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APPELLATE DIVISION.

SEPTEMBER 29TH, 1914.

GUARDIAN TRUST CO. v. DOMINION CONSTRUCTION CO.

Master and Servant—Death of Servant—Action by Administrator under Fatal Accidents Act—Negligence—Railway—Deceased Walking on Tracks Struck by Train—Findings of Jury—Nonsuit—Appeal.

Appeal by the plaintiff company from the judgment of BRITTON, J., 6 O.W.N. 406, dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

Christopher C. Robinson, for the appellant company.

R. McKay, K.C., for the defendant company, respondent.

THE COURT allowed the appeal with costs, and directed that judgment should be entered for the plaintiff company, upon the findings of the jury, for $1,000 damages, with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JANUARY 4TH, 1915.

HARRIS v. WOOD.

Partnership—Death of Partner—Action by Surviving Partner in Name of Firm—Rule 100*—Amendment of Style of Cause—Land Conveyed to Partnership — Title — Joint Tenancy — Conveyancing and Law of Property Act, R.S.O.* 1914 *ch.* 109, *sec.* 13*—Land Vesting in Surviving Partner—Action for Possession — Right to Redeem — Ability of Surviving Partner to Reconvey.*

Appeal by the defendant from an order of the Master in Chambers dismissing the appellant's motion to stay proceedings in this action, upon the ground that the action was improperly brought in the name of "W. Harris & Company."

K. F. Mackenzie, for the appellant.
A. C. Heighington, for the plaintiff.

MIDDLETON, J.:—The firm of W. Harris & Company consisted of William Harris and John B. Harris. William Harris died after the transaction giving rise to the action and before the issue of the writ.

On the 11th September, 1911, the defendant conveyed certain lands to "William Harris and John B. Harris, trading as W. Harris & Company;" this conveyance being taken either as collateral to or in satisfaction of his indebtedness to the firm. The defendant had never given possession of the property, and this action is brought to recover possession; the plaintiff asserting that the conveyance was in satisfaction of the debt and is absolute. No defence has yet been delivered, but the defendant's contention is that the conveyance, though absolute in form, was in truth a mortgage, and that an account ought to be taken and that redemption should be permitted.

In making this motion the defendant disclaims any intention to harass or delay the plaintiff, but desires to be satisfied that, upon redemption, if his contention succeeds, he will receive a satisfactory conveyance. The executors of William Harris are not willing to join in the action. Two questions are involved in the motion:—

(1) As to the right of the surviving partner to sue in the firm name under the provisions of the Rule. This is not a matter of practical moment, as the plaintiff John B. Harris is willing to sue in his own name as the surviving member of the firm. Rule 100 applies only where, at the time of the bringing of the action, there are two or more persons claiming as partners. Partners carry on business jointly, and upon the death of one partner the whole partnership estate vests in the survivor. The surviving partner then asserts in his own name the rights of the firm. It, therefore, follows that the style of cause should be amended so as to read "John B. Harris, sole surviving member of the firm of W. Harris & Company."

(2) The more material question is as to the ability of the surviving partner to give a good title if the defendant is entitled to

a reconveyance. It is admitted that the transaction was a partnership transaction, and it follows, I think, that the whole property, upon the dissolution of the partnership, became vested in the surviving partner. In In re Bourne, [1906] 2 Ch. 427, the whole question is, I think, satisfactorily dealt with. For a complete understanding of the situation, In re Hodgson (1885), 31 Ch. D. 177, should also be consulted.

I had some doubt whether our enactment relating to tenancy in common, sec. 13 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, affects the matter in hand. On consideration, I do not think it does. The fact that the transaction is a partnership transaction, and that the property was conveyed to the partners, as partners, sufficiently demonstrates that the holding is as joint tenants and not as tenants in common.

The result is, that, while the proceedings should be amended as already indicated, the motion in substance fails; and, with this variation, the order appealed from should be confirmed.

The costs here and below may well be in the cause.

MIDDLETON, J. JANUARY 4TH, 1915.

BRAZEAU v. BEDARD.

Judgment—Satisfaction—Trial of Issue — Parties — Sheriff — Solicitor—Injunction.

Motion by the plaintiff to continue an interim injunction restraining the defendants from paying over a certain sum of money made by the sheriff (a defendant) under an execution issued by the defendant Bedard in a former action of Bedard v. Brazeau.

The motion was heard in the Weekly Court at Toronto on the 30th December, 1914.

E. F. Macdonald, for the plaintiff.

H. E. McKittrick, for the defendants.

MIDDLETON, J.:—The question between the parties is, whether a mortgage given after the date of the recovery of the judgment in the former action was accepted in satisfaction of or as col-

lateral to the judgment. There appears to be a real issue between the parties, which cannot be disposed of without a trial. That issue might well have been raised by an application in the old action, but this, it appears to me, is a question going only to costs, and it can be dealt with at the trial.

In the meantime the proper disposition of this motion is to direct the sheriff to pay the money in his hands, less his costs up to this date—which should be fixed at a nominal sum—into Court to the credit of this cause, to abide further order, and thereupon the sheriff should be dismissed from the action.

There seems to be no justification for making the solicitor a party to the suit. His name should be struck out, without costs, and the action should proceed to trial, as between Brazeau and Bedard, for the purpose of determining the question raised.

Save as aforesaid, the costs will be dealt with by the trial Judge.

MIDDLETON, J. JANUARY 4TH, 1915.

RE HISLOP.

Will—Construction—Division of Estate among Named Brothers and Sisters by one Brother "according to his Best Judgment"—Trust—Imperative Direction—Discretion—Limited Power—Division Based upon Equality—Exercise of Judgment as to Attaining Equality—Tenancy in Common—One Sister Named in Will Predeceasing Testator—Intestacy as to her Share—Ascertainment of Next of Kin of Testator at his Death—Sister Surviving Testator but Dying before Division—Vested Share Passing to Representatives.

Motion by the executor of the will of Philip Hislop, deceased, for an order determining three questions arising upon the will.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto, on the 23rd December, 1914.

L. Harstone and R. S. Robertson, for the executor.

N. W. Rowell, K.C., for Mrs. Hislop.

W. Davidson, K.C., for the representatives of Euphemia Moody.

R. S. Hays, for D. Hislop.

G. G. Albery, for the Glover family.

J. W. Graham, for Margaret Hislop.

MIDDLETON, J.:—The testator, who died on the 30th June, 1913, by his last will, dated the 23rd March, 1910, devised and bequeathed his property as follows: "To my brother John Hislop I leave the disposition of all my real and personal estate of which I may die possessed to be divided by him the said John Hislop according to his best judgment among my two brothers, the said John Hislop and my brother David Hislop, and my three sisters," who are then named.

In the interval between the making of the will and the death of the testator, Euphemia Moody, one of the sisters, died intestate.

After the death of the testator, Janet Glover, another of the sisters, also died, leaving a will.

Three questions are raised:—

(1) Has John Hislop an absolute and uncontrollable discretion which enables him to divide the testator's property among those entitled, in such shares and proportions as he may see fit, or is the testator's intention that the property shall be divided equally, and is John Hislop's function limited to apportioning it so as to bring about that which would, in his judgment, constitute equality?

(2) Are those who represent Euphemia Moody, the sister who predeceased the testator, entitled to any share; that is, does her death before the testator's result in a lapse?

(3) Does the death of the sister Janet after the death, but before any division had been made of the estate, preclude her representatives from sharing?

I think the devise creates a trust. Applying the familiar test indicated by Wilmot, L.C.J. (Wilmot, Opinions and Judgments, p. 23)—"Powers are never imperative: they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted"—it is clear that this direction is imperative. It is not optional with the brother whether he disposes of the property or not. The property is given to him for the purpose of making a division of the property between himself and his brother and sisters.

It is true that the brother is given a certain discretion in the division of the property, and to that extent he is given a power; but it is either a power coupled with a trust or a power in the nature of a trust. In either case his fiduciary obligation remains and is paramount.

The more difficult question is, whether the brother is, in making the disposition of the property, to be guided by the

principle of equality. It is to be observed that his duty is to divide the property according to his best judgment among the five named persons. The testator has not used the words commonly found where the donee of a power is intended to be given unlimited discretion—"in such shares and proportions as he may see fit"—and I have come to the conclusion that the division contemplated is a division based upon equality. "The best judgment" which is to be exercised by the brother is, I think, to be exercised in attaining equality.

Peat v. Chapman (1750), 1 Ves. Sr. 542, has always been treated as an authority in favour of equality of division. There, the testator desired the residue of his estate to be divided between two. The Master of the Rolls said this must be understood to be "equally divided;" and by the death of one in the lifetime of the testator his moiety would not survive to the other devisee, but would be considered as undisposed of by the will.

In Ackerman v. Burrows (1814), 3 V. & B. 54, the testator directed his property "to be divided amongst" his mother and sisters. Held, that this created a tenancy in common among those living at the time of his death, and that the shares of those who had died in the testator's lifetime lapsed.

These cases are regarded as having settled the law that a direction to divide is sufficient to import equality, and so to constitute a tenancy in common. See, for example, Jarman on Wills, 6th ed., p. 1791, and Stroud's Judicial Dictionary, vol. 1, p. 559.

Once adopting this construction of the will, the second and third questions admit of easy answer. The representatives of the sister who predeceased the testator cannot take. Her share lapses, and falls to be divided among those who at the death of the testator were his next of kin. The share of the sister who survived the testator was vested, and passes to her executors.

The case of Fisher v. Anderson (1880), 4 S.C.R. 406, serves to shew how far the Court will go in favour of declaring a tenancy in common, and the consequent equality of the shares to be taken. See also Robertson v. Fraser (1871), L.R. 6 Ch. 696.

The costs of all parties to be paid out of the estate.

MEREDITH, C.J.C.P. JANUARY 4TH, 1915.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Principal and Agent—Customs Broker—Breach of Duty—Depriving Principal of Control over Goods—Negligently Entrusting Sub-agent with Bill of Lading Endorsed in Blank—Loss of Goods—Negligence of Sub-agent—Liability of Broker—Third Parties—Liability over—Sub-agent—Railway Company—Breach of Contract—Damages—Evidence—Findings of Fact of Trial Judge.

Action for damages for the loss of a motor car shipped to the plaintiffs at Vancouver, British Columbia.

The action was tried without a jury at Toronto.

A. McLean Macdonell, K.C., and J. W. Bain, K.C., for the plaintiffs.

W. N. Tilley and J. J. Maclennan, for the defendants.

A. Haydon, for the third parties the Great Northern Railway Company.

No one appeared for the other third parties.

MEREDITH, C.J.C.P.:—The substantial questions involved in this case are all questions of fact; and questions which, with one exception, are easily answered; the material facts being, with that one exception, easily found: see Heys v. Tindall (1861), 1 B. & S. 296.

The plaintiffs, admittedly, through the fault of one or more of the parties to this action, have been deprived of their control over the goods in question; and are entitled to recover damages for the loss which that deprivation has caused them.

The goods in question—a motor carriage, made and owned by them—were shipped by them from their factory in England to themselves or their assigns at the city of Vancouver, in British Columbia, Canada: and the usual bill of lading, in two parts, was obtained by them from the carriers, and sent, with the usual invoices, to their Canadian sales branch or agency at the city of Toronto, in Ontario, Canada.

The bill of lading provided, in the usual form, for the carriage of the goods to the plaintiffs, or their assigns, at Vancouver, the carriers to pay the freight; that is, the through charges were in effect prepaid.

The carriage was intended by the plaintiffs to be delivered to one Noel Humphreys, at Vancouver, upon payment by him of the price of it, in accordance with an agreement respecting it made between them: and, again in accordance with the plaintiffs' method of doing business of that kind there, they drew, at sight, upon Humphreys for the price of the carriage, endorsed one part of the bill of lading in blank, attached the bill of exchange to it, and sent the two to their bankers in Vancouver, with instructions to deliver the bill of lading so endorsed to Humphreys, upon payment by him of the amount of the bill of exchange, which was the price of the carriage: all of which was in accord with their usual, as well as with common, mercantile methods: possessed of the bill of lading so endorsed, and having paid the price of the carriage to a bank of the highest standing, Humphreys would, and it was meant that he should, have no trouble in getting delivery to him of it.

But, before any one could rightly obtain possession of the goods, it was necessary that they should be "cleared" at the Customs House, having "come through in bond:" and the work of making all entries and clearing all goods, everywhere in Canada, for the plaintiffs, was entrusted to the defendants: and, for the purpose of making this entry, the invoices, and the other part of the bill of lading, were delivered to the senior partner of the defendants, with a cheque for the amount of money required to pay all charges, and the defendants undertook to do the necessary work in clearing the goods from all Customs demands.

When the plaintiffs first opened their sales branch or agency in Toronto, the senior partner of the defendants, who are Customs brokers, sought and obtained from the defendants all of their Customs House work, and has ever since had and done it.

The second part of the bill of lading was given to the defendants with the invoices, because their senior partner had told the plaintiffs that it was necessary that it should accompany the papers, that the Customs House officers required its production; and so it was always given with the invoices to the defendants, sometimes endorsed in blank, and sometimes not so endorsed. The fact is, that sometimes Customs officers require the production of the bill of lading and sometimes they do not; . . . it was not unreasonable for the defendants to ask for and have it so that it might be produced if demanded.

All the papers in regard to this entry, as was also the case with all work done by the defendants for the plaintiffs, were made out and signed and sworn to in Toronto, by the defendants'

senior partner, he, or his firm, having a formal power of attorney from the plaintiffs to act as their brokers. When completed, the papers were sent, with the cheque for the amount required to pass the goods, to the defendants' correspondents in Vancouver, the third parties the Turnbulls, who are Customs brokers there, to clear the goods from all Customs charges: and that was done, they apparently retaining the second part of the bill of lading.

So far it is quite plain sailing, but the subsequent facts are in some respects ill-disclosed. That their part of the bill of lading by some means got into the hands of the carriers at Vancouver, the third party railway company, and that Humphreys got from them the goods without having paid a farthing on their price, is very plain: how the bill of lading got into the hands of the railway company, as well as just by what means and how Humphreys so got possession of the goods, is not made plain by the testimony.

In these circumstances, the plaintiffs sue the defendants for the value of the carriage: and the defendants, besides contesting the claim, make a claim over against the third parties, the Turnbulls and the carriers, the railway company.

The defence set up to the plaintiffs' claim is: that the defendants themselves were not guilty of any error; and that, if the Turnbulls were, the defendants are not answerable for it; that the Turnbulls were not the defendants' agents, but were the plaintiffs'; but in both respects I find them to be clearly wrong.

I find the defendants guilty of a gross breach of their contract with the plaintiffs, to perform duly the duty of the plaintiffs' Customs brokers. Such brokers are employed because of their professed knowledge, skill, and care in the performance of such duties as the defendants undertook in this case. To send, without the least need, indeed without the least excuse for it, a bill of lading of goods of the value of several thousands of dollars, so to send such a bill endorsed in blank, with a full knowledge of the danger of so doing, a knowledge which every business man must possess, not to mention those who hold themselves out as competent Customs brokers, I find to have been an undoubted act of negligence, standing alone, and one which becomes the more culpable in view of the fact that the broker who is personally answerable knew at the time that the other part of the bill of lading was to be sent with bill of exchange attached, as I have before mentioned, to guard against delivery of the goods until the price had been paid; and also of the fact that in forwarding the papers to the Turnbulls, and in giving them in-

structions regarding the entry, not a word was said in the way of warning either regarding the bills at the bank, the means they adopted of preventing delivery before payment, or even calling attention to the fact that the part of the bill of lading sent to them was a dangerous instrument, being endorsed in blank.

It is not a sufficient answer to this charge of negligence to say that the plaintiffs should not have given to the defendants the bill so endorsed. The defendants were not paying the plaintiffs for skilled reasonable care in the performance of the plaintiffs' professional duties: the plaintiffs were paying the defendants for all that. The plaintiffs owed no duty to the defendants to know that an endorsed bill of lading was not necessary for Customs purposes: the defendants owed that duty to the plaintiffs; and they owed the duty to the plaintiffs also to inform them of the fact and let the danger be removed by them: or else to have removed it themselves by running a pen-mark through the endorsement, or otherwise cancelling it. And after all that there was the gross neglect to warn the Turnbulls: a neglect which, whatever else may be said against them, gave them some ground for the complaint they make in this respect, in their letter of the 24th June, 1913, to the defendants: see Rudd Paper Box Co. v. Rice (1912), 3 O.W.N. 534.

Nor is it a sufficient answer to this charge of failure to do that which they were paid for doing and had contracted to do, for the defendants to say that anyway no harm would have come from their negligence if others had not been negligent too. The person who wrongfully sets the squib going is answerable for all that may reasonably be expected as a possible result: and the person who sends on a loaded, capped, and full-cocked gun, and especially one who is a professed armourer for hire, can hardly escape being answerable for what might reasonably have been anticipated, if he does not take the trouble to put the dangerous weapon at least at "safe."

Upon the other question, I find that the Turnbulls were not brokers of the plaintiffs, but were acting for the defendants in doing the few purely ministerial acts which the defendants employed them to do. . . .

But it is urged, for the defendants, that there was an expressed arrangement, between Jackson and the manager of the plaintiffs' branch or agency at Toronto, under which the Turnbulls were to become the plaintiffs' Customs brokers at Vancouver: that contention however fails for two reasons: because it is not proved; and, if it had been, no such arrangement was ever

carried into effect; no such appointment was expressly made, nor were the Turnbulls ever employed except by the defendants in their own name to do for them the purely ministerial acts I have mentioned. . . .

I find this defence not proved; but, if it had been, the defendants would still remain liable because of their own negligence—quite apart from that of the Turnbulls.

In order that the plaintiffs may recover all their loss from the defendants it is not necessary for the plaintiffs to shew that the defendants' negligence was the cause of a rightful delivery of the goods to a wrong person. The defendants were guilty of a breach of their contract with the plaintiffs, and without that breach of contract there would not have been such misdelivery.

. . . .

The defendants . . . must pay the amount of the plaintiffs' actual loss; which is the price that Humphreys was to have paid for the carriage, and, in addition, what was lost through being deprived of both carriage and price from the time of the wrongful delivery of it until the entry of judgment in this action: and those damages I fix at the same amount and interest upon the price at 5 per centum per annum during that time. The judgment clerk can, and is to, add these two amounts together and enter judgment for the plaintiffs against the defendants and damages in the amount of them in one sum—with costs.

The third parties the Turnbulls are liable to make good to the defendants that sum: they were plainly guilty of a breach of their duty to the defendants, who employed them and paid them for their services. They had no authority from the defendants, or right of any kind, to make any use of the bill of lading, sent by the defendants to them, except in the Customs House, and for the purpose of clearing the goods. They may have a very good "moral" ground of complaint against the defendants for not making the bill of lading "safe" before sending it to them, or at least for not warning them of its dangerous condition: but that does not excuse them from the wrong of making an unauthorised use of it, whether they observed, or ought to have observed, the endorsement in blank, or not. If they gave the bill of lading to Humphreys, it was a flagrant breach of duty: if they only lent it to the railway company, at the company's request, to enable the company to "fix freight charges," they did it at their own risk and must take the consequences. . . . It is also no answer to the defendants' claim to say: "No property in the goods has yet passed; you or the plaintiffs can go and get the carriage yet." . . .

After giving the whole evidence the best consideration I could, and naturally relying much upon the indisputable circumstances of the case, my conclusion is: that the railway company have not proved that they delivered the carriage to Humphreys upon the faith of the bill of lading, endorsed in blank—to which I have before frequently referred—produced, and given to them, by him as the lawful holder of it: nor have they shewn any other proper discharge of all their duties as carriers of it for him.

The onus of proof of a valid delivery of the goods is upon these third parties, the railway company; and, for the purpose of discharging that onus, they rely mainly upon that part of the bill of lading which was entrusted to the brokers by the plaintiffs, supported by the testimony of their witness Burton, who describes himself as the company's "revising clerk" at Vancouver, and his duty as revising the weight and charges on the waybills of freight coming in. . . .

Upon this branch of the case the railway company have not proved their defence; indeed, my findings upon it must be: that the order for the delivery of the goods to Humphreys was made by the witness Burton because he believed Humphreys to be the agent of the plaintiffs and as such entitled to it; and because he had, as he thought, been safeguarded against any personal loss on account of freight charges; and not because Humphreys brought to him the bill of lading—and under it, or upon giving it up, he was lawfully entitled to possession of the goods. Burton was not free from want of reasonable care. . . .

I find, therefore, that the third parties the railway company are liable for a misdelivery of the carriage; and I assess the damages against them at the same amount, made up in the same way, as I have assessed them against the defendants. . . .

It must be made plain that throughout this action, until the present moment, it has been taken for granted by every party, that the bill of lading, endorsed in blank as it was, would be a sufficient authority to the carriers for the delivery by them, in good faith, of the goods, to the bearer of it. I have, therefore, not considered the subject, because, quite apart from any effect the bill might, in any circumstances, have upon the property in the goods, any sort of order or authorisation for any such delivery as the parties might have, expressly or tacitly, agreed upon, would be sufficient between them. But I may point out that, under the bill, the goods are to be forwarded, not to the plaintiffs or their order, but to the plaintiffs or their assigns only:

and that one of its provisions is in these words: "This bill of lading, duly endorsed, to be given up in exchange for delivery order." In the case of Glyn Mills Currie & Co. v. East and West India Dock Co. (1882), 7 App. Cas. 591, the delivery was to the consignees themselves. . . .

In like manner it has been taken for granted that the third party proceedings are regular and proper, and that, upon the findings I have made, the defendants are entitled to judgment against the railway company, as well as against the other third parties; that they had and have a right to do if they choose; and, seeing that it is a convenient and comprehensive way of settling all the questions that have been discussed, I follow them in it, with this provision—added so as to make my findings apply to and safeguard all interests—that it shall be adjudged that any claim the plaintiffs might make against the railway company for the misdelivery of the goods shall be precluded by the judgment between the parties to the third party proceedings herein, and that the damages recovered in such proceeding shall be paid and applied in satisfaction of the plaintiffs' judgment against the defendants. . . .

There will be no order as to costs of the third party proceedings in any case. All parties have been negligent; negligence and loose methods are common enough; to let those who are guilty of them succeed, or let them off, just as if they had been ever so careful and methodical, would be an improper encouragement in misdoing, which ought rather to be punished.

No judgment is to be entered upon any of my findings until after the lapse of thirty days; so that all parties may have abundant time to consider whether they shall appeal against them, or what other course is likely to be most in their interests.

MIDDLETON, J., IN CHAMBERS. JANUARY 6TH, 1915.

RE NICHOLSON AND CANADIAN ORDER OF FORESTERS.

Life Insurance—Benefit Certificate—Society Subject to Act respecting Benevolent Provident and other Societies, R.S.O. 1897 *ch.* 211—*Repeal of Act by* 7 *Edw. VII. ch.* 34, *sec.* 211 (3) — *Preservation of Rights of Beneficiaries — Rules of Society—Designation of Next of Kin as Beneficiaries—Will of Assured—Lien for Premiums Paid.*

Motion by W. G. Nicholson for payment out of Court of $978, insurance moneys, paid in by the Canadian Order of Foresters.

J. E. Jones, for the applicant.

J. A. Paterson, K.C., for other brothers and sisters of James Nicholson, deceased.

MIDDLETON, J.:—James Nicholson was insured in the Canadian Order of Foresters on the 1st October, 1886. The certificate designated his "next of kin" as payees.

Nicholson died on the 14th October, 1912, and by his will he appointed his brother W. G. Nicholson executor, and confirmed "any appointment or nomination I have or may make of my assurance money in the Canadian Order of Foresters, and subject thereto I give devise and bequeath all my estate and effects including any portion of the said assurance money of which my nomination now or hereafter to be made shall prove inoperative, unto my said brother William Gardner Nicholson absolutely."

W. G. Nicholson for many years paid the monthly assessments upon this policy, and his right to be refunded the amount of such payments, amounting to $280, is not disputed.

Under the constitution of the Canadian Order of Foresters, sec. 57, the amount of the certificate becomes payable to the designated payee or payees of the deceased.

At the time of the effecting of this insurance, the Order was subject to the Act respecting Benevolent Provident and Other Societies, R.S.O. 1897 ch. 211, which provides that where under the rules of the society any money becomes payable upon the death it shall be paid to those entitled under the rules, and shall, to the extent of $2,000, be exempt from all claims by the personal representative or creditors of the deceased. This statute has now been repealed, but, by the statute 7 Edw. VII. ch. 34, sec. 211 (3), now found as R.S.O. 1914 ch. 183, sec. 33, the repeal of the statute does not affect the corporate existence of the society incorporated under it "nor the rights and privileges of the members thereof or their beneficiaries."

It is contended by Mr. Paterson, and I think rightly, that the right to receive this money is one of the rights and privileges of the beneficiaries preserved to them by this clause. If this view of the repealing Act is correct, there can be no doubt that, subject to the lien for the amount advanced for premiums, the money ought to be divided among the testator's next of kin. The

material does not satisfactorily disclose who these are. If it cannot be supplemented, there will have to be a reference to the Master in Ordinary to distribute the fund. This, however, need not delay the payment to Mr. W. G. Nicholson of the amount of his advances.

Costs of all parties may come out of the fund.

MIDDLETON, J. JANUARY 6TH, 1915.

RE SINGER.

Will — Construction — Gift of Income to Wife for Life and Widowhood "for the Maintenance of herself and our Children"—Equal Division of Corpus among Children upon Death or Remarriage of Wife—Provision for Advancement to Sons—Resulting Trust—Obligation of Wife to Maintain Children—Discretion—Reference to Fix Allowances—Postponement of Time for Conversion of Real Estate into Money —Effect upon Advancement—Interest upon Sums Advanced —Appointment of "Managers" of Estate — Remuneration —Provision Depriving Executors of Remuneration — Acceptance of Office with Disability Attached.

Motion by the surviving executor of the will of Jacob Singer, deceased, for an order determining questions arising as to the construction of the will.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

H. H. Dewart, K.C., for the applicant.

G. H. Watson, K.C., and J. Bernbaum, for Annie Singer.

C. J. Holman, K.C., for seven beneficiaries.

M. K. Cowan, K.C., H. E. Rose, K.C., and J. W. Pickup, for two beneficiaries.

M. H. Ludwig, K.C., for the widow of Solomon Singer.

H. S. Osler, K.C., for the infant children of Solomon Singer.

F. W. Harcourt, K.C., Official Guardian, for the infant Fannie Singer.

MIDDLETON, J.:—The late Jacob Singer died on the 13th November, 1911, leaving him surviving his widow, now 62 years

of age, and eleven children, the eldest being Mrs. Miller, now 42 years of age, and the youngest Fannie, now 17. Of the sons, three, Moses, Max, and Israel, have attained 30 years of age; five are yet under that age.

Mr. Singer left a large estate, almost all of it being land. He owned about 300 houses in Toronto. These are all subject to incumbrances, and it is as yet impossible to state how much will ultimately be realised. The mortgage and other indebtedness amounts to almost $350,000; the estimated net value of the estate being somewhere between $400,000 and $500,000.

Mr. Singer's will bears date the 16th May, 1904; there is a codicil dated the 31st October, 1911; and the most serious difficulty arises when it is attempted to ascertain the effect of the codicil upon the provisions of the will.

By the will, the executors are given full power to deal with the estate as they think best, to realise and invest in their own discretion; and the net annual income is to be paid to the wife during her life and widowhood "for the maintenance of herself and our children." Upon the death or remarriage of the wife the estate is to go to the children share and share alike, to be paid over to each child on attaining 21 years of age. There is a provision that grandchildren are to stand in the place of any child who predeceases the wife, and that, if the child leaves no issue, then the surviving children are to take share and share alike.

So far, the will is comparatively free from difficulty. It also contains a provision directing the trustees to pay to each son who shall attain the age of 30 years a sum equal to one-half the portion to which he is entitled under the will upon the death of his mother; this amount to be estimated by the executors, whose decision shall be final. The will then provides that "such payment is to be considered as a loan from the estate." The clause relating to division provides that there shall be deducted from the share of each child "any sum or sums which shall already have been advanced to such child."

By the codicil, clause 10, the testator directs that his "real property shall not be divided amongst the beneficiaries as directed by my will until after the lapse of ten years from my death." The net income from the estate, over and above all outgoings properly chargeable against the life-tenant, is considerable, possibly between $25,000 and $30,000 per annum.

The questions which now arise are:—

(1) As to the widow's right to the income; does she take this absolutely during her life and widowhood, or does the provision

in the will which directs the income to be paid to her for the maintenance of herself and "our children," impose any obligation upon her to use any part, and if so what part, of the income for the benefit of the children?

A subsidiary question was suggested upon the argument which does not require much consideration. It was suggested that there was some resulting trust which prevented the widow from retaining as her own anything not needed for the maintenance of herself and the children. There is no foundation for this contention. If authority is needed, it will be found in Re Robert George Barrett (1914), 5 O.W.N. 805.

It is quite hopeless to attempt to reconcile all that has been said by different Judges upon devises somewhat similar to that in question here, and I am inclined to think that the cases are of little real use. Mr. Singer undoubtedly had unbounded confidence in his wife. Many expressions in the will point in that direction; and I think that his dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself. These children would all inherit handsome fortunes. The difference in the ages of the children is great, 25 years between the oldest and youngest. At the time of the writing of the will the mother was only 52 years of age. The final division would only take place upon her death or remarriage, an event that might be postponed for many years. As the sons attained the age of 30 years each was to receive an advancement of half of his prospective share.

In the meantime, the mother was to receive the income; I cannot think without some corresponding obligation. The children who had been nurtured by the testator were not to be left without any right to anything in the interval between attaining majority and receiving their advancement. The best view that I can form is, that the mother, who was to receive this large income, was to use her judgment as to the sum that should be paid to the different members of the family for maintenance.

The decision in In re Booth, [1894] 2 Ch. 282, appears to me to apply. There the testator gave the estate to his trustees, and directed them to pay the income to his wife "for her use and benefit and for the maintenance and education of my children," and upon her death to divide it equally between all his children. The holding was that the wife took the income subject to a trust for the maintenance and education of the children, and that the trust was not limited to children under 21 or unmarried. North,

J., who determined the case, after so holding, states: "It is not, however, a trust for all the children equally; some may take nothing at all. The widow has a discretion as to the amount to be applied for each child. If there are children who do not require maintenance, they are not to have any of the income; a discretion is given to the widow."

The case, I think, falls within what is said by Theobald, 6th ed., p. 476: "The gift may be so expressed as to entitle the parent to the gift subject to the obligation of maintaining the children so far as they require it. This is the case if the gift is to the testator's widow for her use and benefit and for the maintenance of his children. . . . In such cases the Court will not interfere with the parent's discretion so long as it is honestly exercised. But it will, if necessary, administer the trust and direct an inquiry to bring out the facts. If the will does not impose a limit, maintenance may be allowed to a child requiring it who has attained 21, and also to a married daughter."

Here, the applicants have made out a primâ facie case of needing parental assistance. The mother has taken the position, not that she has exercised a discretion, but that she is absolutely entitled to the income and that the children have no right.

If the mother is ready to exercise her discretion and make some reasonable allowance to those of the children apparently in need, then I do not think the Court should interfere; and I trust that the matter may even yet be amicably arranged. If not, I think the children so desiring are entitled to a reference on the lines indicated by Mr. Justice North in the case already referred to.

At first I thought that the clause providing for the maintenance of infant children after the wife's remarriage weighed somewhat against this construction; but, when it is considered that upon the remarriage of the wife the adults at once receive their shares, this clause is seen to be colourless.

The second question is that of the right of the sons who have attained 30 years of age to insist on an advancement. The executors have not yet sold any of the realty, and there is nothing in hand out of which an advancement can be made, unless a sale of the realty is enforced, or some further incumbrance is placed upon it. The widow and the executor take the position that the effect of the 10th clause of the codicil, providing that there shall be no division of the real property until after the lapse of 10 years, prevents the making of any advancement.

The conclusion at which I have arrived upon this question is, that the effect of the clause in question is to preclude any divi-

sion, either upon the death or remarriage of the mother, or by way of preliminary advancement, so far as the real estate is concerned. The intention of the testator, I think, was to give to his executors ten years before they should be called upon to distribute the real estate. If at any time there is on hand personal property or the proceeds of real estate available for distribution, this may be advanced to the sons. I think the advancement clause does not contemplate an allotment of real estate in specie. As such advancements are made, the mother's income must necessarily be kept down to some extent; but she will be released pro tanto of her obligation to assist in the maintenance of the sons receiving the advancement.

The question whether interest should be charged upon any sums which are advanced, is then raised. The underlying principle of all the cases is, that interest is charged for the purpose of producing equality among those who are ultimately entitled to share. Inasmuch as the entire income goes to the widow, and as the advancement, which cuts down the income, indirectly enures to her benefit by relieving her pro tanto from the obligation to maintain, this principle has no application here. Equality among the children, so far as the capital is concerned, is not interfered with; the elder child, by virtue of his seniority, receives an advancement on account of his ultimate share. This is a benefit conferred upon him by the testator, who has not exacted any terms. Re Hargreaves (1903), 88 L.T. 100, and In re Craven, [1914] 1 Ch. 358, as well as the cases collected in Re Nordheimer (1913), 29 O.L.R. 350, establish the principle upon which the Court acts.

The next question is as to the respective duties of the executors and managers under the will and codicil. Under the will, after the appointment of executors, it is stated that "the manager of the estate is to be selected by a majority of my children, assented to by my wife: such manager is to get a reasonable salary and to be one of the heirs." By the codicil the executors are changed, and it is provided: "I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salary as shall seem just in the discretion of my executors in remuneration for their services."

The testator evidently contemplated the employment as a continuation of the employment of his sons as during his lifetime in the renting, repairing, and general management of the large amount of real estate held by him. For this duty those

actively employed were to receive remuneration. The executors were to be relieved from this detailed work, which was to be performed by the salaried employees. The executors, as executors, were to receive no remuneration.

It is asked, finally, if the executors are entitled to receive remuneration for their services as executors and trustees. The will expressly provides that they shall not, and I cannot relieve them from this disability. If they did not like to accept the position offered by the testator, they could have renounced probate. Having accepted the position, their rights depend substantially upon contract.

It should have been mentioned that Solomon's children are not within the class entitled to maintenance from the widow.

Costs of all parties may come out of the estate.

MIDDLETON, J. JANUARY 7TH, 1915.

RE IMPERIAL PAPER MILLS OF CANADA LIMITED.

DIEHL v. CARRITT.

Company — Winding-up — Receivership — Advances Made by Bank upon Security of Timber—Payment of Crown Dues by Bank—Claim for Repayment out of Assets of Bank in Priority to Claim of Mortgagee—Obligation of Company not Binding on Mortgagee — Preferential Lien of Crown — Validity against Secured Creditors—Subrogation—Salvage —Court in Control of Fund—Equitable Administration.

Claim of the Quebec Bank, made in a reference for the winding-up of the company and in a receivership action, brought before the Court for adjudication in the first instance, the Referee having died, and the parties having made admissions in the nature of a stated case.

D. T. Symons, K.C., for the bank.
J. H. Moss, K.C., for the receiver and liquidator.

MIDDLETON, J.:—The claim of the bank, as filed, is for $34,983, the amount paid as representing Crown dues with respect to certain timber, and for interest. This claim includes two

items, $1,056 and $3,085, with respect to which the bank now abandons its claim.

The facts giving rise to the claim are set forth in admissions signed by counsel. On the 6th October, 1898, the Sturgeon Falls Pulp Company Limited acquired the right for a period of 21 years to cut and remove spruce, jack pine, and other woods for the pulp and paper mills of the company, from a large area, roughly estimated at 3,300 miles, subject to the payment of certain timber dues. These dues, if unpaid, carried interest. The Imperial Paper Mills of Canada Limited succeeded to the title of the Sturgeon Falls Pulp Company, and became subject to its obligations under the agreement with the Crown.

By mortgages dated the 23rd September, 1903, and the 18th November, 1903, the Imperial Paper Mills of Canada Limited hypothecated all its assets, including its rights under the agreement with the Crown, but expressly excepting from the subject of the hypothecation "logs on the way to the mill." The mortgages becoming in default; and in the action of Diehl v. Carrit a receiver was appointed, in the interest of the mortgagees, on the 27th October, 1906. From that time on, the whole undertaking has been in the hands of the mortgagee's receiver. A winding-up order has been made, a liquidator has been appointed, some changes have taken place in the personnel of the receivers; but none of these matters in any way affect the question now raised.

Prior to the receivership, the Quebec Bank had made large advances to the company upon the security of logs on the way to the mill.

After the receiver was appointed, the position of the Quebec Bank was attacked. It was alleged that the logs on the way to the mill, excluded from the debenture mortgage, were merely the logs on the way to the mill at the time of the granting of the mortgage, and that the logs thereafter cut from timber upon the limits were subject to the mortgage, and that the mortgagees had priority over the bank. It was also alleged that the bank's securities were invalid by reason of failure to comply with the provisions of the Bank Act. This resulted in litigation, which only ended by the decision of the Privy Council on the 7th August, 1913, upholding the bank's title. The Privy Council took the view that the intention was to exclude from the debenture-holders' securities all logs cut upon the limits and taken to the mill, so that the company could continue to operate as a going concern, and that there was no defect in the bank's title under its own securities. The bank has, therefore, succeeded in its claim, as against the mortgagees, to all these logs.

In the meantime the bank had not been deprived of the right to take away the logs; but the Crown had intervened with respect to its claim for dues, and on the 28th December, 1906, the bank, for the protection of its rights in regard to these logs, paid to the Crown something over $20,000 as representing Crown dues, and this sum with interest constitutes the bank's claim now put forward.

Such proceedings have been taken under the mortgage securities that the entire assets of the company, which are subject to these mortgages, have been sold thereunder. The amount realised will not pay the amount due to the bond-holders. Part of this money has been distributed among the bond-holders, but a considerable sum is yet in Court to answer any claims which may be established and which have priority over the right of the bond-holders.

The bank now claims to be entitled to priority with respect to this sum and interest, placing its claim in three ways:—

(1) It is said that this is a debt of the company, and the mortgagees became the assignees of the company of the contract under which this debt is payable, and as assignees of the contract the mortgagees are bound by the company's obligations.

(2) That the bank is really claiming as assignee of the Crown, and the Crown would be entitled to priority in respect to this claim.

(3) That the bank is entitled to priority because its claim is in the nature of salvage; and the Court, being in control of the fund, would recognise and enforce all claims based upon justice and equity.

Dealing with these contentions in order, I am unable to find anything to justify the suggestion that the mortgagees became bound by the covenants contained in the agreement with the Crown. The logs cut upon the limits, as it has been held, were expressly excepted from the security. The covenant to pay, if there is, as there probably is, a personal obligation on the part of the company, is one that did not run with the land. The mortgage was not an absolute assignment of the agreement with the Crown, but a mere hypothecation. There was no novation. I can find nothing in either law or fact upon which this claim can be based. The situation appears to me to be simple. The company owned these logs free from the mortgage, but subject to the Crown's lien. It borrowed money from the bank and conveyed the logs to the bank, and the bank for its own protection paid the Crown dues.

The claim for priority by virtue of the Crown's prerogative, it also appears to me, rests upon a fundamental misconception. That the Crown had a preferential lien upon the logs no one disputes; but that the Crown in respect of Crown dues can assert a preferential claim entitling it to priority over other creditors holding security upon other assets, is a totally different matter. In the administration of assets in bankruptcy it may be that the Crown has priority over the general body of creditors—"common persons" as it is put in the old books—but creditors having security upon specific assets of the debtor have never been regarded as mere "common persons," nor is there any authority that I can find which indicates that the Crown has any right to displace secured creditors. The truth is, that, so soon as the property is mortgaged, it has become the mortgagee's property, and the Crown has no right to take the property of a third person for the payment of its debts.

The right of the bank to be subrogated to the rights of the Crown appears to me to be by no means clear, nor can I see anything in which it has any equity superior to the equity of the mortgagees.

With reference to the last argument, the fact that the fund is under the control of the Court makes no difference. At one time it seems to have been thought that because the Court had control over the fund it was justified in administering the fund in some way which recognised moral obligations as distinct from legal obligations; but the decision in In re Hazeldine's Trusts, [1908] 1 Ch. 34, shews that this idea can no longer prevail. Quite apart from this, as already indicated, I can see no reason for suggesting that the bank, which paid this money for the protection of its own security, has any moral or legal right as against those who lent money upon the security of the other assets.

The claim is, therefore, disallowed; and I can see no reason why costs should not follow the event.

MIDDLETON, J. JANUARY 7TH, 1915.

*JOURNAL PRINTING CO. v. McVEITY.

Municipal Corporation—Right of Access of Public and Newspaper Representatives to Municipal Buildings and Offices—Right to Information for Purpose of Publication—Municipal Act, R.S.O. 1914 ch. 192, secs. 219, 237—Right to Inspect Certain Documents—Injunction.

*To be reported in the Ontario Law Reports.

Action by the publisher of an Ottawa newspaper against the Mayor of the City of Ottawa for a declaration that the reporters employed by the plaintiff company were entitled, at reasonable times, to access to the offices of the City Clerk and other heads of departments at the city-hall of the city of Ottawa, for the purpose of obtaining information respecting the proceedings of the city council and of inspecting the books and records kept by the City Clerk and for the purpose of obtaining information as to the conduct of the affairs of the city; and for an injunction restraining the defendant from interfering with the reporters in obtaining such access and information.

The action was tried without a jury at Ottawa.

G. F. Henderson, K.C., for the plaintiff company.

T. A. Beament, for the defendant.

MIDDLETON, J. (after setting out the facts) :—Much that was done by the reporters appears to have been absolutely without justification. There was a more or less deliberate attempt made persistently to annoy the defendant.

No public official is bound to submit to an interview at the hands of a newspaper against his will, and a persistent attempt on the part of reporters to interview the defendant and to catechise him with reference to his conduct of public affairs is not seriously attempted to be justified.

A reporter, as a reporter, has no particular rights or privileges. He is not entitled to information, save that which is open to any member of the public.

The function of the press in gathering information for the public, so as to enable public affairs to be intelligently discussed, is obviously of the greatest importance. Those in charge of public business may well, as a matter of courtesy, afford special privileges to representatives of the press, and may well seek its aid in the education of the public mind by availing themselves of its readiness to disseminate information. All this must rest on goodwill and mutual confidence, and this happily is generally found sufficient to insure adequate information reaching the public. When, unfortunately, this happy relation does not exist, and there is a tendency on the one side to heckle and annoy, and an inclination on the other side to be curt and perhaps almost churlish, it will probably be found that the Courts can afford no real redress. Many of the practical affairs of life must depend on good taste and good manners rather than on strict definitions of right emanating from the Courts.

According to the evidence of the defendant, when he took office he found an entirely unsatisfactory state of affairs existing. The newspaper reporters had the "run" of the city-hall. City officials were interviewed almost daily with regard to questions of policy and matters of administration. Reports and documents were given to the newspapers for publication before being submitted to the council or its committees. Subordinate officials were airing their views in the newspapers as to the proper and probable municipal action. Chaos reigned supreme. All order and discipline were forgotten. The newspapers were endeavouring to "run" the municipality, and civic officials were aiding and abetting in this state of affairs.

In discussing the matter with the defendant, the heads of the departments pointed out how unsatisfactory the situation was, and asked the defendant to take such steps as would keep those too enterprising reporters in their proper position. . . .

The defendant was amply justified in adopting the course he did. His conduct, however, was not unnaturally resented, and then he was made the victim of a good deal of persecution at the hands of the newspaper and its representatives. Attempts to compel him to discuss civic affairs, and the items referring to his refusal, under the heading "Our Daily Chat with the Mayor," cannot be justified.

In excluding the reporters from the city-hall, the defendant, I think, went too far. As the representatives of the newspaper company, a ratepayer of the city, and as residents of the city, the reporters had, I think, the right to enter the city-hall for the purpose of obtaining such information as they were lawfully entitled to, and for the purpose of seeking information which might be voluntarily given to them by those in charge of municipal affairs.

A motion was made for an interim injunction on the 31st October, and I then made an interim order, which I suggested to the parties the desirability of considering as a basis of a final settlement of the action. I then restrained any interference with the plaintiff's reporters in obtaining any information to which they were entitled under the provisions of the Municipal Act, and provided that the order should not justify any reporter remaining in the office of any official when that official requested him to retire.

This arrangement has not been found either workable or satisfactory, and I have now to deal with the matter according to what I find to be the strict legal rights of those concerned.

The Municipal Act, R.S.O. 1914 ch. 192, sec. 219, provides that any person has the right to inspect the books and documents mentioned in sec. 218, which it is the duty of the Clerk to keep, and the minutes and proceeding of any committee of the council, whether the acts of the committee have been adopted or not, and the assessment rolls, voters' lists, etc. By sec. 237, auditors are required to prepare certain statement of receipts and expenditures, and a resident of the municipality has the right to inspect these. No doubt, scattered throughout the Municipal Act and other Acts, there are other records and documents which are open to inspection. All these, it is admitted, the newspaper, through its reporters, has a right to inspect. Beyond this, the giving of information rests entirely in the discretion of the municipal authorities.

The case of Mayor, Aldermen, etc., of Tenby v. Mason, [1908] 1 Ch. 457, supplies the principles which must guide me. . .

That case, while defining the principles applicable, differs from the case in hand, because here there has been no attempt whatever to exclude reporters from the meetings of the council; but the underlying principle is the same. In the administration of the public affairs of the municipality there must be many things that cannot be transacted in public, and there must be many other things which cannot be placed before the public prematurely, if the public interests are to be properly served. Those charged with the administration of public affairs are answerable to the electorate. If their constituents do not receive due information as to how the stewardship of their representative is being administered, the result will be ascertained at the polls. The Court cannot be called upon to compel the municipal officers to give to the newspapers any information beyond that which the Municipal Act prescribes. The Mayor, as the head of the corporation, has the right to require the civic officials to give out no information beyond that pointed out by the statute, without his approval and sanction. If his views do not agree with those of the council, the council can overrule his action; but the matter is essentially a domestic one, with which the Courts have no concern.

Because the Mayor went too far in excluding reporters from the municipal buildings, some injunction must be granted; and I think it may well be framed in this way. There should be a declaration that the plaintiff's reporters are entitled at reasonable times to access to the offices of the City Clerk for the purposes pointed out by sec. 219 of the Municipal Act, and also en-

titled to access to the proper office for the purpose of inspecting the statement of the auditor under sec. 237, also for the purpose of obtaining the inspection of any records or documents the inspection of which is expressly authorised by the Municipal Act or by any other statute. It should also be declared that the reporters are entitled to inquire at reasonable times from the heads of the municipal departments whether such officers have any information they are ready to give for publication; but this provision is not to authorise any reporter remaining in any municipal office when requested to retire by the officer in charge thereof.

In view of the divided success, the case is not one for costs.

LATCHFORD, J. JANUARY 8TH, 1915.

BALDWIN v. CHAPLIN.

Waters—Invasion of Riparian Rights—Obstruction Placed on Waters of Navigable Lake in Front of Plaintiffs' Land—Lease from Crown of Lands Covered by Water—Reservation of Rights of Navigation and Access from Shore—Navigable Waters Protection Act, R.S.C. 1906 *ch.* 115, *sec.* 4—*Illegal Obstruction—Interference with Navigation—Interference with Right of Access of Riparian Proprietor—Right of Action—Special Damage.*

Action for an injunction restraining the defendants from invading the plaintiffs' riparian rights in respect of land bordering on Lake Erie, for a mandatory order to compel the removal of structures placed by the defendants in the lake opposite the plaintiffs' land, and for a declaration of the plaintiffs' rights.

The action was tried without a jury at Chatham.

W. M. Douglas, K.C., I. F. Hellmuth, K.C., and J. G. Kerr, for the plaintiffs.

O. L. Lewis, K.C., J. W. Bain, K.C., and Christopher C. Robinson, for the defendants.

LATCHFORD, J.:—The plaintiff Frank P. Baldwin was, at the time of the commencement of this action, the owner in fee of the east quarter of lot No. 185, Talbot Road survey, in the township of Romney, in the county of Elgin; and the plaintiff Nicho-

las Baldwin was the lessee from him of the same lands. After the action was begun, Frank P. Baldwin conveyed all his interest in the lands to his mother, Eliza Baldwin, who was thereupon added as a plaintiff.

Nicholas Baldwin resides on the property, and is engaged, under a license from the Crown, in extensive fishing operations in the waters of Lake Erie fronting upon the said lands and other lands in the vicinity. His license enables him to operate in front of lots 179 to 189 of the Talbot Road survey. On lot 189, more than two miles to the west of lot 185, he has leased a landing place, with store-houses for ice and fish. No similar accommodations at present exist upon his own property. He, however, states that it is his intention to erect a proper landing stage and the buildings necessary for his fishery. All along the shores, pound-net fishermen, like Nicholas Baldwin, are operating under licenses from the Government of Ontario.

On the 1st August, 1911, the defendant James B. Chaplin, of St. Catharines, was granted by the Government of Ontario a lease, at a nominal rental, for a period of ten years, and renewable, of "all the portion of land covered by the waters of Lake Erie in the township of Romney (sic), in front of lots 181 to 187 inclusive, in the said township of Romney, and extending 40 chains into the lake, containing about 608 acres, with the right to dig and explore for petroleum and natural gas and to remove the same."

The locality is known as a gas-producing district. Many gas-wells were in operation in the township of Romney when the lease was given. Mr. Chaplin's purpose in obtaining the concession was to bore for gas, or to dispose of his lease to persons engaged in producing natural gas or promoting companies with that object.

The lease is subject to conditions which, with one exception, have no bearing on the issues presented in this case.

The exception is, that the lessee or his assigns shall not in any way interfere with navigation or with the use of any docks or wharves existing or thereafter to be constructed in or upon the water covering the demised lands, or with the right of access to the water by the riparian proprietors.

When the township was surveyed, a reservation of one chain for a road was made near the shore. This road, known as the Old Talbot Road, may have existed as a trail before the survey was made. Many years ago, the land between the old road and the lake, and the old road itself, disappeared, owing to erosive

agencies, and the waters of Lake Erie now roll over part of the lands originally granted to the predecessors in title of the plaintiffs. A road, also called the Talbot Road, was opened up in 1838, several hundred feet from the shore.

The plaintiffs' buildings are on a plateau about 100 feet above the level of the lake. The shores are steep and the beach narrow. A road allowance extending along the easterly side of the Baldwin farm has been opened as far south as the present Talbot Road. From the point of intersection to the lake, a ravine, increasing in depth and width, descends to the water in the line of the road allowance.

The soil and other materials falling into the lake form a bar approximately paralleling the shore and distant 200 or 300 feet from the water's edge. Ordinarily there is sufficient water—about 6 feet—over the bar to enable the fishermen to cross it without danger in their flat-bottomed boats. Tugs and large boats cannot come in near shore, but are obliged to anchor or lay-to some distance outside the bar, where they receive the fish collected from the pounds.

In January, 1913, Mr. Chaplin assigned all his interest in the lease to the Glenwood Natural Gas Company. Prior to the date of the assignment in November, 1912, Mr. Chaplin or the Glenwood Company, acting through the defendants Symmes and Tripplehorn, utilised the road allowance leading to the lake for bringing down timber and other materials to be used in erecting the structures necessary in sinking a gas-well opposite lot 185.

From the point where the end of the road allowance reaches the lake they constructed a platform upon bents, extending in front of the plaintiffs' land in a broken line to a point on the bar, where piles were driven, a pier erected, and a gas-well bored. The platform and its supports were but temporary structures, which were removed when the well was completed. While they were in position, they obstructed any approach by boat to lot 185 from the east inside the bar—a course frequently taken by fishermen when heavy seas were running. It is not improbable that part of the platform was actually within the original boundaries of the plaintiffs' land. The plaintiffs are not, however, proceeding on the ground that they are the owners of the *situs* of the pier, and no evidence was submitted to establish what was originally the southerly boundary of the Baldwin property.

In this respect the present case differs from Volcanic Gas Co. v. Chaplin (1912), 27 O.L.R. 34, 484, and (1914) 31 O.L.R

364, where the judgment of the trial Judge and that of a Divisional Court of the High Court were reversed by a Divisional Court of the Appellate Division on a question of fact. An appeal to the Supreme Court of Canada is now, I think, standing for judgment. In that case it was found by the learned and experienced trial Judge that the *situs* of the structures then in question was within the boundary of the lands granted to the predecessor in title of the plaintiff Carr. The case is unimpeached on the question of accretion, but it does not apply here.

In this case the plaintiffs seek an injunction restraining the defendants from invading their riparian rights, a mandatory order to compel the removal of the structures placed in the lake opposite lot 185, and a declaration of their rights.

Up to the time the pier was built, and for long afterward, the only rights any of the defendants had were such as the lease from the Government of Ontario conferred. The waters of Lake Erie are navigable, and the Navigable Waters Protection Act (R.S.C. 1906 ch. 115, as amended by 9 & 10 Edw. VII. ch. 44) applies to them. Section 4 prohibits the building of any pier or other structure in or across any navigable water, unless the site has been approved by the Governor in Council, and unless such pier or structure is built and maintained in accordance with plans approved by the Governor in Council. These provisions do not apply to small wharves nor to groynes or beach protection works or boat-houses which do not interfere with navigation.

All the structures other than the pier, with the well sunk in the centre of it, had been removed by the defendants prior to the trial of this action.

At a time not stated in evidence, but during or after the construction of the pier, the Glenwood Company applied to the Department of Public Works at Ottawa for approval of their plans for a wharf and 10 piers in Lake Erie. The company had apparently acquired an additional concession, as their application covered the front not only of lots 181 to 186 but lots 172 to 186. The application itself was not before the Court. Its purport in part can, however, be ascertained from recitals in the order in council of the 22nd January, 1914, approving a memorandum, dated the 13th December, 1913, of the Minister of Public Works, stating that approval of the plans of the 10 piers "might be granted" subject to certain conditions.

With several of these conditions the pier in front of the Baldwin farm does not comply. It is not surrounded by a talus composed of stones of not less than one ton each. An automatic

bell to indicate in a fog the position of the pier has not been installed, nor has a bright fixed red light to indicate the location at night and avert possible disaster to fishermen.

I find that the pier has been erected and is maintained contrary to law, and interferes with navigation. It affords no protection to fishermen. . . .

The defendants have absolutely disregarded the conditions imposed by the order in council, but that is a matter giving the plaintiffs no right of action.

Additional piers, even if erected conformably to the conditions, will of course greatly add to the dangers now existing; and a situation may arise when it will be practically impossible for riparian owners to leave or reach their beaches in rough weather when the bar along the shores of the gas-area in Romney and Tilbury East is dotted with piers, each undoubtedly as dangerous as a large rock. But that is not the situation at the present time.

Whatever may be the inconvenience and danger to which fishermen and the public generally may be exposed by the pier erected by the defendants, it is quite clear that, before the plaintiffs can obtain relief, they must establish that they have suffered some special injury over and above that suffered by the rest of the public. Apart from the slight interference with access and regress while the temporary platform was in place, there has been, I find, no damage of a special character suffered by any of the plaintiffs.

It is, however, contended that the right of access of a riparian proprietor to a navigable water is a right of property distinct from the public right of navigation, an injury to which is actionable without proof of special damage: Coulson & Forbes' Law of Waters, 3rd ed., p. 111, citing Rose v. Groves (1843), 5 M. & G. 613; Lyon v. Fishmongers' Co. (1876), 1 App. Cas. 662; North Shore R.W. Co. v. Pion (1889), 14 App. Cas. 612; and other cases. . . .

In each of the cases mentioned it was found as a fact that the obstruction did interfere with a private right.

The distinction is well illustrated in W. H. Chaplin & Co. Limited v. Westminster Corporation, [1901] 2 Ch. 329, between a private right and an individual interest in a public right. . . .

In the case at bar, the pier is not an interference with the plaintiffs' right of access, but merely with the public right of navigation enjoyed by the plaintiffs in common with others of the public.

I, therefore, feel obliged to hold—notwithstanding the unwarranted acts of the defendants in obstructing navigation without authority from the only source competent to grant it, and in failing to comply with the principal conditions imposed by the order in council—that the plaintiffs are not entitled to the relief which they claim. Damages are not specifically asked for the interference with the plaintiffs' access and regress caused by the temporary platform, and, if asked, they would be so trivial as not to merit consideration.

I, therefore, dismiss the action, but without costs.

MIDDLETON, J. JANUARY 8TH, 1915.

CURRY v. GIRARDOT.

Mortgage—Foreclosure — Title of Mortgagor — Remedy upon Mortgagor's Covenant for Payment—Statute of Limitations —Counterclaim—Breach of Agreement—Statute of Frauds.

Action for foreclosure in respect of two mortgages, and counterclaim by the defendant Girardot for damages and other relief.

The action was tried without a jury at Sandwich.

A. R. Bartlet, for the plaintiffs.

F. D. Davis, for the defendant Girardot.

The other defendants did not appear.

MIDDLETON, J.:—The plaintiffs are the executors of the late John Curry, and in this action seek foreclosure in respect of two mortgages executed by the defendant Girardot. The first of these mortgages bears date the 1st November, 1902, and purports to cover four parcels of land. The mortgage is said to be collateral security for all moneys owing to John Curry or to the firm of Cameron & Curry, of which he was a member, and for any future indebtedness.

The second mortgage, dated the 7th January, 1903, purports to cover three parcels of land, and it is also collateral security for the indebtedness of Girardot, present and future, to Curry or his firm. The claim is, that there was due at the commencement of the action $5,818; and, in addition to foreclosure, a personal recovery of this amount is sought, and possession of the mortgaged lands.

By his defence Girardot admits the making of the two mortgages, and alleges that on the 1st April, 1890—that is, some two years before the mortgages to Curry—he executed a mortgage to one Marentette to secure the sum of $1,500 upon certain lands, being part of lot lettered E; and, as far as I can make out, forming no part of the lands covered by either of the Curry securities. This mortgage was assigned to one Bessie Newman; and about the time of the making of the mortgages to Curry, it is said, an agreement was entered into between Curry and Girardot that he, Curry, would pay to Mrs. Newman the amount due to her, and that Curry would then hold the Newman mortgage not only as security for the amount advanced to pay her, but as security for the total debt. It is then alleged that it was also agreed that Curry would advance money to pay off mortgages existing upon the lands covered by the original Curry mortgages, and that all the lands were to be held as security for these advances also. It is then alleged that on the 15th November, 1912, Mrs. Newman assumed to convey 8 acres, a parcel of the said land, to one Tulley, for the nominal consideration of $1, and that Tulley thereafter conveyed the land to other persons.

It is said that the power of sale in the Newman mortgage was not validly exercised, and that Girardot still has a right to redeem, and that the plaintiffs are bound to allow redemption, and, if they cannot make title, to account in damages for the value of the property conveyed. It is then alleged that by reason of Curry's failure to advance the money necessary to protect certain lands, the Agricultural Loan and Savings Company sold and conveyed certain parcels of block G under a power of sale contained in a mortgage existing thereon.

The Statute of Limitations is then pleaded, and a counterclaim is made with respect to the lands covered by the Newman mortgage for $20,000 damages, in the event of a reconveyance being impossible.

At the trial, the defendant Girardot was allowed to amend by . . . alleging that on the 25th July, 1903, Curry purchased part of the land covered by the mortgages to him from Noyes, a mortgagee of the lands; that Curry went into possession at that date, but that no conveyance was made until the 13th February, 1914, when Noyes assumed to convey the land to the plaintiffs, who subsequently assumed to convey it to the Essex County Golf and Country Club. As to these lands, the defendant claims a right to a reconveyance, or, in the alternative, damages to the amount of $25,000. To this counterclaim the plaintiffs reply setting up the Statute of Frauds and the Statute of Limitations.

At the trial, it became quite plain that it was impossible to understand the contention between the parties, owing to the inability of any one present to understand the description of the various parcels. . . . Since the trial, memoranda have been sent in. . . . The plaintiffs ask to exclude from the lands in question in this action the fourth parcel described in the first of the two Curry mortgages, alleging that the Curry estate has acquired title thereto outside of the mortgages in question. This parcel was covered by the Noyes mortgage, and was sold in 1903 by Noyes to Curry, the conveyance being only recently completed.

The first three parcels contained in the earlier mortgages are parts of block G, and it now appears that as to the bulk of this property Girardot had no title at the time of the making of the mortgage, he owning then only 10½ acres, known as the Girardot homestead. This 10½-acre parcel was subject to a mortgage to the Ontario Loan and Debenture Company, and that company in 1913 conveyed this land to William Wright, who is not a party to this action.

The last parcel described in the Curry mortgage is the northeasterly part of lot 56 on the west side of Hands street. Girardot conveyed his equity of redemption in this parcel to John T. Martin; and Ella Jannisse holds an agreement with Martin for its purchase. Martin and Ella Jannisse are both defendants in the action, and have not appeared.

It is said that the portions of the land forming part of block E covered by the Newman mortgage, which, it is alleged by Girardot, are still in the hands of the plaintiffs, have been conveyed by the plaintiffs to third persons.

The plaintiffs may have the ordinary judgment of foreclosure as far as the owners of the Hands street lot are concerned, but as to this there will have to be a reference because there is a subsequent incumbrancer.

As to the remaining property, the plaintiffs do not desire foreclosure because block G has been sold to Wright, and the title to block E is claimed adversely to Girardot under the Noyes mortgage.

The remaining question, so far as the plaintiffs' claim is concerned, is their right to recover against Girardot upon his covenant. The indebtedness is represented by four promissory notes, the first dated the 19th June, 1903, for $1,129, at 2 months. This would fall due on the 22nd August. On the 22nd August, a second note was given, for $950.35, payable 6 months

after date. The third note produced is dated the 28th October, 1902, payable 3 months after date, for $755.49, thus maturing on the 31st January, 1903. The fourth note bears date the 7th January, 1903, for $400, payable 3 months after date, due on the 10th April, 1903. On this note are endorsed credit memoranda, dated the 25th January, 1904, $29.31, and the 17th February, 1904, $30.44; being a balance of a payment of $54.26 which ought to have been credited at an earlier date.

A statement signed by Girardot, dated the 21st January, 1902—evidently a clerical error for 1903—is produced. This certifies that the first Curry mortgage was given as security upon the renewal of three notes: one, $873.30, evidently the predecessor of the second note; one, $1,095, evidently the predecessor of the first note; . . . This memorandum further states that the second mortgage was given when a further advance of $400 was made—this being represented by the fourth note.

The existence of this debt appears to be clear—the only question being whether it is statute-barred. The action was begun on the 16th February, 1914, so that ten years elapsed after the maturity of all the notes save the second. The question as to this is, whether the obligation can be based upon covenant.

The mortgage is made in the statutory form, and contains the usual covenant; and I think that the obligation to pay this note has become a specialty debt by reason of this covenant. It is said that the mortgage contains an acceleration clause. This is true; but I cannot give to it any application which would make this note due at an earlier date. There will, therefore, be judgment against Girardot for the amount due upon this note, with interest.

Turning then to Girardot's counterclaim, I do not think that an agreement such as that set out has been satisfactorily made out. Possibly there was some more or less vague discussion and understanding by which Curry was to aid Girardot, but I do not think that there was any obligation upon him to pay off the prior mortgages, nor that he became in any sense Girardot's agent for the disposition of the property. There can be now no redemption, as the properties are in the hands of third parties; and, apart from any difficulty in the defendant's way by reason of the Statute of Frauds, the Statute of Limitations affords a complete answer to any claim based upon breach of agreement.

Owing to the fact that the plaintiffs claim more than they are entitled to, I think that the judgment for the plaintiffs should not carry costs, but that the counterclaim should be dismissed with costs.

TOWNSHIP OF STAMFORD v. ONTARIO POWER CO. OF NIAGARA FALLS—FALCONBRIDGE, C.J.K.B.—JAN. 5.

Assessment and Taxes—Liability for School Taxes.]—Action to recover taxes and interest thereon for the year 1914. The learned Judge said that the main issue was completely covered by the judgments of the Appellate Division in Re Ontario Power Co. of Niagara Falls and Township of Stamford (1914), 30 O.L.R. 378, and of the Supreme Court of Canada in the same case (1914), 50 S.C.R. 168, 196. The other defences, now raised for the first time, appeared to be equally untenable and unavailing. Judgment for the plaintiffs for $2,405 with interest and costs. Counterclaim dismissed with costs. A. C. Kingstone, for the plaintiffs. Glyn Osler and R. C. H. Cassels, for the defendants.

TORONTO BRICK CO. v. BRANDON—FALCONBRIDGE, C.J.K.B.—JAN. 7.

Promissory Note—Company—Settlement of Differences—Evidence.]—Action for the return of a promissory note, or, in the alternative, for payment of a balance of money alleged to be due to the plaintiffs. The learned Chief Justice said that there was no real dispute about the facts of a settlement between the parties. It was admitted by the defendant that the plaintiffs were dealing and acting in that settlement on the assumption that the defendant had a real note of the Brandon Pressed Brick and Tile Company which he was endorsing over as part of the settlement. The note in question did not answer that description. (1) It did not even purport to be a note of that company, but of a "Brandon's Brick Company." (2) It was not signed, as required by the company's by-law, by the president or vice-president and by the treasurer. S. E. Brandon was not the treasurer. Whether S. E. Brandon did or did not authorise R. C. Brandon to sign that note was probably immaterial; but, the onus being on the defendant, the finding should be that S. E. Brandon did not so authorise him. It was pointed out in argument that there was an apparent attempt to imitate the signature of S. E. Brandon. It was inconceivable that the plaintiffs would wish to bring a law-suit in which all kinds of equities might arise. Judgment for the plaintiffs for $1,091.39, with interest on $1,000 from the 15th April, 1914, and costs. The judgment is not to affect or

prejudice the alleged right of R. C. Brandon to recover a half-share of the price of the land, and this is to be declared in the formal judgment. M. H. Ludwig, K.C., for the plaintiffs. Hamilton Cassels, K.C., and N. Phillips, for the defendant.

REAUME v. CITY OF WINDSOR—MIDDLETON, J.—JAN. 7.

Highway—Dedication—By-law of Municipality—Waiver of Conveyances—Evidence.]—Action for a declaration of the plaintiffs' rights with regard to a certain street or alley in the city of Windsor, alleged by the defendants, the city corporation, to be a public highway, and for an injunction and other relief. The question was, whether what was called Medbury street, extending from Brock street westward to the Crawford House property, had been dedicated as a public highway. The plaintiffs were the owners of lands south of the street. There was formerly a defined road or alley immediately north of the American Hotel, extending easterly from the extension of Ouelette street. A by-law was passed by the Windsor council on the 18th May, 1884, which recited that Mrs. Medbury, the then owner of the lands to the south, desired to have this alley closed, and had offered to dedicate, in lieu thereof, the strip of land now called Medbury street, and provided for the closing of the old alley and acceptance of the new strip—the by-law to come into force immediately after the date of the conveyance of the strip by Mrs. Medbury to the corporation. Mrs. Medbury, however, never executed the conveyance, and the corporation never executed any conveyance of the old alleyway, but Mrs. Medbury took possession of the latter, and the strip called Medbury street had been used by the public since 1884. MIDDLETON, J., finds upon the evidence that there was a dedication of Medbury street to the public as a highway, and that the execution of the conveyances was waived both by Mrs. Medbury and the corporation. Action dismissed. Declaration that Medbury street, as described in the by-law, is a public highway. If the plaintiffs desire to have any question as to the title to the old alleyway cleared up, the defendants are to execute a proper conveyance of the land covered by it. The plaintiffs to pay the defendants' costs of the action. J. H. Rodd, for the plaintiffs. E. D. Armour, K.C., and F. D. Davis, for the defendants.

KAAKEE v. KAAKEE—KELLY, J.—JAN. 7:

Husband and Wife—House and Land Purchased by Husband —Action by Wife to Establish Co-ownership—Evidence—Contributions to Purchase-price — Separate Earnings—Gift—Payment of Taxes—Possession.]—Action by the defendant's wife for a declaration that she was co-owner with the defendant of a dwelling-house and premises used by both parties and their children as their home. The plaintiff alleged that when the property was purchased it was understood between her and her husband that both were to be equally interested in it, and that she contributed to the cash payment then made on the purchase-money and to all the payments subsequently made on the mortgages representing the balance—the money paid by her, as she alleged, being derived from keeping boarders and doing sewing and laundry work. KELLY, J., finds that the defendant practised no deception on the plaintiff by giving her to understand that she was to be part owner or otherwise; and that what took place in relation to his acquiring the property fell far short of what the law requires to establish a gift. The learned Judge was also of opinion that the evidence did not warrant a finding that the plaintiff contributed her own personal moneys towards the purchase or the payment of incumbrances or taxes. The evidence left no doubt that she was not possessed of any means of her own. She failed to shew any substantial earnings; and the keeping of boarders was not such as to be classed as an employment, trade, or occupation in which she was engaged and from which she could be said to have acquired separate earnings. The plaintiff was now occupying the property, and had paid the taxes for 1912 and 1913. She had no legal right to exclude the defendant from possession or to hold the property as against him. Judgment declaring that the plaintiff has failed to establish her claim to part ownership, and that the defendant is entitled to possession, subject to any inchoate right of dower in the plaintiff and to her right as his wife to reside on the property with him, if he continues to occupy it. No costs. W. R. Cavell, for the plaintiff. D. Macdonald, for the defendant.

CORRECTION.

In RE HARRIS, ante 597, on p. 599, line 19, before the words "to transfer," insert the words "to refuse."