutual Ins. Co. v. Westenall, 8 U. C. R. 487.

THE MASTER.—Neither of these cases nor the statute 63 Vict. ch. 24 (O.) shews that a foreign corporation carrying on business in Ontario, without a license, can be treated as a partnership or firm. The appearance was improperly entered. But, although the solicitors had no authority to act for the corporation, they entered the appearance in good faith.

Order made striking out appearance without costs.