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COURT OF APPEAL.

OCTOBER 24TH, 1911.

DELL v. MICHIGAN CENTRAL R.R. CO.

Railway—Injury to and Death of Servant—Section-man on Track Struck by Engine Moving Reversely—Absence of Warning Flag or Flagman—Negligence—Unsatisfactory Findings of Jury—New Trial.

An appeal by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiffs, the infant children of Levi Dell, deceased, in an action for damages for his death, while in the service of the defendants as a section-man, owing to the negligence of the defendants, as alleged. The jury assessed the damages at $2,500, and judgment was given for that sum with costs.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

D. W. Saunders, K.C., and A. Ingram, for the defendants.

W. M. German, K.C., for the plaintiff.

The judgment of the Court was delivered by MAGEE, J.A.:—The finding of the jury that the negligence which caused the accident consisted of the crew running backwards in a westerly direction over the east-bound track without a flagman, must be construed with reference to the evidence and the instructions they received from the learned trial Judge. Throughout, the object of both the flag and flagman was referred to as being to stop approaching engines or trains from approaching others or a place where repairs upon the track were going on. A man placed at the rear end of an engine or train which was proceeding backward was not spoken of as a flagman. Hence that finding must, I think, be taken to mean that a flagman on the ground to warn approaching trains, or possibly to warn the

deceased when at work, of their approach, should have been employed. This meaning would seem more evident if the jury's answer to question 4B is read with the finding referred to. They there say that what made the system of shunting in use in Welland yard a dangerous one consisted in running without proper precautions in the yard; and, on being asked to define what proper precautions were lacking, they added, "running backwards without a flagman contrary to the rules." If they referred to the written rules, put in evidence, as I think they did, then no contravention of any of them was shewn, and the only rule specially referred to at the trial—rule 93, which requires trains not to move or occupy the left-hand track except by special order or under protection of a flagman in each direction—had been complied with by the special order of the yardmaster, who was himself on the returning engine. In that rule the flagman referred to is manifestly not a man on the engine; and nowhere throughout the rules do I find the word "flagman" referred to in that sense. If the jury referred to rules established by ordinary practice, as sworn to by the witness Wedge, the next friend of the infant plaintiffs, then equally the reference would be to a man on the ground. He does not refer to any rule as to engines or trains running backward. He does say that it was the recognised practice to have a man, usually the foreman, to warn the men working on the track of approaching engines or trains, or else to have a flag out which they should not pass; but he also says that, when a man was working by himself, he would have only himself to look out for the trains.

Taking it then as the meaning of the jury that it was negligence of the defendants to run without such a flagman on the ground, the finding would, I think, be unreasonable and unwarranted by the evidence.

The deceased Dell, a section-man, walking alone along the track, noticed a rail which he considered out of gauge, on the southerly or east-bound track, and he at once set to work alone to put it in gauge and spike it, and while at this work he was struck by a shunting engine running backward westerly on that track, which had passed him a few minutes previously on the same track at the rear end of an east-bound freight train, which it was assisting or "shoving" out of Welland. Neither the existing condition of the rail nor his work upon it in any way made the track impassable or interfered with traffic. There would be no necessity or even propriety in sending out a flag or a flagman to stop a train while a workman was walking off

the track. Neither under the evidence nor the written rules is any such suggestion made. There would, however, be the other alternative of having some one to warn the workman, as the witness Wedge suggests was the practice. But in this case it is not shewn that any one had instructed Dell to do this particular work at that time on the east-bound track, nor that any one even knew that he was going to be or was engaged upon it. If it was necessary or proper that a flag or flagman should have been put out, and if, as Wedge says, it was a foreman's duty to have seen to that, there was no request to any foreman or superior for any protection, and no knowledge by any foreman or superior of the necessity for any, and no knowledge of the existence of circumstances in which such protection might reasonably have been considered necessary. There is no direct evidence, even, that it was in the line of his ordinary duty that Dell should set about doing what he did without first reporting the defect he set about to correct; the jury might, in the absence of evidence to the contrary, properly infer that it was his duty to do the work; but they could not infer that if, as Wedge says, it was the foreman's duty to see that the workman was protected, the workman was entitled to expect this protection without making known the existence of its necessity.

The evidence shews that Dell was an experienced man, in the defendants' employment for twelve or more years, and knew what protection he should have; and no difficulty was suggested in the way of his applying to a foreman for any protection which, under the rules or practice of the company or the yard, he should have.

I am unable to see how the finding of the jury that there was negligence in not having a flagman, in the sense referred to, can be sustained upon the evidence. Their answer refers to the engine running west upon the east-bound track; but the evidence for the plaintiffs shewed that, within the yard, engines and trains ran upon either track in either direction, as indeed one would expect would be necessary. If that running on the left-hand track in the yard was intended by the jury as an element of negligence, it was unwarranted by the evidence. But it was probably intended only to state one of the circumstances making up the condition of affairs in which it was negligence not to have a flagman. The same may be said of the reference to the engine running backward, which in the very nature of things must be both necessary and frequent. That main finding of the jury upon the first and second questions submitted to them cannot, I think, stand.

But the jury also found, in answer to questions 3 and 4A, that the system of shunting cars as practised in the Welland yard was a dangerous system, and the danger consisted in running without proper precaution in the yard. Had the finding stopped there, it would be a question whether it was wrong. But, on being asked to say what proper precautions should have been taken, they added "running backwards without a flagman contrary to the rules." The mere finding that a system is a dangerous one is not of itself sufficient to create liability. A system may be dangerous without involving negligence. It may be the only system that is practicable; and, if persons enter upon or continue willingly to work under it with full knowledge of its inherent dangers, they cannot complain if at some time those dangers culminate in injury. But here the finding is more specific, and it is that the system of running backward without a flagman, contrary to the rules, constitutes the danger. Had this reference to the rules been omitted, it might be said that by "flagman" they meant some one at the rear of the engine or tender, and different considerations might arise as to the propriety of such a finding. But the jury evidently considered that the danger was owing to the fact that it was contrary to the rules; and, if it were so, the existence of rules against it, known to the workman, would constitute danger, in that he would be tempted to rely upon them, whether they were written rules or those of ordinary practice.

Then, as I have said, the evidence does not shew any such rule; and the finding, in its present shape, is, to my mind, unwarranted. The Railway Act, R.S.C. 1906 ch. 37, does, in sec. 276, call for a man at the rear end of a backing engine or train, when crossing a highway, to warn the public thereon. But to say that in a busy yard, where there must be constant backward and forward movement of cars and engines, it is negligence not to have a man so stationed, is another matter.

In the present case there was a most unfortunate conjunction of circumstances, it would almost seem of all circumstances, likely to bring about an accident. A diligent workman engrossed in his work upon the track; an adjoining moving train, which would prevent him from hearing the approaching engine or any warning by bell or whistle from it; an engine moving backward, so that its crew would not have a view along the track ahead; a curve to the north, preventing a view from the south side of the engine; and the train upon the other track, preventing, owing to that curve, a view from the north side. And yet one would think just such concurrences not unlikely to happen frequently,

if not daily, not perhaps at Welland, but wherever there is a curve in a busy railway yard throughout the country. If there be such permanency of probability of coincidence, then it is a question for the jury whether a system which does not guard against danger is not unnecessarily dangerous, and whether there is not negligence at common law on the part of the employer in maintaining it or allowing it to continue.

In my view, the case could not be withdrawn from the jury; but, as I have said, the present findings should not stand, and there should be a new trial; the costs of the former one to be costs in the cause, and the costs of this appeal to be costs to the defendants in any event.

I may add that, with the jury's finding that what was done was contrary to the rules, the negligence would be that of the company's servants, and they would only be liable under the Workmen's Compensation for Injuries Act, so that the judgment for $2,500 would be unauthorised, the jury having found the damages under the Act to be $1,500.

OCTOBER 24TH, 1911.

*PATTERSON v. DART.

Mortgage—Redemption—Account—Interest—Insurance Moneys —Expenditure for Rebuilding — Improvements — Lien — Agreement.

Appeal by the plaintiff from the order of a Divisional Court, 2 O.W.N. 429, affirming an order of LATCHFORD, J., dismissing the plaintiff's appeal from the report of the Judge of the County Court of the County of Essex, to whom (as an Official Referee) the taking of the accounts directed by the judgment in the action was referred.

The action (which was for redemption of mortgaged lands) was dismissed at the trial, but, on appeal, a Divisional Court declared the plaintiff entitled to redeem, and directed an account to be taken "of what is due from the plaintiff to the defendant or from the defendant to the plaintiff, making all just allowances to the defendant for money expended in improvements and rebuilding after fires, the management of the said premises, including the keeping of accounts, the collecting of rents, paying of

*To be reported in the Ontario Law Reports.

insurance and taxes, the overseeing of repairs to the buildings on the said premises, and the time and work given to the rebuilding after the fires on the said premises;" reserving further directions and costs. This judgment was affirmed by the Court of Appeal: 11 O.W.R. 241.

The taking of the accounts was proceeded with, and the present appeal concerned the allowance by the Referee of some of the items of the account brought in by the defendant. No question was raised as to the amounts allowed, the contention being confined to the propriety of any allowance in respect of them.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

Shirley Denison, K.C., for the plaintiff.

J. M. Pike, K.C., for the defendant.

MOSS, C.J.O. (after setting out the facts at length):—The first objection is, that the Official Referee should not have allowed interest to the defendant upon the sums of $1,340.62, the amount of the mortgage-debt, as ascertained or estimated when the agreement of April, 1895, was entered into, and of $1,857, the amount of the judgment then payable to the defendant.* The plaintiff's position is, that, under the agreement, the ascertainment of the correct amount due and payable in respect of the mortgage and judgment was never carried out; and, consequently, there was no debt or sum certain payable by virtue of a written instrument so as to bring the case within sec. 114 of the Judicature Act, and that it was not within sec. 113.

These contentions are not applicable under the conditions existing before the Official Referee. By the judgment, the defendant is allowed to redeem upon the special terms expressed therein, and the Official Referee was bound to have regard to them as well as to the provisions of Con. Rules 666, 667, and 756, all of which were applicable to the proceedings before him.

The defendant was being treated as a mortgagee in possession, and as such accountable for the rents and profits. To charge him with rents and profits, and allow him no interest on the mortgage-debt, would be contrary to equity and justice,

*This refers to a former judgment in an action brought by the Molsons Bank against the present plaintiff and defendant and others, by which the defendant was to recover the sum named from the plaintiff; and to an agreement afterwards made between the plaintiff and defendant, which was not carried out.

and contrary to the course of the Courts. The Official Referee dealt with the case as such cases are ordinarily dealt with upon a mortgagee bringing in his account. The parties admitted before him the correctness of the figures stated in the agreement as shewing the indebtedness at that time; but the plaintiff claimed that he was entitled to be credited with the costs that he was entitled to, over and above those to which the defendant was entitled. This was admitted, and the parties agreed upon $150, and credit was given for that amount upon the sum of $1,340.62, admitted to be due in respect of the mortgage-debt. The Official Referee, having thus, by the admissions and agreement of the parties, ascertained what was due as of the 1st July, 1895, proceeded to take the accounts according to the well-understood rule laid down in McGregor v. Gaulin, 4 U.C.R. 378, charging interest upon the debt up to the date when the rents and profits received exceeded the interest and reduced the principal: Bell & Dunn on Mortgages, p. 156. An examination of the final account as found shews that the Official Referee observed the proper practice. And there can be no question that in so taking the accounts he rightly allowed the defendant interest upon the principal moneys. The judgment bore interest as of course from its date: Con. Rule 116; and the agreement, which was never fulfilled, had not the effect claimed for it of depriving the defendant of the right to be allowed interest upon his mortgage-claim, especially when, as here, he is charged with the rents and profits of the premises as a mortgagee in possession.

The objections to the manner in which the insurance moneys were received and dealt with are covered and answered by the wide terms of the judgment. The Official Referee was not restricted as to the allowances to be made for moneys expended in improvements and rebuilding after the fire, otherwise than that they were to be just, which must mean just to both parties. And it is quite apparent that the reference directed was intentionally designed to cover the state of circumstances which was due in part at least to the plaintiff's delay and apparent acquiescence in what the defendant was doing with the premises during the long period which elapsed between the 1st July, 1895, and the commencement of this action. As between mortgagor and mortgagee in possession, it has long been the rule to allow for reasonable lasting improvements, and especially where the effect of the expenditure has been to increase the revenue from the rents and profits from the premises, which was the case in this instance. And, in order to support such a claim, it has not been necessary to resort to the statutory provisions with regard to

allowances to persons holding under a mistake of title. Even before the enactment of those provisions, relief of that nature was allowed, not only to mortgagees in possession and tenants in common receiving the whole of the rents and profits and making improvements, but to persons holding under a mistake of title. The subject is discussed by Strong, V.-C., in McLaren v. Fraser, 17 Gr. 567, and more fully by Boyd, C., in Munsie v. Lindsay, 11 O.R. 520, at p. 528 et seq., where he points out that the measure of relief allowed to a mortgagee in possession may exceed that which the statute secures to a person holding under a mistake of title. See also Curry v. Curry, 25 A.R. 267, where the same questions were discussed to some extent. In the case at bar the Official Referee, while allowing the expenditure and charging the increased rents and profits, properly credited the insurance moneys as of the respective dates of their receipt, and in thus doing he followed the proper course. It was urged that the agreement of April, 1895, made a different disposition of moneys to be received for insurance. But, as already pointed out, that agreement was made with reference to a condition of affairs expected to result in case it was carried out according to its terms. It was not intended to and could not govern the circumstances which arose after the failure to carry it out.

As to the objection to the allowance for compensation, that is also covered and answered by the terms of the judgment. Having regard to the evidence, the amount allowed does not appear to be excessive or improper, and there is no good ground for interference with the Official Referee's conclusions in regard to the claim.

The remaining objection is pointed at the right of the defendant to be paid the amount of the judgment for $1,857 recovered in April, 1895. Upon the argument of the appeal it was said that this judgment had been assigned by the Molsons Bank to one Watterworth, and that the defendant was not now entitled to it. There is nothing in the printed case pointing to any such disposition of the judgment. But in the printed case in the former appeal to this Court the assignment from the Quebec Bank to Watterworth is one of the exhibits. Referring to it and the judgment in the case of Molsons Bank v. Patterson, Dart, et al., it clearly appears that the assignment has no reference to the judgment for $1,857 obtained by the defendant against the plaintiff. It only deals with the judgment obtained by the Molsons Bank against the plaintiff and defendant with others, which is an entirely distinct recovery.

The appeal should be dismissed with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

GARROW, MACLAREN, and MAGEE, JJ.A., also concurred.

OCTOBER 24TH, 1911.

*HUTT v. HUTT.

Will—Devise—Vested Estate in Interest—Restraint on Alienation—Repugnancy—Invalidity.

An appeal by the plaintiff from an order of a Divisional Court of the 7th March, 1911, dismissing the plaintiff's appeal from the judgment of MIDDLETON, J., at the trial, whereby the action, which was brought to recover possession of land, was dismissed.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. D. Armour, K.C., and W. A. Proudfoot, for the plaintiff.

I. Hilliard, K.C., for the defendant.

MOSS, C.J.O.:—This action is brought by a son of John B. Hutt, deceased, to recover possession from the defendant, who is a grandson of John B. Hutt, of a parcel of land described as the west half of lot 8 in the 6th concession of the township of Winchester, in the county of Dundas.

Both parties claim to derive title from or through one George Alonzo Hutt, a son of John B. Hutt; and their respective rights depend upon the effect of a devise of the lands, contained in the will of John B. Hutt, in the following terms: "I give and bequeath to my son George Alonzo Hutt the west half of lot number 8 in the 6th concession of the township of Winchester, containing by admeasurement 100 acres more or less, to be given him in possession at the time or immediately after his marriage or in the event of his marriage not having taken place, and his brother John Elgin Hutt be deceased, then to be taken into possession at once, said described 100 acres to be not sold by my son George Alonzo Hutt to any other person than to my son John Elgin Hutt for the sum of $1,400. In the event of the decease

*To be reported in the Ontario Law Reports.

of my son John Elgin Hutt taking place before the decease of my son George Alonzo, then my son George Alonzo may sell said 100 acres as and to whom he pleases or bequeath the same to whom he wills."

The main, and indeed it may almost be said the only, question is as to whether the provisions with regard to the disposition of the land by George Alonzo Hutt are valid restrictions or whether they are void as repugnant to the gift of the fee.

Another question was raised and discussed at the trial, as to whether the title to the land ever vested in interest in George Alonzo Hutt. But, when the provisions are carefully examined, there seems to be no question that, notwithstanding the somewhat confused directions as to possession, there is nothing to prevent the vesting of the estate in interest, and no condition or limitation sufficient or effectual to divest that estate at any subsequent period, unless the restriction on alienation imposes one.

And on the argument in appeal it was virtually conceded that the sole question was as to the validity of the provisions in restraint of alienation.

The plaintiff's contention is, that the restraint is only partial and not unreasonable; and that, having regard to the decisions of the Courts of this Province, founded upon and adopting the principles enunciated by Sir George Jessel, M.R., in In re Macleay, L.R. 20 Eq. 186, it is valid and operative to prevent George Alonzo Hutt from selling the land to any one but the plaintiff during his lifetime.

The defendant, on the other hand, contends that, having regard to the decision of Pearson, J., in In re Rosher, 26 Ch. D. 801, and of the Supreme Court of Canada in Blackburn v. McCallum, 33 S.C.R. 65, the restriction as to alienation is void as repugnant to the gift in fee.

The effect of the provisions of the will is to impose upon the devisee a condition which, in substance, prevented him from selling the land to any one but the plaintiff during his lifetime or disposing of it by will to any one unless he survived the plaintiff. In other words, it was, having regard to the evidence as to the actual value of the farm, an absolute restraint against disposal during the plaintiff's life. A provision having a similar effect was held by Pearson, J., in In re Rosher, supra, to be void.

. . . .

In perusing the numerous decisions which appear in the reports relating to the question, one is much inclined to sympathise with, if not entirely to coincide in, the regret expressed by Pearson, J. (In re Rosher, p. 814), and repeated by Meredith,

J., in McRae v. McRae, 30 O.R. 54, at p. 58, that the rule against repugnancy had ever been departed from.

In re Macleay was decided by Sir George Jessel, M.R., in 1875. The decision of Pearson, J., in In re Rosher was given in 1884. In the interval this Court dealt with a similar question in Earls v. McAlpine (1881), 6 A.R. 145. . . . The Court did not assume to adopt or follow the decision of the Master of the Rolls in In re Macleay or to lay down any principle of general application. But, if it did affirm a principle contrary to what was subsequently propounded in In re Rosher, still, notwithstanding anything that is suggested by the Judicial Committee in Trimble v. Hill, 5 App. Cas. 342, it would be the duty of this Court to accept Earls v. McAlpine, as long as it stood unreversed or unvaried by the Supreme Court or the Privy Council, in preference to In re Rosher. . . .

[Reference in regard to the authority of decisions, to Jacob v. Beaver, 17 O.L.R. 496, 499, 500; Macdonald v. McDonald, 11 O.R. 187. Reference to Blackburn v. McCallum, as to the restriction upon alienation.]

In view of the opinions expressed and the decision actually rendered (in Blackburn v. McCallum), it must be taken that, to the extent to which Earls v. McAlpine determined that a restriction upon alienation limited to the lifetime of a third person is a condition valid at law, it must be deemed to be no longer a binding authority, and that the decision in Blackburn v. McCallum is to be accepted as determining the contrary.

Comparing the provisions of the will in that case with those of the will in the present case, the restrictions imposed by the latter are quite as absolute as in the former. Not only is the devisee, by the stringent terms of the will, prevented from selling, but he is rendered incapable of disposing of it by will unless in the event of his surviving the plaintiff. In effect, the power of disposal is so fettered as to be incapable of exercise for the lifetime of the plaintiff. There is no other form of transfer or disposition by which he could effectively avail himself of the right to deal with the lands as his own, without forfeiting his estate. . . .

It is only necessary to conclude that, upon the language of the will and the circumstances of this case, it is governed by the decision of the Supreme Court.

The appeal should be dismissed with costs.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH and MAGEE, JJ.A., agreed in the result, each giving reasons in writing.

HIGH COURT OF JUSTICE.

RIDDELL, J. OCTOBER 20TH, 1911.

BOEHMER v. ZUBER.

Trespass—Occupant of Office in Hotel—Sale of Hotel under Power of Sale in Mortgage—Notice of Sale—Removal of Books and Papers of Occupant—Deposit in Unsafe Place.

An action against the defendant Zuber and his co-defendants, his servants, for $10,000, for that they "came and broken open and entered into the . . . office premises of the said plaintiff, and took and carried away therefrom certain goods, chattels, and personal property of the plaintiff, as well as certain chattels, books, and papers, not the property of the plaintiff, but in his care and custody, causing loss and injury to the plaintiff."

The action was tried without a jury.

W. M. Reade, K.C., for the plaintiff.

F. E. Hodgins, K.C., and J. A. Scellen, for the defendants.

RIDDELL, J.:—Zuber, owning a hotel property in Berlin, sold in April, 1909, to Floyd Boehmer, son of the plaintiff; he mortgaged to Pipe and also to Dunke and sold to the Kaiserhof Hotel Company. Pipe assigned his mortgage to Irwin, who assigned it to the defendant Zuber; Dunke also assigned to Zuber his mortgage.

The plaintiff had been occupying a room in the hotel as an office, and continued so to do; but, on the whole, I think he did so as representing his son. On the 10th February, 1910, the plaintiff, acting for his son, settled with the Kaiserhof Hotel Company in respect of an account of $1,368 claimed against the company. In the settlement, rent, $300, was allowed the company; this, on the evidence, it is plain, was for the office for one year from the 2nd April, 1909, to the 2nd April, 1910. I think, also, that it was the rent of Floyd Boehmer, and not of the plaintiff; but this is perhaps immaterial.

Interest falling in arrear, notice of exercise of power of sale was served upon the company; the plaintiff was interested in the company, and knew that notice of exercise of power of sale had been served—he knew the contents of the notice, but took no steps to prevent the sale. He was not personally served with

notice; and, if he had been, he would not have done more than he actually did.

The sale took place on the 15th July, 1910. The plaintiff remained in occupation of the office with some books, papers, etc. On or about the 18th August, the plaintiff went away from Berlin with his wife, temporarily, leaving his house locked up. On the evening of the 18th August, the defendant Zuber found the office door unlocked; and on the 19th he sent his co-defendants, who went into the office, through the front door, unlocked, as I have said, and carefully and prudently gathered the books, papers, etc., put them into boxes, etc., and took them to the plaintiff's house. Finding that place locked up and no one in, they left the goods on the verandah of the house, the plaintiff admittedly having no other house or place of business. The plaintiff came home some days after this occurrence, and found that some of his papers had been scattered by the wind—one apparently lost. The damage, however, is trifling, and I assess that at $10—to which sum, with Division Court costs, with a set-off of High Court costs, the plaintiff will be entitled, if he is entitled to anything.

But the defendants contend that he is not entitled to judgment at all.

It has been said that a tenant may redeem or procure one to redeem for him: Coote, 7th ed., p. 714. And any one who has the right to redeem is entitled to notice of exercise of power of sale: Re Abbott and Medcalf, 20 O.R. 299.

But it has not been held that an occupant like the plaintiff—even if the fact is, as I find it is not, that he was the tenant in the tenancy from April, 1909, to April, 1910, and thereafter remained in possession as a tenant whose term had expired—has a right to redeem. He was not entitled to notice of the exercise of power of sale. Nor had he any right to have his goods upon the premises of the defendant Zuber. The defendant Zuber can avail himself of the time-honoured plea to this action for trespass, that the goods were incumbering his property, "whereupon the defendant took the said goods and removed them to a small and convenient distance and there left the same for the plaintiff's use, doing no more than was necessary for that purpose:" Bullen & Leake's Precedents in Pleadings, 3rd ed., pp. 799, 800.

So far, I had no doubt at the trial, but I reserved judgment to consider whether what was done with the goods by the defendants answered all the requirements of the law in that regard. My doubts have been removed. It seems that a removal, even upon the public street, is justifiable: Ackland v. Lutley, 9 A. &

E. 879; Carruthers v. Hollis, 8 A. & E. 113. This will answer the suggestion that it was improper to remove these goods to and leave them at a place at which they might be tampered with by others.

The case of Rea v. Steward, 2 M. & W. 424, shews that the defendants were justified in going upon the premises of the plaintiff with the goods. At p. 426 the learned Judge cites Viner Abr., Trespass, pl. 17 (1, a), and Rolle Abr., Trespass, 1 pl. 17, p. 566; and decides, following these, that one is justified in taking from his close the goods of another and in taking them to and leaving them upon the premises of that other.

Pratt v. Pratt, 2 Ex. 413, Drewell v. Towler, 3 B. & Ad. 735, Melling v. Leak, 16 C.B. 652, among other cases, may also be looked at.

I think the action should be dismissed with costs.

MIDDLETON, J. OCTOBER 20TH, 1911.

RE SAWDON.

Will—Construction—Life Insurance Policy Payable to "Heirs according to Will"—Bequest of Residue to Nephews—Power of Appointment — Wills Act, sec. 30 — Ontario Insurance Act, sec. 2, sub-sec. 36—Amendment by 7 Edw. VII. ch. 36, sec. 1—Moneys of Infants—Retention in Court—Costs.

Motion by the executors of James Edgar Sawdon for an order declaring the construction of his will in relation to an insurance of $500 in the Royal Templars of Temperance. The insurance moneys had been paid into Court by the society.

W. E. Raney, K.C., for the executors.
W. S. Ormiston, for the next of kin.
J. R. Meredith, for the infants.

MIDDLETON, J.:—By policy of the 18th May, 1909, the society agreed to pay $500 to "heirs according to will or such other person as the said member may hereafter legally designate."

The member, an unmarried man, whose father and mother are both dead, by will dated the 30th October, 1909, after some small legacies, gave "to my nephews Samuel Sawdon-Smokum

and George Guy Sawdon all that is left;" this to be held by the executors in trust during the nephews' minority.

This insurance money is now claimed by the infants, and the executors as trustees for them.

The next of kin of the insured, his surviving brothers and sisters, also claim this fund.

In any aspect of the case, I think the infants take.

Manifestly the word "heirs" is not used in its strict legal sense. By the expression "heirs according to will" the deceased meant those who according to his will would succeed to his property.

Rose v. Rose, 17 Ves. 347, is an illustration of this use of the word. There the testator directed that, in the event of a lapse, the property was to go to "my heir under this will." The Master of the Rolls, Sir William Grant, said that there was "no doubt" that this meant the testator's daughter, his residuary legatee.

The same result is arrived at in another way.

This policy is not payable to a "preferred beneficiary;" and, therefore, the insured had a general power of appointment; and, by virtue of sec. 30 of the Wills Act, 10 Edw. VII. ch. 57, the general residuary bequest to the infants includes this policy as personal estate "which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will." The section gives to the will the same effect as an appointment executed in conformity with the statutory power found in the Insurance Act.

It must be borne in mind that sec. 30 of the Wills Act cannot be relied on where the policy is payable upon its face, or by any duly executed document, to any preferred beneficiary, because the insured has then only a limited power of appointment, and cannot appoint "in any manner he may think proper."

I do not think that sec. 2, sub-sec. 36, of the Ontario Insurance Act, R.S.O. 1897 ch. 203 (as amended by 7 Edw. VII. ch. 36, sec. 1), applies, as here the expression is not "heirs" but "heirs according to will."

There will, therefore, be an order declaring that this money is equally divisible between the two named infants, and directing it to be placed to their credit and to be paid to them, with accumulated interest, on attaining majority, unless in the meantime order is made to the contrary.

It is not the practice to order money of infants to be paid out of Court for investment, even when the will authorises the executor to hold and invest.

The costs of the executors (and their solicitor, who was appointed to represent these infants as guardian ad litem) and of the Official Guardian, who represented infants having an adverse interest, may be paid out of the fund before division. Otherwise no costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 20TH, 1911.

RE BEAM.

Will — Construction — "My Life Insurance" — Policy Payable to "Legal Heirs"—Limited Control—Words of Will Confined to Insurance with which Testator had Power to Deal—Payment to Widow and Children in Equal Shares—Insurance Act, sec. 2, sub-sec. 36—Amendment by 7 Edw. VII. ch. 36, sec. 1.

Motion by the widow of a deceased assured for payment out of Court of insurance moneys paid in by trustees.

H. S. White, for the widow.
J. R. Meredith, for the infants.

MIDDLETON, J.:—The testator, by his will, after giving his wife certain land and personal property, says: "I give her also my $3,000 life insurance to be hers absolutely."

There was $3,000 insurance, $2,000 in the Oddfellows, payable to the wife (this she has received), and $1,000 in the Foresters, payable "to his legal heirs," which has been paid into Court.

The testator left his widow and two infant children; and, according to the statute R.S.O. 1897 ch. 203, sec. 2, sub-sec. 36, as amended by 7 Edw. VII. ch. 36, sec. 1, and interpreted in Re Hamilton and Canadian Order of Foresters, 18 O.L.R. 121, unless the will gives this $1,000 to the wife, she and her sons each take a third. The $2,000 policy was in favour of the wife, and probably did not fall within the description contained in the will, as the testator purported to deal only with his own insurance. In re Cochrane, 16 O.L.R. 328, shews that when a testator speaks of "my life insurance" he is not to be regarded as dealing with insurance which he has declared to be for the benefit of a preferred beneficiary. This, by the statute, then ceased to be

his, and became a trust fund over which he had a limited statutory power.

The fact that the testator had no control over this $2,000 does not of itself render the clause inoperative, but the clause must be read as though what had been given the wife was "my life insurance."

The head-note of Re Cheesborough, 30 O.R. 639, goes beyond what was actually decided, and the true effect of the decision is pointed out in In re Cochrane, supra, at p. 333. General words, such as here used, applying to all the testator's insurance, are sufficient to constitute a declaration under the Insurance Act without further identification of the policies as to all insurance to which they can be applied, that is, as to insurance which is the testator's own. What In re Cochrane determines is, that these words cannot be made to apply to that which, by the earlier declaration, has ceased to be the testator's.

This view of the decisions was accepted by Mr. Justice Clute in Re Watters, 13 O.W.R. 385; and I do not regard Re Earl, 1 O.W.N. 1141, as in any way in conflict with it.

The policy payable "to the legal heirs" must, in view of the interpretation section, be read as payable "to the widow and children in equal shares," and is, therefore, not subject to the will.

To hold that the will could be read as meaning "the $3,000 insurance now upon my life," would be in direct conflict with In re Cochrane, which has, I think, confined the expression "my insurance" to the narrower meaning "the insurance which is mine"—an expression which, as I have pointed out in Re Sawdon, ante, is again expanded by the Wills Act so as to include all insurance over which the testator has a general power of disposition.

One-third of the money may be paid to the widow, and the remaining thirds should be placed to the credit of the infants and be paid to them on majority.

Costs out of the fund.

MIDDLETON, J. OCTOBER 21ST, 1911.

RE ONTARIO ACCIDENT INSURANCE CO.

ROLPH & CLARK'S CASE.

LAWRENCE'S CASE.

Company—Winding-up—Contributories—Conditional Subscriptions for Shares—Fulfilment of Condition by Subscription for a Certain Number of Shares by Others—Inquiry as to Other Subscriptions—Acceptance of Shares—Letters—Acquiescence.

Two appeals by the liquidator from certificates of a Referee, in winding-up proceedings, upon a reference back to the Referee by order of MEREDITH, C.J.C.P., of the 12th December, 1910.

By these certificates it was found that the condition upon which alone the subscriptions for and allotments of shares were to become operative, *i.e.*, the subscription of 900 shares, had not been complied with. Four subscriptions, those of Pelletier, Grondin, Ross, and Mills, were dealt with in the evidence. The Referee found in the liquidator's favour as to Ross and Mills and against his contention as to Pelletier and Grondin.

W. N. Tilley, for the liquidator.
J. E. Jones, for Rolph & Clark and Lawrence.

MIDDLETON, J.:—If the liquidator is right as to Ross and Mills, and Pelletier ought to be added, the condition has been complied with, and Grondin's position need not be considered.

Dealing first with Pelletier's case. Pelletier gave a power of attorney to Eastmure, and, after the lapse of several months, Eastmure subscribed, and a stock certificate was issued and sent to Pelletier. It may be that the delay and the fact that there was not then a formal allotment warranted Pelletier in refusing to accept and in cancelling Eastmure's authority. I do not think it is necessary to consider this aspect of the situation, because, upon Pelletier's attempting to withdraw, Eastmure denied his right, and, as the result of the correspondence that ensued, Pelletier, in my view of the evidence, elected to ratify his subscription and to accept the stock upon the terms, which amount to a condition subsequent, that the calls should be paid by his contra account as solicitor. This aspect of the case does not ap-

pear to have been considered by the learned Referee. Standing by itself, the letter of the 21st January would no doubt be a withdrawal of any authority to Eastmure and any offer made by him, assuming in his favour that there had been no acceptance. Eastmure met this by an explanation of the affairs of the company in which he endeavoured to make it plain to Pelletier that it was in his interest, both from a financial standpoint and as the solicitor of the company in Quebec, to reconsider his determination to withdraw; and at the same time his contention that there was no right to withdraw was not by any means concealed.

The list of shareholders had to be completed by the 31st March, 1908; and this was well known to Pelletier. The fate of the company depended in large measure upon the report to be then sent to the Government.

On the 19th February, Eastmure wrote to Pelletier: "Our annual meeting takes place on February 25th, and in dealing with the new stock issue, if we cannot arrange matters satisfactorily in Quebec before then, I suppose, as I completed the subscriptions upon the strength of the powers of attorney given me, that we shall have to treat them as in existence and thresh the matter out afterwards." No answer to this letter is produced.

On the 21st March, Eastmure again wrote: "We have not yet disposed of the subscriptions you gave me to the company's stock, and, as we have to complete the matter before the end of the present month, I had better write you about it." Then follows some discussion of the financial position of the company and the statement: "It is necessary that the question be disposed of during the present month, and that is why I want you to retain your present holding. We shall be able to reciprocate very fully in a business way. . . The completion of your subscription will be a favour, there being no time now for placing it elsewhere. The amount to be called is, as already advised you, 25 per cent. . . In your case the matter can be dealt with if you desire on a contra account."

On the 23rd March this is answered thus: "I have already given you fully the reasons why I cannot take up that stock now. However, as you have offered me in one of your letters to pay for that stock with fees which may become due me by your company for professional services, I am prepared to stretch a point in order to meet you on those lines. I understand the amount to be paid for this stock will be $1,000."

This was understood by the company to be an acceptance, as on the 10th April they wrote asking for a voucher for the

$250 which had been credited on the call. No reply was made to this, but on the 10th July a change was made in the organisation of Mr. Pelletier's firm, and a letter was written asking acceptance of a draft for $301, the amount of a bill rendered the previous year.

On the 17th July, the company answered stating that $250 had been credited on the call, and that a draft for $51, the balance, would be accepted.

On the 1st August, the firm wrote that Mr. Pelletier's "only undertaking was to take stock, which he will pay out of the proceeds of any new business to our firm."

The winding-up order was pronounced on the 31st July.

This correspondence satisfies me that the letter of the 23rd March was an acceptance of the stock, upon the terms indicated, and that it was so understood by Pelletier. I am not concerned with the interpretation of these terms.

When Mr. Pelletier's evidence was taken, the liquidator had not found the letter of the 23rd March among the company's papers, and Mr. Pelletier did not produce a copy of it, and gave his evidence on the assumption that the letter of the 21st March had not been answered, and so no questions were put to him about it.

With reference to the letter of the 10th April and the failure to answer it, this took place:—

"Q. You did not object to this letter? A. Well, I did not answer the letter. I thought it was a clever move on my part not to answer the letter, remaining on good terms and not objecting, as I had taken my stand in previous letters.

"Q. Well then, can I say that you tacitly consented? A. Oh, no. To the credit? If I had consented, I would have written that I accept. I was waiting to see how things would turn out. . . .

"Q. It was to cover future work to be done? A. When I got that letter, I thought it was not the position as it should be. To be very frank about it, I thought if I did not answer that letter, my stand having been taken, I would not have been compromised, and it might help the company to remain on its feet, and, being the company's representative in Quebec, I did not want to put any obstacle in the way.

"Q. Why did you not answer that letter of the 10th April? A. Well, I did not wish to answer that letter of the 10th, if my memory serves me right, because my previous letters had stated my position in the matter, and I did not wish to depart from it, except if the company became a success. I was its advisor and wanted to go very smoothly about it."

This is exactly the kind of a case which falls within the rule laid down in Weidmann v. Walpole, [1891] 2 Q.B. 537. A business man in a business matter must not play fast and loose in this way; and, when Pelletier knew that the company were treating him as a shareholder, and had credited him with $250, part of his contra account, as against the call upon this stock, there was an obligation upon him to reply, and his silence amounts to acquiescence.

So, on both grounds, that the letter of the 23rd March was an acceptance of the stock, and the silence after receipt of the letter of the 10th April amounts to an estoppel, I think Pelletier was a shareholder.

Mr. Jones attempted to uphold the finding by shewing that Ross was not a shareholder. It was objected that there was no cross-appeal, but I ruled that this was open to him without any cross-appeal, because the finding was not as to Pelletier or Ross, but a finding in his favour that 900 shares had not been subscribed, and that he might support this finding in any way the evidence would warrant.

Upon the evidence, I agree with the Referee's findings as to Ross.

In the result, the appeal must be allowed and Messrs. Rolph & Clark and Lawrence must be placed upon the list of contributories.

I can see no reason for withholding costs from the liquidator.

DIVISIONAL COURT. OCTOBER 21ST, 1911.

*OTTAWA WINE VAULTS CO. v. McGUIRE.

Fraudulent Conveyance—Husband and Wife—Voluntary Settlement—Consideration—Assumption of Mortgage—Covenant—Bar of Dower—Solvency of Husband—Value of Assets—Goodwill of Business—Intent—13 Eliz. ch. 5.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex.D., 2 O.W.N. 987, in favour of the plaintiff, setting aside, as against the plaintiffs and all other creditors of the defendant John L. McGuire, a conveyance of land by that defendant to his wife, the defendant Hattie McGuire.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*To be reported in the Ontario Law Reports.

F. B. Proctor, for the defendants.
W. D. Hogg, K.C., for the plaintiffs.

RIDDELL, J.:— . . . I cannot say that argument and perusal of the evidence justify any material alteration of the facts as to the financial standing of the settlor at the time of the settlement. Nor can I find evidence to shew that there was any contract at the time the wife joined in the conveyance of the Toronto property, although, in view of Pratt v. Bunnell, 21 O.R. 1, and similar cases, the statement of the learned Chief Justice that the husband could convey the equity of redemption without the wife's concurrence may require modification. This statement of the law would not in any case be conclusive against the wife—it is immaterial that she has in fact and in law no right to dower, etc., if she bona fide believed that she had: Forrest v. Laycock, 18 Gr. 611; McDonald v. Curran, 1 O.W.N. 121, 389. So, too, while the assumption of and covenant to pay the $3,350 mortgage might well be a valuable consideration under different circumstances, it would savour of absurdity to call these such in the present instance. The doctrine of Price v. Jenkins, 4 Ch. D. 483, 5 Ch. D. 619, has not extended to cases under 13 Eliz.; and such cases as In re Ridler, 22 Ch. D. 74, and Green v. Paterson, 32 Ch. D. 95 (see p. 104), so decide. Harris v. Tubb, 42 Ch. D. 79, and In re Latham, 53 L.J. Ch. N.S. 928, are cases of a different kind.

It is, I think, plain that the real transaction was a voluntary gift to the wife—a voluntary settlement of the equity of redemption of the Madoc property, and that no one contemplated the liability on the covenant as a real liability. . . .

[The learned Judge then found that the settlor's assets were, at the time of the settlement, considered from a business point of view, $14,180 (including his business, chattels, and goodwill), and his liabilities only $3,947.]

It is argued that "goodwill" is not to be considered as an asset, and Ex p. Russell, 19 Ch. D. 588, is relied upon. . . .

[The learned Judge quoted from that case, and distinguished it.]

The goodwill is, of course, an asset—it is worth something; but, when a tradesman is carrying on his business, he cannot use the goodwill to make money with which to pay his debts—that is not at all to say that the goodwill of a business is not to be taken into account in determining a man's financial standing; still less is the goodwill of a business but recently bought to be disregarded when the inquiry is not, "What is the effect of

a settlement?'' but, ''With what intent was it made?'' These are not the same thing—although the intent may be inferred, perhaps in some cases necessarily inferred, from the effect: Ex p. Mercer, 17 Q.B.D. 290.

I cannot find anything in the evidence to justify a holding that the settlor had any idea that he was in other than thoroughly solvent circumstances when he made the settlement, or, indeed, that he was in fact insolvent. His business was good and a paying business; his liabilities seem to have been promptly met—and, even if we neglect the value of the goodwill, I am unable to see that there is any ground upon which intent can be found.

His difficulties arose from the action—not, I venture to think, to be anticipated—of the License Commissioners; and in some part from other causes subsequent to the settlement. But these subsequent troubles and their effect do not help to fasten guilty intent upon the settlor: per Malins, V.-C., in Crossley v. Elworthy, L.R. 12 Eq. at p. 167.

I am of opinion that the judgment appealed from should be reversed and the action dismissed, both with costs.

BRITTON, J., agreed that the husband was in fact, and thought himself to be, in solvent circumstances when he executed the conveyance to his wife. He referred to Elgin Loan Co. v. Orchard, 7 O.L.R. 695. The appeal should be allowed with costs, and the action dismissed with costs.

FALCONBRIDGE, C.J., dissented, for reasons stated in writing. He thought that the majority of the Court had placed too large a value upon the business, chattels, etc., including goodwill. The business was a hotel business, and was not on the same plane as other businesses, being subject to control by the License Commissioners. Any one going into the liquor business incurs risks. There is a hazard which is or ought to be in the contemplation of any one embarking in or carrying on that business; and this consideration bears on what was or ought to have been the attitude of mind of John L. McGuire when he made the settlement impeached. The fraudulent intent should, therefore, be inferred, and the case is distinguishable from Elgin Loan Co. v. Orchard.

MULOCK, C.J.Ex.D. OCTOBER 23RD, 1911.

NOBLE v. NOBLE.

Limitation of Actions—Possession of Land for Statutory Period —Limitations Act, 10 Edw. VII. ch. 34, sec. 23—Mortgage—Registered Discharge—Effect of—Registry Act, 10 Edw. VII. ch. 60, sec. 62—Lien for Mortgage-debt Paid off—Parties—Pleading.

Action by Thomas A. Noble to recover possession of certain lands in the city of Brantford.

W. S. Brewster, K.C., for the plaintiff.
T. Woodyatt, for the defendant.

MULOCK, C.J.—On the 8th September, 1894, the plaintiff's son, Frank Noble, married the defendant; and the plaintiff, desiring to provide them with a home, on the 20th February, 1895, purchased the lands in question, which consisted of a house and grounds in Brantford, and on the same day executed a mortgage thereon to secure the sum of $650 and interest. On the 1st April, 1895, Frank Noble, with the defendant, his wife, took possession, and with his father's consent remained in undisturbed possession until the month of April, 1907, when he became insane and was removed to an asylum, where he remained until he died intestate on the 24th April, 1908, leaving him surviving his widow, the defendant, and one child, Grace, aged fourteen years. No administrator of his estate has been appointed.

When Frank Noble was removed to the asylum, his wife and child continued to occupy the premises as a home, and were in such possession on Frank Noble's death, and remained in possession until about the 30th May, 1908, when the property was rented by the defendant to one Frank Smith, who occupied it as tenant from the 17th June, 1908, until the 17th October, 1909, when he vacated, giving the key to the defendant, who retained it, and about a month thereafter resumed possession, and has so remained ever since.

There is a slight discrepancy between the evidence of the plaintiff and the defendant as to the circumstances under which the premises were rented to Frank Smith; but I think the plaintiff, in the transaction, acted as agent for the defendant.

The plaintiff from 1895 until 1910 each half-year paid interest accruing on the mortgage in question, and on the 28th

February, 1910, paid off the principal and interest owing and obtained a statutory discharge thereof, which, on the 11th January, 1911, was duly registered in the registry office.

On the 1st April, 1895, Frank Noble, on taking possession, became tenant at will of the plaintiff: Keffer v. Keffer, 27 C.P. 257; and at the expiration of one year, viz., on the 1st April, 1896, the statute began to run in his favour.

From that date until the 1st April, 1906, he remained in undisturbed possession, not paying rent or in any way recognising the plaintiff's title; so that the plaintiff became barred on the 1st April, 1906, unless the circumstance of his having made payments on the mortgage prevented the statute running against him.

The language of the section of the statute relied upon by the plaintiff is as follows: "Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued:" 10 Edw. VII. ch. 34, sec. 23.

The object of the statute was not to benefit mortgagors, but mortgagees, by making "mortgages on available security, where they were good and valid in their inception, and the mortgagee, having received payment of his interest, cannot be charged with any laches:" Doe d. Palmer v. Eyre, 17 Q.B. 366, 371.

In Henderson v. Henderson, 23 A.R. 577, Maclennan, J.A., expressed the opinion, concurred in by Burton, J.A., that a mortgagor, on the registration of a certificate of discharge, become a "person entitled to or claiming under" the mortgage, but this opinion was not adopted by the majority of the Court. With great respect, the view of Maclennan, J.A., does not commend itself to me. Where the owner of lands mortgages the same, he remains in equity the owner subject to the mortgage charge, and, when it is discharged and the certificate thereof registered, the substantial result is, that the mortgage transaction has been wiped out as effectually as if the mortgage had never existed, and the owner continues as owner by reason of his original title, the mortgage never having in fact been a link in his chain of title. I, therefore, fail to see how here the mortgagor can be said to be a person entitled to or claiming under a mortgage made by himself. The point came up for consideration in Thornton v. France, [1897] 2 Q.B. 143, and the view of the Court was that the owner of land who pays off a mortgage thereon does not thereby become "a person claiming under a

mortgage" within the meaning of the statute. Following that case, I think the plaintiff must fail, unless saved by the Registry Act, 10 Edw. VII. ch. 60, sec. 62.

This section declares that "the certificate when registered shall be a discharge of the mortgage, and shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

The object of this section is to enable a registered certificate to operate as a release of the mortgage and as a conveyance of the legal estate to the mortgagor or other parties entitled thereto, but not so as to defeat the rights acquired against the mortgagor after the making of the mortgage. Further, the "original estate" mentioned in the section means the estate granted to the mortgagee; and, in the present case, does not include the right to possession of the mortgaged lands. That right was reserved to the mortgagor, and at no time during the currency of the mortgage was the mortgagee in possession.

In the meantime Frank Noble had, as against the mortgagor, acquired title by possession, but the mortgagor's estate in the lands did not thereby pass to Frank Noble, but remained in the mortgagor, the statute, while barring the owner from recovering possession, not transferring to the party in possession any title or estate in the land: Tichborne v. Weir, 8 Times L.R. 713. Thus, the registered certificate, operating as a reconveyance to the mortgagor of the "original estate" held by the mortgagee, does not include the right of possession; and, consequently, does not affect or disturb any right of possession acquired by Frank Noble.

Mr. Brewster contended that, in the event of the plaintiff failing to recover possession, he was entitled to a lien on the land to the extent of the mortgage-debt paid off by him. This contention raises an entirely new issue, not open to the plaintiff on the present pleadings and as the action is at present constituted. In the trial of such an issue a representative of the estate of Frank Noble would be a necessary party. For such purposes his widow, the defendant, does not represent the estate. She may ultimately have a beneficial interest in the property, but at present as the party in possession she is simply defending her possession against the claim of the plaintiff, who has no right to dispossess her.

For these reasons, I am unable to deal with the question thus raised by Mr. Brewster.

The action fails and should be dismissed, but without costs.

DIVISIONAL COURT. OCTOBER 23RD, 1911.

BANK OF MONTREAL v. PARTRIDGE.

Appeal—Right of Appeal to Divisional Court—County Court Appeal—Order for Arrest—Want of Jurisdiction.

Appeal by the defendant from an order for his arrest made by the Judge of the County Court of the County of Kent, in an action in that Court.

The appeal came on for hearing before BOYD, C., LATCHFORD, and MIDDLETON, JJ.

J. G. Kerr, for the plaintiffs, objected that the appeal did not lie.

J. M. Ferguson, for the defendant.

The judgment of the Court was delivered by MIDDLETON, J.:—In this case the defendant has mistaken his remedy. Upon an order for arrest being made, in the High Court, the defendant may, if he thinks the order has been granted upon improper material, move under Con. Rule 538 to rescind the order. Quite apart from this special jurisdiction (originating in the Rules of the 1st January, 1896, to meet the situation pointed out in McNab v. Oppenheimer, 11 P.R. 214), "the Court out of which the process issued has general jurisdiction . . over the acts and decision of the Judge granting the order, to revoke the order or to discharge the prisoner, proceeding upon the same identical material that was before the Judge:" Damer v. Busby, 5 P.R. 356, at p. 389.

In County Court cases it is open to the defendant to seek similar relief. Such applications must be made in the County Court.

In addition, there is the special jurisdiction conferred by the statute, now found in Con. Rule 1047, to move for discharge from custody. This motion for discharge is an entirely independent and original proceeding, based upon the arrest, and upon it the defendant undertakes, upon new material, to satisfy the Court that his further detention is unwarranted—the intention to abscond having been displaced: Toothe v. Frederick, 14 P.R. 287. Upon such a motion the original order for arrest is not the subject of attack; and, if discharge is ordered, it still stands and affords protection to those acting under it. In County Court cases, this motion must be made in the County

Court. In High Court cases, the motion may be made either to a Judge of the High Court or to a County Court Judge who has made an order for arrest under the special jurisdiction conferred upon him under 9 Edw. VII. ch. 50, sec. 3 (2). Any order upon a motion for discharge made by a County Court Judge is subject to appeal—to a Divisional Court—but no right of appeal is given from the original order for arrest.

This motion, therefore, fails for lack of jurisdiction, and must be dismissed. No costs.

DIVISIONAL COURT. OCTOBER 24TH, 1911.

FISHER v. MURPHY.

Motor Vehicles Act—Injury Caused to Person Driving by Overtaking Motor Vehicle—Negligence—Onus—Evidence.

Appeal by the plaintiff from the judgment of the County Court of the County of Lincoln dismissing the action, which was brought to recover damages for personal injuries caused to the plaintiff by a collision of the buggy in which she was driving with a motor vehicle driven by the defendant.

The appeal was heard by BOYD, C., BRITTON and MIDDLETON, JJ.

A. W. Marquis, for the plaintiff.

M. J. McCarron, for the defendant.

The judgment of the Court was delivered by MIDDLETON, J.:—In this case a perusal of the evidence convinces me that the defendant has failed to satisfy the onus placed upon him by the statute. In fact, the whole evidence, apart from this onus, satisfies me that he was to blame. The accident occurred "by reason of a motor vehicle upon a highway;" and by sec. 18 of the Motor Vehicles Act, 6 Edw. VII. ch. 46, the onus is upon the defendant to shew that the accident did not happen by his negligence or improper conduct.

By sec. 6 the speed is limited to ten miles; and by sec. 10, upon overtaking a vehicle drawn by a horse, the motor vehicle shall not approach within 100 yards at a greater speed than seven miles per hour, and the person in charge shall signal his desire to pass, so that the driver may turn out and be passed with safety.

In this case the whole evidence goes to shew that the Act was not complied with, and that such non-compliance caused the accident.

The plaintiff and a companion were being driven up a heavy hill in a buggy, the horse going at a walk. They were on the right side of the road. The automobile, overtaking, in some way struck the rig and overturned it. The contact was with the left hind wheel of the buggy. The automobile at the time of the impact was so far turned towards the right as to be almost at right angles to the road, and the left guard struck the buggy.

The defendant's case is, that the driver was about to pass on the left, when the plaintiff turned sharply, and, to avoid striking the horse, he attempted to turn his automobile into the bank. The motorman, Jones, says that he was going seven miles per hour, and saw the horse moving towards the centre when 25 or 30 feet from them. Then was the time to act, and, had he been going at less than seven miles per hour, he could and ought to have brought his machine to a standstill in less than 30 feet. He was bound to be on the alert, and had the heavy grade to help him. As it was, he struck the buggy so hard as to shove it, according to his own account, four feet to the side, before it turned over.

The driver of an automobile is called upon to signal before passing, and he should watch to see that his signal has been heard, and that way is being made for him to pass. While it is quite true that a motor is not an outlaw, it must also be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation.

I think the appeal should be allowed, and there should be judgment for the plaintiff for $200 and costs throughout.

SUTHERLAND, J. OCTOBER 24TH, 1911.

HOLMAN v. KNOX.

Landlord and Tenant—Tenant Taking down Wall of Building—Absence of Permission from Landlord—Breach of Covenant to Repair and Keep in Repair—Forfeiture—Landlord and Tenant Act, R.S.O. 1897 *ch.* 170, *sec.* 13—*Proper Notice not Given—Waiver by Receipt of Rent—Knowledge—Receipt without Prejudice—Election by Action Brought first for Injunction and Damages only—Relief against Forfeiture—Right to "Build and Rebuild"—Restoration of Wall—Mandatory Order—Pleading—Prayer for General Relief—Damages to Reversion—Costs.*

Two actions by the trustees under the will of the Honourable William McMaster, deceased: (1) for an injunction restraining

the defendants, the lessees from the plaintiffs of the premises on the north-west corner of Queen and Yonge streets, in the city of Toronto, from taking down the wall between the building on the land demised to them by the plaintiffs and a building adjoining it, upon land also demised to the defendants, and for damages; and (2) to recover possession of the land demised by reason of breaches of covenants in the lease, and for damages. The actions were consolidated.

W. N. Tilley, for the plaintiffs.
E. D. Armour, K.C., for the defendants.

SUTHERLAND, J. (after stating the facts and referring to the pleadings and the evidence):—The question as to whether the plaintiff did or did not, knowing that an opening in the basement had already been made, give permission to the defendants, at the interview on the 5th April, 1909, to go on with the main portion of the work to be done, pending an agreement to be made between the parties, is a matter of importance in determining this action. I have come to the conclusion that the testimony of the plaintiff Thomson is to be preferred to that of the defendants. . . . The fact appears to be that the defendants were very anxious to proceed with the work, and assumed, without leave or license, to go on with it and take the chances.

I, therefore, find as a fact that no leave was given to the defendants to proceed with the work, as they allege.

I think that, under the terms of the lease, the defendants had no right to make openings of the kind they did in the wall in question, and that their so doing was a breach of the covenant to repair and keep in repair contained in the lease. . . .

The plaintiffs ask that a forfeiture of the lease be declared, and that they be given possession of the premises. As to this branch of the case several contentions are put forward on behalf of the defendants. In the first place, they say that the notice referred to in paragraph 7 of the statement of claim, and dated the 6th July, 1909, is not a notice given under sec. 13 of the Landlord and Tenant Act, R.S.O. 1897 ch. 170, but is a notice given under the clause as to repair in the Act respecting Short Forms of Leases, R.S.O. 1897 ch. 125; and an examination of it would appear to confirm this view. . . . It would appear, therefore, that no notice as to the forfeiture of the lease, in the terms required by the Landlord and Tenant Act, sec. 13, was given; and, consequently, that the landlords (the plaintiffs) were not in a position, when the action for possession was be-

gun, to assert a right of re-entry or forfeiture under any proviso or stipulation in the lease.

The defendants also contend that there was a waiver by the plaintiffs of any breach, by their receiving rent on the 1st April, 1909, after notice that repairs were contemplated of the kind in question. It appears that a small opening in the wall had been made on or about the 20th March, 1909. When the plaintiffs received the rent on the 1st April following, they had no knowledge of this. I do not think that the receiving of the rent on the 1st April could be considered a waiver merely because, prior to that date, notice had been received to the effect that repairs were in contemplation, but no part of which repairs, so far as the lessors knew, had been done.

When the next instalment of rent for three months became payable on the 1st July following, and was finally accepted by the plaintiffs without prejudice to their rights, it is contended on behalf of the defendants that such acceptance was a complete waiver. They argue that the plaintiffs could not accept the rent without prejudice. But the correspondence filed on the trial of the action discloses that there was an express agreement on the part of the defendants, at the time of the payment of this rent, that it should be received without prejudice to the respective contentions and rights of the parties. At that time one of the contentions on behalf of the plaintiffs was, that the defendants had committed a breach of the lease by breaking through the wall, and had failed to repair as requested.

The defendants also contend that the plaintiffs, by issuing the first writ, in which they claimed only an injunction and damages, thereby elected to pursue that remedy with notice and knowledge of the existing facts, and that that was an election which could not subsequently be altered and changed into a claim for forfeiture and possession. . . .

[Reference to Fawcett's Landlord and Tenant, p. 499; Evans v. Davis, 10 Ch. D. 747; More v. Ullcoats M. Co., [1908] 1 Ch. 575.]

I do not think that the plaintiffs have made out a case for forfeiture of the lease, or that I can, on the facts in evidence, make an order giving them possession of the property. Even if a case for forfeiture had been made out, one would hesitate, in regard to a lease of so much importance, to give effect to it, and would rather incline to relieve therefrom, if possible, and seek for and grant another remedy less drastic.

The defendants also contend that the taking down of the wall was no breach of the terms of the lease; that, under its terms,

viz., to "build and rebuild," they were entitled to take down a portion of the wall, as they have done. I do not think this contention can be given effect to. I am of opinion that to make an opening in the wall of such a size as has been indicated was a breach of the terms of the lease as to "repair;" and that this is particularly so in a case where the opening practically causes the building in question, which was an entire building before, to become a part of two buildings thrown together and used as one.

I find, therefore, that the defendants by breaking into the wall in question, as disclosed in the evidence, committed a breach of the covenant to repair.

Then as to the claim for an injunction. The defendants contend that all the demolition complained of was done before the writ was issued, and that the claim for an injunction in it and in the statement of claim has in contemplation and refers to future breaches only. The defendants say that since the writ was issued, they have not done any work about which the plaintiffs have complained or can complain, and do not contemplate doing any; and, therefore, there is nothing to which an injunction can apply. They also argue that there is no request in the writ or in the statement of claim for a mandatory order compelling the defendants to restore the wall to its original position; and that, consequently, the plaintiffs cannot obtain such an order except after amendment and on terms. But is this so? . . . The plaintiffs complain of demolition; they ask for an injunction restraining from further similar acts; and they ask for such further and other relief as may be just. The principle on which a relief, not expressly asked for, may, under a prayer for general relief, be granted, is discussed and determined in Gaughan v. Sharpe, 6 A.R. 417. . . . See also, Johnson v. Fessenger, 25 Beav. 88, 3 DeG. & J. 13; Gunn v. Trust and Loan Co., 2 O.R. 293.

I think that, under the prayer for general relief, the plaintiffs were, upon the pleadings and evidence, entitled to ask, as by their counsel upon the argument they did, and that it is proper and appropriate to grant, a mandatory order requiring the defendants, within a reasonable time, to restore the wall in question to the same condition in which it was before it was broken into by them. I make such order accordingly, and fix the period of restoration at one month.

No evidence as to damages to the reversion or as to what it would cost to restore the wall was given at the trial. The lease has some time yet to run, with rights of renewal; and damages

to the reversion could not, one would think, in any event, be large. I fix and allow the sum of $10 as nominal damages for breach of the covenant.

The plaintiffs will have their costs of the action, which, under the circumstances, as they are trustees, will be costs as between solicitor and client.

SUTHERLAND, J. OCTOBER 24TH, 1911.

FLETCHER v. ROBLIN.

Limitation of Actions—Title Acquired by Possession—Absentee—Declaration of Death—Jurisdiction of High Court—Declaration of Title—Vesting Order.

An action by William G. Fletcher against Betsey Roblin and Mary Roe, by original action, and Mary Garnett, by order of revivor, for a declaration of the plaintiff's title to certain land in the township of Chatham, in Ontario, and for other declarations.

One Frederick William Fletcher, by deed dated the 14th January, 1871, became the owner of the land in question, subject to certain charges. On the 24th July, 1886, he executed a mortgage on the land in favour of one Sarah Nevilles for $200. Within a few days thereafter, he left Ontario and went to Michigan. Before doing so, he made an arrangement, not in writing, with his brother Daniel W. Fletcher with reference to the land; he put Daniel in possession, on the condition that he would pay the taxes and the interest on the mortgage and do the road-work. Frederick William was then about 36 years of age. Reports were received about his whereabouts, but no definite word until the year 1895, during which three letters from him were received by Daniel, written from Belfast, Washington. Since the last of these, no word had been received from Frederick William, and no definite intelligence about him was obtained, in answer to inquiries. When he left Ontario, he was a bachelor, and no one had heard of his having since married.

Daniel continued in possession, doing as he had promised, until 1904, when the defendant Mary Garnett, a daughter of the defendant Betsey Roblin, who was a sister of Frederick William, entered into possession, as assignee of the mortgage made to Sarah Nevilles.

The father and mother of Frederick William and one sister were dead. Daniel and the other surviving brothers and sisters, except the defendant Betsey Roblin, executed a conveyance of the land in favour of the plaintiff, a nephew of Frederick William.

Daniel W. Fletcher, in his evidence at the trial, said he continued to work the farm until about ten years before the trial. He also said that he was never disturbed in his possession of it, and that he never gave any acknowledgment in writing of Frederick William's title.

At the trial consent minutes in writing were put in, embodying certain findings and declarations which the Court was asked to make.

W. E. Gundy, for the plaintiff.
J. S. Fraser, K.C., for the defendants.

SUTHERLAND, J. (after setting out the facts) :—The following findings and declarations were asked:—

1. A finding and declaration that on the 24th July, 1886, Frederick William Fletcher was the owner of the land (describing it), subject to certain charges which have since been satisfied, and subject to a mortgage for $200, bearing interest at 8 per cent. per annum, to one Sarah Nevilles, who on the 28th August, 1891, assigned the same to the defendant Mary Garnett.

There is no difficulty about making a finding that Frederick William Fletcher was the owner of the said land on the 24th July, 1886, subject to the mortgage already referred to. No evidence was offered as to the charges which are mentioned having been satisfied, although they would seem to have run in favour of Elizabeth Fletcher, the mother of Frederick William Fletcher, and his sister Margaret M. Fletcher, both of whom are deceased, and of Mary Ann Fletcher, now McDonald, who is said to be one of the parties who has joined in the deed to the plaintiff; and it may well be assumed that they have been satisfied. If the parties to the deed in favour of the plaintiff, together with the defendants, are the heirs of the said Frederick William Fletcher, then they would be the proper persons to be affected by the question of whether or not the charges have been satisfied, and they are consenting to a declaration to that effect.

A further finding and declaration is asked in the consent minutes as follows:—

2. A finding and declaration that Frederick William Fletcher died intestate and unmarried, on or about the 25th day of April,

1902, leaving him surviving Daniel W. Fletcher, Charles William Fletcher, John Fletcher, Mary Ann McDonald, and the defendant, Betsy Roblin, his only heirs and heiresses-at-law, and that all of his said heirs and heiresses-at-law, except the said defendant Betsy Roblin, have conveyed their undivided interest in the said lands and premises to the said plaintiff.

The last letter received from Frederick William Fletcher bears date the 25th April, 1895, and seven years from that date would be the 25th April, 1902. Upon the evidence none of his relatives, who, if he had been alive, would naturally have heard of him, have done so since the said date, namely, the 28th April, 1895. It is said in the evidence by Daniel W. Fletcher that in the fall of the year 1895 he heard that his brother had left Belfast, Washington. He wrote to British Columbia and inquired, and had been told that he did not stay long there. Upon this evidence Frederick William Fletcher would be presumed, I think, to have been alive until the expiration of seven years from the fall of 1902, say from the 31st December, 1902, and to have died at that time. But have I any jurisdiction so to declare? I think not: Re Coots, 1 O.W.N. 807; Mutrie v. Alexander, 23 O.L.R. 396.

The plaintiff asks for a declaration that he and his predecessor in title, the said Daniel W. Fletcher, have acquired title by possession of the said lands and premises. It seems to me that, under the arrangement made between Frederick William Fletcher and Daniel Fletcher, after the period of one year from the 24th July, 1886, the latter became a tenant at will. From that time on until 1901 or 1904 Daniel says he never gave "any acknowledgment in writing to Frederick William Fletcher of his title." I think that, under these circumstances, Daniel acquired a title by possession (so-called) on or about the 24th July, 1897. See Foster v. Emerson, 5 Gr. 135; McCowan v. Armstrong, 3 O.L.R. 100. See also Lonsdale v. Menzies, 9 Commonwealth L.R. 89.

At the time the said Daniel Fletcher made the conveyance to the plaintiff, therefore, he had, by his possession of the property in question in manner aforesaid, extinguished the title of his brother, the said Frederick William Fletcher, and was in a position to make a conveyance to the plaintiff, and I find and adjudge accordingly.

I am also asked by the written consent of the parties to the action to find and declare that on the 19th April, 1911, there was due for principal and interest upon the said mortgage the sum of $500, and that . . . Mary Garnett, the holder of the

mortgage, has agreed to extend the time for payment of the said mortgage for five years from the 19th April, 1911, with interest at 6 per cent. per annum, payable annually thereon. I do not think it is necessary or expedient, on the material before me, to make this order. The parties can very well be left to make such an arrangement between themselves, if it is so desired.

I am also asked by the said consent to make an order vesting the lands and premises in the plaintiff, subject to the said mortgage. I do not think that, upon the material before me, it is necessary for me to consider whether I can make such an order.

The parties have agreed that there shall be no costs to either party, and I therefore make no order as to costs.

BOYD, C. OCTOBER 25TH, 1911.

D'AVIGNON v. BOMERITO.

Assignments and Preferences—Chattel Mortgage Made by Insolvent—Security for Current Promissory Note and Moneys Advanced to Satisfy Execution—Assignment for Benefit of Creditors within one Month after Chattel Mortgage Given—Action by Assignee—Onus—Assignments Act, sec. 5(4)—Preferential Payment—Account of Proceeds of Goods Sold.

An action by the Sheriff of Essex, assignee for the benefit of creditors of the estate and effects of James Bomerito, an insolvent trader, to set aside a chattel mortgage given by the insolvent to his father, the defendant, and for a declaration that the money realised by the sale of the chattels belonged to the estate of the insolvent.

A. B. Drake, for the plaintiff.
F. C. Kerby, for the defendant.

BOYD, C.:—The defendant's son, being in the fruit business, was burnt out, and the father, defendant, advanced $500 to set him going again, and took a note at the time for the amount, dated the 10th January, 1910, and payable in a year. In November, judgment was recovered by Schiappacasse, and execution put in the Sheriff's hands on the 2nd November, 1910, which was settled by $400 paid by the defendant for the son on the 4th November, and on the same date a chattel mortgage for the two

sums, amounting to $900, was given by the son to the father. This covered all the son's goods except about $136 worth (which afterwards brought $114 on sale). The son was then indebted to others to about the same amount (at least) as the mortgage. On the 6th December, the son assigned to the plaintiff for the benefit of creditors.

I thought at the hearing that the transaction by which a mortgage on chattels was obtained by the father (defendant) from the son (the insolvent) for $900 could not be supported so far as $500 of it was concerned, which represented the amount of the note held by the father from the son and then current. I was in doubt as to the balance of $400, which represented money paid to an execution creditor of the son, who was about to sell the goods under the execution. The father paid the money (all but $15) direct to the execution creditor, and so satisfied the judgment. The father says he made no inquiry as to other debtors or as to the son's position financially, and that he included the note in the mortgage so as to make himself safe. The son being then indebted to others to the extent of at least $800, the father—had the judgment and execution been assigned to him—could have only shared ratably with the other creditors (a preferential lien existing only as to the costs, which were small, as the judgment was by default).

The onus is by the statute on the defendant, for the son assigned for the benefit of creditors to the Sheriff within less than a month after the giving of the mortgage and the payment of the creditor: the onus to displace the intent to gain an illegal preference imputed by the statute 10 Edw. VII. ch. 64, sec. 5, sub-sec. 4. Upon the meagre evidence in this case, I am not able to find that there existed in either father or son a bonâ fide belief that the advance of $400 (all paid to one creditor) would enable the debtor to continue his business and to pay all his debts in full. The son knew his insolvent condition, and the father apparently asked no questions, and took the security with an eye to his own security rather than any possible prosecution of the business. The money paid by the defendant was not in the nature of an advance of money, but rather in the nature of a preferential payment to the execution creditor, which was within the mischief of the Ontario Act.

Judgment will be to set aside the chattel mortgage, and the defendant is to account to the assignee for the goods sold under it of which he may have received the proceeds. The $500 held pending this action should be paid over to the assignee for distribution, and the transactions of the defendant with the goods

may be dealt with by the assignee when he ranks as creditor on the estate. The defendant should also pay the costs of the action.

TEETZEL, J. OCTOBER 26TH, 1911.

RE MCNEILL.

Will—Construction—Legatee Predeceasing Testatrix—Claim by Children of Legatee—Provision for Lapse of Legacies where Legatees Died without Issue—Effect of—Legacy Falling into Residue.

Motion by the executors of the will of Ellen A. McNeill, deceased, for an order determining a question arising in the administration of the estate as to the proper construction of the will.

G. F. Ruttan, K.C., for the executors and residuary legatees.
J. E. Jones, for the children of Richard Davern.

TEETZEL, J.:—By her will, the testatrix gave a number of legacies, among them being one of $1,000 to her half-brother Richard Davern, who predeceased her, leaving issue.

The will contains a residuary clause giving the residue to a niece and four nephews.

The question for determination arises under the nineteenth clause of the will, which reads: "In the event of any legatee herein named dying during my lifetime without leaving lawful issue him or her surviving then and in such case the legacy bequeathed to the legatee so dying shall lapse and be and form part of my residuary estate."

The children of Richard Davern claim that the legacy of $1,000 bequeathed to their father goes to them, while the residuary legatees claim a lapse and that it goes into the residue.

In support of the claim that the legacy did not lapse but goes to the issue of Richard Davern, it is urged that, the testatrix having expressly provided for a lapse in the case of the death of any legatee without issue, the maxim *expressio unius est exclusio alterius* applies; and that, therefore, the necessary implication is, that, in the event of a legatee predeceasing the testatrix leaving issue, the testatrix intended that there should not be a lapse and that the legacy should go to such issue.

Another way in which the argument is put is, that the

language of clause 19 is in the form of what was called in the old days of special pleading a negative pregnant, that is to say, it is such a form of negative expression as implies an affirmative; and that the necessary implication in this case is, that the testatrix intended that there should be no lapse of any legacy where the legatee predeceased her leaving issue; and that, instead of the legacy falling into the residue, it should go to such issue.

The whole trouble in the case, it seems to me, has arisen from a misconception of the law by the testatrix, under which she apparently assumed that it was necessary to provide expressly that in case any of the legatees predeceased her without leaving issue the legacy should lapse and go to the residuary estate, and by implication assumed that if a legatee predeceased her leaving issue there would be no lapse.

Where a legacy fails by reason of the death of a legatee (not being a child or other issue of the testator) in the lifetime of the testator it has long been settled law that unless a contrary intention appears in the will such legacy lapses and shall, if there is a residuary bequest, be included in it whether or not the legatee leaves issue.

It is also clear, as stated by Vice-Chancellor Wickens, in Browne v. Hope (1872), L.R. 14 Eq. 343, at p. 347, "that a testator may prevent a legacy from lapsing, but the authorities shew that in order to do that he must do two things; he must in clear words exclude lapse; and he must clearly indicate who is to take in case the legatee should die in his lifetime."

Now, in this case, if permitted to conjecture, I should say that, by a misconception of the law, the testatrix thought that if any legatee predeceased her leaving issue such issue would, under the law, take the legacy; but there is nothing in the language used by her to justify a judicial opinion that she intended by her will to give the issue any such right. The most that can be suggested is, that she made no express provision because she erroneously assumed that the law rendered it unnecessary for her to do so.

The right of the issue or of any one claiming through the deceased legatee to have a lapsed legacy withheld from its strictly legal destination—the residuary gift—must rest upon a plain and unequivocally expressed intention of the testatrix that it is to be given to them and not to the residuary legatees.

Beyond a conjecture of what the testatrix thought would happen under the law if a legatee predeceased her leaving issue, I can find no sufficient language in this will to indicate either an intention to prevent a lapse or to give the legacy in question to the issue of Richard Davern.

In further support of the rule that, as against the residuary legatee claiming a lapsed or void gift, it is necessary to find from the language used a plain and unequivocal intention to exclude the property from the residuary gift, see In re Bagot, Paton v. Ormerod, [1893] 3 Ch. 348, and Blight v. Hartnoll (1881), 23 Ch. D. 218.

The principle of construction is stated in Jarman on Wills, 6th ed., p. 453, to be that "conjecture is not permitted to supply what the testator has failed to indicate; for, as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness."

It is to be hoped that, if the residuary legatees agree that the testatrix executed her will under a misapprehension of the law relating to lapsed legacies, they will do for their cousins what the testatrix would probably have done had she correctly understood the law.

The order will, therefore, be that the $1,000 legacy lapsed and passes under the residuary clause of the will. The costs of all parties out of the estate.

PYNE v. PYNE—MASTER IN CHAMBERS—OCT. 20.

Pleading—Statement of Claim—Husband and Wife—Action for Alimony and Custody of Child—Facts Alleged to Shew Unfitness of Husband—Relevancy.]—Motion by the defendant (before delivery of the statement of defence) to strike out certain paragraphs of the statement of claim. The action was for alimony and for the custody of the only child of the plaintiff's marriage with the defendant, a daughter born in 1900. The plaintiff alleged that the defendant was not a fit and proper person to have the custody of a girl of tender years, and in the paragraphs attacked set out facts on which she relied to establish this proposition. By paragraphs 7 and 11 she alleged that the defendant was constantly away from home, and that she, for three or four years, had had a companion living with her, but that on the 23rd April, 1911, the defendant dismissed the companion. Held, that this paragraph should be struck out: the facts alleged shewed, at most, cruelty. In paragraph 8 the plaintiff only repeated the substance of previous paragraphs, and stated the inability of the plaintiff to live with her husband.

Held, that it might be unnecessary, but that was no reason for striking it out. In paragraphs 13 and 14 the plaintiff set out that she had been trying to effect a settlement, and that, during the negotiations, the defendant, by deceit, got possession of the daughter, and then broke off the negotiations, whereupon, and not earlier, this action was begun. Held, that these paragraphs were merely historical; there was nothing embarrassing in them; and they could not be struck out. By paragraphs 15, 16, 17, and 18 the plaintiff alleged, in substance, that, before his marriage to her, the defendant had been married in Michigan, and had been divorced there, on the wife's application; that the custody of the child of that marriage (a girl) had been given to the defendant; that the defendant's neglect to provide for the child resulted in her being seduced, whereupon he refused to have anything to do with her, and left her to be cared for by the plaintiff, who looked after her welfare and had her sent to her mother. The Master referred to Christie v. Christie, L.R. 8 Ch. 499; Re Gray, 6 W.L.R. 674 (Sask.); Re Curtis, 28 L.J. Ch. 458; Re Fynn, 2 DeG. & S. 457; Ball v. Ball, 2 Sim. 35; In re Agar Ellis, 24 Ch. D. 317; and said that, in view of these authorities, he did not see how these paragraphs could be struck out. It would be for the trial Judge to say whether they alleged relevant facts, and, if so, what weight was to be given to them. Order made striking out paragraphs 7 and 11 only. Costs in the cause. D. Inglis Grant, for the defendant. M. H. Ludwig, K.C., for the plaintiff.

WILSON v. DEACON—DIVISIONAL COURT—OCT. 24.

Principal and Agent—Agent's Commission on Sale of Patent Rights—Sale by Principal—Mala Fides—Depriving Agent of Commission—Contract—Damages.]—An appeal by the defendant from the judgment of RIDDELL, J., 2 O.W.N. 1229. The appeal was heard by BOYD, C., BRITTON and MIDDLETON, JJ. The Court reduced the damages from $1,100 to $625, and, with this variation, dismissed the appeal with costs; but ordered that the judgment as varied should be without prejudice to any other proceeding which either of the parties may institute against the other in respect of the matters in question. I. F. Hellmuth, K.C., for the defendant. G. S. Gibbons, for the plaintiff.

TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO—MACLAREN, J.A., IN CHAMBERS—OCT. 25.

Appeal—Court of Appeal—Leave to Appeal Directly from Judgment at Trial—Case for Further Appeal to Supreme Court of Canada—Interest in Land—Consent to or Acquiescence in Judgment.]—Motion by the defendants for leave to appeal directly to the Court of Appeal from the judgment of BOYD, C., ante 77. The plaintiffs opposed the motion on two grounds: (1) because no further appeal would lie to the Supreme Court of Canada; and (2) because the judgment was in effect a consent judgment. Held, that an appeal would lie to the Supreme Court under sec. 48(*a*) of the Supreme Court Act, inasmuch as an interest in the lands and highways of the municipality of North Toronto would be in question and affected by the judgment complained of. Held, also, that there had been no consent on the part of the defendants to the judgment nor any such acquiescence as would deprive them of their right to appeal. Motion granted; costs to be costs in the appeal; the appeal to be expedited and to be set down for the November sittings. T. A. Gibson and Grayson Smith, for the defendants. D. L. McCarthy, K.C., for the plaintiffs.