

and failed as to the replevin branch of the case. The plaintiffs must be ordered to restore the second machine to the defendants and pay them damages, fixed at \$50, and the costs of this branch of the case.

As apportionment of costs is not easy, and seldom attains real justice, the costs should be fixed at a lump sum; and, as the defendants succeeded on the more important branch of the case, the plaintiffs should pay the defendants \$100 for costs.

ROSE, J.

DECEMBER 27TH, 1918.

PEEL v. PEEL.

*Husband and Wife—Conveyance of Land by Husband to Wife—Presumption of Gift—No Evidence to Rebut—Failure to Shew Agreement to Hold in Trust—Discharge of Mortgage upon Promise to Execute New Mortgage—Equitable Mortgage—Statute of Frauds—Performance of Contract on one Side—Interest—Charge on Land—Costs.*

Action for a declaration that certain land was the property of the plaintiff or that the defendant held it as trustee for the plaintiff and subject to his direction and control.

The action was tried without a jury at a Toronto sittings.

Edward Meek, K.C., for the plaintiff.

W. J. McLarty, K.C., for the defendant.

ROSE, J., in a written judgment, said that the evidence did not satisfy him that, when the plaintiff conveyed the land to his wife, the defendant, there was any agreement that she should hold it in trust for him or that her title should be other than an absolute one. The presumption that a gift was intended was, therefore, un rebutted, and the action by the plaintiff in his personal capacity failed.

As to the claim by the plaintiff as executor of the will of Robert Peel, the evidence clearly established that the discharge by Robert Peel of the mortgage securing \$800 upon the whole of the land was executed by Robert Peel in order to enable F. J. Peel (the plaintiff) and the defendant to procure a loan of \$1,200 secured by a first mortgage upon the north half of the land, and upon the faith of an undertaking, given to Robert Peel by F. J. Peel, upon behalf and with the authority of the defendant, that the defendant would execute a new mortgage securing the \$800 upon the south