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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 3RD, 1916.

*GORDON v. GORDON.

Husband and Wife—Separation Deed—Construction—Allowance to Wife—Cesser—Act Entitling Husband to Divorce—Adultery.

Appeal by the defendant from the judgment of DENTON, Jun. Co.C.J., in an action in the County Court of the County of York, in favour of the plaintiff for the recovery of money payable under a separation deed, the plaintiff being the wife of the defendant.

The only defence set up or relied upon was, that the plaintiff was guilty of adultery after the deed was made and before the money sued for became due. For the purposes of the action, such guilt was admitted.

The deed provided that "in case the said marriage should at any time hereafter be dissolved upon the petition of" the husband, "or in case" the wife "shall be guilty of any act which would entitle" the husband "to obtain a dissolution of the said marriage, then and in such case the said annual payment and allowance shall cease and determine and these presents shall become void."

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

George Wilkie, for the appellant.

J. E. Lawson, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering judgment at the conclusion of the argument, said that the Court was asked to hold that the

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

words "shall be guilty of any act which would entitle" the husband "to obtain a dissolution of the said marriage" meant no more than "shall commit adultery;" that the parties must have meant that the deed was to become inoperative, in so far as it was beneficial to the plaintiff, if she did not remain chaste.

If adultery was what was meant, the well-known dum casta clause which commonly forms part of separation deeds and of divorce decrees should have been inserted. See Ollier *v.* Ollier, [1914] P. 240.

It is idle to contend that adultery "entitles" husband or wife to a dissolution of the marriage in this Province. Nothing entitles any one to such a divorce. A new law must be made before any such divorce can be had, and there is just as much legislative power to make such a law for any other cause, or for no cause, as to make it for adultery.

To sustain the defence, it was incumbent on the defendant to prove that he was "entitled to a dissolution of the marriage," and that he had not done.

It was said that, as the deed provided for two cases, the one dissolution of marriage and the other entitled to dissolution of marriage, the Court was bound to give some effectual meaning to the latter case different from that attributable to the former—and no other reasonable meaning could be attributed to the later words than "or if the wife shall commit adultery." But the later words plainly carry a meaning, and can have an effect different from the earlier, as, for instance if the parties should become domiciled in a country the laws of which would entitle him to a dissolution of the marriage on the ground of adultery or on any other ground.

MASTEN, J., agreed in the result. He pointed out that the later clause was not meaningless. Assuming that an application were made for a divorce, and that Parliament declared the applicant entitled, the ascertainment that he was so entitled would relate back to the time when he became so entitled.

RIDDELL and LENNOX, JJ., concurred.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. NOVEMBER 6TH, 1916.

BENDER v. TORONTO GENERAL TRUSTS CORPORATION.

Evidence—Action against Executors of Deceased Mortgagee—Payment Made on Account of Mortgage—Corroboration—Finding of Trial Judge—Appeal—Admission of Additional Evidence —Evidence Act, R.S.O. 1914 ch. 76, sec. 12—Costs.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., ante 9.

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

D. L. McCarthy, K.C., and D. B. White, for the appellants.

A. C. Kingstone, for the defendants, respondents.

Additional evidence was allowed to be put in upon the appeal.

The judgment of the Court was delivered at the conclusion of the hearing by MEREDITH, C.J.O., who said that he was satisfied from communication he had with the Chief Justice of the King's Bench that, if the additional evidence which had come to hand since the trial had been before him, he would have come to a different conclusion, and would have held that there was corroboration of the testimony of the appellant Hiram Bender sufficient to satisfy the statute. All the members of this Court agreed in that view.

There were but three ways in which the note given by the appellant for $1,000 could be accounted for: it was a gift, or it was for an advance made by the deceased Lowell, or, as the appellant contended, a payment on account of the mortgage.

The bank-account had been produced, as well as the ledger, and they shewed that Lowell, at the time the note was given, was "hard up," and that his account was overdrawn.

He was in this position when, as the appellant testified, Lowell came to him and asked him for a payment of $1,000 on account of the mortgage. The appellant said that Lowell told him that his bank was pressing him for payment; and, in reply to Lowell's request, the appellant said that he could not let him have the money then, but that he had money coming in in three months, and that he would give him a note. A promissory note was accordingly given, and the books of the bank shewed that it was discounted.

In these circumstances, there was sufficient corroboration of the testimony of the appellant.

Having regard to all the circumstances, there should be no costs of the litigation to either party. The litigation was necessary on account of the failure of the appellant to obtain a receipt; although he was not strictly entitled to it, yet he would have received it had he asked for it.

This was not the case of a living person disputing the fact of a payment having been made, and the Court deciding against him. Lowell being dead, there was simply the appellant's side of the story; and a suit, therefore, had become necessary.

The only question was whether, in view of the position taken by the executors, the respondents, their costs ought not to be paid by the appellant; but upon the whole the proper disposition of the case seemed to be that there should be no costs of the case to either party.

FIRST DIVISIONAL COURT. NOVEMBER 7TH, 1916.

HARGRAVE v. HARGRAVE.

Husband and Wife—Alimony—Failure of Defendant to Deliver Statement of Defence—Motion for Judgment on Statement of Claim—Rule 354—Admission of Facts—Quantum of Alimony—Reference—Appeal—Costs.

Appeal by the defendant from the judgment of RIDDELL, J., ante 54.

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

G. R. Roach, for the appellant.

Grayson Smith, for the plaintiff, respondent.

THE COURT varied the judgment by substituting a declaration that the plaintiff is entitled to alimony and directing a reference to the Master in Ordinary to fix the amount of permanent alimony, which is to date from the issue of the writ of summons, on condition that the appellant, within two weeks, pays the costs of the motion for judgment and of this appeal; in default, the appeal is to be dismissed with costs. The alimony fixed by RIDDELL, J., is to stand pending the reference; and, if a lesser sum is found to be proper to be allowed, that sum is to be substituted when the report is confirmed.

FIRST DIVISIONAL COURT. NOVEMBER 8TH, 1916.

*REX v. SINCLAIR.

Criminal Law—Theft—Summary Trial by Police Magistrate under sec. 777 (5) of Criminal Code—Motion to Quash Conviction—Dismissal of—Appeal to Divisional Court—Jurisdiction—Secs. 797 and 1013 of Code.

Appeal by the defendant from the order of CLUTE, J., 36 O.L.R. 510, dismissing the defendant's motion to quash his conviction by the Police Magistrate for the City of Toronto on the 17th March, 1916. The defendant was charged before the magistrate with the theft of $5, was tried summarily under sec. 777 (5) of the Criminal Code, and convicted.

The appeal came on for hearing before MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and RIDDELL, J., when objection was taken by the Court as to jurisdiction to hear the appeal.

J. G. O'Donoghue, for the appellant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.O., read the judgment of the Court. He said that the motion before Clute, J., and the appeal were misconceived, as the summary convictions provisions of the Criminal Code were not applicable to a prosecution under sec. 777 (5). See 8 & 9 Edw. VII. ch. 9. It is only where the trial has taken place before two magistrates that an appeal lies in the same manner as from a summary conviction under Part XV. (sec. 797). The only appeal which lies in a case such as this is that given by sec. 1013 of the Code, which provides that an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under sec. 777, on the trial of any person for an indictable offence, shall lie, upon the application of such person if convicted, to the Court of Appeal, in the cases hereinafter provided for, and in no others.

The appeal must therefore be quashed.

The same conclusion was reached in Regina v. Racine (1900), Q.R. 9 Q.B. 134, 3 Can. Crim. Cas. 446.

FIRST DIVISIONAL COURT. NOVEMBER 8TH, 1916.

RE REX v. SCOTT.

Police Magistrate—Jurisdiction—Motion for Prohibition—Refusal by Judge in Chambers—Appeal to Divisional Court—Proper Remedy—Order Quashing Appeal.

Appeal by the defendant from the order of SUTHERLAND, J., in Chambers, 10 O.W.N. 366, refusing a motion for prohibition to a Police Magistrate.

The appeal came on for hearing before MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and RIDDELL, J., on the 26th September, 1916.

F. H. Thompson, K.C., for the appellant.

J. R. Cartwright, K.C., for the Crown.

THE COURT took exception to the appeal being heard, being of opinion that the remedy of prohibition was not open to the appellant; and that the case was, therefore, not properly before the Court; but directed that it should stand.

On the 8th November, an order quashing the appeal was pronounced.

FIRST DIVISIONAL COURT. NOVEMBER 8TH, 1916.

*OAKLEY v. WEBB.

Nuisance—Noise and Dust from Stone-cutting Yard—Annoyance to Neighbours in City Street—Evidence—Municipal By-law—Area not Exclusively Residential—Character of Neighbourhood—Reasonable Use of Property—Weight of Testimony—Finding of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of BRITTON, J., 10 O.W.N. 339.

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

W. N. Tilley, K.C., for the appellant.

G. H. Watson, K.C., and S. J. Birnbaum, for the defendant, respondent.

The judgment of the Court was read by HODGINS, J.A., who, after stating the facts at length, said that the right of the respondent to carry on his business as a stone-cutter was a legal right, and so was that of the appellant and his family to enjoy their life in reasonable comfort. To enjoin the respondent it was necessary to shew that his right wrongfully invaded that of the appellant; in other words, that his business was so carried on as to amount to a nuisance, and so was an unlawful invasion of the competing right of the appellant.

The character of the neighbourhood is an important element in determining the standard of comfort which may be insisted upon. The block in a city street which contained the works of the respondent and the dwelling-house of the appellant was near a railway yard and was excepted from a city by-law, passed in 1912, which made the lands south and east of it a residential district.

The rule stated by Middleton, J., in Appleby v. Erie Tobacco Co. (1910), 22 O.L.R. 533, 536, and adopted by Sutherland, J., in Beamish v. Glenn (1915), 36 O.L.R. 10, was the proper test to be applied: "An arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances."

Reference also to Ball v. Ray (1873), L.R. 8 Ch. 467, 469; Sanders-Clark v. Grosvenor Mansions Co. Limited, [1900] 2 Ch. 373; Polsue & Alfieri Limited v. Rushmer, [1907] A.C. 121; Gaunt v. Fynney (1872), L.R. 8 Ch. 8.

The question was mainly one of fact; and, though there was evidence from which the learned trial Judge might have arrived at a different result, it was not so certain that he came to a wrong conclusion that the Court ought to reverse his finding. He had to consider not only the evidence as to the noise, but also the character of the neighbourhood, the reasonable use of the respondent's property, and the weight of testimony offered.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. NOVEMBER 8TH, 1916.

*NIAGARA GRAIN AND FEED CO. v. RENO.

Sale of Goods—Representation as to Quality—Warranty—Condition—Breach—Right of Purchaser to Reject notwithstanding Resale—Reasonable Time.

Appeal by the defendant from the judgment of the County Court of the County of York (Coatsworth, Jun. Co.C.J.) in favour of the plaintiff.

Action to recover $225.06, the price paid to the defendant for a car-load of hay, upon the ground that the hay delivered was not according to contract. The judgment was for the amount asked for with interest and costs.

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

F. D. Davis, for the appellant.

Harcourt Ferguson, for the plaintiffs, respondents.

The judgment of the Court was read by MACLAREN, J.A. He stated that the hay was bought by the plaintiffs from the defendant as No. 1 timothy and refused on the ground that it was No. 3, a much inferior article.

The representation that the hay was No. 1 timothy was not a mere warranty in the narrow sense, but a condition, and its breach gave the plaintiffs the right to reject in case that right was exercised within a reasonable time: Pollock on Contracts, 8th ed., p. 563; Halsbury's Laws of England, vol. 25, p. 154 and note (*p*); Wallis Son & Wells v. Pratt & Haynes, [1910] 2 K.B. 1003, [1911] A.C. 394.

The fact that the plaintiffs had resold the hay did not preclude them from rejecting. The defendant was aware that they were buying to sell again; and, if the resale, inspection, and rejection took place within a reasonable time, the plaintiffs were entitled to exercise this right. The hay arrived in Toronto on the 24th December; Christmas-day and a Sunday immediately followed; the car was moved to North Toronto and the hay inspected on the 30th; and the next day the plaintiffs wired the defendant the result of the inspection and their rejection. In the circumstances, this was within a reasonable time.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. NOVEMBER 10TH, 1916.

RE CANADIAN MINERAL RUBBER CO. LIMITED.

Contract—Winding-up of Contracting Company—Moneys Payable to Company in Respect of Contract—Assignment to Bank—Claims of Wage-earners and Material-men—Priority—Construction of Contract.

Appeal by the Canadian Bank of Commerce from an order of SUTHERLAND, J., in the Weekly Court, dismissing an appeal from a decision of the Master in Ordinary in a winding-up matter: 10 O.W.N. 456.

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

Glyn Osler for the appellants.

W. B. Raymond, for the respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. NOVEMBER 10TH, 1916.

THORNE v. HODGSON.

Contract—Timber—Delivery not Made as Agreed—Deduction from Price—Quality of Timber—Inferiority — Counterclaim—Damages—Extinction of Plaintiff's Claim—Dismissal of Action—Costs—Appeal.

Appeal by the plaintiff from the judgment of CLUTE,, J., 10 O.W.N. 461, dismissing the action without costs.

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

A. R. Hassard, for the appellant.

No one appeared for the defendant, respondent.

THE COURT dismissed the appeal without costs.

MASTEN, J., IN CHAMBERS. NOVEMBER 11TH, 1916.

LOVELAND v. SALE.

Appeal—Supreme Court of Canada—Leave to Appeal after Expiry of Time—Supreme Court Act, R.S.C. 1906 ch. 139, secs. 69, 71—Vacation—Supreme Court Rules 9, 119—Excuse for Delay—Reasonable Case for Appeal—Concurrent Findings of Fact of two Tribunals—Special Circumstances—Merits—Refusal of Leave.

Motion by the plaintiff Murphy, under sec. 71 of the Supreme Court Act, R.S.C. 1906 ch. 139, to allow an appeal to the Supreme Court of Canada although not brought within the time prescribed by the Act and Rules relating to such appeals.

The proposed appeal was from the judgment of the Second Divisional Court of the Appellate Division of the 12th May, 1916, noted 10 O.W.N. 238.

I. F. Hellmuth, K.C., for the applicant.
M. K. Cowan, K.C., for the defendants, respondents.

MASTEN, J., in a written judgment, said that sec. 69 of the Supreme Court Act required that every appeal should be brought within 60 days from the pronouncing of the judgment appealed against. The running of the time is not suspended during vacation: News Printing Co. of Toronto v. Macrae (1896), 26 S.C.R. 695. The time within which the security should have been perfected and allowed expired on the 11th July, 1916.

If the appeal had been regularly brought and proceeded with, the time for filing the case would not have expired till the 10th October, 1916 (Rules 9 and 119 of the Supreme Court of Canada); and so no sittings of the Court had been lost.

The excuse for his slip put forward by the applicant was not superlatively satisfactory, but it would suffice if the special circumstances were such as to warrant the granting of the leave.

The crucial question was, whether the applicant had shewn that legal issues involving matters of importance, doubt, and difficulty —questions fairly debatable—would arise on the proposed appeal. If that were shewn, justice would require that leave should be given.

The applicant's quarrel with the existing judgment was founded mainly on two grounds: (1) that as a matter of fact the sale by

Parker to Little under the mortgage was not a real sale, but that the defendant Sale was the real purchaser; and (2) that as a matter of law where a trustee (Sale) purchases the trust property in such circumstances he takes it subject to the original trust, whether he acquires it secretly or openly.

The judgment of the trial Judge was reversed by the Divisional Court, a circumstance which favoured the application; but the trial Judge and the Divisional Court concurred in their findings of two facts: (1) that fraud was distinctly charged and negatived; and (2) that the sale to Little was a real sale. To succeed in the Supreme Court of Canada, the applicant must upset these findings of fact; and the general rule is, that where there are concurrent findings of fact by two successive tribunals, the Supreme Court of Canada will not interfere.

The applicant had failed to shew a reasonably arguable case for an appeal.

Having regard to the lack of merits and the lack of a clear legal right, and considering that the applicant deliberately refrained from arguing his case in the Divisional Court, considering also the numerous postponements and delays at the instance of the applicant, the small amount really at stake, and the loss and inconvenience likely to result from a further prolonging of the litigation, justice requires that there be an end to the present litigation, and that leave should be refused.

Costs to be paid by the applicant to the respondents.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 6TH, 1916.

REX v. ON KEE.

Liquor License Act—Magistrate's Conviction—Keeping Intoxicating Liquor for Sale without License—Liquor Found on "Premises"—Building Divided into Sections with Inter-communications—Evidence—Finding of Magistrate—R.S.O. 1914 ch. 215, sec. 102 (2)—Presumption—Keeper of "Premises."

Motion to quash the conviction of the defendant, by a Police Magistrate, for unlawfully selling or keeping liquor for sale, contrary to the Liquor License Act, R.S.O. 1914 ch. 215.

D. L. McCarthy, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the only question argued was, whether there was any evidence upon which it could be held that the accused was the person who kept the liquor, or who kept the premises upon which the liquor was found; or whether, in the circumstances, sec. 102 (2) of the Act applied so as to raise the presumption that the liquor was kept for sale.

The accused had filed an affidavit and produced a plan of the premises. The affidavit was not admissible. The plan seemed to have been before the magistrate. It shewed a large building subdivided by main walls into three sections, but in these walls there were doors which enabled access to be obtained to all the rooms without resort to outside communications. The east section was marked "restaurant," the centre "store," and the west "chambers."

The liquor was found in some quantity in a closet opening off a "chamber" and in proximity to the door between the "chambers" and the "store" and opposite to the door leading from the "store" to the "restaurant."

The magistrate might well find that this whole building constituted one "premises," and, in the absence of any explanatory evidence, ignore the suggestion that there were separate holdings of the different sections.

One Frank Lee at one time ran the restaurant, and imported 23 cases of spirituous liquor, and in December, 1915, he was convicted of selling liquor without a license. The liquor in question here was part of the same shipment.

The evidence here was of an officer of the police force, who "made a search of the defendant's premises at 61 Sandwich street, and found the defendant there with other Chinamen . . ." Then followed some details of search and request made of the defendant to open the door between the "store" and the "chambers." The defendant "said the man was not there that had the key. Then a man came with the key, who unlocked the door. We found nothing in the two rooms. Afterwards we asked Kee to open the door under the stairway." On this being done, the liquor was found.

On cross-examination the witness said: "On Kee seemed to be in charge of the place. I cannot say positively that On Kee is the owner of the place."

Another constable says: "On Kee appeared to be in charge on both occasions."

On this evidence the magistrate could convict the accused.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 9TH, 1916.

*SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Security for Costs—Action against Local Board of Health and Medical Officer of Health—Death of Diphtheria Patient—Negligence—Fatal Accidents Act—Public Authorities Protection Act, sec. 16 (1)—Interpretation Act, sec. 29 (x)—"Person"—Assumption of Defence by Municipal Corporation—Incurring of Costs by Defendants—Insolvency of Plaintiffs—Proof of.

An appeal by the plaintiffs from an order of the Local Judge at Belleville requiring them to give security for the defendants' costs of the action.

W. C. Mikel, K.C., for the plaintiffs.
A. A. Macdonald, for the defendants.

MIDDLETON, J., in a written judgment, said that the action was brought under the Fatal Accidents Act, R.S.O. 1914 ch. 151, against the Local Board of Health and the Medical Officer of Health, to recover damages for the death of the plaintiffs' infant daughter, who, having diphtheria, was isolated by the defendants, and whose death was caused, as the plaintiffs alleged, by the defendants' negligence and failure to supply her with proper medical attendance, medicine, and assistance.

"Where an action is brought against a Justice of the Peace or against any person for any act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, the defendant may at any time after the service of the writ apply for security for costs:" sec. 16 (1) of the Public Authorities Protection Act, R.S.O. 1914

ch. 89. By the Interpretation Act, R.S.O. 1914 ch. 1, sec. 29 (*x*), "person" includes any body corporate or politic.

The learned Judge thought it clear that this action fell within the purview of the statute. There was no room for the suggestion that there was malice or that the action of the defendants was merely colourable within the statute.

The Fatal Accidents Act and the Public Authorities Protection Act stand together; there is no conflict between their provisions. If there is a cause of action under the former Act, an action will lie; but, if the defendants are entitled to the protection of the latter Act, that protection must be accorded to them.

It was shewn that the Corporation of the City of Belleville had assumed the defence of the action (see sec. 26 of the Public Health Act, R.S.O. 1914 ch. 218); and it was said that the effect of this was to relieve the defendants from the necessity of incurring any costs in their own defence, and, as they could incur no costs, they needed no security for costs. As to this the learned Judge said that, if there was no liability for costs upon a judgment awarding costs, the plaintiffs' sureties (supposing the plaintiffs to have given security) might escape; but the defendants ought not to be placed in jeopardy as to the possible outcome of the litigation upon this question when the statute entitled them to the security.

The affidavit of the defendants shewing the plaintiffs' insolvency was not sufficient; but leave was given to supplement it; and upon further material supplied insolvency was abundantly established.

The appeal should be dismissed; costs in the cause to the successful party.

FALCONBRIDGE, C.J.K.B. NOVEMBER 10TH, 1916.

*SWIFT CANADIAN CO. LIMITED v. DUFF AND ALWAY.

Promissory Note—Liability of Endorser—Notice of Dishonour not Given—Waiver—Correspondence — Admission of Liability—Promise to Pay—Mistake of Fact—Onus—Statute of Frauds.

The plaintiffs sued the defendants as respectively maker and endorser of a promissory note.

Judgment by default was entered against Alway, the maker; and the only defence urged by the defendant Duff, the endorser, was that no notice of dishonour was given to him.

The action was tried without a jury at Hamilton.

G. S. Kerr, K.C., and W. L. Ross, K.C., for the plaintiffs.

J. W. Lawrason, for the defendant Duff.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that it was undoubted that no notice of dishonour was given to the defendant Duff; and the only question was whether a sufficient waiver of notice was shewn by certain letters which passed between him and the plaintiffs.

On the 27th November, 1915, Duff wrote to the manager of the plaintiffs' credit department that Alway had requested him (Duff) to write "regarding the note you hold against him, which I endorsed. He said he would like you to wait a few days . . . and I also hope you can give an extension of time." The plaintiffs answered this on the 9th December, saying, "We intend taking legal action unless Mr. Alway's account is satisfactorily reduced by Monday, December 13th." On the 11th December, Duff again wrote to the plaintiffs' manager, saying that the note was "only six weeks past due. . . . It is hardly possible to raise the amount at two days' notice. But I think I can promise you that you will receive it in a short time." There were no more letters from Duff, but the plaintiffs wrote to him on the 14th December, 1915, and again on the 8th January, 1916. This action was begun shortly afterwards.

The learned Chief Justice said that, even if Duff had written merely the letter of the 27th November, 1915, the case would hardly have been so favourable to him as Britton v. Milsom (1892), 19 A.R. 96, because, although the letter was written at the request of the maker, it contained an admission of the endorser's liability. Some of the cases cited in the Britton case shew that if there is an unequivocal promise to pay or admission of liability on the endorser's part, he is deemed to have waived notice of protest; and Duff's letter of the 11th December, especially when read with the earlier letter, was reasonably plain both as to the admission of liability and the promise to pay.

The onus of shewing that the defendant gave the promise or made the admission under a mistake of fact was upon him, and he had failed to discharge it: Maclaren on Bills of Exchange, 5th ed., p. 302; Falconbridge on Banking and Bills of Exchange, 2nd ed., p. 670; Byles on Bills, 17th ed., p. 283.

The Statute of Frauds was not applicable.

Judgment for the plaintiffs for the amount of the note with interest and costs.

MIDDLETON, J. NOVEMBER 10TH, 1916.

RE WILLIAMSON.

Will—Construction—Payment of Debts—Appointment of Trust Fund—Benefit of Widow—Dower — Election — Direction to Sell and Realise—Blended Fund—Rights of Creditors—Priorities.

Motion by the executors of the will of Edmund Schofield Williamson, who died on the 30th October, 1915, for an order determining questions arising upon the construction of the will.

The testator owned land in Brampton and certain chattel property. By his father's will property was left to a trust company upon trust to realise and divide into seven separate trust funds, one of which was to be held for him (Edmund) and the remaining funds for the father's other children; and it was provided that upon the death of any of such children the trustees should deliver to such person or persons as the child should appoint by will the corpus of the fund allotted to such child; in the event of a child dying intestate or without having made any appointment there was a gift of the fund for the benefit of the children of that child.

By Edmund's will he directed that his fund should be paid over to his executors and trustees; and, after certain specific bequests, that all the residue of his estate, including any property subject to his appointment, and his interest in his father's estate, should be held by his executors and trustees upon trust, first to sell his Brampton lands and out of the proceeds to pay his debts; and, in case of a shortage for this purpose, that the unpaid balance of his debts should be paid out of his father's estate, if possible out of the principal, otherwise out of the income, but in such a way that his wife should not be deprived of any of her income "as hereinafter provided," that is, after payment of debts, to invest all that is left, including the interest of his father's estate, to pay his wife during her lifetime $150 monthly.

The Brampton land was sold by the executors; the balance of the proceeds, after clearing off a mortgage, was not enough to pay the debts; and that balance was held subject to the determination of the questions raised. The sale was effected under the terms of an order providing that the sale should not prejudice the wife's claim for dower.

The motion was heard in the Weekly Court at Toronto.

A. M. Denovan, for the executors.

S. H. Bradford, K.C., for the widow.

M. H. Ludwig, K.C., and A. C. Heighington, for execution creditors.

F. W. Harcourt, K.C., for infants.

MIDDLETON, J., in a written judgment, said that the widow was not put to her election under the will. The more recent cases establish the necessity for some clear indication that the wife is to be deprived of her dower if she takes under the will; neither a direction to sell and realise nor the formation of a blended fund is a sufficient indication of the testator's intention to deprive the wife of her right to dower if she accepts the benefits given by the will: Leys v. Toronto General Trusts Co. (1892), 22 O.R. 603; Re Shunk (1899), 31 O.R. 175; Re Hurst (1905), 11 O.L.R. 6. These cases are not overruled by Re Ouderkirk (1913), 5 O.W.N. 191.

The widow claimed priority over the creditors upon the theory that, the fund being an appointed one, the creditors could have no greater right than that given to them by the will, and that under the will their right was made subordinate to that of the wife. That, however, was not the meaning of the will. The fund from the father's estate cannot be resorted to until there is realisation of the father's estate. As and when it falls in, it will probably be found possible so to arrange as to enable some scheme for the payment of the creditors to be devised which will not bear too hard upon the widow.

Costs of all parties out of the estate.