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APPELLATE DIVISION.

NOVEMBER 16TH, 1915.

*RE HANNAH AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Railway—Expropriation of Land—Compensation — Method of Estimating—Award—Value after Expropriation—Offer to Reconvey Part of Land—Increase in Commercial Value—Disregard by Arbitrators—Appeal from Award—Costs.

Appeal by the railway company from an award of three arbitrators.

The company took and paid for land of Robert Hannah upon which to build their railway. They also took from him land for a gravel-pit; after taking away a quantity of gravel, they found it was not suitable, and offered and continued to offer a reconveyance of the land thus taken; but Hannah refused and continued to refuse to accept it.

On an arbitration as to the damages to be awarded for severance, etc., the arbitrators found $10,500—not taking into consideration the offer to reconvey.

The majority of the arbitrators stated that, in arriving at the sum to be allowed to Hannah for compensation, they endeavoured to ascertain the difference in value to the claimant between the farm as it existed as one body of land before the taking of part and the farm as it was left after such taking and the work done upon it by the company.

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

W. N. Tilley, K.C., and J. D. Spence, for the railway company, appellants.

M. K. Cowan, K.C., and J. E. Madden, for the claimant, respondent.

*This case and all others so marked to be reported in the Ontario Law Reports.

RIDDELL, J., delivering judgment, said that evidence was given of the amount by which the damages would be diminished or the present value of the farm increased by the addition thereto of the land expropriated but now useless to the company—the least sum being $750.

The general principle followed by the arbitrators, as stated, was sound: James v. Ontario and Quebec R.W. Co. (1886-8), 12 O.R. 624, 15 A.R. 1.

In estimating the value of land, it is the pecuniary or commercial value that must be considered; and, in determining this, all potentialities must be considered and contingencies taken into account: Re Macpherson and City of Toronto (1895), 26 O.R. 558, 565; In re Cavanagh and Canada Atlantic R.W. Co. (1907), 14 O.L.R. 523; and there can be no reason why this should not be done in estimating the value after as well as before expropriation.

The Court does not decide that the railway company have the right to compel the owner to accept a reconveyance and take back the property—the effect of the readiness of the railway company to reconvey is considered only on the point of the value of the property being thereby increased commercially.

It was clear from the evidence that if a deed were accepted the land remaining to the owner would be worth $750 (at least) more than it otherwise would be. This element had been disregarded by the arbitrators. The amount of the award should be diminished by $750—the railway company to tender the deed again to the owner.

Success being divided, there should be no costs of the appeal.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD and KELLY, JJ., agreed in the result.

Appeal allowed in part; no costs.

NOVEMBER 16TH, 1915.

POWELL LUMBER AND DOOR CO. LIMITED v. GILDAY.

Mechanics' Liens—Claims of Wage-earners and Material-men—Building Contract—Amount Due by Owner to Contractor—Claim for Extras—Amount Required to Complete Building after Dismissal of Contractor—Report of Referee—Variation on Appeal—Costs.

Appeal by the defendant Graham from the report of an

Official Referee in a proceeding for the enforcement of mechanics' liens.

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

T. Hislop, for the appellant.

J. P. MacGregor, for Shannon, a lien-holder, respondent.

G. N. Shaver, for the plaintiffs and for Tijon, a lien-holder, respondents.

KELLY, J., delivering the judgment of the Court, said that in May, 1914, the defendant Hartley entered into a contract with the appellant in respect of the erection of a house on lands of the appellant. Hartley proceeded with and continued in the performance of his contract until the 7th October, 1914, when, owing to disputes between him and the appellant, the latter's architect discharged him from the work. At that time, Hartley was indebted to a number of wage-earners for work done upon the contract; and six others claimed for work done and material supplied in the performance of the contract, all of whom in October caused liens to be filed against the property.

After a hearing on these claims before Mr. Roche, an Official Referee, he found that Hartley was primarily liable for the claims of these six claimants, aggregating $1,113.50, and for the costs of the wage-earners and of the six claimants, aggregating $301.10; that, by consent of all parties, the claims of the wage-earners, amounting to $352.87, had been paid, apparently pending the proceedings; and that the other six claimants were entitled to liens upon the said lands for amounts shewn by the report, totalling $1,113.50, and that they and the said wage-earners were also entitled to liens for the costs. The appeal was from these findings.

It was not disputed that the contract price of the work was $3,850, and that the amount paid by the appellant to Hartley was $2,940.33. After the dismissal of the contractor, the appellant proceeded to complete the building.

The matters now in dispute were: first, what should be allowed the contractor for extras; and, second, what was the amount to be properly allowed for completion of the building. While the Referee had not made specific findings on these two headings, the clear effect of the conclusion he had reached thereon was favourable to the contractor. Several somewhat substantial changes, alterations and additions to the work con-

tracted for were made at the appellant's request as the work proceeded, for which she rendered herself liable; a part only of these she admitted.

The contractor, on the evidence, had established extras to the amount of $540. The work contracted for and the additional work treated as extras were not completed when the contractor was dismissed. A reasonable sum necessary to complete was $258, of which $158 was paid to R. J. Shannon, one of the lien-holders, for completion of his contract. The appellant contended that the cost of completion much exceeded the figure named.

The Referee's finding of the amounts for which Hartley was primarily liable remained undisturbed. The amount paid by the owner to Hartley or on his account prior to the notice of the liens did not exceed 80 per cent. of the value of the work, services, and material actually done, placed, or furnished by Hartley at the time of the dismissal.

The six lien-holders were entitled to liens upon the property to the extent of $838.80 (in addition to the costs allowed by the report, for which they had also liens), in the proportion of their several claims for debt and interest (if any) found to be due them.

The report should be varied as indicated; no costs of the appeal.

NOVEMBER 17TH, 1915.

*BELL v. TOWN OF BURLINGTON.

Municipal Corporations—Annexation of Part of Township to Village—Order of Ontario Railway and Municipal Board—Erection of Village, including Annexed Territory, into Town—Jurisdiction of Board—Supplementary Assessment—Invalidity—Liability for Taxes—Municipal Act, R.S.O. 1914 ch. 192, sec. 20 (1), (2), (7)—Assessment Act, R.S.O. 1914 ch. 195, secs. 54, 56 (1), (2)—Injunction—Costs.

Appeal by the plaintiff from the judgment of BOYD, C., ante 44, 34 O.L.R. 410.

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

W. Laidlaw, K.C., for the appellant.

W. Morison, for the defendants, respondents.

RIDDELL, J., delivering judgment, said that it was unnecessary to discuss the validity of the order of the Ontario Railway and Municipal Board of the 10th June, 1914; but, at all events, he saw no reason to disagree with the view of the Chancellor; he added a reference to Re Simpson and Village of Caledonia (1912), 3 O.W.N. 503.

The important order was that of the 9th December, 1914, purporting to create a town with a territory "including the territory annexed thereto by the Board on the 10th June, 1914." This was descriptive of the territory and not of the legal effect of the order, and the invalidity in law of the order could have no effect on the description. The order was valid under sec. 20 (1), (2), of the Municipal Act, R.S.O. 1914 ch. 192—the latter sub-section enabling the Board to add the annexed territory. If there were any doubt, it would perhaps be removed by sub-sec. (7).

Taxes, in our system, are a creature of the statute; before they can be required of any one, some legal and statutory obligation must be made out. To entitle a municipality to demand taxes, a legal and proper assessment must (speaking generally) be made out: Re Clark and Township of Howard (1885), 9 O.R. 576.

Here there was no legal assessment at all of the plaintiff's land—the only assessment made was such as could be made use of for the following year only: sec. 56 (1) of the Assessment Act, R.S.O. 1914 ch. 195. Section 56 (2) could not be made to apply, as there had been a final revision of the roll—the roll itself shewed this plainly. It was said that it was impossible to make a legal assessment of this land; but that would not entitle the defendants to demand taxes on a wholly illegal assessment. Section 54 had no reference to the present case.

The defendants should not be permitted to exact these taxes.

By the statement of claim, the plaintiff asked that it be declared that his land is not within the limits of the town of Burlington and not liable to be assessed, also that the orders of the Board should be declared invalid. Upon these claims the plaintiff failed. He should succeed in obtaining an injunction restraining the defendants from collecting the taxes now alleged to be payable.

Success being divided, there should be no costs of the action or appeal, and the appeal should be allowed to the extent indicated.

FALCONBRIDGE, C.J.K.B., LATCHFORD and KELLY, JJ., agreed in the result.

Written reasons were given by LATCHFORD and KELLY, JJ., respectively.

Appeal allowed in part.

NOVEMBER 19TH, 1915.

ROBINSON v. CAMPBELL.

Highway—Sand-heap Left in Front of House in Course of Erection—Injury to Vehicle Running into it—Obstruction —Nuisance—Liability of Sub-contractors for Building — Contributory Negligence—Evidence—Onus — Finding of Trial Judge—Appeal—Costs.

Appeal by the defendants Evans and Oram from the judgment of SUTHERLAND, J., 8 O.W.N. 537.

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

D. L. McCarthy, K.C., for the appellants.

T. Mercer Morton, for the plaintiff, respondent.

RIDDELL, J., delivering the judgment of the Court, said that one Campbell owned a lot in Windsor, and entered into a contract with Galloway for the erection of a building thereon; Galloway had sub-contractors, amongst them Evans and Oram: Evans and Oram bought certain gravel to be delivered to them, and accepted delivery upon the street from the Cadwell Sand and Gravel Company—whose driver, before such acceptance, had piled the gravel upon the street. This was left unguarded by light or otherwise at night, and the plaintiff's servant struck the heap with the plaintiff's taxicab. The plaintiff sued all parties, including the Corporation of the City of Windsor; at the trial he abandoned against all but the defendants Galloway and Evans and Oram. The learned trial Judge dismissed the action against Galloway, and gave judgment against Evans and Oram for $400 and County Court costs.

So far as the appeal was against the dismissal of the action against Galloway, it could not succeed; the appellants had no

interest in that; their position could not in law be altered by holding the defendant Galloway liable. It was not necessary to consider the line of cases such as Ballentine v. Ontario Pipe Line Co. (1908), 16 O.L.R. 654. The ground of the action was that the appealing defendants accepted and made their own the gravel, that with it they obstructed the street an unreasonable time, and therefore were liable for damages caused by the obstruction.

It was argued that the plaintiff, through his servant, was guilty of contributory negligence; but that was not established. The "side-lights" of the taxicab were lighted; they were at least in a sense "head-lights;" and consequently the plaintiff was not violating the law—and in respect of other "head-lights" the most that could be said was that they might, had they been lighted, have prevented the accident; but the undoubted occasion of the accident was the negligence of the defendants in placing the unlawful obstruction on the highway. The trial Judge acquitted the plaintiff of contributory negligence. The onus of proving contributory negligence is on the defendant: Morrow v. Canadian Pacific R.W. Co. (1894), 21 A.R. 149; Vallee v. Grand Trunk R.W. Co. (1901), 1 O.L.R. 224. The defendant had not satisfied the trial tribunal; and, unless the Court could say as a matter of law that not to light lamps which he was not legally bound to light was contributory negligence *per se*, it could not, on this evidence, reverse the finding.

The amount of damages was not complained of.

The appeal should be dismissed with costs on the higher scale.

HIGH COURT DIVISION.

SUTHERLAND, J. NOVEMBER 15TH, 1915.

McEWAN v. TORONTO GENERAL TRUSTS CORPORATION.

Executors and Administrators—Claim against Executors of Deceased Person—Promise to Pay Sum of Money on Settlement of Action for Rent—Evidence of Solicitor—Corroboration—Promise Made to Persons Representing Estate of Deceased Lessor—Confirmation after Issue of Letters of Administration—Statute of Frauds—Consideration — Public Policy—Costs.

Action against the executors of one James I. Carter, deceased, to recover $1,000 upon an alleged agreement or promise by

Carter to pay that sum in the event of the settlement of an action brought to recover the rent of premises in which he had an interest, and $200 in respect of costs of another action, which was compromised or settled.

The action was tried without a jury at Goderich.

C. Garrow, for the plaintiff.

A. Weir, for the defendants.

SUTHERLAND, J., in a considered opinion, referred to the evidence of Mr. Proudfoot, who was solicitor for the present plaintiff and his brothers, the plaintiffs in the former action. Mr. Proudfoot said that the deceased Carter orally agreed with him (Mr. Proudfoot), as representing the plaintiffs, that, if a compromise of that action were arranged and carried out, he (Carter) personally would pay his share—which would be about $1,000, the sum for which the present action was brought. A settlement was effected, and was embodied in two letters, one from Mr. Proudfoot to Mr. Hanna, solicitor for the defendants in that action—the other from Mr. Hanna to Mr. Proudfoot.

In the present action it was contended by the defendants that, Carter being dead, and the action being against his executors, the evidence of Mr. Proudfoot as to the promise made by Carter should be corroborated. As to this the learned Judge said that, if corroboration was necessary where the evidence relied on to support the claim was not that of a person interested, but of his solicitor, the evidence of Mr. Hanna was a sufficient corroboration.

It was also argued that, though the three McEwan brothers brought the action which was settled, not only on their own behalf but on behalf of their father's estate, as letters of administration had not then issued to that estate, neither they nor their solicitor was in a position legally to ask for or receive such a promise from Carter. But, said the learned Judge, the action being framed as it was, Carter was in effect making a promise to the estate, and a promise which (on the evidence of Mr. Proudfoot) he recognised and in effect confirmed after letters of administration had issued.

Carter's promise was a personal one, in connection with the settlement, that, if a certain sum were accepted by the plaintiffs in full of their claim against all of the defendants for the whole sum, he himself would pay a part of the balance. This was not a promise covered by the Statute of Frauds. The interest of

Carter in the litigation and the compromise of the suit constituted a sufficient consideration for the promise: Halsbury's Laws of England, vol. 15, paras. 889-894; Goodman v. Chase (1818), 1 B. & Ald. 297; Guild & Co. v. Conrad, [1894] 2 Q.B. 885; Howes v. Martin (1794), 1 Esp. 162; Stephens v. Squire (1697), 5 Mod. 205; Harburg India Rubber Comb Co. v. Martin, [1902] 1 K.B. 778.

It could not be found, upon the evidence, that the defence that the contract was void as against public policy was made out.

At the trial, it was well-nigh conceded on the part of the plaintiff that he could not succeed in so far as the claim for $200 for costs was concerned; and this claim should be dismissed.

Judgment for the plaintiff for $1,000 with interest and costs.

BOYD, C. NOVEMBER 15TH, 1915.

*HUNT v. BECK.

Water—Floatable Stream—Improvements Made by Crown Timber Licensee—Rivers and Streams Act, R.S.O. 1914 *ch.* 130, *sec.* 3 — *Lawful Detention of Water — Rights of Persons Floating Logs on Lower Part of Stream—Claim for Damages for Deprivation of Water.*

Appeal by the defendants from the report of a Local Judge, to whom the action was referred for trial, and who found in favour of the plaintiffs upon their claim for damages for wrongfully depriving the plaintiffs of water sufficient to float their logs down the Thessalon river; and motion by the defendants for judgment on their counterclaim.

The appeal and motion were heard in the Weekly Court at Toronto.

G. H. Watson, K.C., and T. E. Williams, K.C., for the defendants.

T. P. Galt, K.C., and U. McFadden, for the plaintiffs.

THE CHANCELLOR referred to the decision of the Privy Council in Caldwell v. McLaren (1884), 9 App. Cas. 392. and to the

Act passed by the Ontario Legislature after that decision, 47 Vict. ch. 17, for protecting the public interest in rivers, streams, and creeks, containing the statutory provisions now found in the Rivers and Streams Act, R.S.O. 1914 ch. 130, sec. 3.

The plaintiffs, he said, had no particular status on the Thessalon river, but during the spring and summer of 1914 were driving logs down the river from Wood's creek, a tributary of the Thessalon, joining that stream below the confluence of its two branches, and about 15 miles south of the defendants' operations on the western branch of the river. The defendants had acquired timber rights from the Government by the purchase of berth No. 195 on the north shore of Lake Huron, in the district of Algoma. They constructed dams and made improvements essential for taking away the timber from this berth.

As to the floatation of logs in the Thessalon river, the plaintiffs and defendants had equal rights under the statute; but as to the user of the water above where the defendants had made improvements, they had preferential rights. They were the first and the only occupants of these head waters of the Thessalon, and as to their various works to facilitate the driving of logs to the market, they were statutory licensees. The statutory license, implemented by the erection of works, gave them, by necessary implication, superior rights in regard to the use and control of these improvements as between them and the plaintiffs operating on the river at Wood's creek. As a matter of natural justice, the timber licensees who had the right to further their operations, by the construction of dams etc., had also the right to put them to the most beneficial and profitable use for their own undertaking primarily, and were not called on, to their own prejudice, to make their reserves of water subject to the needs of a lower operator. There had been no diversion or termination of the water, no interference with the natural, ordinary flow of the stream; and the rightful detention of the water by the defendants could not be turned into an illegal detention of it from the plaintiffs.

In all aspects of the case, whether of fact or of law, the plaintiffs had not established a claim for damages.

The appeal should be allowed with costs and the action dismissed with costs. As to the defendants' counterclaim, the amount agreed upon should be paid by the plaintiffs—but without costs.

MASTEN, J. NOVEMBER 17TH, 1915.

ROSE v. ROSE.

Trusts and Trustees—Trust Agreement—Direction to Convert Subject of Trust into Money—Company-shares—Failure of Beneficiaries to Agree upon Allotment in Specie—Direction to Sell—Reference—Sale en Bloc or in Parcels—Discretion of Master.

Motion by the plaintiff for judgment on the pleadings.

The subject-matter of the action consisted of 244 shares of the capital stock of the Hunter-Rose Company Limited, standing in the name of the defendant, and held by him under the terms of a certain trust agreement, the important clause of which was this: "From and after the death of . . . M. R. to call in and convert into money all the estate of G. M. R. and every share and portion thereof and to distribute the same in equal portions share and share alike among the children of G. M. R. who were living at the time of his decease, the representative of any child or children since deceased to take the share or portion of such deceased child or children."

The plaintiff asked the direction of the Court as to whether the defendant had power to distribute the shares in specie among certain beneficiaries, or whether he was bound to sell and convert them into money and distribute the proceeds.

The motion was heard in the Weekly Court at Toronto.

L. F. Heyd, K.C., for the plaintiff.

Strachan Johnston, K.C., for the defendant.

MASTEN, J., said that, having regard to the positive terms of the provision directing the trustee "to call in and convert into money" the estate, he was of opinion that, as certain beneficiaries demanded that there should be a conversion into money prior to the distribution, the trustee was bound to deal with the trust estate in that manner: Bechtel v. Zinkann (1907), 16 O.L.R. 72; Rose v. Rose (1914), 32 O.L.R. 481; Re Harris (1914), 33 O.L.R. 83; and the judgment should declare accordingly.

It was desired that a right to bid at the sale of the shares should be afforded to all parties; and that could only be accomplished by a reference. There should be a reference, therefore, to the Master in Ordinary, or to a special referee agreed upon by the parties; and the Master or referee should determine whether the shares should be sold en bloc or in parcels.

MASTEN, J. NOVEMBER 17TH, 1915.

RE OLIVER.

Will—Construction—Ineffective Devise—Mistake in Description of Land—Residuary Devise—Partial Restraint on Alienation—Validity—Title—Conveyance—Next of Kin—Period of Ascertainment.

Motion by James Oliver and others for an order declaring the true construction of the will of Sarah Oliver, deceased.

The motion was heard in the Weekly Court at London.

R. G. Fisher, for the applicants.

T. W. Scandrett, for other adults interested.

F. P. Betts, K.C., for the Official Guardian, representing infants.

MASTEN, J., said that by clause 5 of the will the testatrix devised to her son Beattie for life, with remainder to her daughters, ten acres of land particularly described in the clause; but it appeared that the testatrix did not own the ten acres described, though she did own another ten acres in the same concession. The learned Judge was of opinion, following Re Clement (1910), 22 O.L.R. 121, that clause 5 was ineffective to pass any lands owned by the testatrix.

The result was that the ten acres which the testatrix did own (and which undoubtedly she intended to devise by clause 5) fell into the general residuary devise contained in clause 6.

By clause 6, the testatrix devised to her daughter Catharine "all the rest and remainder of my real estate without the right to mortgage or sell the same during her lifetime, but the full right to leave by her will the said real estate and the said ten acres described in clause 5 to whomsoever she pleases with the right to my daughters Phœbe and Sarah to remain in the dwelling-house on the said lands until the decease of my said daughter Catharine." By clause 7, the testatrix provided that, in the event of Catharine neglecting to devise the land, Phœbe and Sarah were to have it during the terms of their natural lives or the survivor of them, and after the decease of the survivor the land to be sold and the proceeds divided equally "between all my next of kin in equal shares."

The learned Judge was of opinion that the restraint on

alienation was a valid one: Re Porter (1907), 13 O.L.R. 399; Re Martin and Dagneau (1906), 11 O.L.R. 349.

He was also of opinion that Catharine could not, even with the concurrence of Phœbe and Sarah, make a good title to the land.

The general rule is that the next of kin are to be ascertained as at the date of the death of the testator, and this is so even if there is a prior gift of a life estate to one of them. There was nothing in this will to shew a contrary intention, and the general rule should prevail: Theobald on Wills, Can. ed., pp. 340, 349; Jarman on Wills, 6th ed., pp. 1641 et seq; Brabant v. Lalonde (1895), 26 O.R. 379; Re Helsby, Neate v. Bozie (1914), 138 L.T.J. 108.

Order accordingly; costs of all parties out of the estate.

MIDDLETON, J. NOVEMBER 18TH, 1915.

JASPER v. TORONTO POWER CO. LIMITED.

Master and Servant—Injury to Servant—Electric Shock—Negligence—Findings of Jury—Voluntary Assumption of Risk—Fault of Fellow-servant—Workmen's Compensation for Injuries Act.

Action for damages for personal injuries sustained by the plaintiff while working for the defendants as a lineman, by reason of the negligence of the defendants or of some one in their service, as the plaintiff alleged.

The action was tried with a jury at Hamilton in October, 1915.

C. W. Bell and Martin Malone, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

MIDDLETON, J., describing the manner in which the plaintiff was injured, said that, under instructions, he had ascended a tower for the purpose of changing the insulators upon one side of the tower; having completed his task, he was descending, and in descending lost his foot-hold. Exactly what happened cannot be ascertained, for there was no eye-witness, and the plaintiff's own account was naturally not clear. In some way,

he swung round, and, receiving a shock fell to the ground. Both of his wrists were badly burnt and also the sole of one foot where it had rested on the tower.

The action was first tried in January, 1915, when the jury found that the accident to the plaintiff was due to the negligence of the defendants, in that the facilities for climbing the tower were not such as would enable a lineman to get a proper foot-hold; contributory negligence and voluntary assumption of risk were negatived; and upon these findings judgment was entered for the plaintiff. A new trial was directed by an appellate Court.

At the second trial—that before MIDDLETON, J., in October, 1915—the construction of the tower was again attacked. The jury, however, found that there was negligence "in not taking the precaution to turn the power off the tower that the plaintiff was working on." This amounted, the learned Judge said, to a finding in favour of the defendants in respect of the attack upon the tower construction.

The plaintiff knew that the wires on one side of the tower were alive; but he ascended and descended on the dead side—and in doing so he was 3 feet 3 inches away from the live wire. How he managed to reach across this space when he fell, it was difficult to appreciate.

Interpreting the findings of the jury in the light of the indisputable facts, they mean that the defendants were negligent in requiring the plaintiff to ascend the pole, knowing that he might fall as the result of unavoidable accident or mere mischance, and at the same time permitting a dangerous electric current to be where by any possibility he might fall against it.

The learned Judge was not satisfied that there had not been again a mistrial, nor that the finding that there was no assumption of the risk could stand; but the responsibility for the consideration of the case, with all its possible refinements, rests with an appellate Court.

The negligence found is, however, a negligence which entitles the plaintiff to recover under the Workmen's Compensation for Injuries Act only—for, if it was negligence to order the work to be done while any wire was alive, that was the negligence of a fellow-servant.

Judgment for the plaintiff for three years' wages, $2,200, and costs.

MEREDITH, C.J.C.P. NOVEMBER 18TH, 1915.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Constitutional Law—5 Geo. V. ch. 45 (O.)—Roman Catholic Separate Schools—Suspension of Powers of Trustees—Conferring Powers upon Commission—Intra Vires — British North America Act, 1867, sec. 93 (1)—"Right or Privilege with Respect to Denominational Schools"—Legislation Prejudicially Affecting.

Actions for a declaration that the provisions of the Act 5 Geo. V. ch. 45 are beyond the powers of the Legislature of Ontario and of no effect, and for an injunction restraining the defendants from diverting the moneys of supporters of the Roman Catholic Separate Schools in the city of Ottawa from the control of the plaintiffs.

Under the Act referred to, the Minister of Education appointed a Commission to govern the schools and exercise the powers of the plaintiffs, they having failed to obey the judgment in Mackell v. Ottawa School Trustees (1915), 34 O.L.R. 335.

The actions were tried without a jury at Ottawa.

N. A. Belcourt, K.C., J. A. Ritchie, and E. R. E. Chevrier, for the plaintiffs.

W. N. Tilley, K.C., for the defendants the Ottawa Separate Schools Commission and the Quebec Bank.

F. B. Proctor, for the defendants the Corporation of the City of Ottawa.

McGregor Young, K.C., for the Attorney-General for Ontario.

MEREDITH, C.J.C.P., said that the single question involved in these actions was, whether the legislation providing for the suspension of the powers of the Ottawa Roman Catholic Separate School Board, and for conferring such powers upon a Commission, was within the legislative power of the Province; and that question had been, in argument, further confined to the single point, whether such legislation "prejudicially affects any right

or privilege with respect to denominational schools'' which Roman Catholics had in Upper Canada at the time of the passing of the British North America Act, 1867: see sec. 93 (1) of that Act.

The actions failed at the threshold for want of evidence of any prejudice; but it was urged that the legislation deprived the Roman Catholic Separate School supporters of Ottawa of their elective public school franchise and of their own school moneys, and so prejudicially affected them.

But, the learned Chief Justice points out, the restriction upon the power to legislate is not in favour of these plaintiffs, nor of those who elected them, but is in favour of the whole class, a class which comprises all the adherents of the Church of Rome throughout this Province, of whom those in Ottawa, concerned in these actions, form but a very small part; it may be that that which might prejudicially affect one might not so affect another; it might be for the good of an individual himself, or of a community itself, to be deprived of an elective right; and the ratepayers had not been deprived of their money —the money must be devoted to the same purposes, whosoever might be the trustees.

The creation of the office of Minister of Education, and the enactment of all the elaborate legislative provisions of this Province respecting education, were not for the mere benefit of parent or child; the paramount purpose was the public interest of the Province. For that purpose public schools and compulsory schools are essential; and so public schools were established long ago, and have been and are maintained, and compulsory laws are in force. In consequence of the religious desires of some classes of the community, separation in schooling is permitted; and special separate school provisions were made for the class of residents of the Province described as Roman Catholics. But such separation in no wise affects the public purposes of the schools, or makes the separate school other than a public school. The trustees of all schools are public officers, and both ordinary and separate schools are subject to the control of the provincial educational authorities, and entitled to share equally in the provincial grants of money made for public school purposes.

The modern fashion of applying the short name ''public schools'' to the general public schools, which were in earlier days called ''common'' or ''union'' schools, and more appropriately so called, and of applying the short name ''separate

schools" to the particular public schools separated from the general ones under the Separate Schools Act, is no excuse for misunderstanding their true character of, all alike, public schools, maintained in the public interests and for the public welfare.

It seems plain that the Legislature of this Province has power to abolish all public schools, and so abolish separate schools, for then there would be nothing to be separated from, and so no right or privilege of separation—but that is out of the question.

Actions dismissed with costs.

MASTEN, J., IN CHAMBERS. NOVEMBER 19TH, 1915.

PATTERSON v. WURM.

Mortgage—Action on by Assignee—Summary Judgment—Defence — Assignment by Mortgagee-trustee in Breach of Trust—Notice to Assignee—Evidence.

Appeal by the defendant from a judgment for payment, redemption, or foreclosure, in a mortgage action, pronounced by the Master in Chambers, upon the plaintiff's summary application for judgment.

L. F. Heyd, K.C., for the defendant.
A. A. Macdonald, for the plaintiff.

MASTEN, J., said that the defendant, who was illiterate, being the owner of land in Toronto, made a second mortgage thereon to Gross, her son-in-law; this, she stated, was made in order that Gross, as her agent, might negotiate a sale of it and bring her the money. Gross assigned the mortgage to the plaintiff, to whom he was largely indebted; no money was paid, but the plaintiff gave Gross credit on his indebtedness for the amount of the mortgage. The action was brought upon this mortgage, and the defendant desired to defend.

Upon the appeal, counsel referred to the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, secs. 6 and 7; Bickerton v. Walker (1885), 31 Ch.D. 151; Bateman v. Hunt, [1904] 2 K.B. 530; Manly v. London Loan Co. (1896), 23 A.R. 139; Jones v. McGrath (1888), 16 O.R. 617.

If there had been a real purchase of the mortgage by the plaintiff and money paid, the judgment must stand. But, as between himself and the defendant, his cestui que trust, Gross had power to sell only, not to exchange or to set off the mortgage against his own debt. It did not appear that the plaintiff had in any way altered his position. In making the arrangement with the plaintiff, Gross was not acting within the scope of his authority.

No affidavit was filed on behalf of the plaintiff, and probably, under the Rules, no affidavit was called for. In the absence of any statement by him as to whether he had or had not notice, the case should be more fully heard.

Appeal allowed and order of the Master set aside; the action to proceed to trial in the ordinary way. Costs of motion and appeal to be costs in the cause.

MEREDITH, C.J.C.P. NOVEMBER 19TH, 1915.

*FRY AND MOORE v. SPEARE.

Limitation of Actions—Tenants in Common—Possession by one Tenant—Stepmother of Co-tenants—Presumption that Possession Held for all—Rebuttal—Question of Fact—Evidence—Limitations Act, R.S.O. 1914 *ch.* 75, *sec.* 5*—Application for Partition or Sale—Trial of Issue—Costs.*

Mary Irene Fry and Dollena Moore, as plaintiffs, applied, upon notice to Christina Ellen Speare, as defendant, for an order for partition or sale of land in the town of Southampton, and upon the application an order was made directing that the plaintiffs and defendant proceed to the trial of an issue, wherein Christina Ellen Speare should be plaintiff and Mary Irene Fry and Dollena Moore should be defendants, and that the question to be tried, should be, whether the plaintiff in the issue had acquired title to the land by virtue of the Limitations Act.

The issue was tried without a jury at Walkerton.

D. Robertson, K.C., for the plaintiff in the issue.

W. H. Wright and D. Forrester, for the defendants in the issue.

MEREDITH, C.J.C.P., said that the case was substantially an action to recover land from the plaintiff in the issue; and the

law is, that no such action shall be brought but within 10 years next after the time at which the right of action first accrued to the person bringing it: The Limitations Act, R.S.O. 1914 ch. 75, sec. 5.

The defendants first became entitled to undivided shares in the land upon their father's death in 1892; and their claim to the land would long since have become ineffectual but for the contention that they had ever since been in possession through their stepmother, the plaintiff in the issue; she having had actual possession, in person and through her tenants, during the whole time since the death of her husband and the defendants' father in 1892—except for the possession of half of the land by her present husband, she living with him, since 1899.

The defendants' contention was, substantially, that, because the plaintiff was their stepmother, the law permitted no other conclusion than that her possession was merely as their bailiff as to their shares in the land; but the learned Chief Justice could not consider that there was any such irrebuttable presumption; and the cases cited by counsel for the defendants (Kent v. Kent (1890-2), 20 O.R. 158, 445, 19 A.R. 352, and the cases referred to in Simpson on Infants, 3rd ed., pp. 99-102) did not stand in the way of giving effect to the view that the question—for whom is possession taken and held?—must always be a question of fact.

The learned Chief Justice, upon a full consideration of the evidence, finds the issue in favour of the plaintiff; that—her husband assenting—she had acquired title to the rights and interests of the defendants in the issue, in the land in question, by length of possession, under the provisions of the Limitations Act; and, treating this trial as also a motion for the final disposition of the matter, he directs that the motion for partition be dismissed with costs, but without costs of this trial, which was quite unnecessary. There was no material question of fact really in dispute. There was no reasonable ground for raising any contest over any such fact, and so no excuse for failing to present the facts as they were known to be, in the first instance, and having had the application finally disposed of then. The costs of the motion should be taxed as if that had been done.

MIDDLETON, J. NOVEMBER 20TH, 1915.

*CLELAND v. BERBERICK.

Lateral Support — Right of Adjoining Land-owner — Interference with Natural Condition—Excavation and Removal of Sand—Operations of Nature.

The plaintiff and defendant owned adjoining lots forming part of a beach on the share of a lake, and each had a summer cottage upon his lot.

The plaintiff alleged that the sand in front of his house upon his lot had been carried away by reason of the wrongful acts of the defendant in removing sand from his own property, whereby the action of wind and water had been greatly facilitated; and the plaintiff claimed damages for injury to his property.

The action was tried without a jury at Hamilton.

J. G. Gauld, K.C., and R. W. Treleaven, for the plaintiff.

H. S. Robinson, for the defendant.

MIDDLETON, J., said that, upon the evidence, he had come to the conclusion that a great deal more sand had been taken away from the defendant's property than he admitted, and that the excavation done upon his property was to a considerable extent responsible for the inroad upon the plaintiff's land.

The question of the legal responsibility of the defendant for the consequence of his conduct was not free from difficulty. No case had been found dealing with the precise point raised. The general principle was stated in Dalton v. Angus (1881), 6 App. Cas. 740, at p. 791, by Lord Selborne, L.C., and at p. 808 by Lord Blackburn. The principle there laid down had been given a wide application, and had been applied not only to the case of lateral support but to subjacent support—even to the case of subjacent support by running silt: Jordeson v. Sutton Southcoates and Drypool Gas Co., [1899] 2 Ch. 217; and by semi-fluid pitch: Trinidad Asphalt Co. v. Ambard, [1899] A.C. 594.

Broadly speaking, the right of the owner of land is, to have that land left in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land. Each land-

owner must so use his own land that he shall not interfere with or prevent his neighbour enjoying the land in its natural condition.

Judgment for the plaintiff for $750 damages with costs.

SUTHERLAND, J. NOVEMBER 20TH, 1915.

BEAMISH v. GLENN.

Nuisance—Noxious Trade—Injury to Neighbour's Property—Local Standard of Neighbourhood—Evidence—Injunction—Damages—Counterclaim—"Boycotting."

Action for damages and an injunction in respect of what the plaintiff alleged to be a nuisance—the carrying on by the defendant of the trade of a blacksmith upon premises adjoining the premises occupied by the plaintiff and his family as a dwelling-house in Boston avenue in the city of Toronto.

The action was tried without a jury at Toronto.
T. H. Barton, for the plaintiff.
H. A. Newman, for the defendant.

SUTHERLAND, J., said that the plaintiff had erected his dwelling-house some time before the defendant's blacksmith shop was built. He actively opposed the granting of a permit to erect it. He said that the defendant bought his lot with knowledge of building restrictions imposed by previous conveyances. He also said that in the operation of the blacksmith shop the defendant was committing a nuisance, in that large volumes of smoke and disagreeable odours and noise issued from the shop and made it impossible for the plaintiff and his family to enjoy his property.

If the defendant caused a nuisance to the plaintiff, it was no defence to say that the defendant was making a reasonable use of his premises in the carrying on of a lawful occupation. The permit from the city authorities to erect a blacksmith shop would not carry with it permission to commit a nuisance in the exercise of the right thereby granted. The duty of the defendant to his neighbour was to abstain from causing any nuisance to him. Mere smoke or offensive odour may be a sufficient ground for the interference of the Court but; it will not, as a rule, inter-

fere by injunction if the damage is slight or the nuisance is merely of a temporary or occasional character.

It is, of course, the intention of the defendant, unless restrained, to continue carrying on his business as heretofore.

Reference to Attorney-General v. Cole & Son, [1901] 1 Ch. 205, at p. 206; Appleby v. Erie Tobacco Co. (1910), 22 O.L.R. 533, 2 O.W.N. 449.

Upon the evidence, the conclusion must be that the smoke and odours from the premises of the defendant cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, making all possible allowance for the local standard of the neighbourhood: Kerr on Injunctions, 5th ed. (1914), pp. 154, 155, 200, 203, 207; Ball v. Ray (1873), L.R. 8 Ch. 467; Pwllbach Colliery Co. Limited v. Woodman, [1915] A.C. 634, 638, 641.

Judgment restraining the defendant from so operating his blacksmith shop as to cause a nuisance to the plaintiff by reason of the offensive odours, smoke, and noise complained of, and for payment by the defendant of $25 damages, with costs.

Counterclaim by defendant for damages for "boycotting" dismissed without costs.

SUTHERLAND, J. NOVEMBER 20TH, 1915.

LAMPHIER v. BROWN.

Will—Proof in Solemn Form—Due Execution—Testamentary Capacity—Costs.

Action to establish as the last will and testament of Jane Lamphier, who died on the 30th September, 1913, an instrument dated the 22nd July, 1911.

The action was brought in the Surrogate Court of the County of Peel, and was transferred to the Supreme Court of Ontario by order of a Judge in Chambers.

A later testamentary instrument, bearing date the 25th May, 1912, was propounded in Murphy v. Lamphier (1914), 31 O.L.R. 287, 32 O.L.R. 19, but was not established.

The executors named in the instrument of the 22nd July, 1911, now offered it for proof in solemn form.

J. W. Bain, K.C., for the plaintiffs, the executors.

A. Ogden, for the defendant Woerz.

D. C. Ross, for the other defendants.

SUTHERLAND, J., said that, in addition to the "notes of haste, stealth, and contrivance" which the Chancellor found to have been incident to the execution of the alleged will in question in Murphy v. Lamphier, 31 O.L.R. 287, there were also "sweeping changes" therein as compared with wills previously executed by the testatrix.

The will now in question was similar in its main features to a number of wills of the testatrix previously executed by her. There were two substantial changes.

One of the witnesses to the will, James Dandie, was called. It was clear from his evidence, and indeed was admitted in argument, that the will was duly executed in accordance with the Wills Act, in so far as requisite formalities were concerned. This witness had not seen the testatrix for some time before the day on which the will was executed, and did not pretend to say that he had attempted to ascertain whether or not she was competent to make a will. She seemed to him to be quite well.

One of the executors, Patrick Lamphier, testified that his mother, the testatrix, was quite able to transact business on the day she executed the will. He was one of two sons who were the principal beneficiaries in this and in the previous wills.

The testatrix was about 80 years of age and had had severe illnesses arising from a stroke or strokes of paralysis; and, while from these causes she had mentally and physically failed to some extent, the conclusion must be that at the time she executed this will she was of testamentary capacity and that the will was duly executed.

On the question of costs, the learned Judge referred to McAllister v. McMillan (1911), 25 O.L.R. 1, at p. 3. He directed that the plaintiffs and the defendant Catherine Woerz should have their costs out of the estate—those of the plaintiffs as between solicitor and client. If the other parties interested in the estate agreed, the other defendants should also have costs out of the estate, fixed at $100.

SPECTAR v. CLUTHE—CLUTE, J.—Nov. 19.

Vendor and Purchaser—Exchange of Land for Chattels—Owner of Land Replevying Chattels — Premature Action — Amendment—Specific Performance—Costs.]—Action for detention of chattels and to recover possession thereof. The plaintiff made an agreement with the defendant to exchange certain land

(3 lots) for the chattels in question (cattle and motor car etc.) Immediately after the action was begun, the plaintiff obtained a replevin order and replevied part of the chattels. The action was tried without a jury at Berlin. CLUTE, J., was of the opinion that the action was premature, inasmuch as, when it was begun, the plaintiff was not in a position to demand the chattels, the agreement on his part not having been fully carried out. However, the facts were all established by the evidence, and the plaintiff was permitted to amend and turn his action into one for specific performance of the agreement for exchange; and judgment was pronounced declaring that the agreement provided for an exchange of the plaintiff's lots, 3, 12, and 14, for the defendant's chattels; that the defendant was entitled to a conveyance of the three lots free of incumbrance; that the plaintiff was entitled to the possession of the chattels upon delivering a deed of the lots to the defendant, and to an injunction restraining the defendant from selling the chattels; that the taking possession of the chattels by the plaintiff was illegal, but that the defendant suffered only nominal damage by reason thereof; and that there should be no costs to either party. R. S. Robertson and J. A. Scellen, for the plaintiff. D. Inglis Grant and A. L. Bitzer, for the defendant.

UNION BANK OF CANADA V. MAKEPEACE—MIDDLETON, J.—Nov. 20.

Guaranty—Action on—Defence—Fraud—Evidence — Finding of Fact of Trial Judge.]—Action upon a guaranty signed by the defendant. The defence was, that the defendant, an old woman, did not understand that the paper which she signed imposed upon her any pecuniary liability. The action was tried without a jury at Hamilton. The learned Judge said that the manager of the plaintiff bank, against whom the fraud charged must be found if at all, impressed him (the Judge) favourably when examined as a witness; and, although he(the Judge) was inclined to view the defendant's position with sympathy, he could not bring himself to find that there was any fraud or misrepresentation or misconduct of any kind on his part when the guaranty was obtained. Judgment for the plaintiff bank for the amount claimed, with interest and costs. B. Holford Ardagh, for the plaintiff bank. W. S. MacBrayne, for the defendant.

BLOHM v. HAYES—HAYES v. BLOHM—FALCONBRIDGE, C.J.K.B.—Nov. 20.

Contract—Sale of Goods—Interlineation—Fraud—Reformation—Findings of Fact of Trial Judge.]—On the 26th October, 1914, the parties signed an agreement whereby Hayes sold to Blohm "about one thousand barrels of apples," to be delivered to the Grand Trunk station at Smith's Falls, except about 500 barrels to be shipped at Weller's Bay, at the price of $1.46 per barrel f.o.b. cars, and to consist of certain named varieties of apples. Hayes agreed, wherever possible, to have the apples teamed to the Trenton Cold Storage without expense to Blohm. Terms of payment were agreed upon. Hayes delivered nearly 500 barrels of the apples, and about 267 barrels of culls. In the action of Blohm v. Hayes, Blohm claimed damages for non-delivery of over 500 barrels, and he also alleged that those that were delivered were improperly marked and graded, and claimed damages therefor. In Hayes v. Blohm, Hayes obtained an interim injunction restraining Blohm from selling or removing apples deposited with a storage company in Trenton, and claimed $399.80 as due for apples delivered. The injunction was dissolved on the 11th January, 1915, having been in force for about a month; and Blohm claimed damages therefor. It was a term of the order dissolving the injunction that Blohm should pay $182.20 into Court, which he did. In the written agreement, Blohm interlined the words "more or less" after the words "about one thousand barrels of apples," ostensibly to meet the objection of Hayes, who did not know the number of barrels there would be from his own orchard and which he could purchase. The two actions were consolidated and tried without a jury at Belleville. The learned Chief Justice found the facts to be as stated in the evidence of Hayes and his wife. The true agreement was, that Blohm should have all the apples that Hayes had or could get. The pleonastic phrase "about one thousand barrels more or less" would allow of great elasticity in construction. The account of the transaction given by Hayes shewed the real bargain. The agreement as to culls was, that Hayes should get for Blohm all the culls he could get, irrespective of the number set out in the contract. The contract should, if necessary, be reformed, as Blohm's conduct amounted to a fraud upon Hayes. Blohm in fact laid a trap for Hayes by inserting words which he pretended would answer his objection to the agreement as drawn. Blohm's action dismissed with costs. Judgment for Hayes for $399.80, plus $10 damages, in all

$409.80, with costs. Order allowing Hayes to take the $182.20 and interest out of Court and apply it pro tanto on his debt. F. E. O'Flynn, for Blohm. A. Abbott, for Hayes.

RE SANDERSON—SUTHERLAND, J.—NOV. 20.

Will—Construction—Division of Estate among Children—Shares of Estate—Share of Absentee—Presumption of Death Intestate—Vested Interest.]—Motion by the National Trust Company Limited, trustees under the will of Thomas Sanderson, deceased, for an order declaring the true construction thereof in respect of two questions arising thereunder. The will was dated the 28th June, 1897; the testator died on the 1st July, 1898. The testator gave to his wife all his real and personal property for her personal use and for the education and maintenance "of our children now living at home. When our youngest child shall have arrived at the age of 23 years, all properties, if not sold before, shall then be sold. The proceeds, together with my insurance moneys, shall then be divided as follows: the sum of $10,000 shall be put out at interest for the support of my wife . . . she having the interest paid to her so long as she shall live. Any surplus which may be over and above the said $10,000 shall then be divided as follows: to my daughters Laura Edith Pym and Ida Victoria Sanderson one full share; to my daughter Mary Maud Purvis one half share; to my sons Albert Henry and Edward John and Thomas Wilfred Sanderson one full share; to my son Oliver William one quarter share. At the death of my wife . . . the $10,000 shall be divided among our children then living in the same proportions as mentioned above in the first division. When our youngest child shall have arrived at the age above mentioned the executors will divide all moneys then on hand among our children then living in portions as mentioned above." Held, that the testator meant by the word "share" a comparative interest in the estate as between the persons named in that clause of his will, and that those mentioned therein take the following shares: Laura Edith Pym, one full share; Ida Victoria Sanderson, one full share; Mary Maud Purvis, one half share; Albert Henry Sanderson, one full share; Edward John Sanderson, one full share; Thomas Wilfred Sanderson, one full share; Oliver William Sanderson, one quarter share. As Edward John died intestate on the 23rd May, 1903, his share will fall into the residue

and be divided among the children in the proportions above set forth. As letters of administration have been issued to the estate of Oliver William, an absentee, it is to be presumed that he died intestate. His share, therefore, will be distributed by the administrator of his estate under the Statute of Distribution. Costs of all parties out of the estate. W. J. McDonald, for the trustees. W. D. McPherson, K.C., for the adult beneficiaries. F. W. Harcourt, K.C., for the infants.

and distributed among the [illegible] in the proportions [illegible] to their respective [illegible] estate of Oliver Walsh, an [illegible] is to be presumed that he died intestate. His share, therefore, will be distributed by the administrator of his estate under the Statute of Distribution. Costs of all parties out of the estate. W. [illegible] McDonald, K.C., for the trustees. W. D. McPherson, K.C., for the adult beneficiaries. [illegible] W. Harcourt, K.C., for the infants.