The
Ontario Weekly Notes

Vol. I TORONTO, OCTOBER 27, 1909. No. 5.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P. OCTOBER 4TH, 1909.

RE CONGER.

Will—Construction—Enumeration of Properties without Specific Disposition — Previous Direction for Payment of Debts — Subsequent Residuary Bequest.

Motion by E. M. Conger for an order under Rule 938 determining a question arising upon the will of Stephen Marshall Conger.

The will was made upon a printed form. It began: "This is the last will and testament of me Stephen Marshall Conger of the town of Picton in the county of Prince Edward." Then came a clause revoking all former wills and testamentary dispositions. Then the direction that "all my just debts funeral and testamentary expenses to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease." Then this paragraph: "I give devise and bequeath all my real and personal estate of which I may die possessed in manner following this is to say." Then, under six heads, were enumerated various properties, consisting mainly of real estate, but including the half interest of the testator in the Picton "Gazette" printing office and contents, including notes, accounts, etc. These six enumerated parts of the property were written in. Then followed in print: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto—" and then in writing: "McDonald Conger my son and my daughter Mabel Lynette Conger,

wife of James W. Allison, with the hope that they will pay over such a sum of money to my grandchildren Merle Pauline Conger and Stephen Harold Conger as they may deem best." Then followed a clause appointing executors.

W. E. Middleton, K.C., for the applicant.

E. C. Cattanach, for the infants.

E. F. B. Johnston, K.C., and G. Grant, for the executors.

Meredith, C.J.:—It is argued that the manifest intention of the testator was to make a disposition of the six enumerated properties to some one, and that he has omitted to have written into the will the object of that devise; that for that reason there was an intestacy as to the enumerated properties. . . .

I am not able to agree to that contention. I do not see why any such mistake as is suggested should be attributed to the testator, and it seems to me there is no violence done to the language which he has used, in treating the words "all the residue of my estate not hereinbefore disposed of" as another enumeration of the particulars in addition to those which were described in the written part of the will and numbered from 1 to 6.

Even if it were otherwise, and there were no previous disposition contained in the will, I should doubt whether that would not be the proper view to take of the effect of the will; but in this will there is a preceding effectual disposition of part of the testator's estate. I refer to the direction that the debts and funeral and testamentary expenses are to be paid by the executors, and therefore to add to the enumeration of the properties a description of the residue as the residue "of my estate not hereinbefore disposed of" seems to me to be an accurate description and to sweep in all the estate that had not been disposed of by the paragraph of the will to which I have referred.

The effect of In re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726, is, I think, correctly stated in Theobald on Wills, Can. ed., at p. 233. . . .

[Blight v. Hartnoll, 23 Ch. D. 218, referred to.]

I think that all the property of the testator, real and personal, is included in the residuary gift which this will contains, and there will be a declaration accordingly. Costs out of the estate.

FALCONBRIDGE, C.J.K.B. OCTOBER 11TH, 1909.

LETCHER v. TORONTO R. W. CO.

Street Railway—Injury to Passenger—Negligence—Contributory Negligence—Findings of Jury.

Action by Julia Letcher and her husband, Edwin Letcher, for damages suffered by reason of the defendants' negligence, as alleged.

The plaintiff Julia Letcher on the 24th May, 1909, was a passenger on a west-bound King street car of the defendants and wished to alight at Portland street. The car stopped there, but, as she alleged, started again as she was about to alight, and she was thrown to the ground and injured.

The action was heard before the Chief Justice and a jury.

The questions put to the jury and their answers were as follow:—

1. Were the injuries which the plaintiff Julia Letcher sustained caused by any negligence of the defendants? A. Yes.

2. If so, wherein did such negligence consist? A. In the conductor starting the car before the plaintiff had time to get off.

3. Or were the injuries sustained by reason of her own negligence or want of care? A. No.

4. If so, wherein did her negligence or want of care consist?

5. Could the plaintiff Julia Letcher, notwithstanding any negligence of the defendants, by the exercise of ordinary care, have avoided the accident? A. Yes—possibly by taking hold of the hand rail.

6. If you find that the plaintiff Julia Letcher was guilty of negligence, nevertheless could the defendants by the exercise of reasonable diligence have avoided the accident? A. Yes.

7. If you answer "yes" to the last question, what further could defendants have done to avoid the accident? A. We are of the opinion that the conductor was not attending to his business.

8. In case the plaintiffs should be entitled to recover, at what sum do you assess the compensation to be awarded?

(a) To the plaintiff Julia Letcher? A. $450.

(b) To the plaintiff Edwin Letcher? A. $150.

On the jury bringing these findings into Court, they were further asked:—

Q. Where do you find the plaintiff Julia Letcher was when the car started? The Foreman: "At the edge of the step." The jury were polled and were unanimous on that.

Q. What do you mean by the edge of the step?

The Foreman: "At the edge of the platform."

FALCONBRIDGE, C.J. after consideration): — With unusual doubt and hesitation I enter the verdict for the plaintiffs.

MASTER IN CHAMBERS. OCTOBET, 15TH, 1909.

GREENE v. BLACK.

Discovery—Production of Documents—Affidavit on Production—Claim of Privilege—Insufficiency—Fraud.

Motion by the plaintiff for a further and better affidavit on production by the defendant.

The plaintiff claimed specific performance of an agreement by the defendant to purchase a mining claim for $15,000, or $7,000 damages for breach of the agreement. The plaintiff alleged that, when he had, under the agreement, made all necessary arrangements with the owner and another person interested in the claim, the defendant "conspired with (them) to procure, and by false and fraudulent representation did procure the breach by (them) of their said agreement, and in fraud of the plaintiff obtained a conveyance of the mining claim to himself on payment of only $8,000, whereby the plaintiff lost his profit upon the sale of the said mining claim, being $7,000."

The second part of the defendant's affidavit on production set out 10 documents which he objected to produce as "privileged, as they are communications between my several solicitors," naming them.

C. C. Robinson, for the plaintiff.

Z Gallagher, for the defendant.

THE MASTER held that the claim to privilege was not sufficient within the rule laid down in Clergue v. McKay, 3 O. L. R. 63, 478;

and also that, inasmuch as fraud on the part of the defendant is a direct issue raised on the pleadings, the privilege is taken away: Regina v. Cox, 14 Q. B. D. 153; Williams v. Quebrada Railway Land and Copper Co., [1895] 2 Ch. 751; Smith v. Hunt, 1 O. L. R. 334; Cutten v. Mitchell, 10 O. L. R. 734, 738; Bullivant v. Attorney-General for Victoria, [1901] A. C. 196.

Motion granted with costs to the plaintiff in any event.

MEREDITH, C.J.C.P. OCTOBER 15TH, 1909.

RE WILLIAM HAMILTON MANUFACTURING CO.

Company—Winding-up—Claim of Bank on Securities Assigned by Company—Notice of Assignment to Persons Liable on Securities—Absence of—Status of Liquidator to Object.

An appeal by the liquidator of the William Hamilton Manufacturing Co. Limited in a proceeding for the winding-up of the company under the Winding-up Act, R. S. C. ch. 144, from a certificate of the local Master at Peterborough allowing the claim of the Ontario Bank.

W. D. McPherson, K.C., and F. D. Kerr, for the liquidator.

J. H. Moss, K.C., for the Ontario Bank.

MEREDITH, C.J.:—The only objection against the ruling of the Master urged upon the argument was that the Ontario Bank were not entitled to the benefit of certain securities assigned to them by the company, because notice of the assignment had not been given to the persons liable upon the securities; and that objection is not entitled to prevail, as the appellant, as liquidator, stands in no better position than the company, and the assignment as to the company was effectual to transfer the securities, in equity at all events, notwithstanding that notice of it was not given to the persons liable.

Appeal dismissed with costs.

DIVISIONAL COURT. OCTOBER 15TH, 1909.

SETCHFIELD v. EVANS.

Promissory Note—Action on—Liability of Maker—Guarantor.

Appeal by the defendant from the judgment of the 1st Division Court in the county of York in favour of the plaintiff in an action on a promissory note for $105 made by the defendant to one S. A. Paterson, indorsed by one Thomas Gosnell without recourse, and sold by him to the plaintiff two years before maturity.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

C. A. Moss, for defendant.

Frost, for plaintiff.

The judgment of the Court was delivered by FALCONBRIDGE. C.J.:—We have carefully considered all the circumstances urged upon us by the defendant's counsel; but the evidence of Thomas Gosnell, which the learned Judge has accepted, covers the whole ground, and there is really no evidence to controvert it. The defendant is the maker of the note, and not in the position of a guarantor.

Appeal dismissed with costs.

DIVISIONAL COURT. OCTOBER 15TH, 1909.

IHDE v. STARR.

Easement—Park Reserve and Entrance—Right of Purchaser According to Registered Plan to have Unobstructed Use of—Registry Laws—Statute of Limitations—Mistake of Title.

Appeal by plaintiff from the judgment of MULOCK, C.J.EX.D., dismissisng the action.

The plaintiff claimed to be the owner of lots 111 to 121 in block D. according to a registered plan of land in Bertie, all of which lots were originally owned by the Crescent Beach Association. Lots 111 to 114 were conveyed by the association to S. in October, 1899, by deed registered in November, and were conveyed by S. to the plaintiff in September, 1902, by deed registered in that month; lots 115 to 121 were conveyed by the association to the plaintiff in November, 1906, by deed registered in that month.

The defendant had a registered paper title to lots 122 to 129 in block E. according to the same registered plan.

Upon the registered plan there were laid down 162 lots, and there were shewn upon it 6 blocks, lettered A. to F.; between these blocks there was a space marked "no thoroughfare—private entrance for exclusive use of occupants of lots in Crescent Beach tract;" and, except between blocks E. and F., there was at the lake shore end of the space a pear-shaped figure marked "Park Private Reserve." Between blocks E. and F. there were two figures in the space, marked respectively "Park Private Reserve" and "Private Reserve Park."

The defendant's buildings and grounds and roads, as originally erected and laid out, encroached upon lots 114 to 121 in block D.; and the plaintiff brought an action for a declaration of right, damages, and an injunction. A compromise of the action was effected, and judgment was entered for the plaintiff for possession according to the terms of the compromise, without costs.

The defendant's buildings, grounds, and roads at this time were partly on the space between blocks D. and E. already referred to, and partly on that part of it marked "Park Private Reserve."

Shortly after the compromise, the defendant removed her buildings and other property from the plaintiff's lots, and ceased to occupy any of them; the house was removed to the space between blocks D. and E., and it and her grounds and roads were at the time of the present action partly on this space and partly on the part of it marked "Park Private Reserve," and partly on the land to which the defendant had a paper title.

The present action was brought on behalf of the plaintiff and "all other the property holders at Crescent Beach, in the township of Bertie, in the county of Welland," and an injunction was sought to restrain the defendant from obstructing or interfering with in any way or preventing or hindering the plaintiff and the other property owners in the free and uninterrupted use and enjoyment of the private park reserve and the private entrance to lots for the

exclusive use of occupants of lots in Crescent Beach tract, and to compel the defendant to remove her buildings, etc.

By her defence the defendant claimed title to the land of which she was in possession by length of possession, and in the alternative claimed the benefit of the statute as to improvements made under mistake of title.

The defendant also alleged that in August, 1894, she purchased from the association a part of the property called "the mound," which included that part of the land over which the plaintiff claimed the rights in respect of which the action was brought; that she (the defendant) paid her purchase money and at once entered into possession of what she had purchased; that by mistake a lease and not a conveyance in fee simple was made to her by the association; and that also by mistake what she purchased was described as lots 128 and 129, and that this erroneous description was by mistake followed in the conveyance to her from the association of the 12th March, 1908; and that the plaintiff purchased lots 115 to 121 from the association knowing that the defendant was entitled to the mound, and that she was and had been for many years in possession of it claiming title to it.

The trial Judge found that the defendant had purchased the mound and been put in possession of it by the association; that the mistakes which she alleged were made were proved; that her defence based upon the Statute of Limitations was made out; and he dismissed the action with costs.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

E. D. Armour, K.C., and G. H. Pettit, for the plaintiff.

W. M. Douglas, K.C., for the defendant.

The judgment of the Court was delivered by MEREDITH, C.J., who said that, assuming that the findings of fact were warranted by the evidence, he was unable to see how, upon the present record and in an action to which the association was not a party, what would be practically a reformation of the instruments of conveyance from the association to the defendant could be adjudged. . . . Even if, as between her and the association, a case for the reformation of the instruments of conveyance had been made out, and she was in equity the owner of the land which she claimed to have purchased from the association, her equitable right could not prevail against the plaintiff, who claimed under a registered conveyance. There was no evidence to support a finding that the plaintiff pur-

chased with such notice of the defendant's equitable right, if any she had, as is required to defeat the plaintiff's registered title. All that was shewn was that the plaintiff had notice that the respondent was in possession and had made valuable improvements on the land over which the plaintiff claimed the right she was seeking to enforce in this action, and that was not sufficient to entitle the defendant's equitable interest to prevail against the plaintiff's registered title: Gray v. Ball, 23 Gr. 390; Roe v. Braden, 24 Gr. 589; McVity v. Trenouth, 9 O. L. R. 105, per Osler, J.A., at p. 110.

That the defendant's possession for 10 years is not sufficient to bar the right of the plaintiff to the easements claimed by the latter, the Court is bound to hold on the authority of Mykel v. Doyle, 45 U. C. R. 65; that decision has been questioned but never over-ruled. . . .

That the effect of the plan and the conveyance to the plaintiff and to S. by the association was to confer on them . . . the easements or rights in respect of the space between blocks D. and E. and the park in the space was not disputed by counsel for the defendant, and there was no doubt as to the right of the plaintiff to have both unobstructed and the use of them for the purposes indicated on the plan. . . .

[Other questions arising in the action, as to the effect of the consent judgment in the former action, not considered, it being unnecessary to consider them.]

Appeal allowd with costs, and judgment for plaintiff as prayed with costs, but the operation of the injunction to be suspended for a year to enable the defendant to remove the obstructions.

TEETZEL, J. OCTOBER 16TH, 1909.

RE DALE AND TOWNSHIP OF BLANSHARD.

Municipal Corporations—By-law—Voting on by Electors—Voters' List not Based on Last Revised Assessment Roll—Court of Revision—Time for Sitting—Assessment Act, secs. 61, 65—Municipal Act, sec. 348—Curative Provision, sec. 204.

Motion to quash a by-law of the township authorising the issue of debentures to the amount of $20,000 for the purpose of granting

aid to that amount to the St. Marys and Western Ontario Railway Co.

The by-law was voted upon on the 21st May, 1909, and was carried by a substantial majority of the ratepayers to whom it was submitted.

The objection chiefly relied upon was that the voting was not upon a list of voters based upon the last revised assessment roll, as required by sec. 348 of the Consolidated Municipal Act, 1903. It was undisputed that the assessment roll for 1909 was duly returned to the township clerk on the 30th April; that the Court of Revision sat on the 18th May; and the voting took place on the 21st May.

C. C. Robinson, for the applicant.

J. C. Makins, for the township corporation.

Teetzel, J.:—Section 65 of the Assessment Act, 4 Edw. VII. ch. 23, provides for notices of appeal against the assessment roll to the Court of Revision being given within fourteen days after the return of the roll.

The last day for appealing was therefore on the 14th May.

Section 61 of the Assessment Act provides that the first sitting of the Court of Revision shall not be held until after the expiration of at least ten days from the expiration of the time within which notices of appeals may be given to the clerk of the municipality. The Court could not, therefore, have legally held its first sitting before the 24th May, which was three days after the voting. See Tobey v. Wilson, 43 U. C. R. 230.

I think the objection must be sustained. The Court of Revision is a judicial body appointed by the Act, and contains its whole jurisdiction from the provisions of the Act. It seems to me clear, therefore, that it was acting entirely beyond its jurisdiction in assuming to sit and adjudicate at a time prohibited by the statute, and that anything assumed to be done at such sitting would be entirely void, and that the assessment roll which it purported to revise was not the last revised assessment roll of the municipality at the time of the election, within the meaning of sec. 348; but that the last revised assessment roll would be that of the previous year.

Mr. Makins invoked the curative provisions of sec. 204 of the Municipal Act, but I think it is impossible to apply that section in support of this by-law, for it cannot be said that the disregard of the positive requirements of the statute by the Court of Revision was an unsubstantial act or omission.

It seems to me that the objection is fundamental and is not within the category of irregularities contemplated by sec. 204.

The latest judicial discussion of this section to which my attention has been called is to be found in Hickey v. Town of Orillia, 17 O. L. R. 317, at pp. 331, 332, 342.

The by-law must, therefore, be quashed with costs.

DIVISIONAL COURT. OCTOBER 16TH, 1909.

YOUNG v. CASHION.

Bills of Exchange—Drafts on Bank—Death of Payee before Presentation—Rights of Foreign Administrator—Foreign Domicile of Deceased—Holder of Drafts—Rights of Ontario Administrator—Money in Court—Retention of Part to be Paid out in Ontario—Costs.

Appeal by the plaintiff from the judgment of MAGEE, J., deciding in favour of the defendant an issue directed by an order of the Court.

The plaintiff in the issue was the California administrator of the estate of James Young, deceased, and the defendant the Ontario administratrix. In 1904 James Young came to Ontario from California, being then domiciled in California, and sold a farm in Ontario. Before returning to California he bought from the Bank of Montreal at Cornwall, Ontario, two drafts upon the National City Bank, New York, each for $1,000, and carried them with him to California. On the 8th March, 1905, he died there without having cashed them.

The plaintiff was on the 5th September, 1905, by a California Court appointed administrator, and, having indorsed the drafts as administrator, sent them to New York for collection. The New York bank refused payment, the Bank of Montreal having in May, 1905, stopped payment of the drafts, and a demand was then made on the Bank of Montreal, who required evidence of identity, etc. Before that was furnished, and on the 23rd November, 1905, the defendant, next of kin of the deceased, residing near Cornwall, obtained from the Surrogate Court of the united counties of Stormont, Dundas, and Glengarry, letters of administration to the estate of the deceased, and on the 21st February, 1906, began an action against the Bank of Montreal to recover $2,021, being the amount paid by the deceased to that bank when he obtained the drafts, and interest.

The Bank of Montreal obtained an order allowing them to pay into Court $2,000, less their costs, and directing the trial of this issue between the claimants, as to whether the money was the property of the plaintiff as administrator or of the defendant as administratrix, etc.

The plaintiff's appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

C. H. Cline, for the plaintiff.

G. A. Stiles, for the defendant.

The judgment of the Court was delivered by RIDDELL, J., who said that there was a contract upon the part of the New York bank to accept and pay all drafts drawn upon it by the Cornwall bank. This contract was between the two banks; and Young, not being privy to it, could not take advantage of it; he could not sue the New York bank before acceptance, or for non-acceptance: Boyd v. Nasmith, 17 O. R. 40, at p. 45, and cases cited; Hopkinson v. Forster, L. R. 17 Eq. 76; Falconbridge on Banking, pp. 609, 610; Encyc. of the Laws of England, pp. 2, 212. The proposition that A. can sue B. upon a contract made by C. with B. had its quietus many years ago: see Kendrick v. Barkey, 9 O. W. R. 356, 358-360, 362n. The Bank of Montreal by becoming the drawers of the bills did not undertake that the New York bank would accept and pay in New York, but did guarantee that, if that bank did not do so, they themselves would, if duly notified, reimburse the holder: Encyc. of Laws of England, vol. 2, p. 212; Maclaren on Bills of Exchange, 4th ed., p. 371 *ad fin.;* R. S. C. ch. 119, sec. 82. This was a contract with Young, and he might enforce it. Neither of these contracts died with Young; his duly appointed personal representative had the same right to enforce the latter as Young himself. The drafts passed into the hands of the plaintiff in California; he was the duly appointed representative of Young in California, and as such had the right to act in California in respect of these drafts as Young would have had, had he lived: see Hyde v. Skinner, 2 P. Wms. 196; Williams v. Burrell, 1 C. B. 402; Rawlinson v. Stone, 3 Wils. 1, 1 Stra. 1260; Watkins v. Maule, 2 J. & W. 243. . . . The plaintiff was the legal holder of the drafts in the legal and mercantile sense. . . .

The New York bank refused to accept, whereupon the liability attached to the Canadian bank to "reimburse the holder. . . . . The liability is to the holder of the drafts. There can be no pretence that the defendant was the holder of these drafts, and conse-

quently I am unable to see how she can be considered as having any claim against the Canadian bank; the action is not for money had and received, but upon the drafts by the holder of the same. The money paid into Court . . . should be in the same ownership as that of the bills.

Were there nothing more in the case than a dispute between two administrators, the order should be that the money should be paid out to the California administrator under Con. Rule 1114. But it appears that the defendant is the sole next of kin of the deceased, and that it will require all this money to pay debts, etc. It would not be advisable to pay money out of Court to a foreign administrator who would necessarily repay some of that amount to a person in Ontario, party to this action. With a declaration that the money in strictness should be paid to the plaintiff, the defendant should have the option of taking a reference to the Master to determine the amount which should be sent to the plaintiff. The reference will be at her own expense in reality, as the costs of all parties should be paid out of the fund.

Costs of the plaintiff of the action to be paid out of the fund in priority; if sufficient remain after providing for the costs of the plaintiff of action (and reference if a reference be taken) and this appeal, as also the amount which should be sent him, the costs of the defendant of action and reference may be paid out of such residue.

If the defendant refuses a reference, the appeal should be allowed generally, and the amount in Court ordered to be paid to the plaintiff; and he will have his costs of action and appeal out of the fund.

In any event costs of the action shall be considered to begin with the application for an interpleader order.

MEREDITH, C.J.C.P., IN CHAMBERS. OCTOBER 18TH, 1909.

TOWNSEND v. NORTHERN CROWN BANK.

Practice—Particulars—Statement of Claim—Inability of Plaintiff to Give Particulars—Postponement till after Examination of Defendants' Officers for Discovery.

Appeal by the plaintiff from an order of the Master in Chambers requiring the plaintiff to deliver to the defendants "full particulars embracing the full description of each of the conveyances, assign-

ments, and transfers referred to in the 5th sub-clause of paragraph 3 of the statement of claim," confining the plaintiff at the trial to the particulars which he should deliver pursuant to the order, and directing that in default of delivery of the particulars the sub-clause should be struck out without further order.

The plaintiff was the assignee for the benefit of creditors of B., and the action was to set aside, either as fraudulent against creditors or as fraudulent preferences, certain securities alleged to have been given by B. to the defendants.

In sub-clauses 1 to 4 particulars were given of certain of the securities which were impeached. Sub-clause 5 stated that B. also executed other conveyances, assignments, and transfers to the defendants.

W. Laidlaw, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendants.

Meredith, C.J., said (after consultation with other Judges who approved his view) that the appeal raised a somewhat important point of practice, whether such an order should be made as was made by the Master, or an order allowing the plaintiff to have discovery from the defendants' officers before the statement of defence was delivered, and requiring him to deliver particulars after discovery had been obtained. The practice given effect to by the Master appeared to be an inconvenient and cumbrous one, as applied to a case in which a plaintiff was unable to give the particulars until he had had an opportunity of examining the defendant within whose knowledge the particulars wholly lay. . . . To permit the plaintiff to have discovery now and to require the particulars to be delivered after the discovery is had, does no injustice to the defendants, and avoids the necessity of an amendment of the statement of claim, and does not put the plaintiff, as he is put by the Master's order, in such a position that he may never be able to get the discovery necessary to enable him properly to frame his pleading. . . .

[Reference to Gordon v. Phillips, 11 P. R. 540; Miller v. Harper, 38 Ch. D. 110; Waynes Merthyr Co. v. D. Radford & Co., [1896] 1 Ch. 29.]

Order varied by directing that the plaintiff be at liberty to examine for discovery; the examination to take place within 10 days, and the time for delivery of particulars to be one week after discovery obtained. Costs of the appeal to be costs in the cause.

DIVISIONAL COURT. OCTOBER 18TH, 1909.

CANADA CARRIAGE CO. v. LEA.

Fraudulent Conveyance—Action to Set aside—New Trial—Evidence—Burden of Proof.

Appeal by the defendant Maud C. Lea from the judgment of ANGLIN, J., of the 4th December, 1908, in favour of the plaintiffs upon the second trial of an action by creditors to set aside as fraudulent and void a conveyance of land and a bill of sale made by the defendant Edward A. Lea to the appellant.

The judgment of the Court of Appeal directing the new trial is reported in 11 O. L. R. 171.

ANGLIN, J., was of opinion that the burden of shewing that the transactions were entered into and carried out in good faith, and that the consideration which the appellant alleged had been paid by her had been actually paid, rested upon the appellant, and that she had not discharged it by the evidence adduced at the trial before him, and he was also of opinion that, if the burden of proof rested upon the plaintiffs, they had successfully impeached the transactions which they attacked, and he entirely discredited the testimony of the appellant's husband.

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

J. Bicknell, K.C., for the appellant.

G. Lynch-Staunton, K.C., for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J., who said that, in the opinion of the Court, the conclusion reached by Anglin, J., and the reasons which he gave therefor were right and his judgment should be affirmed.

Appeal dismissed with costs.

DIVISIONAL COURT. OCTOBER 18TH, 1909.

DREWRY v. PERCIVAL.

Guaranty—Consideration—Belief in Validity of Claim—Forbearance to Sue—Evidence.

Appeal by the defendant George Percival from the judgment of the District Court of Rainy River in favour of the plaintiff in an action, as against the defendant George Percival, upon an alleged guaranty for the repayment of $3,500 lent by the plaintiff to the defendant H. C. Percival.

The defendant H. C. Percival in 1901, being desirous of buying or leasing a hotel, borrowed money from the plaintiff, and gave promissory notes for the amount. H. C. Percival went in as lessee, and there continued until the 27th January, 1902, when the hotel was burned.

The plaintiff swore that the defendant George Percival assured him (the plaintiff) that his account should be paid, that he (Percival) would see it paid, that he would undertake to do it.

After the fire George Percival was seen by one Graham (who had also lent money to H. C. Percival), and it was said that George then made a promise to Graham that he (George) would pay the plaintiff and Graham, who in the matter of the insurance on the hotel were acting together, the insurance being the security they were to receive. Graham did look after the insurance for both parties, and informed the plaintiff that he would do so, and this was acceptable to the plaintiff. Graham informed the plaintiff of the undertaking of George Percival to pay the two creditors. After the fire it was arranged that the policies should be assigned to George, and on the 10th April, 1902, the plaintiff wrote to George that he and Graham were agreeable to do this, and asked if he (the plaintiff) might draw on George for the amount of his (the plaintiff's) account. George answered by letter of the 15th April: "I told Graham I would see you would not be losers for cash advanced; I did not promise to pay the amount, but in time see you were paid." The policies were not assigned to George, but another arrangement was made in December, 1902. In August, 1903, however, George was in Kenora, and asked the plaintiff to wait till the insurance was adjusted. The plaintiff said he waited at George's request, "doing nothing because he asked me not to." George said (the plaintiff swore) that if he did not get sufficient out of the

insurance he would take care of the balance. Long after the adjustment of the insurance and in January, 1907, and later, the matter was again taken up, and finally in June, 1907, George refused to pay anything.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

W. N. Ferguson, K.C., for the defendant George Percival.

G. R. Geary, K.C., for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J., who said there could be no doubt that the plaintiff believed that he had a good cause of action, and it was equally clear that he delayed taking proceedings upon the promise that George would pay the amount he had agreed to pay if he (the plaintiff) would wait. . . Ever since Callister v. Bischoffstein, L. R. 5 Q. R. 449, at least, it has been the law that "if a man believes bona fide he has a fair chance of success he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration:" per Cockburn, C.J., at p. 452. In Ex p. Banner, 17 Q. B. D. 480, some doubt seems to have been cast upon this principle (see p. 490) by Brett, L.J.; but this doubt is in turn spoken of with disapproval by the Court of Appeal in Miles v. New Zealand, etc., Co., 32 Ch. D. 266; and there can be now no doubt that the law is as stated by Cockburn, C.J.

Appeal dismissed with costs.

MEREDITH, C.J.C.P., IN CHAMBERS. OCTOBER 19TH, 1909.

STIDWELL v. TOWNSHIP OF NORTH DORCHESTER.

Parties—Substitution of Assignee of Original Plaintiff—Order to Continue Proceedings—Terms—Security for Costs—Examination of Parties.

Appeal by the defendants from an order of the Master in Chambers, ante 51, refusing to set aside a præcipe order to continue the action at the suit of the assignee of the original plaintiff.

W. E. Middleton, K.C., for the defendants.

J. F. Lash, for the plaintiffs.

Meredith, C.J., held that the order to continue the proceedings should be allowed to stand, on the original plaintiff giving security for the payment of such of the costs as were incurred before the order if the plaintiffs should be ordered to pay costs; the costs of the motion and this appeal to be costs in the cause to the defendants. Order not to issue for two weeks to enable the defendants, if they so desire, to examine the original plaintiff and the substituted plaintiff, and if after such examination they desire the appeal to be brought on again it may be reargued.

Meredith, C.J.C.P. October 20th, 1909.

Re McGloghlon and Town of Dresden.

Municipal Corporations — By-law Authorising Borrowing of Money for Erection of School Building—Site of School House —Determination by School Board—Foundation for By-law— Application of School Board.

Motion by a ratepayer of the town of Dresden to quash so much of by-law No. 357, passed by the council of that municipality on the 14th June, 1909, and intituled "A by-law for the purpose of raising by way of loan the sum of $20,000 for the erection of a public school building in the town of Dresden," as provided "that a certain site shall be the site upon which a proposed school house be erected," or to quash the whole by-law, upon the ground that the municipal council by the by-law "assumes to fetter the power of the school board" of the municipality "in the selection of a site for a school house."

E. Bell, for the applicant.

A. M. Lewis, K.C., for the town corporation.

Meredith, C.J.:—I am of opinion that the by-law must be quashed in its entirety; to quash that part of it which provides that the money to be raised under the authority of the by-law shall be paid over to the school board for the purpose of building "a school house on the site now occupied by the present school building," would be to bind the corporation of the town as to an expenditure which has not been sanctioned by the ratepayers or

authorised by by-law of the council, and that cannot of course be done.

The question of the site of the school house is one to be determined by the school board, and not by the council of the municipality, though it is, of course, open to the council to refuse to comply with the request of the school board to raise the money required to build a school house if the council is not satisfied with the site selected by the board, or if the board refuses to say whether the schoool house is to be erected, the final appeal being to the electors, to whom a by-law must be submitted in the terms of the application of the board, in the event of the application not being complied with by the council.

The by-law is also, I think, open to the further objection that the foundation for it should have been an application to the council by the school board to pass a by-law for borrowing money by the issue and sale of debentures for the purpose of erecting the school house, and no such application was made.

The only application to the council is a resolution passed by the school board "that an application be and is hereby made to the municipal council of the town of Dresden for a grant of the sum of $20,000 for the erection of a school house in the said town of Dresden," which was communicated to the council; and this was not such an application as the statute requires: 9 Edw. VII. ch. 89, sec. 43.

The whole by-law must be quashed, without costs.

APPENDIX.

SEWELL v. CLARK—MASTER IN CHAMBERS—OCT. 19.

Particulars—Seduction.]—A motion by the defendant for better particulars of the statement of claim in an action for seduction was dismissed. Switzer v. Switzer, 10 O. W. R. 949, 1116, 11 O. W. R. 143, and Hodgson v. Bible, 9 O. W. R. 264, 867, were referred to. W. H. McFadden, K.C., for the defendant. T. J. Blain, for the plaintiff.

COOK v. WINEGARDEN—MASTER IN CHAMBERS—OCT. 20.

Discovery.]—The defendant in an action to set aside a will, on the ground of undue influence exercised by her, she being sole executrix and residuary legatee thereunder, was examined for discovery; she denied all knowledge of the will until after the death of the testator. She declined to write the names of her brothers and sisters when asked to do so on the examination. On a motion to compel her to attend for re-examination and write the names, it was stated that a document had been found supposed to be in the defendant's handwriting which was an exact statement of the

provisions of the will. This document was not shewn to her. The Master dismissed the motion, holding that what the defendant was requested to do was not relevant to the issues. N. G. Heyd, for the plaintiff. M. F. Muir, for the defendant.

HOLMES V. CITY OF ST. CATHARINES—MASTER IN CHAMBERS—OCT. 21.

Parties.]—Action for injuries caused by the faulty condition of a street and walk and the faulty condition of the lights thereon. The defendants moved, after the action had come on for trial and the trial had been postponed, to add as defendants the gas company who supplied the lighting of the streets under a contract with the defendants. The plaintiff not objecting, the Master made an order adding the company, saying that the statement of claim would have to be amended so as to make a claim against the company, and suggesting that the defendants should serve the company with a notice under Rule 215. Reference to Hewitt v. Heise, 11 P. R. 47; Erdman v. Town of Walkerton, 15 P. R. 12; Reid v. Goold, 13 O. L. R. 51; Bullock v. London General Omnibus Co., [1907] 1 K. B. 204; Tracey v. Toronto R. W. Co., 13 O. W. R. 15. Featherston Aylesworth, for the defendants. R. H. Parmenter, for the company. J. A. Keyes, for the plaintiff.