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COURT OF APPEAL.

GARROW, J.A., IN CHAMBERS. JUNE 10TH, 1912.

McCLEMONT v. KILGOUR MANUFACTURING CO.

Appeal—Court of Appeal—Extension of Time for Appeal—Bona Fide Intention—Communication to Opposite Party—Substantial Question of General Interest.

Application by the defendants to extend the time for appeal to the Court of Appeal from the order of a Divisional Court, ante 999, notice of appeal not having been served in time.

T. N. Phelan, for the defendants.
W. M. McClemont, for the plaintiff.

GARROW, J.A.:—The judgment is for $1,000 and costs. And the question of law relied on by the defendants is, that the defence known as volenti non fit injuria applies to the breach of a statutory obligation, which was denied in the Divisional Court.

The question is substantial and of general interest; and the leave should, I think, be granted, it appearing that there was an intention to appeal within the time, communicated to the plaintiff's solicitors, and that the failure to serve the notice was through an oversight in the defendants' solicitors' office. See Ross v. Robertson, 7 O.L.R. 494.

The case must be set down in time to be heard at the September sittings; and the costs of the application will be to the respondent in any event of the appeal.

HIGH COURT OF JUSTICE.

KELLY, J. JUNE 7TH, 1912.

RE COUTTS AND LEBŒUF.

Will—Devise of Land not Owned by Testator—Misdescription—Intention—Evidence—Vendor and Purchaser.

An application under the Vendors and Purchasers Act.

J. A. Walker, K.C., for the vendor.
A. Clark, for the purchaser.

KELLY, J.:—Jane Coutts, claiming to be devisee under the will of her husband, Alexander Coutts, of the north half of the north half of lot 11 in the 5th concession of the township of Tilbury East, in the county of Kent, agreed, in February, 1910, to sell these lands to Eugene Lebœuf. The purchaser objected to the title, on the ground that the property was not devised or disposed of by Alexander Coutts, and did not pass by his will, and that he died intestate as to it; and that, therefore, the vendor has no power to sell it.

Alexander Coutts made his will on the 17th April, 1875, and died on the 14th August, 1881. His wife, Jane Coutts, was appointed his executrix, and probate of the will was issued to her.

The first paragraph of the will is: "I give devise and bequeath all my lands and tenements goods and chattels as follows." Then, after devising to his son the south half of the north half of lot 11 in the 5th concession of Tilbury East, containing 50 acres more or less, and other lands, he devised to his wife, Jane Coutts, the vendor, for the benefit of his family, several parcels, including "the north half of the south half of lot number 11 in the 5th concession, containing 50 acres more or less;" and he did "also enjoin her to sell any portion or parcel of the lands willed to her at any time she may see fit or judicious."

At the time the will was made, and also at the time of his death, the testator was the owner of the north half of lot 11 in the 5th concession of Tilbury East, but was not then and never was the owner of or interested in the south half of that lot.

The will shews an intention on the part of the testator to dispose of all his lands and tenements, etc. Not owning the

south half of the lot, but owning the north half of it, and having devised the south half of the north half to his son, if in the devise to Jane Coutts he had used the word "north," instead of "south," the description in the will would then, as stated in Re Harkin, 7 O.W.R. 840, at p. 841, "fit his exact ownership, and all his lands will pass by his will as the intention is therein expressed."

I am of opinion that the will operated so as to pass to the vendor, Jane Coutts (for the benefit of the testator's family, and subject to the power of sale as therein expressed), the north half of the north half of lot 11 in the 5th concession of the township of Tilbury East. I refer to Re Harkin, 7 O.W.R. 840; Re Clement, 22 O.L.R. 121; and Smith v. Smith, 22 O.L.R. 127, where many of the earlier cases are considered.

KELLY, J. JUNE 7TH, 1912.

RE BOEHMER.

Will—Construction—Bequests to Children—Deduction of Advances—Apparent Inconsistency in Clauses of Will—Reconciliation—Oral Evidence—Inadmissibility—Intention.

An application by Norman Boehmer, under Con. Rule 938, for an order determining certain questions arising upon the construction of the will of August Boehmer.

J. A. Scellen, for the applicant and his infant children.

E. P. Clement, K.C., for the executors and the other adult beneficiaries and for Emma Boehmer, an infant.

KELLY, J.:—The first question submitted here is, whether the executors, in fixing the amount of Norman Boehmer's indebtedness to the estate, should be guided by the "family book" in their possession, or by paragraph 20 of the will, which directed the $2,782 therein mentioned to be deducted from Norman Boehmer's share.

It is contended on behalf of the applicant that, in arriving at the amount to be deducted from his share of his father's estate, the terms of paragraph 7 should be disregarded, and that only $2,782, mentioned in paragraph 20, should be deducted, notwithstanding that, at the date of the will, the "family book" shews that more than that sum (including the $575 received

from his brother George) had been advanced prior to the making of the will, and that the will provided for a charge against each child's share of any further amounts which the testator might charge in the "family book" against such child.

These paragraphs are as follows:—

"7. Whatever moneys or stocks I have given or advanced to any of my children during my lifetime, whether charged in my family book or not, and any further amounts for which I shall hold notes against any of my children or which I shall have charged against any of my children in my family book, shall be deducted from their respective shares in my estate.

"20. My son Norman has received from me the sum of $2,207, and he has received from my son George $575; therefore, I direct my executors to pay to my son George $575 and interest at five per cent. from April 26, 1904, and to deduct from the share of my son Norman in my estate $2,782, but without interest."

The evident intention of the testator, to be drawn from the whole of the will, was to treat all his children as nearly as possible alike, and to have them benefit equally from his estate, regard being had to advances made to them during his lifetime.

An illustration of this is shewn in paragraph 8 of the will, where he directed that each of his unmarried children should, on his or her marriage, receive the same amount of cash ($500) and the same "wedding outfit of bedding, clothes," etc., which each of the children then married had received at the time of his or her marriage.

On this view of the intention, the question arises: are paragraphs 7 and 20 inconsistent to the extent that paragraph 20 excludes the application of paragraph 7 to the bequest made to Norman?

If this question can be answered in the affirmative, I would fell bound to hold that paragraph 20 should prevail: Sims v. Doughty, 5 Ves. 243; Constantine v. Constantine, 6 Ves. 100.

My view, however, is, that this is not a case of an inconsistency, with a direction in one clause and a different one in another. I think the two clauses can be read together, the meaning to be taken from them, when so read, being that, so far as Norman is concerned, whatever moneys or stocks the testator had given or advanced to him during his (the testator's) lifetime, and any further amounts for which the testator would hold notes against Norman, or which he should charge against Norman in the "family book," would be deducted from Nor-

man's share; and that whatever sum these deductions amounted to would include the $2,782; or, in other words, that the $2,782 is part of the total to be deducted.

Paragraph 20 does not say that the $2,207 therein mentioned is the only amount Norman has received, or that $2,782 is the only amount that is to be deducted. The direction that the $2,782 is to be charged "without interest" was made, to my mind, to exclude the possibility of Norman being charged with the interest on the $575 which that paragraph directed the estate to pay to George; and does not shew an intention to limit the charges against Norman's share to the $2,782.

From the language of paragraph 7, it is evident that the testator contemplated the possibility of his making further advances to one or other of his children after the making of his will; and, as it is unlikely that he knew what such further advances would be, it is not reasonable to suppose that he intended to limit the deductions to be made against Norman to the amount mentioned in paragraph 20, while there was the possibility of further advances being made to him. This is not in keeping with the general spirit and intention of the will.

While I have come to the conclusion, on consideration of the language and general intention of the will, that paragraph 7 is to apply to Norman's share in the same manner as to the shares of the other children, certain circumstances in connection with the will confirm the view I have taken.

Evidence was tendered of the intention expressed by the testator after the will, tending to shew that he intended to benefit Norman to a greater extent than the other members of his family. This evidence, however, is not admissible. In Jarman on Wills, 5th ed., p. 384, it is stated that parol evidence of the actual intention of the testator being inadmissible for the purpose of controlling or influencing the construction of the written will, the language of the will must be interpreted according to its ordinary acceptation, or with as near an approach to it as the context of the instrument and the state of the circumstances will admit of.

The "family book" shewed that in April, 1904, the amount to be chargeable against Norman was $2,207, and that between that time and the making of the will further advances were made to him and charged in the book. It appears that in April, 1904, the testator made a will which contained in exact words the provisions of paragraphs 7 and 20 of the present will. The circumstances that the amount chargeable in 1904, against Norman, as shewn by the "family book," corresponded with the

amount of the deduction to be made from his share by the terms of the earlier will, and that the paragraph referring to it had been copied into the new will, helps to confirm the view which I have expressed, but which I have arrived at altogether apart from that circumstance.

The answer to the first question submitted being that the executor ought to be guided by and to act on paragraph 7 and not paragraph 20, no further answer is necessary to the second question.

The costs of all parties will be out of the estate; those of the executors to be as between solicitor and client.

MIDDLETON, J. JUNE 7TH, 1912.

*WOOD v. GRAND VALLEY R.W. CO.

Contract—Undertaking to Extend Railway to Village—Payment of Money to Railway Company by Property-owners in Village—Receipt of Company's Bonds—Breach of Undertaking—Liability of Company—Personal Liability of President—Damages — Principle of Assessment — Return of Bonds.

Action by a number of manufacturers and merchants, carrying on business at the village of St. George, against the railway company and A. J. Pattison, formerly president of the railway company, to recover damages from the defendants for breach of contract to construct an addition to their line of railway so as to connect the village of St. George with the Canadian Pacific Railway at Galt; for repayment of $10,000 paid by the plaintiffs for bonds of the railway company; and for other relief.

G. F. Shepley, K.C., and A. M. Harley, for the plaintiffs.

S. C. Smoke, K.C., for the defendant company.

C. J. Holman, K.C., for the defendant Pattison.

MIDDLETON, J.:— . . . Upon the faith of the defendant Pattison's personal guarantee, the plaintiffs agreed to purchase bonds of the road to the extent of $10,000. These bonds were not regarded as being of any great value, and were not sought as an investment. What the plaintiffs desired, and what Mr.

*To be reported in the Ontario Law Reports.

Pattison promised—both in his own name and in the name of the railway company—was the construction of the line, which would give them a means of handling freight independently of the Grand Trunk; the accommodation afforded by that company being . . . regarded as quite inadequate and unsatisfactory.

Mr. Pattison undertook to reduce the arrangement to writing, and he prepared a short memorandum . . . . This . . . was signed by the Grand Valley Railway Company, and was to be delivered to each individual subscriber whose subscription would form part of the $10,000.

When this document was submitted as embodying the arrangement made, it was at once repudiated. Mr. Pattison's attitude then was: "If you do not like the draft that I propose, prepare one to suit yourselves." Mr. Wood was selected as the draftsman, and prepared the document exhibit 3. This was afterwards read over by all concerned, was deemed to be satisfactory, and was executed by Mr. Pattison, who signs thus: "The Grand Valley Railway Company, A. J. Pattison, President."

Upon the faith of this document (dated the 29th June, 1906), individual subscriptions for bonds—some of which bear an earlier date, but were until then held in escrow—were handed over, and new subscriptions were made for an amount necessary to cover the shortage, so that the total would reach the required $10,000. A joint note was executed by the subscribers and discounted; the proceeds went to the credit of the railway company; and the bonds were allotted and distributed. Some of the signatories to this note ultimately proved unable to pay. The plaintiffs paid the whole note, and among them became entitled to the whole $10,000 of bonds.

The company readily assimilated the $10,000, but did not make any serious endeavour to construct the four miles of road: merely grading a short distance. . . .

Upon the pleadings the company disputed all liability for the transaction; but when it was made to appear that the money had gone to the company, and when Mr. Pattison stated that all he had done was done with the sanction, not only of the entire directorate, but with the sanction and approval of all the shareholders of the company, Mr. Smoke admitted that the company were not in a position to repudiate the transaction.

The question of difficulty is, whether, on the agreement of the 29th June, Mr. Pattison assumed any personal liability.

In the first place, much reliance is placed upon the fact that Mr. Pattison did not sign this document individually; he signed it merely as president of the railway company.

. . . The addition of the word "president" would not derogate from Mr. Pattison's personal liability if the signature had been simply "A. J. Pattison, President;" but I cannot agree that the signature in question is Mr. Pattison's signature. I think it was intended to be the signature of the railway company, by Pattison, its president.

Nevertheless, I think that, by the terms of the agreement, Mr. Pattison was intended to be personally bound; and the absence of his signature is not fatal. The writing was intended to embody in a permanent record the terms of an agreement already made. It does not itself constitute the agreement; and, as I understand the transaction, the agreement was one which it was quite competent for the parties to make without any written instrument.

Yet I think it important to investigate the terms of the written agreement, because, no doubt, all concerned regarded it as embodying the agreement which had already been made. Looking, then, at the agreement for the purpose of ascertaining Mr. Pattison's liability, and for this purpose disregarding all other evidence, I think I find conclusive proof of his personal liability: "Mr. A. J. Pattison, President of the Grand Valley Railway Company, hereby undertakes and agrees, on his own behalf and on behalf of the Grand Valley Railway Company, that he will make or cause to be made through traffic arrangement with the C.P.R., making direct connection with the C.P.R. at Galt, in terms of the Railway Act of Canada, in such a way that current competitive freight rates will apply continuously from St. George," etc.

The addition to Mr. Pattison's name of his description, "President of the Grand Valley Railway Company," does not, as already said, detract from his individual liability.

Then the agreement proceeds: "It is further agreed that the extension of the Grand Valley Railway to St. George . . . "will be proceeded with at once." And this is followed by a proviso: "Provided always that the terms, conditions, and covenants of this agreement shall be binding upon the heirs, executors, and assigns of the said Pattison and the said Grand Valley Railway Company."

I am inclined to think that the draftsman of this agreement at first intended it to be an agreement entirely between Pattison and the plaintiffs, and that it was an afterthought which induced him to add "and the said Grand Valley Railway Company." If this is so, then the words "It is further agreed" must be translated, "It is agreed between Pattison and the subscribers for bonds."

Upon the argument it was pointed out that the document was on its face defective, in that, while "parties" are spoken of, there are no parties. But, viewed not as an agreement, but merely as a record of the agreement, I think it goes far to corroborate the plaintiffs' version of what the real agreement was.

Therefore, both on the document and on the oral evidence, I find this issue in favour of the plaintiffs.

Mr. Pattison, some time after the making of this agreement, appears to have sold his interest in the railway to a third party, who undertook to assume and carry out the contracts entered into. Some dispute has arisen between Pattison and his vendee, and the vendee now refuses to carry out the bargain. Mr. Pattison relies upon this as a moral justification for his position, thinking that the contract was one which ran with the office of president.

I cannot at all agree with him in this. His railway company received the $10,000; and, in selling out, he, no doubt, obtained a correspondingly increased price; so that, if he is now called on to make good his undertaking, he ought not to complain.

. . .

The plaintiffs' counsel contended that I should give judgment for recovery of the $10,000, upon the theory that there had been a failure of consideration; the plaintiffs undertaking to return the worthless bonds of the railway company. No case was cited that appears to me to justify the granting of this relief.

I do not think the consideration can be said to have failed: for two reasons. In the first place, the plaintiffs have the bonds; and, although the bonds may not be of great value, they undoubtedly formed part of the consideration. In the second place, I find no case in which money has been ordered to be refunded, as upon failure of consideration, where the failure is a non-performance of a promise. The $10,000 was given by the plaintiffs for the bonds of the railway company and for the promise of the railway company and of Pattison to secure the construction of the road. This promise has not been performed; and the only remedy is damages for its breach.

Particulars were given of the damages which the plaintiffs thought they were entitled to recover, upon an entirely erroneous theory. The true principle is found in the case of Chaplin v. Hicks, [1911] 2 K.B. 786, where the Court of Appeal entirely repudiated the idea that substantial damages should not be awarded where there is difficulty in the assessment. . . .

In this case, the plaintiffs expected to receive great benefit if they could secure the construction of the railway and com-

petition between the Grand Trunk and the Canadian Pacific. In addition, they expected great convenience in the carrying on of their business, by the ready access to a railway by which incoming and outgoing freight could be handled. They expected additional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.

There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the $10,000 paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But, endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were, no doubt, equally present to the minds of both parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway company induced the plaintiffs to give for this chance.

The plaintiffs profess to regard the bonds as of no value; and, while I am not allowing this to influence me in the assessment of damages, I think it is fair that any value there may be in them should go in ease of Pattison if he is called upon to pay; and, if the plaintiffs assent, I shall direct that, upon payment of the judgment, the bonds shall be delivered to Pattison or whom he may appoint, and that any money which may be received on account of the bonds in an action brought by other bondholders and now pending, for the realisation of the total issue, $450,000, shall be credited upon the judgment.

The judgment will, therefore, be for $10,000 and costs, subject to the provision above indicated.

RIDDELL, J. JUNE 7TH, 1912.

*ZIMMERMAN v. SPROAT.

Equitable Mortgage—Deposit of Title Deeds as Security for Debt—Oral Evidence—Conflict—Finding of Trial Judge—Legal Estate not in Depositor—Assignee for Benefit of Creditors—Costs.

Action by creditors of one Miller, against Miller's assignee for the benefit of creditors, for payment of the plaintiffs' debt and a declaration that the plaintiffs were equitable mortgagees of Miller's land.

P. McDonald, for the plaintiffs.
S. G. McKay, K.C., for the defendant.

RIDDELL, J.:— . . . Finding that, although the debtor (Miller) had not paid for his farm in full, but had given a mortgage to the vendor for a large part of the purchase-price, nevertheless the vendor had given him a deed of the farm, the plaintiffs demanded the delivery to them of the deed as security for the debt—and, for fear of fire, they also demanded the insurance policies on the building.

On conflicting evidence, I find as a fact that it was agreed that Miller should deliver to the plaintiffs the deed and the insurance policy as security for the said debt; and that he did so deliver the said documents. . . .

While, by reason of the Registry Acts in force in our Province from an early day, the doctrine of equitable mortgages of this character is foreign to our ordinary ideas, there can be no doubt that our law is much the same as the English in respect of such mortgages. The kind of equitable mortgage now under consideration is that which is spoken of by Fisher in sec. 27 of his book on Mortgages. . . .

The first reported case seems to be Russel v. Russel (1783), 1 Bro. C.C. 269. The doctrine has been repeatedly regretted . . . but it is too firmly established to be altered except by legislation.

The intent to create an equitable mortgage by delivery or deposit of writings may be established by parol evidence alone: Russel v. Russel, supra; Ex p. Kensington, 2 Ves. & B. 79; Ex p. Haigh, 11 Ves. 403; Ex p. Mountfort, 14 Ves. 606. And it is sufficient if only some or one of the material documents

*To be reported in the Ontario Law Reports.

of title be so delivered: Ex p. Arkwright, 3 Mont. Dea. & De G. 129; Lacon v. Allen, 3 Drew. 579.

Nothing will be found in the Ontario cases at all differing from the English cases. The expression "equitable mortgage" is used in more senses than that we have been employing, in some cases. . . .

[Reference to Dennistoun v. Fyle, 11 Gr. 372; Jones v. Bank of Upper Canada, 12 Gr. 429, 13 Gr. 74, 78; Aikins v. Blain, 13 Gr. 646; Royal Canadian Bank v. Cummer, 15 Gr. 627; Masuret v. Mitchell, 26 Gr. 435, 437.]

Counsel for the defendant argued that an equitable mortgage cannot be created by the deposit of a deed where the legal title is outstanding in another than the depositor of the deed. I find, however, no trace of any such doctrine. On the contrary, in Ex p. Glyn, 1 Mont. Dea. & De G. 29, an equitable mortgage was held to cover land which had already been mortgaged to another. . . .

[Reference, also, to Ex p. Bisdee, In re Baker, 1 Mont. Dea. & De G. 333; Lacon v. Allen, supra; Goodwin v. Waghorn, 4 L.J. Ch. N.S. 172; Simmons v. Montague, [1909] 1 I.R. 87.]

I do not think the objection well-founded.

The plaintiffs will have judgment with costs. In view of the statements under oath of Miller, the assignee was justified in disputing the claim of the plaintiffs; but that does not disentitle them to costs.

BOYD, C. JUNE 7TH, 1912.

CANADIAN GAS POWER AND LAUNCHES LIMITED v. ORR BROTHERS LIMITED.

Sale of Goods—Default of Vendor—Rescission of Contract—Lien of Purchaser for Amount Paid—Right to Enforce by Sale—Possession of Goods—Costs.

Action to recover possession of an engine and other articles and for damages for detention.

The judgment of the Court of Appeal, in a previous action between the same parties, affirming the judgment of CLUTE, J., at the trial, is reported in 23 O.L.R. 616.

The present action was tried before BOYD, C., without a jury.

G. H. Watson, K.C., for the plaintiffs.
R. McKay, K.C., for the defendants.

BOYD, C.:—The sale of the engine, etc., was rescinded by the Court because of the default of the vendors. At the date of the action to enforce the contract, part of the price had been paid by the purchaser, to the extent of $500; and it was found by Mr. Justice Clute that the vendors had made default, and had no locus standi to sue for the balance of the price; and the action was dismissed. Judgment was given for the return of the purchase-money already paid, and also for damages and costs. This judgment has been affirmed after two successive appeals to the higher Courts. At the trial the Judge said that the engine should be returned; but, as he tells me, this was on the supposition that the judgment against the vendors would be paid. The vendors had, pending action and before the trial and judgment, gone into liquidation; but the liquidator, quoad this contract, stands in the shoes of the insolvents, the vendors.

Had the learned trial Judge then been asked to frame his judgment so that the redelivery of the engine should be conditional on the repayment of the $500 paid as part of the price, he would (as he informs me) have so ordered. This is based upon the assumption that the purchaser had a lien for the purchase-money paid, the contract having gone off through no default of the purchaser; which is, I think, well-settled law, even in the case of chattels; and it is not displaced or disturbed by the mere recovery of judgment: see, in addition to the cases cited, Swanston v. Clay, 3 DeG. J. & S. 558. In the case of Scrivener v. Great Northern R.W. Co., 19 W.R. 388, the Judge says that the lien may be displaced by proving in bankruptcy after judgment has been recovered; but his remark applies to cases where the creditor has come in and proved, not disclosing the lien. There is no such complication in this case; and the mere recovery of judgment does not extinguish the lien. The defendants are still entitled to hold their lien and to have it realised by sale of the property after due notice.

That relief may be given now, to end further applications to the Court: it should have been sought and would have been provided for by Mr. Justice Clute.

This new action is misconceived; but, as no objection was taken to the method in the defence, and as relief is now given to the purchasers, I think the best course is to give no costs of this action to either party.

MIDDLETON, J. JUNE 8TH, 1912.

*FREEMAN v. BANK OF MONTREAL.

Infant—Bank Deposit—Withdrawal by Cheque in Favour of Third Person—Liability of Bank for Amount beyond $500—Bank Act, sec. 95—Benefit of Infant—Bills of Exchange Act, secs. 47, 48, 165—Delay in Bringing Action after Majority—Mistake as to Age—Bank's want of Knowledge of Infancy.

Action by John W. Freeman to recover from the defendants the sum of $1,300, being a portion of a sum of $1,800 deposited by the plaintiff to his credit in the defendants' bank, at the branch at Deseronto, and withdrawn by him from the bank during his infancy.

W. G. Wilson, for the plaintiff.
W. B. Northrup, K.C., for the defendants.

MIDDLETON, J.:—The sum of $1,020.42 was deposited on the 8th September, 1905. This sum was the share of the plaintiff in the estate of his deceased grandfather. His father, John Freeman, was executor of the grandfather's will; and, upon realisation, paid this money to the plaintiff, who thereupon deposited it in the bank to his own credit. The sum of $774.76 was deposited in the bank on the 15th September, 1905, and was the amount of money standing to the plaintiff's credit in the post office savings bank, and withdrawn by him from that bank, in the name of John Freeman. This amount represented $100, the proceeds of the sale of certain sheep given to the plaintiff by his grandfather, with whom he at one time resided, and moneys saved by the plaintiff from wages paid to him by his father.

The plaintiff's father . . . carried on business . . . as an hotel-keeper. The plaintiff . . . assisted . . . as bar-tender. He lived at home, was charged nothing for his board or lodging, and received wages, a substantial portion of which went into the post office savings bank and then into the defendants' bank.

The hotel premises were at that time under mortgage to one John McCullough. In April, 1906, an agreement was come to between the plaintiff and his father by which the plain-

*To be reported in the Ontario Law Reports.

tiff agreed to lend his father $1,800, to be paid on account of the mortgage upon the hotel; and on the 20th April, 1906, the plaintiff signed a cheque in favour of McCullough for this amount. This cheque was afterwards deposited to the credit of McCullough in the defendants' bank, and in due course was paid out, upon McCullough's cheque.

The father continued to carry on the hotel business until shortly before the 22nd August, 1910, when he left Ontario . . . . Almost immediately after his departure, the plaintiff consulted his present solicitor, who on the 22nd August, 1910, wrote a letter to the bank demanding payment of $1,300 and interest, upon the theory that the receipt of the $1,800 from a minor was a breach of the Bank Act, and that the payment to the minor of anything over $500 was void against the plaintiff, who, by reason of his minority, claimed to avoid the contract. Without waiting for a reply, the plaintiff issued the writ in this action on the 23rd August.

The plaintiff was born on the 23rd December, 1887, and so came of age on the 23rd December, 1908; more than a year and a half before the bringing of this action. He asserts that he understood until recently that he was born on the 23rd December, 1888. . . . He relies upon his mistake as an answer to the suggestion that his laches should be treated as precluding him from now repudiating what he did in his minority.

About the time the father left Ontario, the mortgage upon the property was foreclosed; and the whereabouts of the father was not for some time ascertained. It is admitted that he is now absolutely worthless.

In Grant's treatise on the law relating to bankers, 6th ed. (1910), p. 31, it is said: "The relations between a bank and an infant customer have not yet been the subject of judicial decision, and involve questions of great nicety." After the examination of some authorities, he concludes thus: "It is, therefore, submitted that the law is, that, if an infant draws a cheque in his own favour, and receives the money, the banker could clearly not be called upon to pay the infant the money a second time. As regards cheques in favour of third parties, the true relation seems to be based on the principle that an infant may do by an agent any act that he can legally do himself." . . .

[Reference also to Sir John R. Paget's article on Bankers, in Halsbury's Laws of England, vol. 1, p. 587; Burnaby v. Equitable Reversionary Interest Society, 28 Ch.D. 424; Earl of

Buckingham v. Drury, 2 Eden; In re Brocklebank, 6 Ch. D. 358; Overton v. Bannister, 3 Hare 503; Valentini v. Canali, 24 Q.B.D. 166.]

It is clear that when the defendants became indebted to the infant Freeman with respect to his deposit, the mere fact of his infancy would have been no answer to an action brought by him to recover the money. . . .

It is a mere accident that, by the Rules of Practice, in an action for the recovery of a debt due to an infant, the judgment would require the money to be paid into Court for his benefit. That provision does not in any way alter the effect of the contract to repay implied upon the making of the deposit.

The contract was one beneficial to the infant. He was the custodian of his own money, and the agreement merely made the bank a temporary custodian of his funds during his will. The bank's obligation was to hand back the money to its customer or pay it to his order. Nothing in this was detrimental in any way to the interest of the infant.

But, apart from this, I think that the provisions of the Bills of Exchange Act afford a complete defence, although this operation of the section may not have been foreseen by the draftsman of the Act. Section 47 provides that "capacity to incur liability as a party to a bill is co-extensive with capacity to contract." But sec. 48 provides that "where a bill is drawn or indorsed by an infant . . . the drawing or indorsement entitles the holder to receive payment of the bill. . . ."

This provision applies to a cheque (sec. 165): and, substituting the word "cheque" for "bill," the effect is: "A cheque drawn by an infant entitles the holder to receive payment thereof." If McCullough was entitled to receive payment, then the payment must operate to discharge the defendants.

The plaintiff's counsel based his argument to a great extent upon the provisions of sec. 95 of the Bank Act; and I have postponed its consideration because it can better be dealt with in the light of the law relating to infants' contracts. That section provides that the "bank may . . . receive deposits from any person whomsoever . . . whether such person is qualified by law to enter into ordinary contracts or not, and from time to time repay any or all of the principal thereof . . . If the person making any such deposit could not, under the law of the Province where the deposit is made, deposit and withdraw money in or from the bank without this section, the total amount to be received from such person on deposit shall not at any time exceed the sum of $500."

So far as I knew, no case has arisen under this section. The plaintiff's counsel assumes that the effect of it is to make not only the receipt from but the repayment to an infant of any sum exceeding $500 unlawful; and from this he argues that, because $1,800 was received unlawfully, and $500 only could be paid lawfully, he is now entitled to demand payment of $1,300, the disability having ceased.

In the first place, it is to be observed that there is no restriction upon repayment. The restriction is upon the amount of deposit; and if, as a matter of policy, the Legislature requires an infant's account to be kept under $500; and the bank, in ignorance of the fact that the depositor is an infant, receives a sum exceeding this limitation, it then becomes its duty immediately to repay the excess to the infant on learning of his minority. I cannot find in this section any sanction for the theory upon which the action is brought.

But, as said, I do not think that there is any "law of the Province" which prevents an infant from depositing money in and withdrawing it from the bank, even assuming that the expression "law of the Province" is not to be confined to an express statutory provision. . . .

Upon another ground I think the plaintiff fails. The action is not brought until more than a year and a half after the infant attained his majority. The money withdrawn from the bank was used by him for his father's benefit, and applied in reduction of the mortgage on the father's hotel. Before making any claim he waited until the mortgage on the hotel had been foreclosed, and the father had absconded. If he intended to repudiate what he had done during his minority, I think that, under the circumstances, he ought to have acted with greater promptness.

In answer to this, the plaintiff suggests that he had been misled by his mother as to the actual date of his birth, and that he was a year younger than it now turns out that he is.

I do not think that this affords him any excuse. His competency depends upon his age, not upon what he thinks his age is. If the defendants had misled him, they might be estopped. The fact that his mother misled him—if, indeed, she did—is quite immaterial.

I find as a fact that the defendants acted throughout honestly, without any knowledge of the plaintiff's infancy, and that there is nothing in his appearance to indicate infancy or to provoke inquiry. If it had not been for the fact that the

mother's statement was not contradicted, I should have thought from the plaintiff's appearance that he was older than the mother states. I do not at all credit his half-hearted statement that he was coerced into making the loan to his father. I think the true situation was that at that time he had confidence in the business, in which he was his father's right-hand man, and thought that the interest of his father and himself was identical.

The action will be dismissed with costs.

RIDDELL, J. JUNE 10TH, 1912.

SUTHERLAND v. SUTHERLAND.

Assessment and Taxes—Tax Sale—Irregularities—Advertisement of Lands for Sale—Insufficient Publication—Assessment Act, 4 Edw. VII. ch. 23, sec. 143—Time for Questioning Sale—Secs. 172, 173—Commencement of Statutory Period—Date of Tax Deed—"Openly and Fairly Conducted"—Costs—Damages.

Action to set aside a tax sale.

P. McDonald, for the plaintiff.

S. G. McKay, K.C., and J. G. Wallace, K.C., for the defendants.

RIDDELL, J.:—The plaintiff was the owner of about an acre of land in the township of West Zorra, upon which was a brick dwelling-house and another building, worth in all about $800 or $1,000.

On the 27th October, 1909, the Treasurer of the County of Oxford sold this for taxes for the sum of $38.78 (the exact amount due) to John Sutherland, brother of the plaintiff. He died, and in January, 1911, the deed was made to his son, Robert John Sutherland, one of the defendants.

On the 4th December, 1911, the plaintiff brought her action to set aside the sale.

Full credence is to be given to the witnesses called for the defence. This, in the case of C.R., applies to what he swore to after the trial of the case was resumed—I found it necessary to postpone the further hearing of the case by reason of his condition. All the notices that were sworn to have been sent

to the plaintiff, including those by her agent Wadland, I find she received, notwithstanding her denial.

But with all this, the proceedings bristled with irregularities, and such as, on the authorities, well known, rendered the sale voidable.

I mention in particular only one. The Assessment Act, 4 Edw. VII. ch. 23, sec. 143, sub-sec. 1, requires an advertisement "once a week for four weeks in the Ontario Gazette, and in some newspaper published within the county once a week, for thirteen weeks . . .," of the list of lands, etc. Then sub-sec. 3 provides that, instead of this advertising, "the Treasurer may have the advertisement published in the Ontario Gazette as hereinbefore provided, and then published in at least two newspapers, published as in sub-sec. 1 provided, a notice announcing that the list of lands for sale for arrears of taxes has been prepared, and that copies thereof may be had in his office, and that the list is being published in the Ontario Gazette . . . ."

This provision was simply to save the expense of publishing a long list of lands in the local papers: and it cannot, in my opinion, be considered that it did more than this. But the interpretation put upon this section by the county officials is, that a single publication is sufficient; and, accordingly, the publication required by sub-sec. 3 appeared only once in the local papers, instead of for thirteen weeks, as, I think, the statute requires.

The defendants, however, rely upon sec. 173.

Hall v. Farquharson, 15 A.R. 457, is relied upon by the plaintiff as shewing that the purchaser cannot claim the statutory protection, because, as it is argued, the sale was not "openly and fairly conducted."

That decision, it is contended on the other hand, was in a different state of the law. The statute there referred to is R. S.O. 1877 ch. 180. Section 155 of that Act is much the same as sec. 172 of the statute of 4 Edw. VII. Section 156, however, is different from sec. 173 of the present Act, and reads thus: "Wherever lands are sold for arrears of taxes, and the Treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by some person interested in the land so sold, within two years from the time of sale." There is here no validation of the sale; for that, sec. 155 had at that time to be applied to; and that required the sale to have been "openly

and fairly conducted.'' Moreover, in Hall v. Farquharson it was considered that only sec. 155 was or could be relied upon—the two years' time had not run. See p. 467.

This state of the law continued down through R.S.O. 1887 ch. 193, secs. 188, 189; 55 Vict. ch. 48, secs. 188, 189; R.S.O. 1897 ch. 224, secs. 208, 209; but the new Act 4 Edw. VII., while not substantially changing the earlier section by sec. 172, made a great change in the latter by sec. 173: ''Wherever land is sold for taxes and a tax deed thereof has been executed, *the sale* and the tax deeds shall be valid and binding, to all intents and purposes, except as against the Crown, unless questioned before some Court of competent jurisdiction within two years from the time of sale.'' In the present state of the law, there is no need of calling in the aid of sec. 172 to validate a sale—if the sale have been two years before the issue of the writ, that is enough when a tax deed has been executed.

But it has been authoritatively decided in Donovan v. Hogan, 15 A.R. 432, that ''two years from the time of sale'' means ''two years from the time of making the tax deed,'' not from the time of the auction sale of the land. While the Legislature has, in the Act of 1904, inserted the words ''the sale'' in the first part of the section, and it may be contended that this must mean the auction sale—and that the word ''sale'' at the end of sec. 173 must be read as meaning the same thing—I do not think it open to a Judge of first instance to question the applicability of a decision on the word by the Court of Appeal, on mere inference, except of the strongest kind. If a change is to be made, it should be made by the appellate Court. Section 173, then, does not here avail the defendants; and they must rely upon sec. 172. That protects only ''provided the sale was openly and fairly conducted.'' These words are considered in Donovan v. Hogan; and Patterson, J.A., says (p. 446): ''I have a strong feeling that something more must be required than easy-going, uninquiring honesty on the part of the official who sells . . . . What is aimed at is, that these sales shall be conducted as ordinary business transactions are, where property is sold by auction with a view to obtain its fair market value . . . . Fairness is required on the part of the vendee as well as the vendor.''

Here there was no local advertisement, but a bill posted at the court house, and a single insertion in two papers of the skeleton advertisement authorised by the Act. There were only three or four attending the sale, and but one bid for the prop-

erty, and that the exact amount of the charge against the property—this bid was made by the brother of the plaintiff, who had been anxious to get the property, although it is true that it was not proved that the county officials were aware of that fact. It is true, too, that the agent of the owner was at the sale, but he was not in funds. But can it be said that this sale was "conducted as ordinary business transactions are, where property is sold by auction with a view to obtain its fair market value?

I think the defence fails, and that the sale should be declared invalid. It is not a case for costs. The defendant Sutherland will have, of course, the benefit of the provision of 4 Edw. VII. ch. 23, sec. 176; the amount of damages to be assessed to him for purchase-money, interest, improvements, etc., under this section, and the value of the land, etc., will be determined by the Master (unless the parties agree); the costs of reference, etc., and further directions reserved.

I do not find fraud or evil practice by the purchaser (sec. 176 (3) (c)); nor does either of the other exceptions exist. It is to be hoped that aunt and nephew will be able to settle their dispute without further litigation.

MIDDLETON, J. JUNE 11TH, 1912.

RE THORNTON.

Will—Construction—Devise—General Residuary Gift—Description of Land Owned by Testator—Sale of that Land and Acquisition of other Land—After-acquired Land Passing under Residuary Devise.

Motion by Letitia Robbins, one of the next of kin of W. H. Thornton, deceased for an order determining a question arising upon the construction of the will of the deceased.

J. C. Payne, for the applicant.

N. B. Gash, K.C., for the executors and residuary devisees.

MIDDLETON, J.:—This appears to me to be a particularly plain case. The testator gives his nephew and niece all his residuary estate, and then adds "my real estate is," etc. This parcel of land was sold and other land purchased.

The description given of the land owned at the date of the will does not in any way cut down the wide operation given to the general words used in the residuary devise; and clearly the after-acquired land passed. So declare. The applicant will have no costs. The executors and residuary devisees may have theirs out of the estate.

MULOCK, C.J.Ex.D. JUNE 13TH, 1912.

STRANO v. MUTUAL LIFE ASSURANCE CO.

Life Insurance—Misrepresentations as to Health of Assured—Knowledge and Participation of Beneficiary—Material Misrepresentations—Fraud—Evidence—Avoidance of Policy.

Action by Domenico Strano to recover $5,000 under a policy of insurance on the life of his deceased wife, Margaret D. Strano, made for his benefit.

W. A. Henderson, for the plaintiff.

G. H. Watson, K.C., and A. Millar, K.C., for the defendants.

MULOCK, C.J.:—The application for the insurance was made by Mrs. Strano on the 29th August, 1910, and on the same day she underwent a medical examination and answered the questions upon which the examiner made his report to the defendants.

The policy was issued on the 30th September, 1910. On the 3rd February, 1911, Mrs. Strano died of tuberculosis.

The application for the policy contains the following declaration by the deceased: "I, the applicant for the above assurance, hereby declare that, to the best of my knowledge, information, and belief, my health is good, my mind is sound, and my habits temperate; that I usually enjoy good health, and do not practise any habit or habits that tend to impair my health or shorten my life; that the statements made above are respectively full, complete, and true; and I agree that such statements, with this declaration and any statements made or to be made to the company's examining physician, shall form the basis for the contract for such assurance; and, if there be therein any untruth or suppression of facts material to the contract, the policy shall be void and any premiums paid thereon forfeited."

The defence is, that, at the time of the application, the applicant's health, to her knowledge, was not good, nor did she usually enjoy good health, in that, at the time and for some time previously thereto, she had been suffering from and was affected by tuberculosis, from which she afterwards died; that the statement that she usually enjoyed good health was untrue, in that she was subject to and had, at different times, pneumonia, pleurisy; and that, in June, 1910, she had an attack of pneumonia which affected her lungs and resulted in consumption, from which she died.

In the examination of the deceased by the defendants' medical examiner, in connection with the application, the following questions were asked and answers given: Q. "Have you now or have you ever had any disease or disorder of the throat or lungs?" A. "Pneumonia one year ago; laid up ten days; fully recovered; no cough following; has also had occasional attacks of bronchitis (mild)."

The defendants said that this answer was untrue, in that she had not fully recovered, and did not disclose the fact that she had had a serious attack of pneumonia in June, 1910.

The deceased was also asked: "When were you last attended by a physician or when did you consult one and for what disease?" She answered: "Cold; four weeks; cleared up in three or four days; attended by Dr. Soday." She was further asked: "Are you now in perfect health?" To which she answered, "Yes."

The defendants said that these answers were untrue, in that, at the time of such examination, she was not in perfect health, and that the disease for which she was being attended by Dr. Soday was tuberculosis, from which she never recovered.

The defendants said that such misstatements and suppression of facts were material to the risk, and should have been made known to the defendants upon the negotiation for the policy; and that, by reason of such misstatements and suppression of facts, the policy is void.

The defendants further said that they were induced to make the policy by the fraud of the plaintiff; that, at the time of the application, he well knew the state of his wife's health, and that she was affected at the time with tuberculosis; and that he procured her to make the application for his benefit; and, for such purpose and in order to secure the issue of the policy, to misrepresent the actual state of her health; and to represent falsely that she was in perfect health, with intent to defraud the defendants of the insurance moneys. . . .

[Summary of the evidence.]

In my opinion, the evidence shews beyond reasonable doubt that the deceased was suffering from tuberculosis when Dr. Soday was called in, in June, 1910, and when, on the 29th August, 1910, she signed the application and gave the answers to the company's examiner. According to her statement to Mr. McIntyre on the 5th November, 1910, she had been unhealthy from childhood up. She was afflicted with a cough during Miss McIntyre's three weeks' visit in June, 1910; and it shewed no improvement when Miss McIntyre left. Mrs. Strano's state of

health caused her to pass much of her time in bed. Her language and demeanour to Dr. Soday convinced him that she fully realised the nature of her disease; and it was impossible for her, when signing the application and making the answers, to have believed that she was then enjoying good health . . . . To her own knowledge, she did not usually enjoy good health; and at the time of the application it was not good. Her statement that she was then in perfect health—meaning thereby in reasonably good health—was in fact untrue.

Thus she made material misrepresentations and concealed material facts from the company as to the true condition of her health. It was material that the company should have known the facts; and the misrepresentation and suppression of facts thus found render the policy void: Jordan v. Provincial Provident Institution, 28 S.C.R. 554; Von Lindenhaugh v. Desborough, 3 Moo. & Ry. 45.

I further find that the plaintiff, the beneficiary under the policy, was a party to the misrepresentations and concealments on the part of the deceased. In June, 1910, he was given to understand by Dr. Soday that his wife was then suffering from consumption, and was in such an advanced state that she would not live longer than nine months. He knew this when he took her to the insurance agent to effect the policy of insurance in question, and he paid the premium for that policy with his own funds, knowing that it was being effected for his benefit. . . .

In the witness-box he pretended that the idea of effecting insurance on the wife's life originated with her, and was carried out at her instance. I am unable to accept his testimony on the point. Whether or not the moral guilt attaches to both of them in equal degree is immaterial. The husband is here claiming the benefit of the policy, and is affected by his own conduct as well as hers. He knew, when the policy was effected, that his wife was dying of consumption, and he must have been aware that, if that fact were known by the company, the policy would not have been issued. He allowed them to remain in ignorance of the facts, and paid the premium, thereby identifying himself with the transaction. His own conduct is, I consider, sufficient to void the policy. He was a party to the fraud which procured its being issued, and cannot be allowed to profit by his own wrong.

I, therefore, think this action should be dismissed with costs.

POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CO.—MASTER IN CHAMBERS—JUNE 8.

Judgment Debtor—Company—Examination of Director—Con. Rule 903.]—After the motion noted in 3 O.W.N. 844, the plaintiffs signed judgment on default of appearance. They afterwards made a motion for the examination under Con. Rule 903 of Mr. Reynolds. He filed an affidavit to the same effect as on the previous motion, and was cross-examined. The motion was then argued. The Master said that the facts were the same as when the judgment was signed. The defendant company had never been authorised to do business in this Province, because sufficient stock had not been subscribed and paid. But a charter was issued by the Lieutenant-Governor on the 29th November, 1910. In it Mr. Reynolds was the first-named of six elected provisional directors; and the head office of the company was fixed at Toronto. It was also proved that in the prospectus issued by the company in England, and filed with the Provincial Secretary here, Reynolds was named as first of the Canadian directors, and was also called president—also the head offices were stated to be at 77 Victoria street, Toronto. These facts seemed sufficient to support an order for the examination of Mr. Reynolds, if the plaintiffs still thought it would be of any service to them. If they elected to proceed, costs would be reserved. If they took the other course, the motion would be dismissed without costs. M. C. Cameron, for the plaintiffs. John MacGregor, for Mr. Reynolds.

EDGEWORTH v. ALLEN—MASTER IN CHAMBERS—JUNE 10.

Writ of Summons—Service out of the Jurisdiction—Motion to Set aside—Irregularities.]—Motion by the defendants to set aside the service of the copy of the writ of summons. The defendants resided in Alberta; and an order was made for service under Con. Rule 162. The writ, however, was issued as if for service in this Province; and the copy served gave only ten days for appearance, instead of twenty, as directed by the order. The copy served was also unsigned and undated, though the original was correctly made out as to this. The Master said that these very serious irregularities could not be now cured by amendment. There was no explanation of how they came to be made. The first error seemed fatal. Motion granted; with costs, fixed at $25—unless either party should desire a taxation. Featherston Aylesworth, for the defendants. W. H. Bourdon, for the plaintiff.

McLAREN v. TEW—MASTER IN CHAMBERS—JUNE 11.

Evidence—Examination of Party as Witness on "Pending" Motion—No Notice of Motion Served—Appointment for Examination Set aside.]—This was an action to set aside as fraudulent a sale of assets by the defendant Wilson to the defendant Graham, and for an injunction and a receiver. Tew was made a party defendant as assignee of Wilson for the benefit of creditors. Before being served with the writ of summons, Tew was served by the plaintiffs with an appointment for his examination as a witness on a pending motion for an interim injunction and receiver, under Con. Rule 491. On this he attended on the 5th June, with counsel, but refused to be sworn, on counsel's advice, on the ground that there was no motion pending. The examination was thereupon enlarged, and the defendant Tew moved to set aside the appointment. The Master referred to the cases under Con. Rule 491 collected in Holmested and Langton's Judicature Act, 3rd ed., p. 713, saying that none of them was exactly in point. The nearest and the one on which the plaintiffs relied was Dunlop v. Dunlop, 9 O.L.R. 372. It was there decided that an ex parte motion was within the Rule; and the argument of the plaintiffs' counsel was, that it was not necessary that a notice of motion should be served in this case, unless there was a distinction between a party to an action and a stranger. In answer, it was pointed out that such a proceeding was hitherto unknown—that it would enable a plaintiff to do indirectly what cannot be done directly—and there was a clear and vital distinction between the facts of the Dunlop case and the present. It was conceded that, as soon as a motion for an injunction and receiver was served, the defendants could be examined in support if the plaintiffs thought it advantageous. The difference between the facts of this case and those of the Dunlop case was plain. In the Dunlop case, there was no one on whom a notice of motion could have been served, as the whole object was to find out some way of serving the defendant. Here, if the examination was to be of any use, a notice must be served later, and upon the person sought to be examined. To apply the decision in the Dunlop case as decisive here would seem to violate the well known dictum in Quinn v. Leathem, [1901] A.C. 510. In the same way it was lately pointed out that unforeseen and unlooked for consequences arise from case B being decided because it is like case A; then C follows because it is like B; and thereafter D from its likeness to C—though, if D had come up, instead of B, it would

not have been thought to be within the same principle. The present course would not have been followed by the plaintiffs if it had not been for the Dunlop judgment. Motion granted, with costs to the defendant Tew in the cause, leaving the plaintiffs to carry the matter further if deemed of sufficient importance. H. S. White, for the defendant Tew. A. C. McMaster, for the plaintiffs.

RE PIPER—MIDDLETON, J.—JUNE 12.

Will—Construction—Payment of Debts—Resort to Undisposed of Personalty—Costs.]—A question was asked which was not raised on the former motion (see ante 912, 1243): Should the executors first resort to the residual estate as to which no disposition is made for payment of debts, before touching the property given to the widow? MIDDLETON, J., said that the asset to be first resorted to was undisposed of personalty, and the question should be so answered. No costs, as the question might have been raised on the former motion, and there did not seem to be any contest over this question. W. E. Raney, K.C., for the executors. I. F. Hellmuth, K.C., for David H. Piper.

STRONG v. CROWN FIRE INSURANCE CO. (AND THREE OTHER ACTIONS)—SUTHERLAND, J.—JUNE 12.

Judgment—Motion to Vary—Consolidation of Actions—Further Evidence—Erroneous Recital in Judgment Settled and Entered—Motion to Strike out, Made after Hearing of Appeal.]—These actions were tried before SUTHERLAND, J., without a jury, and judgment was reserved and given on the 2nd January, 1912 (ante 481). Before judgment was given, an application was made to SUTHERLAND, J., for an order consolidating each of the original actions with others in which the writs of summons for similar claims had been issued since the trial. The point involved was, whether the original actions were brought prematurely; and, if so, what course it was proper to pursue under sec. 172 of the Insurance Act. In the learned Judge's reasons for judgment, he stated that an order would be made for consolidation of the actions; and in the formal judgment settled and entered on the 17th January, 1912, that order was embodied. The formal judgment also contained the following words: "This Court having been pleased further to direct that the defendants be at liberty, if they so elect, to tender further evidence in the consolidated action in support of their defence, and the

defendants having elected not to tender further evidence." The defendants moved to strike these words out of the judgment. The learned Judge said that, as no intimation had been given to him in the argument of counsel for the defendants that, if the order for consolidation were made, further evidence would be offered, he assumed that it was not intended to offer any; and he gave no direction such as that quoted above from the formal judgment; but, as an appeal from his judgment had been heard by the Court of Appeal, and judgment thereon was pending, he refused to make any order now. F. E. Hodgins, K.C., for the defendants. N. W. Rowell, K.C., and George Kerr, for the plaintiffs.

IMRIE v. WILSON—DIVISIONAL COURT—JUNE 12.

Principal and Agent—Agent's Commission on Sale of Land—Costs.]—Appeal by the plaintiffs from the judgment of CLUTE, J., ante 1145, dismissing the action without costs; and cross-appeal by the defendant as to costs. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. The Court dismissed the plaintiffs' appeal with costs and the defendant's appeal without costs. The Chief Justice said: We all agree that, for the reasons stated in the judgment of the trial Judge, the appeal cannot succeed. The continuity of events was broken; a new and distinct act intervened, by reason of Klingensmith changing his position from that of probable purchaser to that of agent; and this element distinguishes the case in hand from Wilkinson v. Alston (1879), 48 L.J.Q.B. 733, Wilkinson v. Martin (1837), 8 C. & P. 1, and the other authorities. The appeal will be dismissed with costs. We cannot interfere with the learned trial Judge's disposition of the costs. The defendant's cross-appeal will be dismissed without costs. J. R. Roaf, for the plaintiffs. F. Arnoldi, K.C., for the defendant.

FEE v. MACDONALD MANUFACTURING CO.—SUTHERLAND, J.—JUNE 13.

Charge on Land—Registration—Absence of Interest in Creator of Charge—Cloud on Title—Removal—Damages.]—Action for a declaration that a certain agreement between the defendant company and the defendant Henry Lang, registered by the company against lot 3 in the 7th concession of the township

of Collingwood, was a cloud upon the title of the plaintiffs to that lot, and that the registration should be vacated, and for damages for the loss and inconvenience sustained by the defendant company's refusal to vacate the registration. The agreement purported to give the defendant company a lien on the land for the price of machinery sold to Henry Lang. The learned Judge, after stating the facts and reviewing the evidence, said that it was fairly well established that, at the time Henry Lang purchased the machinery, he no longer had any interest in the land in respect of which he could give any lien to the defendant company. Judgment for the plaintiffs as asked, declaring that the agreement registered by the defendant company is a cloud upon the title and must be removed; and awarding the plaintiff $50 damages and costs of action. If either party is dissatisfied with the amount of damages, there will be a reference as to damages, at the risk of that party. A. E. H. Creswicke, K.C., for the plaintiffs and defendant Henry Lang. J. J. Coughlin, for the defendant company.

NADEAU v. CITY OF COBALT MINING CO.—DIVISIONAL COURT—JUNE 13.

Master and Servant—Injury to Servant by Kick of Master's Horse—Finding of Jury—Habit of Kicking—Scienter—Imputed Knowledge of Master—Incorporated Company—Negligence.] —Appeal by the defendants from the judgment of MIDDLETON, J., ante 1126. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. The Court dismissed the appeal with costs. A. E. Fripp, K.C., for the defendants. A. G. Slaght, for the plaintiff.