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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 5TH, 1915.

CURLEY v. VILLAGE OF NEW TORONTO.

Contract—Claim for Payment for Work Done—Extras—Counterclaim—Delay—Findings of Fact of Trial Judge—Appeal—Certificate of Engineer—Judicial Impartiality—Evidence.

An appeal by the plaintiff from the judgment of CLUTE, J., 8 O.W.N. 274, dismissing the action with costs, and the counterclaim without costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

J. J. Gray, for the appellant.

W. A. McMaster, for the defendants, respondents.

LATCHFORD, J., delivering the judgment of the Court, said that it was properly found by the learned trial Judge that the plaintiff had not completed, according to contract, any one of his undertakings with the defendants. What he was entitled to receive had been paid. He had no claim under the contract or for extras.

By a term in each of the three contracts between the parties, payments were to be made to the plaintiff monthly as the work progressed, on the engineer's certificate, at the rate of 80 per cent. of the value of the work done in the preceding month, and the remaining 20 per cent. was to be paid 35 days after the engineer had certified that the work had been completed in accordance with the plans and specifications. A further provision

of each contract was, that the defendants should not be liable for materials supplied by the contractor which were not provided for in the plans or specifications or required (as extras) by the written instructions of the engineer. No certificates were issued subsequent to the 24th November, and no orders in writing were at any time given for extra work and materials.

If a certificate was a pre-requisite as to contract work, and a written order as to extras, no basis for a reference was established, and the action was rightly dismissed.

It was not disputed that the engineer refused to give any certificate subsequent to that of the 24th November.

On behalf of the plaintiff it was urged that the engineer departed from the judicial position assigned to him by the parties; and that, therefore, the defendants were precluded from setting up as a defence that the issue of the engineer's certificate was a condition precedent to any right of recovery on the part of the plaintiff.

Reference to Hickman v. Roberts, [1913] A.C. 229. The principle of that decision is, that an architect or engineer appointed, by the parties to a contract, to act as arbitrator between them, must act impartially in the discharge of his high duty and must maintain his judicial position at all times.

Here, however, there was no evidence that the engineer had not always possessed the judicial independence necessary to persons in his position. All that was shewn was, that he was asked by the defendants to report upon the progress of the work—which was very unsatisfactory—and reported.

The certificates as to contract work and written orders as to extras are necessary pre-requisites to the plaintiff's right of recovery. In their absence, the action was properly dismissed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. JANUARY 3RD, 1916.

*LLOYD v. ROBERTSON.

Will—Action to Set aside after Probate Granted—Judicature Act, R.S.O. 1897 *ch.* 51, *sec.* 38—*R.S.O.* 1914 *ch.* 56, *sec.* 3—*Want of Testamentary Capacity—Undue Influence—Onus of Proof—Findings of Fact of Trial Judge—Will Set aside as Regards Benefits to Parties before Court — Rights of Beneficiaries not before Court—Costs.*

Action for a declaration that a certain testamentary writing signed by John Lloyd, deceased, and admitted to probate by the proper Surrogate Court, was not the true last will and testament of the deceased, and to set aside the grant of letters probate.

The action was tried without a jury at Stratford.

J. C. Makins, K.C., for the plaintiff.

J. J. Coughlin, for the defendants.

MEREDITH, C.J.C.P., said that there was but one question involved in the action, and that question was entirely one of fact: is the will in question the last will of John Lloyd, deceased?

The plaintiff attacked it on the grounds of want of testamentary capacity and undue influence; the defendants pleaded that the testator "was of sound mind and testamentary capacity;" and that the will was "not obtained by any undue influence;" and that "it is the true last will and testament" of the said John Lloyd.

Probate of the will was granted to the executors named in it, by the proper Surrogate Court, the proceedings there having been taken in common form, without notice to the plaintiff, who is one of the two sons of John Lloyd, they two being his only heirs at law and next of kin him surviving.

The proceedings in the Surrogate Court do not stand in the way of a determination here of the questions involved in this action: Judicature Act, R.S.O. 1914 ch. 56, sec. 3; R.S.O. 1897 ch. 51, sec. 38.

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

There was no conflict of testimony as to the circumstances in which the will was made. John Lloyd was 74 years of age when the will was made; he died on the 23rd May, 1915. The plaintiff, when an infant, had been adopted by an uncle, and had never lived with his father and mother except for short periods. The mother died in 1902, and John Lloyd did not marry again. The other son, the defendant Albert Lloyd, had always lived at home, and had worked for his father. Albert admitted that the will was made at his suggestion; and he employed the solicitor who drew the will, and knew what the will was to be before the solicitor came to get his instructions. The instructions were given by the father to the solicitor, but in the son's presence. The will was prepared at the solicitor's office, and the next day after the instructions were given it was signed by the testator in the presence of the two witnesses to it—the solicitor and one of the executors.

The circumstances attending the making of the will shifted the onus of proof from the plaintiff to the defendants. If John Lloyd were incapable of making a will, or, if he were capable, if the will was obtained by undue influence, or if he did not know and approve of the contents of the will, it was not really his last will, and should be set aside. The defendants have not satisfied the onus of proof in any of these respects; and there would be no great difficulty in finding—if it were needful to go further—that, though the voice that gave instructions was the voice of John Lloyd, the hands that pulled the strings controlling that voice were the hands of his son Albert.

Reference to Adams v. McBeath (1897), 27 S.C.R. 13; Fulton v. Andrew (1875), L.R. 7 H.L. 448; Tyrrell v. Painton, [1894] P. 151; and Wilson v. Bassill, [1903] P. 239.

It should be adjudged that the will in question, in so far as it confers any benefit upon any party to this action, is not the will of John Lloyd, deceased. By some oversight, the beneficiaries other than the two sons were not made parties; indeed, the son Albert was not made a party until the trial. No judgment affecting the rights of the other beneficiaries can be pronounced. The will stands as to all their rights under it, and there is an intestacy as to the rest of the estate.

The defendant Albert Lloyd is to pay to the plaintiff the costs of the day of the trial, fixed at $100; and there is no other order as to costs in any respect.

MIDDLETON, J. JANUARY 4TH, 1916.

*MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Accident Insurance—Accidental Bodily Injury—Total Disability—Absence of Fraud—Intervention of Disease—Consequence of Accident—Disability Caused Exclusively by Accident—Evidence—Findings of Fact of Trial Judge.

The plaintiff sought to recover $1,950, being a quarterly payment alleged to be due under a policy issued by the defendants on the 10th February, 1913, in respect of payments for disability, at the rate of $150 per week, during the 13 weeks from the 1st March, 1915, to the 30th May, 1915.

The defendants admitted that they insured the plaintiff against bodily injury resulting in total disability, and denied that the plaintiff had sustained any bodily injury or suffered total or permanent disability.

The plaintiff, at the time of the issue of the policy, was a medical doctor practising as an eye, ear, nose, and throat specialist.

By the policy the plaintiff was insured against "bodily injury sustained . . . through accidental means . . . and resulting directly, independently, and exclusively of all other causes, in an immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation. . . ." The defendants agreed, if the assured suffered total disability, to pay him, so long as he lived and suffered the total disability, $75 a week; and that amount was to be doubled if the injury were sustained while the assured was in or on a public conveyance.

On the 30th May, 1913, the policy being then in force, the plaintiff, travelling as a passenger upon a railway train, was thrown or fell from an upper berth in a sleeping-car, as the result of which his left wrist was badly sprained; and, although 2½ years had elapsed, the wrist had not recovered at the time of the trial; and any future recovery was said to be problematical.

The action was tried without a jury at Sarnia and Toronto.

W. N. Tilley, K.C., and J. H. Fraser, for the plaintiff.

R. McKay, K.C., and Gideon Grant, for the defendants.

MIDDLETON, J., said that the plaintiff had honestly done his best to bring about recovery, and there was no kind of foundation

for the suggestion—which ought never to have been made—that the plaintiff had fraudulently prevented recovery from his injury; nor had his recovery been prejudiced or delayed by the use made of his automobile; nor was there any evidence to warrant the allegation that the condition of the plaintiff's arm was the result of syphilis.

The condition of the arm can be explained only by the presence in the plaintiff's system of tuberculosis in some form; and up to the present time the condition of his arm is such as to amount to complete disability within the meaning of the policy. The plaintiff's injury entirely precludes him from doing any special work on the eye, ear, nose, and throat—which is the thing that constitutes total disability within the meaning of the policy.

But it was said that the bodily injury did not result, independently and exclusively of all other causes, in his total disability; for the disease which had intervened, and which was said to be, to some extent at any rate, responsible for the present condition, was another cause within the meaning of the policy. This is too narrow a reading of the policy. The tuberculosis in the system was harmless until, as the direct result of the accident, it was given an opportunity to become active. This diseased condition was not an independent and outside cause, but a consequence and effect of the accident.

Reference to Coyle or Brown v. John Watson Limited, [1915] A.C. 1.

The germs present in the plaintiff's blood are not different in principle from the septic germs which originate putrefaction, everywhere present when conditions are not entirely aseptic, and cannot be regarded as other causes intervening to bring about the injury. Their lodgment in the wounded tissue is as much the consequence and effect of the accident as the carrying of the germs into the wound in Mardorf v. Accident Insurance Co., [1903] 1 K.B. 584, or the lodgment of the germ of pneumonia in the collier's lung in the Coyle case. This is in accordance with In re Etherington and Lancashire and Yorkshire Accident Insurance Co., [1909] 1 K.B. 591, followed in Youlden v. London Guarantee and Accident Co. (1912-13), 26 O.L.R. 75, 28 O.L.R. 161. These authorities are binding, and are to be preferred to American cases such as Penn v. Standard Life and Accident Insurance Co. (1911), 42 L.R.A. (N.S.) 593.

Judgment for the plaintiff for the amount claimed, with interest and costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 8TH, 1916.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Execution—Judgment—Variation—Amendment—Practice — Irregularity—Rules 219, 497, 502.

Appeal by the defendant from an order of the Master in Chambers, ante 5, dismissing the application of the defendant to set aside a writ of execution issued on the 21st January, 1915.

A. J. Russell Snow, K.C., for the defendant.
J. J. Maclennan, for the plaintiffs.

MIDDLETON, J., said that the motion was "on the ground that no final judgment has yet been obtained in this action, and that under the judgment further directions and costs have been reserved." Upon the argument of the motion before the Master, and upon the appeal, the defendant sought to urge other technical grounds of supposed irregularity in the plaintiffs' proceedings; but counsel for the defendant emphasised very clearly the importance of adhering strictly to the provisions of the Rules, and could not, therefore, complain if the strict provisions of the Rules were invoked against him. Rule 219 provides that "a notice of motion to set aside a proceeding for irregularity shall specify the irregularity complained of and the objections intended to be insisted on." The defendant should, therefore, be confined to the grounds alleged in his notice of motion.

The judgment in the action was not well drawn, and was not in accordance with the judgment as pronounced; but the Appellate Division had held that the judgment as issued bound the parties.

By clause 5 it was provided that the defendant should pay to the plaintiffs the amount which should be found due to them by the Master in Ordinary forthwith after the confirmation of the Master's report. This was a judgment directing payment of the amount to be ascertained, so soon as the Master's report ascertaining it had become confirmed. It was true that, by a later clause of the judgment, further directions and the question of costs were reserved until after the Master should have made his report; but this did not make it necessary to have an adjudication upon the questions reserved, whatever they might be, be-

fore the specific adjudication found in clause 5 could be enforced.

The Master made his report, and it was duly filed. It was not allowed to be confirmed by lapse of time under Rule 502, for a notice of appeal was served; but, upon the appeal being dismissed, the report then stood confirmed, subject to any interference by the Appellate Division upon an appeal duly launched. Before any appeal was launched, the execution was issued—properly issued—and was placed in the sheriff's hands. After the execution was in the sheriff's hands, an appeal was prosecuted with some success; but the appellant did not take the step provided by Rule 497 and supersede the execution by lodging a certificate from the Registrar of the Appellate Division.

The Master in Chambers directed that the amount of the execution should be reduced by the amount by which the finding of the Master in Ordinary was reduced upon appeal. Counsel for the defendant said that he did not desire this; and, if he saw fit, this clause might be stricken out of the order, leaving the execution creditor to reduce the amount for which the execution could be enforced by the proper sum, by giving the sheriff a proper notice of the reduction of the recovery upon the appeal. The amendment of the execution is not the proper method of bringing about this result; for the execution was properly issued for the amount of the judgment as it then stood.

The technical objections taken, and excluded from consideration, did not appear to have any substance.

Upon a motion to extend the time for appealing, the defendant set up the existence of this execution as a security for the plaintiffs' claim; and to attempt now to set it aside pending the appeal was a distinct piece of bad faith.

Appeal dismissed with costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 8TH, 1916.

*REX v. CLIFFORD.

Criminal Law—Indecent Act—Public Place—Criminal Code, sec. 205—"In the Presence of one or more Persons"—"Wilfully"—Amendment of Information.

Motion by Florence Clifford to quash her conviction by the Police Magistrate for the City of Toronto for committing an in-

decent act in a public place, contrary to sec. 205 of the Criminal Code.

T. C. Robinette, K.C., for the applicant.
Edward Bayly, K.C., for the Crown.

MIDDLETON, J., said that the accused was a woman who advertised massage treatment. The evidence disclosed that this was a mere cloak for flagrant immorality; and that, upon the witness for the Crown going to this woman's residence, an abominable offence against morals was committed by her. No one else was present, and the witness and the woman were both parties to the indecent act deposed to.

The information was defective, as it omitted to charge that the act was done "wilfully," which is essential: Ex p. O'Shaughnessey (1904), 8 Can. Crim. Cas. 136; Rex v. Tupper (1906), 11 Can. Crim. Cas. 199; Rex v. Barre (1905), 11 Can. Crim. Cas. 1. This defect, however, was curable by amendment, for the evidence undoubtedly disclosed the wilful nature of the Act.

Section 205 of the Criminal Code provides: "Every one is guilty of an offence . . . who wilfully in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access." The learned Judge said that he was driven to the conclusion that the misconduct complained of was not within the statute. The two parties to the offence, and they only, were present; the statute does not aim at the punishment of an act of indecency unless there is some third person present at the time of the occurrence.

Reference to Stephen's Digest, 6th ed., p. 132; Regina v. Wellard (1884), 14 Q.B.D. 63; Thallman's Case (1863), L. & C. 326; Rex v. Cook (1912), 27 O.L.R. 406; Regina v. Watson (1847), 2 Cox C.C. 376; Elliot's Case (1861), L. & C. 103.

Under the section referred to, the act is punishable only when committed in any place to which the public have or are permitted to have access. Attention is drawn to this, in the hope that Parliament may see fit to amend the statute by adopting the phraseology of the English statute 14 & 15 Vict. ch. 100, sec. 29.

Section 205 may well be interpreted so as to include any place to which the public have access as of right or by the invitation or permission of the owner; and the magistrate was justified in finding that this massage parlour, to which apparently all comers were admitted, was a place to which the public "are permitted to have access," within the statute.

But that is not sufficient to sustain the conviction; it is of the essence of the offence that it should be committed "in the presence of one or more persons;" and this is not satisfied by holding that the man who participates in the offence is "a person" contemplated by the statute. It is enough that one person should be shewn to be present, but it must be a person other than those engaged in the offence.

Order made quashing the conviction, without costs, and with protection to the magistrate and others.

MIDDLETON, J., IN CHAMBERS. JANUARY 8TH, 1916.

REX v. GERALD.

Criminal Law — Indecent Act — Public Place — Criminal Code, sec. 205—"Wilfully"—Amendment of Information—Plea of "Guilty" after some Evidence Taken—"In the Presence of one or more Persons."

Motion by Genevieve Gerald to quash her conviction by the Police Magistrate for the City of Toronto for an offence similar to that in Rex v. Clifford, ante.

T. C. Robinette, K.C., for the applicant.
Edward Bayly, K.C., for the Crown.

MIDDLETON, J., said that this case differed from Rex v. Clifford in that, after some evidence had been given, the applicant pleaded "guilty." The information was defective in that the word "wilfully" was omitted. Had the plea been to the information before evidence was taken, the conviction must have been quashed, for an amendment could not be made; but the evidence taken justified an amendment which would uphold the conviction. The applicant, having pleaded "guilty," could not now set up that the offence was not committed in a public place nor that it was not in the presence of one or more persons. This was alleged in the information, and the plead of "guilty" admitted that which was charged, and brought the case within the words of the statute.

Motion dismissed with costs.

LENNOX, J. JANUARY 8TH, 1916.

ROURKE v. HALFORD.

Lunatic—Order Declaring Lunacy—Partial Recovery—Moneys Paid out by Committee as Gifts to Relatives upon Order of Lunatic — Order not Superseded — Proof of Recovery of Sanity—Onus—Evidence—Gifts Declared Void—Liability of Estate of Committee to Account—Costs.

Action by Michael Rourke and Ignatius Halford, executors of the will of James Rourke, deceased, against Christine Halford, sole executrix of the will of Dennis M. Rourke, and against James Raymond Rourke and Mary McBride, for an account.

On the 16th June, 1908, an order was made declaring James Rourke to be a person of unsound mind, and Dennis M. Rourke was appointed committee of his person and estate.

At the time the declaration of lunacy was made, James Rourke was in an asylum for the insane; he was discharged by an order of the Inspector of Prisons and Public Charities on the 1st March, 1910, and thereafter, until his death, on the 11th December, 1913, resided in the House of Providence at London. He was then more than 80 years old.

Dennis M. Rourke, the committee, died on the 4th July, 1913.

The action was brought to compel the estate of the committee to account for moneys of the estate of James Rourke said to have been improperly handed over by the committee to his son and daughter, the defendants James Raymond Rourke and Mary McBride, in pursuance of orders in writing signed by James Rourke, after his discharge from the asylum.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiffs.

M. K. Cowan, K.C., and E. A. Cleary, for the defendants Rourke and McBride.

J. H. Rodd, for the defendant Christine Halford, executrix.

LENNOX, J., said that, after the making of the order of the 16th June, 1908, there was no order of the Court superseding or vacating it. The committee directly procured the gift to his son; he prompted his daughter to apply for the gift to her; he concurred in both; and he paid the money in both cases out of

the moneys he held as committee and trustee. He had not accounted to the Court for these moneys; and he was not relieved from office or discharged by any order of the Court.

Once a testator or donor is shewn to have been incompetent at any time, the onus of proving recovery or a lucid interval is cast upon the person seeking to uphold a subsequent gift or bequest: Groom v. Thomas (1829), 2 Hagg. Eccl. Rep. 433, 434.

Nothing was involved in the certificate of the Inspector upon which James Rourke was discharged from the asylum, beyond the decision that it was safe to allow him to live outside the asylum.

There was no evidence to satisfy the learned Judge that, as a matter of fact, James Rourke was of sound mind or capable of dealing with his property at the time of the alleged gifts or at any time subsequent to June, 1908. The defendants had failed to prove his recovery, in the legal sense, from his mental disease, though it was possible that his condition improved in some respects.

Reference to In re Walker, [1905] 1 Ch. 160; Re Robinson (1910), 1 O.W.N. 893; In re Dyce Sombre (1844), 13 L.J. Ch. 335; Ex p. Stanley (1750), 2 Ves. Sr. 25; In re Blackmore (1863), 32 L.J. Ch. 436; Martin v. Johnston (1858), 1 F. & F. 122; Ferguson v. Borrett (1859), 1 F. & F. 613; Ex p. Wright (1683), 1 Vern. 155; Hall v. Warren (1804), 9 Ves. 605, 610.

There was no actual bad faith on the part of either the committee or his son or daughter, and they should not be ordered to pay costs.

Judgment declaring that the alleged gifts to the defendants James Raymond Rourke and Mary McBride were and are null and void, and that the estate of Dennis M. Rourke is accountable for these moneys to the plaintiffs.

No costs against any of the defendants. The plaintiffs to have their costs, upon a solicitor and client basis, out of the estate of James Rourke.

LENNOX, J. JANUARY 8TH, 1916.

*CAPLIN v. WALKER SONS.

Master and Servant—Injury to Servant—"Services of Workman Temporarily Let or Hired to Another"—Action against that Other—Remedy under Workmen's Compensation Act, 4 Geo. V. ch. 25—Exclusion of Action by sec. 13—Defective Condition of Works—Knowledge of Defect—Voluntary Assumption of Risk.

The plaintiff, a teamster employed by George Nevin & Sons, was sent by them to work in the yard of the defendants with his employers' team; and, while there, he was to perform such services in the way of team work as the defendants might require or direct. The plaintiff was injured while working in the defendants' yard, by reason of their negligence, as he alleged, and brought this action to recover damages for his injuries.

The action was tried without a jury at Sandwich.

F. C. Kerby, for the plaintiff.

A. J. Gordon, for the defendants.

LENNOX, J., said that the business of the employers—teaming—was of the character described in class 30 of schedule 1 of the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.) It did not come within the classes of trade or business embraced in schedule 2.

The plaintiff was "a workman whose services are temporarily let or hired to another" by his employers, and Nevin & Sons continued to be his employers, as defined by sec. 2(1)(*f*) of the Act.

The defendants raised the question whether the plaintiff could maintain this action, or whether he was limited to obtaining compensation as a servant of Nevin & Sons out of the accident fund.

Section 10 of the Act would not help the plaintiff; for the employer, if liable, was not "individually liable"—those words refer to the liability of the employer of the class embraced in schedule 2 only; and, even if sec. 10 applied, his claim would still be for compensation, and not for damages recoverable by action. See secs. 4, 5.

Section 9 provides that "when an accident happens to a

workman in the course of his employment under such circumstances as entitle him . . . to an action against some person other than his employer," he may have the alternative of an action; but here there was at most a failure on the part of the defendants to provide proper and adequate machinery, plant, or equipment; and, whatever common law liability this might create in case of injury to one of their own employees, it could create no direct liability for injury to the plaintiff where, as here, the relation of employer and employed did not exist. It was not anything in the nature of trap or pitfall giving a right of action in case of injury to even a bare licensee.

The common law obligation to provide adequate equipment or pursue a proper system is not a general obligation, but a duty arising out of contract to protect workmen and servants from unreasonable risks.

Reference to Cory & Sons Limited v. France Fenwick & Co. Limited, [1911] 1 K.B. 114; Halsbury's Laws of England, vol. 20, para. 421; Mulrooney v. Todd, [1909] 1 K.B. 165 (C.A.); Skates v. Jones & Co., [1910] 2 K.B. 903 (C.A.).

No other provision of the Act affords any argument in favour of the plaintiff; and sec. 13 declares that "no action shall lie for the recovery of the compensation . . . but all claims for compensation shall be heard and determined by the Board." See also sec. 15. The plaintiff's rights, if any, are to be worked out under the provisions of the Act.

But, aside altogether from the Act, the plaintiff was not entitled to recover damages by action. Leaving open the question what his rights might be against his employers, upon proceedings taken under the Act; the plaintiff, upon the evidence, could not maintain the action against the defendants. He knew of the defect which caused the injury to him, and must be taken to have voluntarily assumed the risk, with a knowledge and appreciation of it—he was the author of his own misfortune.

Action dismissed without costs.

JACOBS v. GLASSCO LIMITED—BRITTON, J.—JAN. 4.

Master and Servant—Dismissal of Servant—Action for Damages for Wrongful Dismissal—Findings of Fact of Trial Judge.]—Action for damages for wrongful dismissal, tried without a jury at Hamilton. The plaintiff alleged that he was employed by the defendants for a term of 5 years from the 1st April, 1912, at a salary of $1,800 per annum, and that he was to receive, in addition, a bonus of 50 shares of the fully paid-up common stock of the defendants of the par value of $100 for each share. The defendants denied the alleged agreement and pleaded the Statute of Frauds. The learned Judge finds, upon the evidence, that the hiring was by the month; that the plaintiff was paid a month's salary in addition to his salary for the time he served; that the plaintiff was given 10 shares of stock; and that he served for less than two years, but more than one year. Action dismissed with costs. D. O. Cameron, for the plaintiff. C. W. Bell, for the defendants.

CANADA STEAMSHIP LINES LIMITED v. STEEL CO. OF CANADA LIMITED—BRITTON, J.—JAN. 4.

Contract—Carriers—Action by, for Freight—Deduction of Sum for Damages—Failure to Prove Damages—Judgment for Amount Due for Freight without Prejudice to Future Action.]—During 1913 and 1914, the plaintiffs, common carriers, carried a large quantity of iron and steel shipped by the defendants and consigned to divers persons, firms, and corporations at different ports. After the close of navigation for 1913, differences arose between the parties in reference to claims put forward by the defendants against the plaintiffs for losses occasioned by the negligence of the plaintiffs. There were negotiations, but no final settlement was arrived at. A temporary arrangement was made, as shewn by a letter of the 29th May, 1914, written by the plaintiffs to the defendants as follows: "In consideration of your paying our freight bill for the year ending close of navigation, 1913, and our inability to pay certain of your claims . . . we hereby authorise you to retain from freight charges due us for 1914 a sufficient amount to cover your unsettled claim against us." This was accepted by the defendants, and the freight charges for 1913 were paid. The plaintiffs continued to carry goods for the defendants during the season of 1914; and the

defendants paid to the plaintiffs large amounts on account of freight earnings; but they deducted $7,500 from the amount to which the plaintiffs would have been entitled but for the agreement. The plaintiffs sued for this sum; and the defendants contended that they were entitled to retain it until their claims were settled. The action was tried without a jury at Hamilton. The learned Judge finds that a reasonable time had elapsed before the commencement of this action for the defendants to establish their claims; that the letter of the 29th May, 1914, was no bar to the plaintiffs' recovery; and that the defendants are indebted to the plaintiffs in the sum of $7,500 for freight during the season of 1914. Judgment for the plaintiffs for $7,500, with interest at the rate of 5 per cent. per annum from the date of the issue of the writ of summons, and with costs; but without prejudice to the defendants asserting a right to recover damages from the plaintiffs for any breach of contract by the plaintiffs or as the result of any negligence by the plaintiffs for which they may be liable. R. I. Towers, for the plaintiffs. G. Lynch-Staunton, K.C., for the defendants.

RIDLEY v. BLY—BRITTON, J.—JAN. 6.

Contract — Services Rendered to Sister — Death of Sister — Action against Administrator—Quantum Meruit.]—Action for specific performance of an alleged contract to pay the plaintiff for services rendered to her sister, Edith P. Bly, who died intestate; the defendant being the only child and the administrator of the estate of the intestate. The contract alleged by the plaintiff was that if she would go and reside with her sister Edith and care for her, Edith would give to the plaintiff one-half of the estate of which she (Edith) should die possessed. The plaintiff averred performance of her part of the contract. In the alternative, she sought remuneration or compensation as upon a quantum meruit. The action was tried without a jury at Belleville. The learned Judge said that nothing in the shape of a definite and certain contract had been established—nothing as to which specific performance could be awarded. The plaintiff did, however, go to her sister's, at the request of her sister, and render services of value to the sister—services for which she expected remuneration and for which Mrs. Bly expected to pay. The Statute of Limitations was pleaded; so the

plaintiff's recovery must be limited to 6 years prior to the 3rd September, 1915, that being the date of the commencement of this action. The time for which the plaintiff should be allowed was from the 3rd September, 1909, to the 3rd July, 1912—2 years and 10 months, say 34 months, at $6 a month. This was not a case where remuneration should be assessed on the basis of wages paid to a girl in domestic service, nor to a stenographer, nor to a clerk in a store. It was the case of a person doing sisterly service, as the plaintiff herself said, in a place that the plaintiff was pleased with. The facts would not warrant a finding that the plaintiff was to be paid only by legacy; and so she was entitled to recover a small amount. See Baxter v. Gray (1842), 3 Man. & G. 771. Judgment for the plaintiff for $204, with County Court costs; no set-off of costs. E. G. Porter, K.C., and W. Carnew, for the plaintiff. W. C. Mikel, K.C., for the defendant.

KENNEDY v. SUYDAM REALTY CO.—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JAN. 8.

Appeal—Leave—Order Postponing Trial—Order of Judge in Chambers—Rule 507.]—Motion by the defendants for leave to appeal from an order of MIDDLETON, J., putting off the trial until the 20th February, and ordering the defendants not to sell the lands in question in the meantime without reference to him. The order complained of was made after the trial of the action had been entered on. It was taken out as in Chambers by the plaintiff. The Chief Justice was of opinion that, whether the order was rightly issued as a Chambers order or not, the proposed appeal was not an appeal from an order of a Judge in Chambers within the purview of Rule 507. Application refused; costs to the plaintiff in any event. E. D. Armour, K.C., and W. H. Clipsham, for the defendants. J. H. Fraser, for the plaintiff.