The
Ontario Weekly Notes

VOL. XII. TORONTO, APRIL 13, 1917. No. 5

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*PIPHER v. TOWNSHIP OF WHITCHURCH.

Highway—Nonrepair—Collapse of Bridge under Traction-engine—Liability of Municipal Corporation for Damage to Engine—Notice of Claim and Injury—Sufficiency of Notice Given by Stranger who Made Repairs—Actual Notice to Head of Corporation—Reasonable Excuse for Want of Notice if Notice Insufficient—Absence of Prejudice—Municipal Act, R.S.O. 1914 ch. 192, sec. 460 (4), (5).

Appeal by the defendant township corporation from the judgment of the County Court of the County of York pronounced by COATSWORTH, Jun. Co.C.J., after the trial of the action without a jury, in favour of the plaintiff.

The action was by the owner of a traction-engine to recover damages for the injury done to it when the bridge over which it was being driven collapsed—arising out of the same occurrence which was in question in Linstead v. Township of Whitchurch (1916), 36 O.L.R. 462.

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

James McCullough, for the appellant corporation.

K. F. Lennox, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the liability of the appellant corporation for the consequences of the accident having been established in the Linstead case, the

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

only question remaining was, whether this action must fail because the prescribed notice of the accident was not given to the appellant corporation: the Municipal Act, 3 & 4 Geo. V. ch. 43, sec. 460 (4), now R.S.O. 1914 ch. 192, sec. 460 (4). That subsection provides that "no action shall be brought for the recovery of the damages mentioned in sub-section 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or clerk of the corporation . . . within 30 days . . . after the happening of the injury . . ."

It was admitted that the person in charge of the engine was killed as a result of the accident, and that due notice in writing of the claim of his personal representative and of the injury complained of was given within 30 days. The Reeve of the township was informed of the accident, and visited the scene of it on the morning after it happened, and he then learned of the injury that had been done to the respondent's engine, of the death of the person who was in charge of it, and that the injury and death had been caused by the collapse of the bridge.

No formal notice in writing of the respondent's claim or of the injury complained of was served within 30 days of the happening of the injury, but on the 20th August, 1913, and within the 30 days, a letter was written by Charles A. Thompson & Co. to the Reeve, informing him that they had repaired the respondent's engine, enclosing an account for $207.65, and asking for payment.

On the 19th September, 1913, the township clerk wrote to Thompson & Co. saying that the council refused to pay.

According to the respondent's testimony, he instructed Thompson & Co. to send the account to the Reeve.

It could not be said that the County Court Judge was wrong in holding that, in the circumstances, the notice given by Thompson & Co. was a sufficient notice to satisfy the provisions of the statute. But, if the notice was not sufficient, there was "reasonable excuse" (sub-sec. 5) for the want or insufficiency of the notice, and the appellant corporation "was not thereby prejudiced in its defence."

The absence of prejudice was beyond question; and it was reasonable for the respondent to believe that the sending in of Thompson & Co.'s account, which shewed that it was for repairs to the respondent's engine, and indicated that these repairs were necessary in consequence of the happening of the accident the occurrence and results of which were known to the Reeve, was sufficient, and that a more formal notice was not necessary.

Although the cases had gone a long way towards making the

curative provisions of the Act useless in most cases, no decided case made it necessary for this Court to hold that, in the peculiar and special circumstances of this case, reasonable excuse had not been shewn.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

FLEXLUME SIGN CO. LIMITED v. MACEY SIGN CO. LIMITED.

Patent for Invention—Electric Signs—Known Device—Action for Infringement—Finding of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 10 O.W.N. 305.

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

A. C. McMaster, for the appellants.

F. Arnoldi, K.C., and D. D. Grierson, for the defendants, respondents.

THE COURT dismissed the appeal with costs, seeing no reason for differing from the conclusion of the learned trial Judge nor from the reasons upon which his conclusion was based.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*UNITED STATES PLAYING CARD CO. v. HURST.

Trade Mark—Infringement—Colourable Imitation—Use of Word "Bicycle"—Design—Trade Name—Intent to Deceive—Passing off — Evidence — Advertisement — Injunction — Damages — Inquiry—Non-interference with Infringers—Abandonment—Appeal—Variation of Judgment—Costs.

Appeal by the defendant from the judgment of MIDDLETON, J., 37 O.L.R. 85, 10 O.W.N. 207.

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

J. H. Moss, K.C., and A. C. Heighington, for the appellant.

D. L. McCarthy, K.C., and Britton Osler, for the plaintiff company, respondent.

HODGINS, J.A., read the judgment of the Court. He said that the chief contention arose over the trade mark No. 46/11090, which consisted of the use of the word "Bicycle." By the judgment in appeal, the use of this word was prohibited, and two card-designs (Imperial Club, Bicycle Series, 1 and 8) were declared to be an infringement of the trade mark. As to this particular mark it was contended by the appellant that the word was and is publici juris; that it is not a valid trade mark; that, if there was any infringement, it had been discontinued, pursuant to arrangement, in 1905; and that there had not, since then, been any interference with the respondent's rights.

The word "Bicycle" was not printed on the appellant's cards, but on the packages. A special trade mark, in the words of the certificate of registration, was granted as a mark "to be applied to the sale of playing cards." This particular mark was not infringed by the cards sold by the appellant.

Reference to Par lo v. Todd (1888), 17 S.C.R. 196.

If the designs on the back of the cards contain a bicycle or parts of it, there is nothing in the respondent's trade mark to prevent the use of the word by the appellant as properly describing that design, if he does not apply that word to the article itself, or to the packages in which it is sold, and on the sale thereof, as designating the class of card itself. Nor does the solitary word "Bicycle" prevent the pictorial representation of that aid to locomotion being used in ornamental design.

Reference to Singer Manufacturing Co. v. Loog (1882), 8 App. Cas. 15, 27.

The use of an ordinary word such as "Bicycle" as describing merely the design on the back of a card becomes prohibited because it is forbidden if applied to the article itself or to any package containing it.

Reference to sec. 5 of the Trade Mark and Design Act, R.S.C. 1906 ch. 71.

The respondent company's witnesses all agreed that the word "Bicycle" was adopted to indicate a particular class, quality, or style of card of a specific finish and price, but having upon the individual cards numerous and differing designs, most of which,

if not all, possessed bicycles, or parts thereof, wheels, etc., as ornamentations thereon. The use of these designs, except where they are copies or imitations, is not interdicted or affected by possession or registration of a trade mark, unless that trade mark is one that covers the identical design. There is no reason why the only word which can appropriately describe such a design cannot be used, provided that it is not applied to the article produced or offered for sale as descriptive of the whole product.

But, with regard to passing off, it was proved by reasonable evidence that, before registration, the respondent company had established the word "Bicycle" as having acquired a significance referable only to its own manufacture of a class, quality, style, and price of card, both in the United States and Canada, and that the word had not, by reason of the circulation of the other cards prior to 1902, lost that significance. It had become identified with these particular cards as the manufacture of the respondent company. See Provident Chemical Works v. Canada Chemical Manufacturing Co. (1902), 4 O.L.R. 545, 549.

It was not suggested that any of the respondent company's immediate customers were, or could be, deceived by anything done by the appellant. But it was contended that the appellant was attempting to pass off his cards as those of the respondent company by using in connection with class names, such as "Imperial Club," the term "Bicycle Series" as indicating back designs.

There was no evidence of any passing off having been accomplished. Even retail customers would not be easily taken in. See National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co., [1894] A.C. 275; Standard Ideal Co. v. Standard Sanitary Manufacturing Co., [1911] A.C. 78.

No purchaser (so far as appeared) had been misled into buying the cards which the appellant was selling, instead of the respondent company's; and, but for the single advertisement produced, the respondent company had not made out its right to interfere with the appellant company on this branch of the case. This advertisement was apparently a breach of the undertaking given in 1905, and was sufficient to warrant an injunction against its repetition, though not the award of damages made.

The respondent company should be restricted to an inquiry as to damages, if it insists upon more than nominal damages, and the costs of the inquiry should be reserved.

The judgment below should also be modified so as to limit the declaration in para. 1 and the injunction in paras. 5 and 7 to using the word "Bicycle" on the tuck cases and cartons and to

advertising and selling these cards as "Bicycle Cards." As to para. 4, the declaration should be confined to trade mark 46/11091.

The respondent company had not lost its right to enforce its trade marks through non-interference with infringers.

Judgment below varied accordingly, and otherwise affirmed. No costs of appeal.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*MACDONALD v. FOX.

Husband and Wife—Promissory Note Signed by Wife—Consideration—Lack of Independent Advice—Failure to Shew Undue Influence of Husband or Solicitor—Failure to Establish Fraud or Duress—Release of Judgment against Husband—Surety—Evidence.

Appeal by the plaintiff from the judgment of SPOTTON, Co.C.J., acting by request as a Judge of the County Court of the County of Halton, dismissing, as against the defendant Rosella Fox, an action, brought in that Court, against Thomas W. Fox and Rosella Fox, his wife, to recover the amount of a promissory note made by both defendants, on the ground that the signature of the defendant Rosella Fox had been obtained by undue influence, within the principle of Bank of Montreal v. Stuart, [1911] A.C. 120.

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

Gordon Waldron, for the appellant.

William Laidlaw, K.C., for the defendant Rosella Fox, respondent.

The judgment of the Court was read by FERGUSON, J.A., who said that the note was made in April, 1907, and did not fall due till April, 1913; the action was begun on the 15th February, 1915.

The appellant had recovered judgment against the husband, the defendant Thomas W. Fox.

After stating the facts, the learned Judge said that, according to the decisions in Bank of Montreal v. Stuart, supra, Euclid Avenue Trusts Co. v. Hohs (1911), 24 O.L.R. 447, 450, and Howes v. Bishop, [1909] 2 K.B. 390, 402, the fact that the respondent had not advice independent of her husband was not, without more, sufficient to entitle her to relief.

The next question was, whether undue influence was exercised by the husband or by any one else. Upon the evidence, if there was any undue influence, it was not that of the husband.

Mr. Cameron, a solicitor, who endeavoured to act as a friend to the plaintiff and also to the defendants, was present when the note was signed, but not as solicitor for the defendants; and there was no foundation for the charges which the respondent made against him—misrepresentation, fraud, and duress.

From Willes v. Barron, [1902] A.C. 271, 283, it might be argued that, by voluntarily assuming the roll of candid friend, advising both the appellant and the respondent, Mr. Cameron assumed not only a moral but a legal obligation to the respondent, and placed himself, to the knowledge of and with the approval of the appellant, in the position of solicitor advising both parties. Even if Mr. Cameron did occupy that position (which he did not), the contention must fail, because there was no mistake, dishonesty, or neglect. Neither was Mr. Cameron, in this transaction, acting for the appellant, and the appellant was not responsible for Mr. Cameron's advice, wrongdoing, or neglect, if any.

The appellant was asserting a right—a doubtful right perhaps—but doing so in good faith; the respondent, desiring to save her daughter from the loss of property which had been transferred to her by the defendant Thomas W. Fox—a loss which would result if the plaintiff's alleged right were enforced, negotiated, with the benefit of Mr. Cameron's honest opinion, a bargain whereby the appellant gave up that right and his judgment against Thomas W. Fox, and gave six years' time for payment. Such a compromise should not lightly be set aside: see Lucy's Case (1853), 4 DeG. M. & G. 356.

It was argued that the note sued upon was held by Macdonald as collateral security for an indebtedness of Thomas W. Fox and one Joyce, and that the notes taken from Joyce bore interest as 6 per cent. per annum, while the note sued on bore interest at 5 per cent.; and, therefore, the respondent as surety was discharged from liability: Bolton v. Salmon, [1891] 2 Ch. 48. The result of the evidence was, that, at the time the note was made, it was the judgment against Thomas W. Fox that was being settled, and that it was intended that the defendants should, as they did, become primarily liable for the claim of Macdonald, and that the getting and taking of the notes from Joyce was something to be done in ease of the defendants, and therefore the respondent was not a mere surety for Joyce, and that the authority cited was not applicable to the facts.

The appeal should be allowed with costs, and judgment should be entered against the separate estate of Rosella Fox for the amount of the appellant's claim and costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

REX v. SHORTALL.

Criminal Law—Attempting to Receive Stolen Money—Knowledge of Accused that Money was Stolen—Evidence—Inference from Facts—Trial and Conviction by Judge Sitting without a Jury.

Case reserved by WINCHESTER, Co. C.J., on the trial before him, in the County Court Judge's Criminal Court for the County of York, of the defendant on charges of attempting to receive stolen money knowing it to be stolen and of conspiring to do so. The defendant was convicted.

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

T. C. Robinette, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

FERGUSON, J.A., read a judgment in which he said that the charges involved the proving by the Crown of three facts: (1) an attempt to receive the money; (2) that the money was stolen; (3) that the defendant knew at the time of making the attempt to obtain the money that it was stolen. The first two were admitted.

The question submitted was, whether there was any evidence upon which the trial Judge could find the defendant guilty.

The finding of knowledge was based on the inference drawn from circumstantial evidence; and the question really meant: Was there evidence before the Judge from which he could draw the inference of knowledge? Were there sufficient premises to warrant the presumption of guilt?

Civil cases may be decided on a preponderance of probability; but in a criminal prosecution the guilt of the prisoner must be established beyond reasonable doubt: Powell's Law of Evidence, 9th ed. (Odgers), p. 488; Wills on Circumstantial Evidence, 5th ed. (1902), p. 280; Rex v. Burdett (1820), 4 B. & Ald. 95, 161.

At the trial, it was admitted, proven, or stated in evidence by the accused, that in September, 1914, two men (F. and W.) had rented from a bank in Toronto, a safety deposit box; that the defendant had in September, 1916, made three trips from Chicago to Toronto in order to get the contents of the box; that he had come at F.'s request and expense; that, in asking the defendant to come, F had told him that he could not come

himself; that F. had agreed to pay the defendant $5 a day and expenses to come for the contents of the box; that the defendant had come to Toronto, and the bank, not being satisfied as to his identity, had refused to deliver the contents of the box, but told the defendant that they would, on F.'s request, open the box and send him the contents by express or registered mail; that the defendant returned to Chicago, and reported to F., who said, "No, I want you to go back and bring the valuables;" that the defendant returned to the bank, and was met with the objection that he had not an order from W.; that he again returned to Chicago, and reported, and F. said he would go and see W. and get the order, and sent the defendant back to Toronto; that the defendant was arrested on the 13th September, 1916, in the bank, when he called the third time to see if W.'s order had arrived; that the defendant, when arrested, gave his proper name and address in Chicago, stated that he knew F. for 15 years, and came to Toronto at F.'s request and expense. The defendant testified that he did not know the contents of the box; that F. had told him that the box contained valuables; and that, had he known it contained money, he would not have come; that he did not know the nature or value of the "valuables," had made no provision for taking them to Chicago, or for paying duty on them if they were dutiable.

It was shewn that the contents of the box were bank-notes (value, $1,925) done up in bundles, not covered by envelopes; and it was admitted that the notes had been stolen and placed in the box by F. and W.

The trial Judge did not accept the defendant's denial of knowledge; and when, along with the other facts and circumstances adduced in evidence, it is considered that, had the venture on which F. sent the defendant to Toronto been successful, the defendant must, of necessity, as soon as he opened the box, have discovered that the contents were bank-notes, it cannot be said that there was no evidence on which the trial Judge might reject the defendant's denial and find, not only that he was untruthful, but that he did, as a fact, know that the box contained stolen property.

There was evidence to support the conclusion of the trial Judge; and the question should be answered in the affirmative.

MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., read a dissenting judgment.

Conviction affirmed.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

WESTON v. BLACKMAN.

Title to Land—Dispute as to Ownership of Small Strip—Ascertainment of Boundary-line between Town Lots—Survey—Evidence — Fences — Original Monuments — Inference — Possession of Strip—Limitations Act—Estoppel.

An appeal by the defendants from the judgment of the Judge of the County Court of the County of Perth in favour of the plaintiff in an action in that Court, brought to determine the ownership of a strip of land, and tried without a jury.

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

R. G. Fisher, for the appellants.

J. W. Graham, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the controversy was as to the ownership of a small strip of land, of trifling value, forming part of a lot in the town of St. Mary's. The County Court Judge found that a triangular piece of land, having a width in front of 3 feet $8\frac{2}{3}$ inches, and extending from the street-line to a point in the rear of lot 27 (the respondent's lot), formed part of that lot.

The case was to be dealt with as if the respondent had claimed the land not only by having the paper title to it, but also because if the paper title to it was in the appellants, their title was extinguished by the operation of the Statute of Limitations.

The learned Judge determined that question in favour of the respondent, holding that the deceased Hugh Smyth, of whose estate the respondent was administratrix, and his predecessors in title, had had possession of a somewhat large piece of land from a time prior to 1897 until the appellants, in 1913, erected a fence, taking it or part of it into their lot, and that as far back as 1907 or 1908 the title of the owner of it, if it formed part of lot 26, became extinguished by the operation of the Limitations Act; and it was adjudged that the respondent was the owner and entitled to the possession of this parcel.

The evidence of Mr. Farncombe, an Ontario Land Surveyor, who made a survey at the instance of Smyth, was in itself insufficient to establish the true boundary-line between the two lots. Mr. Farncombe found no original stakes or monuments

at any point, and made his survey on the assumption that certain posts or monuments, which were clearly not original ones, were in the true position for marking the points which they were intended to indicate.

Mr. Farncombe's evidence was, however, supplemented by evidence that many years ago fences were built, dividing the lots in question and the lots in rear of them, and that the owners of these lots recognised them as being, and treated them as marking, the boundary-line between the lots; and there was evidence that the fence ran through from Church street to Wellington street, the next street north, in a straight line. It was proved also that, according to the plan in the registry office, the line between lots 26 and 27 on Wellington street and the lots of the same numbers on Church street was a continuous straight line from street to street; while the line for which the appellants contended departed from the straight line to the extent of about 5 feet.

The boundary-line for which the respondent contended was, upon the findings of fact as to the old fence, shewn to be the true boundary-line between her lot and the appellants'. The facts so found warranted the inference that the old fence was built when the original monuments were in existence and on the true boundary-line: Home Bank of Canada v. Might Directories Limited (1914), 31 O.L.R. 340.

But, even if the strip in question formed part of lot 26, the possession of Smyth and his predecessors was sufficient to extinguish the title of the owner of that lot to it, as found by the County Court Judge.

No case of estoppel was made out; nothing could be added to the reasons which the Judge gave for that conclusion.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*MEREDITH v. PEER.

Negligence—Snow and Ice Falling from Roof of House on Neighbour's Land—Duty to Guard or Remove Accumulation on Roof—Liability for Breach—Damages—Injunction.

Appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, in an action brought in the County Court of the County of York, to recover damages

and for an injunction in respect of injuries sustained by the plaintiff owing to the fall from the roof of the defendant's house, adjacent to that of the plaintiff, of snow and ice which had been permitted to accumulate there, and by reason of slates falling or being blown from the roof of the defendants' house.

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

M. H. Ludwig, K.C., for the appellants.

Shirley Denison, K.C., for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who, after stating the facts, said that the case for the respondent was rested on two grounds: (1) that there was an absolute duty resting upon the appellants to prevent the snow and ice from falling upon his property; or (2) that the appellants were guilty of negligence in not adopting adequate means to prevent that from happening when the probable consequences of the snow and ice falling would be to cause injury to the respondent's property.

The learned Chief Justice said that he had been unable to find any reported English or Canadian case in which the question now presented for decision had arisen; there were however, some American cases; and cases both in Ontario and the United States in which the question of the liability of the owner or occupant of a building abutting on a highway for injuries caused to persons lawfully using it, by snow or ice which had accumulated on the roof of the building falling into the highway had arisen; but the cases were conflicting.

Reference to Shipley v. Fifty Associates (1869-70), 101 Mass. 251, 253, 106 Mass. 194, 197; Bellows v. Sackett (1853), 15 Barb. (N.Y.) 96; Walsh v. Mead (1876), 15 N.Y. (8 Hun) 387; Garland v. Towne (1874), 55 N.H. 55, 58, 59, 60; Underwood v. Waldron (1876), 33 Mich. 232, 238, 239; Barry v. Severen Peterson (1882), 48 Mich. 263; Hindman v. North Eastern R.W. Co. (1876), 3 C.P.D. 168, 173; Lazarus v. City of Toronto (1859), 19 U.C.R. 1, 13, 17; Skelton v. Thompson (1883), 3 O.R. 11, 14; Landreville v. Gouin (1884), 6 O.R. 455, 461, 462; Roberts v. Mitchell (1894), 21 A.R. 433, 439.

The conclusion is, that the owner or occupant of a building, the roof of which is so constructed that from natural causes the snow and ice which falls or collects upon it will naturally and probably slide from the roof, is bound, apart from any obligation imposed upon him by a municipal by-law, to take all reasonable

means to prevent the snow or ice from falling upon the adjoining property or an adjoining highway and causing damage to person or property there; and that that is the extent of the obligation which the law imposes upon him.

Upon the evidence, the appellants, if they did not know, ought to have known, that the natural and probable consequence of the snow and ice accumulating upon the roof of their house would be that, unless some guard or other means of prevention was provided, or unless the snow and ice were removed, they would slide and fall; there was no difficulty in adopting one or other or both of these means of prevention; and the appellants were guilty of negligence in not adopting them, and were liable for the consequences of their neglect.

The slates which fell from the roof on the respondent's land were, no doubt, brought down by the pressure of the snow and ice and the sliding of the mass; and for the conseuqences of their having fallen the appellants were equally answerable.

The judgment below was right as to the damages awarded to the respondent, but the provision as to an injunction should be eliminated.

No order as to the costs of the appeal.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*MORGAN v. BANK OF TORONTO.

Banks and Banking—Agreement between Bank and Customer—Deposit of Securities—Fraud and Misrepresentation—Failure to Prove—Construction of Agreement of Hypothecation—Right of Bank to Hold Securities against Payment of Promissory Note Made by Customer and Transferred to Bank by another Customer—Transferred Note not Endorsed by Payee—Right of Action of Bank—Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 61—Equitable Assignee of Chose in Action.

Appeal by the plaintiff from the judgment of LENNOX, J., at the trial, without a jury, at Sarnia, dismissing the action, which was brought to compel the defendants to return certain moneys and securities and for damages, and for other relief.

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

C. M. Garvey, for the appellant.
G. H. Sedgewick, for the defendant bank, respondent.

MEREDITH, C.J.O., read a judgment, in which he said that the appellant's allegations were: that in 1911 he opened an account with the Sarnia branch of the respondent bank, and deposited, as security for an advance, "in the vicinity of $1,700 worth of notes or customers' paper;" that he was asked by the manager of the branch to sign a printed document; that he never read it, nor was it read to him, but he signed it on the representation that it was only an agreement that the respondent bank should hold "the collateral notes so deposited until the advances made to him from time to time were duly paid off and discharged; "that the agreement was obtained by fraud and misrepresentation; that by it, as appeared to be the case, the respondent bank was "at liberty to purchase other paper on which" he (the appellant) "might be liable and use it to his detriment and disadvantage;" that in November, 1915, he paid off in full his indebtedness to the bank and demanded the return of his notes and securities and the money that the bank had collected on them, but the bank refused to return and pay as asked; and that he had been greatly damaged by the wrongful detention of these securities and moneys. His claim was for the rectification of the instrument signed, the return of the moneys and securities, and damages.

The learned Chief Justice said that the appellant's attack upon the agreement as having been obtained by misrepresentation and fraud entirely failed; and the only substantial question in dispute was as to the right of the bank to hold the securities, not only for indebtedness incurred by him directly, but also for his indebtedness upon promissory notes made by him to other persons, of which the bank had in the course of business become the holder; and, if that was the right of the bank, whether it was entitled to hold the securities for the indebtedness of the appellant on a promissory note which he had made to one Cook on the 1st May, 1915, for $968.99, payable 6 months after date, and which was in the possession of the bank when it refused to hand over the securities to the appellant.

According to the terms of two agreements between the appellant and the respondent bank, the latter was to be entitled to hold the securities "as security for the payment of all my present and all my future liability to your bank, whether direct or indirect, and all costs, charges, and expenses in connection therewith, and for all bills of exchange, promissory notes, or other instruments now or hereafter representing same or any part or parts thereof."

The indebtedness on a promissory note made by the appellant to another of the respondent bank's customers, of which it became in the ordinary course of business the holder, came within the terms of these agreements.

The note made by the appellant to Cook was payable to Cook's order, but was not endorsed by him; it was given to the bank to be held as security for an indebtedness. The manager of the Sarnia branch had, however, a power of attorney from Cook to "endorse promissory notes;" and that, with the possession of the notes, was sufficient. The true test was not whether, at the time the demand for the securities was made, the bank could have maintained an action on the note. The bank had then the possession of the note, though unendorsed, and was in a position at any moment to complete its legal title to the note and to maintain an action upon it by the exercise of the power of attorney; and the appellant was then indebted to the bank within the meaning of the agreements.

The effect of sec. 61 of the Bills of Exchange Act, R.S.C. 1906 ch. 119, was, that the transferee, before endorsement, was in the position of equitable assignee of a chose in action, and might sue in the name of the transferor, and also enforce by action his right to have the instrument endorsed to him. See Halsbury's Laws of England, vol. 2, p. 503, para. 853, and cases cited.

MACLAREN, HODGINS, and FERGUSON, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

FRANCIS v. ALLAN.

Contract—Claim against Estate of Deceased Person—Promise of Executor to Pay Sum in Settlement—Want of Consideration for Promise—Enforcement of Moral Obligation—Claim upon Promissory Notes—Interest—Costs—Appeal.

Appeal by the defendant Norman Allan and cross-appeal by the plaintiff from the judgment of KELLY, J., 11 O.W.N. 259.

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

M. K. Cowan, K.C., and A. G. Ross, for the appellant.

G. W. Holmes and W. A. Lamport, for the plaintiff, respondent and cross-appellant.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that he agreed with the learned trial Judge in his conclusion with regard to the agreement with the testator, the respondent's uncle, which the respondent set up; and would agree entirely with the disposition of the case made by the judgment in appeal if it could be found that the promise of the appellant (a son of the testator and one of the executors) was a promise made in order to settle a claim made by the respondent which was doubtful or believed by the parties to be doubtful, even though it was in fact a claim that could not be enforced. But the learned Chief Justice was unable to see that the appellant's promise was of that character. Nowhere in the correspondence was any claim enforceable against the estate of the testator put forward, beyond a claim on three promissory notes; and any claim beyond that was put forward, if as a claim at all, only as being a moral obligation resting on the appellant as the possessor of the bulk of his father's estate to make good the expectations of the respondent based upon what she testified the testator had told her as to the provision for her that he had made by his will.

A mere moral obligation to do that which the promisor agrees to do is not a valuable consideration: Halsbury's Laws of England, vol. 7, para. 799.

There remained for consideration the respondent's claim to recover the amount of the two overdue notes and the overdue interest on the $1,000 note, the principal being not yet payable. The notes for $50 and $100 were overdue when the action was begun, and some interest on the $1,000 note was also then overdue; and the respondent was entitled to judgment for the amount of the two overdue notes with interest and for the amount of the interest that was overdue on the $1,000 note on the 16th September, 1915, when the action was begun.

It was argued that the testator gave the $1,000 note in satisfaction of the other two notes, except the interest upon them; but, if that was his intention, it was not clearly expressed in his letter of the 1st October, 1912, sending the $1,000 note to the respondent. This the testator, in his letter to the respondent of the 25th September, 1912, recognised, and consented to her retaining the three notes as her own property.

There should, therefore, be substituted for the judgment below a judgment for the respondent against the executors for the amount of principal and interest due upon the three notes as above, and dismissing her action as to her other claims.

The respondent should have the costs of a County Court action for the recovery of what she was now found entitled to, against which there should be no set-off, and neither party should pay or receive costs in respect of the claims which had failed or of the appeal.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

MUIRHEAD v. MUIRHEAD.

Improvements—Lien on Land for—Lease of Farm by Father to Son—Alleged Promise to Devise Farm—Request—Representations—Estoppel—Action against Executors of Father—Failure to Prove Definite Contract—Claim for Value of Work Done under Lease.

Appeal by the plaintiff from the judgment of KELLY, J., 11 O.W.N. 221.

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

T. N. Phelan, for the appellant.

M. K. Cowan, K.C., for the defendants, respondents.

The judgment of the Court was read by MACLAREN, J.A., who said, after stating the facts, that the evidence fell far short of the requirements of the law in such cases. The evidence of the plaintiff with regard to the alleged promises and statements by his father was, in most cases, altogether too vague to found a legal claim upon; and with regard to several of them quite opposed to and destructive of such a claim.

It was argued that, even if the evidence fell short of proving a contract or agreement, the plaintiff was entitled to recover, on the ground that his father stood by while he saw the plaintiff making these improvements, evidently under the impression that he was improving what would ultimately become his own property, and did not do or say anything to undeceive him, and that the defendants were, therefore, liable by estoppel, or the plaintiff would have a lien on the land for these improvements.

The evidence, however, established the fact that the father did from time to time, sometimes before the works were undertaken, at other times while they were going on, refuse to assent or sufficiently warn the plaintiff of the risk he was incurring.

The judgment of Kelly, J., should be affirmed.

The appellant specially urged a claim for $104 for fall ploughing and seeding done by the plaintiff shortly before giving up possession of the farm. This was not specifically dealt with by Kelly, J.; and it rested upon a different principle from the other claims. By an oversight, apparently, the necessary evidence as to the nature and terms of the lease, if any, in force immediately before the plaintiff gave up possession, was not given. As the case stood, this claim was properly dismissed with the others.

In the circumstances, the dismissal of the action should be without prejudice to the right of the plaintiff to bring another action for the $104 if he should be so advised.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*HUTCHINSON v. STANDARD BANK OF CANADA.

Husband and Wife—Mortgage Made by Wife Securing Part of Indebtedness to Bank Guaranteed by Husband—Undue Influence—Independent Advice—Onus—Evidence—Improvidence—Bank Act, 3 & 4 Geo. V. ch. 9, sec. 76, sub-sec. 2 (c).

Appeal by Lillian Maud Hutchinson, the plaintiff, from the judgment of BOYD, C., 11 O.W.N. 183, dismissing the action.

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

W. R. Smyth, K.C., and J. F. Boland, for the appellant.

Gideon Grant, for the defendants, respondents.

The judgment of the Court was read by FERGUSON, J.A., who said that the action was brought by the wife of George Hutchinson against the bank to set aside, as obtained by undue influence and misrepresentation, and without the plaintiff having independent advice, a mortgage dated the 13th October, 1914, made by the plaintiff in favour of the bank, securing $4,000 of the indebtedness of the Monarch Optical Company Limited, for

which her husband was a surety; and as against the defendant McMillan, manager of the bank, to set aside a subsequent mortgage and a release of an equity of redemption.

On the appeal, the attack was confined to the mortgage made to the bank.

In argument the appellant's right to succeed was founded on this proposition: "Where a wife becomes, on her husband's request, surety for his debts, the law presumes undue influence on the part of the husband; and, if such a transaction is impeached, the burden rests on the creditor to prove that the wife had full knowledge of the facts at the time she became surety for her husband; that she understood the transaction, and that she had independent and competent advice:" Chaplin & Co. v. Brammall, [1908] 1 K.B. 233; Bischoff's Trustee v. Frank (1903), 89 L.T.R. 188; Turnbull & Co. v. Duval, [1902] A.C. 429.

The learned Judge referred to Howes v. Bishop, [1909] 2 K.B. 390, as deciding, after discussion of these cases, that in a husband and wife transaction there is no presumption of undue influence, and no burden cast on the person upholding such a transaction to prove that the wife had independent advice, but the contrary; Bank of Montreal v. Stuart, [1911] A.C. 120, 126, 137; Euclid Avenue Trusts Co. v. Hohs (1911), 24 O.L.R. 447, 450; T. J. Medland Limited v. Cowan (1916), 10 O.W.N. 4; Talbot v. Von Boris (1910), 27 Times L.R. 95; Halsbury's Laws of England, vol. 15, para. 215.

The document was carefully read over and explained to the appellant by Mr. Wherry, who was acting in the transaction as solicitor for her and her husband; she herself read it over carefully and understood it; she discussed and considered it with Mr. Wherry, with her father, and with her husband. No doubt, she was to some extent influenced by her husband's desire to secure money from the bank for his proposed new venture, and also by her husband's and her own necessities and by her wish to help her husband to earn a livelihood for both. But the evidence fell far short of proving that the husband, either by undue influence or by pressure, exercised a domination over the mind of his wife so as to prevent her understanding the nature of the transaction or exercising her own judgment and freedom of action in reference thereto.

There was nothing in the transaction itself to lead to the conclusion that it was an improvident transaction or that there was overreaching or impropriety in connection with the appellant's execution of the mortgage attacked.

It was alleged that the mortgage contravened sec. 76, sub-

sec. 2 (*c*), of the Bank Act, 3 & 4 Geo. V. ch. 9 (D.), because it purported to be made as security for a past indebtedness of the optical company, but was in fact given as security for a future advance; but in fact the document represented the real transaction to be entered into.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*CLIFTON v. TOWERS.

Assignments and Preferences—Unjust Preference—Chattel Mortgage — Insolvency — Knowledge — Intent — Instrument Executed within 60 Days before Assignment for Benefit of Creditors — Presumption — Rebuttal — Evidence — Onus — Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5 (4).

Appeal by the defendant from the judgment of BRITTON, J., 10 O.W.N. 224, 11 O.W.N. 11.

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

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

J. D. Bissett, for the plaintiff, respondent.

HODGINS, J. A., read the judgment of the Court. He said that the question involved was, whether the respondent had successfully rebutted the statutory presumption under the Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5, sub-sec. (4), or whether the giving of the chattel mortgage in question to him was null and void as an unjust preference. Sub-section (4) deals with a transaction, such as is mentioned in sub-secs. (1) and (2), which results in preferring a creditor. If it takes place within 60 days of an assignment, there are two presumptions—one that the transaction is in fact an unjust preference, and the other that it was so intended. If, therefore, there be insolvency, or inability to pay debts in full, or consciousness that insolvency is pending, the creditor must, in order to discharge the statutory onus, shew that there was no intent to prefer unjustly. To rebut the intent, it is not enough to shew pressure.

The trial Judge had confined himself to finding that the respondent had satisfied the onus cast upon him of negativing any intent to defraud, or to defeat, hinder, or delay, and that the debtors who made the chattel mortgage had no such intent. But, before this Court, the case was argued as governed by sub-sec. (4), which deals with the giving of an unjust preference; and it became necessary to consider the facts, apart from the finding mentioned, in order to ascertain their relation to the question of preference.

After an examination of the evidence, the learned Judge said that the debtors' reason for refusing at first to give the security, when the respondent demanded it, was, that their other creditors would be prejudiced; and the final yielding to the respondent's wish was consistent either with a charge in that belief or with an acceptance of the demand notwithstanding that it placed their other creditors at a disadvantage. Both debtors admitted that their fear that the respondent would sell them out induced them to sign; and, as pressure was unimportant, that shewed that they intended to prefer him in order to save themselves. That they were insolvent there was no doubt; and there was nothing, but rather the contrary, to warrant the conclusion that, if they had been able to harvest their crops, they could have paid the interest on the farm mortgage and the $4,209.92 which they owed outside.

On the whole, therefore, the result must be that the onus remained undischarged by the respondent.

The appeal should be allowed and the action dismissed, both with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

BYRNES v. SYMINGTON.

Sale of Goods — Warranty — Clover Seed — "Clean and Clear of Foul Seed" — Evidence — Findings of Jury — Qualified Warranty — Government Standard — Seed Control Act, 1 & 2 Geo. V. ch. 23, sec. 8 (D.)

An appeal by the defendant from a judgment of the Judge of the County Court of the County of Lennox and Addington, upon the findings of a jury, in favour of the plaintiff, in an action brought for the recovery of damages for breach of a warranty that a half bushel of red clover seed purchased by the plaintiff

from the defendant on the 26th April, 1916, was "clean and clear of foul seed."

The jury's findings, in answer to questions, were: (1) The defendant sold to the plaintiff, through his brother, the half bushel of red clover seed in question. (2) The seed contained "a greater number of seeds of noxious weeds than 80." (3) The defendant's clerk, at the time of sale, and in the presence of the defendant, in the usual way represented to the plaintiff's brother that this red clover seed was clean and clear of foul seed, or words to that effect. The jury assessed the plaintiff's damages at $300, for which amount judgment was ordered to be entered.

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

W. S. Herrington, K.C., for the appellant.

W. N. Tilley, K.C., for the plaintiff, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that only one warranty was alleged or attempted to be proved, and that was that the seed was clear and clean of foul seed, or that it was so according to Government standard; and the reason for asking the third question was probably twofold, viz., to prove a breach of the warranty, or, if the jury should find that the respondent had failed to establish the warranty, to enable the respondent to recover apart from warranty, on the ground that the sale of seed containing a greater number of seeds of noxious weeds than 80 to the ounce was a contravention of the Seed Control Act, 1 & 2 Geo. V. ch. 23 (D.); and that, having been so sold, an action lay by the purchaser for the recovery of the damages he had sustained by reason of his having been supplied with such seed.

It was not quite clear upon the evidence whether the warranty that was given was an unqualified warranty that the seed purchased was clean and clear of foul seeds or a warranty qualified by the words "according to Government standard." Taking the answers of the jury to mean that the warranty was the qualified warranty mentioned—sec. 8 of the said Act prohibiting the sale, for seeding purposes, of seed containing a greater number of noxious weeds than 80 to the ounce—the only other finding necessary to support the respondent's judgment was that made by the answer to the second question; and the only question involved in the appeal was whether or not that finding was supported by the evidence.

After an examination of the evidence, the learned Chief

Justice concluded that it was ample to support the finding in answer to the second question and to justify the conclusion that the injury which the respondent had sustained owing to wild mustard infesting his field was occasioned by the presence in the seed purchased from the appellant of seeds of noxious weeds to a greater number than 80 to the ounce.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*WODEHOUSE INVIGORATOR LIMITED v. IDEAL STOCK AND POULTRY FEED CO.

Sale of Goods—"Passing off" by Defendant of Goods as those of Plaintiff—Failure to Establish—Representations by Travelling Salesman of Defendant that Plaintiff out of Business—Responsibility of Defendant for—Damages—Formulæ of Secret Processes—Partnership—Use after Dissolution of Knowledge Obtained—Derogation from Grant—Property Right—Betrayal of Confidence—Appeal—Costs—Scale of—Rule 649.

Appeal by J. J. Hobson, the person carrying on business under the name of the company made defendant, from the judgment of FALCONBRIDGE, C.J.K.B., 11 O.W.N. 296.

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

J. Lynch-Staunton, K.C., and J. M. Telford, for the appellant.

S. F. Washington, K.C., and J. G. Gauld, K.C., for the plaintiff company, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the judgment in appeal enjoined the appellant from representing that his products were the respondent company's manufacture; but, on the evidence, no case was made out for this relief. No one was deceived, and there was nothing to suggest intent in that direction; nor was any damage proved. There was no "passing off" in fact: the commendation was that the foods were "just as good," "practically the same except one ingredient," or "better than" the respondent company's—statements which

did not transcend what is allowable under the authorities: White v. Mellin, [1895] A.C. 154; Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited, [1899] 1 Q.B. 86; Cundy v. Lerwill and Pike (1908), 99 L.T.R. 273; Spalding v. Gamage Limited (1915), 32 R.P.C. 273, 283, 284 (H.L.)

The two claims urged by the respondent company were that the appellant should be restrained from representing that the respondent company had gone out of business and that the appellant had taken it over, and from using the formulæ and trade secrets of the respondent company.

Pringle, the appellant's traveller, represented to Smith that the respondent company had sold out; to Parks, that the appellant had taken over the business of the respondent company; and to Martin, that the respondent company was out of business. The only possible damage arose out of the Smith order, which, however, was given after an explanation that the appellant's feed was just as good as the respondent company's, except for one ingredient. The loss to the respondent company on this order would be only the 115 lbs. which that company gave Smith when the appellant's feed was returned, worth $5.75, and the profit on the remaining 85 lbs., say $2.25. If the respondent company could recover, its damages should be limited to $8. The misrepresentation was actionable, provided damage was proved: White v. Mellin, supra; Ratcliffe v. Evans, [1892] 2 Q.B. 524.

The misrepresentation was made in the course of the agent's employment, in the situation in which he was placed by his employer, and was part of the inducement which caused the contract to be made. It caused damage, though only to a small extent, and the principal retained the benefit received under it. It afforded a cause of action, and the respondent company should recover the damages suffered thereby: Refuge Assurance Co. Limited v. Kettlewell, [1909] A.C. 243.

What was objected to as regards the formulæ and secrets was, that they were in use by the partnership in which the respondent company's predecessor and the appellant were members; and that the latter, having sold out his interest therein, was disabled from using his knowledge as such partner. The respondent company put it in two ways—one that the appellant occupied a confidential position when he acquired knowledge of the formulæ, and the other that he sold out whatever rights he had in them and could not derogate from his grant. The two positions were inconsistent. That the appellant was not using the identical formulæ was established by his evidence, and there

was no other evidence upon the point. If the outgoing partner grants his interest in the process, he parts with that which he owns, and any subsequent objection to his interference with it must rest upon a property right, and not upon betrayed confidence or breach of a fiduciary duty.

The argument that the appellant was derogating from his grant depended for its basis on the fact that he was using in competition that which was the subject of the sale. This foundation of fact was lacking here; and it could not be argued that the substance of the respondent company's combination had been appropriated by the appellant. To so hold would result in excluding the appellant from any animal feed business altogether.

The appeal should be allowed in part, the judgment set aside, and in place thereof judgment should be entered for the respondent company for $8 damages, with costs on the Division Court scale. Rule 649, as to set-off of costs, should operate, as the respondent company began its action on the 25th April, 1916, six months after the event and after the defendant's disclaimer of responsibility for the acts of his traveller. The appellant practically took the course suggested by Cozens-Hardy, M.R., in Havana Cigar and Tobacco Factories Limited v. Tiffin (1909), 26 R.P.C. 473, at p. 478.

As the appellant did not wholly succeed, there should be no costs of the appeal.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*CITY OF TORONTO v. TORONTO R.W. CO.

Contempt of Court—Motion to Commit General Manager of Street Railway Company—Disobedience to Judgment Requiring Company to Furnish City Corporation with Annual Statements—Agreement—Jurisdiction of Ontario Railway and Municipal Board—Failure to Shew that Furnishing of Statements Part of Duty of General Manager—Rule 553—Appeal—Costs.

An appeal by the defendant company and Robert J. Fleming, its general manager, from an order of RIDDELL, J., of the 18th December, 1916, directing "that on or after the 6th day of April, 1917, the sheriff . . . shall take the said R. J. Fleming into his custody and commit him to the common gaol" for the contempt mentioned in the order, until such time as the defendant shall have purged such contempt, and that a writ or writs of

attachment should issue accordingly. The contempt was that the defendant had "neglected or refused to comply with the judgment . . . in this action, dated the 15th January, 1903, whereby the defendant was ordered and directed to furnish the plaintiff with the statement referred to in the agreement between the plaintiff and defendant as set out in the pleadings herein, annually, in a form shewing such details, if any, as might be settled by the Senior Judge of the County Court of the County of York," which were settled by that Judge on the 27th October, 1906.

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

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

C. M. Colquhoun, for the plaintiff corporation, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the first contention of the appellants—that the Court had no jurisdiction to punish for disobedience of the judgment, because, being a consent judgment, it is in effect an agreement between the parties, and deals with matters as to which, under the Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 260, and the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 22, that Board had exclusive jurisdiction—was not well-founded. The Board had no jurisdiction, exclusive or otherwise, to do what was required to be done—to punish for disobedience of the judgment in the action.

The second contention was, that it was not proper to order the committal of the appellant Fleming for the appellant company's disobedience of the judgment. There was nothing before the Court to shew what the authority or powers of Fleming were, or that he had anything to do with the compilation or furnishing of the statements which the appellant company was by the judgment required to furnish—nothing except the bald statement that he was the general manager of the company. On the other hand, there was no denial by the appellants that the preparation and furnishing of the statements was not a matter entirely under his direction and control.

If it were shewn that the disobedience of an order of the Court by a corporation was the act of its manager, an order for his committal might properly be made: Ex p. Green (1891), 7 Times L.R. 411; O'Shea v. O'Shea Ex p. Tuohy (1890), 15 P.D. 59. The contempt in these cases was of a different character

—publications calculated to interfere with the administration of justice.

Reference to Rule 553; Re Bolton and County of Wentworth (1911), 23 O.L.R. 390; Demorest v. Midland R.W. Co. (1883), 10 P.R. 82, 85.

There being nothing to shew that the making-up of the statements was a duty which, as manager, the appellant Fleming had to perform, the appeal should be allowed, and the order appealed from discharged, without prejudice to another application supported by other material, and without prejudice to any application against the appellant company which the respondent corporation might be advised to make.

No order as to the costs of the appeal or of the proceedings in the Court below.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

CRAWFORD v. ODETTE.

Contract — Oral Promise to Repay Money Paid for Shares in Company on Happening of Uncertain Event—Enforcement—Statute of Frauds—Consideration—Interest.

An appeal by the plaintiff from the judgment of LENNOX, J., at the trial at Sandwich, dismissing the action, which was brought to recover $1,500 paid by the plaintiff to the defendant in the circumstances mentioned below.

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

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

J. H. Rodd, for the defendant, respondent.

MEREDITH, C.J.O., read the judgment of the Court. The husband of the appellant, he said, had been carrying on business as a general merchant; he made an assignment for the benefit of his creditors; he arranged with the respondent to buy the stock in trade and form and incorporate a company to carry on the business; the appellant gave her husband the $1,500, and he gave it to the respondent to aid the latter in making the cash payment on the purchase, on the understanding that the appellant's husband was to be the manager of the business. According

to the testimony adduced by the appellant, and as found by the trial Judge, the respondent agreed that, if the appellant would take stock in the new company for the $1,500, he would, in the event of the appellant's husband ceasing to be general manager, take the stock off her hands and pay her the $1,500. The husband was employed, but was dismissed, and this action was brought.

The trial Judge found the facts in favour of the appellant, and properly so upon the evidence, but dismissed the action, on the ground that the parol agreement could not be enforced because of the provisions of the Statute of Frauds. But it was clearly not necessary that the agreement should be evidenced by a writing signed by the respondent; and the judgment should, therefore, on the findings of fact, have been entered for the appellant.

It was contended that there was no consideration for the promise of the respondent, if he made it; but the husband was acting for his wife in the transaction, and she was bound by the obligation that the arrangement imposed upon her—to take $1,500 worth of the stock and to give it up to the respondent upon receiving the $1,500 in the event of her husband being discharged—and that was a consideration sufficient to support the respondent's promise.

The appeal should be allowed with costs, and judgment should be entered for the appellant for the recovery of $1500, with interest at 5 per cent. from the date of the appellant's husband leaving the employment of the company, and with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*LORSCH & CO. v. SHAMROCK CONSOLIDATED MINES LIMITED.

Company—Shares—Application for Transfer on Books—Companies Act, R.S.O. 1914 ch. 178, sec. 121—Issue as to Right—Irregularity or Illegality in Issue of Shares—Failure to Prove—Status of Applicants—Holders of Certificates—Sec. 54 of Act—Real Ownership of Shares—Evidence—Refusal of Company to Register Transfer—Costs.

Appeal by the plaintiffs from the judgment of LENNOX, J., 11 O.W.N. 357, finding in favour of the defendants an issue directed to be tried, and refusing to require the defendant com-

pany, under sec. 121 of the Companies Act, R.S.O. 1914 ch. 178, to register 1,500 shares in the name of the plaintiff.

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

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

P. White, K.C., for the defendant company, respondent.

The judgment of the Court was read by HODGINS, J.A., who said that the trial Judge had held that the appellants were not the owners of the shares; that they were illegally issued; and that the appellants, having had notice of this, did not come into Court with clean hands.

After an examination of the evidence, the learned Justice of Appeal said that the shares were paid-up, and that there was no irregularity or illegality that he could see affecting their issue.

The judgment in appeal, however, rested also upon the ground that the appellants had no locus standi, that they were not the owners of the shares, and that only the real owner could be registered. The judgment upon the issue declared that the appellants were not entitled to the transfer of these shares from the name of Gooderham to the name of the appellants.

The evidence disclosed that, one Bilsky having asked the appellants, as brokers, to sell Shamrock stock, they did in September, 1916, sell for him 1,500 shares. These were unidentified. The appellants were paid for them, and then paid Bilsky, who handed them the certificates for the shares now in question, endorsed by one Gooderham (in whose favour they were issued) in blank. The appellants entered their name on them as transferees, and then applied for registration. This was refused, and the appellants borrowed stock, made delivery to the purchaser, and said that they were the holders of the certificates and desired registration. No one disputed their title save the respondent company.

Under sec. 54 of the Companies Act, every shareholder is entitled to a certificate, which, by sub-sec. (2), is prima facie evidence of his title to the shares mentioned in it.

Reference to Smith v. Rogers (1899), 30 O.R. 256, 259; Castleman v. Waghorn (1908), 41 S.C.R. 88, 97.

The respondent company had no right to refuse the transfer in the circumstances here: Re Dominion Oil Co. (1903), 2 O.W.R. 826; Re Panton and Cramp Steel Co. (1904), 9 O.L.R. 3; Re Good and Jacob Y. Shantz Son & Co. Limited (1910), 21 O.L.R. 153.

No by-laws of the company affecting the matter were alleged

or proved, even if that was important: see In re McKain and Canadian Birkbeck Co. (1904), 7 O.L.R. 241.

The appeal should be allowed, and the issue found in favour of the appellants, and an order should issue, under sec. 121 of the Companies Act, requiring the company forthwith to register the appellants as the owners of the shares in the company's books; the company to pay the costs of the application, issue, and appeal.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*SMITH v. CAMPBELLFORD BOARD OF EDUCATION.

Schools—Engagement of High School Principal—Contract—Provision for Termination on Notice—Notice to Terminate—Resolution of Board of Education—"Month's Notice to Resign"—Absence of By-law—Sufficiency of Resolution—Notice Given pursuant to Resolution—Necessity for Seal—Powers and Duties of Executive Officers.

Appeal by the plaintiff from a judgment of the Eleventh Division Court of the United Counties of Northumberland and Durham, pronounced on the 23rd January, 1917, dismissing the action, which was brought for a balance of the plaintiff's salary as principal of the high school under the jurisdiction of the defendant board.

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

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

Grayson Smith, for the defendant board, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the appellant's engagement was for one year beginning on the 1st November, 1915, and ending on the 31st October, 1916, subject, as the written agreement provided, to the right of either party to terminate the engagement "by giving notice in writing to the other of them at least one calendar month previously and so as to terminate on the last day of a calendar month."

At a regular meeting of the board on the 27th July, 1916, it was resolved "that Principal Smith be given a month's notice to resign," and "that the internal committee advertise in the *Mail and Empire* and *Globe* for a principal." Next day, the

secretary telegraphed the appellant: "A resolution was passed at the regular meeting of the Board of Education July 27th giving you one month's notice that your contract with the board is cancelled." On the following day, the chairman of the board wrote to the appellant: "According to resolution of board at the regular June" (mistake for July) "meeting, you are hereby given a month's notice that your contract with Campbellford School Board is cancelled." On the 28th July, the appellant wired in answer to the telegram sent on that day: "Matter settled at June meeting. I shall hold board responsible for next year's salary." (At the June meeting, a motion that the appellant be asked to resign was defeated.)

It was argued that, if any notice was authorised to be given, or if the chairman or secretary might properly act upon the resolution by giving the notice, a notice to resign is a very different thing from a notice to terminate the contract between the parties. But "no particular form of words is necessary to effect a removal. . . . ; a demand for one's resignation may be the equivalent of a removal:" Am. & Eng. Encyc. of Law, 2nd ed., vol. 23, pp. 432, 433. This is a correct statement of the law; and, if a demand of a resignation may be the equivalent of a removal, a notice to resign may be the equivalent of a notice to terminate an employment, and should be so treated if it was understood in that sense by the parties. That it was so intended and understood by both parties was manifest.

Reference to Stephenson v. London Joint Stock Bank (1903), 20 Times L.R. 8.

The removal of an officer of a municipal corporation need not be by by-law—a resolution of the council is sufficient: Vernon v. Town of Smith's Falls (1891), 21 O.R. 331; Village of London West v. Bartram (1895), 26 O.R. 161; and so the determination to give notice to determine an employment, which is but a step towards removing the employee, may properly be evidenced by a resolution.

It having been resolved to terminate the appellant's employment by notice, it was within the power, and indeed was the duty, of the executive officers of the board to act upon the resolution and give the requisite notice.

A by-law not being necessary, it was not necessary that the notice to terminate the contract should be under the board's corporate seal: Roe ex d. Dean and Chapter of Rochester v. Pierce (1809), 2 Camp. 96; Doe d. Co. of Proprietors of the Birmingham Canal Navigations v. Bold (1847), 11 Q.B. 127.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

WILLIAMS & CO. v. SPARKS.

Contract—Shipments of Hay—Agents or Brokers—Sale on Commission—Correctness of Returns—Findings of Fact of Trial Judge—Evidence—Appeal.

Appeal by the defendants from the judgment of LENNOX, J., 10 O.W.N. 391.

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

J. E. Jones, for the appellants.

Alfred Bicknell and B. H. D. Symmes, for the plaintiffs, respondents.

The judgment of the Court was delivered by FERGUSON, J.A. The appellants, he said, were dealers in hay at the village of Vars, in Ontario, and the respondents were hay merchants and brokers in Liverpool, England; they claimed the balance of an account for commission on the price of hay sold by them for the appellants in England, and moneys paid by them in connection with the sales of hay for the appellants' benefit and under instructions from them, according to detailed statements rendered and put in at the trial.

The trial Judge found against the contention of the appellants that the respondents were not their agents, but purchasers of the hay; and the appellate Court was of the opinion, upon the evidence, that no other finding could be made than that the respondents undertook to handle the hay as agents or brokers for the appellants.

Upon the argument of the appeal, the appellants sought to make out that the respondents had misrepresented the prices which the hay would net the appellants; but it was satisfactorily established that the quotations "c.i.f. net to you" were intended merely as estimates based on the ruling prices and demand prevailing, and further based on the assumption that these prices and the demand would continue up to the time of the arrival of the hay and that the hay would be in good condition and of the grade which the appellants represented it to be—and the appellants so understood the quotations.

Much of the trouble was caused by the appellants not shipping hay which was up to grade and in good condition; that caused expense and delay in the selling; and a portion of the loss was

occasioned by a falling market and lack of demand, which caused a loss on the prices and also in the cost of handling.

There was no suggestion that the respondents had not accounted for all the moneys received by them on the sale of the hay, or that they had made any profit other than their commission. The only ground on which the appellants could seek to reduce the amount of the respondents' claim or deprive the respondents of commission would be negligence in quoting prices and cost of handling, thereby misleading the appellants; and the evidence fell far short of establishing such negligence.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT, APRIL 3RD, 1917.

SOUTHGATE v. DODSHON OVERALL CO.

Contract—Existing Liability on the Part of Commercial Company to Pay Commissions to Travelling Salesman—Oral Promise by Third Person Interested in Company to Pay—Promise to Answer for the Debt of Another—Statute of Frauds—Company Sued with Third Person in one Action—Judgment Recovered against Company.

Appeal by the defendant Mills from the judgment of DICKSON, Co. C.J., in an action brought in the County Court of the County of Huron, and tried without a jury.

The plaintiff was employed by the defendant company as a traveller; the terms of his employment were set out in a written agreement, signed by him and by the president of the company, dated the 6th April, 1916. The employment was to continue for five years, but might be terminated by either party giving the other six months' notice in writing. The plaintiff's remuneration was to be 7½ per cent. on all orders sent in by him and accepted by the company.

The action was against the company and Mills, treating them as joint debtors, to recover the amount of the commissions earned in April, May, and June, 1916.

The company had refused the plaintiff's drafts upon it for commissions; and the plaintiff alleged a promise by the defendant Mills, who had a large financial interest in the company, to "look after" the plaintiff's drafts.

The company did not appear at the trial, and judgment was directed to be entered against it for the full amount of the plaintiff's claim, and against Mills for the amount of the April and May commissions, $619.28, with costs.

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

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

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

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant attacked the finding of fact and contended that, assuming the alleged promise to have been made, it was a promise to answer for the debt of another, and, not being in writing and the Statute of Frauds being set up, could not be enforced.

Where a liability on the part of a third person exists or is contemplated, the promise falls within the statute: De Colyar on Guaranties, 2nd ed., p. 70.

When the appellant's promise was made, as found by the trial Judge, not only was it contemplated that the company should be liable to pay the commissions for April and May, but it was actually liable to pay them, and the written contract by which it was agreed to pay them was executed at the time the promise of the appellant was made, and the two things formed part of the same transaction. In bringing this action, the respondent treated the company, as well as the appellant, as being liable to him for the commissions, and had obtained judgment against the company for the amount of them.

Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, distinguished.

It was doubtful whether the finding of fact was fully supported by the evidence; but, assuming that it was, the plaintiff could succeed against the appellant.

The appeal should be allowed with costs and the action as against the appellant dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*REX v. CHAPPUS.

Criminal Law—Magistrate's Conviction—Motion to Quash—Adequate Remedy by Appeal to Division Court—Certiorari Taken away—Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, sec. 10 (1), (3)—Refusal of Motion.

Appeal by the three defendants from the order of SUTHERLAND, J., in Chambers, 11 O.W.N. 388, dismissing their motion to quash a conviction under the Petty Trespass Act, R.S.O. 1914 ch. 111, by two Justices of the Peace, for trespassing upon "the wholly enclosed lawn land" of the Bar Point Land Company.

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

M. K. Cowan, K.C., for the appellants.

W. E. Raney, K.C., for the private prosecutors, respondents.

MACLAREN, J.A., reading the judgment of the Court, after stating the facts and referring to the provisions of the Ontario Summary Convictions Act, sec. 10 (1), (3), said that it was not contended that an appeal to a Division Court would not afford the appellants an adequate remedy. The appellants urged that there was no evidence whatever to shew that the alleged offence had been committed and that there were fatal irregularities in the proceedings. But these grounds were not open to them. Certiorari being taken away (sec. 10 (3)) where there is an adequate remedy by appeal, the proceedings could be questioned only upon the ground of want or excess of jurisdiction. The charge in the information being one that came within the scope of the Petty Trespass Act, the Justices had the right to enter upon the inquiry; and, the conviction being good upon its face, the Court could not look at the evidence or at any affidavits to ascertain whether or not they came to a proper conclusion. It was for them to decide, and not for the Court, even although the Court might be of opinion that they were mistaken.

Reference to Regina v. Bolton (1841), 1 Q.B. 66; Rex v. Morn Hill Camp Commanding Officer, [1917] 1 K B. 176; Bank of Australasia v. Willan (1874), L.R. 5 P.C. 417; Rex v. Cantin and Rex v. Weber (1917), 11 O.W.N. 435.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

*RE TOWNSHIP OF ASHFIELD AND COUNTY OF HURON.

Costs—Application to County Court Judge under sec. 449 of Municipal Act, R.S.O. 1914 ch. 192—Power to Award Costs—Persona Designata—Judges' Orders Enforcement Act, R.S.O. 1914 ch. 79, sec. 2—Practice—Discretion—Costs of Appeal.

Motion by the township corporation to vary as to costs the terms of the order of this Court of the 7th February, 1917 (11 O.W.N. 369), made on the appeal of the county corporation from an order of the Judge of the County Court of the County of Huron declaring the bridge in question to be a county bridge.

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

W. Proudfoot, K.C., for the township corporation, contended (1) that neither the Judge of the County Court nor this Court had jurisdiction to award costs in a proceeding under sec. 449 of the Municipal Act; and (2) that, if there was jurisdiction, the case was one in which, in view of the decided cases which supported the view of the Judge below, one of which (counsel said) was overruled by the judgment pronounced by this Court in the present case, the discretion of the Court should be exercised by giving no costs to either party.

W. Lawr, for the county corporation, contra.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the first of Mr. Proudfoot's contentions was not well founded. The County Court Judge was acting as persona designata; and, where he so acts, sec. 2 of the Judges' Orders Enforcement Act, R.S.O. 1914 ch. 79, gives him jurisdiction to award costs; and it was not open to question that this Court had jurisdiction to pronounce the order which the Judge should have pronounced, as well as to deal with the costs of the appeal.

But the question of costs was not argued when the appeal was heard; and, upon further consideration and in view of which had probably been the practice of County Court Judges in dealing with applications under sec. 449 of the Municipal Act, which was said to be not to award costs to either party, the present application should be granted (without costs of it), and neither party should pay or receive costs in respect of the proceedings before the County Court Judge or in respect of the appeal to this Court.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. APRIL 2ND, 1917.

RE SCHERMEHORN.

Will—Construction—Charitable Bequest—Discretion of Executors—Proper Objects of Charity—Children's Aid Society—County House of Refuge.

Motion by the executors of the will of Reuben Daniel Schermehorn, deceased, for an order determining certain questions arising upon the will as to the distribution of the estate.

There were many bequests in the will. The residue of the estate was devised and bequeathed to the executors in trust to be by them applied to such charitable purpose or purposes as they might deem wise and proper, "and for the purpose or purposes aforesaid I direct that the erection and maintenance of a poor-house or house of refuge or similar institution or institutions in and for the County of Lennox and Addington, or that a gift to the Kingston General Hospital, may, if they in their judgment so decide, be considered and deemed by my executors a charitable object or purpose. . . . To better enable my said executors to select the proper charitable purpose or purposes as aforesaid I allow them a period of three years after my decease to select and decide upon such charitable object. . . . I also hereby direct that any donation or gift by my said executors for patriotic purposes or for the benefit of the Belgians or for the benefit of other branches or classes of the contestants on the Allied side . . . is to be considered as a charitable object or purpose."

The motion was heard at the Napanee sittings for trials.

W. A. Grange, for the executors.

T. B. German, for the Children's Aid Society of the County of Lennox and Addington.

J. E. Madden, for T. A. Martin.

W. G. Wilson, for the Corporation of the County of Lennox and Addington.

D. H. Preston, K.C., for the Official Guardian.

FALCONBRIDGE, C.J.K.B., at the hearing, answered in the affirmative a number of questions relating to payments made or proposed to be made by the executors; and reserved judgment as to questions 3 and 4.

These questions were now disposed of in a written judgment. Question 3 was: "Would a payment of a sum of money out of the residue to the Children's Aid Society of the County of Lennox and Addington be within the authority conferred?"

The learned Chief Justice said that at a special meeting of the society, held on the 24th February last, a resolution was carried retaining counsel to represent the society on this motion, and in the resolution they embodied "the request that any money donated under said will to this society shall be paid to or placed with the Toronto General Trusts Corporation for the benefit of this Children's Aid Society, and that such money be not paid to or placed with the Corporation of the County of Lennox and Addington." The question whould be answered in the affirmative, and the request made in the resolution acceded to.

Question 4: "Would a payment of a sum of money out of the residue to the Corporation of the County of Lennox and Addington for the purpose of assisting said county in securing or constructing a house of refuge . . . be within the authority conferred?"

It was suggested that the county council might refuse the gift when coupled with the burden of building a house of refuge. The learned Chief Justice said that he was not concerned with the attitude of the council. He answered the question in the affirmative. If the corporation should be advised to refuse to accept the gift cum onere, that would be a matter for another forum to consider—perhaps the Provincial authorities, perhaps the electorate.

Order declaring accordingly; costs out of the estate.

FALCONBRIDGE, C.J.K.B. APRIL 4TH, 1917.

*RE JACKSON AND IMPERIAL BANK OF CANADA.

Landlord and Tenant—Lease—Renewal Clause—Construction—Right of Perpetual Renewal—Costs of Summary Application for Determination of Question of Construction.

Motion by Jackson, lessor, under Rule 604, for an order determining whether, by the terms of a certain lease, the lessees, the Imperial Bank of Canada, were entitled on the first renewal of the lease to a covenant for the renewal thereof in perpetuity or only to a covenant for renewal for a third term of 25 years—the lessor contending that the latter was the true construction.

The motion was heard in the Weekly Court at Toronto.

E. D. Armour, K.C., and W. E. Raney, K.C., for the lessor.

J. W. Bain, K.C., for the lessees.

FALCONBRIDGE, C.J.K.B., read a judgment in which he said that the lease bore date the 31st October, 1889, and purported to be made in pursuance of the Act respecting Short Forms of Leases. It recited that the lessor was the owner of the lands, and that he had contracted with the lessees to sell the buildings and erections on the said lands to the said lessees absolutely, "and to grant and demise unto them a lease of the said lands and premises for a period of 25 years and renewable thereafter from time to time in the manner hereinafter mentioned." It further recited an agreement that the lessees and their assigns should have the right to use and enjoy the north wall of the adjoining building as a party wall for both buildings.

The clause for renewal was as follows: "The said lessor, for himself, his heirs, executors, administrators, and assigns, further covenants with the said lessees and their assigns that at the expiration of the term hereby granted . . . the said lessor, his heirs, executors, administrators, or assigns, will, if so requested by the lessees in writing at least 6 months prior to the expiration of said term, grant a new and further lease of the premises . . . for the further term of 25 years from the end or determination of the present term, at such rental for the said land . . . as shall be determined by arbitration . . . and such new lease shall contain all the covenants, provisoes, and agreements contained in the present lease, including the covenant for renewal, except only that the rent to be reserved in said renewal lease shall be at such rate as shall be determined by arbitration . . ."

On p. 9 of the lease there was this clause: "The costs, charges, and expenses of all renewal leases and arbitrations which may be had or granted in virtue hereof shall be equally borne by the lessor and lessees and their respective heirs, executors, administrators, and assigns."

The lessor contended that the renewal covenant gave the lessees the right to two renewals at the most; but, in view of the authorities, effect could not be given to this contention: Woodfall on Landlord and Tenant, 19th ed., pp. 435, 436; Halsbury's Laws of England, vol. 18, para. 935; Brown v. Tighe (1834), 2 Cl. & F. 396; Swinburne v. Milburn (1884), 9 App. Cas. 844; Wynn v. Conway Corporation, [1914] 2 Ch. 705; Hare v. Burges (1857), 4 K. & J. 45.

Necessarily, if the lessees were entitled to have a covenant

for renewal repeated totidem verbis in the first renewal, on the expiration of the renewed lease they would be equally entitled to have it repeated in the second renewal, and so on ad infinitum. Therefore, there may be right of perpetual renewal, although no words of perpetuity such as "for ever" are used. In the present case the result is confirmed by the words in the first recital and in other parts of the lease.

There should be a declaration that the renewed lease ought to contain a covenant for renewal in the same words as that contained in the lease, including the covenant for the insertion of the covenant for renewal.

Perhaps, in strictness, the lessees should have their costs of this application; but, in view of the provision in the lease that the costs of all renewal leases and arbitrations shall be equally borne by the lessor and lessees, this application should be treated as ancillary thereto, and no order as to costs should be made.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. APRIL 5TH, 1917.

IMPERIAL TRUSTS CO. OF CANADA v. JACKSON.

Discovery—Examination of Defendant—Refusal to Answer Questions—Validity of Agreement Set up by Agent and Trustee—Refusal of Application for Trial of Preliminary Issue and Postponement of Discovery.

Appeal by the plaintiffs from an order of the Master in Chambers refusing to strike out the defence or enforce the answering by the defendant of questions which he refused to answer upon his examination for discovery.

Motion by the defendant for an order directing the trial of a preliminary issue as to the validity of an alleged agreement.

G. H. Kilmer, K.C., for the plaintiffs.
I. F. Hellmuth, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the case of Graham v. Temperance and General Life Assurance Co. of North America (1895), 16 P.R. 536, was a very exceptional case, and, in view of the most unfortunate result of the order there made, one which a Judge should hesitate to follow. But here

there was nothing at all analogous in the status of the parties. The defendant was admittedly the agent and trustee of the plaintiffs, and the examination should be allowed to proceed so as to give the information which might enable the Court to pronounce judgment if the defendant should fail to establish the agreement which he set up.

The application was not answered by the defendant's offer to submit to a reference, if the question of contract should be decided against him. The policy of the Judges is, if possible, to try out cases and not to refer them.

The Master's order should be reversed, and the defendant ordered to attend at his own expense for further examination.

Costs here and below to be paid by the defendant to the plaintiffs in any event.

The motion by the defendant for the trial of a preliminary issue as to the validity of the alleged agreement should, for the same reasons, be dismissed with costs to be paid by the defendant to the plaintiffs in any event.

MIDDLETON, J. APRIL 5TH, 1917.

IMPERIAL TRUSTS CO. OF CANADA v. JACKSON.

Receiver—Profits and Commissions in Hands of Defendant—Admission of Trust—Right to Choose Custodian.

Motion by the plaintiffs for an order for a receiver.

The motion was heard in the Weekly Court at Toronto.

G. H. Kilmer, K.C., for the plaintiffs.

F. S. Mearns, for the defendant.

MIDDLETON, J., in a written judgment, said that, in view of the declaration of trust dated the 21st June, 1916, and the attitude of the parties, the plaintiffs were entitled to have a receiver appointed for the purpose of receiving and holding all profits and commissions referred to in the declaration of trust.

The defendant declared himself trustee of these profits and commissions for the plaintiffs, and the plaintiffs had, in the circumstances, the right to choose who should be the custodian of their property.

The order should go as asked; costs in the cause unless the trial Judge otherwise orders.

KELLY, J. APRIL 5TH, 1917.

ELLIS v. CITY OF TORONTO.

Highway—Nonrepair—Accumulation of Snow and Ice—Injury to Pedestrian by Fall—Evidence—Failure to Establish "Gross Negligence"—Municipal Act, R.S.O. 1914 ch. 192, sec. 460.

Action for damages for injury sustained by the plaintiff by a fall upon a sidewalk in the city of Toronto, alleged to have been caused by the slippery and unsafe condition in which the defendants, the city corporation, had negligently left it.

The action was tried without a jury at Toronto.
Gideon Grant and P. E. F. Smily, for the plaintiff.
Irving S. Fairty, for the defendants.

KELLY, J., in a written judgment, said that about 10.30 in the forenoon of Sunday the 30th January, 1916, the plaintiff, accompanied by two other women, was walking easterly on the sidewalk on the north side of Bloor street east, in Toronto, and, when opposite the house No. 20, she fell and was injured. She alleged that this happened by reason of the slippery and unsafe condition of the sidewalk caused by the defendants negligently permitting snow and ice to form in ridges. The evidence of the plaintiff and one of her companions (the other was not called as a witness) was, that the sidewalk was rough and lumpy with snow and ice, the snow having been trodden down; that the lumps were 2½ or 3 inches high; and that it was raining and freezing. There was other evidence on both sides, referred to by the learned Judge, who said that there was much difficulty, when all the circumstances were viewed, in arriving at the conclusion that there had been established that degree of negligence which was necessary to impose liability upon the defendants under sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192—i.e., gross negligence. There was a complete absence of evidence to shew how long the condition which the plaintiff said existed on the 30th January had continued, or that it had continued for such time as would make its non-removal an act of negligence, not to say gross negligence. On the whole evidence, it could not be found that there was gross negligence.

The plaintiff's case was a hard one; her injuries were serious.

Had she been entitled to succeed, her damages would reasonably have been assessed at $2,000.

The action should be dismissed, and with costs, if demanded.

SUTHERLAND, J. APRIL 5TH, 1917.

WILLIAMS v. BRAYLEY.

Deed—Conveyance of Land—Cutting down to Mortgage Security—Redemption—Mortgagee in Possession—Lease of Premises—Negligence in not Obtaining Adequate Rental—Failure to Prove—Findings of Fact of Trial Judge—Interest—Costs.

Action for a declaration that a certain conveyance of land to the defendant, though absolute in form, was merely a security for the repayment of $1,000 and interest by the plaintiff to the defendant, and for redemption.

The action was tried without a jury at Toronto.

A. C. McMaster, for the plaintiff.

J. R. L. Starr, for the defendants, the executors of the original defendant, who died pendente lite.

SUTHERLAND, J., in a written judgment, said that the plaintiff, as the owner of the land afterwards conveyed to the defendant, had first sold it to one Lawless for $7,000, subject to Lawless assuming a mortgage for $3,450 and interest at 5½ per cent. thereon.

In his statement of claim the plaintiff alleged that the original defendant did not enforce payments on the agreement with Lawless as they accrued due, but had rented the premises to Lawless at an inadequate rental, and had neglected to collect the proper rents and profits therefrom; and he claimed damages against the defendant as a mortgagee in possession.

The defendant, in his original statement of defence, alleged that he had received and accounted for all the rentals, and had been always ready and willing to reconvey the property on receipt of $1,000, the balance of interest due, and his costs.

The defendant having died before the action came to trial, it was revived in the name of his executors; and an amended statement of defence was delivered, wherein it was alleged that it was

Lawless who had entered into possession of the lands and so continued, and the defendants denied all allegations of negligence in respect to the rental, and counterclaimed a declaration that they were incumbrancers to the extent of $1,000 and interest, and asked for payment thereof.

The date of the lease to Lawless, the 1st July, 1913, was, upon the evidence, the date at which the defendant became mortgagee in possession.

Considering the character of the property and the difficulty of suitably renting it during the period of the defendant's possession as mortgagee, it could not be found that he was chargeable with negligence in failing to rent the premises for part of the period or in not securing a higher rental while it was rented.

These facts being found, and it being admitted that the deed should be cut down to a mortgage or mere security, the differences between the parties may be adjusted between them, as it was understood between them at the trial. It was agreed that the defendant was entitled to interest at the rate of 10 per cent. per annum for one year and thereafter at the legal rate.

If the parties cannot agree, there will be a reference to take the account.

Judgment not to issue for a week, and in the meantime the parties shall endeavour to adjust the account. The question of costs may be spoken to.