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APPELLATE DIVISION.

MAY 1ST, 1914.

RE ROBERT GEORGE BARRETT.

Will—Construction—Devise—Sale of Lands Devised between Date of Will and Death of Testator—Mortgage Taken for Part of Purchase-money—Claim of Devisees to Mortgage—Conversion—Bequest to Daughter of Moneys in Hand or Bank at Time of Decease for Current Housekeeping Expenses—Large Fund in Bank—Absolute Right of Legatee to whole Fund.

Appeal by the three unmarried daughters of Robert George Barrett, deceased, from the order of MIDDLETON, J., 5 O.W.N. 805.

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

W. N. Tilley, for the appellants.

I. F. Hellmuth, K.C., for the testator's sons.

F. Arnoldi, K.C., for the testator's married daughter.

H. S. White, for the executors.

The judgment of the Court was delivered by MEREDITH, C.J.O..—As to the first question, i.e., the devises contained in paragraphs 12, 13, and 14 of the will, we are of opinion that we should follow the decision of the Court of Appeal in In re Clowes, [1893] 1 Ch. 214; and, we being of that opinion, the first ground of appeal fails.

The second and remaining question is as to the effect of paragraph 26 of the will, which reads as follows: "I hereby give to my daughter Sarah Frances Barrett whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease for the purpose of en-

abling my said daughter to meet the immediate current expenses in connection with housekeeping."

No question would probably have arisen as to the meaning of this provision but for the fact that the testator had at the time of his death at his credit in his bank the large sum of $17,200.

It is very probable that if the testator had contemplated when he made his will that so large a sum as $17,200 would be at his credit in his bank at the time of his decease he would have made a different provision as to the disposition of it from that contained in paragraph 26, but that, in my opinion, affords no reason for putting a construction on the language of the testator different from that which would be placed upon it if the fund amounted to no more than $500.

My learned brother's view was that the legatee is not entitled to the fund absolutely, but that a trust is created, and that all money not needed for the purpose which the testator mentioned "belongs to the estate as a resulting trust."

I am, with respect, unable to agree with this view, and am of opinion that the clear words of gift to the daughter are not cut down or controlled by the statement of the testator as to the purpose or object of the gift.

Such a provision in favour of a wife is spoken of by Kay, J., in Coward v. Larkman (1887), 56 L.T.R. 278-280, as "the usual provision for a wife after her husband's death." The bequest in that case was of £100 to the wife "for her present wants and for housekeeping expenses," and it was not suggested that any trust was created or that the wife was not entitled to the £100 absolutely, but the contrary was taken for granted in all the Courts before which the case came; (1887), 57 L.T.R. 285, (1889), 60 L.T.R. 1.

In Hart v. Tribe (1854), 18 Beav. 215, one of the questions was as to the effect of a provision of a will in these words: "I also request my sister to give her, the said Maria, my wife, the sum of £100 out of any money which may be in the house or at my banker's at the time of my decease, for her present expenses of herself and the children;" and it was held that this was an absolute gift to the wife of the £100. In delivering judgment the Master of the Rolls said (p. 216): "With respect to the first legacy of £100, I entertain no doubt. It was intended by the testator to be paid to the widow, immediately upon his death, and for her current expenses. That being so, I think that it was a proper payment to be made; and the Court will not in-

quire into the mode in which she has administered that money, provided the infants have really been supported, which it is not disputed they have been. If one was taken away a few days after the death of the testator or at any subsequent time, I think the Court cannot inquire whether more or less was expended on him or make her refund. I think she was entitled to receive that £100, and that I cannot now take it away from her."

I am unable to see how, if the wife in that case was entitled to the £100 absolutely, on what principle it can properly be held that the legatee in the case at bar is not entitled to receive the whole of the fund bequeathed to her or that she can be called upon to account for the mode in which she may have expended it.

While it may probably have been intended by the testator that the legatee should temporarily keep up the house in which he was living at the time of his death, and that his other unmarried daughters should continue to live with her in it, there is nothing in the language of the paragraph in question to create a duty on the part of the legatee to keep up the house or to maintain it as a residence for herself and her sisters, or to indicate that anything but a benefit personal to the legatee was intended.

What the paragraph means, I think, is, that whatever money there should be at the time of the testator's death in the places mentioned, whether it should be more or less, should belong to the legatee to enable her to meet the immediate current expenses in connection with housekeeping; and to treat the provision as meaning that a fund was created out of which the legatee was to pay the testator's household debts and "all that could fairly be regarded as falling within that designation during a reasonable time after his death, pending the family reorganisation," is to read into the will something which, with great respect for the contrary opinion of my brother Middleton, the testator has not said, and which the language he has used to express his intention does not import.

I would vary the order appealed from by substituting for the declaration contained in its third paragraph a declaration that Sarah Frances Barrett is entitled under the provisions of the 26th paragraph of the will to receive absolutely all money which the deceased at the time of his death had at his credit in any bank or upon his person or in his domicile; and, with that variation, I would affirm the order.

The costs of all parties of the appeal, those of the executors between solicitor and client, should be paid out of the fund.

MAY 1ST, 1914.

RE REBECCA BARRETT.

Will—Construction—Gift to Daughters—Annuity out of Rents of Land or Estate Tail in Land—Bequest to Granddaughter —Increased Rental—"Out of the Rental"—"Issue"—Limitation to Children—Residuary Clause.

Appeal by Helena A. Mosson, the married daughter of the testatrix, from the order of MIDDLETON, J., 5 O.W.N. 807.

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

F. Arnoldi, K.C., for the appellant.

W. N. Tilley, for the unmarried daughters of the testatrix.

I. F. Hellmuth, K.C., for the sons.

H. S. White, for the executors.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—I agree with my brother Middleton that there is no gift to the daughters of the rents and profits of the Bostwick property, and that the effect of the will is to give annuities payable out of these rents and profits.

It is unquestionable that, unless a contrary intention appears by the will, a devise of the rents and profits of land carries the land itself, and, by force of the Wills Act, the fee simple or other estate of the testator in the land; and in Goring v. Hanlon (1869), 4 Ir. C.L.R. 144, it was sought to extend this rule of construction to bequests of specific annual sums out of land, but it was held that it was not applicable, even though the specific sums happened to be the whole of the rent which at the time the land produced.

Some support for the proposition that a devise of an aliquot part of the rents and profits of land passes a like part of the land itself is to be found in Bent v. Cullen (1871), L.R. 6 Ch. 233; but that case cannot, in the light of subsequent cases, be treated as authority for the proposition, and it is stated in Theobald on Wills, 7th ed., p. 503, that it "must be considered overruled." The case is discussed in In re Morgan, [1893] 3 Ch. 222, and it was there said by Lindley, L.J. (p. 228), that he could "not help thinking that in Bent v. Cullen the Lord Chancellor, Lord Hatherley, did for a moment fail to observe the difference be-

tween giving a person a portion of the income of a fund and something payable out of it." . . .

[Reference to the facts of the case of In re Morgan and to the opinions of the Lords Justices.]

Although in the case at bar the gift is a direct gift of £654 "out of the rents and profits payable" from the property, and not, as in In re Morgan, a gift of the property to trustees to pay the annuities out of the interest and profits of the property, that circumstance is not, for the purpose of the present inquiry, of any importance.

It was contended by counsel for the appellant and for the three unmarried daughters that the language of the testatrix indicates that she intended that the gift should extend to the whole of the rents and profits of the property, and it was said that the increase to $600 of the annuity to the granddaughter provided for in case upon renewal of the lease the rentals should be increased, upon the construction adopted by my brother Middleton, would result in the annuities to the daughters being correspondingly reduced, and that that could not have been the intention of the testatrix. I am unable to agree with that contention, and think that the increase in the granddaughter's annuity is to be made only if and so far as the increased rental will permit of its being made after providing for the annuities to the daughters. In other words, that the daughters are to have their annuities of £150 each, and that, if the increased rental should permit that being done, the granddaughter's annuity should be increased to the same amount.

It is quite impossible for me to conceive that the testatrix, who contemplated that there would be an increase in the rentals when the renewal took place, if she had intended to give the whole of the rents and profits of the property to the daughters and the granddaughter, would not have said so, instead of creating and disposing of a fund of £654 payable out of the rents and profits; and it is a strong circumstance making against the contention of the appellant that, although the testatrix, as I have said, contemplated an increase in the rental when the renewal of the lease should come to be made, the only increase in the annuities for which she provides is an increase in the annuity of the granddaughter.

It is to be observed, also, that in In re Morgan, the result of the decision was that the corpus of the fund was undisposed of, while in the case at bar there will be no such result, because of the residuary gift to all the sons and daughters of the testatrix.

It was also contended that in any case the annuities were not, as my brother Middleton held, annuities for the lives of the annuitants, but were perpetual. Practically all the previous cases bearing on this branch of the inquiry, and they are numerous, were discussed by Monroe, J., in In re Forster (1889), 23 Ir. Ch.R. 269, and the result of them, as well as of that case and the subsequent cases of In re Morgan, Ward v. Ward, [1903] 1 I.R. 211, and In re Smith's Estate, [1905] 1 I.R. 453, is, that there is nothing in the will in question to take the case out of the ordinary rule that where annuities are created de novo the annuitants take only for life, although the gift of them is limited to several persons successively for life and then to their children.

On this branch of the case I agree with the judgment of my brother Middleton.

The result is that, in my opinion, the appeal fails and should be dismissed, and that the costs of all parties of the appeal, those of the executors between solicitor and client, should be paid out of the estate.

MAY 1ST, 1914.

*RE C. M. BILLINGS AND CANADIAN NORTHERN ONTARIO R.W. CO.

Railway—Expropriation of Land—Arbitration and Award—Appeal from Award—Question of Amount—Method of Ascertainment—Evidence of General Rise in Value of Lands in Neighbourhood—Relevancy—Frontage Value—Potential Value—Allowance for Clay "Filling"—Increase in Amount Awarded.

Appeal by C. M. Billings from an award under the Railway Act of Canada.

The award was made by His Honour Judge MacTavish and Mr. G. F. Macdonnell, two of the three arbitrators appointed to fix the compensation to be paid by the railway company, the respondent, to the appellant, for lands taken by the respondent for the purposes of its right of way. The amount awarded for the lands taken and for damages to the lands of the appellant

*To be reported in the Ontario Law Reports.

injuriously affected by the construction and operation of the railway was $9,350. The third arbitrator (Mr. J. I. MacCraken) dissented from the award, being of opinion that the amount should be $18,952.30.

See Re Billings and Canadian Northern Ontario R.W. Co., 5 O.W.N. 396, 29 O.L.R. 608, an appeal from an award of compensation to H. B. Billings, the brother of the present appellant, in respect of lands in the same neighbourhood.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and RIDDELL, J.

I. F. Hellmuth, K.C., and D. J. McDougal, for the appellant.

E. D. Armour, K.C., and A. J. Reid, for the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The respondent urges that the arbitrators have not erred in any question of principle, and that, as the appeal involves only a question of amount, this Court should not interfere, there being evidence on which the award could properly be supported.

But, if it were only a question of the amount of the compensation allowed, the cases of James Bay R.W. Co. v. Armstrong, [1909] A.C. 624, Re Ketcheson and Canadian Northern Ontario R.W. Co. (1913), 29 O.L.R. 339, and Re Cavanagh and Canada Atlantic R.W. Co. (1907), 14 O.L.R. 523, indicate that this Court has jurisdiction to increase or diminish the amount awarded within the limits of the rule therein laid down.

One of the arbitrators, Mr. Macdonnell, in one of the papers furnished as containing his reasons says: "The sale from H. B. Billings was at the rate of $3,500 per acre; and, although the railway company claimed that a special price was paid for this land, I think this sale is the best evidence we have to go on to determine the value of the lands in question.

"As I understand the effect of the legal decisions, the proprietor is not entitled to have the value of the lands taken based on what he might sell them for at a problematical sale in the future, as city or town lots, but he is entitled to the present value of the lands based on what a reasonable purchaser would give for them at the present time, keeping in view their potential value and the opportunity of making money out of them later on by subdividing. It is, of course, quite obvious that any such amount as $3,500 per acre is far beyond the value of farm or market-garden property, except as it might be bought with a

view to sell for other purposes; but, on the evidence, I should be inclined to say that the lands taken should be assessed at that rate, which, as they consist of 1.49 acres, would amount to $5,215."

To this amount (i.e., $5,215) the award adds the sum of $1,000 "in order" (to quote Judge MacTavish) "to fully compensate the claimant, as his land was a little better situated" (than the five acres owned by H. B. Billings sold at $3,500 per acre), "having a frontage on Bank street road." Judge MacTavish at the conclusion of his reasons adds: "I concur in the reasons given by Mr. Macdonnell for his computation." In a subsequent memorandum Mr. Macdonnell thus states the position: "I did not think it proper to subdivide values on the basis of front and rear lots, as this seemed fanciful. No subdivision has actually been made, nor have steps been taken for that purpose either on this property or in the vicinity; and the owner, though present at the hearing, did not give any evidence, and in fact no evidence was tendered at all of any intention on his part to subdivide his land."

This latter reason given by Mr. Macdonnell is not consistent with his former opinion nor with the addition of $1,000 for "frontage on Bank street;" and I am inclined to think that Judge MacTavish's agreement with the computation made by Mr. Macdonnell only involves his approval of the views found in the earlier memorandum.

If so, the question is not one of principle, but a difference between the mode of ascertainment adopted by the two arbitrators, and that favoured by all the witnesses both for and against the claimant.

For the reasons given in the Ketcheson case, 29 O.L.R. 339, I think this Court may reject the method favoured by the arbitrators, if, upon the evidence given in the case, another is preferable or more likely to do justice between the parties.

The evidence, speaking broadly, discloses that the city of Ottawa is spreading southward along and on both sides of Bank street. In consequence of this, speculation in lands has extended beyond the canal, while the territory in which the land in question lies is described by one witness, Davis, called by the respondent, as "the coming land of the future." With this the general body of the evidence coincides. While much testimony was given of individual sales on and near Bank street at considerable distances from the appellant's property, and, therefore, of no specific value, the result of it all is to establish

a gradual and noticeable rise in values in the district south of the Rideau river. This is relevant evidence within the principle—if adopted—stated in the case of Levin v. New York Elevated R.R. Co. (1901), 165 N.Y. 572. . . . The reasoning in that case commends itself to me. See Re National Trust Co. and Canadian Pacific R.W. Co., 5 O.W.N. 221, 29 O.L.R. 462.

I think the arbitrators might well act upon it in arriving at a general basis of value in the locality.

All the witnesses, both for the appellant and respondent, value the 200 feet on Bank street, which is taken, upon a frontage basis, the only difference between them being the amount to be allowed. The figures vary from $20 a foot to $75 or $80. . . .

Taking the award as it stands, the 200 feet on Bank street by a depth of 100 feet represent 41/100ths of an acre, and, calculated upon the basis of $3,500 per acre plus the $1,000 for frontage on Bank street, its value works out at $13.75 per foot frontage, or $6.25 per foot less than the lowest at which any witness for the respondent has placed it.

There is little, if any, evidence of sales in this district on Bank street. . . .

It is somewhat startling, of course, to find that the highest value, $75 or $80 per foot, works out at $34,000 per acre. But Mr. Rogers thinks this a reasonable value, and bases his ideas upon the rapid increase of value within the past few years. . . .

The frontage value, ascertained by striking an average, is, on the part of the appellant, $62, and, on the part of the respondent, $25.

Taking the admission of Mr. Clarke, referred to later on, that there is enough filling in the land expropriated to level up the 100 feet on each side of the right of way, then, upon the basis of $25 as it now stands, plus the value of the filling, $4,154, this 200 feet, when levelled up, would come out at $45 per foot. Dealing with it at $62 per foot, and deducting this $4,154, the lots would represent a value of $41 per foot.

Viewing the question in every aspect, and endeavouring to pay due regard to the evidence on both sides, as well as the admitted difficulties caused by the lie of the land, the necessity of dealing with the line and flow of the creek, and, what is agreed upon by all, the carrying of the property for some years, I think it would not be unreasonable to place the present frontage

value of the Bank street lots, including all their potentialities, at not more than $30.

In dealing with what is called "filling" by the dissenting arbitrator, there is no record of the reason why an allowance was not made for it, save a memorandum of Mr. Macdonnell read to the other arbitrators before the award was made. No reference to it appears in Judge MacTavish's reasons. The award does not mention it in terms, and it can only be included, if at all, in the $3,500 per acre allowed. It is really part of the land taken, and should, if at all, be allowed as an element in its value. The case of The King v. Kendall (1912), 14 Can. Ex. C.R. 11, does not seem in point except so far as it lays down the principle that the property must be assessed at its market value in respect of the best uses to which it can be put by the owner, taking into consideration any prospective capabilities and any inherent value it may have.

If before levelling down the one hundred feet, to the grade of Bank street, the appellant found that there would have to be removed clay which he could sell in situ, at a price, I can see no good reason why he should not be compensated for it at that value. The evidence is that it is worth twenty cents per cubic yard over and above the cost of digging it down. In this value Mr. Clarke, the engineer called for the respondent, agrees, and also admits that there is sufficient there to fill up the one hundred feet on each side of the right of way to a sufficient height to make it good property. Therefore it would seem that a fair allowance to make for it would be the 20,774 cubic yards at twenty cents a cubic yard. . . .

Both parties sem satisfied with the amount allowed for the other lands taken and with the amount allowed for depreciation to the remainder of the property. The allowance for that element is not accurately expressed, and is intended, I think, to mean that upon the assumption that it is worth $3,500 per acre it is damage to the extent of twenty-five per cent. The lands taken, apart from the Bank street lots, have an area of 1.085 acres, and, at that valuation, would amount to $3,797.50.

But I do not see that any damage has been suffered by the Bank street lands within a distance of one hundred feet on each side of the railway allowance which is not sufficiently compensated for in the allowance made for the filling. This leaves the damage by the railway confined to that part of the remainder of the property which forms a hundred-foot strip in rear of the Bank street lots on each side of the lands taken.

The award should, therefore, be increased in the following way:—

200 feet taken on Bank street at $30 per foot....	$6,000.00
Rest of land taken, 1.085 acres, at $3,500 per acre	3,797.50
Filling 20,774 cubic yards at twenty cents.....	4,154.80
Damage to 100 feet strip on each side of railway in rear of Bank street lots, 2.16 acres on the basis of 25% of its value.....	1,890.00
Total	$15,842.30

The respondent should pay the costs of the appeal.

MAY 1ST, 1914.

*HOME BANK OF CANADA v. MIGHT DIRECTORIES LIMITED.

Buildings—Wall between Buildings on City Street—Failure to Establish as Party Wall—Boundary between Lots—Method of Ascertainment—Disappearance of Original Monuments—Mode of Survey—Surveys Acts, R.S.O. 1914 *ch.* 166, *sec.* 40—*Inapplicability—Easement—Injunction.*

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 690.

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

R. McKay, K.C., and Gideon Grant, for the appellant company.

E. D. Armour, K.C., and A. E. Knox, for the plaintiff bank, the respondent.

MEREDITH, C.J.O.:—The action is brought to restrain the appellant from cutting openings into the south wall of a building known as numbers 78 and 80 on Church street, in the city of Toronto, and placing therein steel girders and columns in connection with the construction of a building which the appellant is erecting upon land to the south of these premises.

*To be reported in the Ontario Law Reports.

The contest is as to the ownership of this south wall, which, according to the contention of the respondent, stands entirely on its land, but, according to the contention of the appellant, is a party wall and is owned by the parties in common.

The Chief Justice found in favour of the respondent's contention, and by the judgment in appeal it is declared and adjudged that the appellant, its servants and agents, be and they are restrained from further interfering with or pulling down the wall in question, and that the appellant's wall adjoining that wall "be allowed to remain as at present constructed."

. . .

The south face of the wall in question is practically plumb from top to bottom, except possibly that part of it below the ground, which is said by one witness, McLeish, to extend about 4 inches south of the southern face of the upper part of the wall. On the south face of the wall openings were left so that they might be used to receive the joists of a building to the south, and in the wall there were two chimneys, in each of which were built, besides the flues for use in the respondent's building, two flues which would be available for use in the building to the south, and on the first and third floors fireplaces projecting beyond the face of the wall were constructed on both sides of the chimneys, the projections extending about 10½ inches from the face of the wall.

The wall in question is about 22 inches in width up to the top of the basement. It then narrows to 18 inches, and continues of that width up to the attic floor, and from there up to the roof is 14 inches in width, and above the roof the wall is continued as a parapet wall 9 inches in width for a few feet.

The south face of the wall is, as I have said, plumb from top to bottom, and the offsets occasioned by its width being narrowed are all on the north side.

An attempt was made at the trial to prove the position of the side lines of the lots on the plan. This was done by calling Ontario land surveyors to prove the results of surveys they had made. None of the original posts or monuments marking the angles of the lots can now be found, and no evidence of their position was obtained by these surveyors. The course adopted by them was that prescribed by sec. 40 of the Surveyors Act, R.S.O. 1914 ch. 166, and the southerly limit of Adelaide street and the northerly limit of Court street were assumed to be those limits as the streets are laid out and travelled. The distance between these streets was divided into the number of

lots which it contained in the survey upon which the plan was based, and there was assigned to each lot a breadth proportionate to that intended in the survey as shewn on the plan. The distance between Adelaide street and Court street was found to be 217 feet 4 inches, which is about 8 inches more than the distance as shewn on the plan. The result of this method of survey was to place the line between lots numbers 1 and 2 at its point of commencement on Church street, about the centre of the wall in question, and to continue it westward, trending gradually to the north, so that at the westerly limit of the lot it ran a few inches to the north of this wall, leaving it for a distance of 31 feet 4 inches wholly within the limits of lot number 2.

The mode of survey adopted is not authorised by the Surveys Act, sec. 40 being applicable only to original surveys in townships made by or under the authority of the Crown.

The statute not being applicable, and the original posts or monuments not being in existence, and there being no direct evidence as to their position, some other mode of ascertaining the boundaries of the lots must be resorted to, and in such a case the best evidence is usually to be found in the practical location of the lines, made at a time when the original posts or monuments were presumably in existence and probably well-known.

That is the rule adopted by the State of Michigan and others of the United States.

In Diehl v. Zanger (1878), 39 Mich. 601, it was said by the Supreme Court that a re-survey made after the monuments of the original survey have disappeared is for the purpose of determining where they were, and not where they ought to have been, and that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. . . .

With this statement of the law I entirely agree, and I proceed to apply it to the evidence in the case at bar, in order to determine what are the proper inferences to be drawn from the facts and circumstances in evidence as to the position of the line between lot number 1 and lot number 2.

If it were not for the fact that, when the building on lot number 1 was erected, Widmer was the owner of both that lot and lot number 2, the only reasonable inference to be drawn would be that the south face of the building was co-terminous

with the boundary line between the two lots. . . . The building was erected before 1850, probably some years before, and at a time when the original monuments were presumably in existence or their position was known. Notwithstanding the fact that Widmer was the owner of both lots when the building was erected, the proper inference upon the facts in evidence is, I think, that the south wall was built so that its south face was upon the line between lots numbers 1 and 2, and there is nothing to indicate that that wall should constitute a party wall for that building and a building which might afterwards be erected on lot number 2.

As the Chief Justice points out, according to the testimony of Mr. Gibson, who is an architect of long experience, he could not recall a case of a party wall being built like the wall in question, i.e., plumb on the south side with steps or jogs on the north side of it, and so constructed that, if it were a party wall, the respondent would own less and less of it as it goes up and until the parapet wall would be entirely on the appellant's land.

Another circumstance which, I think, makes against the contention of the appellant, is the fact that the lease to Hamilton contained a covenant on his part to "excavate and dig the ground hereby demised" (i.e., lot number 2) "upon Church street for the foundation or foundations of a messuage or messuages or building or buildings . . ."—indicating, as it appears to me, that the land demised was entirely unbuilt upon, and, therefore, not occupied, as, according to the appellant's contention, it is, to the extent of 11 inches, or one-half the width of the wall in question, by the south part of the wall.

It is also in evidence that the south face of the wall, so far as it is exposed, has been kept in repair by the respondent, and that no contribution towards the expenditure for that purpose has been asked from or made by the appellant or its predecessors in title.

The inference I would draw from the evidence and the circumstances I have mentioned is, that the wall in question is not a party wall, and that the most that the circumstance that in erecting the building on the respondent's land provision was made for placing the floor joists of a building in the south wall and supporting them by the wall, and for the fireplaces and flues, indicates, is, that the south wall was intended to be used for those purposes, and that all that the appellant has acquired is the right to use the wall for those purposes.

Upon the whole, I am of opinion that the Chief Justice came to the right conclusion, and that the appeal should be dismissed with costs.

See also Barry v. Des Rosiers (1908), 14 B.C.R. 126.

MACLAREN and HODGINS, JJ.A., agreed.

MAGEE, J.A., dissented, for reasons to be given later.

Appeal dismissed; MAGEE, J.A., *dissenting.*

HIGH COURT DIVISION.

KELLY, J. APRIL 27TH, 1914.

LAURIN v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Goods—Claim for Value of Goods not Delivered—Contract—Change in Destination—New Contract—Liability of Railway Company for Full Value—Inapplicability of Condition Limiting Liability—Evidence—Finding of Fact of Trial Judge—Ascertainment of Value of Missing Goods.

Action for the value of goods delivered to the defendants for carriage, and lost or mislaid in the course of carriage.

T. N. Phelan, for the plaintiffs.

I. F. Hellmuth, K.C., and C. W. Livingston, for the defendants.

KELLY, J.:—This action was commenced by the plaintiff Laurin on the 2nd July, 1913, to recover from the defendants $2,741.25 as the value of goods delivered to them on the 5th May, 1913, for shipment over their road to Winnipeg; the goods, consisting of household furniture and effects and clothing, were made up in 71 packages or parcels. Shipping bills were made out, copies of which were delivered to Laurin, and there was a special contract under which the defendants seek to limit their liability to a sum not exceeding $5 for any one of the packages or any one article not enclosed in a package. A further docu-

ment was obtained from Laurin guaranteeing payment of freight and charges by the consignee at the destination of the goods. This guarantee, according to the evidence of Stewart, the defendants' yard-checker at Montreal, was obtained after the other papers were signed.

On the 8th May, Laurin and his family left Montreal for Winnipeg, arriving there on the 10th May. Soon after their arrival, Laurin, having changed his plans and decided to return to Toronto, instructed the defendants' agent to have the goods intercepted at Fort William, and arranged with Mr. Smith, the defendants' freight agent at Winnipeg, that the defendants should deliver the goods to the Northern Navigation Company at Fort William to be conveyed by that company from Fort William to Toronto; he also made arrangements with the navigation company's representative at Winnipeg to carry them from Fort William to Toronto, and made a payment to him on the freight charges. At Smith's request, Laurin then signed the following direction:—

"Winnipeg, May 13th, 1913.

"Mr. George Smith, C.P.R. Freight Agent, Winnipeg.

"Dear Sir: Kindly return 74 pieces of household furniture in car No. 116908 from Fort William to the Northern Navigation Co. in Fort William, Ont., and oblige,

"Yours truly,

"A. Laurin."

"74" was an error for "71."

On the same day, Smith instructed the defendants' representative at Fort William to deliver the goods to the Northern Navigation Company, advising him that Laurin had made arrangements with that company to accept the shipment. The goods had not arrived in Fort William on the 12th May, but on the 14th the defendants' agent at Fort William advised Smith that the goods had then arrived there. Laurin and his family came on to Toronto, arriving on the 17th May. Not finding his goods, he learned on inquiry that they had not been delivered to the Northern Navigation Company at Fort William, but had been forwarded from that point over the defendants' road to Toronto, the part of them which he afterward received arriving here on the 29th or 30th. In the meantime, the defendants arranged with him that their charge for carrying the goods from FortWilliam to Toronto would be, not the regular rate by rail between these points, but the lower rate chargeable for transmission by lake and rail, which would have been the charge had they been delivered to the navigation company.

When delivery was about to be made to Laurin in Toronto, it was discovered that only 64 out of the 71 parcels or packages had arrived, and for the smaller number he gave his receipt. The missing packages have not been located.

The evidence is, that all the missing goods were the property of Laurin, except a Persian-lamb coat, and perhaps some other fur garments, the property of Marie Philomene Elma Lefebre, a cousin of Laurin, who for more than 10 years has resided with him practically as a member of his family. Five days after the action was commenced, Laurin assigned to Miss Lefebre his interest in the moneys now claimed from the defendants. At the trial, with the written consent of Miss Lefebre, I added her as a party plaintiff.

Not a little evidence was given relating to the issue in Montreal of the shipping bill and the procuring from Laurin of the special contract limiting the defendants' liability and the guarantee of the freight rates; and it is contended for the plaintiffs that these were issued under such circumstances that the defendants are not relieved from liability for the full value of the missing goods. Perhaps something may be said in favour of this contention; but I do not dispose of the case on this ground, my opinion being that the breach committed by the defendants was not of the contract to carry the goods from Montreal to Winnipeg, but of the new contract to deliver them, at Fort William, to the Northern Navigation Company for shipment to Toronto. This latter contract was entered into before the arrival of the goods at Fort William, and the defendants' duty then was to deliver them to the navigation company on their arrival. This, however, they neglected to do; and, notwithstanding the express agreement so to deliver, they forwarded them over their own line to Toronto.

The contract which aimed at limiting the amount of the defendants' liability has no application, either expressly or impliedly, to the new contract by which the defendants bound themselves to deliver the goods to the navigation company.

The defendants also contend that the evidence established that three parcels were not taken from their car on its arrival at Fort William, and that, therefore, they should not be held liable for more than four parcels, if they are at all liable, and if it is held that the terms of the agreement limiting their liability are not to apply. They are not entitled to succeed upon that contention. Apart from any other consideration, it is shewn from the correspondence passing between representatives of

the defendants that 71 packages or parcels were billed out of Fort William. Only 64 were delivered at Toronto, and I am clearly of opinion that the defendants are liable for the value of those not delivered.

The only direct evidence of the value of these is that of Laurin and Miss Lefebre. The greater part of the amount claimed is made up of expensive furs and rugs, many of which were purchased—according to the evidence of the plaintiffs—not at fur stores, but from a travelling dealer at Laurin's premises. Others of considerable value were purchased at a time when Laurin's financial condition was declining; and it is argued for the defendants that the plaintiffs did not possess these goods, or that, if they did, they were not of the high value now placed upon them. Circumstances surrounding the shipment corroborate the evidence of their existence and of their having been included in the shipment. At the time the goods were packed, a list of the contents of each package was written out by Miss Lefebre in detail, with the number of the parcel or package in which the respective articles were placed. A complete record is, therefore, produced of everything that went into the shipment, from which it appears that the articles claimed for were placed in the packages now lost. Any suggestion of manufactured evidence as to the particular articles contained in these packages is sufficiently met. There could not then have been in contemplation the making of this claim, nor could it have been anticipated that there would be any such happenings as have resulted in this action.

I find on the evidence that the articles claimed for were those contained in the missing packages.

The evidence substantiating their value is that of the plaintiffs, supplemented by that of Mr. Clancy, called for the defence. The evidence of other witnesses to the effect that they had never seen in the plaintiff's possession some of the expensive articles now claimed for, and that they have no knowledge of Cherrier, from whom Laurin says he made some of the purchases, cannot prevail as against the positive evidence of the plaintiffs, supported as it is by the detailed lists made at the time the goods were packed for shipment.

Laurin in his evidence was inclined to exaggerate; and, having regard to this, as well as to Mr. Clancy's evidence, and giving consideration to the character of the goods and to their having been in use and not new—from which their value necessarily suffered depreciation—I am of opinion that there should

be a deduction of $527 from the claim made. The plaintiffs claim the value of the goods and damages for their wrongful conversion. These claims will be fully met by judgment in the plaintiffs' favour for $2,214.25 and interest from the 30th May, 1913, the date when the remaining part of the consignment was delivered to Laurin.

I do not pass upon the validity of the assignment from Laurin to his co-plaintiff, leaving the judgment to be in their favour jointly.

SUTHERLAND, J. APRIL 28TH, 1914.

HOWARD v. CANADIAN AUTOMATIC TRANSPORTATION CO. LIMITED AND WEAVER.

Company — Prospectus — Misrepresentation as to Existence of Patent—Purchase of Shares—Rescission—Fraudulent Misrepresentation by Agent as to Business of Company—Materiality—Reliance on—Inducement to Purchase—Evidence —Prompt Repudiation after Discovery of Falsity of Statements.

An action to rescind sales of two blocks of shares of the capital stock of the defendant company to the plaintiff, on the ground that the plaintiff was induced to purchase by false and fraudulent misrepresentations, and for repayment of the moneys paid by the plaintiff.

T. A. Beament, for the plaintiff.
G. M. Macdonnell, K.C., for the defendant company.
G. S. Henderson, for the defendant Weaver.

SUTHERLAND, J. (after setting out the facts at length):—I think a perusal of the agreement and prospectus shews that it was only with respect to rights in Ontario under alleged patents that any representations can be held or be said to have been made to the plaintiff. It is plain, however, that the sale of the stock was made on the basis of there being existing patents for Canada, as to which the defendant company had acquired rights in Ontario.

Weaver admits that he thought that the Canadian patents were purchased and being dealt with. . . . The prospectus

speaks of the Automatic Electric Limited as "holders of the Canadian patent" under the alleged sale and transfer of rights thereunder to the defendant company for the Province of Ontario.

At p. 3 of the prospectus there is this statement: "The Canadian Automatic Transportation Company Limited has been formed for the purpose of manufacturing, building, and operating, in the Province of Ontario, under the valuable patents of the W. C. Carr system of transportation, and leasing rights in connection therewith to subsidiary companies."

At p. 23 there is this reference: "The Automatic Electric Limited was formed to hold the W. C. Carr Canadian patents, and obtain any subsequent patents without expense to this company, as is usual in companies of this kind."

In the extract quoted from p. 23 of the prospectus, reference is made to the agreement dated the 9th March, 1909, and in the extract already quoted therefrom there appears the statement in the first recital that the Automatic Electric Limited, the licensor, "is the owner of certain letters patent of the Dominion of Canada, dated the 24th day of December, 1907, granting a patent under No. 109300," etc.

When the prospectus was issued on the 1st April, 1910, what was the fact about the said Canadian patent, which seems to have been the only one in existence at the date of the said agreement?

It was proved at the trial that no extension of the time for manufacture within two years from the date of the patent, as required by sec. 38 of the Patent Act, R.S.C. 1906 ch. 69, had been obtained, nor had advantage been taken of the conditions which may be substituted under sec. 44 of that Act. The patent was, therefore, void at the end of two years from its date. It had no legal existence when the prospectus was put forth by the defendant company on the 1st April, 1910, and the references in the prospectus and the agreement therein, referring to the patent as an existing one, were false and misleading.

Under the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, sec. 97, sub-sec. 2: "All purchases, subscriptions or other acquisitions of shares . . . shall be deemed as against the company . . . to be induced by such prospectus, and any term, proviso or condition of such prospectus to the contrary shall be void."

An amendment was made to the original statement of claim permitting the plaintiff to set up misrepresentation in the prospectus.

I am of opinion that the misrepresentation as to the existence of the patent was a material one, and that, under the section of

the Companies Act referred to, the contract of sale for the first block of shares is void. I am also of opinion that the defendant Weaver did falsely and fraudulently represent to the plaintiff in connection with the sale of the second block of 50 shares of the capital stock that the business of the company was so great as to render it necessary to erect a second factory. I find that this was a material misrepresentation made by the agent of the company to the plaintiff, on which he relied and by which he was misled and induced to purchase the stock: Lloyd v. Grace Smith & Co., [1912] A.C. 716. The sale of the second block of stock must also be set aside.

I have come to this conclusion on the evidence of the plaintiff and Weaver alone, giving credence to the testimony of the plaintiff as against that of Weaver. I have not taken into consideration the evidence of other witnesses called by the plaintiff to shew that Weaver had made similar representations to those persons when inducing them to also buy stock in the defendant company. The evidence was taken at the trial subject to objection, and I do not think it material or necessary to pass upon its admissibility.

It appears that the plaintiff did not learn that the representations which had been made to him were untrue until at a meeting of the defendant company held in Welland in February, 1913. Thereupon he promptly made the claim which he is seeking to enforce in this action, and, it being resisted, issued his writ on the 26th May, 1913.

There will, therefore, be judgment against the defendant company rescinding the subscriptions for the said shares, rectifying the stock register by removing the name of the plaintiff as a shareholder therefrom, and for repayment of the sum of $500 paid by the plaintiff for the first block of stock, with interest from the dates when he paid therefor; and judgment also against the defendant company and the defendant Weaver for $500 paid by the plaintiff for the second block of stock, with interest in the same way.

The plaintiff will have his costs of suit as against both defendants.

SUTHERLAND, J. APRIL 28TH, 1914.

ELMER v. CROTHERS.

Release—Action for Damages for Personal Injuries—Settlement after Action Brought — Validity — Payment of Money—Receipt—Liability—Injuries Sustained from Barbed Wire Fence on Lawn Abutting on City Street—Safe Distance form Highway—City By-law—Liability of City Corporation.

Action for damages for injuries sustained by the plaintiff by reason of a barbed wire fence erected by the defendant Crothers on his own land, at the corner of Clergy and Earl streets, in the city of Kingston. The action was brought against the Corporation of the City of Kingston, as well as the defendant Crothers.

The injury was sustained on the 1st February, 1913, at about ten o'clock at night. The plaintiff and her daughter were walking along Clergy street when she saw a runaway team of horses heading towards her, and in her fright ran upon the land of the defendant Crothers and into his fence, which was ten feet back from the street line.

This action was begun on the 18th April, 1913; a solicitor acting on behalf of the plaintiff. On the 1st May, 1913, the defendant Crothers and a Mr. Neal, a clergyman, called on the plaintiff and arranged with her a settlement of her claim, without the knowledge of her solicitor. The plaintiff accepted a cheque for $150 from the defendant Crothers, and signed a receipt "in full settlement of my claim for injuries received on the 1st February, 1913." The plaintiff, by her solicitor, afterwards repudiated the settlement, and the action proceeded; the defendant Crothers pleaded the settlement as a release; and the plaintiff replied that she was induced to accept the $150 and sign the receipt by undue pressure, influence, and representations. The cheque was retained by the plaintiff without being endorsed, and was produced by her at the trial.

The action was tried before SUTHERLAND, J., without a jury, at Kingston.

G. M. Macdonnell, K.C., for the plaintiff.

J. L. Whiting, K.C., for the defendant Crothers.

D. A. Givens, for the defendant corporation.

SUTHERLAND, J. (after setting out the facts) :—The accident undoubtedly occurred on the property of the defendant Crothers; and it is clear, I think, that there is no liability on the part of the defendant corporation. Indeed, it was not seriously contended at the trial that there was. . . .

[Reference to a by-law of the City of Kingston prohibiting the erection of a barbed wire fence along and within one foot of a public street or place in the city, etc.]

In so far as the defendant Crothers erected a barbed wire fence along a portion of the street, it may be that he was doing an illegal thing; but the by-law has no application to that part of the fence which was constructed on his own property, and not "along any public street or place in the city;" and, the accident having occurred at a point ten feet away from "any such street or place," the plaintiff cannot make the defendant Crothers liable in any way under the by-law.

Neither the defendant Crothers nor Mr. Neal was called at the trial, although a portion of the former's examination for discovery was read on behalf of the plaintiff. Upon her own shewing, however, I am unable to come to the conclusion that there was any undue influence exerted or representation made by either the defendant Crothers or Mr. Neal to bring about the settlement or on account of which I could properly set it aside. . . .

It is plain that at that time the plaintiff supposed that her arm was likely to get completely well. Indeed, in her examination for discovery she stated that the only reason she declined to stand by the agreement was owing to the fact that the injury had turned out to be more serious than she thought. She is a woman accustomed to business; and she apparently decided to accept a certainty rather than run chances.

In the circumstances and at the time, the amount offered did not appear to be an unreasonable settlement. . . .

I think that the action fails, therefore, on the ground that the plaintiff agreed to accept $150 in settlement thereof and is bound thereby: North British R.W. Co. v. Wood (1891), 18 Ct. of Sess. Cas. (4th series) 27; Gissing v. T. Eaton Co. (1911), 25 O.L.R. 50.

But, even if I had not come to this conclusion, I should be obliged to dismiss the action as against the defendant Crothers on the ground also that, the fence at the point where the accident occurred not being substantially adjoining the highway, there could be no liability.

Counsel relied on Coupland v. Hardingham (1818), 3 Camp. 397. There is, of course, a duty upon those whose property abuts on a street not to permit an excavation to exist or a barbed wire fence to be erected so adjacent to it as that those lawfully using it may by some "sudden start of a horse" or "making a false step or being affected with sudden giddiness," or perhaps being suddenly startled by a runaway horse, fall into the excavation or come in contact with the barbed wire and injury result: Beven on Negligence, 3rd ed., pp. 364, 428, 429, and 435.

But the test as to liability is, whether the excavation or fence is so near the highway as to interfere with the ordinary use of the same by the public.

In the present case the fence in question at the point where the plaintiff came in contact with it was 20 feet distant from the sidewalk on which the plaintiff was walking and 10 feet back from the street line on the defendant Crothers's property.

It would, I think, be out of question to impose a liability on the defendant in such a case: Hardcastle v. South Yorkshire R.W. and River Dun Co. (1859), 4 H. & N. 67; Binks v. South Yorkshire R.W. and River Dun Co. (1862), 3 B. & S. 244; Latham v. R. Johnson & Nephew Limited, [1913] 1 K.B. 398; Pedlar v. Toronto Power Co. (1913), 29 O.L.R. 527.

The action will, therefore, be dismissed as against both defendants, with costs, if asked.

MIDDLETON, J., IN CHAMBERS. APRIL 29TH, 1914.

DICARLLO v. McLEAN.

Appeal—Bond Filed as Security on Appeal to Supreme Court of Canada — Security for Costs of Appeal — New Trial Directed by Supreme Court—Costs of Appeal to Abide Result—Retention of Bond to Answer Possible Award of Costs against Appellant—Practice.

Motion by the defendant for delivery up of a bond filed by the defendant upon appeal to the Supreme Court of Canada.

J. N. Adam, for the defendant.
Chitty (DuVernet & Co.), for the plaintiff.

MIDDLETON, J.:—The plaintiff recovered judgment at the trial. This was affirmed by the Appellate Division. On appeal to the Supreme Court of Canada, a new trial was directed, the costs of the former trial and of the appeals to abide the result of the new trial. The new trial has not yet been had, but the appellant seeks to have the bond filed upon the appeal to the Supreme Court of Canada delivered up for cancellation. The bond filed is security for the verdict and judgment already had and now set aside.

So far, there can be no liability, for the bond does not stand as security for any judgment yet to be recovered; but the bond is also security for costs awarded upon the appeal. These costs, while not directly awarded, have been directed by the Supreme Court to abide the result of the new trial; and, if the judgment upon the new trial is in favour of the plaintiff, then these costs will become payable by the defendant, and will be payable by virtue of the judgment of the Supreme Court of Canada, and will, I think, be within the term of the bond. It is perhaps premature to determine this, particularly as the motion is made, not by the sureties, but by the defendant.

I think that the bond must remain until the ultimate disposition of the action and until the plaintiff, if he recovers, has an opportunity of having any claim he may desire to make against the sureties determined in a way that will bind them.

The motion is refused, and the costs may be in the cause unless otherwise directed by the Judge at the hearing.

MIDDLETON, J. APRIL 29TH, 1914.

RE WALL AND CITY OF OTTAWA.

RE COUILLARD AND CITY OF OTTAWA.

Municipal Corporation—By-laws Reducing Number of Shop and Tavern Licenses in City—Liquor License Act, R.S.O. 1914 *ch.* 215, *sec.* 16—*Submission to Electors—Form of Ballot—Non-compliance with Form Authorised by Municipal Act—Entirely Different Form Calculated to Mislead Electors—Order Quashing By-laws.*

Motion to quash two by-laws of the City of Ottawa.

James Haverson, K.C., for the applicants.
W. E. Raney, K.C., for the city corporation.

MIDDLETON, J.:—These are motions attacking two by-laws of the City of Ottawa for the reduction of the number of shop licenses and tavern licenses respectively. The by-laws were passed under the Act 1 Geo. V. ch. 54, sec. 21, now found as sec. 16 of the Liquor License Act, R.S.O. 1914 ch. 215. Under this section the council of a city is compelled to submit to the electorate a by-law limiting the number of tavern or shop licenses. Under sec. 28, the council of a town, village, or township may itself limit the number of licenses.

The voting upon the by-law is regulated by the provisions of the Municipal Act, which provides a form of ballot paper, number 20, upon which the voter is required to mark his ballot "for the by-law" or "against the by-law."

The first objection taken to this by-law is, that the council departed from this explicit direction of the statute, and apparently assumed that the voting was not upon the by-law, but upon a plebiscite or a question submitted under sec. 398 (10) for the opinion of the electors.

The ballots are headed "Plebiscite re Tavern Licenses" and "Plebiscite re Shop Licenses" respectively; and, instead of voting upon a by-law, the voters are asked to vote upon a question, "Are you in favour of limiting the number of shop licenses in the City of Ottawa to ten for the ensuing license year beginning 1st May, 1914, and for all future license years thereafter until the by-law is altered or repealed?" (The by-law in the case of the tavern licenses is precisely similar, except that the word "tavern" is substituted for "shop" and "thirty-six" for "ten.") The voter was required to mark his ballot "yes" or no."

This is, I think, the substitution of an entirely different form of ballot from that prescribed by the Legislature; and the case of Re Milne and Township of Thorold (1912), 25 O.L.R. 420, must be taken to determine that, where the Legislature has prescribed a particular form, the by-law cannot be upheld if the voting is upon an entirely different form of ballot. This is not a mistake in the use of the form, nor is it an immaterial variation from a prescribed form. It is the substitution of a totally different form, which may well have misled the voter into thinking that his opinion only was desired, and may have failed to bring home to his mind the fact that legislative action must follow inevitably upon the result of the voting.

I regret exceedingly to be driven to prevent effect being

given to the expressed will of the electorate. There is a heavy responsibility upon those charged with the conduct of the elections; and, where the result of the carelessness, stupidity, or worse of those charged with this responsibility results in a miscarriage such as this, it should be understood that the responsibility is theirs, for the Court has no duty save to see that that which the Legislature has required is complied with. There is much force in the view stated in the case which I follow, that those whose property rights are being taken away from them by the will of a bare majority have the right to insist that this shall only be done in the manner in which the law permits it to be done.

This renders it unnecessary to consider the other objection taken to the by-law. There is much to indicate that the same laxity which induced the Court to quash the by-law in Re Hickey and Town of Orillia (1909), 17 O.L.R. 317, existed here.

I think the by-law must be quashed, and I can see no reason why costs should not follow the event.

MIDDLETON, J. APRIL 29TH, 1914.

COX v. RENNIE.

Trade Name—Right to Use Partnership Name—Similarity to Firm Name of Plaintiffs—Passing-off—Action for Injunction—Evidence.

Action to restrain the defendants from carrying on business as sign-painters and decorators under the firm name of Cox & Rennie.

W. R. Smyth, K.C., for the plaintiffs.
W. H. Ford, for the defendants.

MIDDLETON, J.:—The plaintiffs had carried on business under the firm name of Cox & Andrew, as sign painters and decorators, for about ten years. They seek an injunction restraining William J. Rennie and Edward Charles Hartnell from carrying on a similar business under the firm name of Cox & Rennie.

Rennie had been employed by the plaintiffs in their business.

In April, 1913, he entered into a partnership with one Herbert H. Cox, in the sign painting business, under the name of Cox & Rennie. This partnership continued until early in September of the same year, when it was dissolved; Cox selling out his interest to Rennie for a small sum. Cox and Rennie both went to a solicitor's office, and the dissolution was evidenced by a memorandum drawn up by the solicitor, acknowledging receipt of this sum by Cox "in full of all interest I have had to date in the business of Cox and Rennie." In consideration of this and of the assumption of liabilities, Cox assigned to Rennie "all interest I have in the said business of Cox & Rennie."

Rennie then continued business in his own name for a few days, when, realising that he was placing himself at a disadvantage by reason of all lack of continuity, he resumed the name of Cox & Rennie. Finally, he sought out Hartnell, an employee of the plaintiffs, and entered into a partnership with him. In order to fortify his position he procured one W. G. Cox, a caretaker in an office building, to sign a memorandum authorising Rennie and Hartnell to use his name in styling their business Cox & Rennie. This good-natured individual received no benefit from his participation in this somewhat questionable transaction, except the promise of ten per cent. on all business which he might bring to the new firm. So far this has resulted in nothing.

Cox & Andrew, who had endured what they thought was the grievance they suffered, so long as there was a real firm of Cox & Rennie, thought this called for action. They, therefore, brought this suit against Rennie.

At the trial I pointed out the difficulty of dealing with the matter in the absence of Hartnell. He was present, and consented to be added as a party defendant, and that the defence already on the record for the original defendant should stand as his defence.

Counsel for the defendants did not seriously contend that the machinations with W. G. Cox afford any real right, but he contended most strenuously that, upon the dissolution of the firm of Cox & Rennie, Rennie had the right to continue to trade under that name, and that its similarity to the plaintiffs' name gave the plaintiffs no right of action.

The plaintiff called Herbert H. Cox as a witness, and he contends that upon the dissolution of the firm it was expressly understood that Rennie should not continue to use his name, but that he should thereafter carry on business in his own name.

I do not think that the plaintiffs' right in this action depends in any way upon the rights as between Herbert H. Cox and Rennie. The principle governing the case is well set out in the judgment of Lord Justice James, in Levy v. Walker, 10 Ch.D. 436, at p. 447: "It should never be forgotten in these cases that the sole right to restrain anybody from using any name he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark; that is to say, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not—which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.' That is the principle, and the sole principle, on which this Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything. If there is any misleading, that may be for the Criminal Courts of the country to take notice of, or for the Attorney-General to interfere with, but an individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name."

The underlying principle thus being based upon passing-off or the fraudulent representation of the identity of the business carried on by the plaintiff and defendant, the case must be determined upon the evidence as to passing-off. In this case I am unable to perceive that there is any evidence which would enable me to find for the plaintiffs. There is some evidence that similarity of the names has caused confusion, but there is no evidence that the defendants did anything either to bring about that confusion or to profit improperly by it. On the other hand, I think the adoption by the present defendants of the name of Cox & Rennie was for the purpose of insuring continuity of the business which had been carried on by Herbert H. Cox and Rennie. Herbert H. Cox and Rennie, I think, had the right to carry on business in their own names, and in the firm name of Cox & Rennie, and such confusion as has resulted, so far as has been shewn, has arisen only from the similarity of the two firm names.

If the case is to be determined upon the right of Rennie to

use the name of Cox & Rennie, then I think he has the right. On the dissolution of the firm Rennie bought out Cox, and I should find on the evidence against there being any agreement prohibiting the use of Cox's name. It may well be that Cox thought that the right to use his name came to an end on the dissolution of the partnership. If so, he was in error: Burchall v. Wilde, [1900] 1 Ch. 551; Smith v. Greer, 7 O.L.R. 332.

The action fails and must be dismissed; but, as I think the defendants' conduct in their dealing with W. G. Cox and endeavouring to bolster up the right to use the name "Cox" by the agreement made with him, is reprehensible, I give them no costs.

MIDDLETON, J. APRIL 29TH, 1914.

*BROWN v. GALLAGHER & CO. LIMITED.

Landlord and Tenant—Forfeiture of Lease for Non-payment of Rent—Rent Accrued before Conveyance of the Reversion—Breach of Covenant before Conveyance—Rights of Re-entry—Landlord and Tenant Act, 1 Geo. V. ch. 37, sec. 5—Suspension of Rent—Implied Term of Agreement—Failure to Complete Repairs—Deprivation of Beneficial Occupation—Relief against Forfeiture—Refund of Rent Paid—Trespass—Counterclaim—Damages—Third Party—Breach of Covenant for Quiet Enjoyment—Costs.

Action to recover possession of part of the premises No. 644 Yonge street, in the city of Toronto, and damages for retention of possession.

The defendant company claimed to be entitled to possession under a lease made to the company on the 18th September, 1912, by Annie Murphy, who was then the owner, for five years, commencing on the 1st November, 1912. The defendant company counterclaimed for damages for trespass by the plaintiff. The defendant company also brought in Annie Murphy as a third party.

The action was tried before MIDDLETON, J., without a jury, at Toronto.

*To be reported in the Ontario Law Reports.

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

A. C. McMaster and R. G. Agnew, for the defendant company.

Shirley Denison, K.C., for the third party.

MIDDLETON, J.:— . . . The first month's rent was paid by the defendant company, but until the bringing of this action no further rent was paid.

At the time of the making of the lease, the premises were in bad repair and required substantial alteration. Mrs. Murphy by the lease undertook to make certain changes in the building. . . .

When Mrs. Murphy undertook to make the contemplated changes, the structural condition of the building was found to be so seriously impaired by age and decay that the city officials intervened and threatened to demolish the whole structure unless some extensive repairs were made. Mrs. Murphy elected to make these repairs, and she was permitted to enter upon the premises and carry on her work of reconstruction without any objection on the part of the tenant. . . . No rent was paid because the tenant had no beneficial occupation, and possibly the tenant thought it had a substantial claim by reason of the loss of the most profitable month's business in the year. . . .

In the meantime, on the 27th November, 1912, the plaintiff made an offer to purchase the property from Mrs. Murphy, this purchase to be subject to the Gallagher lease, and to be dependent upon the completion of the alterations necessary to bring the building into accordance with the city regulations. This is so stipulated in the offer. The offer was accepted on the 28th November, but the sale was not carried out until the alterations were substantially completed at the end of May. The conveyance from Mrs. Murphy to Brown is dated the 30th September, 1912, but the transaction was not closed nor was the deed handed over until the 23rd May, 1913. Upon the adjustment made when the transaction was closed the vendor was charged with the rents up to the 1st June, although it was well known that the rent had not actually been paid.

At this time the premises were still lying fallow. The defendant company had a key, but no business was being carried on. . . . There never was any intention on the part of the company in any way to abandon the lease. The premises were thought not even then to be in a proper condition for occupation. No furnace had been installed. . . .

At the end of May or in the first few days of June, one Heslop . . . conceived the idea of getting possession of this store; and he approached the plaintiff with the view of obtaining a lease. No notice of the conveyance of the reversion had been given to the defendant company; but the fact that the conveyance had been delivered was known or suspected. Consequently, a registered letter was written by the company's solicitors on the 3rd June to Brown, advising him that it was understood that he intended taking possession, but that the company insisted upon the lease and intended to bring action for possession and have the premises placed in proper condition for occupation. . . . A lease was finally made by Brown to Heslop, bearing date the 9th June. This lease, it is said, was executed on the 6th June. By it the entire building was demised for a term of three years commencing on the 9th June, at an annual rental of $1,800, payable $150 per month in advance. Heslop, it is said, placed some paint pails on Saturday the 7th; and, no doubt, Brown, using the key that he had received from Mrs. Murphy, went upon the premises.

The defendant company took possession of the premises on the 9th, and on the 10th a motion was made before me for an injunction. On the return of that injunction motion, the fact that Mrs. Murphy was entitled to the rent up to the 1st June was not disclosed. After argument, an order was made for a speedy trial, and permitting the defendant company to retain possession in the meantime, upon payment to Brown of the arrears of rent and the accruing rent. The speedy trial was not had, and the matter has dragged on from then to the present time, the defendant company remaining in possession, but having no beneficial enjoyment of the property owing to the uncertainty incident to this litigation, as the store could not be used advantageously without an expenditure of considerable money in constructing and placing the necessary fittings.

Brown now contends that he had a right to re-enter and forfeit the lease by reason of the non-payment of the rent. Obviously there had been no sufficient default in payment of the rent accruing due on the 1st June to entitle him to exercise this right, and it is contended by the company that Brown is not entitled to take advantage of any forefeiture arising from the default before the property was conveyed to him.

Rent which had accrued due before the conveyance of the reversion did not pass to the grantee of the reversion unless expressly assigned: Flight v. Bentley, 7 Sim. 149; Sharpe v.

Key, 8 M. & W. 379; Salmon v. Dean, 3 Macn. & G. 344. Nor does any right for breach of covenant, even though running with the land, which took place before the conveyance.

Sohen v. Tannar, [1900] 2 Q.B. 609, shews that a right of re-entry for breach of covenant cannot be exercised where the breach took place before the assignment. In England the law has now been changed, and by the Conveyancing Act of 1911, sec. 10 of the Conveyancing Act of 1881 is made to apply to the right to re-enter where the assignment of the reversion is made after the breach. The section of the Conveyancing Act of 1881 amended by this Act is the same as sec. 5 of the Landlord and Tenant Act. This statute was adopted here in 1911, but not in its amended form. That the English statute of 1911 changed the existing English law is plain from reference to the 19th edition of Woodfall, p. 291. . . .

[Reference to Rickett v. Green, [1910] 1 K.B. 253, distinguishing it.]

Rent accruing due, as is well-known, is an incorporeal hereditament, but rent which has accrued due is a mere chose in action. The conveyance of the reversion passed the rent accruing due, but it would not pass a mere debt due to the grantor.

This is sufficient to dispose of the plaintiff's case; but two other matters should be mentioned.

First, the proper inference from the conduct of the defendant and third party is that, when the tenant allowed the landlord to resume possession for the purpose of making the necessary repairs and alterations, it was an implied term that the payment of rent should be in the meantime suspended.

Secondly, owing to the failure to have beneficial occupation of the premises and the failure of the landlord to complete the repairs, the tenant had a claim which would equal or exceed the amount due for rent.

Finally, under the circumstances, if there was any default in payment of the rent, relief ought to be granted against any forfeiture thereby incurred.

Owing to the non-disclosure of the arrangement made at the time of the conveyance, Brown has received from the defendant company $390 to which he has no right. He must now be ordered to refund this sum, less the month's rent now past due, or, if the parties so agree, it may be set off against rent yet to accrue due.

Damages are claimed in this action for the entry made by the plaintiff. For his trespass I allow $25 damages. The defendant

company, no doubt, has a grievance owing to inability to use the premises beneficially pending the action; but this, in view of the injunction order, under which it was restored to possession, is a mere incident of the litigation for which no one is answerable.

The action must, therefore, be dismissed with costs, and the defendant company will have judgment for $25 on the counterclaim with costs.

The defendant company has made a claim against the third party for damages by reason of the breach of covenant for quiet enjoyment. The plaintiff's act was a wrongful act, for which he alone was responsible, so this claim fails; but I give no costs, as the plaintiff's conduct is to some extent the result of a declaration somewhat improvidently given at the time of closing the transaction, stating that the rent had not been paid.

To the other issues which remain to be adjusted between the defendant and the third party, this judgment will be entirely without prejudice, as the only claim I have to consider is that mentioned, the right to indemnity by virtue of this covenant.

LATCHFORD, J. MAY 1ST, 1914.

RE LAMBERTUS.

Will—Insufficiency of Estate to Pay Debts and Legacies—Abatement of Legacies—Legacy to Widow in Lieu of Dower—Election to Take—Legacy of Specific Chattels—Abatement of Other Legacies.

Motion by the executors of Christopher Lambertus, deceased, upon an originating notice, for an order determining certain questions arising in the administration of the estate of the deceased.

W. Proudfoot, K.C., for the executors.
M. G. Cameron, K.C., for the widow.
C. Garrow, for the other legatees.

LATCHFORD, J.:—Application for the opinion of the Court as to what legacies shall abate—the estate, over and above what is specifically devised to the widow and three of the testator's

sons, Morgan, Augustine, and Oswald, not being sufficient to pay debts.

The testator directed that his farm be sold; that $1,500 be paid out of the proceeds to his wife in lieu of dower; and that the balance be divided equally between his sons Morgan and Augustine. The will put the widow to her election between the $1,500 and her dower.

The farm was sold, realising $2,850. The widow elected to take her legacy instead of dower, and is entitled to it in priority to the other legatees: Koch v. Hersey (1894), 26 O.R. 87; Williams on Executors, 10th ed., p. 1094; Theobald on Wills, 6th ed., p. 810. The latest case I can find is In re Wedmore, [1907] 2 Ch. 277. At p. 280, Kekewich, J., says: "It must be taken to be established that a legacy given to a widow in satisfaction of dower does not abate."

Five horses and two cows were specifically bequeathed to the testator's son, Oswald, who instructed the executors to sell them at the sale of the other chattels of the estate. They were so sold, and realised $741.50, to which Oswald claims to be entitled. The total realised on the sales of the realty and personalty in excess of the balance of $1,350, after payment of the widow's legacy and the $741.50, is $548.55, while the debts amount to $847.72. There is a further legacy of $100 to the Rev. M. McCormack for Masses for the repose of the soul of the testator, and also $100 to the Rev. D. A. McCrea of Goderich. The sons of the deceased desire that there shall be no abatement of these two legacies.

The testator directed his executors to erect to the memory of himself and his first wife a monument, at a cost not exceeding $250.

There will arise a deficiency of about $500.

The specific legacy of the horses and cows to Oswald should not abate. He was entitled to the particular animals mentioned in the will, and in selling them the executors acted not as such but as his agents. Oswald is accordingly entitled to the $741.50, subject to any proper claim the executors may have for their services in selling.

The burden of the deficiency accordingly falls pro rata upon the sons Morgan and Augustine. It will be lessened to some extent if the executors limit their discretion as to the cost of the monument, and expend upon it no more than $50—an ample sum in the circumstances.

Costs of all parties out of the estate.

MIDDLETON, J. MAY 2ND, 1914.

McCLELLAN v. POWASSAN LUMBER CO.

Costs — Action for Interference with Flow of Water — Sale of Properties of both Parties to Common Purchaser—Action of Parties Rendering Determination of Rights Unnecessary —Motion for Disposal of Costs of Action—Dismissal of Action without Order as to Costs—Judicial Discretion.

Motion by the plaintiff for an order disposing of the costs of the action.

H. S. White, for the plaintiff.
E. D. Armour, K.C., for the defendants.

MIDDLETON, J.:—These parties are not entire strangers in litigation. The judgments in a former action between them, concerning the same property, are reported: McClellan v. Powassan Lumber Co., 15 O.L.R. 67, in the Court of Appeal, 17 O.L.R. 32, and in the Supreme Court of Canada, 42 S.C.R. 248. That action concerned a certain alleged right of way.

This action deals with claims alleged with reference to the interference by the defendants with the flow of water. The action, brought as long ago as the 4th February, 1909, was entered for trial at the Barrie sittings in May, 1911, and postponed to the sittings there in June, 1911. By arrangement between the parties, the case was to be heard before Mr. Justice Teetzel in Toronto at some time that might be arranged. It was never brought on for hearing. The allegation is now made that the delay has been caused by the illness of Mr. Justice Teetzel; but, as my brother Teetzell's illness only began in the autumn of 1912, the entire delay at any rate cannot be attributed to that cause.

In the meantime, both the plaintiff and defendants have sold their properties to a common purchaser; the transactions with this purchaser being quite independent. This would make any attempt to deal with the merits of the controversy over the water rights quite academic. It is true that at one time there was a claim for damages, but that claim was abandoned long ago.

It is now suggested that I should go into the pleadings and the documentary evidence, with the view of forming some opinion as to what the rights of the parties are upon the merits, and that I should award costs upon the view that I might thus form.

I do not think that the Court should be asked to undertake this task. The parties, by their action in selling the property, have made it entirely unnecessary that the rights in the litigation should ever be determined. Costs are in truth incident to a determination of the rights of the parties, and ought not to be made themselves the subject-matter of the litigation. When the merits for any reason cannot be determined, there ought not to be a pretended investigation of the merits for the purpose of awarding costs. The intervention of the Court has been rendered unnecessary by the conduct of the parties, and no order should now be made save that the action should now be dismissed, so that the caution registered against the property may be vacated.

This, I may say, is intended to be an exercise of "judicial discretion," and not to be a refusal to adjudicate upon the question submitted.

LATCHFORD, J. MAY 2ND, 1914.

RE GREENSHIELDS.

Will — Construction — Intestacy as to Part of Estate — Distribution among Next of Kin — Ascertainment of Persons Entitled to Share — Devolution of Estates Act, R.S.O. 1914 *ch.* 119, *sec.* 30*—Brother and Sister of Half-blood of Mother—Exclusion of Children of Deceased Brothers and Sisters of Parents — Bequest of Furniture and other Enumerated Household Articles — "And other Articles of Household Use and Adornment"—Ejusdem Generis Rule—Exclusion of Motor Car—Devise of "any Freehold or Leasehold House which may Belong to me at Death"—Inclusion of all Leaseholds and Freeholds of Testatrix.*

Motion by the executors of Julia Greenshields, deceased, upon an originating notice, for an order determining three questions arising in the administration of the estate.

Hamilton Cassels, K.C., for the executors.

G. F. Shepley, K.C., and H. S. White, for Helen Grace Fleming.

Glyn Osler, for Geraldine Paterson and Hartland St. Clair MacDougall.

J. F. Edgar, for Dora Bell and others the descendants of deceased brothers and sisters of the father and mother of the testatrix.

LATCHFORD, J.:— . . . Miss Greenshields made her will on the 21st March, 1902, and died on the 9th February, 1914. James J. Greenshields, a brother of the testatrix, died on the 20th August, 1913; and, owing to his death, an intestacy has arisen in respect to part of the estate, amounting to about $50,000.

The first question to be disposed of is, what persons are entitled to share in this undisposed-of residue?

The father and mother and all lineal ancestors of the testatrix had predeceased her, and no brother or sister, and no child of any brother or sister, survived the deceased.

Both the father and mother of Miss Greenshields had brothers and sisters of the whole blood, and her mother had brothers and sisters of the half-blood; but all such uncles and aunts predeceased the testatrix. Several of them, however, left descendants, one of whom is Mrs. Dora Bell. Mr. Edgar, who appeared for Mrs. Bell, was appointed by the Court to represent, for the purposes of this motion, the descendants of the deceased brothers and sisters of the whole and half-blood of both the parents of the testatrix.

Geraldine Paterson and Hartland St. Clair McDougall are respectively a sister and a brother of the half-blood of the mother of Miss Greenshields. Do they take the undisposed-of residue, to the exclusion of Mrs. Bell and other descendants of the deceased uncles and aunts of the testatrix?

Under sec. 30 of the Devolution of Estates Act, R.S.O. 1914 ch. 119, personal property in such a case as that now before me "shall be distributed equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree; but there shall be no representations admitted among collaterals after brothers' and sisters' children." By sec. 3, sub-sec. 1, realty shall be distributed as if it were personalty.

The provisions of our statute as to the distribution of personalty upon an intestacy are based upon the old Statute of Distribution, 22 & 23 Car. II. ch. 10. In one of the early cases under that statute, Pett v. Pett (1701), 1 Salk. 250, 91 Eng. Rep. 220, the question for determination was, whether the brother's grandson should have a share with the daughter of

the intestate's sister. To quote the report: "The words of the Act are, 'Provided no representation be admitted amongst collaterals after brothers' and sisters' children;' and it was urged that this Act was a remedial law to prevent the mischief of administrators sweeping away the whole personal estate of the intestate, and therefore to be taken largely; sed non allocatur per Cur."

The correctness of this decision has never been impugned.

In Re McEachern (1905), 10 O.L.R. 499, the intestate was an unmarried woman. There were two daughters of a deceased sister of the intestate's father, and sixteen or more grandchildren of deceased brothers and sisters of the intestate's mother. As in the present case, the intestate's father and mother were dead. The learned Chief Justice of the King's Bench held that there was no representation of collaterals, and that the daughters of the deceased sister of the intestate's father took, to the exclusion of the grandchildren of the deceased brothers and sisters of the intestate's mother.

The prohibition that there shall be no representation among collaterals after brothers' and sisters' children excludes all but Mrs. Paterson and her brother. That they are but of the half-blood does not limit their right. Under the Statute of Distribution—which our statute follows—the old rule of the Common Law (derived like many others from the Canon Law) was superseded, and the degrees of relationship are reckoned from the intestate up to the common ancestor, and thence downward to the other parties. According to this mode of computation, those of the half-blood are related to the propositus in the same degree as those of the full blood, as they are all of the same father or mother: Armour on Devolution, p. 246; Robbins & Maw on Devolution, p. 354; In re Wagner (1903), 6 O.L.R. 680.

The second question, as to the automobile, arises under paragraph 3 of the will, which, so far as material, is as follows: "3. I bequeath to my cousin Helen Grace Gillespie free of duty all my watches jewellery trinkets lace wearing apparel and other articles of personal use or adornment furniture plate linen china glass books pictures works of art musical instruments and other articles of household use or adornment."

The deceased did not own a motor car at the date of the will; and, unless the car which she owned at the time of her death passed to Mrs. Fleming (formerly Miss Gillespie) under the words "and other articles of household use or adornment," it forms part of the residuary estate.

It will be observed that these words follow an enumeration

beginning "furniture" and including "plate, linen, china, glass, books, pictures, works of art, musical instruments."

"Other articles of household use or adornment" must upon authority be held to relate to things ejusdem generis as those specifically mentioned; and an automobile cannot, in my opinion, be considered to be of the same genus as any of the articles enumerated. Everything particularly mentioned is an article for use or ornament within a house. The case is not one where there is a general bequest of all household goods and effects.

Reference to In re Howe, [1908] W.N. 223, and In re Ashburnham, [1912] W.N. 234, distinguishing those cases.]

No similar intention can be observed in the present case as to this particular bequest. Having regard to the "collocation of words"—In re Hall, [1912] W.N. 175—in which occur the words "other articles of household use or adornment," I am impelled to the conclusion that the motor car does not pass to Mrs. Fleming, but falls into the undisposed-of residue of the estate.

The final paragraph to be considered is as follows: "7. I devise and bequeath to my said cousin Helen Grace Gillespie any freehold or leasehold house with the lands belonging to or held with the same in Canada which may belong to me at the time of my death."

At the date of the will, the testatrix owned no freehold land in Canada, but held under separate leases two leasehold properties in Toronto, on which were erected two semi-detached houses, one occupied by the testatrix and the other by Miss Gillespie and Miss Gillespie's sister. The houses were, at the time of Miss Greenshields's death, connected by a doorway in the third storey. After the will was made, Miss Greenshields bought two freehold properties, one at Port Hope—on which was her summer home—and the other near-by, at Bowmanville. Nearly half of the latter property was conveyed in the lifetime of the testatrix to Miss Gillespie, and a cottage erected upon it, in which Miss Gillespie resided during the summer. On the remaining part Miss Greenshields erected a garage, where she kept her motor car when she visited her cousin, as she frequently did, spending a day or two at a time, and then returning to her own summer residence at Port Hope.

I think it clear from the general terms expressed in this devise in relation to "any house" that the testatrix used "any" in the sense it frequently has of "every." There are numerous cases in which "any" has been so construed: Words and Phrases, vol. 1, p. 412; 2 Cyc. 472; though, when the context requires it,

the word may be taken in the sense it sometimes bears of one of several: New Haven Young Men's Institute v. City of New Haven (1891), 60 Conn. 32, at p. 39. Here, I think, there is a manifest intention to devise to Miss Gillespie every house which might belong to the testatrix at the time of her death, whether the same was held in connection with freehold or leasehold lands.

Accordingly, there will be a declaration that the leaseholds in Toronto and the freeholds in Port Hope and Bowmanville have passed by the will to Mrs. Fleming.

Costs of all parties out of the estate.

RE REDDOCK AND CANADIAN ORDER OF FORESTERS—BRITTON, J., IN CHAMBERS—APRIL 27.

Life Insurance—Designation by Insured of Wife as Beneficiary under Certificate of Benevolent Society—Subsequent Will Designating another Beneficiary—Trust—Issue—Adjudication—Costs.]—Application by Jane Reddock for payment out of insurance moneys paid into Court by the Canadian Order of Foresters. Adam Reddock in his lifetime held a certificate of the Canadian Order of Foresters, dated the 17th January, 1888, for the sum of $1,000, payable to the person or persons who should be named, subject to certain provisions and conditions. This certificate was first designated as payable to the executors or administrators of Adam Reddock; but, on the 17th January, 1913, he endorsed on the certificate a revocation of the former direction and designation and directed payment to be made to his wife, the present claimant, Jane Reddock. On the 1st August, 1913, Adam Reddock made his will, thereby assuming to bequeath this sum of $1,000 to the claimant Alexandrina Burt, stating the bequest to be in consideration of her having provided him with board and lodging and nursing. He died on the 8th August following. The money was claimed by each of the claimants. The Canadian Order of Foresters then obtained an order for leave to pay the money into Court, and by that order an issue was directed to be tried between Jane Reddock and Alexandrina Burt to determine which of the two was entitled to the money. The parties afterwards consented that the question should be determined by a Judge in Chambers upon an application by Jane Reddock for payment out to her of this money, and this application was made accordingly. BRITTON, J., found that,

upon the death of Adam Reddock, the money in the certificate mentioned became the money of Jane Reddock; and that it should now be paid out to her. A trust was created by Adam in favour of Jane, and that trust was not revoked by Adam. Alexandrina Burt abandoned—or perhaps never set up—any claim except under Adam's will, and she should not be ordered to pay any costs. There would be no costs payable by her. The costs of Jane Reddock should be paid out of the money in Court. Order made for payment out of the money in Court and all interest thereon to Jane Reddock. W. A. Proudfoot, for Jane Reddock. R. H. Parmenter, for Alexandrina Burt.

MOFFATT v. GRAND TRUNK R.W. CO.—BRITTON, J., IN CHAMBERS —APRIL 27.

Judgment—Settlement of Minutes—Terms—Undertaking—Infants—Costs of Official Guardian.]—Motion by the plaintiff to settle the minutes of judgment. The action was heard and disposed of at Sarnia on the 26th March last by His Honour Judge MacWatt, Senior Judge of the County Court of the County of Lambton, acting for BRITTON, J., upon his request in writing. In accordance with the views of the trial Judge, BRITTON, J., directs that judgment be entered for the plaintiff for the sum of $3,000, with costs fixed at $200, and that the said sum of $3,000 be paid to the plaintiff, less the sum of $15 to be paid to the Official Guardian. The undertaking given by the plaintiff to be filed and noted so that it will be available in case the plaintiff or any one on her behalf should, during the minority of her children, make any further application for any part of the money in Court for the maintenance of her children or either of them. Costs of this application to be paid by the plaintiff. Featherston Aylesworth, for the plaintiff. E. C. Cattanach, for the Official Guardian.

TRUSTS AND GUARANTEE CO. v. FRYFOGEL—FALCONBRIDGE, C.J. K.B.—APRIL 27.

Deed—Conveyance of Land by Father to Son—Action by Administrators of Father's Estate to Set aside—Mental Incapacity—Undue Influence—Duress—Lack of Independent Advice—

Improvidence—Recovery of Possession—Allowance for Improvements.]—Action by the administrators of the estate of Peter Fryfogel, deceased, to set aside a conveyance made by him to his son, the defendant, and for other relief. The learned Chief Justice found that, at the time of the pretended execution of the conveyance to the defendant (the 2nd September, 1909), the mental capacity of Peter Fryfogel had become so impaired by old age and disease (arterial sclerosis) that he was incapable of understanding the nature of the said conveyance or of making any disposition of his property. A codicil purporting to have been made about the same time had been set aside in the Surrogate Court of the County of Perth, on the same ground. There was also undue influence of the defendant, and Peter Fryfogel was so hedged about by the defendant that it amounted to duress; and Peter Fryfogel had no independent legal advice. Owing to his being so surrounded and to his want of mental capacity, he was never in a position to attack the deed in his lifetime, had he desired to do so, and he was entirely unable to acquiesce in or confirm the transaction in any manner. Judgment declaring that the said conveyance is void, as not being the deed of the said Peter Fryfogel and as having been obtained by duress and undue influence and as improvident, and directing that it be delivered up to be cancelled, with costs; also order for possession of the lands and recovery of rents and profits with interest, as to which there will be a reference, in which the defendant will be allowed for all sums expended by him in improvements and repairs of a substantial and permanent nature by which the present value is enhanced, with interest. Further directions and subsequent costs reserved. R. S. Robertson, for the plaintiffs. J. M. McEvoy, for the defendant.

DRAKE v. BRADY—FALCONBRIDGE, C.J.K.B.—APRIL 28.

Contract—Dealing with Lands—Share of Profits—Account—Amendment.]—Action for an account of the defendants' dealings with certain lands, payment of the plaintiff's share of the profits, and damages. The learned Chief Justice find that the plaintiff is justly and equitably entitled to recover $355.72, and gives judgment for the plaintiff for that sum, with County Court costs and no set-off. The defendants' motion for leave to add a counterclaim for damages is refused. W. T. J. Lee, for the plaintiff. William Proudfoot, K.C., for the defendants.

FAUQUIER v. KING—SUTHERLAND, J.—APRIL 28.

Contract—Services Rendered—Material Supplied—Money Paid—Claim for Payment of Balance—Counterclaim.]—Action to recover $6,475.84, a balance alleged to be due on account of services rendered and material supplied by the plaintiffs to the defendant and money paid by the plaintiffs for the defendant in connection with the construction of the Transcontinental Railway under an agreement between the plaintiffs and defendant. The defendant counterclaimed for $3,039.04. The learned Judge wrote an opinion in which he discussed the evidence and stated his conclusion that there should be judgment for the plaintiffs for $5,315.24 with costs and dismissing the counterclaim with costs. F. H. Chrysler, K.C., and C. J. R. Bethune, for the plaintiffs. J. F. Smellie, for the defendant.

REYNOLDS v. WALSH—MASTER IN CHAMBERS—APRIL 29.

Security for Costs — Increased Security—Admissions—Increase of Costs Occasioned by Counterclaim—Admitted Balance Due on Plaintiffs' Claim.]—Motion on behalf of the defendants for increased security for costs. On the examination for discovery, the following admissions were made by counsel. The plaintiffs' claim of $22,250.18, set forth in paragraph 2 of the statement of claim, is admitted by the defendants; and the defendants' claim of $14,296.01, set forth in paragraph 13 of the statement of defence and counterclaim, and the defendants' claim of $2,730, set forth in paragraph 14 of the statement of defence and counterclaim, are admitted by the plaintiffs. This left a balance of $5,224.17 admitted by the defendants as due to the plaintiffs on their claim. The Master said that this was clearly not a case to compel the plaintiffs to furnish additional security, as the plaintiffs had a valid claim for the amount abovementioned against the defendants, even although the balance of their claim should be disallowed at the trial. The contest at the trial would be on the defendants' counterclaim, and the increased costs of the trial would be occasioned by the counterclaim. The defendants, in addition to the amount of the security for costs already ordered, were protected as to costs to the extent of the admitted balance due on the plaintiffs' claim. Motion dismissed with costs to the plaintiffs in the cause. H. D. Gamble, K.C., for the defendants. H. E. Rose, K.C., for the plaintiffs.

GUELPH CARPET MILLS CO. v. TRUSTS AND GUARANTEE CO.—MASTER IN CHAMBERS—APRIL 29.

Third Party—Action by Company against Executors of Deceased Director for Breach of Trust—Third Party Claim against Co-director—Contribution or Indemnity—Companies Act, sec. 108—Trial of Issues between Defendants and Third Party.]—This action was brought by the plaintiffs against the executors of the late Christian Kloepfer to recover $18,894.32, of which $12,674.52 was claimed on the ground that the deceased was a director of the plaintiff company and as such responsible for advances, to the amount last-mentioned, made by the plaintiffs to the Dominion Linen Manufacturing Company Limited. A third party notice was issued by the defendants against R. Dodds, a director of the plaintiff company, claiming contribution or indemnity. The defendants moved for directions as to trial; and, on the return of the motion, counsel for the third party and for the plaintiffs moved to set aside the third party notice, on the ground that the defendants were not entitled to avail themselves of the third party procedure, because there is no contribution between joint tort-feasors. The Master expressed the opinion that the third party notice could not be upheld under sec. 108 of the Companies Act, referring to the English Directors' Liability Act, 1890, sec. 5, and Shepheard v. Bray, [1906] 2 Ch. 235. The Master held, however, that a director who has, in pursuance of a judgment, paid to the company an amount found due upon breach of trust, is entitled to contribution from the other directors or persons who were parties thereto, citing Ramskill v. Edwards, 31 Ch.D. 100; In re Sharpe, [1892] 1 Ch. 154; Ashurst v. Mason, L.R. 20 Eq. 225. He was, therefore, of opinion that the third party notice should stand, and the usual order be granted directing the trial of issues between the defendants and the third party. Costs of the application to be costs to the plaintiffs in any event of the cause; and costs between the defendants and the third party to be costs in the third party proceedings. W. J. Boland, for the defendants. H. S. White, for the third party. Featherston Aylesworth, for the plaintiffs.