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BOYD, C. NOVEMBER 25TH, 1907.

WEEKLY COURT.

CHAMBERS v. WINCHESTER.

Municipal Corporations—Investigation of Conduct of Municipal Officer—County Court Judge Appointed by Council to Conduct Inquiry—Powers of Commissioner—Municipal Act, 3 Edw. VII. ch. 19. sec. 324—Scope and Method of Inquiry—Proceedings Open to Public—Examination of Witnesses and Parties—Discretion of Commissioner—Injunction—Removal of Commissioner—Alleged Bias—Ex Parte Proceedings—Jurisdiction of High Court—Status of Officer Accused of Misconduct as Plaintiff in Action.

Motion by plaintiff for an interim injunction to restrain the defendant (the Judge of the County Court of York), as persona designata, from investigating certain charges against plaintiff as park commissioner for the city of Toronto, and from calling or hearing evidence of any witnesses in connection with the investigation who had previously attended under subpœna before defendant, and been examined by defendant ex parte and in camera, and from referring to or adducing in evidence and allowing the same to be used in evidence against plaintiff, etc., and to remove defendant from the conduct of the investigation as commissioner, and for the appointment by the Court of an unbiassed, impartial commissioner in place of defendant, on the ground that the defendant could not now make an investigation in a judicial spirit, as required by the statute.

T. C. Robinette, K.C., and W. W. Vickers, for plaintiff.

J. S. Fullerton, K.C., and W. E. Raney, for defendant.

BOYD, C.:—A resolution has been passed by the city council under sec. 324 of the Municipal Act, 3 Edw. VII. ch. 19 (O.), requesting the Judge of the County Court to investigate certain charges alleged of breach of trust or misconduct on the part of the city commissioner of parks. The Judge has entered upon the inquiry, and is, by virtue of the said section, clothed with all the powers which are conferred upon a statutory commissioner under the Ontario statute providing for inquiries into public matters: R. S. O. 1897 ch. 19. Among other thisgs, he has the power of summoning before him any party or witness, taking evidence upon oath, calling for the production of such documents and things as he may deem requisite to the full investigation of the maters of inquiry. In these regards he exercises the same power as is vested in any Court: sec. 2, as amended by 4 Edw. VII. ch. 10, sec. 7. An injunction is now asked, based upon a writ issued in the High Court to restrain the County Court Judge as such commissioner from proceeding with the inquiry in a private manner, with closed doors, as in camera, and from proceeding first to examine the said parks commissioner, who is the plaintiff in the action, and is a party to the inquiry.

An opinion being expressed by Meredith, C.J., at an earlier stage of the action, that the proceedings should be conducted in public, I understand that the County Court Judge has expressed his willingness to conform himself to that method of procedure, so that nothing now needs to be said on that branch of the motion, except that I quite agree that in a matter of public interest such as this, where misconduct is alleged, it is expedient to have the inquiry conducted as in open court. The procedure of the Court is impliedly recognized as the normal method of examining the witnesses and parties, though I do not say but that in exceptional cases the commissioner will exercise a wise discretion in excluding witnesses (while one is being examined) or excluding the general public when the disclosures are of a nature unfit for publication. But evidence should not be taken behind the back of the person chiefly interested. The general rule as to the ordering of business is that the commissioner has the absolute power of regulating the proceedings of his own tribunal, so long as he keeps within his jurisdiction: Todd's Parliamentary Government, 2nd ed., vol. 2, p. 445.

That consideration as to the wide discretionary power of the commissioner suffices to answer the objection now raised, that the party whose conduct as a public officer is under investigation should not be first called. That is a matter entirely for the commissioner, who will rule upon the questions and direct the course and scope of the examination. He is not to be under the supervision of any Court as to his manner of getting at such legal and permissible evidence as he may deem requisite for a full investigation. He is appointed for that purpose, and I know of no authority, nor was any cited, to restrain him from discharging that duty within the bounds of his commission.

The authorities are the other way: the last is Lane v. City of Toronto, 7 O. L. R. 423, 3 O. W. R. 269, where Mr. Justice Britton refused to interfere by injunction with the conduct of an inquiry such as this in regard to the admission or rejection of evidence or the examination of witnesses. To the same effect is In re Godson and City of Toronto, 16 A. R. 452, which was affirmed by the Supreme Court, 18 S. C. R. 36, where the Court was asked to intervene by way of prohibition, but the reasoning of the Court (particularly in the judgment of Hagarty, C.J.O.), applies with equal force to relief by way of injunction.

Lastly, the Court is asked to remove the County Court Judge and appoint an "unbiassed, impartial commissioner," as the Judge (now made defendant) cannot now make the investigation "in a judicial spirit." The status of the County Court Judge in the discharge of these functions is defined in In re Godson and City of Toronto. His duties are, to take evidence, and to return the evidence, with a report of the result of his inquiries, to the council by whose action he was appointed. His report may supply information and material upon which the council may decide to take action, but any such action is wholly within their discretion. He has no power to pronounce judgment imposing liability on anybody; he merely makes preliminary inquiries, gathering together and presenting in compact form such information as will enable the council to deal with the whole matter as they shall be advised. All he has to do as the outcome of his commission is to report to the council the result of the inquiry and the evidence taken thereon. It is the evidence taken which governs, and that speaks for itself. The com-

missioner tries nothing, and decides nothing. He is not a judicial officer.

The affidavit of the plaintiff complains of the commissioner having asked for complaints to be sent, and having received letters relating to the parks department, and makes suggestions of improper motives and prejudiced action on the part of the commissioner. Nothing beyond mere suspicion of bias and inference or conjecture that wrong will be done in the result of the investigation, can be drawn from the affidavit.

Now, regard what the commissioner may do in entering upon this and like investigations without being blameworthy in any culpable sense.

It is not beyosd the competence of the commissioner himself to initiate proceedings to procure papers, books, and documents which are likely to further his investigations; nor is it beyond his competence to invite communications to be sent in by persons who are willing to assist in the inquiry; it is also within his powers, though it may not be a discreet course, to confer with possible witnesses with a bona fide view of ascertaining what they knew and whether it will be worth while to have them duly subpœnaed. So long as ex parte affidavits are not procured from such persons, the commissioner may take (or preferably direct to be taken) such steps in the way of collecting evidence as are permissible in the case of solicitors preparing for trial. But, of course, such communications do not become evidence till the deponent speaks openly under the sanction of an oath and under liability to be forthwith cross-examined. Whatever ex parte information has been or may be obtained, I cannot suppose that the commissioner will act upon it or return it as evidence in his report; much less can I assume that he is being actuated by any partizan spirit, however zealously he may seek to gain light from every available quarter to guide him in giving permanent shape to all the relevant facts.

I deprecate the making of affidavits impugning the integrity of an officer designated by the legislature and accepted by the municipality as statutory commissioner, upon such slender grounds as are here alleged. Aspersions of this serious kind are easy to frame upon "information and belief," but they should not be listened to for a moment when the function of the commissioner is merely to collect and report materials for the subsequent consideration or action of the

city council. The commissioner is not, pro hac vice, a judicial person—he decides nothing affecting the legal rights of the plaintiff, and he is not, therefore, within the ambit of judicial, quasi-judicial, or administrative officers, who become disqualified by interest or bias: Regina v. London, 71 L. T. 638.

Even were a plain case clearly established of unfair dealing, that would not, in my opinion, suffice to attract the jurisdiction of this Court. By analogy to proceedings in the case of a royal commission (as distinguished from a statutory), the application for redress, where, for any sufficient reason, the commissioner becomes unworthy of confidence, should be directed to the appointing power—which in this instance is the municipal council. That body may, if it pleases, in a proper case, suspend or dissolve the resolution under which the present commissioner acts. See Todd's Parliamentary Government, 2nd ed., vol. 2, p. 441.

I refuse the application for an injunction with costs. I have a very strong opinion that the plaintiff has no locus standi, because the Court is without jurisdiction, but upon an interlocutory application I do not dismiss the action.

MABEE, J. NOVEMBER 25TH, 1907.

TRIAL.

GORMLEY v. BROPHY CAINS LIMITED.

Chattel Mortgage—Seizure under—Action by Mortgagor for Conversion and Trespass—Sale of Mortgaged Goods—Business Continued as Going Concern—Payment of Rent to Save Distress—Statement of Demand and Costs—R. S. O. 1897 ch. 75, sec. 15—Account—Interest—Costs.

Action by Olive Adelaide Gormley, trading under the firm name of Gormley & Co., against the defendants, for the recovery of damages for alleged wrongful and illegal conversion of goods and chattels, "for illegal and improper proceedings," and for trespass to goods, lands, and property.

G. H. Watson, K.C., and R. J. Slattery, Arnprior, for plaintiffs.

Hamilton Cassels, K.C., for defendants.

MABEE, J.:—On 6th February, 1906, the plaintiff gave the defendants a chattel mortgage as collateral security for

certain promissory notes amounting to $7,988.15, and a further indebtedness of $1,000, the proviso for payment being for the sum of $8,988.15, which, by the terms of the instrument, was to be paid on 18th July, 1906. Nothing was paid upon the mortgage, and it was duly renewed in 1907, by a renewal statement under the Act. The mortgage covered all the mortgagor's stock in trade, consisting of a general stock of dry goods, ready made clothing, millinery, carpets, linoleums, hats, caps, furs, as well as all fixtures, together with "all goods, chattels, stock in trade, and fixtures of every kind and description whatsoever which now are or hereafter may be during the currency of these presents situate in or upon the store or premises now occupied by the mortgagor on the east side of John street, in the town of Arnprior, known as "Gormley's Up-to-date Dry Goods Store." The business was managed entirely by the plainttiff's husband, Thomas J. Gormley, who acted under a general power of attorney dated 6th February, 1905.

The complaint of the plaintiff as elaborated in the pleadings is that on 18th March, 1907, the defendants, without any warning to the plaintiff, "and without following the usual course provided in such cases," entered and took possesssion of all the general stock of dry goods, ready made clothing, millinery, carpets, linoleums, hats, caps, furs, and fixtures and stock in trade of the plaintiff, and have since retained possession of the same, and have continued to run the said business of the plaintiffs in the usual way of buying and selling, and have made no attempt to realize in the usual way under the chattel mortgage; that the defendants did not advertise the goods for sale under the mortgage; that the defendants brought new goods into the store premises, that they marked goods far below cost; that they sacrificed the stock by selling it at figures much below the market price, and by not advertising and selling under the mortgage; that the defendants made no list or inventory of the goods seized; that they made no demand upon the plaintiff for any moneys due under the mortgage, "nor did they give to the plaintiff any memorandum or paper writing whatsoever at the time of or before or after the wrongful seizure, detention, and conversion;" and that the defendants wrongfully took possession of the plaintiff's store and retained possession thereof against the plaintiff. A claim was also made upon

the pleadings that the mortgage was void for non-compliance with the Act, but this was abandoned at the trial.

The letters from defendants to the plaintiff covering the period from 6th September, 1906, to 1st February, 1907, shew that the plaintiff's account was getting in an unsatisfactory condition: the defendants were continually complaining of the smallness of remittances, and insisting upon being paid all the receipts from the store except regular expenses of management.

On 1st February, 1906, the plaintiff, from a statement appearing in the stock book at p. 17, owed the defendants $7,988.15, and outside accounts $2,498.15; at p. 21 of the stock book it appeared that in February, 1907, the liability to the defendants was $12,076.62, and outside accounts $1,754.79.

In the beginning of March, 1907, Thomas J. Gormley went to Montreal to see the defendants regarding the liability, and I find upon the evidence that the following arrangement was made. Thomas S. Church, an employee of the defendants, was, with the consent and approval of Gormley, sent up with him to take charge of the businsss as manager for the defendants; the stock was to be reduced by specially advertised sales at reduced prices; and Church was to remit the proceeds to defendants in reduction of their liability. Church at once prepared advertisements for the local papers, and issued and published posters; these were prepared with the approval and assistance of Gormley; some of the statements in the first advertisement were the following: "Cash is King. Clean Sweep Sale. We want $10,000 by April 1st. Clean Sweep Sale of Everything Regardless of Cost. On Monday Morning at 8 o'clock The Knife Will Go Deep into Everything." In the posters Church is described as manager. The advertisements were in the name of Gormley & Company. Some $2,000 of cash was taken in for goods sold between 8th and 18th March, and this was sent daily to the defendants upon account of their claim.

On 18th March a warrant was issued by the defendants to Church, authorizing him to seize under the chattel mortgage for $8,988.15. Thomas J. Gormley knew of the intention to issue this warrant, he having been advised by letter from the defendants, which he received on the morning of the 18th. Church demanded and received the keys from

Gormley, the latter having been assisting in the store down to the 18th.

On the 19th Mr. Brophy, the president of the defendant company, went up to Arnprior, saw Gormley, and engaged him to work in the store at $75 per month. Gormley says he was engaged for 3, 4, or 5 months; he continued assisting Church in carrying on the business for a month, when he was discharged, having been paid $75 for his month's services; then some 10 days or 2 weeks after such dismissal, complaints were first made upon behalf of the plaintiff as to the proceedings taken by the defendants. On 19th March, when Gormley was engaged, Mr. Brophy offered to throw $1,000 off defendants' claim if Gormley could find security, but he was unable to do so.

I find that Gormley was a consenting party to everything that was done down to the time of his dismissal, and, so far as inferences can be drawn from the course of dealings, Mrs. Gormley must have known of all that was going on and being done, and she made no objection until after her husband's dismissal. This action was commenced on 30th May, and on the same day an ex parte injunction was obtained at Pembroke, restraining the defendants from making sales of the goods covered by the chattel mortgage until 6th June. The motion was enlarged from time to time, and the injunction continued, until 27th June, when an order was made for the sale of the goods en bloc through Messrs. Suckling & Co., and the proceeds thereof were ordered to be paid into Court; the sale took place, and there is now in Court $4,576.74.

I find that at the date of the seizure the chattel mortgage was overdue, and the defendants were entitled to enter and take possession, and as to the complaint that the defendants did "not follow the usual course," I find that any departure from the course usually followed when the parties are at arm's length was at the request and for the benefit of the plaintiff, and the object in continuing the business as a going concern was to reduce the liability and give the plaintiff an opportunity of taking it back if the defendants' debt was reduced and there was found to be any equity in the stock. The goods were not advertised under the mortgage, because it was thought more could be realized by selling in the name of Gormley & Co., and this also was for their benefit and credit. The stock was short in many staple articles,

and the shipment of new goods by the defendants was solely to fill up the short lines and assist in disposing of the old stock; it was for the benefit of the plaintiffs as much as the defendants, and was done with the consent of Gormley, and for a month he assisted in making sales from the new stock as well as the old. I find that there were no goods unduly sacrificed; many articles were sold at greatly reduced prices, but a good deal of the stock was old and in bad condition; and I think good judgment was used in making the sales, and that much more was realized than would have been obtained by selling in any other way.

The plaintiff was lessee of the store premises, and ordinarily of course the mortgagees would not have been entitled to continue the business in those premises to the exclusion of the plaintiff, and would have been bound to remove the goods, but I find that at the time of the seizure the rent was $240 in arrear, and on 22nd March demand was made upon the defendants by the landlord for payment of this $240, and an additional quarter's rent of $90, and the defendants paid $330 rent to the landlord; this was done to enable them to carry on the business for the benefit of the plaintiff. It does not appear that the plaintiff or Thomas J. Gormley actually knew of the payment of rent, but they must have known it was in arrear and that the defendants would have to pay it to save the goods from distress for rent. The taxes for the year 1906 were unpaid; that was a liability of Gormley & Co., and was paid by the defendants.

Complaint was made that the defendants had not complied with R. S. O. 1897 ch. 75, sec. 15, requiring a statement in writing to be given of the demand and of the costs charged in respect of the seizure and subsequent proceedings. I do not think the plaintiff can obtain any redress for this, for two reasons. First, the arrangement made as to the mode of selling and realizing upon the goods prevented any charge of costs for seizure upon the basis of the scale of charges referred to in sec. 4 of the Act, which would be the same charges referred to in sec. 15. And, in the second place, the "subsequent proceedings" had not been terminated when the action was brought, and the time had not then arrived for delivering such statement, had it otherwise been necessary to deliver one at all.

When the goods were seized on 18th March Church engaged all the staff in the store to continue the business, and

their salaries, as was Thomas J. Gormley's, and other expenses, were paid out of the money received; there is no intention of making any charges for seizure under the statute, and the other arrangement having been made and acted upon, the plaintiff cannot now complain.

I accept the statement of the defendants and their witnesses when in conflict with the plaintiff or Thomas J. Gormley.

It was urged at the trial that a case had been made for an account, and Rennie v. Block, 26 S. C. R. 356, was relied upon. I do not think the plaintiff has made out any case for an account. The action is not brought to obtain an account, and no such claim is made upon the pleadings.

It appears that on 18th March, 1907, there was owing upon the mortgage $9,287.33, and the net amount received by the defendants from sales is $4,375.93, leaving owing on the mortgage $4,911.40, to which must be added the rent and taxes paid, making the mortgage debt, without adding interest, $5,344.93, upon account of which there is in Court $4,576.74.

In the view I take of the case, the action entirely fails, and must be dismissed with costs, and the sum of $4,576.74, together with interest thereon, be paid out to the defendants.

MABEE, J. NOVEMBER 25TH, 1907.

TRIAL.

UNIVERSAL SKIRT MANUFACTURING CO. v. GORMLEY.

Chattel Mortgage—Action by Creditors to Declare Fraudulent and Void—Failure of Proof of Insolvency of Mortgagor—Defect in Chattel Mortgage—Affidavits of Bona Fides—Renewal—President of Incorporated Company—Necessity for Authority from Directors—Construction of Chattel Mortgage Act and Amendments—Seizure under Mortgage—Excess—Inventory—Waiver—Abatement of Action by Assignment of Plaintiffs pendente Lite—Revivor in Name of Assignee—Right of Assignee to Question Validity of Mortgage.

Action (begun 20th June, 1907,) by the plaintiffs, the holders of past due promissory notes given to them by de-

fendant Olive A. Gormley, trading under the firm name of Gormley & Co., amounting with interest to $330.29, to recover that amount against the defendant Gormley, and as against that defendant and defendants Brophy Cains Limited for a declaration that a certain chattel mortgage given by the former to the latter, dated 6th February, 1906, covering the goods, chattels, and stock in trade of defendant Gormley, and a certain renewal thereof, filed on 23rd January, 1907, were fraudulent and void, and for an account by Brophy Cains Limited of all moneys received by them from the sale of the goods covered by the mortgage.

G. H. Watson, K.C., and R. J. Slattery, Arnprior, for plaintiff.

H. Cassels, K.C., for defendants Brophy Cains Limited.

No one for defendant Gormley.

MABEE, J.:—The grounds alleged for the attack upon the mortgage are that on and prior to 6th February, 1906, Olive A. Gormley, trading as Gormley & Co., was unable to pay her debts in full, and was insolvent, to the knowledge of Brophy Cains Limited, and that the chattel mortgage and renewal were made for the purpose of defeating, defrauding, hindering, and delaying the plaintiffs and the other creditors of Olive A. Gormley. A further ground is alleged, that the chattel mortgage and renewal do not comply with R. S. O. 1897 ch. 148 and amending Acts. The statement of claim further alleges that on 18th March, 1907, the defendants Brophy Cains Limited seized and sold the goods covered by their mortgage, at slaughter prices; that the seizure was illegal and excessive; and that no inventory or memorandum was served upon the mortgagor by the defendants Brophy Cains Limited or their bailiff.

On 13th August, 1907, the Universal Skirt Co. made an assignment for the benefit of their creditors to James Glanville, and on 12th September, 1907, an order was made, upon the application of Glanville . . . adding him as a party plaintiff, and allowing the action to proceed; a copy of this order was served upon the defendants, and no appeal was taken therefrom.

No defence is made upon behalf of Olive A. Gormley, and, the plaintiffs having proved the overdue notes, judgment may go against her for the amount thereof, with interest, and costs upon the scale of the County Court.

On 6th February, 1905, Olive A. Gormley gave to Messrs. Brophy & Co., the predecessors in business of the defendants Brophy Cains Limited, a chattel mortgage upon her stock of goods at Arnprior to secure $3,000. Prior to 6th February, 1906, the defendants Brophy Cains Limited had commenced an action in the High Court against P. Doutigny, the father of Olive A. Gormley, and on that date, in consideration of Brophy Cains Limited staying proceedings in that action, Olive A. Gormley assumed $1,000 of the claim of Brophy Cains Limited against her father, and signed an agreement to that effect, which also contained a clause that she should give to Brophy Cains Limited a chattel mortgage for her then present indebtedness to them, which was agreed upon at $7,988.15, and the Doutigny claim assumed at $1,000, making $8,988.15. The $7,988.15 represented the amount owing upon the $3,000 mortgage and the balance due for goods supplied since the date of it. The new mortgage for $8,988.15 was accordingly executed by Olive A. Gormley on 6th February, 1906, and the old mortgage for $3,000 allowed to expire. The new mortgage is the subject of the present attack. On 23rd January, 1907, a renewal statement was filed, shewing the whole sum of $8,988.15 still unpaid.

I find the contention that Olive A. Gormley was insolvent on 6th February, 1906, is entirely without foundation; no evidence was given of any insolvency or expected impairment of any kind; no circumstance existed from which the defendants Brophy Cains Limited could suspect any such condition; the transaction was entered into in entire good faith, and no suspicion of any kind attaches to it. Thomas J. Gormley, who was managing the business for his wife, Olive A. Gormley, took stock about the time the mortgage was given, and his stock taking and statement of liabilities was as follows: stock, $14,588.54; fixtures, $550; book accounts, $863.10; total, $16,001.64. Liabilities: Brophy Cains Limited, $7,988.15; outside accounts, $2,498.15; total liabilities, $10,486.30. Assets over liabilities, $5,515.34. Of course the $1,000 indebtedness of the father was a new liability that was being assumed at that time, which would increase the liabilities to $11,486.30, but still the parties were dealing with a supposed margin of $4,515.34.

All attacks upon the security, on the ground of insolvency, or bad faith of any kind, entirely fail.

Brophy Cains Limited continued to carry the account of Gormley & Co., and in February, 1907, their claim had increased by $3,000. No payments had been made upon account of the chattel mortgage.

On 8th March, by virtue of an agreement between Thomas J. Gormley and Brophy Cains Limited, Thomas S. Church was put in charge of the business for Brophy Cains Limited, and as their manager; sales were advertised, and from 8th to 18th March over $2,000 was realized in that way. On the 18th Brophy Cains Limited issued a warrant under their chattel mortgage to Church, and from that time Church was selling the goods for Brophy Cains Limited, and remitting the receipts to them. The mortgagor was never in possession of the goods covered by the mortgage subsequent to 8th March, 1907.

An elaborate argument was made that the plaintiffs were entitled to the relief claimed apart from the insolvency of the mortgagor, because the mortgage security did not comply with the provisions of the Chattel Mortgage Act, and that taking possession did not cure these alleged defects.

R. S. O. 1897 ch. 148, as amended by 63 Vict. ch. 17, sec. 19, 3 Edw. VII. ch. 7, sec. 30, and 4 Edw. VII. ch. 10, sec. 35, now provides, where the mortgage is made to a company, that the affidavit of bona fides and the affidavit required upon the renewal of the mortgage may be made "by the president, vice-president, manager, assistant manager, secretary, or treasurer of such company, or by any other officer or agent of such company duly authorized by resolution of the directors in that behalf. Any such affidavit made by an officer or agent shall state that the deponent is aware of the circumstances connected with the sale or mortgage, as the case may be, and has personal knowledge of the facts deposed to."

The affidavit of bona fides was made by Thomas Brophy, "president of Brophy Cains Limited, the mortgagees, etc.;" and it was contended that this was defective, in that it was shewn that there had been no resolution of the directors of the company authorizing him to make the affidavit, and that the affidavit did not state that he was aware of the circumstances connected with the mortgage, and had personal knowledge of the facts referred to.

As I read this section (3 Edw. VII. ch. 7, sec. 30), it is an officer or agent not being the president, vice-president,

manager, assistant manager, secretary, or treasurer, that requires the authority of a resolution of the directors to make the affidavit. . . . . .

[Reference to Bank of Toronto v. McDougall, 15 C. P. 475; Freehold Loan and Savings Co. v. Bank of Commerce, 44 U. C. R. 284.]

The effect of the amendment now under consideration appears to me to have extended the principle of . . . Bank of Toronto v. McDougall and made it now permissible for the affidavit to be made by the president, vice-president, manager, assistant manager, secretary, or treasurer, but as to officers or agents other than the foregoing, authority should be conferred by resolution of the directors.

Then do the words "any such affidavit made by an officer or agent" refer to and cover all the classes of persons referred to in the section, or are they limited to such officers and agents only as require the authority of a resolution of the directors?

It seems clear that they are limited to the latter class; the insertion of the words "made by an officer or agent" shews that the legislature was dealing only with the class requiring the authority of the resolution, and had it been intended to cover the president, etc., the sentence in question would have read "any such affidavit shall state that the deponent," etc. So, as I read this section, the affidavit of bona fides is not open to the objection taken, nor is the affidavit of renewal.

The mortgage was in default, and the defendants had the right to take possession of the goods. It is not open to these plaintiffs to complain of the seizure being excessive, or that no inventory was made or memorandum given to the mortgagor; and in any event I find that the seizure was not excessive, and that the taking of an inventory, if it had otherwise been necessary, was waived by the mortgagor.

Mr. Cassels urged that Glanville, by virtue of the assignment from the Universal Skirt Co., did not acquire the right to continue this action, other than for the recovery of judgment upon the notes, and that it was not open to him to question the validity of the mortgage. I think, however, that, the action having been revived, it was so for all purposes, and that this objection is not open to the defendants.

The action as against Brophy Cains Limited entirely fails, and must be dismissed with costs.

BOYD, C. NOVEMBER 26TH, 1907.

CHAMBERS.

MADGETT v. WHITE.

Parties—Addition of Defendant—Agent—Authority—Costs.

Appeal by defendants from order of Master in Chambers, ante 787, adding a defendant.

Grayson Smith, for defendants.

T. N. Phelan, for plaintiff.

BOYD, C., dismissed the appeal; costs in the cause.

BOYD, C. NOVEMBER 27TH, 1907.

CHAMBERS.

ROSSITER v. TORONTO R. W. CO.

Execution—Issue of Fi. Fa. —Regularity—Issue on Same Day that Judgment Signed and before Entry—Practice —Rules of Court.

Motion by defendants to set aside a writ of fi. fa. issued by plaintiff upon a judgment recovered against defendants for damages.

D. L. McCarthy, for defendants.

J. MacGregor, for plaintiff.

BOYD, C.:—At common law the practice was that upon signing judgment execution might be issued, and no entry upon the roll was necessary for that purpose. The signing of judgment by the proper officer was the essential thing. The present practice under the Consolidated Rules has been assimilated to that type, so far deviating from the old Chancery practice. At first the writ of execution could not issue till a month had elapsed after the entry of judgment. That

was shortened so that the writ might issue as soon as a judgment was duly entered: Rule 863 of the Con. Rules of 1888. By Rule 1359 (1894) that was amended so as to read that every person was entitled to sue out execution under a judgment "immediately after the time when the judgment was duly signed;" and in the last version of that Rule, in the present Con. Rule 843, it reads: "Every person to whom a sum of money is payable under a judgment shall be entitled immediately to issue execution;" that is, he shall be entitled to sue out execution instanter upon the judgment being signed, and without waiting till it is duly entered.

The course pursued in the central office is when the judgment is signed to issue contemporaneously the writ of execution, though the judgment may not be actually entered in the office. Delay may and does arise from the pressure of business so that the clerical work of entry cannot be attended to at once. This method is in accord with that which obtains for like reasons in land registry offices. The document for registration is brought in and the date or registry is then marked on it—though the actual transcription in the official record is not done till the particular document is reached in its turn.

Judgments take effect from the day when pronounced, and may be signed forthwith, unless otherwise directed. The manner of procedure in causes heard in Toronto is for the registrar to settle the minutes of the judgment—then it is passed and signed by him in authentication of its being proper in form and expression. It is then taken to the central office, where it is signed by the proper officer as the judgment of the Court: Rule 628. This signed judgment is then turned over to the entering clerk, who enters it in the proper book, which completes it as a judgment of record: Rules 635, 637. But for purposes of execution the judgment is complete when it is signed. The entering makes the judgment of record and facilitates its proof, but it may be otherwise verified if in fact a judgment exists: Dyson v. Wood, 3 B. & C. 457.

The judgment in this case is produced authenticated by the signature of the registrar, and marked as signed the 22nd day of November, 1907, by the Clerk of the Crown and Pleas. The writ of execution is tested the same day, and

was issued by the proper officer on production of the signed judgment.

In another aspect of the matter, the juxtaposition of dates should end the formal objection, for the Court will not inquire into the fraction of a day to see whether the writ actually issued before the judgment was actually signed; but will assume that all was rightly done: Wright v. Mills, 4 H. & N. 488.

Altogether, I think the plaintiff is right, and the writ of execution was rightly issued by the officers of the Court, and the application should be dismissed with costs.

NOVEMBER 27TH, 1907.

DIVISIONAL COURT.

CLISDELL v. LOVELL.

Jury Notice—Striking out—Separate Sittings for Jury and Non-Jury Cases—Practice—Discretion—Trial—Irregularity—Action for Equitable Relief.

Appeal by plaintiffs from order of BRITTON, J., ante 609, striking out a jury notice filed and served by plaintiffs.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

W. N. Tilley, for plaintiffs.

W. H. Blake, K.C., for defendants Mackenzie et al.

H. Cassels, K.C., for defendants Case et al.

W. N. Ferguson, for defendant Millar.

ANGLIN, J.:—In my opinion, the practice defined in Montgomery v. Ryan, 13 O. L. R. 297, 8 O. W. R. 855, as applicable to cases to be tried at Toronto, is in the interests both of litigants and of the public, upon whom the burden falls of maintaining our courts of justice. The jurisdiction to strike out jury notices in Chambers as a matter of discretion should, however, be strictly confined to cases in which it is obvious that no Judge would try the issues upon the record with a jury. If I could conceive it possible that any Judge would at the present day permit the trial of this action to proceed before a jury, I should be disposed to favourably

consider the plaintiffs' appeal. Not only is it clear to me that I would not myself think for a moment of trying this case with a jury, but, unless I entirely misapprehend the views of my brethren on the Bench, the plaintiffs cannot hope to bring this action to trial before any Judge of the High Court who would adopt any other course than that of summarily striking out the jury notice, if still subsisting, upon a mere perusal of the record.

I would dismiss the appeal with costs.

MULOCK, C.J., for reasons stated in writing, agreed in dismissing the appeal, inclining to the opinion that the action was one for equitable relief, and that the jury notice was, therefore, irregular; but, if it were not so, considering that the involved nature of the various matters set forth in the statement of claim shewed that no Judge would think it a proper case to be tried by a jury.

CLUTE, J., also agreed, for reasons stated in writing. He was of opinion that the action was one which belonged exclusively to the jurisdiction of the Court of Chancery prior to the Administration of Justice Act, 1873, and so, under sec. 103 of the Judicature Act, should be tried without a jury unless otherwise ordered: Pawson v. Merchants Bank, 11 P. R. 72; Farran v. Hunter, 12 P. R. 324; Sawyer v. Robertson, 19 P. R. 174. He was also of opinion that this was an action which no Judge would try with a jury: Montgomery v. Ryan, supra; Lauder v. Didmon, 16 P. R. 78.

RIDDELL, J. NOVEMBER 28TH, 1907.

TRIAL.

PEACOCK v. BELL.

Sale of Goods—Misdescription—Deceit—Agent of Vendor—Fraud—Contract—Proviso as to Representations—Knowledge of Defects—Estoppel—Ratification—Recovery on Notes Given for Price—Execution—Sheriff—Costs.

Action for damages for deceit and for other relief.

E. G. Porter, Belleville, for plaintiffs.

W. Proudfoot, K.C., for defendants.

RIDDELL, J.:—The plaintiffs had bought from the defendants a steam engine, and had given their notes therefor.

They found the purchase not quite suitable, and entered into negotiations with the defendants, through their agent, one Tomelty, with a view of getting rid of a heavy liability. This was agreed to upon terms that the plaintiffs should buy a second-hand engine the defendants had. An agreement was entered into in writing, in the form of an order signed by the plaintiffs, 21st April, 1905, whereby the defendants were to deliver on board cars at Seaforth, Ontario, on or about 1st May, 1905, or when further ordered, and ship to Coe Hill . . one S. & M. portable 17 horse power second-hand engine in good repair and repainted, etc. And the plaintiffs agreed, amongst other things, "to pay . . . on or before delivery of above described machinery, as the purchase price therefor, the sum of $700, as follows: cash before delivery of old notes $100 and $50 on shipment of engine, cash on or before delivery. Note due 1st January, 1906, $50, note due 1st January, 1907, $166, note due 1st January, 1908, $167, note due 1st January, 1909, $167, with interest at the rate of 7 per cent. per annum from 1st March after date of delivery of said machinery until maturity of each note and at the rate of 10 per cent. per annum after maturity until paid. . . . .

"The purchaser agrees with the vendor that the property in and the title to the goods . . . shall remain in the vendor, and shall not pass to the purchaser, until the full payment of the . . . price and the said notes . . ."

It was further agreed that "no representations made by any person as an inducement to give and accept this order shall bind the company," and that the order "cannot be varied in any respect except in writing over the signature of an officer of the vendor."

The second-hand engine was at the time in or near Norwood; and, notwithstanding the terms of the order, it never was intended that the engine should be shipped to the purchaser from Seaforth.

Several times during the summer the plaintiff (so I shall denominate the active plaintiff Charles H. Peacock) spoke to the agent of the defendants, and asked him not to ship the engine, as his water power answered his purpose fully, and he was not ready to pay the $50 which he had agreed to pay on the shipment of the engine. He was told that the engine was all ready for him in Norwood, but still he made more than once the request I have mentioned. On 10th August,

1905, the plaintiff paid $84 "to apply on first payment of engine," so says the receipt, and in the fall some time he told the agent of the defendants that he would not accept the engine—that he was not going to take it.

In January, 1906, the plaintiff, in company with one Tripp, an agent for the Sawyer-Massey Company, examined the engine in Norwood. I have no doubt that this examination was not with a view of seeing whether the engine should be accepted, but for the purpose of finding a pretext to justify, if possible, the refusal already made. After this, and on 20th January, 1906, one of the plaintiffs, with a full knowledge of all the alleged defects, paid the remainder ($16) of the first payment of $100. This was done admittedly that the old notes might be received back, as they were, and this sum was so paid after the plaintiffs' solicitor had written the defendants threatening action (15th January, 1906).

On 9th February, 1907, the present defendants issued a writ against the present plaintiffs for the sum of $50 and interest and for the amount of the promissory notes and interest. No appearance being entered (I am told by counsel that the solicitor received his instructions too late), judgment was entered for the now defendants on 27th February, 1907, for $640.16 and $32.58 costs. Subsequently a writ of fi. fa. was placed in the hands of the sheriff of the county of Hastings, and under that writ goods of the plaintiffs were sold, the proceeds of which, a sum of $294, remain still in the hands of the sheriff.

On 15th May, 1907, this action was begun, the sheriff being added as a party defendant.

The action is framed substantially as an action in deceit, the plaintiffs alleging that the engine was fraudulently misdescribed, and relief is asked for also on the ground of alleged fraud practised upon the Court in the action already spoken of.

If I could find fraud in the conduct of the agent of the defendants, the clauses in the contract apparently introduced to avoid, as against the defendants, the consequences of that fraud, would be ineffective. . . .

[Reference to Pearson v. London, [1907] A. C. 351.]

This most salutary rule must be given full effect to in cases to which it applies, but here I find no fraud, no mis-

representation. My findings of fact have not been in the least modified by argument or further consideration. The engine is and was as represented by Tomelty; and I am unable to accept the statement of the plaintiff or his witness as to what representations were made. And the engine was in a good state of repair, remembering that it was second-hand and not new. Tripp's standard of repair is quite too high—involving as it does rebuilding. In case of further proceedings, my findings at the trial may be looked at, but I do not think it necessary to say more at the present time on the question of fact.

Nor do I see how any fraud was perpetrated upon the Court in the proceedings in the former action. The action must fail, therefore, on these grounds. In respect of the previous action the plaintiffs could not succeed even if these difficulties were overcome.

With full knowledge of all the alleged defects, the plaintiffs went on and paid the balance of the first payment of purchase money upon the engine, and received back the old notes. There was no right to do this unless the present contract was valid; they therefore and thereby ratified the contract. I am not forgetting the form of the second receipt, but I find as a fact that the $100 was not expenses, etc., in respect of the first engine (though the amount may have been fixed at $100 in view of the amount of such expenses), but that it was, precisely as stated in the order, a payment on account of the $700 purchase money.

The contract being valid, the notes given in pursuance thereof are also valid; and as to the $50, the plaintiffs here cannot set up the non-shipping or non-delivery of the engine, as that was prevented by their own act in first requesting delay and then repudiating the purchase: Steen v. Steen, 9 O. W. R. 65, 10 O. W. R. 720, and cases cited. This would not, of itself, perhaps, prevent an action of deceit, but I have held that such an action cannot succeed.

The action must be dismissed with costs payable to both defendants; the sheriff cannot deduct his costs from the money on hand, but must look to the plaintiffs for the same.

In the view I have taken of the facts, it has not been necessary to consider whether relief in respect of the former action should have been sought and would be given in this.

TEETZEL, J. NOVEMBER 29TH, 1907.

WEEKLY COURT.

COLE v. LONDON MUTUAL FIRE INSURANCE CO.

Stay of Proceedings—Action on Fire Insurance Policy—Variation of Statutory Condition 16—Not "Just and Reasonable"—Onerous Terms—Appraisement—Arbitration—Expiry of Time for Moving under Arbitration Act, sec. 6.

Motion by the defendants to stay proceedings in an action upon a policy of fire insurance until after the appraisal required under a variation of the statutory conditions or until after the arbitration provided for in the 16th statutory condition.

W. H. Hunter, for defendants.

G. C. Gibbons, K.C., for plaintiff.

TEETZEL, J.:— . . . In the present case, the 16th statutory condition, which provides for a reference under the Arbitration Act, is struck out by a variation indorsed on the policy in these words: "10. Condition No. 16 is hereby struck out and the following inserted in lieu thereof: (a) In pursuance of the powers conferred by R. S. O. ch. 203, sec. 145, sub-sec. 3, it is hereby expressly provided and mutually agreed, if any difference arises as to the value of the property insured, of the property saved, or the amount of the damages or loss, such value and amount and the proportion, if any, to be paid by the company shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to and ascertained by two competent and disinterested appraisers, one to be appointed by the assured and one by the company. The said appraisers shall first select a competent and disinterested umpire, but in case of their failure to agree on such umpire within 10 days, he shall be appointed by the Judge of the County Court of the county wherein the loss happens. The said appraisers shall then together estimate and appraise such value and amount in detail, stating separately sound value and damage and loss; and in the event of the two appraisers

failing to agree thereon, shall submit their differences to the umpire so chosen, and the award in writing by the said umpire and at least one of the said appraisers as to the amount of said damage and loss shall be binding upon the assured and the company. The assured and the company shall pay the appraisers respectively selected by each of them, and each shall pay one-half the expenses of the umpire. (b) It is furthermore hereby expressly provided and mutually agreed, that no arbitration shall be had under said condition No. 16, and that no suit or action against the company for the recovery of any claim shall be sustainable in any court of justice, until after an award shall have been made fixing the amount of such damage and loss in the manner above provided, in all cases where the company shall, within 30 days after completion of the proofs of loss, give notice to the assured that the company requires the amount of the damage and loss to be adjusted by the said appraisers."

Within 30 days after proof of loss, and before action, the defendants appointed an appraiser, and gave the notice provided for in the variation. No other notice of or application for arbitration was given or made.

The plaintiff refused to appoint an appraiser, and brought this action.

The defendants plead the variation as a bar to the action, and in the alternative they plead the 16th statutory condition, and by the statement of defence purport to appoint an arbitrator on their behalf.

If the variation is held to be invalid, and the defendants are entitled to rely on the 16th statutory condition, no application having been made in compliance with sec. 6 of the Arbitration Act, the motion is now too late and must fail, on the authority of the judgment of the King's Bench Divisional Court on the appeal in Cole v. Canadian Fire Insurance Co., ante 906.

The only other question for determination is whether the variation is binding upon the plaintiff, and that depends upon whether it can be held to be one that is "just and reasonable to be exacted by the company."

In the judicial consideration of variations of the statutory conditions, this rule for determining whether they are "just and reasonable" has been well settled, viz.: "Conditions dealing with the same subjects as those given by the statute and by variations of the statutory conditions should

be tried by the standard afforded by the statute, and held not to be just and reasonable if they impose upon the insured terms more stringent or onerous or complicated than those attached by the statute to the same subject or incident:" Smith v. City of London Insurance Co., 14 A. R. at p. 337, 15 S. C. R. 69. See also Ballagh v. Royal Insurance Co., 5 A. R. at p. 107; May v. Standard Insurance Co., 5 A. R. at p. 622.

Now, does the variation here "impose upon the insured terms more stringent or onerous or complicated" than are imposed by the statutory conditions in the matter of ascertaining the amount of loss?

The most serious differences between the two conditions are: (1) the variation prohibits the arbitration provided for by the statutory condition under the Arbitration Act, and substitutes for it an appraisement; and (2) it compels the insured to pay the expense of his own appraiser and one-half the expense of the umpire, in any event, while the statutory condition provides that where the full amount of the claim is awarded, costs shall follow the event, and that in other cases all questions of costs shall be in the discretion of the arbitrators.

If the last sentence of the variation had been omitted, it might fairly be argued that since 6 Edw. VII. ch. 19, sec. 13, amending the Arbitration Act, the provisions of the latter Act would be applicable to the appraisement; but by the express provision against the arbitration under the statutory condition which provides that the Arbitration Act shall be applicable to the reference, I think it was the intention of the company to exclude the application of that Act.

If the language used is sufficient to deprive the plaintiff of the benefit and protection of the provisions of the Arbitration Act (which I do not deem it necessary to decide), the variation would be within the rule above quoted, and manifestly unjust.

Without determining whether any of the provisions of the Arbitration Act are applicable to the appraisement, it is quite clear that the plaintiff would be bound by the findings of the majority of the appraisers as the result of their own personal opinions only, and he would be debarred from calling witnesses and having them examined on oath touching the amount of his loss.

Both in this aspect and in imposing upon the insured the payment in any event of the expenses mentioned, I think the variation imposes upon the insured terms more stringent and onerous than are imposed by the statutory condition, and therefore not just and reasonable to be exacted by the company.

The motion to stay proceedings will, therefore, be refused with costs to be paid by the defendants in any event, and the trial of the action will proceed at the London winter assizes.

BOYD, C. NOVEMBER 29TH, 1907.

WEEKLY COURT.

RE BATTERSHALL.

Will—Construction—General Legacies—Insufficiency of Estate—Abatement Ratably—Exceptions—Legacies to be Paid in Full—Bequest of Half a Share of Stock—Direction for Sale of One Share—Charitable Bequest—Benefit of Poor—Devise of Land to Municipal Corporation for a Public Park—Public Parks Act—Mortmain and Charitable Uses Act—Amending Act of 1902—Construction—Exemptions.

Motion by the executors of the will of William Battershall, deceased, for an order determining certain questions arising upon the will and codicils.

The testator died on 12th March, 1906. His will was dated 21st October, 1904. The following are the material parts:—

1. I nominate . . . Albert William Day . . . and William Lawrence . . . the executors and trustees of this my will.

2. I will, devise, and bequeath all my property, real and personal, to my trustees . . upon the following trusts and to and for the following purposes.

1st. To sell and dispose of all my personal property and collect . . . all sums of money . . . .

2nd. Upon trust to sell and dispose of my real estate. . .

4. Then upon trust to pay out of the proceeds of the said sale and personal estate the following legacies:—

A. The sum of $500 to my sister Susan Yelland. . . .

B. The sum of $500 to . . Henry Albert Yelland.

C. $1,000 to my deceased wife's brothers and sisters, the child or children of any deceased brother or sister to receive his, her, or their father's or mother's share.

D. The sum of $100 to my present housekeeper, Mrs. Smith.

E. The sum of $100 to Mrs. Barker.

The sum of $150 to the Stratford Lodge of the Sons of England.

To my old neighbour James Stevenson the sum of $50 and to his brother Anderson Stevenson the sum of $50. To Mrs. Claxton . . . $100. In case any of the above predecease me, then the legacy . . is to revert to my estate.

F. The sum of $250 to the churchwardens of St. James Church, Stratford, the interest derived therefrom to be expended towards purchasing books for the Sunday school. .

G. The sum of $500 to the said churchwardens to be applied in the purchase of a peal of bells. . . .

All above legacies to be paid in full one year after my decease.

H. The sum of $2,000 to be given to the Corporation of the City of Stratford upon the follow trusts: to invest the same . . . and to apply the interest for the purchase of suits of clothing for poor boys and girls between the ages of 6 and 11. . . .

I. I further bequeath $2,000 to be paid over to the said City of Stratford and to be invested . . . and the interest . . . to be expended annually in bread and beef or clothing to be given to the poor of the said city . . at Christmas in each year.

J. I will and bequeath to the City of Stratford Hospital Trust the sum of $200. . . .

K. I will and bequeath the sum of $200 to the County of Perth to hold in trust for the County House of Refuge to be invested . . . the interest to provide . . . reading matter . . for the patients. . . .

L. The sum of $100 to the County of Perth, the interest . . . to be expended in moral reading for the prisoners in the county gaol.

M. The sum of $500 to the Corporation of the County of Perth upon the following trusts: to invest . . . and to apply the interest in three prizes to be given at the North Perth Agricultural Fair each year. . . . In case the interest on the $500 . . . is not required or called for for 3 consecutive years, the said fund and accumulated interest shall then be handed to the City of Stratford with the $2,000 bequeathed . . . to the said city under clause "I." . . .

9. All the rest and residue of my estate I will, devise and bequeath as under:—

One half to my said nephew Henry Albert Yelland and his heirs, and the other half to the children of my half brother known as Samuel Day . . . who may be living at the time of my decease.

10. I hereby declare that the above bequests under subsections "F.," "H.," "I.," "J.," "K.," and "M.," are to be kept invested by the corporations to whom they are devised as above . . . from time to time to the intent that the interest, dividends, and annual income may be a perpetual fund for the benefit, relief, or improvement of the parties or classes mentioned. And I hereby declare that the above corporations are to be trustees for the respective amounts bequeathed to them for all time to come.

The first codicil was dated 7th March, 1906. The material parts were as follows:—

I hereby amend clause E. in my said will by adding thereto the following legacies payable as therein stated: I give and bequeath George Warner . . . $100; to Mabel Wood . . . $50; to the Rev. W. T. Cluff . . . $100; to my

half brother Samuel Day . . . $1,000; to his son Bert Day . . . $1,000.

I also give and bequeath to my friend George Shore stock to the amount of $100 held by me in the Stratford Clothing Company; to his wife also $100 stock in the said company; to Robert Shore . . . stock in the said company to the amount of $100; to William Warner . . . stock in the said company to the amount of $50; to Lucy Smith . . . stock in the said company to the amount of $100. Said stock to be transferred to the several parties 3 months after my decease.

I hereby amend clause H. in my said will by changing same from $2,000 to $4,000.

I hereby cancel clause I. of my said will.

And I direct that the provision made in clause M. in my said will, in case the legacy therein mentioned shall come to the city of Stratford, that the same shall be invested by the city of Stratford for the benefit of class under clause H. in my said will, instead of clause I. as therein mentioned. And that where clause I. is referred to in my will, it shall be read as H.

I give and devise to the city of Stratford lots J., K., (and a number of others, describing them) . . . to be used as and in connection with parts of lots V. and W. . . . which have already been conveyed by me to the said city of Stratford for the same purpose as is set out in the conveyance from me to the said city of Stratford. . . .

In all other respects I do confirm my said will.

The second codicil was dated 8th March, 1906, and was as follows:—

I hereby revoke the appointment of Samuel Day as one of my executors, and nominate and appoint my nephew William Albert Day, usually known as Bert Day, in his place and stead.

I hereby revoke the legacy of $100 to George Warner, and give and bequeath to him $50 in cash in lieu thereof. To be paid in 3 months after my decease.

I give and bequeath to my said nephew the sum of $600 in addition to the provision heretofore made in his favour.

Otherwise I confirm my said will and the codicil thereto attached.

F. W. Harcourt, for the executors and the infant.

E. Sidney Smith, K.C., for St. James Church and others.

W. H. Blake, K.C., for the Corporation of the County of Perth and others.

R. S. Robertson, Stratford, for the Corporation of the City of Stratford and others.

J. B. Davidson, St. Thomas, for the Warners.

BOYD, C.:—Prima facie, all general bequests are upon an equal footing, and those who claim priority or payment in full, in case of deficiency of assets, must positively and clearly establish that it was the intention of the testator that the bequests should not abate ratably. This is in substance the test supplied by Knight Bruce, V.-C., in Thwaites v. Foreman, 1 Coll. C. C. 414.

Such clear indication of intention is found in the words used in this will with respect to the legacies given in clauses A., B., C., D., E., F., and G.; after these bequests the testator says, "All above legacies to be paid in full one year after my decease." The words "in full" cannot be explained away, and express a manifest intention to provide for the payment in full of these legacies. . . .

[Reference to Watson's Compendium of Equity, 2nd ed., p. 1342; Marsh v. Evans, 1 P. Wms. 668; Johnson v. Johnson, 14 Sim. 313.]

Consequent upon this ruling I hold that the beneficiaries mentioned in the first clause of the first codicil are to be promoted to the same preference in payment, by reason of the words used, "I hereby amend clause E. in my said will by adding thereto the following legacies payable as therein stated." . . . As to George Warner, the testator provides in his second codicil as follows: "I hereby revoke the

legacy of $100 to George Warner, and give and bequeath to him $50 in cash in lieu thereof, to be paid in 3 months after my decease." This withdraws the legacy out of the preference which it had while made subject to clause E., and this bequest must abate.

The legacy to Bert Day of $1,000 under the first codicil ranks for privilege under clause E., but not so the further bequest of $600 made to him in the second codicil—which is given " in addition to " the provision heretofore made in his favour. The words are not sufficiently expressed to create a preference.

To an infant, William Warner, is given $50 stock in the Stratford Clothing Co. It appears that the shares represent $100 each, and are not divisible. All parties agree that the best practical plan to solve the difficulty is to sell one share and account to the infant for half the value obtained; with this I agree.

A bequest of $2,000 to the city of Stratford for the benefit of poor boys and girls between 6 and 11 years of age, which is increased by the first codicil to $4,000, appears to be valid as a good charitable bequest. It falls within the authority of Re Kinney, 6 O. L. R. 459, 2 O. W. R. 81.

The devise of lots to the City of Stratford for the same purposes as are set out in a conveyance made during the testator's life, to the city, is questioned. . . . The lots were conveyed by the testator for the purposes of a park, and these lots adjoin the others and are less than 20 acres in all. The deed was made in 1905, and the codicil in March, 1906, in which month the testator died. The lots in the will were evidently to supplement the lots conveyed by the testator so as to make the park a more commodious resort for recreation and enjoyment on the part of the citizens. He provides in the last clause of the first codicil for the expenditure of $100 in erecting an arch and gateway as an entrance to the said park property. By the general Act relating to Public Parks, R. S. O. 1897 ch. 233, sec. 12, real and personal property may be devised, granted, or given to the city for the establisment and formation of a park. The origin of this provision dates back to 1883: 46 Vict. ch. 20, sec. 12. Standing by itself,

this would amply justify and legalize what was done by the testator in completing his purpose with regard to Battershall Park, as it is called in the conveyance.

It is argued that the will is inoperative as to this land, because it was not made 6 months before the testator's death, under the Mortmain and Charitable Uses Act, 1902, 2 Edw. VII. (O.) ch. 2, sec. 8 (ii.). I do not read this late statute as affecting the operation of the revised statute as to public parks. "Assurance" in the Act of 1902 includes disposition by will. Section 3 provides that land shall not be assured to any corporation in mortmain otherwise than "under the authority of a statute for the time being in force." This in effect recognizes the validity of the Public Parks Act, and there is no pretence of repealing any of it under the schedule of Acts repealed by the Act of 1902.

The whole Act of 1902 is to be read as part of the Mortmain and Charitable Uses Act, R. S. O. 1897 ch. 112, and it cannot be supposed as intended to derogate from the express power given to municipalities to take and hold land for parks.

The case was argued as if the provisions of the Act of 1902, sec. 8, were at variance with the other legislation in the Public Parks Act. But I think that the heading of the statute, above sec. 8, "Exemptions," gives the clue to the real meaning. The difficulty of the Act in relation to charitable uses was dealt with . . . in Re Barrett, 10 O. L. R. 337, 5 O. W. R. 790. But as to parks we have to consider the mortmain aspect of the statute, and clause 8 provides for the exemption of other cases from the operation of the Mortmain Acts in addition to those already existing, such as, e.g., those provided for the Public Parks Act. The Act of 1902 does not disturb any existing licenses or statutes authorizing holding lands in perpetuity: see secs. 3, 4, and 11; but extends the power to hold to other cases (parks, museums, and school houses), where the right does not exist independently of the Act of 1902. Cases that fall under the Act must conform to its methods of assurance or to time limit, but these directions are not pertinent to the present case.

I have now disposed of all the questions submitted. Costs out of estate.

RIDDELL, J. NOVEMBER 30TH, 1907.

TRIAL.

CLARK v. MOTT.

Sale of Goods—Action for Price—Defence Based on Failure of Title to Goods—Implied Warranty of Title—Executor—Will—Provision for Maintenance of Testator's Children in Hotel—Sale of Furniture in Hotel—Right of Child to Object—Executor—Powers of—Conduct—Estoppel—Contract—Lease—Offer to Purchase.

Action to recover $950, in the circumstances stated in the judgment.

M. Wright, Belleville, for plaintiff.

E. G. Porter, Belleville, for defendant.

RIDDELL, J.:— . . . The late G. W. Clark was in his lifetime the owner of a hotel in Frankfort village, with furniture, etc. By his will he gave this hotel, furniture, etc., to his wife, but the will contains a clause as follows: "I will, bequeath, and direct that my 4 daughters, namely, Edna Clark, Gladys Clark, Hattie Clark, and Lena Irene Clark, shall have a home and maintenance at my said hotel till they are married respectively, and that upon their marriage they shall be paid the sum of $100 in ready money by my executors hereinafter named out of my estate respectively."

G. W. Clark died in August, 1900; his widow took possession of hotel, furniture, etc., and was in such possession at the time of her death, 16th August, 1906. She made a will in which she appoints the present plaintiff, Gladys Clark, sole executrix, and provides: "I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say, unto my three daughters, Gladys Clark, Hattie F. Clark, and Lena Irene Clark, share and share alike"—with an unimportant exception.

On 27th October, 1906, the plaintiff, as executrix of her mother, leased to the defendant the hotel for a term of 3 years from 1st November, 1906. In the indenture is found

the following: "The lessee covenants with the lessor to purchase the household goods and effects in the said hotel . . . and to pay therefor $950 upon the transfer of the license being duly made to him." The license was transferred in November, 1906, and the defendant took possession of the hotel under the lease and also of the furniture, etc.

On 30th October, 1906, an agreement was made wherein, after reciting that the defendant had leased the hotel and had agreed to purchase the furniture for . . . $950, it was agreed "that the said lessor leases to the said lessee the said household furniture from day to day until not later than the 1st day of May, 1907, the said lessee to pay for the said furniture according to the covenant in the lease of the said premises, and to pay interest at the rate of 8 per cent. per annum upon the said sum of $950, until the said amount is fully paid, from the 1st day of November, 1906."

Bearing in mind that this was before the transfer of the lease, the effect of this agreement was to bind the defendant to pay interest at the rate mentioned up to 1st May, 1907, and then, if the license should have been by that time transferred, pay the sum of $950, and if not, then pay this sum as soon as the license had been transferred. On 3rd May, 1907, "the date 1st of May, 1907, is hereby changed, and shall be hereafter the 1st day of August, 1907, as if the said last date had been placed in this agreement . . . at the time of the making thereof." This postponed the time at which the $950 was to be paid to 1st August, 1907. Rent was received for the furniture at the said rate up to but not after 1st August, 1907; plaintiff refused to receive rent for the furniture thereafter.

Edna Clark, one of the beneficiaries under the will of G. W. Clark . . . at the time her sister the plaintiff attempted to sell to the defendant claimed . . . a right to an interest in the furniture, etc., and in November, 1906, forbade the defendant concluding the sale, as she would not give up possession and use of the furniture, etc., and she has continued in the hotel, gets her board and maintenance, and insists that she has a right to use such of the furniture as she sees fit, though she does not interfere with the defendant's enjoyment of the same except the part in her own room.

This action was brought on 28th August, 1907, for the $950. The defendant defends upon the ground that there was a representation of absolute title by the plaintiff, which has turned out not to be true by reason of the claim of Edna Clark. The will of G. W. Clark is pleaded, but not the will of his widow. The defendant further pleads that he "has always been ready and willing, and is now ready and willing, to carry out the said agreement and pay the said purchase money, upon receiving from the plaintiff a proper conveyance fee from any other claim or incumbrance on the same," and "denies that he has ever refused to pay for the said household goods and effects on a good and sufficient title being given to him therefor." . . .

Several technical objections were taken by counsel for the defendant—none of them of substance, I think—and I should not perhaps mention them here, as no amendment to the pleadings being asked for or made, the defendant should not complain if he is held to his offer in the pleadings. It may be well, however, briefly to dispose of them.

The first point . . . is that the dealings between the parties, the one as owner and the other as lessee, puts an end to the agreement to buy. The answer is obvious. In that very transaction a new promise was made by the defendant to pay.

Again, it is contended that the original document was a mere offer to purchase. The succeeding documents get over that difficulty if there were one.

The real questions are three: First, upon a sale of this character, is there an implied warranty of title Second, had the plaintiff a good title to these chattels? And if not, third, have the dealings between the parties modified their rights?

As to the first, it seems free from difficulty. "It is well settled that in an executory agreement the vendor warrants, by implication, his title in the goods which he promises to sell:" Benjamin, 4th Eng. ed., p. 622.

The second, if it depended upon the only will pleaded, would also, I think, not present any difficulty. The provision for maintenance is that it shall be at the hotel—the testator himself distinguishes between the hotel and the furniture.

No doubt, the beneficiaries are entitled to a home and reasonable maintenance at the hotel, and, no doubt, such home and reasonable maintenance would not be afforded by the bare walls of the hotel. But it does not seem to me that the widow could not at any time sell the whole or any part of the furniture, provided that she left or procured furniture of the kind and quantity necessary to furnish a reasonable home. If she at any time failed to do this, no doubt the beneficiaries would have a good cause of action, and, if necessary, the hotel would be sold to provide a home and maintenance for those entitled thereto. But that is quite a different proposition from that of the defendant, that is, that each beneficiary could have prevented her mother from selling any single article.

But the will of the widow is much more explicit, containing, as it does, an express bequest of this property to the 3 named legatees.

"The power of the executors to dispose of a chattel specifically bequeathed seems to have been formerly questioned, but succeeding cases in modern times have established it beyond dispute:" Williams on Executors, 9th ed., p. 802. And whether the case might be different if it were established that the executrix had done anything in the way of assenting to the bequest, I need not inquire, as nothing of the kind is set up here, but, on the contrary, it appears that the plaintiff was insisting upon her right to sell from the beginning.

As to the last point, I have said that there is nothing in the conduct of the plaintiff which bars her right. If any estoppel exists, it exists against the defendant. With full notice and knowledge of the claim of others in and to these chattels, he agreed, if not by the agreement of 30th October, 1906, at least by that of 3rd May, 1907, to pay the sum of $950 to the plaintiff for them. I should, however, as at present advised, hesitate to decide against the defendant upon this ground alone.

It would have been better had Edna Clark and her infant sister been made parties to this action, and the action fought out with their claims fully explained and urged; but the solicitor for the defendant, who was also solicitor for Edna Clark, did not see fit to take this course. I cannot hold that the plaintiff should have made these parties—the plain

issue being, as between herself and the defendant, should the defendant pay the $950.

There will be judgment for the plaintiff for $950 and interest thereon from the teste of the writ, with costs.

MULOCK, C.J. NOVEMBER 30TH, 1907.

TRIAL.

NETTLETON v. TOWN OF PRESCOTT.

Trial—Jury—Answers to Questions—Inconsistent Findings—Mistrial.

The plaintiff was confined in the lock-up owned and established by the defendants, the municipal corporation of the town of Prescott, and in his statement of claim alleged that whilst he was so confined the defendants negligently omitted to keep the lock-up reasonably warm, and that such negligence occasioned to him a serious illness, and he brought this action to recover damages because of the injury which he thus sustained. Other causes of action were set forth in the statement of claim, but were abandoned at the trial.

J. A. Hutcheson, K.C., for plaintiff.

J. B. Clarke, K.C., and J. K. Dowsley, Prescott, for defendants.

MULOCK, C.J.:—The evidence of the plaintiff went to shew that at the time of his imprisonment he had Bright's disease; that during the night following his arrest the cell was allowed to become very cold; that the next day he was found to be seriously ill, was removed to his home, and there suffered a protracted illness.

The case was tried with a jury, and the following are the questions submitted to them and their answers:—

1. Were the defendants guilty of any negligence or breach of duty in respect of the heating of the lock-up? A. Yes.

2. If so, in what did such negligence or breach of duty consist? A. In not looking after the heating of the lock-up from 12 o'clock Saturday night until 12 o'clock Sunday noon.

3. Was the illness of the plaintiff which immediately followed his imprisonment caused by such negligence or breach of duty? A. Yes.

4. Was the plaintiff at the time of such imprisonment in a reasonably good state of health? A. Yes.

5. If not, did he make known to Lee or Mooney the fact of his health being impaired, and request that the cell be heated so as to meet all reasonable requirements because of his impaired state of health? A. No.

6. If the plaintiff at the time of his imprisonment had been in a reasonably good state of health, would the conditions to which he was subject during his imprisonment have caused the sickness complained of? A. Yes.

7. Were the defendants in control of the heating system which supplied heat to the cell? A. Yes.

8. Was Lee in managing the heating of the cell the servant of the defendants? A. Yes.

9. What amount of damages, if any, do you award the plaintiff? A. Award $250.

After the jury retired to consider the questions, the plaintiff's counsel asked that in lieu of question No. 6 the following question should be submitted:—

"If the plaintiff was not then in a reasonably good state of health, and did make the fact known to Lee or Mooney, did the defendants take reasonable precautions to prevent his suffering injury?"

This question—numbered 6a—I allowed to be submitted to the jury, in addition to the 9 above mentioned, and the jury's answer to it was "yes."

This answer may be paraphrased to read as follows:—

"Having regard to the illness of the plaintiff at the time of his imprisonment, the defendants took reasonable precautions to prevent his suffering injury."

If such precautions were sufficient, supposing the plaintiff, at the time of his imprisonment, to have been in an impaired state of health, a fortiori they were sufficient if he was at that time in a good state of health, and this positive finding in answer to question 6a thus negatives the previous findings of negligence or breach of duty.

Thus there are two inconsistent and irreconcilable findings in regard to a matter which goes to the root of the action, rendering it impossible to base thereon any judgment in favour of either party, and the result is a mistrial.

NOVEMBER 30TH, 1907.

C.A.

REX v. PAUL.

Criminal Law—Murder—Judge's Charge—Evidence—Misdirection—New Trial.

Case reserved by ANGLIN, J., at the trial, upon the application of the prisoner, who was found guilty of murdering one Henry Schelling.

W. Proudfoot, K.C., for the prisoner.

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

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MOSS, C.J.O.:—The case as stated raised two questions for the opinion of the Court. Upon the argument a motion was made on behalf of the prisoner with a view to raising two other questions.

The first question in the case relates to the manner in which certain evidence with regard to the finding of a small book, said to be the property of the deceased, and supposed to have dropped from his pocket while his body was being dropped or carried by the prisoner to where it was afterwards found, was dealt with by the learned Judge.

Two books were produced at the trial: first, the book in question, which was marked for identification; and afterwards another book which was said to have belonged to the deceased, and was found some 5 months later than the book in question, and on the other side of the road from that on which the body was found.

The finding of the second book was deposed to by one Griffiths. Subsequently one O'Neill testified as to a statement made to him by the prisoner, in which the latter spoke of having found a book which had dropped from the clothing of the deceased, and of taking from it a cheque payable to the deceased—which he had subsequently cashed—after which he had thrown the book in the bush to one side of the path. O'Neill further stated that he knew a book had been found in the bush about 10 feet from the road near the tracks leading in to where the body was, pretty close to them, just off to one side, coming down to where the body was.

As stated in the case, the learned Judge in his charge treated the case as if the second book was the only one in evidence, commenting upon the assumed fact that no book had been proven to have been found where the prisoner had told O'Neill he had thrown the book from which he had taken the cheque, as possibly reflecting upon the credibility of the prisoner's entire statement as to provocation on which he relied as a defence. The importance of O'Neill's evidence as bearing on this part of the prisoner's defence is quite manifest. At the conclusion of the charge, the learned Judge was asked by the prisoner's counsel to state to the jury that there was no evidence that the book spoken of by Griffiths had been the property of the deceased. The learned Judge did so, and in the course of his remarks stated that "no other book was found there which would answer the description;" and, in reply to a juryman who asked, "That is the only book?" he stated, "That is the only book which would answer the description except Paul's own book." The learned counsel for the prisoner failed to direct attention to the other book or the evidence relating to it, and it was, in consequence, overlooked.

In the case which is now before us, as amended by the learned Judge, he states that, at the instance of counsel for the prisoner, he had the evidence of Griffiths as to the finding of the second book read to the jury, but he did not direct

that the evidence of the witness O'Neill should be read as to the finding of a book about 10 feet from the road, where the prisoner had told O'Neill he had thrown the book from which he had taken the cheque, and that this omission, with his remark above quoted, made in answer to the question of a juryman, possibly had the effect of withdrawing that portion of O'Neill's evidence from the jury. In this view we concur. We think that in this respect there was a substantial misdirection upon a material question, and that there must be a new trial.

This conclusion renders it unnecessary to deal with the other questions, and, as the new trial opens the whole matter, it is better to abstain from expressing any opinion with regard to them. It is, however, not to be supposed that in taking this course we are lending any countenance to them. But anything that might be said about them would be of no service on the new trial which is now directed.

The answer to the first question will be that there was a substantial misdirection, and that there must be a new trial.