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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 27TH, 1916.

*LLOYD v. ROBERTSON.

Will—Action to Set aside—Want of Testamentary Capacity—Undue Influence—Onus—Findings of Fact of Trial Judge—Reversal on Appeal—Costs.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 35 O.L.R. 264, 9 O.W.N. 339.

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

W. N. Tilley, K.C., and J. J. Coughlin, for the appellants.

Glyn Osler, for the plaintiff, respondent.

The judgment of the Court was read by GARROW, J.A., who, after setting out the facts, said that there was no explicit finding that the testator was not of testamentary capacity. The finding was that the will had been procured by the defendant Albert Lloyd, and that he had not satisfied the onus resting upon him of shewing that the paper-writing propounded contained in truth the last will of the deceased. GARROW, J.A., was, with deference, unable to agree with the finding. The will could not be said to have been "procured" by the defendant Albert Lloyd at all. The burden of proof had, upon the undisputed evidence, been fully and amply discharged.

There was no good reason why the clause of the will which bequeathed the residue to Albert should not stand as part of the will.

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

The appeal should be allowed and the action dismissed.

The plaintiff's costs as between party and party up to and inclusive of the trial-judgment, and the defendants' costs to the same point as between solicitor and client, should be paid out of the estate; and the plaintiff should pay the defendants' costs of the appeal.

SECOND DIVISIONAL COURT. JUNE 27TH, 1916.

DAVISON v. FORBES.

Reference—Stay of, pending Appeal to Supreme Court of Canada from Judgment Directing Reference—Security—Consent.

Appeal by the defendant Forbes from the order of SUTHERLAND, J., in Chambers, ante 358.

The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., RIDDELL and MASTEN, JJ.

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

Harcourt Ferguson, for the plaintiff, respondent.

P. E. F. Smily, for the defendant Haines.

THE COURT, on consent of the parties, ordered that, upon the appellant giving security in the sum of $25,000, all proceedings should be stayed pending the appeal to the Supreme Court of Canada.

SECOND DIVISIONAL COURT. JUNE 28TH, 1916.

*RE ARNOLD v. COOK.

Division Courts—Action Dismissed in Absence of Parties—Case Improperly on List by Mistake of Clerk—Judgment of Dismissal Treated as Nullity—Division Courts Act, R.S.O. 1914 ch. 63, secs. 79 (2), 123—Motion for Prohibition—Refusal—Appeal—Costs.

Appeal by the defendants from the order of KELLY, J., in Chambers, ante 113.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. T. Walsh, for the appellants.

C. H. Porter, for the plaintiff, respondent.

RIDDELL, J., in a written opinion, after stating the facts, said that the Clerk of the Division Court had no right to place the case on the list for trial on the 20th May, 1915; the statute is specific that he "shall place the action on the list for trial at the next sittings of his Court which commences six clear days or more after he receives the papers:" R.S.O. 1914 ch. 63, sec. 79 (2). The case was, against the express direction of the statute, put on the list for trial; and it must be treated as though it were not there at all. The Judge had no power to try the case at that time—the statute is imperative. There had been no "trial" in law, and sec. 123 did not apply. It was unnecessary to express any opinion as to whether Re Nilick v. Marks (1900), 31 O.R. 677, was rightly decided, as it was inapplicable.

The appeal should be dismissed with costs.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

LENNOX and MASTEN, JJ., also concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 28TH, 1916.

*GEORGE WESTON LIMITED v. BAIRD.

Covenant—Restraint of Trade—Unreasonable Restrictions—Public Interest—Inseparable Provisions—Refusal to Enforce Agreement.

Appeal by the defendant from the judgment of one of the Judges of the County Court of the County of York, in favour of the plaintiffs, in an action for an injunction and damages in respect of the defendant's alleged breach of an agreement or covenant "that he will not during his employment" (as cake-salesman and driver for the plaintiffs), "or within twelve months after its termination, whether by mutual consent or otherwise, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes,

confectionery, pastry, or other bakery products, within the city of Toronto, for himself or for any other person, firm, or company than the" plaintiffs, etc. The judgment awarded the plaintiffs an injunction and $5 damages.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. Bicknell, for the appellant.

E. B. Ryckman, K.C., for the plaintiffs, respondents.

LENNOX, J., read a judgment setting forth the facts. He was of opinion that there was nothing in the fact that the defendant was in the service of the plaintiffs before he signed the agreement. He was making trial trips only; his engagement was conditional upon his proving to be efficient and satisfactory; and the authorities are clearly and uniformly against the defendant in such circumstances—generally even where there has been previous service of a permanent character.

The restraint provided for, having regard to the extent and character of the plaintiffs' business, was reasonable as to time, and the area was not too wide to be embraced in an effective agreement, if properly confined to the actual connection of the defendant with the plaintiffs' business and customers, and limited to what was reasonably necessary to prevent prejudice to the plaintiffs' proprietary rights arising out of the employment. There was legitimate scope for an effective restrictive agreement of a limited character; it could have been framed, entered into, and enforced; but the agreement actually made was not of this character—it attempted too much, was unfair to the defendant, prejudicial to the public interest, and not enforceable in whole or in part. It was an attempt to prevent competition of a character not arising out of, and throughout an area wider than the proposed or actual scope of, the defendant's employment.

The learned Judge considered and quoted from a number of authorities—among others: Halsbury's Laws of England, vol. 27, para. 1097; Skeans v. Hampton (1914), 31 O.L.R. 424; Herbert Morris Limited v. Saxelby, [1916] A.C. 688; Mason v. Provident Clothing and Supply Co., [1913] A.C. 724.

The paramount consideration is always the public interest. Subject to this consideration, the recognised aim is freedom of trade and freedom of contract.

The provisions of the contract were not distinctly severable; and it was not a case in which some of the restrictions should be enforced and others disregarded.

It was not enough to say that the defendant could seek employment in Montreal or Ottawa or Hamilton. Subject to certain restrictions, he had the right to live and labour in Toronto, and the people of Toronto had the right to the gain resulting from industry and legitimate competition.

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

RIDDELL and MASTEN, JJ., concurred.

MEREDITH, C.J.C.P., was of opinion, for reasons stated in writing, that the restraint was not a reasonable one, and was obtained in such circumstances that it ought not to be enforced. The case was plainly not one in which the reasonable and unreasonable parts of a contract are separable: see Allen Manufacturing Co. v. Murphy (1911), 23 O.L.R. 467.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 28TH, 1916.

RE SLATER AND CITY OF OTTAWA.

Municipal Corporations—Expropriation of Land—Compensation—Method of Estimating—Evidence—Market Price—Fair Selling Value—Scheme of Subdivision and Sale—Wrong Basis for Award—Appeal—Reference back to Arbitrator—Costs.

Appeal by the Corporation of the City of Ottawa, contestants, from an award of the Official Arbitrator for the city, in favour of the claimants, upon an arbitration to ascertain the compensation to be paid by the city corporation in respect of two blocks of land of the claimants taken for the purposes of a drainage system. The arbitrator awarded the claimants $10,950 in respect of one block of land and $10,050 in respect of the other.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

F. B. Proctor, for the appellants.

R. G. Code, K.C., for the claimants, respondents,.

The judgment of the Court was read by MEREDITH, C.J.C.P. He said that he could not think that the Official Arbitrator was

right in the method adopted by him in estimating the compensation; and, besides, he had evidently overlooked a very important consideration in estimating the compensation upon that method.

The arbitrator took as the criterion the price of a single lot sold in a different locality; then made an imaginary subdivision of the lands in question into small lots, and an imaginary sale of all such lots to workmen at one-half the price of his standard; and then made a deduction of 25 per cent. from the imaginary total purchase-price of all these imaginary lots, for "slowness with which the lots would be disposed of, increased taxes to be paid during the sales, interest which would not be obtained during the sales" and "commission on the sales and other incidental expenses."

Whilst such a method may be taken into consideration in ascertaining the fair value of the lands taken, it is but evidence, and at best evidence of a most uncertain character. The market price, if there be such a price, is generally the best evidence, though not necessarily a conclusive test. Where there is a market price, all such things as are contained in the Official Arbitrator's precarious method go more or less to make up such price. Evidence of the fair selling value of property is almost always available and should be had; and, having regard to the whole evidence, a reasonable purchase-price can generally, and should be, found and given effect to; the arbitrator here adopted but one of the means, and perhaps the most uncertain one, of finding the true value; and a finding so reached ought not to stand. The prospective subdivision, as shewn by subsequent events, was not feasible, and was not a proper means of arriving at the actual value.

Much evidence shewed that it was practically impossible to have sewerage by gravitation for these lands; and so they never could be available for homes for workmen or others; and, if that be so, the arbitrator's method of ascertaining the value was altogether wrong, not useful for any proper purpose.

The appeal should be allowed, and the matter referred back to the arbitrator to be dealt with upon proper principles; no order as to costs of the appeal.

SECOND DIVISIONAL COURT. JUNE 28TH, 1916

RE BROWN AND CITY OF OTTAWA,

Municipal Corporations — Expropriation of Land — Award— Method of Estimating Compensation—Reinstatement Plan— Value of Land—Value of Building Partly on Strip Taken.

Appeal by the claimant from an award of the Official Arbitrator for the City of Ottawa upon an arbitration to ascertain the compensation to be paid to the appellant in respect of a strip of his land taken by the city corporation for the purpose of widening a street. The amount awarded, which the appellant sought to increase, was $8,596.25.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

L. A. Smith, for the appellant.

F. B. Proctor, for the contestants, respondents.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that upon the argument objection was made by Mr. Smith to what was called the reinstatement method; but really little, if anything, turned upon the method in this case, for, by whatsoever name it might be called, the appellant had been allowed quite a full price for all that was taken from him; and, although the arbitrator proposed to follow the reinstatement method, he really quite departed from it in allowing the full value of the building, instead of the cost and loss which a removal of it inwards from the widened highway would have entailed.

Regard should be had to any reasonable desire of the land-owner to retain his property as nearly as can be in a like state to that which it had before the taking of part of it: he ought not to be improved out of his property, as the saying is in mortgage cases. But that regard seemed to have been had in this case: and it was to be remembered that, whatever might be done, the land-owner was very likely to say that he would have preferred the other way, if for any reason he was not satisfied with the award.

This case became a very simple one because land lying inward from the appellant's property was in the market at a fixed price; so that, by acquiring as much of it as had been taken from the appellant, he would be left with a corner-lot of just the same

dimensions as before, and bettered by the widening of the highway. Though that method of ascertaining compensation might be called a reinstatement method, it none the less proved the actual value of the strip taken. Therefore, the amount awarded for the land taken was right, having been put at the price for which in effect it was purchasable.

The appellant was allowed the whole value of the wooden building partly upon the land taken—the appellant preferring to be paid for it rather than paid for moving it back and for other losses, in rents or otherwise, owing to the removal: see Gibbon v. Paddington Vestry, [1900] 2 Ch. 794; and Beyfus v. Westminster Corporation (1914), 84 L.J. Ch. 838.

The other two items making up the amount awarded were not objected to; plainly the appellant could have no objection to them; and the respondents had not seen fit to appeal against them; so they must stand.

It was suggested that the building, that is, the old material in the wooden building, which must be taken down, should go to the appellant, who could make some good use of it, whilst the respondents could only use it for an insignificant amount; and the appellant would have been content if this had been done; but the respondents had refused to accede to that suggestion, which seemed a reasonable one.

Appeal dismissed: but, under all the circumstances, without costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JUNE 26TH, 1916.

SPINK v. SILL.

Appeal—Motion for Leave to Appeal from Order of Judge in Chambers—Substituted Service of Writ of Summons—Foreigner Resident abroad—Presence in Ontario—Evidence.

Motion by the defendant Sill for leave to appeal to a Divisional Court from an order of BOYD, C., in Chambers, dismissing an appeal from an order of the Master in Chambers refusing to set aside the writ of summons and service thereof upon the applicant.

A. C. McMaster, for the applicant.
Grayson Smith, for the plaintiff.

MIDDLETON, J., in a written opinion, said that the defendant Sill was frequently to be found in the Toronto Club; but, when service of the writ of summons upon him was attempted, he could not be served; and an order for substituted service was made, allowing the writ to be served upon a resident of Toronto for the defendant Sill. Sill moved to set aside the service as a nullity; it was said that he was a foreigner, and was served with the writ, instead of notice of the writ.

This missed the whole point; for, if Sill was, at the time of service, in Ontario, then service on him of a writ for service in Ontario was good.

The cases shew that the service of a writ in Ontario substitutionally, when the defendant is at the time out of Ontario, is not regular, and possibly is a nullity: Hewitson v. Fabre (1888), 21 Q.B.D. 6; Kemp v. Necchi (1913), 134 L.T. Jo. 454; cf. Fry v. Moore (1889), 23 Q.B.D. 395; but in the case in hand the defendant, at most, had shewn that he was a United States citizen and usually resided at Detroit. He might, for all that was shewn, have been in Ontario.

The solicitor for the defendant Sill in his affidavit said that he was informed that on the 3rd June Sill "was at and residing at Detroit." This was not enough, for two reasons. The deponent swore on information only and did not state his belief. Secondly, as Detroit is just across the river from Ontario, the fact that the defendant Sill was at Detroit on the 3rd did not prove that he may not have been within Ontario on the same day.

All this was very narrow and technical, but the motion was itself based upon the merest technicality, and was devoid of any semblance of merit; so any weapon might be fairly employed against it.

There should not be the delay and expense of an appeal to discuss these questions further.

Motion refused; costs to the plaintiff in any event. An appearance should be entered in a week, or judgment for default.

MIDDLETON, J. JUNE 26TH, 1916.

RE TANNER.

Will—Construction—"Homestead Property"—Inclusion of small Parcel Separated by Road from Farm.

Motion by the Inspector of Prisons and Public Charities, representing the estate of the devisee Roland, a lunatic, for an

order determining a question as to the property falling under the devise, which was contained in the will of one Tanner, deceased.

H. E. Rose, K.C., and K. W. Wright, for the applicant.
L. C. Raymond, for the executors.
J. M. Ferguson, for the children of William and George Tanner.
E. C. Cattanach, for the Official Guardian, representing the infants.

MIDDLETON, J., in a written opinion, said that the testator gave Roland his "homestead property." At his death the testator owned 22½ acres, constituting a farm, with residence and outbuildings. Across the road from it, he had one-fifth of an acre, on which was a small house, which, according to the uncontradicted evidence, was for twenty years used as a dwelling-place for the "hired man" employed from time to time to help work the larger parcel.

The small parcel, the learned Judge held, passed to Roland as part of the property given him: In re Willis, [1911] 2 Ch. 563. Bigelow v. Bigelow (1872), 19 Gr. 549, was distinguishable upon the facts.

It is always a question of the intention of the testator as applied to the facts—and, as the testator here had acquired and used this parcel as a part of his homestead, it was more probable that he meant Roland, to whom the homestead was given, to take it in its entirety than dismembered; and this was aided by the somewhat unusual expression "homestead property."

Declaration accordingly; costs of all parties out of the residuary estate.

BOYD, C. JUNE 26TH, 1916.

*DIEBEL v. STRATFORD IMPROVEMENT CO.

Company — Powers of — Contract — Guaranty—"Advances"—Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 23(1) (k)—6 Geo. V. ch. 35, sec. 6, Adding sec. 210 to Companies Act.

Appeal by the plaintiff from the report of BARRON, Co.C.J. of Perth, to whom the action was referred under sec. 65 of the Judicature Act. The action was upon a sealed guaranty.

The appeal was heard in the Weekly Court at Toronto.

R. S. Robertson, for the plaintiff.
F. H. Thompson, K.C., for the defendant company.
R. T. Harding, for the defendant Johnston.

BOYD, C., set out the facts in a written opinion. He referred first to an agreement of the 5th February, 1914, between one Tolton and the plaintiff, that the latter would erect a factory on a tract of land owned by the defendant company, for $12,500. This agreement was superseded by the agreement now sued upon, dated the 19th October, 1914.

Tolton contracted for putting up the building as one representing a concern promoted by the president of the defendant company. This concern, the "Stratford Industrial Sites Limited," was intended to be utilised in the sale of the lots laid out on the large tract—but it came to nothing. At the time of the first agreement, Tolton held an option from the company for the purchase of some of the land of the defendant company, including the factory-site.

By the first agreement, Tolton engaged himself to advance money to the plaintiff as the building progressed; but he was not able to do so; the company in fact made advances; and by the agreement of the 19th October, 1914, reciting that advances had been made by the company to the plaintiff, the company guaranteed the undertaking of Tolton to advance further sums.

The Chancellor was inclined to think that Tolton was not in substance a party interested—he was merely the agent of the company, the real and substantial contractor with the plaintiff.

But, assuming that the contract was strictly one of guaranty, the question raised was, whether it transcended the powers possessed by the company. By sec. 208 of the Companies Act, R.S.O. 1914 ch. 178, the language of that Act is admittedly to be read into the charter of the company, though subsequently enacted; and, by sec. 23(1) (*k*), "a company shall possess as incidental and ancillary to the powers set out in the letters patents . . . power to . . lend money to customers and others having dealings with the company and guarantee the performance of contracts by any such persons." Tolton was a person having dealings with the company; and the dealings and negotiations and advancing of money were all centred on one transaction—the benefiting of the company and the enhancement of the value of its property by facilitating the disposal of it profitably as building lots. Or, regarding Tolton as an option-holder, the money advanced would be a loan to Tolton. As to the meaning of "advance," reference was made to the Oxford Dictionary, sub voce, and to Rose v. Hickey (1878), 3 A.R. 309, 329.

There was apparently no defence upon the merits; the contention of the defendant company, to which the Referee had given effect, was, that the guaranty was beyond its powers. The advances were either loans to Tolton or payments to the plaintiff; and, in either aspect, the defence of ultra vires was not to be regarded as fatal to recovery on the sealed instrument sued upon for the amount found due by the report. The statute should be liberally construed to carry out the legislative intent, which was also the intention of the parties, that the engagement of the company to pay should be a valid one.

The findings of fact of the Referee were in favour of the plaintiff, and the company should have leave to appeal from them, the decision of the Referee upon the statute being reversed.

Two minor items of $125 and $100, not passed upon by the Referee, should be allowed to the plaintiff in the account.

The Chancellor referred also to the last amendment of the Companies Act (6 Geo. V. ch. 35, sec. 6), adding sec. 210 to the Act. This greatly extends the powers of companies so that, unless otherwise expressly declared, they have from their creation the general capacity of corporations created by charter—an unrestricted corporate capacity: Palmer's Company Law, 8th ed., p. 3.

Appeal allowed with costs, and judgment to be entered for the plaintiff, with costs of action and reference, subject to the appeal for which leave is given.

SUTHERLAND, J. JUNE 26TH, 1916.

RE PINE RIVER LIGHT AND POWER CO. LIMITED AND TOWN OF ORANGEVILLE.

Vendor and Purchaser—Agreement for Sale of Land—Application under Vendors and Purchasers Act, R.S.O. 1914 ch. 122, sec. 4—Cloud on Title—Mortgage—Validity—Scope of Application under Act.

An application by the Municipal Corporation of the Town of Orangeville, purchasers, under the Vendors and Purchasers Act, R.S.O. 1914 ch. 122, sec. 4, for an order declaring the validity of an objection to title made by the purchasers upon a contract for the sale to them by the company of their electrical power distribution system, including lands, plant, etc., in the town of Orangeville.

The motion was heard in the Weekly Court at Toronto.
Grayson Smith, for the purchasers.
F. H. Kilbourn, for the vendors.
R. McKay, K.C., for the Bank of Hamilton.

SUTHERLAND, J., in a written opinion, after setting out the facts, said that it was contended on behalf of the purchasers that a mortgage to the Bank of Hamilton was a cloud on the title which should be removed, and, on behalf of the Bank of Hamilton and the guarantors of the mortgage, that it had not been shewn that the bank or the guarantors had notice of the sale proceedings so as to enable them to protect their interests upon the sale.

It was contended, on the other hand, by the vendors, that the remedy, if any, on the part of the bank or their guarantors was solely against the proceeds of the sale in the hands of the receiver, and that, so far as the vendors were concerned, they obtained through their vendor, one Kilbourn, a good title.

It was also pointed out that, as no by-law authorising the mortgage to the Bank of Hamilton, confirmed by supplementary letters patent, had been shewn to have been passed, the mortgage to the Bank of Hamilton was invalid and did not form any cloud upon the title.

It was not apparent upon the face of the material filed on the application, the learned Judge said, whether the Official Referee, upon the reference in an action of Pickering v. Dufferin Light and Power Co., made any inquiry as to incumbrances subsequent to the mortgage under which the sale was made, nor that the bank or the guarantors were served with copies of the advertisement or notice of the sale. It seemed highly probable that they were aware of the contemplated sale.

Neither the bank nor the guarantors on this motion had shewn how the mortgage to the bank could validly be made, in view of the first mortgage to secure bonds to the extent of $110,000. The procedure under the Vendors and Purchasers Act is a summary one, substituted for an action for specific performance, where the contract is admitted, and the question is only one as to title: In re Nichols' and Von Joel's Contract, [1910] 1 Ch. 43; Fry on Specific Performance, 5th ed. (Can. notes), p. 435; Re Jones and Cumming (1912), 3 O.W.N. 672. Reference also to Cameron v. Hull (1913), 4 O.W.N. 581, 583.

On the material here and on an application under the Act, the Court ought not to be asked to determine that the mortgage to the bank is an invalid one. On the face of the title it appears as a cloud which the vendors should ordinarily be called upon to

remove. The learned Judge declined to make an order as asked, that it did not form an incumbrance or cloud upon the title, and left the parties, if so advised, to have that question determined in an action.

The purchasers should have the costs of the present motion; no other order as to costs.

KELLY, J. JUNE 28TH, 1916.

SOVEREIGN BANK OF CANADA v. McINTOSH.

Assignments and Preferences—Conveyance of Land—Mortgage—Action by Judgment Creditors to Set aside—Fraudulent Preference—Intent—Judgment Setting aside Conveyance—Interest Passing by Mortgage of no Value—Action Dismissed as to Mortgage—Costs.

Action by judgment creditors of the defendants Mary Ann McIntosh and Margaret McIntosh to set aside a conveyance made by them on the 26th December, 1913, of certain lands, to their brother and co-defendant, Anselm McIntosh, and to set aside a mortgage of the same date made by the defendant Margaret McIntosh to the defendant Anselm McIntosh.

The action was tried without a jury at Toronto.

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

C. H. Cline, for the defendants.

KELLY, J., read a judgment in which he set out the facts. The defendants Mary Ann and Margaret had each a one-third interest in the lands conveyed, acquired under the will of their mother, who died in 1909; and the defendants set up that, from 1887 until the mother's death, Anselm made frequent advances to her or for her benefit, and after her death paid her funeral expenses and advanced money for repairs, taxes, etc.; that the mother had said that she would like to see him repaid, and that the sisters had promised to repay him; but there was nothing in writing to show that any such bargain was made.

Upon the evidence, the learned Judge found that there was no present consideration for the deed or the mortgage; and that, if advances were made by Anselm, such as were set up, they were not made on any understanding or agreement, at the time

of the advances, that the deed or mortgage would be given, or that the advances would be otherwise secured. As against the plaintiffs, the deed was voluntary, and was made with intent to secure the property against the pending claim of the plaintiffs and become a fraudulent preference in favour of the grantee, and so prejudicially affected the plaintiffs. That was sufficient ground for declaring it void as against the plaintiffs.

The mortgage, though also made with the intent of giving the mortgagee a preferential security, was in a different position. There was no real value in the mortgagor's equity of redemption which she mortgaged to her brother; there was really nothing to be taken from the plaintiffs or any other creditor of the mortgagor, and so they were not thereby deprived of any benefit, and the Court should not interfere. See Ithaca Gas-Light Co. v. Treman (1883), 93 N.Y. 660.

Judgment setting aside the conveyance, and dismissing the action as to the mortgage. The plaintiffs' costs of the action, to the extent of two-thirds of the taxable amount, except the costs occasioned by the reopening of the case for further evidence, should be paid by the defendants. The defendants' costs occasioned by the reopening should be paid by the plaintiffs. The amounts should be set off pro tanto.

KELLY, J. JUNE 28TH, 1916.

*HIRSHMAN v. BEAL.

Motor Vehicles Act—Liability of Owner of Vehicle for Negligence of Person Driving Vehicle without Authority—Person in Employment of Owner—Foreman of Repair-shop—Use of Vehicle for Purposes of his own—"Stolen it from the Owner"—R.S.O. 1914 ch. 207, sec. 19—Amendment by 4 Geo. V. ch. 36, sec. 3.

Action for damages for injuries sustained by the plaintiff, a boy of five years, suing by his next friend, by coming into contact with the defendant's automobile, in a public highway in Toronto, on the 22nd September, 1915.

The vehicle, at the time, was driven by one Sheppard, who was employed as foreman by Andersons Limited, to whose repair-shop the defendant brought the vehicle to be repaired. Sheppard repaired it, and then took it out to test it. But, having tested it, he did not return it to the repair-shop; he used it for his own purposes, driving about the city, and, while so driving, injured the plaintiff, who alleged negligence.

The action was tried by KELLY, J., and a jury, at Toronto.

E. F. Singer, for the plaintiff.

T. N. Phelan, for the defendant.

KELLY, J., in a written opinion, after stating the facts, said that the jury had made findings in favour of the plaintiff, based upon the negligence of Sheppard; and that judgment had been reserved upon a motion for a nonsuit.

The learned Judge had no doubt that Sheppard was not in the employment of the defendant, in the sense intended by the Motor Vehicles Act, R.S.O. 1914 ch. 207.

Looking at the circumstances in which Sheppard was using the car when the plaintiff was injured, the vehicle must be taken to have been "stolen" within the meaning of that term as used in the amendment made to sec. 19 of the Motor Vehicles Act by 4 Geo. V. ch. 36, sec. 3.

Sheppard had been convicted in the Police Court for theft of the vehicle; but it was not necessary to rely upon that in determining that there was a theft such as is referred to in the amending Act.

It could not be successfully contended that one in Sheppard's position, who, secretly and for his own purposes, and without the authority, knowledge, or consent of the owner, appropriates an article and uses it for his own benefit, knowing that the owner would not have given authority for its use, had not the animus furandi necessary to constitute the act a theft such as intended by the statute. See the amendment made to the Criminal Code by 9 & 10 Edw. VII. ch. 11.

Downs v. Fisher (1915), 33 O.L.R. 504, distinguished.

Action dismissed with costs.

HODGINS, J.A. JUNE 30TH, 1916.

*BLAND v. BROWN.

Appeal—Stay of Execution of Judgment—Rules 496, 498—Possession of Land—Breach of Injunction—Contempt of Court—Motion to Commit.

Motion by the plaintiffs to commit the defendant for breach of an injunction contained in the judgment of CLUTE, J., at the trial.

The judgment directed the immediate delivery of possession

by the defendant to the plaintiffs of the lands in question, and restrained the defendant until after the 1st April, 1918, from trespassing upon, or interfering with the plaintiffs' possession of, the said lands.

The plaintiffs alleged that the defendant had retained possession of the lands and occupied the dwelling-house and barns thereon, and continued to do so, and refused to give the plaintiffs possession.

The trial Judge made this note of his directions for judgment: "Judgment for plaintiffs for possession and injunction and costs —to be allowed to take immediate possession to put in crop. Defendant to be allowed to occupy the house and barn . . . for 15 days, or until appeal, if any, may be had."

The defendant had launched an appeal, which had been set down for hearing.

The motion was heard in the Weekly Court at Toronto.

G. H. Kilmer, K.C., for the plaintiffs.

William Proudfoot, K.C., for the defendant.

HODGINS, J.A., in a written opinion, said that under Rule 496 the effect of the appeal being set down was not to stay the operation of the injunction—a stay could, however, be "ordered by the Judge appealed from or by a Judge of a Divisional Court." (Mr. Holmested's Judicature Act gives the Rule as being, "ordered by the Judge of a Divisional Court:" p. 1102.)

The trial Judge's note meant that he stayed the judgment only for 15 days or until an appeal should be lodged; an appeal being lodged, the stay was at an end, and the Rules governed the situation.

The effect of Rules 496 and 498 is to stay all further proceedings in the action other than the issue of the judgment and the taxation of costs.

Hence the plaintiff could not enforce the delivery of possession ordered by the judgment by the issue of a writ of possession under Rules 540 and 541; and the refusal of the defendant, on the 16th June, 1916, to give possession, was justified; or, if only justified by the setting down of the appeal, no contempt punishable by attachment should now be adjudged.

There was no stay of the injunction; but, if the plaintiffs could not, by reason of the stay, enforce their judgment for immediate possession, and were not in actual possession, the defendant could not be guilty of a breach of the injunction, which pro-

ceeded upon the implication that the plaintiffs were entitled to immediate possession.

Semble, that the plaintiffs' proper course would be to apply under Rule 496 to a Judge of a Divisional Court to remove the stay, on proper terms.

Motion refused, with costs to the defendant in the appeal in any event.

HODGINS, J.A. JUNE 30TH, 1916.

RE BELL AND SMITH.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Power of Sale—Notice of Exercise—Signature of Mortgagee—Requirements of Notice—Sale by Mortgagee to Husband—Subsequent Sale by Husband at Advanced Price.

Motion by the purchaser, under the Vendors and Purchasers Act, for an order determining the validity of objections to the vendor's title to land, the subject of an agreement of sale and purchase.

The motion was heard in the Weekly Court at Toronto.

D. Urquhart, for the purchaser.

G. N. Shaver, for the vendor.

HODGINS, J.A., in a written opinion, said that the objection made as to the notice of exercising a power of sale was unsubstantial, as it was not disputed that the name of the mortgagee was appended in typewriting as and for a signature at the bottom of the notice, and with her authority. The requirements stated in Ansell v. Bradley (1916), ante 257, were fully met here—(1) the identity of the person giving the notice appears in the notice itself, and (2) the notice is a complete document.

As to the previous sale made in 1910 by Mrs. Cornwell to her husband for $500 over and above the first mortgage, and his subsequent sale at an advance of $1,000 in November, 1910, the two circumstances combined did not raise any presumption of collusion or undervalue.

The mortgagee was entitled to find a purchaser, if she did it fairly; and her husband did not, in the absence of any suggestion to the contrary, come within the prohibited classes mentioned

in Farrar v. Farrar's Limited (1888), 40 Ch.D. 395. In 1910, the profit of $1,000 inside six months might not have seemed anything very extraordinary. This objection should be overruled.

The costs should follow the agreement of the parties.

ANNING v. ANNING—SUTHERLAND, J.—JUNE 27.

Husband and Wife—Conveyance of Land by Husband to Wife—Oral Agreement that Ownership to Remain in Husband—Death of Wife—Claim of Husband—Evidence—Statute of Frauds.]—An issue to determine the ownership of a house and lot in the city of Toronto, conveyed to the plaintiff Charles Henry Anning in 1900, and conveyed by him in 1901 to his wife, who died intestate in 1906. At the time of the death, the property stood in the name of the wife. Some of her children launched an application for partition or sale thereof, when a claim was made by the plaintiff to the sole ownership, under an arrangement (not in writing) made with his wife at the time he conveyed to her. The issue was then directed, some of the children being made defendants, and the father and others of the children the plaintiffs therein. The issue was tried without a jury at Toronto. SUTHERLAND, J., after setting out the facts in a written opinion, said that on the unsupported evidence of a surviving spouse a gift to the deceased spouse might be rebutted: Green v. Carlill (1877), 4 Ch. D. 882; but the evidence must be clear and unequivocal: In re Whittaker (1882), 21 Ch. D. 657; Eversley on Domestic Relations, 3rd ed., p. 301. There was here no written acknowledgment on the part of the wife, and the Statute of Frauds would be a bar to the husband's claim unless it could be established that its operation would be a fraud on him: In re Duke of Marlborough, [1894] 2 Ch. 133; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; McLeod v. Lawson (1906), 8 O.W.R. 213; Barton v. McMillan (1892), 20 S.C.R. 403; Windsor Auto Sales Agency v. Martin (1915), 33 O.L.R. 354. Upon all the evidence, the learned Judge said, he had come to the conclusion that the issue must be found adversely to the claim of the husband—the property must be held to belong to the estate of the wife. The plaintiffs in the issue to pay the defendants' costs thereof. R. McKay, K.C., for the plaintiffs. E. P. Brown, for the defendants.

COUNTY COURT OF THE COUNTY OF MIDDLESEX.

MACBETH, Co. C.J. JUNE 22ND, 1916.

RE MACMILLAN CALDER & CO. AND CITY OF LONDON.

Assessment and Taxes—Business Assessment Made pursuant to By-law Passed in 1915—Assessment for 1916 Made in 1915—Business Discontinued Early in 1916—Remission of Taxes for Proportionate Part of Year—Assessment Act, R.S.O. 1914 ch. 195, secs. 56, 118.

Appeal by MacMillan Calder & Co. from a decision of the Court of Revision for the City of London.

George S. Gibbons, for the appellants.

T. G. Meredith, K.C., for the city corporation.

MACBETH, Co. C.J., said that on the 9th July, 1915, the appellants, who were then wholesale merchants, were entered upon an assessment roll of the City of London for a business assessment of $13,500. The assessment was made in pursuance of a by-law passed under sec. 56 of the Assessment Act, R.S.O. 1914 ch. 195, between the 1st July and the 30th September, 1915. The roll, was returned to the city clerk on the 12th September, 1915: the usual Courts of Revision were held, and the roll finally revised and concluded in the latter part of December, 1915.

The assessment was clearly made for the purposes of the year 1916: City of Berlin v. Anderson (1915), 7 O.W.N. 790. It was not made for the year 1915, for in that year the city council adopted an assessment made in the autumn of 1914 as the assessment for 1915, and the taxes for the year 1915 were fixed and levied on the assessment so made and adopted.

The council of 1916 was not obliged to adopt as the assessment for that year the assessment taken in the summer and autumn of the previous year: Re Dwyer and Town of Port Arthur (1891), 21 O.R. 175—but it was adopted by by-law on the 10th January, 1916, and it was taken for the sole purpose of being so adopted.

It followed that the appellants' assessment for business in July, 1915, was made for the year 1916.

In January, 1916, the appellants wholly discontinued and wound up their business, and thereafter applied to the Court of Revision, under sec. 118, for remission or reduction of taxes levied or to be levied upon their business assessment for the year 1916.

Their application was refused, and from that refusal this appeal was taken.

The city council had not passed any by-law under sec. 118, but nevertheless the appellants' application was to be considered and dealt with on its merits: Re Norris (1897), 28 O.R. 636.

The appellants were entitled to relief as claimed. They had been assessed for business for the year 1916: they had not carried on business for the whole year, but only for one month of that year; and it was not disputed that the business in respect of which they were so assessed was wholly discontinued and ceased to exist in the first month of the current year.

The appeal was therefore allowed, and it was ordered that eleven-twelfths of the taxes levied in 1916 on the appellants' business assessment be remitted.

CORRECTION.

In GRAND TRUNK R.W. Co. v. SARNIA STREET R.W. Co., *ante* 384, at p. 385, line 5, delete "not."