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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

*SCOTT v. TORONTO R.W. CO.

Street Railway—Injury to Passenger—Sudden Stop of Street-car—Passenger Thrown against Brass Rail in Car and Injured—Evidence—Cause of Stop—Warning by Previous Jarring—Possibility of Findings of Jury—Result of Injury—Disease—Question for Jury.

Appeal by the defendants from the judgment of MASTEN, J., upon the findings of a jury, in favour of the plaintiff (an elderly woman), in an action for damages for injury sustained by her while a passenger in a street-car of the defendants, by reason, as the plaintiff alleged, of the negligence of the defendants' servants. The judgment was for $1,000 and costs.

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

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

J. B. Clarke, K.C., for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the questions put to the jury and their answers were as follows: 1a. Was the plaintiff injured as a result of the action complained of? A. Yes. 1b. Is the disease, i.e., arthritis, from which the plaintiff is now suffering, attributable to the injuries sustained by reason of the accident? A. Yes. 2. Were the defendants guilty of negligence which caused the injury complained of? A. Yes. 3. If so, in what did such negligence consist? A. That of the car-crew in not ascertaining the cause of the jolting. 4. Did anything

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

happen before the accident which suggested that the street-car was unfit to run? A. Yes, from the unusual jolting before the accident. 5. If you answer "yes" to the last question, state what it was that so happened? A. Answered in the fourth question. 6. Damages? A. $1,000.

The plaintiff was sitting in the car at the end of a seat, where a small brass rod was placed a few inches above the seat-level; against this she was thrown, the lowest part of her spine coming in contact with it. That the stop was a sudden one was not denied, but it was said that no warning of it could be had by jarring, because it was found to be due to the fall of the brake-shoe, which, coming down on the track in front of the wheel, resulted in an immediate cessation of the car's motion, throwing every one about.

McCrea, the defendants' master mechanic, was a witness at the trial, and explained the result of the fall of the brake-beam, from one end of which a plug, which held it up, had worked out. It appeared from McCrea's evidence, which was the only evidence on the subject, that there was a possibility that, if the brake-beam was let down at one end only, the other holding firm, there would be a period of time when there would be bumping or jarring. There was therefore some evidence upon which the jury might found their answer to question 4. If the possibility spoken of by McRae existed, the duty of the servants of the defendants was clear, i.e., to ascertain why the bumping was going on: St. Denis v. Eastern Ontario Live Stock and Poultry Association (1916), 36 O.L.R. 640. There was but slight evidence to support the possibility—that given by the master mechanic, and his expert knowledge was not shewn to be possessed by either the motorman or conductor. Want of sufficient information in the subordinate officers was not a reason for absolving the defendants, who were in law charged with responsibility for conditions which might exist or be brought about. Assuming, as the jury did, that there was continuous bumping or jarring, inquiry should have been made at the time by those in charge. The fact that bumping may be occasioned in the streets of Toronto by causes not in themselves involving danger does not excuse the absence of inquiry by the motorman and conductor, and the failure to inquire stands in the way of the defendants relying on the want of information by these men. The jury were entitled to come to the conclusion they did.

Arthritis as an element in the damages depended on the evidence of two doctors. If these two differed, there was evidence for the jury to weigh and decide upon.

Upon the whole case, the appeal failed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

*RE THOMPSON.

Will—Construction—Direction to Executors "to Pay off the Mortgage upon my Real Estate" out of Specified Part of Estate—Mortgage Existing when Will Made Paid off by Testator and New Mortgage Substituted—Will Speaking from Immediately before Death —"Contrary Intention"—Wills Act, sec. 27 (1).

Appeal on behalf of all persons other than James E. Thompson interested in the estate of James Thompson, deceased, and cross-appeal by James E. Thompson from an order of LATCHFORD, J., in the Weekly Court, Ottawa, declaring the construction of the will of the deceased in respect to a charge and the amount of a legacy.

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

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

R. McKay, K.C., and R. J. Slattery, for James E. Thompson, respondent and cross-appellant.

HODGINS, J.A., reading the judgment of the Court, quoted a portion of the will as follows: "I give devise and bequeath all my estate both real and personal unto my executors . . . under the following trusts namely: first to convert the same into cash and the proceeds thereof to divide into four parts so that three of such parts shall be equal and the fourth part shall be $5,000 less than the other three parts; secondly to pay off the mortgage upon my real estate in the town of Perth out of the said fourth part and should the same not be sufficient for that purpose then the deficiency shall be taken equally from the other three parts and should the said fourth part prove more than sufficient to discharge said mortgage then upon trust to pay the surplus of such part to my son James."

The will was dated the 30th January, 1905, and there were three codicils in 1905 and 1908 not directly affecting these appeals. The testator died on the 28th October, 1912. At the date of the will, a mortgage existed upon the real estate of the testator in Perth for $4,233.33 to the Mohr executors. This mortgage was afterwards paid off and discharged, the testator obtaining the money which he paid partly from a new mortgage for $3,600 upon the same lands to one Spence and partly from his own resources. Upon the Spence mortgage the testator paid $300 in 1910 and $300

in 1911, and at the time of his death it stood at $3,000 and interest. It had since been paid off by his executors.

It was held by Latchford, J., that this mortgage could not be charged against James E. Thompson's share in the estate; also that the estate was to be divided into four parts, of which the fourth part, devised to J.E.T., was to be $5,000 less than each of the other parts.

The appellants in the main appeal contended that the amount of the Spence mortgage was to be deducted. The cross-appeal was directed to the division of the estate.

There was nothing to prevent the application of sec. 27 (1) of the Wills Act, the section declaring that the will speaks from immediately before the death of the testator, unless a contrary intention appears by the will. The fact that when the will was executed there was a mortgage upon the real estate of the testator which had since been discharged, though in fact replaced by another, was relied upon.

Reference to Douglas v. Douglas (1854), Kay 400, 404, 405; Goodlad v. Burnett (1858), 1 K. & J. 341; In re Gibson (1866), L.R. 2 Eq. 669; Re Atkins (1912), 21 O.W.R. 238, 3 O.W.N. 665; Morrison v. Morrison (1885), 9 O.R. 223, 10 O.R. 303; Hatton v. Bertram (1887), 13 O.R. 766; In re Holden (1903), 5 O.L.R. 156; In re Portal and Lamb (1885), 30 Ch. D. 50; Re Ashburnham (1912), 107 L.T.R. 601; Cave v. Harris (1887), 57 L.T.R. 768; Dickinson v. Dickinson (1878), 9 Ch. D. 667, 672; In re Evans, [1909] 1 Ch. 784; Halsbury's Laws of England, vol. 28, p. 692.

The words of the will in this case, "the mortgage upon my real estate," while in one sense describing the charge then existing, conveyed nothing in themselves clearly excluding another mortgage if substituted for it. The expression could be as accurately applied to the mortgage in esse at the testator's death as to the incumbrance at the time he made his will. Nothing compelled the conclusion that he intended that mortgage and that mortgage alone to be paid off. "Mortgage" means "debt secured by mortgage," and is generic in the same sense as "stock of goods" in In re Holden, supra. There was nothing indicating "a contrary intention."

As to the cross-appeal, no other conclusion than that reached by Latchford, J., was possible.

Appeal allowed with costs and cross-appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

*FOLLICK v. WABASH R.R. CO.

Railway—Injury to Person Struck by Locomotive of Train when Attempting to Cross Tracks at Crossing of two Railways at Rail-level—Negligence—Findings of Jury—Evidence—Duty to Signal and Stop Train—Railway Act, R.S.C. 1906 ch. 37, secs. 277, 278—Train Approaching Wreck Zone—Duty to Proceed with Caution—Speed of Train.

Appeal by the plaintiff from the judgment of BRITTON, J., 15 O.W.N. 155.

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

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

R. S. Robertson, for the defendants, respondents.

MACLAREN, J.A., read a judgment in which he said that the plaintiff was struck and severely and permanently injured by the locomotive of a Wabash passenger train running westward from Bridgeburg to St. Thomas.

At the close of the plaintiff's case, a motion for a nonsuit was made, upon which the trial Judge reserved his decision. The trial proceeded; the jury answered in favour of the plaintiff questions submitted to them, and assessed the damages at $3,000. The Judge afterwards granted the motion and dismissed the action.

The negligence of the defendants found by the jury was "in not stopping at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed." They also found against contributory negligence on the part of the plaintiff.

The plaintiff was a section foreman of the Michigan Central Railroad Company, and on the morning of the 20th December, 1916, was sent to clear the track of a train which had been wrecked at a crossing of the Grand Trunk track two miles west of Bridgeburg. About 5 o'clock the next morning the track had been cleared, and the men were preparing to leave; the plaintiff had to cross the Grand Trunk track, and in doing so was struck by the defendants' locomotive running on that track.

Sections 277 and 278 of the Railway Act, R.S.C. 1906 ch. 37, are applicable to the crossing where the man was struck—two lines of railway there crossing each other at rail-level, and there being no interlocking system, a signal should have been given and the train should have stopped.

The defendants attempted to prove that the train had come to a full stop between the distance semaphore and the railway cut. This the jury negatived. The only other stop, according to the evidence, was at Bridgeburg, two miles east of the crossing. It was not contended by the defendants that this could avail them as a stop to satisfy the statute with reference to this crossing.

This was quite sufficient to justify and sustain the finding of the jury.

As to the speed of trains at railway crossings, reference was made to Minor v. Grand Trunk R.W. Co. (1917), 38 O.L.R. 646 (explaining the decision), and Columbia Bitulithic Limited v. British Columbia Electric R.W. Co. (1917), 55 Can. S.C.R. 1, 34.

The appeal should be allowed and judgment entered for the plaintiff for $3,000, with costs thoroughout.

MAGEE and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

HODGINS, J.A., read a short judgment, in which he said that he preferred to rest the decision in favour of the plaintiff upon the finding of the jury that the accident happened because the servants of the defendants did not proceed "with sufficient caution approaching wreck zone which was observed." There was evidence to support this conclusion, and it proceeded upon the rule laid down in Orth v. Hamilton Grimsby and Beamsville Electric R.W. Co. (1918), 43 O.L.R. 137.

The decision in Minor v. Grand Trunk R.W. Co., 38 O.L.R. 646, must be read as confined wholly to the question of speed, irrespective of the circumstances of the moment which must control it.

The learned Judge expressed no opinion as to the breach of the statutory duty to stop before reaching the crossing of two railways.

The appeal should be allowed.

Appeal allowed.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

COWIE v. BAGULEY.

Company—Industrial Concern—Transfer to, of Secret Process—Sale of Assets—Issue of Shares to Vendor in Payment—Contract—Half-interest in Shares—Agent—Commission.

Appeal by the defendant from the judgment of MIDDLETON, J., of the 16th December, 1918, in favour of the plaintiff in an action to compel delivery to the plaintiff of one half of a block of shares of the capital stock of an incorporated industrial company received by the defendant on a sale to the company of a secret process for treating iron; the plaintiff alleging a contract with the defendant for payment of one half of the shares as commission.

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

J. T. Loftus, for the appellant.

L. J. Phelan, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that he saw no answer to the position that the parties had treated the transfer of the secret process as a sale, and must be bound thereby. The denial that the process had been parted with for a valuable consideration, i.e., shares in a duly incorporated company, depended upon the appellant's view that the company was really Dyer and Robertson. No doubt, they controlled it, but in a legal sense they and the company were not identical.

Persons who incorporate a company and endow it with assets, on the basis of which they sell stock, ought not to be allowed by the Courts to say that those assets have not been sold to the company. The shares which they received were issued to pay for the assets, and that was the only reason or justification for their issue.

There was, on the documents, no escape from the conclusion of the trial Judge. The oral testimony could not impair their effect, to the detriment of a third person, who was in no way consulted or informed of the views and intentions of the promoters.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

WINGROVE v. MAPPIN.

Principal and Agent—Agent's Commission on Sale of Land—Retention out of Deposit Paid by Purchaser—Sale not Carried out by Agreement between Vendor and Purchaser—Executed Transaction—Agreement to Pay Commission not Embodied in Separate Document—Statute of Frauds, sec. 13 (6 Geo. V. ch. 24, sec. 19, as Amended by 8 Geo. V. ch. 20, sec. 58).

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing an action to recover $250, alleged to have been received by the defendant as agent for the plaintiff and for the plaintiff's use.

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

C. P. Tisdall, for the appellant.

H. J. Scott, K.C., for the defendant, respondent.

HODGINS, J.A., read a judgment in which he said that the appellant, a vendor, sued the respondent, his agent, for repayment of $250 which the respondent had received from the purchaser upon the signing of a valid agreement for the sale of lands. The purchase did not go through because of building restrictions upon the land, and the parties agreed to let the matter drop. The appellant paid the purchaser the $250, and now sued the respondent for it. The respondent, before action had transferred to his own credit, out of the $250, the amount of his commission, and had sent the appellant a cheque for the balance.

It was admitted that, unless the case could be distinguished from Silverman v. Legree (1919), 15 O.W.N. 378, the appeal must fail.

The essential fact in the Silverman case was, that payment had actually taken place by what occurred before action. If the matter had been still in fieri, and the action had been brought before the agent had become properly entitled to his commission and had appropriated the money in payment thereof, the cases as to set-off cited for the appellant would apply. But here, as in Silverman v. Legree, the transaction had become an executed one, and the statute formed no bar.

If so, then the objection that the agreement to pay commission was not upon a separate document—if that were the case, as to which the learned Judge said nothing—must fail. No action

having to be brought on the agreement, any formal defects in it became of no importance.

The appeal should be dismissed.

MACLAREN and MAGEE, JJ.A., concurred.

SUTHERLAND, J., read a judgment in which he said that he was unable to distinguish this case in principle from the Silverman case, and was therefore of opinion that the appeal should be dismissed.

If that case was rightly decided, as must be assumed, it appeared possible that a way was left open to real estate agents by which the apparent intention of the Legislature as embodied in sec. 19 of the Statute Law Amendment Act, 1916, 6 Geo. V. ch. 24 (sec. 13 of the Statute of Frauds), as amended by sec. 58 of the Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20, that agreements for the payment of commissions on the sale of real estate shall be in writing and separate from the sale agreement, may be nullified.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

BOWLES v. CITY OF TORONTO.

Highway—Nonrepair—Death of Person Walking on Highway—Dangerous Condition Continued for Long Period—Negligence—Cause of Death—Inference from Facts Found by Trial Judge—Appeal.

Appeal by the defendants from the judgment of MIDDLETON, J., 15 O.W.N. 216.

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

Irving S. Fairty, for the appellants.

T. N. Phelan, for the plaintiff, respondent.

MACLAREN, J.A., reading the judgment of the Court, said, after stating the facts, that the evidence as to the cause of the death of the man on behalf of whose widow and children the action was brought, was wholly circumstantial; but the defendants were at fault in leaving the embankment along the side of the road where the deceased met with his death, in a dangerous condition. The trial Judge found that the condition condemned itself, and in that the Court agreed.

And, on the whole case, the Court should accept the conclusions of the trial Judge, who saw and heard the witnesses, especially as a reading of the evidence led to the same conclusion. Indeed the maxim res ipsa loquitur might be applied—the man appeared to have fallen from the embankment and to have been killed by a passing street-car.

Reference to Kerr v. Ayr Steam Shipping Co. Limited, [1915] A.C. 217, 232.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

*RE CLEGHORN.

Will—Construction—Trust for Maintenance of Dwelling-house as Home for Widow and Daughters—Payment to Widow of Lump-sum in Lieu of Dower—Election—Condition—Charge—Rights as to Occupancy of House—Costs.

Appeal by Clara G. Cleghorn, the widow of T. H. Cleghorn, deceased, from the judgment of ROSE, J., 15 O.W.N. 444, declaring the construction of the will of the deceased.

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

H. J. Scott, K.C., and E. F. Coatsworth, for the appellant.

J. J. Maclennan, for the daughters of the testator, respondents.

HODGINS, J.A., reading the judgment of the Court, said, after stating the facts, that from a survey of the whole will it was evident that the desire of the testator was to preserve the house as a residence for his wife and unmarried daughters, including his married daughter if widowed. To this end he directed the winding-up of his business and the payment of the mortgage upon the house. The amount realised from his business, however, proved insufficient to discharge the incumbrance, which was for $1,700. If the $2,500 to be paid to the wife was a charge upon the property, the equity was worth, it was said, about $2,200. The clause read: "If at the expiry of two years my said wife and daughters do not desire to live together in the said house then upon payment to my said wife by my said daughters of $2,500 in cash the said house property shall be held by my trustees for my said daughters free from any right of dower on the part of my widow."

The question turned upon the meaning of the phrase "upon payment," which, if a condition, imposed a charge upon the property or upon the right of occupancy thereof given by the will. The words "my said daughters" referred to all those previously mentioned, that is, the married daughter as well as the unmarried ones.

No precise form of words is necessary to create conditions in wills—any expression disclosing the intention will have that effect.

Reference to Jarman on Wills, 6th ed., p. 1461; In re Kirk (1882), 21 Ch.D. 431, 437; Barnardiston v. Fane (1699), 2 Vern. 366; Hodge v. Churchward (1847), 16 Sim. 71; In re Welstead (1858), 25 Beav. 612; Cunningham v. Foot (1878), 3 App. Cas. 974; Re Oliver (1890), 62 L.T.R. 533.

The words above quoted appear to import a charge of $2,500 upon what is to be obtained when payment is made, and not a mere option, allowing the daughters, by refusing to exercise it, to obtain the property subject merely to the widow's dower.

It may reasonably be said that the holding of the property and the payment of the taxes, insurance, and repairs upon it, for the period of occupancy, is not for the benefit only of those entitled to occupy but for all those whose ultimate advantage could be secured only if the outgoings were met so as to preserve it for them. That fits in with the earlier disposition, "to hold it for my said daughters," and that expression should control the after-provision as to occupancy and relegate that right to a mere temporary use imposed for the better enjoyment of the property in specie by some one or more of the beneficiaries while unmarried. If a life-estate had been given to one daughter only, it would not have been possible to hold that the payment of the $2,500 was to be charged upon the life-estate, in face of the earlier direction to hold the "said house property for my said daughters," which came into effect immediately upon the payment being made.

The judgment below should be reversed and the questions answered in accordance with the views now expressed.

As the construction of the will was not clear, its phraseology giving rise to the ambiguity, the costs of all parties of the application and appeal should be borne one half by the appellant and one half by the daughters, those of the executors as between solicitor and client.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

*HUTTON v. TORONTO R.W. CO.

Workmen's Compensation Act—Servant in Course of Employment Injured by Negligence of Third Person—Election to Claim Compensation from Board—Board Subrogated to Rights of Injured Person—4 Geo. V. ch. 25, sec. 9—Effect of—Action Brought by Injured Person against Wrongdoer—Recovery of Judgment for Damages—Action Maintainable in Name of Injured Person—Amount of Judgment to be Paid to Board—Right of Defendant in Action to Maintain Objection—Consent and Agreement of Board after Judgment—Jury—Finding of Negligence against Street Railway Company—Evidence—Appeal.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,500 damages, in an action for injury to the plaintiff by reason of a collision of a waggon which he was driving with a street-car of the defendants. The plaintiff alleged that the collision was caused by the negligence of the defendants.

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

H. H. Dewart, K.C., and G. S. Hodgson, for the appellants.

William Proudfoot, K.C., for the plaintiff, respondent.

The judgment of the Court was read by HODGINS, J.A., who said that the jury had found that the street-car was running too fast, and it was contended that there was no evidence to justify that finding. That point was disposed of at the hearing adversely to the appellants.

The main ground of appeal was, that because, before action brought, the respondent had elected under the Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 9 (3), to claim compensation from the Workmen's Compensation Board, and had received compensation from the Board, the present action was not maintainable in the name of the respondent and on his own initiative.

The accident to the plaintiff occurred in the course of his employment by a master, and on the 12th May, 1918, before this action was launched, the plaintiff, by a formal document, elected to claim compensation from the Board and did forgo his right of action against the third parties (that is, the defendants), "it being understood that by this election the . . . Board is subrogated to all my rights . . . against such third . . . parties."

After the judgment for the plaintiff at the trial had been settled, and notice of appeal given by the defendants, the Board, by a formal document, consented and agreed that, for the purposes of this action, the plaintiff "be permitted to withdraw his election to claim compensation from the said Board, and for the said purposes the said Board hereby releases and assigns to the said plaintiff as from the date of the said election all its rights and title to proceed against the said defendants for the cause of action involved therein, provided that in the event of the said plaintiff's action failing by reason of the right to bring such action being vested in the said Board and not in the said plaintiff the said Board is to be entitled to bring such action as it would have been entitled to bring if this consent and agreement had not been given."

The learned Judge said that at the argument he had the impression that to permit the respondent after election to sue the tort-feasor would or might result in embarrassment and promote instead of preventing litigation. Further consideration had brought the learned Judge to the conclusion that these difficulties were inseparable from the situation created by the right of subrogation, and that the objection of the appellants could not, on that ground, be given effect to.

After quoting the provisions of sec. 9 of the Act and referring to numerous authorities, the learned Judge said that the only right given to the Board by the election was that of subrogation (with, of course, the added power to sue in its own name). That right has never prevented the enforcement by the person possessed of the cause of action in his own name; and, once the right of subrogation has arisen, he can do nothing to prejudice the person subrogated. That right can be enforced at any time, whether the original claim is one in fieri or has been pressed to a recovery—and all the inconveniences and difficulties suggested by the appellants arise from- and flow out of this peculiar fiction (subrogation) and from it alone.

The situation created by the election spoken of in the statute (sec. 9) and its consequences cast no additional burden upon the wrongdoer nor any which differs from that which he has brought on himself by his wrongful act. He has no concern with the dealings of the Board and the claimant; and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested: it exists still in him; but, if enforced by him, it must be for the benefit of the Board if he has signed an election.

The consent and agreement of the Board, procured after the judgment, are not sufficient to change the situation created by the statute. After the election, and while it stands, whether tentative

or final, the Board is subrogated to the respondent's rights and claims. The Board cannot divest itself of the position of trustee of the amount recovered for the accident fund, without effective action on its part, having regard to its duties and responsibilities as a Board. If, on considering the whole situation, it chooses to hand over to the respondent the amount of the judgment, it can do so or deal with it as the statute gives power. But the dismissal of the appeal should be preceded by a direction that the amount of the judgment shall be paid to the Board, to be dealt with by it in due course.

Balancing the conveniences and inconveniences of the situation, and looking at the omission of any peremptory restriction upon the injured workman pursuing both remedies, particularly where he has the consent or has obtained the subsequent ratification or approval of the Board, the appellant's objection must fail.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. MAY 19TH, 1919.

MEHARRY v. AUBURN WOOLLEN MILLS CO.

Vendor and Purchaser—Contract for Sale of Gravel-pit—Default by Purchaser in Payment of Purchase-price—Termination of Contract by Notice Given by Vendor—Acquiescence—Discretion of Court—Refusal of Specific Performance—Return of Part of Purchase-money Paid—Costs.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial of the action at Peterborough, in favour of the plaintiff, directing the defendants specifically to perform a contract for sale of a gravel-pit to the plaintiff.

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

Strachan Johnston, K.C., and J. E. S. Goodwill, for the appellants.

R. R. Hall and J. F. P. Birnie, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said that, when the facts were understood, the case resolved itself more into a question of the sound discretion of the Court than a decision of the legal issues involved. It was not necessary to decide the case upon the basis of time being of the essence of the contract. This

was a case for applying the language of Lord Alvanley, M.R., in Milward v. Earl Thanet (1801), 5 Ves. 720 (note), "A party cannot call upon a Court of Equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager."

The plaintiff in this case had been, by the notice served on him on the 1st December, 1915, definitely notified that his rights had come to an end in pursuance of a term of the contract; he had endeavoured to induce the appellants to recede from that position without success; he withdrew from the property, refrained from taking gravel therefrom, and before the next instalment of interest became due he wrote a letter stating that he was unable to carry out the contract he made with the defendants for the purchase of the gravel-pit.

Reference to Hook v. McQueen (1854), 4 Gr. 231; Wallace v. Hesslein (1898), 29 Can. S.C.R. 171, 174.

The plaintiff, having made default in payment, and being notified that his contract was at an end, acquiesced in that view and continued to acquiesce; he did not revive his interest in the property until he found that it had largely increased in value.

Counsel for the appellants, on the argument, offered on their behalf to repay to the plaintiff the amount that he had paid on account of the purchase-money.

The appeal should be allowed and the action dismissed with costs—the defendants to repay the $700 paid by the plaintiff and in the meantime to have a lien on it for their costs of the action and of this appeal, which the plaintiff should pay.

Appeal allowed.

FIRST DIVISIONAL COURT. APRIL 9TH, 1919.

FRONTIER COAL CO. v. PENNSYLVANIA CENTRAL COAL CO.

Sale of Goods—Resale by Buyer—Purchase-price Claimed by both Seller and Buyer—Question whether Property Passed to Buyer—Delivery to Carrier—Intention.

Appeal by the plaintiffs from the judgment of the County Court of the County of York finding in favour of the defendants an issue directed to be tried in order to determine the ownership of certain money paid into Court by the W. H. Cox Coal Company

The appeal was heard by MACLAREN and MAGEE, JJ.A., and LATCHFORD and MASTEN, JJ.

A. M. Dewar, for the appellants.

J. A. Rowland, for the defendants, respondents.

LATCHFORD, J., read a judgment in which he said that the right of the plaintiffs to the price of the two car-loads of coal—paid into Court by the coal company, after it was claimed from them by both the plaintiffs and the defendants—did not depend upon whether a valid contract was made on the 1st August at Buffalo, between McLean, acting for the plaintiffs, and Voelker, acting for the defendants, for the purchase and sale of the 14 car-loads then "on wheels or in breaker," at the colliery operated by the defendants.

What was done at the mine on the 1st August, upon receipt by the defendants' superintendent of a telephone message from McLean, was to weigh 6 cars of coal then loaded and to send way-bills for these cars to the plaintiffs. As of the same date, but after 3rd August, an invoice for the coal was sent to the plaintiffs from the office of the defendants in Pittsburg.

For some reason not clearly appearing, the defendants did not ship to the plaintiffs any of the 6 cars of coal.

It was unnecessary to consider whether an enforceable contract was or was not made between the plaintiffs and the defendants, for the breach of which an action would lie. There was no action for damages before the Court. The sole contention was that the property in the two car-loads had passed to the plaintiffs.

It was held in the County Court that the two car-loads never became the property of the plaintiffs; and in that conclusion the learned Judge agreed.

The attempt made by the plaintiffs to establish that the defendants' superintendent was an agent of the Lehigh Valley Railway Company wholly failed. Had he delivered the coal to the railway company, or handed over the way-bills to an agent of that company, as was the practice when coal was shipped, the delivery of the coal or the way-bills to the carrier would, in the absence of evidence of an intention to the contrary, vest the coal in the plaintiffs. Delivery to a carrier by order of the buyer is delivery to the buyer: Dutton v. Solomonson (1803), 3 B. & P. 582.

There was, no doubt, an intention on the part of the superintendent to appropriate the 6 car-loads to the defendants' order; but that intention was to be effective only upon receipt from the defendants of instructions to ship; and, no such instructions having been received, the intention was revoked. It was not intended that the property in the coal should pass to the plaintiffs except in an event or events which did not happen.

As no property in the coal passed to the plaintiffs the judgment should be affirmed.

MACLAREN and MAGEE, JJ.A., agreed with LATCHFORD, J.

MASTEN, J., read a dissenting judgment. He was of opinion that the property in the coal passed to the plaintiffs, and that the appeal should be allowed.

Appeal dismissed with costs (MASTEN, J., *dissenting*).

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. MAY 19TH, 1919.

RE METROPOLITAN THEATRES LIMITED.

Company—Winding-up—Directors—Payment of Dividend out of Capital—Liability—Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 95.

An appeal by E. C. Eckert, P. Noble, and S. Stevely from the order and report of the Master in Ordinary, in a winding-up matter, finding the appellants to have been directors of the company and to have been parties to the ordering, declaring, and paying of a certain dividend out of the funds of the said company contrary to law, and ordering them to pay the sum of $1,500 to the liquidator of the company.

The appeal was heard in the Weekly Court, Toronto.
J. M. McEvoy, for the appellants.
A. C. McMaster, for the liquidator, respondent.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the transaction in respect of which these three directors had been held by the Master to be liable did not, on its face, seem to involve any great amount of moral turpitude. Out of the dividend declared two of them received $20 each, and the third $116. It was probable that it never occurred to them that they were doing wrong. In view of the apparent hardship of the case and of the very earnest and forceful argument presented by counsel on their behalf, the learned Chief Justice said, he had more than once gone over the material and the authorities, but found himself unable

to come to conclusions different from those arrived at by the Master either as to matters of fact or law.

Reference to Re Owen Sound Lumber Co. (1917), 38 O.L.R. 414; Re Port Arthur Waggon Co., Tudhope's Case (1919), 16 O.W.N. 65; Bond v. Barrow Hæmatite Steel Co., [1902] 1 Ch. 353; Dovey v. Cory, [1901] A.C. 477; Northern Trust Co. v. Butchart (1917), 35 D.L.R. 169; an article by Mr. Justice Hodgins (when at the Bar) on paying dividends out of capital, in 44 C.L.J. 94.

There were obvious distinctions between this case and those in which directors had been exonerated.

A great factor in the situation lay in treating the lease under the conditions then existing as of any value whatever, instead of being, as the Master styled it, an overburdening liability, with 4 years to run—rental $20,000 a year and $16,000 worth of permanent improvements not removable by the lessees but remaining at the end of the term the property of the lessors.

These directors took no steps to protect themselves under sec. 95 of the Ontario Companies Act, R.S.O. 1914 ch. 178.

No objection appeared to have been taken to the admission of the minute-book as evidence. If the objection had been made and sustained, no doubt evidence to establish the facts set forth in the minutes could have been easily procurable.

The appeal must be dismissed; in the circumstances, without costs.

ROSE, J. MAY 20TH, 1919.

*GROSSMAN v. MODERN THEATRES LIMITED.

Landlord and Tenant—Lease of Theatre—Covenant of Lessee not to Assign or Sublet without Leave—Proviso that Leave should not be Unreasonably Withheld—Agreement by Lessee to Assign Lease—Refusal by Lessors of Leave—Claim that Leave Unreasonably Withheld—Onus—Conduct of Proposed Sublessee—Forfeiture of Lease—Waiver—Recognition of Lease as Subsisting by Acceptance of Rent—Rescission of Agreement—Return of Money Paid by Proposed Sublessee—Failure of Consideration—Claim for Specific Performance—Consolidation of three Actions—Costs.

Three actions consolidated by order of a Judge. In the first action Grossman sought the rescission of an agreement by which Modern Theatres Limited agreed to sell to him the lease of a cinematograph theatre and the return by Modern Theatres

Limited and Joseph Singer & Co., their solicitors, of $3,000 paid by Grossman to Singer & Co. as part of the purchase-price. The second action was by Morris and Crooks, the lessors of the theatre, against Modern Theatres Limited, for a declaration that the lease had become forfeited. In the third action Modern Theatres Limited claimed against Morris and Crooks a declaration that the consent of the lessors to the assignment of the lease had been unreasonably withheld, and that the plaintiffs were at liberty to assign the lease without such consent, and, against Grossman, specific performance.

The consolidated action was tried without a jury at a Toronot sittings.

T. R. Ferguson, for Grossman.

D. L. McCarthy, K.C., for Modern Theatres Limited and Singer & Co.

H. J. Scott, K.C., and A. W. Roebuck, for Morris and Crooks.

ROSE, J., in a written judgment, said that the lease was made to one Janks by an indenture expressed to be under the Short Forms of Leases Act. By it the theatre was demised for 5 years from the 1st July, 1918, at a yearly rental of $1,800, payable monthly in advance. There was in the lease a covenant on the part of the lessee that he would not assign or sublet without leave, and there was a proviso that the leave would not be unreasonably withheld. By deed, dated the 5th June, 1918, duly assented to by the lessors, the lease was assigned to Modern Theatres Limited. In November, 1918, an agreement was entered into between Grossman and Modern Theatres Limited by which Grossman agreed to buy and Modern Theatres Limited to sell the lease and the vendor's equipment in the theatre for $5,500. Morris and Crooks, the owners of the theatre, refused their consent to an assignment of the lease to Grossman.

The landlords' action for a declaration that the lease was forfeited failed: the landlords had waived the forfeiture—had recognised the lease as subsisting—by accepting rent from Modern Theatres Limited.

As to the question whether the consent to the assignment was unduly withheld, the burden was on the lessees to prove their case—it was not for the lessors to prove that they were justified in withholding their consent; and they should not be considered to have withheld their consent unreasonably if, in the action they took, they acted as reasonable persons might have acted in the circumstances. A mere dislike of the proposed assignee is not a reasonable ground: Sheppard v. Hong Kong etc. Banking Corporation (1872), 20 W.R. 459. On the other hand, it could scarcely

be said that behaviour on the part of the assignee which indicated that he was a person with whom it would be difficult to get along amicably would not justify a landlord in refusing his consent. And that was the case here: Grossman's conduct (undertaking to discharge the landlord's janitor, etc.) was such as to make it impossible to hold that Modern Theatres Limited had met the onus of proving that it was unreasonable for the landlords to persist in their refusal to have him as a tenant.

As Modern Theatres Limited were unable to procure the landlords' assent to the assignment, their claim against Grossman for specific performance failed; and the claim made against them for the return of the $3,000 paid by Grossman must succeed: Winter v. Demerque (1866), 14 W.R. 281, 699. Grossman's conduct, which led the landlords to believe that he would be an undesirable tenant, did not afford to Modern Theatres Limited any defence to Grossman's claim for the return of money paid upon a consideration which had failed.

There should be judgment in favour of Grossman against Modern Theatres Limited declaring that the agreement was rescinded, and against Modern Theatres Limited and Joseph Singer & Co. for payment of $3,000. The claims put forward by the respective plaintiffs in the second and third actions should be dismissed. The costs of the first action down to the making of the order for consolidation should be paid by the defendants to the plaintiff. In each of the other actions the costs down to the consolidation should be paid by the plaintiffs to the defendants. Modern Theatres Limited and Joseph Singer & Co. should pay Grossman's costs of the proceedings, including the trial, subsequent to the making of the order for consolidation. There should be no further order as to costs subsequent to the consolidation.

KELLY, J. MAY 21ST, 1919.

CURRIE v. CURRIE.

Husband and Wife—Action for Alimony—Failure to Prove Marriage to Defendant—Former Husband Living when Form of Marriage Gone through—Alternative Claim to Payment for Services as Housekeeper—Money Lent—Money Paid for Insurance Premiums in Respect of Policies on Life of Defendant—Money to be Returned if Benefit Diverted from Plaintiff—Interim Alimony—Existing Order for—Right of Plaintiff to Arrears—Costs.

An action for alimony and for other money demands, tried without a jury at Ottawa.

G. E. Kidd, K.C., for the plaintiff.
E. R. E. Chevrier, for the defendant.

KELLY, J., in a written judgment, said that the plaintiff's claim for alimony should be dismissed on the finding that, when she went through the form of marriage with the defendant in Brooklyn, New York, on the 22nd March, 1904, her husband, William E. Murphy, to whom she was married in 1891, was living, and that the marriage had not been legally dissolved.

She lived with the defendant as his wife in various places from March, 1904, until July, 1917—for several years immediately preceding the latter date their home was in Ottawa. In July, 1917, the defendant left the house where they had lived together and did not return. For three months he sent her money for her support, discontinuing it only when he was threatened with action. He said that the immediate cause of his leaving the plaintiff was that he had about that time heard that Murphy was alive when he went through the ceremony with the plaintiff in March, 1904.

It was proved that Murphy was alive at that time and that he was still alive one week before the trial.

The plaintiff set up that, if her marriage with the defendant should be declared invalid, she was entitled to $4,800 for services rendered to the defendant as housekeeper and domestic servant for 13 years and 4 months. This claim failed; her residence with the defendant was not as his housekeeper or servant; there was no agreement indicating that relationship or from which it could be assumed. There was nothing to justify any suggestion that she was misled into the relationship which she assumed towards the defendant. Moreover, during the time of their residence together, she was supplied by the defendant with money necessary to maintain the house and for her own purposes as well. At the same time she added to her income by letting rooms in the house which they occupied and keeping the money paid as rent.

The plaintiff also made a claim for money lent to the defendant; that claim failed because, if for no other reason, it was long barred by the Limitations Act.

The plaintiff also claimed $300 as moneys paid at the request of the defendant between the 1st January, 1915, and the 15th March, 1919, for insurance premiums upon two policies or certificates of insurance on his life, both of which were made payable to her. The defendant said that down to the end of August, 1913, he gave all his earnings to the plaintiff, and thereout she paid the premiums on these two certificates. The defendant's intention with regard to these certiffcates was not made clear. If the benefit thereof was to be taken over by him for himself or for any other beneficiary than the plaintiff, he should pay to the plaintiff the

premiums paid by her since the beginning of September, 1913, with interest on the sums so paid from the respective dates of payment. If the parties do not themselves arrange as to these certificates, the learned Judge may be spoken to about them.

At the time of the alleged marriage in 1904, and before that, the defendant was aware that the plaintiff had been married to Murphy, but he denied that he had any knowledge that Murphy was then living. The learned Judge found, however, that not only had the defendant no proof that Murphy was not living, but he was aware that there was doubt as to whether Murphy was dead.

In all the circumstances of the case, it was not one in which any order as to costs should be made.

An order for interim alimony was made pending the action, and was not appealed against or set aside. The defendant was in default under the order until the opening of the sittings at which the action was tried, when he produced the amount, which was deposited with the Registrar. Had he obeyed the order promptly, this money would have been in the plaintiff's hands, and it should now be paid to her.

MIDDLETON, J. MAY 22ND, 1919.

RE SMITH TRUSTS.

Settlement—Construction of Trust-deed—"Beneficiary"—Issue—Inclusion of Grandchild.

Motion by the trustees under a settlement for an order declaring the construction of the trust-instrument as affecting the rights of Francis A. Harrison and his infant son in regard to the property settled.

The motion was heard in the Weekly Court, Toronto.

T. L. Monahan, for the trustees.

E. T. Malone, K.C., for Francis A. Harrison.

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

MIDDLETON, J., in a written judgment, said that the trustees held certain property conveyed to them by the settlor in 1893, upon trust, to permit his daughter Frances A. Harrison to occupy the premises conveyed for her life, and upon her death to permit any child or children who might survive her (or her grandchild or grandchildren if there be no child surviving) to occupy the premises for the period of 20 years after her death, the trustees having

the right to sell, and in that case the proceeds were to be held upon the same trusts, the income to be paid to the person who would have been the beneficiary had the sale not been carried out. Then followed clause 7: "And upon the further trust to convey assign and transfer to the issue of the said Frances A. Harrison who may be living 20 years after her death all lands moneys assets and securities which may represent the said trust estate or fund at that time." By clause 8 it was provided that if there should be a failure of any beneficiary aforesaid at any time the land or its proceeds should be held in trust for the settlor.

Frances A. Harrison died on the 12th February, 1899, leaving her surviving one child only, Francis A. Harrison, and he had been permitted to occupy the land and receive the income of the trust for the period of 20 years, which had now expired. He had one son, the infant Francis Bruce Harrison, on whose behalf it was contended that he was entitled to share equally with his father under clause 7.

The learned Judge came to the conclusion that the argument for the infant could not be resisted—the intention of the settlor was clear. There was no inconsistency in the use of the word "beneficiary" in clause 8. The property is to go to "the issue of the said Frances A. Harrison who may be living."

"Issue" has the normal prima facie meaning of descendants of all generations: In re Burnham, [1918] 2 Ch. 196; Head v. Randall (1843), 2 Y. & C. Ch. 231, 235; Edyvean v. Archer, [1903] A.C. 379.

The learned Judge could find no ground of distinction between a will and a settlement in this respect: In re Warren's Trusts (1884), 26 Ch.D. 208.

Order declaring accordingly; costs of all parties out of the fund.

MIDDLETON, J. MAY 22ND, 1919.

RICHARDSON v. McCAFFREY.

Mortgage—Practice in Action to Enforce Mortgage—Judgment for Foreclosure—Subsequent Order Directing Sale instead of Foreclosure—Report of Referee—Incorrect Date—Time for Redemption and for Appeal—One Day Appointed, where Sale Ordered, for Original Defendants and Subsequent Incumbrancers to Redeem—Interest—Agreement to Increase Rate—Whether Difference Chargeable upon Land against Subsequent Incumbrancers—Consequences of Redemption or Failure to Redeem—Unnecessary to State in Report—Rules 482, 487, 489—Stay of Reference—Appeal from Order Refusing to Stay—Rules 2, 505 (3), 507 (6).

Motion by the defendants by way of appeal from and to set aside the report of an Official Referee upon a reference in a mortgage action.

The motion was heard in the Weekly Court, Toronto.

H. J. Scott, K.C., for the defendants.

A. C. Heighington, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the report bore an incorrect date. There was evidence upon the face of the report that it was not signed till after the order mentioned in it of the 4th March. Yet the time for redemption mentioned was the 27th August. The effect would be to shorten the time for redemption and the time for appeal. It is imperative that all judicial acts should bear true and not false dates—particularly when the rights of parties depend upon the date.

2. The report was wrong in form. It is not, as was said upon the argument, in accordance with the regular form used in the Master's office, but departed from it in a vital matter. The action originally was for foreclosure, and the judgment directed the ordinary proceedings for foreclosure; but by the order of the 4th March, 1919, the subsequent incumbrancers having paid into Court $80 to secure a sale of the lands, it was ordered that all due proceedings be had for redemption or sale instead of foreclosure. The practice in Ontario is set out in the very accurate notes by Mr. Hoyles found in Taylor & Ewart's Judicature Act and Rules, Appendix, p. [228]: "Under a decree for a sale one day six months off is to be given to the original defendants to redeem the plaintiff and all other incumbrancers who have proved claims." This differs from the practice in foreclosure, where "a day six months from the date of report is to be given to the first incumbrancer to redeem the plaintiff. On default being made and a final order" (as to him) "being obtained, the next incumbrancer is given a day three months" (now one month—see Rule 489) "from date of taking account to redeem plaintiff, and so on until all the incumbrancers entitled to redeem have been foreclosed, when a day should be given the mortgagor to redeem." The reason for this distinction is obvious. When a sale is sought the owner is given his chance to redeem, and, failing this, the sale goes on. The case when foreclosure is sought is quite different. Each incumbrancer, in order, must be given his right to redeem, and the owner can only redeem when those to whom he has given his right to redeem decline to do so. In the case of a sale, an incumbrancer who desires to redeem may always do so, but he is not entitled to have a separate time fixed for him to redeem. The consequence of his failure to redeem the plaintiff is not his foreclosure, but his being compelled to

resort to the proceeds of the land after the plaintiff's claim is first satisfied. This is not unjust, because he took his security subject to the plaintiff's right to sell upon default.

(3) The mortgage calls for 5 per cent. interest; by an agreement made after the registration of the second and third mortgages, the mortgagor agreed to pay 5½ per cent. Prima facie this gave the plaintiff no charge upon the land for the higher rate of interest against these mortgagees. It was said, but not shewn, that these mortgagees were parties to this new arrangement, and the plaintiff on the reference back should have a chance of giving further evidence on this. If the owner was bound to pay more than the mortgagees subsequent to the plaintiff, the exact situation should be made plain by a special finding.

(4) It was not necessary to insert in the report any statement as to what would follow upon redemption or failure to redeem. See Rules 482 and 487.

(5) There was not any stay as the result of an appeal from a refusal to stay. The Judge before whom the appeal came might have directed a stay pending his disposition of the appeal—failing that there was none. See Rules 505 (3) and 507 (6) and Rule 2.

Order made setting aside the report and directing a reference back, with costs of the motion to the defendants in any event.

FALCONBRIDGE, C.J.K.B. MAY 22ND, 1919.

DOMINION SUGAR CO. v. NORTHERN PIPE LINE CO.

Contract—Supply of Gas—Order of Ontario Railway and Municipal Board—Powers of Board—Validity of Legislation Constituting Board—Interpretation of Statutes—Retrospective Operation—Order of Board Made without Hearing Plaintiffs as to their Contract—Right to Shut off Gas in Default of Payment of Demands—Injunction—Right to Money Paid into Bank.

Action for an injunction restraining the defendants from shutting off the supply of gas to the plaintiffs' plant at Wallaceburg, and for other relief.

The action was tried without a jury at Chatham.

Wallace Nesbitt, K.C., and J. M. Pike, K.C., for the plaintiffs.

W. N. Tilley, K.C., and J. G. Kerr, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the facts were not in dispute.

The points raised as to the jurisdiction of the Legislature of Ontario to constitute a tribunal with the powers of the Ontario Railway and Municipal Board and as to the power of that Board to deal with the matters in question were not argued, but were formally mentioned so as to preserve them for adjudication hereafter.

As to the main case, the learned Chief Justice had at the trial a very strong opinion that the plaintiffs were entitled to succeed, and he reserved judgment only for the purpose of verifying the authorities cited. The result had been to confirm that opinion.

Statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject-matter, or context shews a contrary intention: Beal's Cardinal Rules of Legal Interpretation, 2nd ed., p. 414 et seq.

As to the order of the Board having been made without hearing the plaintiffs as to their contract, the basic authority is Cooper v. Wandsworth Board of Works (1863), 14 C.B.N.S. 180. See the cases mentioned in Talbot & Fort's Index, in which that case has been judicially noticed; also Smith v. The Queen (1878), 3 App. Cas. 614, at pp. 623-4-5; Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal, [1906] A.C. 535, at pp. 539, 540; Vestry of St. James and St. John Clerkenwell v. Feary (1890), 24 Q.B.D. 703, at pp. 709, 710, 712; Attorney-General v. Hooper, [1893] 3 Ch. 483, at p. 487.

The defendants had and have no right to shut off the gas to enforce payment, or in default of payment, of their demands.

The cases cited to the contrary in Thornton's Law of Oil and Gas seem to depend on contract, statute, or rule assented to by the consumer. The same remark applies to Husey v. Gas Light and Coke Co. (1902), 18 Times L.R. 299.

The plaintiffs will have judgment: (1) for a perpetual injunction restraining the defendants from shutting off the supply of gas; (2) directing payment to the plaintiffs of the amount in the Merchants Bank at Chatham settled by the parties at $22,659.88, and accrued interest, and such further sum as shall be paid into the bank after the 1st May, 1919; (3) costs of suit.

LOGIE, J., IN CHAMBERS. MAY 20TH, 1919.

RE CONSOLIDATED ORDERS (1916) RESPECTING TRADING WITH THE ENEMY.

Trading with the Enemy—Properties Vested in Receiver-General for Canada—Order of Judge in Chambers—Costs of Debtors—Discretion.

Motion by the Secretary of State for Canada for orders vesting certain properties in the Minister of Finance and Receiver-General for Canada as custodian and conferring upon the custodian certain powers to deal with the properties vested.

Christopher C. Robinson, for the applicant.
A. J. Thomson, for the National Trust Company.
T. R. Ferguson, for R. S. Baker.
Glyn Osler, for the Mexican Power and Light Company.
Frank McCarthy, for the Canada Life Assurance Company.

LOGIE, J., made the orders as asked, and said that, after consultation with some of the other Judges, he had come to the conclusion that he should not direct costs to be paid to solicitors or counsel appearing for the debtors—by way of deduction or otherwise—even if he had power to do so, which he did not decide.

The object of the Government being to safeguard the debts in question, it was inadvisable, as a matter of discretion, to complicate future adjustment of enemy debts with enemies, by any question of possible retaliatory costs in enemy Courts against Canadian citizens who might be debtors to an enemy.

Any costs incurred were such as might reasonably be incurred between solicitor and client; and, should there be any special claim, counsel for the Government had undertaken to make representations to the proper department for such action as might seem just.

The orders should issue without costs being payable to any of the solicitors or counsel for the debtors.

McLAUGHLIN v. DAVIDSON—KELLY, J.—MAY 21.

Principal and Agent—Agent's Commission on Sale of Lumber—Action for—Sale Made, but not through Plaintiff's Efforts—Dismissal of Action—Costs.]—Action for a commission of $1 per thousand feet upon the sale of a large quantity of lumber by the defendants to W. C. Edwards & Co. Limited, in September, 1918. The action was tried without a jury at Ottawa. KELLY, J., set out the facts in a written judgment, and found that the plaintiff had failed to establish his case. The plaintiff had authority from one of the defendants to make a sale within a limited time; but the sale to the Edwards company was not effected through his instrumentality. The action was dismissed, but without costs. T. A. Beament, for the plaintiff. W. D. Hogg, K.C., for the defendants.