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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

REID v. C. G. ANDERSON LUMBER CO.

Contract—Sale and Delivery of Lumber—Construction of Agreement—Unconditional Agreement to Deliver Specified Quantity—Damages for Breach—Variation in Amount.

Appeal by the defendants from the judgment of KELLY, J., 16 O.W.N. 383.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

William Laidlaw, K.C., and S. H. Bradford, K.C., for the appellants.

R. McKay, K.C., and P. E. F. Smily, for the plaintiffs, respondents.

LATCHFORD, J., in a written judgment, said that the appellants had been held liable for $2,605.64 damages for breach of a contract to sell to the respondents 1,000,000 feet of lumber, of divers stated dimensions, "to be what we"—the appellants—"produce from our Massey logs up to the above amount in each item."

The appellants furnished only 700,000 feet, and contended that they were not obliged under their contract to supply more than that quantity, although it was clearly established at the trial that they cut about 2,000,000 feet from their Massey logs.

Their contention was that, according to the usual practice in sawing, they could not cut from such logs without serious loss the balance undertaken to be delivered. If this contention was extended to the logical conclusion, the appellants, by their own acts, in sawing to greater advantage to themselves other sizes

of lumber, could evade supplying to the respondents any of the sizes specified in the contract—which was absurd.

The judgment appealed from was absolutely right, subject only to an admitted deduction of $105.

The judgment below should be varied by deducting $105 from the amount, and as varied should be affirmed with costs.

MIDDLETON, J., agreed with LATCHFORD, J.

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

RIDDELL, J., also agreed in the result.

Judgment below affirmed with variation in amount.

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

BROWN v. CRAWFORD.

Contract—Sale of Shares in Mining Company—Delivery "when Stock shall be Issued"—Stock Held by Directors under Pooling Agreement—Failure of Consideration—Action by Vendee for Specific Performance of Agreement.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 16 O.W.N. 369.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Frank Denton, K.C., and A. Lemieux, K.C., for the appellant.

S. R. Broadfoot, for the defendant, respondent.

MIDDLETON, J., in a written judgment, said that he agreed with the conclusions of the trial Judge.

The defendant held 30,000 shares of the stock of a company, subject to the terms of a pooling agreement. He sold half his holding to the plaintiff, but this was intended by both parties to remain subject to the agreement. The agreement provided that the assignment should be completed "when stock shall be issued" —meaning when received by the trustees the under pooling agreement. The whole venture proved a failure, and the stock was worthless. Now—10 years later—the plaintiff sought to

recover, on the theory that, the shares not having been delivered, there had been failure of consideration.

The plaintiff's claim had as little foundation in law as in morals, and was rightly dismissed.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal dismissed with costs (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

MARIER v. MARIER.

Husband and Wife—Alimony—Cruelty—Condonation—Wife Leaving Husband—Offer of Husband to Receive her back—Evidence—Injury to Health—Apprehension of Danger—Costs.

Appeal by the defendant from the judgment of SUTHERLAND, J., at the trial, in favour of the plaintiff in an action for alimony, awarding her $6 a week, with costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

A. Lemieux, K.C., for the appellant.

N. Champagne, K.C., for the plaintiff, respondent.

LATCHFORD, J., read a judgment in which he said that two or three acts of physical violence on the part of the defendant were proved to the satisfaction of the trial Judge. The last and most serious occurred in March, 1918, when an attempt was made to tie the plaintiff to a chair and her arm was injured. That she was at the time in such a fit of ill-temper that the defendant and his children believed her to have lost her reason was not open to doubt. The hurt which she sustained was due to their efforts to restrain her from smashing crockery and furniture, some of which was owned by herself and some by her husband.

For more than 6 months after this incident, the plaintiff continued to live with the defendant—though not indeed very happily. Disputes arose from time to time, and there were exchanges of terms about equally uncomplimentary. It was not, however, until the plaintiff had acceeded to her husband's request to release her interest in part of his farm which he had conveyed

to a son on the son's marriage, and had in turn exacted from her spouse the payment of a promissory note which he had made in her favour, that she left his bed and board, and brought this action for alimony.

The defendant had not only not objected to her return, but had in the most formal manner stated that she would be welcomed at any time to his home and arms and treated with all the consideration due to a wife by her husband.

The plaintiff sought to justify her decision to reject the defendant's offer by deposing that she found that her health was impaired by her husband's treatment. Her testimony in this regard was credited by the trial Judge "to a very considerable extent." She was considered to be in such a state that "she is afraid to go back," and "afraid that (should she do so) her health will be permanently injured." On these grounds, though not without doubt, the trial Judge came to the conclusion that alimony should be decreed.

But the mere apprehension on the part of the plaintiff that her health will be permanently affected in the event of her return to the defendant is not of itself sufficient to warrant the decree, nor is her conclusion that her health was affected by the treatment received from her husband. There was no evidence that her health was in fact impaired by anything that happened during the 6 or 8 months prior to her departure from her home. The testimony of the family physician on the point is negative. There is no finding—nothing indeed but her own conclusion—that her health will be affected, permanently or otherwise, should she return.

The facts did not bring her case within Lovell v. Lovell (1905-6), 11 O.L.R. 547, 13 O.L.R. 569; Bailey v. Bailey (1919), 45 O.L.R. 59.

The appeal should be allowed.

RIDDELL and MIDDLETON, JJ., agreed with LATCHFORD, J.

MEREDITH, C.J.C.P., was also of opinion, for reasons stated in writing, that the appeal should be allowed. He said also that the defendant should be ordered to pay all such costs as the Court had power to impose upon him.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

*RE LYNETT.

Quieting Titles Act—Title by Possession—Acquisition of Land by Surviving Husband of Deceased Owner—Receipt of Rents—Tenancy by the Curtesy—Devolution of Estates Act—Rights of Children—Absentees—Evidence—Onus.

Appeal by W. Lynett and others from the order of FALCONBRIDGE, C.J.K.B., ante 38.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

H. S. White, for the appellants.

E. C. Cattanach, for the Official Guardian, representing certain absentees with a possible interest.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the real purpose of the applicants (the appellants) in this quieting title proceeding was to bar irrevocably all claims that the brothers of the female applicants, or any heirs of such brothers, could ever make to any estate or interest in the land in question. The land was owned by the mother of the brothers and sisters; she had been in Chicago for some time before her death and died there, while still the owner of the land; but it was not clear how or to whom the rent of the land was then paid. She was said to have died intestate, and no one appeared to have been authorised to administer her estate; but her husband, who was the father of the brothers and sisters, was proved to have been in receipt of the rent from some time after her death up to the time of his death. She died in 1890, and he in 1916.

The receipt of the rent by the father might have been in the character of executor de son tort of his deceased wife's estate; or as tenant by the curtesy; or, as to one-third of it, as his own under the Devolution of Estates Act then in force, and as to two-thirds of it wrongfully; or else, as to his children's shares rightfully as their agent protecting their shares for them.

No evidence had been given of the actual character or purpose of the husband's receipt of the rents; nor was there really any evidence of the time when the first rent was paid to him.

The appellants' case was substantially an *ex parte* one, and so one in which the onus was upon them of proving satisfactorily the facts necessary to entitle them to a certificate of title.

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

The Inspector of Titles seemed to have been of opinion that, in the absence of any direct evidence upon the real question on which the rights of the parties depended, he should consider the father's possession a rightful rather than a wrongful one, and so attributed it to a tenancy by the curtesy, under which the father was entitled to the whole of the rents, just as he received them, during his life; and the learned Chief Justice of the King's Bench, who had to consider whether the applicants were entitled to the certificate of title, with some hesitation agreed with the Inspector that they were not; and the present appeal was from his refusal of the certificate.

The applicants had not made out a case entitling them to the certificate which they sought; but that conclusion should not be based upon the ground that the father must or should be now taken to have been in possession as tenant by the curtesy, but upon the ground that the applicants had failed so far to give such evidence of possession as conferred upon them as devisees of their father an absolute and indefeasible title.

Here there was no evidence of her father having or desiring to have any more out of the land than he lawfully had in it as a surviving husband.

Fry and Moore v. Speare (1915-16), 34 O.L.R. 632, 36 O.L.R. 301, distinguished.

The appeal should be dismissed, but the case should go back to the Inspector, if the appellants desired it, so that they might give further evidence, which should include evidence regarding the brothers, or their heirs, whose rights, if any, should not be barred behind their backs in such a doubtful case as this, and when some of them can easily be found.

Appeal dismissed.

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

*GODFREY v. COOPER.

*HART v. COOPER.

*WARBURTON v. COOPER.

Negligence—Collision of Automobiles upon Highway—Rule of Road—Right of Way—Contributory Negligence—Injury to Passengers in one Automobile—Non-identification with Driver—Unlicensed Driver—Trespasser or Outlaw upon Highway—Motor Vehicles Act, secs. 3, 4.

Appeals by the defendant in three actions in the County Court of the County of York from the judgment of DENTON, JUN. Co. C.J., in favour of the plaintiffs.

The three plaintiffs were passengers in an automobile driven by one Flemming. Flemming was driving west on Dundas street, in the city of Toronto; the defendant was driving an automobile north on Hamilton street; Flemming had the right of way; the defendant ran into Flemming's car, striking it on the hub of one of its rear wheels.

The trial Judge found the defendant negligent in failing to give Flemming the right of way and in driving negligently without keeping a proper watch for traffic ahead and to the right. He found Flemming negligent in driving at an excessive and unlawful speed when approaching and crossing Hamilton street.

Upon these findings an action by Flemming and by his wife, the owner of the automobile driven by Flemming, was dismissed; but judgment was given for each of the three above-named plaintiffs, upon the ground that they were not so identified with Flemming as to be answerable for his contributory negligence.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

O. H. King, for the appellant.

D. J. Coffey, for the plaintiffs, respondents.

MIDDLETON, J., in a written judgment, said that upon these appeals the findings of the trial Judge as to negligence were not questioned by either party. The argument was upon the contention of the defendant—which the trial Judge thought afforded no defence to the actions by the passengers—that, as the car driven by Flemming was owned by his wife, a license was necessary, and, as Flemming had no license, the passengers in his car could not recover against the defendant for injuries sustained by his negligence; or, putting it another way, that Flemming, in driving the car for hire, was unlawfully upon the highway, and the passengers, by participating in his illegal act, were unlawfully upon the highway, and the negligence of the defendant, resulting in their injury, afforded them no right of action.

The learned Judge said that he disagreed with every element of this contention. In his opinion, a mere failure to obtain a license does not deprive the driver of any right of action he could otherwise have against any person who injured him by negligence. Nor could a defendant rely upon any breach of the provisions of the statute unless he can shew that the breach of the statute was a proximate cause of the accident. Nor could any such defence avail against a passenger in the car—he is not so identified with the driver as to be disentitled to recover by the fault of the driver.

Sercombe v. Township of Vaughan (1919), 45 O.L.R. 142, distinguished.

The doctrine relied upon has the assent of the Courts of Massachusetts: Chase v. New York Central and Hudson River R.R. Co. (1911), 208 Mass. 137, 158; Dean v. Boston Elevated R.W. Co. (1914), 217 Mass. 495, 498; Koonovsky v. Quellette (1917), 226 Mass. 474, 475; but it has not been recognised elsewhere; and the Massachusetts statute is different from ours.

The Ontario Motor Vehicles Act, R.S.O. 1914 ch. 207, provides (sec. 3) that the owner of every motor vehicle driven upon the highway shall pay a registration fee and obtain a permit or license; and (sec. 4), that no person shall, for hire, drive a motor vehicle on a highway unless he is licensed; but the whole scope of the Act indicates that it is intended to require those operating vehicles upon the highway to observe its requirements, and failure to do so subjects the offender to penalties, but does not make him a trespasser in the sense that he is an "outlaw" within the meaning of the Massachusetts cases.

The appeal should be dismissed.

LATCHFORD, J., agreed with MIDDLETON, J.

RIDDELL, J., was of opinion, for reasons stated in writing, that the appeal should be dismissed.

MEREDITH, C.J.C.P., read a dissenting judgment. He took the view that the sole cause of the injury which the plaintiffs sustained was the insistence, of the driver of the car in which they were, upon a right of way to which he was not entitled; and so the plaintiffs had no cause of action against the defendant. And, if that were not so, the appeal should be allowed and the action dismissed upon the other and broader ground on which the appeal was based—that the driver of the car in which the plaintiffs were was driving in defiance of the statutory prohibition. And that unlawful state of affairs was caused by the plaintiffs, who hired him and were to pay him for so driving.

Appeal dismissed (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

NATIONAL EQUIPMENT CO. v. JONES & MOORE CO.

Contract—Supply of Electric Motors—Extension of Time for Delivery—Evidence—Failure to Shew that Vendors Relieved from Contract—Postponement—Reasonable Time—Damages—Assessment by Appellate Court.

Appeal by the plaintiffs from the judgment of the County Court of the County of York in an action to recover $1,963.23, for damages for breach of a contract. The judgment was for the recovery of $113.50 only, with costs. The object of the appeal was to increase the amount awarded.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. A. Macintosh, for the appellants.

R. McKay, K.C., for the defendants, respondents.

LATCHFORD, J., in a written judgment, said that the rights and liabilities of the parties to this action fell to be determined on the question whether or not the plaintiffs relieved the defendants from their contract to supply the plaintiffs with 230 electric motors.

After reviewing the evidence, the learned Judge said that the dominant requirement of the contract was that all the 230 motors were to be shipped within one year from the 7th February, 1916. There was a breach of the contract at its inception. No motors were shipped in February, but 6 in March, and none in April. Thereafter, until the defendants asked for time at the end of October, the average shipments per month exceeded 15. The defendants, on the 1st December, by their letter to the plaintiffs, recognised in the most formal manner the extent of their obligation to supply more motors, and pleaded for forbearance. It was accorded to them. They could not now be heard to say that they were thereby relieved from performing their contract.

Where one party has, within the contract-time, requested a postponement of delivery, the other party has the option to insist on the terms of the contract or to assent to the request: Benjamin on Sale, 5th ed., p. 690. The assent given by the plaintiffs was revocable if unlimited; and, if limited, was for postponement for a reasonable time. That time had passed before the action was brought. The defendants did make some attempt to fulfill their agreement, and, after February, 1917, supplied a number of motors at prices fixed by the contract. For the motors not supplied the plaintiffs were entitled to the

damages which they sustained by the breach. From the statement accepted by both the parties, and taking the lowest prices charged subsequent to the breach, it should be found that the plaintiffs had sustained damages amounting to $1,901.61.

The appeal should be allowed with costs and judgment entered in the Court below in favour of the plaintiffs for $1,901.61 and costs.

RIDDELL and MIDDLETON, JJ., agreed with LATCHFORD, J.

MEREDITH, C.J.C.P., was of opinion, for reasons stated in writing, that the appeal should be allowed and judgment entered for the plaintiffs for damages for breach of the contract—the amount to be ascertained upon a reference in addition to the amount of damages already awarded to them.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 2ND, 1920.

*SHEEHAN v. MERCANTILE TRUST CO. OF CANADA LIMITED.

Contract—Services Rendered to Master—Promise to Remunerate at Death of Master—Promise of Marriage—Breach—Compensation—Instrument in Writing Signed by Master Sued upon as Promissory Note—Will—Action against Executors—Evidence—Corroboration—Promise of Gift at Death—Revocation—Consideration—Illegality in Part.

Appeal by the defendants from the judgment of CLUTE, J., 16 O.W.N. 175, 45 O.L.R. 422.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

A. J. Russell Snow, K.C., and C. B. Nasmith, for the appellants.

W. M. McClemont, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that if this case had to be determined on the plaintiff's testimony only, and if he were obliged to treat that testimony as if accurate and true in all respects, the action should be dismissed.

Her story was, that the testator, in his and in his wife's lifetime, promised to marry her (the plaintiff), and that after the wife's death he refused to do so, promising her $10,000 to be paid to her

at his death. That consideration, for that promise, was illegal, and the promise therefore of no effect in law.

It was also said, however, by the plaintiff, that the promise was renewed after the death of the man's wife, and that there were other considerations, such as services rendered or to be rendered. Assuming that there was a new binding promise, made after the wife's death—that it was not merely the promise adhered to—and assuming also that the payment to be made in respect of services rendered or to be rendered was not a mere gratuity—a bounty to be bestowed in respect of services already paid for—the good and the bad together could not make a legal consideration; it was to be the one payment for all, without any possibility of separating the bad from the good, or in any possible way attributing so much of the one payment to the good considerations and the rest to the bad.

The learned Chief Justice said that he had, however, no desire to base his judgment upon that narrow ground; he preferred to put it on the ground that there was no proof sufficient to support any judgment in her favour.

Her case began with a stale claim—an action brought more than three years after the death of the man from whose estate the large sum of money involved in it was demanded; not sooner begun, although, if payable at all, the money was payable immediately after the man's death; and there was no kind of reason why the plaintiff, who was much in need of money, should not have demanded it and ought to have recovered it at once—except indeed that she had no lawful right to it.

It was impossible to give any credit to the plaintiff's unsupported testimony; and in such a case as this it should be impossible to give credit to any plaintiff seeking to recover money on alleged promises of those who had died. Not to mention the corroboration required by statute, the corroboration demanded by common caution and common sense was lacking: Hill v. Wilson (1873), L.R. 8 Ch. 888, 900, per James, L.J.

There was no doubt that the man promised the woman money, but only at his death, that is, by his will. The promise was revocable. It was a promise of a gift at death, a gift which was revocable, and was revoked.

And, if the gift or promise was not revocable, it must fail because there was no corroboration of the plaintiff's testimony as to consideration given; that is, that the testator gave the promise for a valid consideration. In such a case the whole claim depends upon proof of good consideration. Even if consideration were proved, the whole promise would be vitiated by the inseparable taint of part of the consideration proved.

The appeal should be allowed and the action dismissed.

Appeal allowed.

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. DECEMBER 29TH, 1919.

RE IMPERIAL STEEL AND WIRE CO. LIMITED.

Company—Petitions by Shareholders for Winding-up Order—Opposition by Company—Insolvency—Inquiry by Accountant—Result of Impairment of Capital—Whether "Just and Equitable" that Company should be Wound-up—Winding-up Act, R.S.C. 1906 ch. 144, sec. 11 (d), (e)—Dismissal of Petitions—Costs—Attempt to Influence Decision of Court.

Two petitions for an order for the winding-up of the company. The petitions had been adjourned until after the report of an accountant: see ante 11. The report having been made, the argument upon the petitions was renewed.

R. S. Robertson, for the petitioners.

I. F. Hellmuth, K.C., and M. L. Gordon, for the company.

Wallace Nesbitt, K.C., for two shareholders opposing the petitions.

KELLY, J., in a written judgment, said that it was beyond question that, before the launching of the petitions, the company had committed an act of insolvency, affording sufficient ground under the Dominion Winding-up Act for the application; but, on the return of the petitions on the 31st July, 1919, that ground had disappeared through the action of the company in settling with the execution creditors, who thereupon withdrew the execution.

After referring to the report made by the accountant appointed by the Court, the learned Judge said that if it were open to him to entertain the application for a winding-up order on the ground of impairment of the company's capital stock under sec. 11 (*d*) of the Winding-up Act, R.S.C. 1906 ch. 144, he would find it difficult to determine as a fact that there had been impairment to the extent mentioned in sec. 11 (*d*); but he had no authority to entertain the application upon that ground: Re Cramp Steel Co. Limited (1908), 16 O.L.R. 230.

The other ground put forward for granting the application was, that it would be "just and equitable," for reasons other than the bankruptcy or insolvency of the company, to make the order: sec. 11 (*e*).

The learned Judge said that he had, after very full consideration, arrived at the conclusion that the circumstances, unsatisfactory as they in some respects appeared, especially to those who,

in the present proceedings, might properly be classed as minority shareholders, did not warrant the taking of that course at the present time. These shareholders were in the position in which minority shareholders frequently find themselves—bound to submit to the ruling and management of the majority; but that in itself was not a justification for a winding-up at the instigation of the minority.

Both petitions should be dismissed; but the costs of the petitioners and the costs of the investigation by the accountant should be borne by the company.

It might be that the petitioners and other shareholders of the company similarly situated had grounds for complaint of the treatment accorded them by those responsible for the company's management, but the cause of the complaint was not necessarily such as called for a winding-up.

The learned Judge added to his reasons for judgment the following words:—

"I cannot pass from a consideration of these applications without expressing strong resentment at the veiled attempt made to influence the decision of the Court in the company's favour. It is needless to say that counsel and the solicitors engaged in the proceedings to wind up had no part in, or, so far as I know, any knowledge of, what I refer to. It is equally unnecessary to state that the decision I have arrived at was reached solely on what I have conceived to be the merits of the motions, and despite the insult implied in the suggestion that any member of this Court could by any possibility be susceptible to such influence. Though I do so with reluctance, I deem it a duty to make this statement as a protest against such an unwarranted conception of the integrity of the members of the Bench."

FALCONBRIDGE, C.J.K.B. DECEMBER 30TH, 1919.

ORR v. ORR.

Husband and Wife—Conveyance of Land by Wife's Mother to Husband and Wife—Action by Wife for Declaration that Husband Held his Share in Trust for her—Undue Influence—Evidence—Findings of Fact of Trial Judge—Dismissal of Action and Counterclaim—Costs.

The plaintiff was the wife of the defendant. On or about the 9th December, 1893, Angeline Pemberton, the mother of the plaintiff, by conveyance, expressed to be in consideration of

natural love and affection and the sum of one dollar, granted land to the plaintiff and defendant, their heirs and assigns, to and for their sole use forever.

The plaintiff now alleged that her mother agreed to convey the lands in question to her, the plaintiff; but, on the request and solicitation of the defendant, and by his undue influence and persuasion, and without consideration or independent advice, the conveyance was made as above stated; and she claimed in this action to be the owner of the lands in question, and that the defendant held his undivided half interest in trust for her. She also claimed a lien for certain sums of money which, she said, she had expended upon the property, and in repaying a mortgage of $100 thereon.

The defendant denied, both in pleadings and on oath, having exercised any undue influence over the mother, and said that she voluntarily and willingly and freely made the said conveyance. He also asserted a counterclaim for a money demand.

The action and counterclaim were tried without a jury at Belleville.

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

W. C. Mikel, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, after setting out the facts as above, said that Angeline Pemberton never up to the time of her death, which occurred about two years ago, took any proceedings to have the conveyance rectified, but apparently remained satisfied with the same.

It was not a case of alimony, but, as incidental to the contentions on both sides about the money expended on the property, there was a great deal of recriminatory evidence. The plaintiff and two sons, aged 22 and 23 respectively, maintained that the defendant treated his wife and family very badly, and that he was altogether a shiftless and useless person. The defendant denied these charges and called his eldest son, aged 28, who lived at home up to the time of his marriage, about 4 years ago, and who said the "crankiness" was not all on the defendant's side, and that he was a steady workman, and "used his wife right," as far as the witness could see. The charges of undue influence were maintained by her and denied by him under oath, and the learned Chief Justice did not find them to have been proved, even if the action had been brought without such undue delay and laches. He did not take into account the mass of evidence that was given as to their married relations, except to say that the money which the plaintiff claimed to have made by keeping boarders could not be treated as entirely her money, as it was manifest that the

husband's earnings must have, in whole or in part, purchased the food which was supplied to the boarders.

The parties should be left just as they were, the action being dismissed without costs, and the counterclaim being also dismissed without costs.

HODGINS, J.A. DECEMBER 30TH, 1919.

*BEST v. BEATTY.

*CALVERT v. BEATTY.

Chose in Action—Assignment of Part of Debt—Contract—Performance—Actions by Assignees—Necessity for Joining Assignor as Party—Conveyancing and Law of Property Act, sec. 49—Refusal of Plaintiffs to Add Assignor—Dismissal of Actions for Want of Parties.

Actions for money demands.

The actions were tried together without a jury at a Toronto sittings.

J. J. Gray, for the plaintiffs.

W. J. McCallum, for the defendant.

HODGINS, J.A., in a written judgment, said that the plaintiffs declined to add Ash, their assignor, as a party plaintiff, and no application was made to add him as a defendant. Counsel for Beatty, the defendant in both actions, contended that, without Ash as a party, the plaintiffs could not succeed because the assignment was of only a part of the debt.

Whatever the plaintiffs' rights might be under the terms of the agreement itself, or under the assignments from Ash, they could not recover except subject to whatever rights arose out of the agreement which contained the covenant on which they sued. The case is distinguishable from one where the party to whom the money is payable is merely a trustee for others. Here no trust was disclosed, nor was there any proof that the plaintiffs were entitled to the money within the terms of the agreement. Suing alone, they could not recover either upon the terms of the covenant in the agreement itself or by virtue of the assignments by Ash to them. The sum of $5,900 was part of the consideration for the entire agreement between Ash and the defendant, and the defendant was entitled to require Ash to carry out his agreement strictly

before he was called upon to hand over the consideration or to pay the sum of $5,900, either to Ash or to "the various persons entitled thereto." Until the contract was carried out, neither Ash nor those persons were entitled to the $5,900 or to any part of it. Whatever might be the law as to a part assignment of a simple chose in action, the statute (Conveyancing and Law of Property Act, sec. 49) does not extend to an assignment so as to vest in the assignee the right to sue without joining his assignor. His assignor is the person to carry out the agreement, and he is entitled to the consideration money or part of it only upon so doing.

Where, as in this case, questions arise which, although not going to the root of the contract, and therefore not entitling the parties to rescind, yet affect the rights of the parties under the agreement, either to have an account taken or to make deductions or in some other way to modify or alter the carrying out of the strict terms of the agreement, the parties to the contract must always be parties to an action to enforce it, notwithstanding any intermediate rights which they may have endeavoured to give to others, and notwithstanding any rights which may arise under the contract in favour of third parties whose claims are subordinate to the carrying out of the contract.

Reference to Conlan v. Carlow County Council, [1912] 2 I.R. 535, 542; Durham Brothers v. Robertson, [1898] 1 Q.B. 765, 773; William Brandt's Sons & Co. v. Dunlop Rubber Co., [1905] A.C. 454; Graham v. Crouchman (1917), 41 O.L.R. 22; Seaman v. Canadian Stewart Co. (1911), 2 O.W.N. 576, 579.

The learned Judge said that he was reluctant to dismiss the actions for want of the proper parties; but, having given an opportunity to the plaintiffs to remedy the defect, and they not having taken advantage of it, no other course was open.

Actions dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. DECEMBER 31ST, 1919.

RE CANUCK AUTOMOBILES LIMITED.

Company—Winding-up—Petition by Shareholder—Insolvency—Failure of Proof—Winding-up Act, R.S.C. 1906 ch. 144, sec. 3.

A petition by the holder of 40 shares of the capital stock of the company for an order under the Dominion Winding-up Act for the winding-up of the company.

G. Russell, for the petitioner.
R. McKay, K.C., for the company.

SUTHERLAND, J., in a written judgment, said that the petitioner had on affidavit stated his belief that the company was hopelessly insolvent, for the reasons given in para. 10 of the petition, which was based on the company's financial statement of the 31st March, 1919, in which, as the petitioner stated, the company's assets were valued at higher figures than were reasonable, and there was in fact a deficit of from $1,500 to $5,000, instead of a surplus.

No material in answer was filed on behalf of the company. It was contended for the company that the petitioner had not brought himself within sec. 3 of the Act by proving the facts on which it would be proper to find that the company was to be deemed insolvent; that it had not been shewn that in fact, at the time the application was made, the company was unable to pay its debts or was insolvent: Re Cramp Steel Co. Limited (1908), 16 O.L.R. 230; Re Harris Maxwell Larder Lake Gold Mining Co. Limited (1910), 1 O.W.N. 984.

With some doubt, the learned Judge concluded that the material was not sufficient on which to base an order.

Petition dismissed without costs.

SUTHERLAND, J. DECEMBER 31ST, 1919.

RE McCONKEY ARBITRATION.

Arbitration and Award—Motion to Set aside Award—Construction of Lease—Previous Judgment of Court on Special Case Submitted by Arbitrators—Effect of—Refusal to Entertain Application.

Motion on behalf of the Toronto General Trusts Corporation for an order that an award made on the 13th October, 1919, be set aside or remitted back to the arbitrators for reconsideration, on the following among other grounds:—

(1) That an error in law appeared on the face of the award, in that the arbitrators had allowed the tenant the value of the items or articles set out in para. 7 of the award.

(2) That the items or articles referred to in para. 7 of the award were not part of the buildings and improvements for which the landlord was obliged to pay under the terms of the lease between J. H. Richardson, lessor, and William R. Wilson, lessee, dated the 1st November, 1896, referred to in the award.

(3) That the answer given by MIDDLETON, J., in his judgment of the 20th March, 1918 (Re McConkey Arbitration (1918), 42 O.L.R. 380), to the third question in the special case submitted by the arbitrators, was wrong in law and constituted a misdirection to the arbitrators.

The motion was heard in the Weekly Court, Toronto.

E. G. Long, for the Toronto General Trusts Corporation.

M. H. Ludwig, K.C., for the other parties to the arbitration.

SUTHERLAND, J., in a written judgment, said that the arbitration was for the purpose of fixing the value of certain buildings on lands demised under a lease bearing date the 1st November, 1896. The arbitrators, having taken upon themselves the burden of the arbitration, were met with difficulties arising out of the construction of the lease and the basis on which they were to proceed to determine the value of the buildings. Thereupon a case was stated for the opinion of the Court and the clauses of the lease with reference to which the doubts arose were construed by Middleton, J., in the judgment above referred to. The arbitration thereafter proceeded and the said award was made.

Upon the present motion it appeared from the outset plain to the learned Judge that the main contention on the part of the applicants was based on the view that the construction placed by Middleton, J., on the clauses of the lease in question, was an erroneous one; and that, the arbitrators having proceeded upon the basis that it should determine their course of procedure, the award was also erroneous and should therefore be set aside, or remitted back. If this were so, the application was in effect an appeal from one Judge to another.

British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited, [1912] A.C. 673, was referred to. It was there held that, "although the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference, cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award."

The learned Judge said that he was unable to see that that case was an authority which would make it appropriate for him to hear and determine this application, though it might be quite appropriate that it should be heard and disposed of by a higher tribunal: see p. 686.

He therefore refused to entertain the application, and dismissed it with costs.

KELLY, J. DECEMBER 31ST, 1919.

HOARE v. MOORE.

Vendor and Purchaser—Agreement for Sale of Land—Statute of Frauds—Omission of Essential Particulars—Refusal to Enforce Contract—Costs.

Action for damages for breach of a contract.

The action was tried without a jury at Sandwich.

R. L. Brackin, for the plaintiff.

E. S. Wigle, K.C., for the defendant.

KELLY, J., in a written judgment, said that the contract sued upon was for purchase by the defendant from the plaintiff of land in Saskatchewan and purchase by the plaintiff from the defendant of land in Gosfield North, Ontario. The defendant refused to fulfil the contract, and indeed made his part of it impossible of performance by selling and conveying to a third person his Gosfield North land. The plaintiff therefore claimed damages.

In order to satisfy the requirements of the Statute of Frauds, an essential feature of an agreement for the sale of land is, that its material terms be set out with such particularity and definiteness as to enable the Court to enforce it. While the Court will give effect to a contract framed in general terms, where the law will supply the details, it is well-settled that, if any details are to be supplied in modes which cannot be adopted by the Court, there is no concluded contract capable of being enforced: Fry on Specific Performance, 5th ed., para. 368.

In respect to the time and mode of payment, the contract here sued upon was defective and incomplete in that it did not contain such particulars as would enable the Court either to enforce performance or apply the alternative remedy of damages. There was no escape from the conclusion that the contract was wanting in these essential particulars, and that the action upon it must fail.

The defendant's treatment of the plaintiff in withholding from him, near the end of December, the information that he had already sold his property to a third person, disentitled him to any special consideration. Had he then candidly told the plaintiff that he had made another sale, instead of leading him on, it would have been more in accordance with reasonable dealing and might have had some effect in preventing this action; and so it was not a case for costs.

Action dismissed without costs.

KELLY, J. DECEMBER 31ST, 1919.

DIETT v. ORECHKIN.

Vendor and Purchaser—Agreement for Sale of Land—Provision for Reduction of Price on Payment of Full Balance on or before Day Named in Agreement—Offer to Pay after Day Named—Tender—Evidence—Necessity for Strict Compliance with Contract—Waiver not Established—Counterclaim—Recovery of Instalments of Purchase-money, Interest, and Taxes.

Action for specific performance of an agreement for the purchase by the plaintiff from the defendant of land in the city of Windsor.

Counterclaim by the defendant (the vendor) for payment of two quarterly instalments of $200 each of principal and 6 months' interest and $36.72 for insurance premium paid by the defendant.

The action and counterclaim were tried without a jury at Sandwich.

A. B. Drake, for the plaintiff.

F. C. Kerby, for the defendant.

KELLY, J., in a written judgment, said that the agreement was dated the 7th February, 1919; the price was $4,000, of which $1,000 was paid on the execution of the agreement, and the balance was payable in quarterly instalments of $200 each, with interest, and with the provision that if the purchaser should pay the whole of the principal owing and interest on the 1st June, 1919, or sooner, the vendor would allow the purchaser $200 in reduction of the principal—would accept $2,800 as in full of the balance. Time was expressly made of the essence of the agreement.

Before the 1st June, the plaintiff intimated to the defendant that he would avail himself of the privilege and pay the balance of principal on that day. It was suggested that what took place between them resulted in an understanding that the payment need not be made promptly on that day, but would be accepted afterwards. That was not the case. There was no separate agreement and no variation of the original agreement relieving the purchaser from strict compliance with that term of the contract.

The balance of the purchase-money was not paid or tendered prior to the 4th June. On that day, Churchill, the plaintiff's agent, told the defendant that he (Churchill) was prepared to pay the $2,800 with interest to the 1st June and three days' additional interest. Churchill said that he offered the defendant the amount, $1,000 in cash and his own cheque for the balance.

There was no actual or sufficient tender; and the defendant did not waive strict compliance with the provision for the reduction.

It seemed to have been assumed on the plaintiff's behalf that he was entitled to production of a conveyance from the defendant to him before or when payment was made. That was not the meaning of the contract. The evidence was conclusive against the plaintiff's claim.

The defendant was entitled to the sums which he counterclaimed and interest thereon in accordance with the terms of the contract.

The action should be dismissed with costs, and the defendant should have judgment on the counterclaim with costs.

KELLY, J. JANUARY 3RD, 1920.

MERRILL v. WADDELL.

Sale of Goods—Contract—Quality of Goods—Action for Damages for Inferiority—Acceptance without Inspection—Inferiority Revealed by Subsequent Inspection—Warranty of Quality—Waiver—Right of Rejection—Delay in Giving Notice and Making Claim—Damages—Charges for Inspection—Interest.

In March, 1918, the plaintiff, who carried on business at Brantford as a dealer in hay and other produce, purchased by oral contract from the defendant, a hay-dealer at Stratford, several car-loads of hay. The contract-price was $16 per ton f.o.b. at the several points of shipment. The plaintiff alleged that he purchased and that the defendant warranted hay not to be inferior to grade No. 2. The action was to recover damages in respect of 10 car-loads on the ground of inferiority in quality. The plaintiff did not see the hay at or before the making of the contract.

The action was tried without a jury at Brantford.

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

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

KELLY, J., in a written judgment, found that what the plaintiff contracted for was hay not inferior to grade No. 2; that the greater part of the hay shipped was, on inspection, found to be of an inferior kind; and that the hay was not in good condition when shipped, that is, the inferiority was not caused by anything which happened after shipment.

The terms of payment prevented the plaintiff from getting possession of the hay until he had paid the purchase-money to the bank, and until then inspection was impossible. Even inspection without opening up the hay—door-inspection, as it was called in the testimony—would not have revealed the condition.

It cannot be successfully argued that obtaining possession on such terms was an unconditional acceptance, not only of the goods but of the quality. The plaintiff did not thereby waive his right to rely upon the warranty as to quality and condition. There was nothing in the contract requiring inspection at any particular time or place. The defendant knew this, and knew also that the hay was being sold for delivery by the plaintiff in the United States and for use at the military camps there. Accepting the goods did not, in the circumstances, deprive the purchaser of his right to seek damages for inferiority of quality. The right of a purchaser to reject goods not in accordance with what has been contracted for, when delivery has been made and possession taken, must not be confused with the right to claim damages for delivery of goods of inferior quality.

Reference to John Hallam Limited v. Bainton (1919), 45 O.L.R. 483.

The only other objection offered was the delay by the plaintiff in giving notice to the defendant of the condition of the goods and making claim for damages. The plaintiff's explanation was, that this delay was due to his awaiting receipt from his correspondents in Chicago of full particulars of the condition and value on a resale of the contents of all the cars. There was no evidence that the defendant had been prejudiced by this delay; and the learned Judge was unable to say that it was without justification.

The only item in the particulars of damage which was expressly objected to was that covering the charges for inspection.

The plaintiff's agents were compelled to sell the hay at prices much less than those then current, and which they could have obtained, for hay of the grade, quality, and condition called for by the defendant's contract. This resulted in a loss to the plaintiff, exclusive of the charges for inspection, of $1,647. The damages should be assessed at that sum, with interest thereon from the date of these agents' final report to the plaintiff of their disposal of the hay. The defendant should pay the plaintiff's costs.

STEPHENSON v. BROWN—ROSE, J.—DEC. 30.

Trees and Timber—Trees Cut on Plaintiff's Land in Excess of Authority—Finding of Trial Judge—Damages.]—Action for damages for the cutting of trees on the plaintiff's land and injuring certain small trees not cut. The defence was, that the trees were bought by the defendant from the plaintiff. The action was tried without a jury at a Toronto sittings. ROSE, J., in a written judgment, found, after reviewing the evidence, that nothing stood in the way of the plaintiff's claim in respect of all the cutting except that expressly authorised by her, and that the plaintiff would be compensated if the damage done by the cutting was assessed at $1,260, i.e., $1,000 more than she had been paid. There should be judgment for the plaintiff for $1,000 and costs. James McCullough and John W. McCullough, for the plaintiff. William Proudfoot, K.C., and G. H. Gilday, for the defendant.

DOUGHERTY v. ANNALY—ROSE, J.—DEC. 31.

Injunction—Interim Order—Structural Alteration in Demised Premises—Limited Restraint—Payment into Court.]—Appeal by the plaintiff from an order of the Local Judge of the County of Essex, dated the 22nd December, 1919, refusing to continue an injunction granted on the 12th December, but making certain provisions for payment of moneys into Court; and cross-appeal by the defendants from the order for payment in. The appeals were heard in the Weekly Court, Toronto. ROSE, J., in a written judgment, said that the Local Judge was right in refusing to grant an injunction as wide as the ex parte injunction of the 12th December. If the plaintiff had moved before the excavating had been done or the porch had been torn away, she ought to have had an injunction against the excavating and the tearing down of the porch, etc.; but the foundation had been dug and the porch was gone; and, assuming it to be true, as stated by one of the deponents, that the contemplated building would not be as high as the plaintiff's first storey windows, the balance of convenience was in favour of the refusal of any interlocutory injunction against building. This, however, did not mean that the defendants were to be allowed to make holes in the walls of the building leased to the plaintiff, or to tear out the bay window spoken of by the plaintiff on her examination, or to make any other structural alteration in the demised premises: against all such acts there should be an injunction. The order as to payment into Court could not stand with the injunction now granted. The plaintiff ought to go to trial at the next sittings at Sandwich. Costs in the cause. D. L. McCarthy, K.C., for the plaintiff. A. W. Langmuir, for the defendants.

SPARKS v. CANADIAN PACIFIC R. W. CO.—CANADIAN PACIFIC R. W. CO. v. SPARKS—SUTHERLAND, J.—JAN. 2.

Railway—Carriage of Goods—Injury and Loss in Transit—Failure to Shew Negligence—Want of Proper Care—Freight and Demurrage Charges.]—The first action was brought by Albert E. Sparks to recover $2,938.51 as damages for the loss of hay alleged to have been caused by the negligence of the railway company in handling the hay in transit upon their railway. In the second action the railway company claimed $3,551.51 for freight charges and demurrage in respect of the hay shipped upon the railway. The actions were tried together without a jury at Ottawa. SUTHERLAND, J., in a written judgment, said the negligence charged by Sparks consisted in the alleged unsealing of the cars of hay, unloading the hay, and improperly storing it, in consequence of which it was injured by exposure to rain and a considerable portion of it ultimately destroyed by fire. Sparks alleged that the hay was shipped in perfect condition, which the railway company denied. After a review of the evidence, the learned Judge said that he could not find that there was any delay on the part of the company in transporting the hay or that any alleged delay on their part caused damage or depreciation to it. He could not find that the defendants or their agents broke the seals of the cars or authorised the opening of them, or that the opening in Toronto (which was the place of destination) injured the hay to any appreciable extent or caused its rejection by the consignees. Upon the evidence, it must be found that some of the hay was wet before it was shipped. The company made every reasonable effort to get a suitable place to store the hay. Sparks had not shewn that injury or damage resulted to him through the negligence of the defendants for which he was entitled to recover any part of the sum claimed by him. The company proved that the freight and demurrage charges claimed were the authorised ones and covered the periods alleged. The first action should be dismissed with costs; and there should be judgment in the second action in favour of the company for $2,862.61 with costs. C. A. Seguin, for Sparks. W. L. Scott, for the company.

CORRECTIONS.

In REX v. LOFTUS, ante 256, the Court was composed of MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

In CONTINENTAL COSTUME CO. v. APPLETON & CO., ante 258, the Court was composed of MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

HODGINS, J.A., agreed with MACLAREN, J.A.

In *Re* MCKINLEY AND MCCULLOUGH, ante 265, the Court was composed of MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

HODGINS, J.A., agreed with MEREDITH, C.J.O.