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HIGH COURT OF JUSTICE.

MIDDLETON, J. JANUARY 6TH, 1911.

*LOVEJOY v. MERCER.

Judgment—Consent—Provision for Payment of Money on Definite Date—Default—Genuine Mistake as to Date—Power of Court to Relieve—Terms—Costs.

Motion by the defendant for an order relieving him from the consequences of default under a judgment pronounced by consent of counsel at the hearing.

W. S. McBrayne, K.C., for the defendant.
J. L. Schelter, for the plaintiff.

MIDDLETON, J.:—By the judgment of the 5th December, 1910, it was undoubtedly intended to place the rights of the parties upon a clear and definite basis, and that the right conferred upon the defendant to purchase the land should depend upon his carrying out to the letter the stipulations of the judgment, as to which time was made strictly of the essence, and that, upon default, the defendant should stand absolutely debarred and foreclosed from all rights under the judgment.

The defendant, under this judgment, was called upon to pay $75 on the 28th December, 1910. This date was named as being one month after the 28th November, a date formerly arranged between the parties. There is no ambiguity in the judgment, and nothing whatever was done by the plaintiff to mislead the defendant, but the defendant assumed that he had a month from the date of the judgment, 8th December, to make the payment.

On default occurring, the plaintiff, as was his right, issued a writ of possession on the 29th December, and placed it in the

*This case will be reported in the Ontario Law Reports.

Sheriff's hands for execution. The defendant, then and there made aware of his mistake, at once tendered the $75 and costs; and, this being refused, now resorts to the Court.

The plaintiff insists upon his rights, and contends that there is no power to relieve from the default.

So far as I know, there is no case governing the precise point now before me. The judgment was a consent judgment, and I have no power to vary the consent given by the parties or to make a new bargain for them. The judgment, as drawn up and issued, is in exact accord with their intentions; there is in it no slip or error. There is no fraud or misleading upon the part of the plaintiff, and nothing in his conduct upon which any equity can be raised against him. . . .

[Reference to Ainsworth v. Wilding, [1896] 1 Ch. 673; Wilding v. Sanderson, [1897] 2 Ch. 534; Labelle v. O'Connor, 15 O.L.R. 519; Canadian Fairbanks Co. v. Johnston, 18 Man. L.R. 589; Barrow v. Isaacs, [1891] 1 Q.B. 417; Avalon v. McKinnon, [1909] 1 Ch. 476.]

I am satisfied that the defendant has erred in good faith, and that he should be relieved if I have power. The oft-quoted words of Ferguson, J., in Re Gabourie, 12 P.R. 252, 254, "to do justice in the particular case, where there is discretion, is above all other considerations," are not widely, if at all, different from what is said by Halsbury, L.C., in South African Territories Co. v. Wallington, [1898] A.C. 313, 314.

Neale v. Lady Gordon Lennox, [1902] A.C. 465, I think, gives me the same power in this case to relieve the defendant from his slip as I would have to relieve from a slip or default in the course of an action—and the same principle should guide me in the exercise of that discretion. . . .

The plaintiff here used the aid of the Court, by its process, to restore him to the possession of his own land, free from the possession of the defendant, taken under the original agreement and held under the terms of the consent judgment. I cannot see that in assuming that I now have a power to relieve, upon proper terms, I am really carrying this case (the Neale case) beyond its due application. I place the exercise of this discretion on the power to relieve against mistakes, slips, blunders, and even stupidity of parties in the course of litigation, which I regard as quite distinct from the power assumed by Equity to relieve from default under a foreclosure decree.

Had a motion been made by the defendant for an extension of time to pay the money by the date he had, by his contract, fixed

for payment, upon the ground that he was then unable to meet his obligation, I could not have helped him, nor would he have had any equity in his favour. His accidental misunderstanding of the date fixed for payment is another matter.

The defendant will, therefore, stand relieved from the consequences of his default, upon paying within a week: (a) the $75 and interest upon this sum, at five per cent., until paid, computed from the 28th December, 1910; (b) the costs of the writ of possession and incidental to the issue, fixed at $10, and the Sheriff's fees in addition; (c) the costs of the motion, fixed at $25 ; (d) and upon his paying now, as an evidence of his good faith, the next instalment of $75, which, under the judgment, falls due on the 28th June, 1911.

DIVISIONAL COURT. JANUARY 6TH, 1911.

NEIL v. WOODWARD.

Contract—Undertaking of Defendants to Sell Company Shares—Failure of Plaintiffs to Furnish Shares—Counterclaim—Fraud—False Representations Inducing Purchase of Property for Company—Payment by Defendants Acting on Representations—Failure to Shew Fraud—Finding of Trial Judge—Appeal—Leave to Amend—New Trial—Election.

Appeal by the plaintiffs from the judgment of TEETZEL, J., dismissing the action and allowing the counterclaim, both with costs.

The plaintiffs, a partnership, sued the three defendants on a contract, dated the 25th March, 1907, whereby the defendant agreed that they would undertake the sale for the plaintiffs of 16,000 shares of stock of the Culver Silver Cobalt Mines Limited, at not less than par, within four months, and would themselves buy at par any shares they could not sell.

The defendants set up that they were not furnished with the stock; that, in any event, they were induced by fraud to enter into the contract; and they counterclaimed for $6,000.

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

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

G. H. Watson, K.C., and C. H. Porter, for the plaintiffs.

The judgment of the Court was delivered by RIDDELL, J.:—

. . . On the 9th November, 1906, the plaintiffs agreed to transfer all their right in mining claim the south-west quarter of the north half of lot 4 in the 12th concession of the township of Loraine to Thomas Clark, of Buffalo, for $5,000, payable in instalments, $2,000, $2,000, and $1,000. The plaintiffs had not yet obtained the title to this land.

On the 12th November, 1906, Neil, acting for the plaintiffs, made an agreement with Woodward and Parker, two of the defendants, reciting that Woodward and Parker had effected a sale of the south-west quarter aforesaid, and the south-east quarter of the north half of lot 4 in concession 12, and that Neil had agreed to pay them a commission. The agreement is to pay (in case the sale goes through) to Parker and Woodward $2,000 on the 20th November, 1906, $1,000 on the 20th February, 1907, $500 on the 20th March, 1907, and $500 on the 20th April, 1907—but, if title cannot be made to the south-west quarter, and the sale is carried out by Clark, a further commission of $1,000. If Clark defaults, then Parker and Woodward may take his place in the sale, on the same terms as Clark.

Clark did default; and Parker and Woodward paid $4,000 to the plaintiffs. . . .

Parker and Woodward got Culver, the third defendant, interested; he was a large shareholder in the Culver Silver Cobalt Mines Limited. It was arranged that the company should buy the property, paying $400,000 in paid-up stock of the company to Parker and Woodward, and $16,000 of paid-up stock to the plaintiffs. The plaintiffs, however, required to be paid to them another $2,000 in cash—and this was paid to them by Woodward and Parker.

Thereupon, on the 25th March, 1907, an agreement in writing between the company and the plaintiffs was made, whereby the plaintiffs, in consideration of 16,000 fully paid-up shares of $1 each, transferred to the company all their interest in the two claims.

The substance of the transaction clearly was that the plaintiffs conveyed to the nominee of Parker and Woodward, receiving as in full payment of the balance due for the property the $2,000 paid . . . and the agreement of the company to issue to them $16,000 paid-up stock—while Parker and Woodward were to receive for their interest in the property, from the company $400,000 paid-up stock.

At the same time the agreement sued upon was entered into—25th March, 1907.

The company took over the land, found it was not worth developing, and failed to do the necessary work; and the land was at length taken away and conveyed by the province to other persons. The company refused to issue the $16,000 stock.

As to the main action, it is plain that the fact that the stock was not furnished by the plaintiffs to the defendants is a complete answer to the action; unless the stock were supplied for the defendants to sell, it is obvious that the defendants could not sell it. There is nothing in the facts or in the documents implying an agreement on the part of the defendants to cause the stock to be issued or to sell the stock in any event without regard to whether the company issued it or not. The facts may be such that an action would lie against the defendants differently framed; but, with the pleadings in their present condition, the judgment is right.

Then as to the counterclaim. . . .

Before the deal was closed with the company, Neil was asked, "What have you in these properties?" He answered, "We have got a well-defined vein running up over the edge of the cliff, and we have an assay from that vein as high as 510 ounces." It was upon these representations that the company bought, as well as the representations to the same effect previously made by Parker. There is no such vein, and the trial Judge has found that the one giving the 510 ounces' assay was not taken off that property at all.

The learned Judge has directed judgment to be entered for the defendants for $6,000, the amount of the purchase-money. I cannot follow the reasoning. The purchase-money can be directed to be returned only when the contract under which it is paid can be and is rescinded. Rescission of the first contract with Parker and Woodward there cannot be; they have dealt with the land by having it transferred to the company, and the parties cannot be reinstated in their original condition. As to Culver, he paid the sum of $2,000 for Parker and Woodward; and the same rule applies; and, had he paid for his company, the company is not a party to this action, and does not ask rescission.

The action of Parker and Woodward is—if any action lies—for fraud as to the $4,000. This fraud must have been committed before they paid the $4,000, i.e., before Clark made default. What is relied upon as fraud is the false statements of Neil and Johnson as to the vein and the assay, which were made . . . not that Parker and Woodward should buy, but that Clark and his associates should. These representations had

their effect when Clark bought; and Parker and Woodward seem to have taken Clark's place without further representation made to them.

Now, it is undoubtedly true that representations made to A. that he may act upon them, cannot be taken advantage of by B. in case he acts upon them, not having been intended so to do: Langridge v. Levy, 2 M. & W. 516, 534, 4 M. & W. 337; Peek v. Gurney, L.R. 6 H.L. 377; Metropolitan R.W. Co. v. Wright, 10 M. & W. 109, 114. But, where representations have been made, even to a third person, upon which, at least to the knowledge of the person so representing, another acts, in dealing with the representer, the representation is considered to have been made by the representer to the person so acting. The person so acting is in the same position as the person who has been induced by a false prospectus to apply for shares and has the shares allotted to him, as stated by Lord Chelmsford in Peek v. Gurney, L.R. 6 H.L. 377, 400; Andrews v. Mountford, [1896] 1 Q.B. 372.

But it is necessary that the representations be fraudulent. However much we may dislike the law, it seems plain. At all events we are bound by the Divisional Court's approval (1 O.W.N. 396) of Heatherley v. Knight, 14 O.W.R. 338, so holding. The onus is upon the plaintiffs in the counterclaim to prove this fraud —and, assuming that the finding of the learned trial Judge refers to the purchase in the first instance by Parker and Woodward—and that seems doubtful—this finding, in my view, comes far short of fraud. . . .

The plaintiffs say the most that is found against them is that Neil did not know whereof he spoke. This is perfectly consistent with innocence. Nor do I find anything in the evidence making it necessary for us to go further than the learned Judge has done.

There were representations made again before the last $2,000 was paid. . . . The same considerations apply to these statements.

I think the appeal on the counterclaim should be allowed with costs here and below; and the appeal on the main claim dismissed with costs here and below.

It may be that the plaintiffs have a cause of action against the defendants and the Culver company for not issuing the stock promised. If the plaintiffs are so advised, they may amend by adding the company and any others they may be advised, and have a new trial generally upon the whole case. In that event, however, the defendants are to be allowed to retry their

counterclaim and establish fraud if they can—and the plaintiffs should pay in any event the costs of the trial and appeal.

The plaintiffs should have fifteen days in which to elect—unless they elect within that time, the main appeal should be dismissed with costs, and the appeal on the counterclaim allowed with costs, in both cases here and below.

DIVISIONAL COURT. JANUARY 7TH, 1911.

*MICKLEBOROUGH v. STRATHY.

Landlord and Tenant—Lease—Termination—Temporary Occupation—Eviction—Surrender by Act and Operation of Law—Statute of Frauds—Intention.

Appeal by the plaintiffs from the judgment of TEETZEL, J., 21 O.L.R. 259, 1 O.W.N. 846, dismissing the action and allowing the defendant's counterclaim.

The action was for a declaration that a certain lease was determined by the acts of the defendant, and that the plaintiffs were no longer liable for rent in respect thereof. The counterclaim was for rent.

The appeal was heard by FALCONBRIDGE, C.J., LATCHFORD and RIDDELL, JJ.

A. C. McMaster, for the plaintiffs.

George Bell, K.C., for the defendant.

RIDDELL, J.:—Upon the argument it was not all, or, if at all, but feebly, contended that on the question of eviction strictly so-called the law was not correctly apprehended by my learned brother or had not been correctly applied. I add to the cases cited by him Ball v. Carlin, 11 O.W.R. 814.

But it was contended that the case was one of surrender by act and operation of law, and that intention had nothing to do with the matter. . . .

[The learned Judge then set out the facts.]

It seems to me that Ritter (the person temporarily placed by the defendant in the premises leased to the plaintiffs) could not be called the servant of the defendant, nor was he simply a bailiff

*This case will be reported in the Ontario Law Reports.

or caretaker for him, as in Bird v. Defonvielle, 2 C. & K. 415. Nor, I think, was what was done at all like the facts in Griffith v. Hodges, 1 C. & P. 419. It is true that he (Ritter) did shew—or at least agree to shew—the premises to any intending tenant; but he had other rights—he was occupying the premises in the same way as he had occupied No. 177, and in lieu of No. 177, and paying the same rent, $3 a week in advance. He may have agreed (although what is said by the defendant seems rather a conclusion by him as to the effect of the arrangement with Ritter than a statement of what Ritter actually agreed to) to go out at an hour's notice, but during that hour the defendant could not eject him. He paid his week's rent in advance, which gave him the right, as against the defendant, to occupy these premises for one week (subject, at the most, to going out at an hour's notice), and he was occupying the premises as a tenant. Assuming that the transaction between him and the defendant was valid against all the world, Ritter, had the plaintiffs demanded possession, could rightfully have kept them out of possession until they had got hold of the defendant and got him to give the required notice, which might take a week or more.

This dealing, it is said, caused a surrender of the lease by act and operation of the law. . . .

[Reference to the Statute of Frauds, R.S.O. 1897 ch. 338, sec. 4; 29 Car. II. ch. 3, sec. 3; R.S.O. 1897 ch. 119, sec. 7; Co. Litt. 388a; Sm. L.C., 11th ed., pp. 837 sqq.; Nickells v. Atherstone, 10 Q.B. 944, 949; Wallis v. Hands, [1893] 2 Ch. 75; Greenwood v. Moss, L.R. 7 C.P. 360, 364; Phillips v. Miller, L.R. 10 C.P. 430; Lyon v. Reid, 13 M. & W. 306.]

In the present case there was no change of possession effected in fact by the tenants, the plaintiffs; "mere oral assent" is not enough. "There can be no estoppel by mere verbal agreement:" per Brett, L.J., in Oastler v. Henderson, 2 Q.B.D. 575, at p. 579. And all that the plaintiffs did was to agree that the possession which had been given to Ritter should be continued at the option of the landlord. Now, if the defendant had been acting or affecting to act for the plaintiffs in giving the possession to Ritter, the plaintiffs might in the latter case have ratified and in the former be bound by the act of giving possession. It is, however, plain that Strathy was not acting for the plaintiffs in his dealings with Ritter; his authority did not extend to such a transaction and he did not purport to act for the plaintiffs; and consequently there can be no ratification. . . .

[Reference to Keighley and Maxted v. Durrant, [1901] A.C. 240.]

It would then appear that there was nothing done by the plaintiffs after the arrangement between the defendant and Ritter which could bind them by way of estoppel.

There is another line of cases in which the same terminology is employed. The tenant gives up possession, gives up the key, or does some other act indicating his willingness that another tenant be found for the landlord. This in itself is of no effect, nor would the act be helped by the mere fact that the key is retained by the landlord. But, if the landlord by receiving the key or retaining it intended thereby to take possession, and especially if he did take possession, the act becomes effective. And the Courts have considered in many cases that the exception in the Statute of Frauds applies to a case of this kind. . . .

[Reference to Foa, 4th ed., p. 638; Phené v. Popplewell, 12 C.B.N.S. 334, 339; Oastler v. Henderson, 2 Q.B.D. 575; Fenner v. Blake, [1900] 1 Q.B. 429; Easton v. Perry, 67 L.T.R. 290.]

I am not sure that I can make out the principle running through the cases, but this much seems to be clear: that in order that the lease shall be surrendered by operation of law there must be a resumption of possession by the landlord through himself or his (new) tenant; that there is no difference in the effect of a landlord himself going into possession and of a new tenant obtaining possession; and that, aside from unequivocal acts, there must be on the part of the landlord an intention to take possession and put an end to the lease, i.e., no longer "to hold the tenant to his lease" (2 Q.B.D. at p. 578); and that the taking possession for a limited time of two rooms by the landlord is not one of these unequivocal acts, but the effect of such an act depends on the intention (or not) "to hold the tenant to his lease."

In the present case it was only the one room, downstairs, which Ritter was allowed to occupy, and for a short time only: I cannot find that giving possession to another has any more effect than if the landlord himself took possession, and, in my opinion, the intention must be looked at.

Nor is the case of the plaintiffs advanced by the proposition that the transaction was in effect a continuing offer by the defendants to the plaintiffs . . . to put an end to the tenancy, and accepted by the plaintiffs as soon as they knew of it. In an offer the intention must be looked at; and all the circumstances here are against the landlord having intended to make or having made an offer.

There being no surrender by act and operation of law, the plaintiffs must fall back upon eviction. That has been satisfactorily dealt with by the trial Judge.

Nor is this a case such as are to be found in the reports in which the tenant has been deprived of his enjoyment of the premises, and accordingly has a defence to an action for use and occupation. . . .

[Reference to Whitehead v. Clifford, 5 Taunt. 118.]

It being a question of intention on the part of the defendant, I am of opinion that the plaintiffs fail, and the appeal should be dismissed with costs.

MIDDLETON, J. JANUARY 7TH, 1911.

RE HUNTER.

Will—Construction—Bequest to Widow—Income of Fund—When Payable—Postponement—Effect of—Vested Gift—Gift of Chattels "Used on Farm"—Residuary Clause—Division of Residue among Children in Proportion to Legacies—Life Interest of Legatee—Alteration in Amount of Legacy by Codicil—Devise of Interest in Land—Unpaid Purchase-money.

Motion by the executor of the will of W. H. Hunter, deceased, for an order declaring the proper construction of the will.

C. R. McKeown, K.C., for the executor.
Shirley Denison, K.C., for the widow.
F. W. Harcourt, K.C., for the infants.
R. B. Beaumont and J. M. Cairns, for the adult children.

MIDDLETON, J.:—Several questions that are not easy to determine arise upon this will.

The testator was married twice. The adult children are issue of the first wife—Earl Hunter is the eldest son of the widow.

The homestead farm is given to this son, upon his arriving at the age of twenty-one years, for his life, and at his death to his eldest son then living, in fee. Earl is to have the control and management of this farm from the time he is eighteen. He is now about fifteen. The will contains elaborate provisions dealing with this farm in the event of Earl dying and leaving no living son surviving. No question now arises upon these provisions.

Out of the chattels upon the farm certain horses, cows, and other live-stock, implements, etc, are to be retained by the wife

for the purpose of working the homestead in trust for Earl until he comes of age, when they are to become his absolutely. The net income arising from the working of the homestead farm is to belong to the widow until Earl arrives at the age of eighteen, and from the time he is eighteen until he is twenty-one is to be deposited in a bank to his credit, and to be paid to him upon his coming of age.

Apart from this, the only provision for the widow is that $10,000 is to be invested and the revenue to be derived therefrom is to be paid to her, "said payment to commence when" Earl arrives at the age of eighteen and to continue during the life of the widow. On her death this sum is to be divided among the children of the testator and this wife. This is in lieu of dower. Nothing is specifically said as to the income derived from this fund before Earl attains eighteen.

The first question submitted is as to this income. I think the entire income derived from the fund set apart during the lifetime of the widow is given to her. The payment is to commence when Earl attains eighteen. The testator probably made this provision because the widow would be in receipt of the profits of the farm up to this time, but he has not limited in any way the gift of the income. I cannot cut down his gift and say the widow is not to have the income from the fund, but only the income derived from the fund after Earl's attaining age. Still less can I say that what she is then to receive is to be limited to one year's income. The duty imposed upon the executor is to invest this fund at once. The testator contemplated no payment being made to the widow until Earl attains eighteen, but a long series of cases shew that where, as here, the gift is vested, and the time of payment postponed, the legatee has the right to be paid without regard to the delay contemplated.

The second question arises upon the gift of chattels to Earl. In addition to the live-stock enumerated, he is given "all the farm implements, grain, roots, hay, and feed used by me on my homestead farm," which, with substituted chattels, are to become his when he attains age, and are in the meantime to be retained by the widow "for the purpose of working the homestead farm."

I cannot work this clause out in detail. Not all the chattels on this farm, but those "used on the farm," are given. The intention as gathered from the words "for the purpose of working the homestead farm" is that a complete working outfit, including feed, seed grain, etc., should be set apart for the working of this farm as it had been heretofore worked by the testator, and these

should ultimately become Earl's. The mere fact that an implement might have occasionally been used upon this land would not suffice to include it in the gift, if it was not reasonably necessary to the due operation of the farm. The chattels are given for use, and not for sale, and no real difficulty ought to arise in arriving at some reasonable adjustment. If an arrangement is arrived at and approved by the Guardian this may be sanctioned.

The third question arises upon the residuary clause. To each of his children the testator gives a pecuniary legacy. His daughter Sarah is provided for in a way differing from any other child: $3,000 is to be invested, the income paid her during her life, and upon her death this is to be divided among her children. The residue is given "to my children, they to share in proportion to the personal property herein bequeathed to my said children." Does Sarah take a share based on $3,000 or on the value of the life interest in $3,000?

I think she takes in proportion to $3,000. The testator regards this sum as set apart for her, none the less because it is tied up during her life and given to her children after her. He intended the residue to be divided, and the basis of division must be something certain. There is no warrant for estimating the present value of Sarah's life estate. The testator never intended this. "The personal property bequeathed" to Sarah was $3,000, even if she only had a life interest.

The fourth question arises also upon the residuary clause. Henry Albert is given by the will a pecuniary legacy of $2,000. Had the will not been altered by codicil, this would have defined his share in the residue. There are two codicils. By the first, $7,000 is given him "in place and stead of the $2,000 bequeathed to him in my said will." I do not think this in any way altered or enlarged his rights under the residuary clause. That clause still stands, and defines the shares by reference to the bequests "herein" made, just as if they had been repeated in the residuary clause. This clause does not say "in proportion to the shares which my children may take in my estate," but in proportion to the shares "herein" given. A revocation of a bequest would not have taken away the share in the residue. A more liberal bequest by codicil made without reference to the residue will not increase the residuary share. The second codicil gives Albert land instead of his pecuniary bequest, and expressly provides that this shall not interfere with his share in the residue.

A fifth question is also asked, arising on the gift to Albert of "all my interest and claim in section 7," etc. This land was

owned by the testator and another jointly. A sale had been agreed upon, and part of the purchase-price paid the co-owner. All admit that there has not been a conversion so as to defeat the devise. The question is, can the devisee Albert take more than the unpaid purchase-money, which, being a lien upon the land, may pass. I do not think that the purchase-money paid over to the co-owner can possibly be regarded as an interest in the land. It is personal estate.

Costs of all parties out of estate,—executor's as between solicitor and client.

BRITTON, J. JANUARY 9TH, 1911.

BÉLANGER v. BÉLANGER.

Executors and Administrators—Grant of Letters of Administration to Infant Widow of Intestate—Validity until Revoked—Power to Revoke—Surrogate Court—High Court—R.S.O. 1897 *ch.* 59, *secs.* 17, 21, 63, 64—*Independent Proceeding for Revocation—Action to Set aside Conveyance made by Administratrix—Infant Children of Intestate—Conveyance Made without Consent of Official Guardian—Confirmation by Court in Action—R.S.O.* 1897 *ch.* 127, *sec.* 3—10 *Edw. VII. ch.* 56, *sec.* 19—*Mortgage—Payments made by Grantee on Mortgage—Moneys Properly Expended for Infants' Benefit—Lien.*

Action brought on behalf of infants by a next friend to set aside a conveyance of land, in the circumstances mentioned in the judgment.

C. G. O'Brian and W. S. Hall, for the plaintiffs.
N. A. Belcourt, K.C., for the defendants.

BRITTON, J.:—Arthur Bélanger the elder, grandfather of the plaintiffs, on the 15th April, 1891, concluded an agreement with one Pierre Gervois for the purchase of the land in question in this action, viz., parts of lot B. and lots 1 and 2 in the 1st concession of the township of Plantaganet, for the price or sum of $1,046.50. Of this sum Arthur Bélanger the elder paid $100 to Gervois, $146.50 to the mortgagee, and assumed the balance, then amounting to $800, carrying interest at four per cent. per annum, on the subsisting mortgage.

Arthur Bélanger the younger, son of Arthur Bélanger the elder, was then an infant under the age of twenty-one, but Arthur Bélanger the elder requested Gervois to make the conveyance to Arthur Bélanger the younger. Arthur Bélanger the elder said that he intended that the land should ultimately go to his son and his son's children.

Arthur Bélanger the younger was married to Marie Laure Hay on the 10th February, 1902, of which marriage the plaintiffs are the issue; and on the 14th July, 1905, he died intestate.

On the 17th July, 1905, there was what is called a family council before a notary at Papineauville, in the Province of Quebec, at which were present Arthur Bélanger the elder, the widow of Arthur Bélanger the younger, her father, and others, and then an agreement was arrived at by which the mother should be tutrix, and her father, George Simon Hay, should be tutor, of the infant children.

Arthur Bélanger the younger worked for his father both before and after his marriage. They resided at Papineauville, in the province of Quebec, just across the river Ottawa from the land in question. Upon the land there is a spring of saline water said to be valuable as being like the mineral water from the Caledonian springs. The father was in possession of the land, and obtained water from the spring; father and son bottled it, and the father sold it. The father paid the son wages both before and after the son's marriage.

On the 31st January, 1902, there was a marriage contract between Arthur the younger and his intended wife. Arthur the elder was present at the signing of that contract, and it was then stated that the son owned the land in question.

In April, 1901, when Arthur the younger was only nineteen years of age, his father took out a benefit certificate in L'Union St. Joseph for $1,500, payable $5 a week after the death of Arthur the younger. I am of opinion that Arthur Bélanger the elder paid the premiums or dues upon this benefit certificate and that Arthur Bélanger the younger did not pay any of these dues.

On the 11th October, 1905, the widow of Arthur the younger obtained letters of administration to her husband's estate. She then agreed with her father-in-law to accept the benefit certificate, in his possession, upon the life of her husband, and to convey, in lieu thereof, the land above-mentioned. The $1,500 mentioned in the benefit certificate, payable in weekly instalments, was commuted, and the mother of the infants (the widow) got the money, which, she says, she expended in the maintenance of herself and children. On the 12th October, 1905, the widow, as ad-

ministratrix conveyed the land to her father-in-law, her co-defendant. The widow has since married and resides with her husband at the city of Montreal. Her husband seems to be in a good position and able to maintain his wife and the infant plaintiffs.

This action is now brought to set aside the conveyance to the defendant Arthur Bélanger the elder, on the grounds: (1) that, as the widow, at the time of the grant of the letters of administration to her, was an infant, the grant is void; and (2) that the sale to the defendant was made without the consent of the Official Guardian, and so was invalid.

As to the first objection, the grant of letters was regularly made by the Surrogate Court of the United Counties of Prescott and Russell, and has never been revoked. No application has been made to revoke it. That Court has jurisdiction to revoke the grant upon a proper application supported by proper evidence. See R.S.O. 1897 ch. 59, sec. 17, which provides that nothing in it shall be construed as depriving the High Court of jurisdiction. Should the High Court, in an action to set aside a conveyance made by the administratrix, revoke the grant, on its face apparently valid? Section 63 of the last-mentioned Act validates payments under administration afterwards revoked. Section 64 is as follows: "All persons and corporations making or permitting to be made any payment or transfer bonâ fide upon any probate or letters of administration granted in respect to the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the probate or letters of administration."

It seems to me that the defendant is morally entitled to the land in question. It is, of course, the duty of the Court to protect the defendant in this transaction, if it can legally be done. Upon the evidence, I find that the bargain was a fair one, not in any way tainted with fraud, and that the land in question is not of such value as to stamp the agreement as an improvident one for the infants.

In view of the power of the Surrogate Court to revoke the grant of these letters of administration if a case for such revocation is made out, and in view of the plaintiffs not asking for such revocation, but only asking for the cancellation of the conveyance and for possession, I am of opinion that the plaintiffs ought not to succeed. This conclusion is reached after giving full consideration to the judgment of the late Master in Ordinary in

Merchants Bank v. Monteith, 10 P.R. 334. I cannot agree that the grant of letters of administration to the infant widow was a nullity. Section 21 of R.S.O. 1897 ch. 59, is as follows: "Probate or letters of administration, by whatever Court granted, shall, unless revoked, have effect over the property of the deceased in all parts of Ontario, subject to limitation under section 61 of this Act or otherwise." This grant was not limited to the personal estate. . . .

[Reference to Irwin v. Bank of Montreal, 38 U.C.R. 375, 387, 388; Jennings v. Grand Trunk R.W. Co., 15 A.R. 477, 481; Book v. Book, 15 O.R. 119. 121.]

That brings me to the question whether this action is an independent proceeding for the revocation of the grant, within the meaning of the cases cited. In my opinion, it is not. When this action was commenced, the grant had not been otherwise attacked. The jurisdiction of the Surrogate Court is not questioned.

The first objection, in my opinion, fails.

The objection that the sale to the defendant was made without the consent of the Official Guardian may be removed by my order: see R.S.O. 1897 ch. 127, sec. 3, and 10 Edw. VII. ch. 56, sec. 19. I approve of the sale, and, so far as in my power, confirm it.

Agnes McKay is made a party defendant by reason of a mortgage executed by the defendant Bélanger to her on the 2nd April, 1907; and the plaintiffs ask for cancellation of this mortgage. There is no record of service upon or defence by her, and no one appeared for her at the trial.

There was put in at the trial, as exhibit 10, a conveyance of this land (with the exception of the mineral springs) by the deceased Arthur Bélanger the younger and his wife (joining to bar dower) to Michel Dennis and Ludger Dennis, dated the 5th October, 1903. It does not appear that the grantees ever took possession of the land. Neither of the Dennises is a party to the action. Their right, if any, would not be affected by any judgment herein.

I deem it proper to say that, had my conclusion been to set aside the conveyance, I should not have granted immediate possession to the plaintiffs, but should have ordered that, in case of a sale of this land at the instance of or for the benefit of the infant plaintiffs, the defendant Bélanger should be entitled to a lien on the land and proceeds of sale thereof for any amount he has paid, since the death of Arthur Bélanger the younger, upon the

mortgage of said land, and also for the amount received by the defendant Mrs. Hay—expended, as she says, for the maintenance of herself and the infants by virtue of the certificate of insurance assigned to her by the defendant Bélanger. He would be entitled to interest on these amounts, and he would be obliged to account for rents and profits. The plaintiffs were willing to consent to a lien for the amount paid on the mortgage since the death of Arthur Bélanger the younger.

If called upon to find the fact as to the age of the administratrix, upon such evidence as was given, it would be that she was only nineteen years and seven months old when administration was granted to her. The only evidence was that of herself, corroborated by that of her brother-in-law, J. B. Mobilier. . . .

Action dismissed without costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 10TH, 1911.

LAISTER v. CRAWFORD.

Parties—Joinder of Plaintiffs—Joinder of Causes of Action—Trespass to Land—Assault on one Plaintiff—Claim by the Other for Loss of Services—Election—Pleading.

An appeal by the plaintiffs from the order of the Master in Chambers, ante 381, requiring the plaintiffs to elect which of two causes of action they would proceed upon.

George Bell, K.C., for the plaintiffs.
A. J. Russell Snow, K.C., for the defendants.

MIDDLETON, J.:—I think the learned Master has misconceived the situation. In so far as the action is based upon the assault said to have been committed upon the plaintiff Ellen Laister, the causes of action vested in Ellen Laister for the damage sustained by her and in her mother for the loss of her services can well be joined, as these claims arise out of the same occurrence (Con. Rule 185); and the addition of another quite distinct cause of action, i.e., the claim arising in respect of the alleged trespass to land, in which one plaintiff alone is concerned, does not defeat the right of the plaintiffs to join.

Con. Rule 185 does not contemplate only those cases in which the right to relief by the different plaintiffs is identical or even similar. "Any right to relief" is all that is required.

Looked at in another way, the parties might well be entitled to join. There was in substance only one "occurrence"—the trespass and its incidental assault. The meaning of the Rule is that there may be only one judicial investigation arising out of one set of circumstances, where all those having claims agree to join in one action. To succeed in some aspects, there must be more proved than is necessary to entitle the parties litigant to succeed in other aspects—but the object aimed at by this Rule is to have the matter ventilated once for all in the Court, so that justice then and there may once and for all be done in the premises.

The only thing the Rule seems to require is that there should be a common question of law or fact. Trespass with violence to the plaintiff Sarah Laister's servant, Ellen Laister, is what the former alleges, and Ellen Laister alleges that she was assaulted. The common question of fact is, was Ellen assaulted?

The acts of violence in the course of a trespass to land could, even in the old days of common law pleading, be pleaded and relied upon as part of the cause of action set up in trespass, being then regarded as matters of aggravation, or they could be separately pleaded in different counts.

The learning on this subject, now regarded as obsolete, may be found in the early editions of Smith's Leading Cases, as annotations to Taylor v. Cole, 3 T.R. 292, and in Bullen and Leake (1860), p. 245.

The substance rather than the form is now the test.

The joinder is well within both the spirit and the letter of the Rule. No inconvenience can arise at the trial, and, in the defendants' interest, there should be one hearing, and the whole amount for which they are liable should then be ascertained—if they are liable at all.

Appeal allowed and motion dismissed; costs here and below to the plaintiffs in any event.

DIVISIONAL COURT. JANUARY 10TH, 1911.

GRAND TRUNK R.W. CO. v. LAIDLAW LUMBER CO.

Railway—Carriage of Goods—Conveyance of Lumber to Yards of Consignee by another Company's Line—Switching Charge Paid by Carrying Company—Right to Recover from Consignee—Tolls—Board of Railway Commissioners—Approval of Tariff—Burden of Proof.

Appeal by the defendants from the judgment of CLUTE, J., in

favour of the plaintiffs upon their claim and dismissing the defendants' counterclaim.

The defendants were lumber merchants and dealers, having their yards on the line of the Canadian Pacific Railway at what was formerly Toronto Junction. They were in the habit of shipping lumber to Toronto from various points on and by the plaintiffs' lines. The cars were billed to Toronto, and, on reaching there, the practice was for the plaintiffs to obtain instructions from the defendants as to the point at which they desired the cars to be delivered. Where the defendants' yard was the point designated as the place of delivery, the cars were taken by the Canadian Pacific Railway Company from the plaintiffs' line and carried over the Canadian Pacific line to the defendants' yard. For this service the Canadian Pacific Railway Company made a charge against the plaintiffs, termed a "switching charge;" and the question at issue between the parties was as to the right of the plaintiffs to be repaid what they had paid for these charges in respect of certain of the shipments, the action being to recover in certain cases where repayment had not been made, and the counterclaim to get back what the defendants had paid in certain other cases.

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

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

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

The judgment of the Court was delivered by MEREDITH, C.J. (after setting out the facts as above):—It is contended by counsel for the defendants that their contract entitled them to have the cars delivered at their yards without paying anything beyond the freight charges for the carriage of the lumber from the point of shipment to Toronto; but we think that there is no foundation for the contention, for the contract of the plaintiffs was completed when the cars reached their freight terminals at Toronto, and no duty rested on them to carry or to have the cars carried beyond their line and over another line to the defendants' yards, except as agents for and on behalf of the defendants.

It was also contended that the plaintiffs were not entitled to collect or recover tolls, because it was not shewn that their tariff had been approved by the Board of Railway Commissioners; but the right to exact the switching charges depends, not upon the

right of the plaintiffs to exact them, but upon the right of the Canadian Pacific Railway Company to do so.

I am inclined to think that the onus of proving that the switching charges were improperly paid, because the Canadian Pacific Railway Company had no right to exact them—if that had been the fact—would, in the circumstances of this case, have rested upon the defendants; but, however that may be, it has been shewn by the production of the Canada Gazette of the 3rd December, 1904, that the Railway Board had approved of the tariff and tolls filed by that company, which entitled them to charge a much larger toll than they exacted.

The views we have expressed accord with those of the late Chief Commissioner of the Railway Board, the Hon. A. C. Killam, and of the present Chief Commissioner, as reported in Canadian Manufacturers Association v. Canadian Freight Association, 7 Can. Ry. Cas. 302.

Appeal dismissed with costs.

DIVISIONAL COURT. JANUARY 10TH, 1911.

HEALEY v. HOME BANK OF CANADA.

Banks and Banking—Advances by Bank on Securities Pledged—Default—Notice—Sale of Securities—Bank Act, secs. 77 (2), 78.

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing with costs an action to recover twenty-five South African land warrants deposited with the defendants by the plaintiff as security for advances made to the plaintiff, or for damages for conversion of the warrants.

The appeal was heard by MULOCK, C.J. Ex. D., CLUTE and SUTHERLAND, JJ.

E. E. A. DuVernet, K.C., and D. C. Ross, for the plaintiff.

I. F. Hellmuth, K.C., and A. E. Knox, for the defendants.

The judgment of the Court was delivered by CLUTE, J. (after setting out the facts and parts of the testimony):—I take the fair meaning of the evidence and the findings of the learned trial Judge to be, that the defendants made the advances upon the warrants upon the understanding that, having regard to the

current price, the plaintiff should preserve a margin of from $100 to $150 on each warrant; that he failed to do this; that the defendants gave him notice, not only by letter, but through their manager, that they would avail themselves of any opportunity to dispose of the scrip so as to save them from loss, and, if they were unable to do so, and if they suffered loss, they would hold him for the difference; that, after an ineffectual attempt on his part to dispose of the scrip, he paid no further attention to the matter until there was a rising market; that he then made arrangements with a friend of his, who agreed to pay off the defendants and hold the scrip for their (the plaintiff's and his friend's) joint profit; that he called at the bank on the 6th, 7th, and 8th December, with a view of ascertaining the exact amount due to the defendants, in order to pay the same, and that he was unable to see the manager. It does not appear that he had the money with him on either of these occasions to pay the defendants, or that any tender was made, or that the defendants refused to deliver up the scrip upon being paid the amount due by him. He did not call after the 8th until the 13th December, when he found that the scrip had been disposed of on the 9th, 10th, and 11th December.

The question is, whether, having regard to the relationship existing between the parties and the fact that the defendants held this scrip as security for advances, the defendants were justified, in the circumstances of this case, in disposing of the scrip when and as they did.

Section 78 of the Bank Act provides that a collateral security may, in case of default in payment of the debt for the securing of which it was acquired and held, be dealt with, sold, and conveyed, either in like manner and subject to the same restrictions as are provided in respect of stock of the bank on which they have acquired a lien under the Act, or in like manner as and subject to the restrictions under which a private individual might, in like circumstances, deal with, sell, and convey the same: provided that the bank shall not be obliged to sell within twelve months.

Section 77, sub-sec. 2, provides for the sale of stock upon which the bank have a lien within twelve months after the debt has accrued and become payable, "provided that notice shall be given to the holder of the shares of the intention of the bank to sell the same, by mailing the notice in the post office . . . at least thirty days prior to the sale."

In my opinion, this section governs the present case. The

letters of the 26th and 28th May and 5th June are explicit notice to the plaintiff that the defendants will sell the warrants and in case of loss look to the plaintiff for the balance. This notice was sufficient after thirty days to authorise a sale of these securities. Nor do I think what took place on the 6th, 7th, and 8th December, 1909, in any way affected this right of the defendants. Here was an account, largely overdrawn, that had stood for months, towards the liquidation of which the plaintiff had done nothing. His efforts had resulted in the sale of one warrant only. He knew that if the defendants could sell for sufficient to pay his indebtedness, they would do so. If, after the defendants had been able to sell for a price sufficient to pay his liability, they had not done so, he would, I think, have had just cause to complain. He did not call on the morning of the 9th, nor until there was a substantial advance in the market. If there had been a fall in the market, he probably would not have been heard from. He does not make a formal tender or payment. After the rise, he is quite sure that he was ready to take them up; but what took place in the bank was not so understood by either Mr. Calvert or the manager. He wanted to make some arrangement to take up the scrip; and, after a careful reading of the evidence, I do not think the fair meaning of it is that he was ready on any of the days that he called to have paid for the scrip. He wanted to make an arrangement to take it up, but he did not mean that he was then ready to pay the amount due the bank. If he did, he did not say so, and the defendants did not so understand him. Upon the part of the defendants it may fairly be said, I think, that, having waited so long in respect of the overdrawn account, and having given notice of their intention to sell, they naturally took the earliest opportunity offered in the market to sell at a price which would cover their claim. The conduct of the plaintiff did not merit any particular grace by leniency on the part of the defendants. He refused to exert himself in the sale of the scrip except upon the condition that he should receive any balance over and above that which had been advanced upon the particular scrip sold.

Mr. DuVernet strongly urged that Toronto General Trusts Corporation v. Central Ontario R.W. Co., 10 O.L.R. 347, applied to the present case. I do not think so. That turned upon the construction of an instrument which provided for a certain notice in case of sale, and, such notice not having been given, the sale was held invalid. In the present case the notice required by the Bank Act was given.

I think the appeal should be dismissed with costs.

TEEZEL, J. JANUARY 11TH, 1911.

McPHERSON v. TEMISKAMING LUMBER CO.

Timber—Crown Timber Act, R.S.O. 1897 *ch.* 32*—License to Cut —Judgment against Licensee—Execution—Assignment of Timber License to Bank—Injunction—Notice—Seizure of Cut Timber—Bank Act, secs.* 80, 84*—Validity of Assignment—Lien—Transfer of License to Purchasers—Execution Act, sec.* 9*—Interpleader—Costs.*

An interpleader issue tried before TEETZEL, J., without a jury.

W. Laidlaw, K.C., for the plaintiffs.
G. H. Kilmer, K.C., for the defendants.

TEETZEL, J.:—A. McGuire & Co. (Anne McGuire constituting the firm) were the owners of a license to cut timber on certain Crown lands in the townships of Bryce and Beauchamp, in the district of Nipissing, under the Crown Timber Act, R.S.O. 1897 ch. 32, which license had been duly renewed until the 30th April, 1910.

On the 30th November, 1909, the plaintiff McPherson recovered a judgment against McGuire & Co. for $3,961 in default of defence, and on the same day issued execution therefor, which was delivered to the Sheriff of Nipissing on the 2nd November, 1909.

On the same day that the judgment was obtained, a consent order was made opening up the judgment and allowing the defendants in to defend, and directing "that the judgment and execution thereon shall stand as security to the plaintiff pending the trial of the action."

On the 2nd December, 1909, the plaintiff McPherson obtained an interim injunction restraining McGuire & Co. "from proceeding with the transfer of the timber license and the right to cut timber in the townships of Bryce and Beauchamp, or to change the ownership thereof, as against the plaintiff and the judgment recovered against the defendants and execution issued thereon and delivered to the Sheriff of the district of Nipissing, until Monday the 13th day of December instant, and until a motion to be then made to continue this injunction shall be heard and disposed of."

This injunction was continued until the trial, when McPherson obtained judgment dated the 19th April, 1910, directing the judgment of the 30th November, 1909, to be amended by reducing the amount to $3,822.83, and that the execution should be amended accordingly; that the plaintiff should pay the costs subsequent to the judgment of the 30th November, 1909, and ordering that the defendants therein be restrained "from proceeding with the transfer of the timber license and right to cut timber in the townships of Bryce and Beauchamp or to change the ownership thereof as against the plaintiff and the said judgment and execution issued thereon, until payment of the said judgment, interest, and costs." The judgment also dismissed a counterclaim with costs.

The plaintiff Booth had placed an execution against McGuire & Co. for $729.92 in the hands of the Sheriff of Nipissing on the 16th June, 1909, and on the 20th February, 1910, he placed in the hands of the same Sheriff a further execution for $317.58 for the costs of the judgment for which the former execution was issued.

The plaintiff McPherson also placed the following additional executions against McGuire & Co. in the hands of the said Sheriff, namely, on the 31st May, 1910, one for $504.17, and on the 12th July, 1910, two, for $78.98 and $2,625.62 respectively.

The interpleader arises out of a seizure under the first three of the executions, made by the Sheriff of Nipissing on the 11th June, 1910, of a quantity of saw-logs cut upon the Crown lands in respect to which the license above referred to was granted to McGuire & Co. The interpleader order is dated the 22nd June, 1910; and the question directed to be tried is whether, at the time of the seizure of the said logs, they were exigible under the said executions as against the Temiskaming Lumber Co., the defendants in the issue.

On the 27th November, 1909, McGuire & Co. assigned the license in question to the Traders Bank, for the expressed consideration of $3,367.08, and, while the instrument is absolute in form, it was in fact taken as security for McGuire's then indebtedness to the bank.

On the 29th November, 1909, the manager of the Traders Bank gave McGuire & Co. a letter, indefinite as to time, agreeing to transfer to them all the bank's right, title, and interest under the license, on payment of $2,000.

Mr. Laidlaw, for the plaintiffs, argued that the transfer of McGuire & Co. to the bank was void, as being beyond the powers of the bank; but I am of opinion that while, under sec. 84 of the

Bank Act, a bank may lend money upon the security of standing timber and the rights or licenses held by persons to cut or remove such timber, this transaction was not within sec. 84, but was under sec. 80 of the Bank Act, and, although not in form a mortgage, was intended to be a mortgage upon the licensee's interest in the timber limits by way of additional security for McGuire & Co.'s indebtedness contracted with the bank in the course of business.

From this time until the 30th May, 1910, nothing appears to have been done by the bank to change the position or rights of McGuire & Co. as owners of the license subject to the bank's lien or mortgage for $2,000. On the latter date the bank addressed a written authority to the Minister of Lands, Forests, and Mines "to transfer, assign, and set over unto J. E. Murphy" all the bank's interest in the license, and this authority was treated by the Minister as a transfer by the bank to Murphy, and it was formally approved by the Minister on the 2nd June, 1910.

The bank had on the 30th April, 1910, obtained the Minister's approval of the transfer of the 27th November, 1909, from McGuire & Co. to the bank, and had also obtained an extension of the license for two years from the 30th April, 1910, but before the approval of the transfer or extension was granted the bank were required to pay $774.04 for timber dues owing by McGuire & Co.

The consideration for the transfer of the license by the bank to Murphy was the payment by him of the $2,000 owing by McGuire & Co. to the bank under the assignment to them, and the $774.04 which the bank had to pay for dues in arrear.

The position taken by Murphy and the defendants, and not contested by the plaintiffs, is that Murphy took the transfer of license and still holds the same as trustee for the defendant company.

The logs in question were cut between January and April, 1910, and the statutory return for the season's cut was made to the Crown Lands Department in the name of McGuire & Co.

The defendant company was organised after the plaintiff McPherson obtained his judgment and interim injunction, and it was apparently incorporated for the purpose of acquiring the license and business of McGuire & Co. An offer was submitted at the organisation meeting on the 27th January, 1910, by McGuire & Co. to sell their license and their entire lumbering outfit for $9,000, payable by allotment to McGuire & Co. or their nominees of ninety fully paid-up shares of $100 each to the company, and the offer was considered and a resolution passed,

"that said offer be accepted, subject to this, that the transfer of the said license shall not be made until the pending injunction against McGuire & Co. restraining the transfer of the said license shall have been disposed of, but in the meantime that the company shall go upon the limits and carry on the operation of cutting and removing timber therefrom." At the same meeting the $9,000 of stock was allotted to Annie McGuire, and two transfers from her to J. E. Murphy of 45 and 20 shares respectively were approved of.

According to the evidence, Murphy had, some weeks before, agreed with McGuire & Co. to pay $4,500 for a half interest in the company, of which he was to pay $2,500 in cash and to hold $2,000 to satisfy the lien of the Traders Bank on the license. Both these sums were paid by him, the latter on the 1st June, 1910, when he also advanced an additional sum of $774.04 for arrears of dues which the bank had paid. He had previously obtained the consent of the bank to timber being cut under the license on his guaranteeing payment of the $2,000. The defendants thereupon proceeded with the cutting, with the permission of the bank, and without objection by the Crown Lands Department.

As respects the company and Murphy, both of whom had notice of the injunction, it is perfectly plain that, while the agreement for sale may not be impeachable as fraudulent as against creditors, the method of carrying it out was primarily adopted for the purpose of enabling McGuire & Co. to evade the injunction and to circumvent the plaintiff McPherson in his efforts to realise his judgment out of McGuire & Co.'s interest in the license and the right to cut timber thereunder; and I must say that upon this record the course pursued by the Traders Bank was such as without it the dishonest purpose of McGuire & Co. could not have been so nearly accomplished.

As against the defendant company, I would also find, in view of the express notice of the injunction acknowledged in the resolution above cited, that they must be deemed to have had notice that the execution for the protection of which the injunction was granted, was in the hands of the Sheriff and unexecuted at the time they assumed to acquire the interests of McGuire & Co. in the license in question, within the meaning of sec. 9 of the Execution Act, 9 Edw. VII. ch. 47; and I think that the effect of the injunction was, as against the claim of McPherson & Co. under the execution mentioned in the order, to prevent the defendant company acquiring any interest whatever in timber that

might be cut under the license except subject to the satisfaction of that execution.

Under sub-sec. 2 of sec. 3 of the Crown Timber Act, the property in the trees when cut vested in McGuire & Co., for at that time nothing had been done to divest them of the property except the creation of the lien in favour of the Traders Bank and the lien created by the non-payment of Government dues.

So far, therefore, as respects the execution of the plaintiff McPherson under the judgment of the 30th November, 1909, I find that, at the time of the seizure by the Sheriff, the logs were exigible thereunder as against the defendant company, subject only to the liens of the Traders Bank and of the Government for timber dues.

As to this execution, therefore, judgment will be in favour of the plaintiff McPherson, but the defendant company shall be entitled to deduct from the proceeds of the logs the amounts paid by them to the Traders Bank and to the Government in respect of said liens.

As regards the executions of the plaintiff Booth and the other executions of the plaintiff McPherson, I am of opinion that, not being within the protection of the injunction, and the sale by McGuire & Co. to the defendants not being impeachable as fraudulent as against creditors, the defendants are entitled to hold the logs as against these executions, in the absence of notice, when they acquired them, that the writs had been delivered to the Sheriff and remained unsatisfied in his hands, as provided by sec. 9 of the Execution Act.

I also think that the facts bring this case, so far as those executions are concerned, within the principle of Canadian Pacific R.W. Co. v. Rat Portage Lumber Co., 10 O.L.R. 273, and that, therefore, as against these executions, judgment must be for the defendants.

The costs of the plaintiff McPherson of the interpleader proceedings and of the trial of this issue must be paid by the defendants to him; but there will be no costs as between the plaintiff Booth and the defendants, and the plaintiff McPherson will be disallowed on taxation any additional costs occasioned by including in the interpleader proceedings any executions except the one under his first judgment.

RE URQUHART—MULOCK, C.J. EX.D.—DEC. 31.

Will—Construction—Sum to be Set apart for Executors—Rents and Profits.]—After the judgment noted ante 451, the learned Chief Justice made a memorandum as to a question which he omitted to dispose of when giving judgment, viz., whether the $600 set apart for the testator's executors was payable out of rents and profits or out of his residuary estate, as follows: I am of opinion that this sum of $600 is payable out of the rents and profits collectable during the first year after the testator's death.

ISLE OF COVES HUNT CLUB V. WILLISCROFT—LATCHFORD, J.—JAN. 7.

Statute of Frauds—Agreement to Answer for Default of Another—Defence to Action—Costs.]—Action by the abovenamed club, an incorporated company, against John E. Williscroft, Henry F. Murphy, and J. E. Murphy, alleged to be trading as the Tobermory Lumber Co., and against the company and J. E. Murphy, to recover the sum of $4,026.01, the balance of the price of certain timber sold by the plaintiffs to the defendants Williscroft and Henry F. Murphy. The defendant J. E. Murphy was not registered as a partner in the firm which carried on business as the Tobermory Lumber Co. No appearance was entered by the company or by Williscroft and Henry F. Murphy, and judgment for default was entered against them on the 30th April, 1910, for $4,026.01 and costs. The judgment against the company did not affect the defendant J. E. Murphy, as he was not in fact or in law a member of the firm or company. The defendant J. E. Murphy paid into Court with his defence $942, which, he said, was sufficient to satisfy any claim the plaintiffs had against him upon a promissory note which he joined the firm or company in making. The plaintiffs, however, contended that he was liable to them for the whole of the $4,026.01 and interest. Their case was based on the allegation that he agreed, if the plaintiffs would sell the timber to his co-defendants, to give in payment the joint promissory note of himself and co-defendants and to became directly responsible for payment of the price of the timber. The defendant J. E. Murphy in answer set up secs. 5 and 12 of the Statute of Frauds. Held, that sec. 5 afforded him, upon the evidence, a complete, though dishonour-

able, defence. Reference to Sutton v. Gray, [1894] 1 Q.B. 285; Guild & Co. v. Conrad, [1894] 2 Q.B. at p. 885; In re Hoyle, [1893] 1 Ch. 85; Leake on Contracts, 5th ed., p. 159. The action, upon the issues other than these connected with the promissory note, dismissed as against the defendant J. E. Murphy, but without costs. A. G. MacKay, K.C., for the plaintiffs. J. A. McAndrew, for the defendant J. E. Murphy.

DAVIES V. BADGER MINES LIMITED—TEETZEL, J.—JAN. 7.

Master and Servant—Injury to and Death of Servant—Negligence—Dangerous Position in Shaft of Mine—Mistake in Signals —Negligence of Fellow-servant not in Superintendence—Workmen's Compensation for Injuries Act, sec. 3—"Railway."]— Action by an administrator and next of kin, under the Workmen's Compensation for Injuries Act and at common law for damages for the death of a workman employed by the defendants. The deceased was employed as a teamster to cart away waste rock deposited near the mouth of the defendants' mining shaft. One Carrol had charge of the cage, and on the day of the accident, the hood having been improperly closed by some one at the bottom of the shaft, it became necessary to adjust it, and the deceased volunteered to assist Carrol in the adjusting, and in doing so had to climb upon the frame of the shaft above the cage. While he was standing there, the cage was, owing to a mistake in signals, hoisted past him, and his head was crushed between the cage and the timbers of the shaft—which caused his death. The cage was hoisted by means of an engine, operated by one Griffiths, who acted upon signals communicated by means of a bell in the engine-room, which was connected by wire with different parts of the shaft. TEETZEL, J., who tried the action without a jury, said that the deceased was in a place of danger, of which he was duly warned by Carrol. The learned Judge entirely acquitted the engineer of any negligence, and found that he responded properly to the signals, but that the cage was hoisted owing to Carrol, the man in charge of the cage, having improperly given the signal to do so while the deceased was in a position in which he might be injured by the cage in its upward course; that the equipment of the shaft and cage was in compliance with the Mines Act; that there was no defect within the meaning of clause 1 of sec. 3 of the Workmen's Compensation

for Injuries Act, R.S.O. 1897 ch. 160; that the defendants were not guilty of negligence in employing Carrol to operate the cage; that, while Carrol was negligent in giving the signals to hoist the cage he was a fellow-servant of the deceased, and not a superintendent within clause 2 of sec. 3, nor a person to whose orders or directions the deceased was bound to conform, within the meaning of clause 3 of sec. 3; that clause 5 of sec. 3 did not apply, as the signal referred to in that clause is a signal on a railway, tramway, or street railway only, and it was not possible, in view of the character of the appliances here, to hold that Carrol was in charge of a signal upon a railway, within the meaning of clause 5, by analogy to what was held in McLaughlin v. Ontario Iron and Steel Co., 20 O.L.R. 335, 1 O.W.N. 408. The defendants not being liable, therefore, for Carrol's negligence, action dismissed, but without costs. S. White, K.C., and W. MacPhie, for the plaintiffs. F. Denton, K.C., for the defendants.

HENDRY V. WISMER—MULOCK, C.J. EX. D.—JAN. 7.

Principal and Agent—Agent for Sale of Land—Unauthorised Receipt of Purchase-money—Ratification by Vendor—Evidence and Correspondence—Adoption of Act of Agent—Action by Purchaser for Specific Performance of Contract—Payment Effected by Payment to Agent, though Money Misappropriated.]—Action for specific performance of a contract for sale by the defendant to the plaintiff of certain lands in the town of New Liskeard, Ontario. The defendant admitted the contract; and the real question was, whether the plaintiff or the defendant was to bear the loss of the purchase-money—$850—paid by the plaintiff to one Weaver, and by him misappropriated. The defendant, who resided at Vancouver, British Columbia, placed the property for sale in the hands of Weaver, a land agent at New Liskeard, and the latter obtained from the plaintiff an offer for the property, which the defendant accepted. The plaintiff paid the purchase-money to Weaver, who had no authority from the defendant to receive it; and the question was, whether the defendant adopted as his own Weaver's unauthorised action in receiving the purchase-money. In order to solve this question the Chief Justice made a careful analysis of the correspondence and other evidence, and then said: In order that an act shall constitute a binding ratification of unauthorised conduct, it must be done with full knowledge of the facts, and amount to an adoption of

the agent's unauthorised act done in the principal's behalf: Phosphate Lime Co. v. Green, L.R. 7 C.P. 57; Marsh v. Joseph, [1897] 1 Ch. 247. Here Weaver, without authority, gave a receipt for the money, not as a fund to be held by him for the purchaser, but as the purchase-money for the lots. In so doing, he was purporting to represent the owner of the property. His only connection with the transaction was as the defendant's agent to obtain a purchaser. Immediately on receipt of the money, he notified the defendant by letter of the 14th December, in these words: "The buyer has deposited a cheque for the amount of the purchase-money, to be held by me until all is satisfactory." In his previous letter of the 1st December to the defendant, Weaver had informed him that, if he decided to accept the plaintiff's offer, he was to execute the papers and send them to him (Weaver), "and I will complete the transaction." To this letter the defendant on the 7th December replied instructing Weaver to have the transfers prepared and sent to him, when he "will sign them and return them immediately." The subsequent correspondence made it quite clear to the defendant that Weaver held the money on the defendant's account, subject to his order; and that he (the defendant) fully appreciated that fact appears from his letter to his brother, wherein he manifests some anxiety as to Weaver's financial responsibility. . . . When the defendant's brother received the transfers and applied to Weaver to complete the transaction and hand over the purchase-money to him, Weaver refused, and upon the 19th January, 1910, wrote the defendant, "I have no instructions from you to hand over the cash for this property to any one but yourself"—and he asks for instructions. Thereupon the defendant sent to his brother an order directed to Weaver requiring him to pay the purchase-money to his brother. At this time the defendant knew, beyond any question, that Weaver was holding the cash for him and subject to his instructions, and, with this knowledge, endeavoured to exercise dominion over it by ordering Weaver to pay it over to the defendant's brother. . The defendant's conduct, I think, admits of but one inference, namely, that he adopted as his own the previously unauthorised act of his agent in receiving the purchase-money in the defendant's behalf. . . . There are many cases shewing ratification because of the principal accepting or suing to recover purchase-money for goods sold without authority: for example, Hunter v. Parker, 7 M. & W. 322; Simpson v. Eggington, 10 Ex. 845; Lyall v. Kennedy, 14 App. Cas. 437. Further facts in this case also go to establish ratification. . . . For these various reasons, I

am of opinion that the defendant, with full knowledge, ratified the unauthorised act of his agent Weaver in receiving the purchase-money from the vendor; that such payment was good payment to the vendor; and that the plaintiff is entitled to specific performance, with the costs of this action. G. Ross, for the plaintiff. R. McKay, K.C., and M. F. Pumaville, for the defendant.

SOUTHWELL V. SHEDDEN FORWARDING CO.—MASTER IN CHAMBERS —JAN. 9.

Discovery—Examination of Plaintiff—Privilege—Information Obtained for Use at Trial under Instructions of Solicitor.]— The plaintiff, who was injured in a collision with the defendants' runaway team, and brought this action for damages for his injuries, was asked, on examination for discovery, whether he knew the name of the defendant' driver; he said he did, but, on counsel's advice, refused to give the name and refused to answer similar questions, because it was a matter discovered under the direction of the plaintiff's solicitor in obtaining evidence for the trial. Upon an application by the defendants to compel the plaintiff to answer, it was contended on behalf of the plaintiff that the legal professional privilege must be extended equally to facts as to documents and reports. The defendants, by their statement of defence, alleged that the runaway arose from causes beyond the control of the defendants, who used all proper precautions, and without negligence on their part or that of their servants, and that the plaintiff was guilty of contributory negligence, and might with reasonable care have escaped injury. Upon the examination the plaintiff's counsel refused to allow him to answer whether he knew that either of the defendants' horses had previously run away; or whether the defendants knew of their having done so; or what started them or caused them to run away. The Master said that none of these matters, so far as he could see from the authorities, came within the protection claimed. The plaintiff must attend again at his own expense and answer all questions on matters of fact on which he relies to prove his case, or which may assist the defence—subject to this qualification, that he is not bound to disclose the names of his witnesses. He should also give the name of the driver, because it may be that he was not a servant of the defendants, but a volunteer or trespasser. Costs of the motion to the defendants in the cause. R. McKay, K.C., for the defendants. G. H. Kilmer, K.C., for the plaintiff.

RUSSELL V. GREENSHIELDS—MASTER IN CHAMBERS—JAN. 10.

Writ of Summons—Service out of the Jurisdiction—Con. Rule 162—*Both Parties Resident in another Province—No Assets of Defendant in Ontario—Proper Forum.*]—Motion by the defendant to set aside an order made under Con. Rule 162 giving the plaintiff leave to serve the writ of summons and statement of claim upon the defendant in the Province of Quebec, and to set aside the service made under the order. The plaintiff and defendant were partners in certain lands in the North-West to which the Canadian Northern Railway Company made adverse claim. This action was based on a breach of his duty by the defendant, as such partner, in assenting to an arrangement with the Dominion Government in settlement of the claims of the railway company, by which the plaintiff alleged he was injured, and he claimed $1,250,000 damages. It was stated in the statement of claim that both the plaintiff and defendant were resident in the province of Quebec. The Master said that he was not aware of any case in which a foreign plaintiff had been permitted to prosecute an action in Ontario against an unwilling foreign defendant. He referred to Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670; Lopez v. Chavarri, [1901] W.N. 115; Atkinson v. Plimpton, 6 O.L.R. 566, 573. As both parties were resident in Quebec, and the partnership agreement was made there as alleged, the Quebec Courts would be best qualified to determine the issues; and, further, there were, so far as appeared, no assets of the defendant in Ontario. Reference to Standard Construction Co. v. Wallberg, 20 O.L.R. 646; Baxter v. Faulkner, 6 O.W.R. 198; Re Morrow, 26 Gr. 420. Order made setting aside the order and service with costs. Wallace Nesbitt, K.C., and Britton Osler, for the defendant. I. F. Hellmuth, K.C., and C. J. R. Bethune, for the plaintiff.

McCAMMOND V. GOVENLOCK—MULOCK, C.J. EX.D.—JAN. 10.

Vendor and Purchaser—Contract for Sale of Land—Purchase-money Payable by Instalments—Default—Forfeiture—Termination of Contract—Acceptance of Lease by Purchaser—Action to Set aside—Fraud—Finding of Fact.]—Action to set aside a lease made by the defendant to the plaintiff and to compel the defendant to account for insurance and other moneys, including the value of certain lumber. The plaintiff alleged an agreement between her and the defendant, dated the 1st Novem-

ber, 1907, for the sale to her of certain lands, of which she went into occupation; that the buildings thereon were partly destroyed by fire on the 22nd June, 1908, and the defendant received insurance moneys, which he applied to his own use; that, after the fire, the defendant fraudulently induced the plaintiff to execute a document purporting to be a lease to her of these lands, dated the 3rd June, 1908; and that the defendant converted to his own use certain lumber, etc. The defendant admitted the agreement of the 1st November, 1907, and alleged that during the continuance thereof the plaintiff was to be allowed possession of the lands; that, by the terms of the agreement, the plaintiff was required to pay by instalments the purchase-money and interest; that time was of the essence; that the plaintiff made default in payment, whereby the agreement became void; and the defendant thereafter made the lease to the plaintiff. The defendant admitted that he was paid the insurance moneys, but denied that the plaintiff had any interest therein. The learned Chief Justice said that there was default under the agreement, and no ground was shewn for relieving the plaintiff from forfeiture because of such default; that on the 1st June, 1908, the agreement became null and void, and the plaintiff ceased to have any interest in the property or in the insurance moneys arising from the destruction of the premises thereafter. The learned Chief Justice also found that on the 3rd June, 1908, the plaintiff agreed to lease the premises from the defendant, on the terms set forth in the lease in question, and executed the same in the presence of a witness; that the plaintiff expended considerable moneys upon the premises, all of which, together with her payments, have been forfeited to the defendant, who had acted harshly towards her, exacting from her his full legal rights. Action dismissed without costs. W. Proudfoot, K.C., and R. S. Hayes, for the plaintiff. G. Lynch-Staunton, K.C., and J. L. Killoran, for the defendant.

CLARKSON V. LINDEN—DIVISIONAL COURT—JAN. 10.

Pleading—Statement of Claim—Motion to Strike out—Action by Liquidator—Leave of Master—Irregularities—Amendment—Parties—Company.]—Appeals by both the defendants from the order of FALCONBRIDGE, C.J.K.B., ante 379. The Court (MULOCK, C.J. Ex.D., SUTHERLAND and MIDDLETON, JJ.) dismissed the appeals with costs. T. Hislop, for the defendants. W. A. Lamport, for the plaintiff.

Foxwell v. Kennedy—Master in Chambers—Jan. 11.

Pleading—Statement of Claim—Joinder of Causes of Action—Will—Executrix—Maintenance—Parties.]—Motion by the defendants to strike out paragraphs 15 to 23 of the statement of claim, before delivery of the statement of defence, as being a misjoinder of causes of action. This was one of several actions arising out of the will of David Kennedy. The facts in regard to the will and the estate as they existed in April, 1909, are stated in Kennedy v. Kennedy, 13 O.W.R. 984. It was there said that Gertrude Maud Foxwell, a granddaughter of the testator, and named in his will as an executrix, had renounced probate. She was the plaintiff in this action, and asked to have her renunciation set aside, to be declared a trustee and entitled to share in the management of the estate, and to have the will construed by the Court, especially as to the rights given her thereunder for maintenance, and also to have a sale of the whole or part of the residue arranged by James H. Kennedy set aside. There were ten defendants. In paragraph 15 to 17 of the statement of claim the plaintiff set out the devises made to her in the will and what she claimed to be entitled to under the words "all necessary maintenance" to be furnished to her by James H. Kennedy while she resides in the house given to him, which maintenance was made a charge on "the said residence premises." In the next four paragraphs it was alleged that the plaintiff was obliged to leave the house in consequence of the misconduct of an uncle of J. H. Kennedy, with which he refused to interfere, and she asked that he should be compelled to restrain the uncle from interference with the plaintiff's use and occupation of the roof bequeathed to her and carry out the provisions as to "all necessary maintenance," as she understands them, or as they may be interpreted by the Court, or else that, in lieu thereof, he be directed to make her "a proper cash allowance." In the 23rd paragraph the plaintiff submitted that under the lien given by the will "the residence premises" should be sold to carry out the intention of the testator on her behalf. These paragraphs were attacked as being in violation of Con. Rule 235; and Holmested and Langton's Judicature Act, 3rd ed., p. 431, and cases there cited, were referred to. The Master said that there were claims for relief: (1) to have the plaintiff restored as an executrix; (2) to have the proposed sale of the residue set aside; and (3) to have the whole will interpreted by the Court; and these causes of action were not improperly joined. He referred to sec. 57(12) of the Judicature Act; Cox v. Barber, 3 Ch. D. at p. 368; Evans v.

Jaffray, 1 O.L.R. 621. Motion dismissed; costs in the cause. E. D. Armour, K.C., for the defendants. W. Proudfoot, K.C., for the plaintiff.

BROOM V. GODWIN—DIVISIONAL COURT—JAN. 11.

Contempt of Court—Breach of Injunction—Fine—Costs.]—Appeal by the defendants from the order of BOYD, C., ante 321; and motion by the plaintiff for leave to cross-appeal from the same order. The Court (MULOCK, C.J. Ex.D., SUTHERLAND and MIDDLETON, JJ.) dismissed the defendants' appeal with costs to the plaintiff fixed at $5; and dismissed the plaintiff's motion without costs. W. A. Henderson, for the defendants. The plaintiff in person.