The
# Ontario Weekly Notes

VOL. X. TORONTO, MAY 12, 1916. No. 9

## APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 1ST, 1916.

### ONTARIO BANK v. O'REILLY.

*Summary Judgment—Failure to Disclose Defence—Action on Judgment for Recovery of Money.*

Appeal by the defendant McCullough from the order of SUTHERLAND, J., ante 36.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Fraser, for the appellant.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

---

FIRST DIVISIONAL COURT. MAY 5TH, 1916.

### HAMMILL v. MILLAR.

*Mortgage—Proposed Sale under Power—Arrangement between Mortgagor and Mortgagee as to Purchase by Mortgagor—Prejudice of Purchasers of Equity of Redemption—Injunction.*

APPEAL by the defendant from the judgment of CLUTE, J., ante 115.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. C. Davidson, for the appellant.

H. J. Martin, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. MAY 5TH, 1916.

## KIDD v. LEA.

*Negligence—Collision of Motor Vehicles on Highway—Municipal By-law—Rule of Road—Ultimate Negligence—No Reasonable Evidence to Go to Jury—Dismissal of Action by Appellate Court.*

Appeal by the defendant from the judgment of one of the Judges of the County Court of the County of York, in an action in that Court, tried with a jury, in favour of the plaintiff.

The action was brought to recover damages for injury to the plaintiff in a collision at the corner of Avenue road and Heath street, in the city of Toronto, between a motor vehicle driven by the plaintiff and the defendant's motor vehicle, driven by one McIllroy.

The case was submitted to the jury without questions, and they found generally in favour of the plaintiff, and assessed the damages at $500, for which sum and costs judgment was pronounced in favour of the plaintiff.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

D. Inglis Grant, for the appellant.

J. T. Richardson, for the plaintiff, respondent.

GARROW, J.A., reading the judgment of the Court, referred to a city by-law passed on the 23rd June, 1911, enacting (clause vii.) that "vehicles shall not stop at or obstruct crossings, and shall reduce their speed at crossings . . . Vehicles going north and south shall have the right of way over those going east and west . . ."

The plaintiff admitted that he was aware of the by-law. He was driving along Heath street, an east and west street, while the defendant's motor vehicle was being driven along Avenue road, a north and south street, so that the defendant's vehicle had the right of way. It was daylight; each saw the other approaching the crossing; the plaintiff admitted that he was going at twelve miles an hour at least. The plaintiff said that he saw McIllroy apply the brakes some thirty feet above the crossing; the plaintiff applied no brake, but came along at his full speed in the hope of getting past. The plaintiff's duty was to have moderated his speed as he approached the crossing; that duty he totally neglected, with the result that he brought upon himself the consequences which followed. Ultimate negligence on the part of McIllroy was

charged; but there was no reason why he should have assumed that the plaintiff would go on without applying his brake, even at the last moment, and would not slow up sufficiently to allow the defendant's car to pass in front of him.

The plaintiff's negligence was beyond doubt; and there was no reasonable evidence to go to the jury that McIllroy failed to exercise reasonable care to avoid the consequences of the plaintiff's negligence in bringing about the collision.

The appeal should be allowed and the action dismissed, both with costs.

---

FIRST DIVISIONAL COURT. MAY 5TH, 1916.

## *ROURKE v. HALFORD.

*Lunatic—Order Declaring Lunacy—Partial Recovery—Declaration not Superseded—Moneys Paid out by Committee as Gifts to Relatives upon Order of Lunatic—Proof of Recovery of Sanity—Evidence—Onus—Gifts Declared Void—Liability of Estate of Committee to Account—Indemnity.*

Appeal by the defendants from the judgment of LENNOX, J., 9 O.W.N. 347.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

M. K. Cowan, K.C., for the defendants J. R. Rourke and Mary McBride, appellants.

J. H. Rodd, for the defendant Christine Halford, executrix of the committee, appellant.

F. D. Davis, for the plaintiffs, executors of the deceased lunatic, respondents.

GARROW, J.A., read a judgment in which, after stating the facts, he said that the plaintiffs, the executors of James Rourke, deceased, sought to recover the moneys paid to the defendants J. R. Rourke and Mary McBride, upon two grounds: (1) that James Rourke, while the order declaring him a lunatic remained unrevoked and the committee undischarged, was in law incapable of dealing with his estate; and (2) that, in any event and apart from the order declaring him a lunatic, James was, when the alleged gifts were made, of unsound mind.

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

The learned trial Judge proceeded upon the second ground.

Upon the first ground, the case of In re Walker, [1905] 1 Ch. 160, which counsel for the appellants endeavoured to distinguish, covered this case, and should be followed, and a conclusion in favour of the plaintiffs upon the first ground reached.

The conclusion of fact of Lennox, J., upon the second ground, should also be adopted.

No disposition seemed to have been made of the claim to indemnity made by the defendant Christine Halford, as executrix of Dennis, against her co-defendants. She was entitled to such indemnity, without costs, although not to the lien to which the plaintiffs would have been entitled, had they claimed it, upon the lands into which the moneys paid to the defendants J. R. Rourke and Mary McBride went. See Moxham v. Grant, [1900] 1 Q.B. 88.

The judgment should be varied by the addition of an indemnity clause; and, with that variation, the appeal should be dismissed with costs.

The other members of the Court concurred; HODGINS, J.A., giving reasons in writing.

*Judgment varied.*

---

SECOND DIVISIONAL COURT. MAY 5TH, 1916.

## RE BECK TRUSTS.

*Trusts and Trustees—Executors—Over-payment to Beneficiaries—Trustees of Insurance Fund—Moneys Due to Beneficiaries—Set-off—Claims Arising en autre Droit.*

After the reasons for judgment in this case were stated by the Court (9 O.W.N. 283), the appeal and cross-appeal were reargued by leave of the Court (FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.).

H. T. Beck, for the appellants in the main appeal and for Helen Beck.

E. C. Cattanach, for the Official Guardian, representing Doris Beck, an infant.

N. W. Rowell, K.C., and D. B. Sinclair, for the liquidator of the Dominion Trust Company, respondent and cross-appellant.

The judgment of the Court was read by LATCHFORD, J., who said that the funds for which the Dominion Trust Company were

liable to account came into their hands under three separate trusts, distinct in their origins and objects. One arose under the will of the testator; the others under orders of the Court made pursuant to sec. 175 of the Ontario Insurance Act, 1912. The order appealed against (Middleton, J., 15th November, 1915) allowed a set-off of what the company owed Helen Beck against what Helen Beck owed the company, and found the balance due by her to the liquidator to be $93.04. In the same manner, the amount which Doris Beck owed the company had been set off against the amount which the company owed her, leaving a balance adverse to her of $2,064.77.

The contention of the executors of Geoffrey Strange Beck (the appellants in the main appeal) was, that there should be a set-off against what was due to the company by Doris and Helen Beck of the amount which the company owed to the estate of the testator; but claims arising en autre droit cannot be set off.

Reference to Ex p. Morier (1879), 12 Ch. D. 491.

In the present case, the Court could not compel the company to transfer to the daughters of the testator a fund in which they had but a limited interest. What was owed to the estate by the company could not be regarded as owed to the daughters, who had but a life interest in the income. There could, therefore, be no set-off of what they owed to the company. The main appeal should be dismissed.

The accounts, on the other hand, in regard to which set-off or mutual credit had been allowed, were properly set off one against the other. The cross-appeal should also be dismissed.

No order as to costs.

---

## HIGH COURT DIVISION.

MIDDLETON, J. MAY 1ST, 1916.

## BIRCH v. PUBLIC SCHOOL BOARD OF SECTION 15 IN THE TOWNSHIP OF YORK.

*Public Schools—Purchase of Site and Erection of School-house—Meetings of Public School Supporters—Approval of Proposals of Board—Complaint to Inspector—Public Schools Act, R.S.O.* 1914 *ch.* 266, *sec.* 54 (11)—*Finality of Inspector's Decision—Application to County Court Judge under sec.* 20 (3)—*Jurisdiction—Leave to Appeal from Judge's Order—Contract for Erection of School-house—Board of School Trustees, Powers*

*of—Funds not Provided by Township Council—Sec.* 45 (1) *of Act—Injunction—Motion for Judgment—Effect of Judicial Decisions—Reference to Appellate Division—Judicature Act, sec.* 32 (3).

Motion by the plaintiffs to continue an interim injunction, and also for leave to appeal to the Supreme Court of Ontario from an order of the Judge of the County Court of the County of York.

The motion was heard in the Weekly Court at Toronto.

Gideon Grant, for the plaintiffs.

W. D. McPherson, K.C., for the defendant board.

R. G. Smythe, W. B. McPherson, H. A. Newman, and F. H. Barlow, for the other defendants.

MIDDLETON, J., in a written opinion, said that the plaintiffs sought to restrain the Board from proceeding with the purchase of a school-site and the erection of a school-building, upon the grounds (1) that the proceedings at a meeting of ratepayers which authorised an application to the township council for funds, were irregular and unfair, in that the questions were submitted in such a form as to preclude any vote against borrowing, and (2) that the purchasing of the lands and the entering into the contract, before any by-law had been passed by the township council, were irregular and improper.

When the motion to continue the interim injunction first came before the learned Judge, counsel for the defendants objected that this Court had no jurisdiction because the case fell within sec. 20 (3) of the Public Schools Act, R.S.O. 1914 ch. 266. The interim injunction was thereupon dissolved; but the action was not dismissed.

A motion was made, under sec. 20 (3), before the County Court Judge, who held that that enactment had no application to the matters in controversy.

The plaintiffs then moved again for an injunction, and also asked leave to appeal from the order of the County Court Judge; the defendants asked that the action should be dismissed.

The defendant Board had selected a site, and a meeting of ratepayers approved the purchase of that site. The Board, without having obtained the passing of a by-law by the township council, proceeded with the purchase; and a special meeting of public school supporters was called for the purpose of considering a proposal of the Board to apply to the council to issue debentures for such amount as might be deemed adequate for erecting a school-building. This was approved by the meeting, but it was said

that the questions were not put fairly before it. The plaintiffs, representing the minority of supporters, complained to the Public School Inspector, under sec. 54 (11) of the Act, and he determined that the proceedings were substantially in accordance with the Act.

The County Court Judge was right in construing sec. 20 (3) as he did—the attack was not made on the first meeting, and there was no by-law of the council. This exhausted the jurisdiction conferred by sec. 20 (3); and leave to appeal should not be granted.

It was contended that this Court had jurisdiction to declare the proceedings at the later school meeting invalid: McGugan v. School Board of Southwold (1889), 17 O.R. 428. But the aspect of the matter now under discussion was not presented in that case. The plaintiffs having gone to the Inspector, his decision was conclusive. Moreover, his decision appeared to be correct.

In Smith v. Fort William School Board (1893), 24 O.R. 366, it was determined that a School Board could not contract for the building of a school-house until the necessary funds had been provided for the erection of the school; and see Ford v. Grimsby Public School Board (1903), 6 O.L.R. 539. The learned Judge was unable to see any foundation for reading such a limitation into the Act: see sec. 45 (1).

This being the only question which remained to be disposed of in the action, the plaintiffs' motion should be turned into a motion for judgment and referred to a Divisional Court of the Appellate Division, where the decisions in the two cases referred to may be reviewed: Judicature Act, R.S.O. 1914 ch. 56, sec. 32 (3).

---

LATCHFORD, J., IN CHAMBERS. MAY 3RD, 1916.

## RE NEWCOMBE v. EVANS.

*Surrogate Courts—Removal of Testamentary Cause into Supreme Court of Ontario—Surrogate Courts Act, R.S.O.* 1914 *ch.* 62, *sec.* 33 (3)—*Value of "Property of the Deceased"—Assets in Foreign Country, whether Included—Nature and Importance of Case.*

Application by the defendant, under sec. 33 of the Surrogate Courts Act, R.S.O. 1914 ch. 62, for the removal of the application for probate into the Supreme Court of Ontario.

A. W. Langmuir, for the defendant.
H. S. White, for the plaintiff.

LATCHFORD, J., said, in a written opinion, that sub-sec. (3) of sec. 33 prohibits the removal of any cause or proceeding "unless it is of such a nature and of such importance as to render it proper that the same should be disposed of by the Supreme Court, not unless the property of the deceased exceeds $2,000 in value."

The whole property of the deceased within Ontario, where, it was said, he was domiciled at the time of his death, was valued in the application for probate at $105.25. In the State of Massachusetts he was possessed of personal property valued at $900 and of realty valued at about $24,000.

The defendant, the sister and only next of kin of the deceased, was contesting the application for probate.

As a general rule, the law of the *locus rei sitæ* applies to realty, and only personal property is affected by a foreign probate. The total value of the personal property of the deceased, here and abroad, was much less than the amount mentioned in sec. 33. The learned Judge was inclined to regard the words in sub-sec. 3 "the property of the deceased" as meaning his property over which the Surrogate Court has jurisdiction—property within Ontario; but, whether this was right or not, the application failed on the ground that the case was not of such a nature and of such importance as to warrant the interference of this Court.

It was observed in Re Pattison v. Elliott (1912), 3 O.W.N. 1327, that where a fair case of difficulty is made out, so that there will be a real contest, the case should be removed if the amount of the estate brings the case within the statute. No such case was made here.

*Motion dismissed with costs.*

---

MIDDLETON, J. MAY 3RD, 1916.

## RE SANDERSON AND TOWNSHIP OF SOPHIASBURGH.

*Highway—Dedication—Conduct of Owners of Soil—Acceptance—Evidence—Statute-labour—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 432—*Resolution of Township Council under Seal—Motion to Quash Resolution—Oral Evidence—Rule* 606—*Costs.*

Motion by Sanderson to quash a resolution of the Municipal Council of the Township of Sophiasburgh directing the removal of certain obstructions from what was said to be a public road connecting Division and De Mill streets, along the water front, in the village of Northport.

The statements in the affidavits filed being conflicting, oral evidence was taken at the Picton sittings (see Rule 606.)

E. G. Porter, K.C., for the applicant.

E. M. Young, for the township corporation.

MIDDLETON, J., in a written opinion, said that the sole question raised was, whether there had been any dedication of the way in question. He then discussed the evidence as to dedication, and said that for half a century or more the road had been freely used by the public, though there were isolated periods when it was obstructed. Quite recently, the applicant erected a framing for a shed, obstructing the use of the road. The council, asserting that there had been dedication, removed this framing on the authority of the resolution now attacked, which, being under seal, was equivalent to a by-law. The applicant, denying the right of the municipality, refused to participate in the removal, and the timbers placed upon the way were drawn to an adjacent lot. There was some evidence that statute-labour was performed upon this way; but it was insufficient to bring the case within sec. 432 of the Municipal Act, R.S.O. 1914 ch. 192, for it could not be said that statute-labour was usually performed upon the road.

However, the conduct of the owners from time to time amounted to a dedication, or intention to dedicate. "If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public:" Rex v. Lloyd (1808), 1 Camp. 260, 262.

In Ontario, as the highway is vested in the municipality, it is necessary to find an assent on the part of the municipality to the dedication; that may be presumed from the expenditure of public money upon the road, but it may be shewn in other ways; and the resolution (under seal) amounts to an unqualified acceptance.

The situs of the road is sufficiently indicated by the grading done by the municipality.

Motion dismissed, and with costs, unless waived by the municipality.

BRITTON, J. MAY 4TH, 1916

## CLIFTON v. TOWERS.

*Assignments and Preferences—Chattel Mortgage—Duress—Insolvency—Knowledge—Intent to Defraud Creditors—Instrument Executed within 60 Days before Assignment for Benefit of Creditors—Presumption—Rebuttal—Evidence—Assignments and Preferences Act, R.S.O.* 1914 *ch.* 134, *sec.* 5—*Sale of Chattels by Assignee—Conversion—Claim by Chattel Mortgagee—Action to Enforce—Costs.*

Action by a chattel mortgagee, against the assignee for the benefit of creditors of the chattel mortgagors, to recover, out of the proceeds of goods sold by the defendant, the amount of the plaintiff's claim upon the chattel mortgage.

The action was tried without a jury at Woodstock.

R. N. Ball, for the plaintiff.

W. S. Brewster, K.C., for the defendant.

BRITTON, J., in a written opinion, set out the facts. He said that one Forgie and his wife made the chattel mortgage to the plaintiff on the 25th August, 1915. They owed the plaintiff on the 11th January, 1915, $574.45, for which they gave him a promissory note. The note was twice renewed, interest being added on each renewal. On the 25th August, 1915, the debt had mounted to $621.92, and the plaintiff, with a witness, one Hill, then a constable, went to the Forgies' house and insisted upon their executing a chattel mortgage for $621.92, which they did. On the 14th October, 1915, they assigned to the defendant.

The defendant pleaded that, when the chattel mortgage was executed, the Forgies were in an insolvent condition, and that the mortgage was a preference over the other creditors of the mortgagors, and that the mortgage was obtained by the plaintiff by threats, duress, and fraud.

The learned Judge said that there was not, in his opinion, any duress or fraud practised upon the Forgies. The mere fact that Hill, who accompanied the plaintiff and signed as a witness, was a constable and wore a badge, would not constitute duress; and the threats of legal proceedings made were no more than any creditor would have the right to make when honestly pressing for security for or payment of a just debt.

The defendant sold the property covered by the mortgage, and had the proceeds. There was conversion; and the plaintiff

had a right of action and was entitled to recover unless the defendant could prove that the chattel mortgage was fraudulent and void against the defendant, representing the creditors.

The Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5 (2), requires an intent to defeat, delay, hinder, or prejudice creditors to be shewn. The Forgies had no such intent, nor had the plaintiff. Sub-sec. (3) does not apply, this not being an action to set aside the transfer.

Sub-sec. 4 provides that a transfer made within 60 days from the date of an assignment for the benefit of creditors is presumed to have been made with the intent mentioned, and also that the presumption arises whether the transfer was made voluntarily or upon pressure. This presumption is rebuttable: Wade v. Elliott (1907), 10 O.W.R. 206; Craig v. McKay (1906), 12 O.L.R. 121. The plaintiff had satisfied the onus of negativing any intent to defraud, defeat, hinder, or delay the creditors of the mortgagors. The plaintiff, when he took the chattel mortgage, did not know that the Forgies were insolvent.

Judgment for the plaintiff for $621.92 and interest, with costs. The debt will be payable out of the estate of the Forgies in the hands of the defendant as assignee; the costs will be payable by the defendant personally, but with liberty to apply to be indemnified out of the estate when passing his accounts.

---

LENNOX, J. MAY 4TH, 1916.

## SKEANS v. KEEGAN.

*Covenant—Restraint of Trade—Agreement between Master and Servant—Undertaking of Servant not to Engage in Similar Business within Defined Territory—Breach—Injunction Confined to Smaller Area—Costs.*

Action for an injunction restraining the defendant from soliciting customers and selling teas and coffees from waggons, in the city of Toronto or within an area of five miles outside any of the boundaries of the city.

The defendant was employed by the plaintiff, a dealer in teas and coffees, to sell for him, taking a certain route in the city of Toronto. There was a written agreement, by which the plaintiff agreed to engage the defendant as a vendor of teas and coffees, at a salary of $12 a week, and the defendant agreed not to engage, directly or indirectly, in the business of selling teas or coffees in Toronto, or within five miles, for the period of three years from the termination of his employment.

After about a year and a half of service under the agreement, it was terminated by the plaintiff. The defendant took service with a trade rival of the plaintiff and set out to solicit trade and make sales of the same class of goods upon his old routes.

The action was tried without a jury at Toronto.

A. C. McMaster, for the plaintiff.

F. J. Hughes and F. Regan, for the defendant.

LATCHFORD, J., read a judgment in which he said that the agreement was similar to that in question in Skeans v. Hampton (1914), 31 O.L.R. 424. A contract which purports to restrain trade unduly is not illegal, it is merely not enforceable: North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L.T. 439; Mogul S. S. Co. v. McGregor Gow & Co., [1892] A.C. 25; and, if the stipulations are severable, effect may be given to that which is valid: Baines v. Geary (1887), 35 Ch. D. 154; Chesman v. Nainby (1727), 1 Bro. P.C. 234; Mallan v. May (1843), 11 M. & W. 653. The plaintiff's counsel is content if the defendant is enjoined from using the knowledge and connection be acquired while in the plaintiff's service, to the plaintiff's prejudice; and to this he is entitled. The plaintiff should not have the wider relief claimed in respect of the whole territory.

It was a case of divided success, and the plaintiff was harsh in dismissing the defendant; so there should be no costs.

Judgment for the plaintiff, without costs, enjoining the defendant from canvassing for business and from selling teas and coffees along the trade routes upon which he worked for the plaintiff, for the remainder of the three-year period. The streets should be defined in the judgment.

There was no question of condonation of a previous offence, as in McIntyre v. Hockin (1889), 16 A.R. 498. The plaintiff was quite justified in insisting that his employee should live up to his agreement. Wicher v. Darling (1885), 9 O.R. 311, is relevant on the questions of consideration and public policy.

---

MIDDLETON, J. MAY 5TH, 1916.

## *RE KIRKLAND.

*Trust—Royalties from Sale of Books of Deceased Author—Life-tenants and Remaindermen—Apportionment between Capital and Income — Unmarketed Company-shares—Apportionment of Proceeds when Sale Effected.*

Motion upon originating notice for an order determining ques-

tions arising in regard to the construction of the wills of Thomas Kirkland, deceased, and of his wife, Jane Todd Kirkland, deceased.

The motion was heard in the Weekly Court at Toronto.

J. Gilchrist, for the life-tenants, the applicants.

Hamilton Cassels, K.C., for the Toronto General Trusts Corporation, the trustees under the will of Jane Todd Kirkland.

G. H. Gray, for the adult remaindermen.

E. C. Cattanach, for the infant remaindermen.

MIDDLETON, J., in a written opinion, said that Thomas Kirkland died in 1898, and by his will, after making provision for his wife, gave her a general power of appointment over his whole estate. In pursuance of this power, the widow, who died in October, 1899, by her will directed her husband's executors to transfer the estate to the trust company upon trust as to the residue "to set apart and invest the residue . . . and to pay the income and interest thereof to" the applicants, and upon their death to "deal with the said residue" in the way pointed out in the will of the widow.

The testator had written books and copyrighted them. Under agreements made by him with publishers, royalties were payable from time to time upon sales made. The trustees received these royalties and treated them as capital and paid the life-tenants the money arising from the investments made; the latter contended that these payments should be regarded as income.

The learned Judge said that neither contention was entitled to prevail, and that the case was one in which the amounts received must be apportioned between capital and income in accordance with the rule laid down in In re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 643, in the proportion the capital would bear to an assumed income at 5 per cent. with yearly rests from the testator's death. The true capital is the present value of the money received as of the date of death.

Davidson's Trustees v. Ogilvie, [1909-10] Sess. Cas. 294, is in conflict with the principles of the English cases.

A question was raised as to the division of the proceeds of certain company-shares held because not now marketable. When these are realised, the proceeds should be divided in the manner indicated.

Costs of all parties out of the estate.

RIDDELL, J., IN CHAMBERS. MAY 6TH, 1916.

## RE FLAMBOROUGH WEST UNION SCHOOL SECTION.

*Public Schools—Formation of Union School Section—Award of Arbitrators—Confirmation by By-law of County—Order of County Court Judge Referring Adjustment of Claims back to Arbitrators—Jurisdiction—Leave to Appeal—Public Schools Act, R.S.O.* 1914 *ch.* 266, *secs.* 20 (3), 21, 22 (1), (2), 30.

Motion by the Board of School Trustees for School Section Seven for the Township of Beverly, under sec. 20 (3) of the Public Schools Act, R.S.O. 1914 ch. 266, for leave to appeal to the Supreme Court of Ontario from an order of the Judge of the County Court of the County of Wentworth.

J. H. Spence, for the applicants.

A. L. Shaver, for the Board of Public School Trustees of Union School Section A.

RIDDELL, J., in a written opinion, said that, it being desired to form a union school section of parts of the townships of Beverly and West Flamborough, under sec. 21 of the Public Schools Act, the township councils concerned appointed arbitrators, who made an award. An appeal was taken, under sec. 22 (1), to the County Council of the County of Wentworth, in which both townships are; and three arbitrators were appointed by the county council under sec. 22 (2). These gave a unanimous decision on the 20th July, 1915, which, by the provisions of sec. 22 (2), was "final and conclusive." Thereupon the county council passed a by-law, No. 602, on the 13th September, 1915, "confirming" the award and forming a union school section according to its determinations.

No motion had been made against this by-law: but in April, 1916, a motion was made before the County Court Judge, and he, on the 26th April, 1916, made an order "that the arbitrators appointed by the county council consider and adjust the claims and equities arising from union school section A. and the various other sections, parts of which were detached and given to the union section, as a consequence of the severance of the lands necessary for the formation of the said union section."

In view of the express provisions of sec. 22 (2) ad fin. and sec. 30, the learned Judge thought it sufficiently doubtful that the County Court Judge had power to interfere with the award at all, and if so that he had power to do aught but decide the matter

submitted to him without directing a reference back, to justify the leave asked for being granted.

Leave granted accordingly; costs of this motion to be costs in the appeal unless otherwise ordered by the Supreme Court in the appeal.

---

KELLY, J. MAY 6TH, 1916.

## MATHER v. FIDLIN.

*Parent and Child—Agreement to Remunerate Daughter for Services—Action against Executors—Evidence—Corroboration—Remuneration Commensurate with Services—Limitations Act, R.S.O. 1914 ch. 75, sec. 49 (g)—Allowance Confined to Six Years—Costs.*

Action by a daughter of Morgan Silverthorn, deceased, against his executors, to recover remuneration for her services to the deceased and his wife, pursuant to an alleged contract.

The action was tried without a jury at Brantford.

W. S. Brewster, K.C., for the plaintiff.

G. Lynch-Staunton, K.C., and W. A. Hollinrake, K.C., for the defendants.

KELLY, J., after setting out the facts in a written opinion, said that a study of the whole evidence convinced him that the relationship established between the plaintiff and her father, so far as her services were concerned, was founded on a contract for remuneration, not to the amount of $5,000 and the other benefits stated in a will which he afterwards revoked, but remuneration commensurate with the services performed: McKenzie v. McKenzie (1909), 13 O.W.R. 869; Walker v. Boughner (1889), 18 O.R. 448, 457; McGugan v. Smith (1892), 21 S.C.R. 263; Murdoch v. West (1895), 24 S.C.R. 305.

Her story of the agreement was amply corroborated.

The presumption which arises, in the case of services rendered by members of a family living together to one another, that such services are not to be paid for, was amply rebutted in the present case.

The defendants having pleaded the Statute of Limitations, the allowance should be confined to six years: Re Rutherford (1915), 34 O.L.R. 395; and a fair allowance for the six years would be $970; this is in addition to her share of the residue of her father's estate under his will.

Judgment for the plaintiff for $970 and costs.

The costs of the defendants, the executors, as between solicitor and client, should be paid out of the estate.

LENNOX, J. MAY 6TH, 1916.

## SCHMIDT v. M. BEATTY & SONS LIMITED.

*Company—Contract—Authority of Director and President to Bind Company—Absence of Actual Authority—Implied Authority—Opposition of Co-directors—Absence of Ratification—Failure to Repudiate Promptly—Statute of Frauds—Name of Company—"Lim."—Ontario Companies Act, R.S.O.* 1914 *ch.* 178, *secs.* 23, 34, 84—*Breach of Contract—Action for—Costs.*

Action for damages for breach of a contract, tried without a jury at Welland.

W. M. German, K.C., for the plaintiff.
E. C. Cattanach, for the defendant company.

LENNOX, J., read a judgment in which he said that Browning, who negotiated the contract, was at the time a director and president of the defendant company The board of directors was composed of Browning, Gross, and Miles. The Ontario Companies Act, R.S.O. 1914 ch. 178, does not assign any special duties of management to nor vest any independent powers in the president of a company. By sec. 84, the affairs of the company shall be managed by a board of not less than three directors.

The Statute of Frauds was pleaded, and it was objected that the writing sued on was not in form or words sufficient to bind the company; and, if otherwise sufficient, that the contract could not be enforced because it was made with "M. Beatty & Sons Co. Lim.," and the proper name was M. Beatty & Sons Limited. The learned Judge said that he was not disposed to give effect to either of these objections. The body of the writing was a sufficient compliance with the statute. The variation by the introduction of "Co." did not vitiate the contract if it was otherwise valid; the word "limited" might (sec. 34) be abbreviated to "Ltd." or "Ld.;" and "Lim." would convey the same meaning.

The substantial objection was, that Browning, who entered into and signed the agreement in what he considered was the name of the company, and as president, had no actual or implied authority to contract. Actual authority he certainly had not.

The plant covered by the agreement was intended for the carrying on of a contemplated extension of the defendant company's business—the construction of vessels suitable for the Atlantic carrying trade. This was within the chartered authority of the

company, both under the wording of the letters patent and the "incidental and ancillary" powers given by sec. 23 of the Act.

The learned Judge said that he could not find that Browning, whether as president or director, had, in the circumstances of the case, power to bind the company by what he purported to do. There was nothing in the statute or the incorporation or the business or objects of the company to indicate that the president or a director, acting alone—and a fortiori in opposition to his co-directors—had implied authority to bind the company in the way asserted here.

The company did not ratify or adopt the contract; but there was not a prompt and specific repudiation, and that consideration and others affected the question of costs.

The action should be dismissed without costs.

---

RIDDELL, J., IN CHAMBERS. MAY 6TH, 1916.

## *REX v. SWARTS.

*Canada Temperance Act—Search-warrant—Intoxicating Liquor Found in Dwelling-house—Information—Causes of Suspicion—Sufficiency—Question for Magistrate—Names of Persons Making Communications to Informant—Conviction for Unlawfully Bringing Intoxicating Liquor into County where Act in Force—Jurisdiction of Police Magistrate—Note of Adjudication—Evidence—Offence—R.S.C.* 1906 *ch.* 152, *sec.* 117 (*c*)—*Saving Clause, sec.* 117 (2)—*Construction—Acceptance of Evidence of Accused in Part and Rejection in Part—Order for Destruction of Liquor—Sec.* 137.

Motion by the defendant to quash a search-warrant, a magistrate's conviction, and an order for the destruction of intoxicating liquors seized when the search-warrant was executed.

Loftus E. Dancey, for the defendant.
J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J., in a written opinion, said that one Pellow, a constable for the county of Huron, wherein the Canada Temperance Act was in force, swore to an information "that he hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale, in violation of Part II. of the Canada Temperance Act, in the dwelling-house occupied by Clarence Swarts

. . . The grounds of said suspicion are that the deponent is told on reliable authority that a package or box was taken into said dwelling-house last night, which there is ground to believe contained intoxicating liquors." Under sec. 136 of the said Act, R.S.C. 1906 ch. 152, a Police Magistrate issued a search-warrant and placed it in the hands of Pellow, who proceeded to search the defendant's house, and found therein a trunk containing four cases of bottled whisky and gin, which he took away. The License Inspector laid an information against the defendant for unlawfully bringing intoxicating liquor into the county of Huron, contrary to the Canada Temperance Act. The defendant appeared before the Police Magistrate; Pellow testified to the facts above stated; and a drayman proved that the trunk had been brought by him for the defendant from a railway station, where it had come as baggage; but no evidence was adduced by the prosecution to shew whence it had come. The defendant, however, testified on his own behalf, and proved that he had brought the liquor from Guelph into the county of Huron; the Police Magistrate convicted, and made an order, under sec. 137 of the Act, for the destruction of the liquor.

It was contended that the search-warrant should be quashed because the "reasonable cause to suspect" was not set out in the information: Rex v. Bender, ante 102; and the learned Judge said that he was bound by that decision to hold that the causes of suspicion must appear in the information. The causes were in fact set out in the information; and, though they might not be sufficient for some magistrates, it could not be said that a magistrate was necessarily wrong in deciding that reasonable cause was disclosed; and his decision should not be interfered with.

It was argued that the name of the person who told Pellow should have been disclosed: Gibbons v. Spalding (1843), 11 M. & W. 173; Gilbert v. Stiles (1889), 13 P.R. 121; Ex p. Grundy (1906), 12 Can. Crim. Cas. 65; Rex v. Lorrimer (1909), 14 Can. Crim. Cas. 430; but, in this case, where the concern was with suspicion only, there was no reason for compelling the informant to disclose the name of *his* informants, unless the magistrate saw fit to do so.

As to the conviction, there was a sufficient note of the adjudication if that is now necessary.

The objection that the informant was given the warrant, that he made the search, and that it was based on evidence so obtained, was without force: Regina v. Heffernan (1887), 13 O.R. 616; Ex p. Dewar (1909), 15 Can. Crim. Cas. 273.

It was proved that the defendant brought 46 bottles of intoxicating liquor into the county. This was against the prohibition of sec. 117 (*c*) (as enacted by 7 & 8 Edw. VII. ch. 71); but the defendant contended that he was saved by sec. 117 (2), which provides that (*c*) shall not apply to any intoxicating liquor sent, shipped, brought or carried to any person for his personal or family use. This saving clause does not cover the case of one bringing into the county liquor not *to* any one, but *for* himself. Moreover, the magistrate was not bound, believing part of the defendant's evidence, to believe the remainder: Rex v. Van Norman (1909), 19 O.L.R. 447. Considering the large quantity of liquor, the secret manner in which it was brought from the station to the house, and all the other facts, the magistrate had the right to find as he did. The order to destroy naturally and properly followed such a conviction: sec. 137.

Even if the search-warrant had been quashed, the conviction and destruction order would not have been affected.

*Motion refused with costs.*

---

RIDDELL, J., IN CHAMBERS. MAY 8TH, 1916.

## *REX v. BEDFORD.

*Canada Temperance Act—Search-warrant—Grounds for Suspicion—Keeping Intoxicating Liquor for Sale—Evidence—Conviction—Police Magistrate—Jurisdiction.*

Motion by the defendant to quash a search-warrant and a Police Magistrate's conviction for unlawfully keeping intoxicating liquor for sale in the defendant's hotel in the town of Goderich, contrary to the provisions of Part II. of the Canada Temperance Act, there in force.

Loftus E. Dancey, for the defendant.
J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J., in a written opinion, said that several of the grounds taken were the same as those taken in Rex v. Swarts, ante; and, for reasons set out in that case, these grounds were insufficient.

The sworn information upon which the search-warrant was issued stated as the reasons for suspicion "that the deponent knows that intoxicating liquor is being brought to the said hotel, and

persons are resorting there, as the deponent has good reason to believe, for the purpose of drinking the same." It was impossible to say that the magistrate could not consider the above as reasonable grounds of suspicion. The search-warrant should not be quashed.

The detective who executed the search-warrant did not find any intoxicating liquor upon the premises; but he found men drinking there, and he deposed that he knew from the smell that there had been whisky in the glasses from which the men drank; he also deposed that the bar-room was shut and bolted, but was opened to admit certain persons.

The learned Judge said that there was nothing to prevent a magistrate, at least when sitting as a judge of fact, from exercising his common sense and using every-day knowledge.

A tavern-keeper who keeps his bar-room bolted, to be opened to admit such persons as he chooses, who keeps whisky glasses all smelling of whisky (most of them very strongly), who rings up the price of two drinks upon the cash-register in his bolted bar-room just before two men come out of it, and who can give no reason why he should, one of whose customers is seen to take a drink from one of the whisky glasses, followed by a drink of water—cannot complain if the magistrate comes to the conclusion that he was selling whisky.

*Motion dismissed with costs.*

---

McConnell v. Township of Toronto—Britton, J.—May 4.

*Negligence—Municipal Corporations—Ditches and Watercourses—Failure to Provide Sufficient Outlet—Injury to Land—Damages—Claim over against Third Party—Evidence—Findings of Fact of Trial Judge.*]—Action for damages for injury to the plaintiffs' lands by water brought upon them by the acts of the defendants, the township corporation, as the plaintiffs alleged, in diverting the water from the course in which it would naturally flow. The defendants brought in the Toronto Golf Club as third parties. The action and the claim of the defendants over against the third parties were tried without a jury at Toronto. Britton, J., reviewed the evidence in a brief written opinion. He said that the evidence established that the defendants made a ditch or drain along the west side of a highway to the east of the plaintiffs' lands, and that by that ditch water was brought to the plaintiffs' lands that would not otherwise have flowed there. It was the duty of the defendants to provide a sufficient outlet for that water, which

they did not do. The defendants seemed to have been under the impression that they could use the low land or ravine of the Toronto Golf Club property as the outlet for the water, and pleaded a prescriptive right so to use it; but no evidence was given to warrant that conclusion. The Toronto Golf Club employees closed one of the openings for water to their ground. This was surface-water, and the club had the right to close the opening and prevent the surface-water from coming upon their lands. There was no evidence that would fix liability upon the club. There was negligence on the part of the defendants, and damage as the result of such negligence. The plaintiffs' damages should be fixed at $300, that being in full to both plaintiffs from the time of notice to the defendants down to the 8th March, 1916; the plaintiffs to apportion the damages between themselves. There should be no injunction and no mandatory order. Judgment for the plaintiffs for $300 damages with costs payable by the defendants to the plaintiffs, including any costs caused to the plaintiffs by the bringing in of the third parties. The defendants' claim against the third parties dismissed with costs. R. U. McPherson, for the plaintiffs. W. D. McPherson, K.C., for the defendants. R. C. H. Cassels, for the third parties.

---

BULL v. STEWART—LATCHFORD, J.—MAY 4.

*Contract—Building Contract—Extras—Rulings of Architect—Account—Costs.*]—Action by a contractor against a building-owner to recover a balance alleged to be due for work done under the contract and for extras. The action was tried without a jury at Barrie. LATCHFORD, J., disposed of the case in a short memorandum in which he said that, in view of the evidence given by the defendant's architect and the terms of the building contract, which provided that the architect should determine conclusively all matters of dispute, the only question arising in the action was one of account. The plaintiff's claim upon his contract was for $5,000 and for extra work $623.18: total, $5,623.18. The architect allowed $295.18 for extras, and disallowed all other claims for extras. The defendant was entitled to credit for $4,381.88. Deducting that from $5,295.18, left $913.30 due to the plaintiff. The learned Judge regretted that, having regard to the decision of the architect, he was unable to give effect to the claim of the plaintiff to set off $1,000 damages. There should be no order as to costs. Judgment for the plaintiff for $913.30 without costs. J. Birnie, K.C., for the plaintiff. W. A. J. Bell, K.C., for the defendant.